

**TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL  
NEW DELHI**

**Dated: - 3<sup>rd</sup> April, 2014**

**Petition No.658 of 2012**

Etisalat DB Telecom (P) Ltd.	....Petitioner
Vs.	
Union of India	....Respondent

**Petition No.659 of 2012**

Etisalat DB Telecom (P) Ltd.	....Petitioner
Vs.	
Union of India	....Respondent

**Petition No.672 of 2012**

Etisalat DB Telecom (P) Ltd.	....Petitioner
Vs.	
Union of India	....Respondent

**Petition No.722 of 2012**

Etisalat DB Telecom (P) Ltd.	....Petitioner
Vs.	
Union of India	....Respondent

**Petition No.700 of 2012**

Unitech Wireless (Tamilnadu) Pvt. Ltd.(A.P.Circle)	...Petitioner
Vs	
Union of India (DoT)	...Respondent

**Petition No.701 of 2012**

Unitech Wireless (Tamilnadu) Pvt. Ltd.(Karnataka Circle)	...Petitioner
Vs	
Union of India (DoT)	...Respondent

**Petition No.702 of 2012**

Unitech Wireless (Tamilnadu) Pvt. Ltd.(Tamilnadu Circle)	...Petitioner
Vs	
Union of India (DoT)	...Respondent

**Petition No.703 of 2012**

Unitech Wireless (Tamilnadu) Pvt. Ltd.(West Bengal Circle)	...Petitioner
Vs	
Union of India (DoT)	..Respondent

**Petition No.704 of 2012**

Unitech Wireless (Tamilnadu) Pvt. Ltd.(Kerala Circle)	...Petitioner
Vs	
Union of India (DoT)	...Respondent

**Petition No.705 of 2012**

Unitech Wireless (Tamilnadu) Pvt. Ltd.(Orissa Circle)	...Petitioner
Vs	
Union of India (DoT)	...Respondent

**Petition No.706 of 2012**

Unitech Wireless (Tamilnadu) Pvt. Ltd.(U.P. East Circle)	...Petitioner
Vs	
Union of India (DoT)	...Respondent

**Petition No.707 of 2012**

Unitech Wireless (Tamilnadu) Pvt. Ltd.(U.P. West Circle)	...Petitioner
Vs	
Union of India (DoT)	...Respondent

**Petition No.708 of 2012**

Unitech Wireless (Tamilnadu) Pvt. Ltd.(Maharashtra Circle)	...Petitioner
Vs	
Union of India (DoT)	...Respondent

**Petition No.709 of 2012**

Unitech Wireless (Tamilnadu) Pvt. Ltd.(Gujarat Circle)	...Petitioner
Vs	
Union of India (DoT)	...Respondent

**Petition No.710 of 2012**

Unitech Wireless (Tamilnadu) Pvt. Ltd.(Punjab Circle)	...Petitioner
Vs	
Union of India (DoT)	...Respondent

**Petition No.711 of 2012**

Unitech Wireless (Tamilnadu) Pvt. Ltd.(Haryana Circle)	...Petitioner
Vs	
Union of India (DoT)	...Respondent

**Petition No.712 of 2012**

Unitech Wireless (Tamilnadu) Pvt. Ltd.(H.P. Circle)	...Petitioner
Vs	
Union of India (DoT)	...Respondent

**Petition No.713 of 2012**

Unitech Wireless (Tamilnadu) Pvt. Ltd.(Rajasthan Circle)	...Petitioner
Vs	
Union of India (DoT)	...Respondent

**Petition No.714 of 2012**

Unitech Wireless (Tamilnadu) Pvt. Ltd.(M.P. Circle)	...Petitioner
Vs	
Union of India (DoT)	...Respondent

**Petition No.715 of 2012**

Unitech Wireless (Tamilnadu) Pvt. Ltd.(Bihar Circle)	...Petitioner
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Vs  
 Union of India (DoT) ...Respondent

**Petition No.716 of 2012**

Unitech Wireless (Tamilnadu) Pvt. Ltd.(J&K Circle) ...Petitioner

Vs  
 Union of India (DoT) ...Respondent

**Petition No.717 of 2012**

Unitech Wireless (Tamilnadu) Pvt. Ltd.(Assam Circle) ...Petitioner

Vs  
 Union of India (DoT) ...Respondent

**Petition No.718 of 2012**

Unitech Wireless (Tamilnadu) Pvt. Ltd.(Mumbai Metro Circle) ...Petitioner

Vs  
 Union of India (DoT) ...Respondent

**Petition No.719 of 2012**

Unitech Wireless (Tamilnadu) Pvt. Ltd.(Kolkata Metro Circle) ...Petitioner

Vs  
 Union of India (DoT) ...Respondent

**BEFORE:**

**HON'BLE MR. JUSTICE AFTAB ALAM, CHAIRPERSON**

**HON'BLE MR. KULDIP SINGH, MEMBER**

For Petitioner : Mr. Ashish Prasad, Advocate  
 (in P.Nos.658, 659, 672, 722 of 2012) Mr. Mayank Grover, Advocate

For Petitioner : Mr. Meet Malhotra, Sr. Advocate  
 (in P.Nos.700-719 of 2012) Mr.Ravi S.S.Chauhan, Advocate  
Ms. Pallak Singh, Advocate  
Mr. Anant Ramadhyani, Advocate  
Mr. Prateek Dahiya, Advocate

For Respondent (UOI) : Mr. Nitin Rai, Advocate  
Mr. Sidhartha Jha, Advocate

**ORDER**

**By Aftab Alam, Chairperson** - M/s Unitech Wireless Pvt. Ltd. and M/s Etisalat D. B. Telecom Pvt. Ltd. have approached the Tribunal seeking a direction to the Central Government in the Department of Telecommunication (DoT) to release the “performance bank guarantees” submitted by them as stipulated in clause 21 of the Unified Access Service licences granted to them by the Union of India under section 4 of the Indian Telegraph Act, 1885. Unitech has filed twenty petitions (Petition nos.700 to 719 of 2012) in respect of the twenty different service areas/circles for which the performance bank guarantees were furnished by it. Etisalat has filed four petitions (Petition nos. 658, 659, 672 and 722 of 2012) in respect of the four different service areas/circles to which the bank guarantees sought to be released pertain.

The DoT does not deny that with the possible exception of one of the circles, namely West Bengal, it has no claim of any liquidated damages against Unitech for non-performance of the roll-out obligations under the terms of the licences in the rest of the nineteen circles for which the performance bank guarantees in question

were given. Similarly, in case of Etisalat, the DoT admits that apart from Bihar circle it does not have any claim of liquidated damages against it for non-performance of the roll-out obligations in rest of the three circles for which the bank guarantees were taken from Etisalat. Nevertheless, the DoT refuses to release the bank guarantees in question and insists on holding on to those guarantees on the pretext of securitizing any demands that it might possibly have against the petitioners at some time in future.

It is not that the controversy regarding release of the performance bank guarantee is coming to the Tribunal for the first time. It earlier came to the Tribunal and in more than one case the Tribunal held against the DoT but the DoT still refuses to release the performance bank guarantees submitted by the petitioners and tries to justify its stand on the plea that a certain clause of the UAS licence was not properly considered in the earlier decisions of the Tribunal.

It needs to be mentioned here that all the UAS licences (twenty in case of Unitech and four in case of Etisalat) under which the performance bank guarantees were submitted by the two petitioners and the release of which is at issue, are held by the Supreme Court to have been issued illegally and were consequently quashed by judgment and order passed on 2 February 2012 in **Centre for Public Interest**

**Litigation & Ors. Vs. Union of India & Ors.**<sup>1</sup> It is perhaps this development that made the DoT extra-cautious and anxious that in financial matters they should be seen as erring on the “right side”. A simple and straight-forward matter thus has gotten unnecessarily convoluted.

In order to appreciate the controversy it is necessary to refer to the terms of the UAS licence. The UAS licence is granted on condition of furnishing two kinds of bank guarantees, one “the performance bank guarantee” and the other “the financial bank guarantee”. The performance bank guarantee is required to be submitted under sub-clause 1 and the financial bank guarantee is dealt with in the following sub-clauses of clause 21 of the licence. Clause 21 of the UAS licence is as under.

**21. BANK GUARANTEES:**

**21.1 Performance Bank Guarantee:**

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

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

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<sup>1</sup> (2012) 3 SCC 1

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

#### 21.2 Financial Bank Guarantee:

The LICENSEE shall submit a Financial Bank guarantee (FBG), valid for one year, from any Scheduled Bank or Public Financial Institution duly authorized to issue such Bank Guarantee, in the prescribed Proforma (sic) annexed. Initially, the financial bank guarantee shall be for an amount of Rs.50 Crore (for category 'A' service area) which shall be submitted before signing the Licence agreement. Subsequently, the amount of FBG shall be equivalent to the estimated sum payable equivalent to license fee for two quarters and other dues not otherwise securitized and any additional amount as deemed fit by the Licensor. The amount of FBG shall be subject to periodic review by the Licensor and shall be renewed from time to time till final clearance for all dues.

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

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

21.5 Without prejudice to its rights of any other remedy, LICENSOR may encash Bank guarantee (**FBG as well as PBG**) in

case of any breach in terms and conditions of the LICENCE by the LICENSEE.

(emphasis added)

Clause 21.1 makes the release of the performance bank guarantees subject to the stipulations in clause 34. Clause 34 is as under:

#### **34. Roll-out Obligations:**

34.1 LICENSEE shall be solely responsible for installation, networking and operation of necessary equipment and systems for provision of SERVICE, treatment of SUBSCRIBER complaints, issue of bills to its subscribers, collection of its component of revenue, attending to claims and damages arising out of his operations.

34.2(a) Applicable for Category “A”, “B” and “C” Service Area Licence(s)

LICENSEE shall ensure that

**(i) Atleast 10% of the District Headquarters (DHGs) will be covered in the first year and 50% of the District Headquarters will be covered within three years of effective date of Licence.**

(ii) The licensee shall also be permitted to cover any other town in a District in lieu of the District Headquarters.

(iii) Coverage of a DHQ/town would mean that at least 90% of the area bounded by the Municipal limits should get the required street as well as in-building coverage.

(iv) The District Headquarters shall be taken as on the effective date of Licence.

(v) The choice of District Headquarters/towns to be covered and further expansion beyond 50% District Headquarters/towns shall lie with the Licensee depending on their business decision.

(vi) There is no requirement of mandatory coverage of rural areas.

34.2(b) Applicable for Metro Service Area Licence(s)

**The LICENSEE shall be required to provide in 90% of the service area Street as well as in-building coverage within one year of the effective date.**

(emphasis added)

What emerges from a combined reading of clause 21.1 and clause 34 may be summarized thus:

- a. A prospective licensee will be required to submit, before signing the licence agreement, a performance bank guarantee of Rs.20crores, Rs.10crores or Rs.5crores for category “A”, “B” or “C” service areas respectively.
- b. For metro service area the stipulated criteria requires coverage of 90% of the service area, street as well as in-building, within one year from the effective date of licence
- c. For non-metro service area the stipulated criteria requires coverage of at least 10% of the district head-quarters (or any other town in the district in lieu of the district head-quarters), on completion of one year from the effective date of licence.

- d. On completion of one year from the effective date of licence (for non-metro service area), if the licence-holder meets the coverage criteria, the amount of the bank guarantee submitted will be reduced by half.
- e. For non-metro area the criteria further requires coverage of at least 50% of the district head-quarters (or any other town in the district in lieu of the district head-quarters), within three years from the effective date of licence.
- f. On receipt of the test certificate(s) issued by the Telecom Engineering Centre<sup>2</sup> (that will serve as the proof of satisfying the stipulated criteria), the performance bank guarantee (that is reduced to half after one year) will be released to the licence-holder.

It needs to be mentioned here that the licensor, the Union of India, invoking its powers under clause 5.1 of the UAS licence, issued letter dated 10 February 2009 making amendments, twelve in all, in clauses 8.1, 34 and 35 of the licence relating to the roll-out obligations of the licence holder. The amendments, inter alia, clarified the expression “effective date” of licence by providing that for reckoning the “effective date” the delay caused in allocation of spectrum would be discounted [vide paragraphs numbers (v) and (vii)]. At paragraph number (xi) the amendments further provided that on being tested, if the coverage criteria were

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<sup>2</sup>Now replaced by the Term Cells

found as having been met the coverage would relate back to the registration with the TEC/TERM.

### **Unitech**

In this background of legal position let us now see the facts relating to Unitech petitions. The facts are best summarized in a tabular chart, submitted in course of hearing by Mr. Meet Malhotra, Senior Counsel for the petitioner. But before adverting to the table it needs to be made clear that the veracity of its contents is not in dispute. At an interim stage of the proceedings in the case, the DoT had accepted that the facts stated in the table are correct. The Tribunal, in the interim order passed on 1 November 2012 noted as under:

“6. Learned counsel appearing on behalf of the respondent was asked to obtain instructions with regard to the factual aspect involved in the matter as contained in the aforementioned chart in terms of an order dated 15.10.2012.

7. Mr. Rai submitted that the factual aspects of the matter as reflected in the aforementioned chart are correct except that in respect one of the circles namely UP (East) instead and in place of 16.04.2010 the Petitioner has completed its roll out obligation on 18.04.2010.

8. It is however conceded at the Bar that the said discrepancy in the chart is not of much relevance.”

By the aforesaid interim order the Tribunal allowed the prayer of Unitech and directed the DoT to reduce the performance bank guarantees furnished by it to half. The operative portion of the order is as under:

“For the reasons aforementioned the interim prayer made in these petitions are allowed and the respondent is hereby directed to reduce the performance bank guarantees furnished by the petitioner within one week from date failing which a strict view of the matter shall be taken.”

As a result, the aggregate of the bank guarantees furnished by Unitech for all the 20 circles which was earlier Rs.230 crores was reduced to half and now stands at Rs.115 crores.

With this clarification we may now advert to the table which is reproduced below:

S. N.	Petition No.	Service Area	GSM startup spectrum	Total number of districts	No. of districts covered in 10% roll-out	Registration with TERM 1 <sup>st</sup> Phase (10%)	Cumulative number of district covered in 50% roll-out	Registration with TERM 2 <sup>nd</sup> Phase (50%)	Certificate issued by TERM Cell	Certificate still pending
1	P.No.700 of 2012	Andhra Pradesh	27-May-08	23	2	31-Dec-09	12	14-Feb-11	12	0
2	P.No.701 of 2012	Karnataka	30-May-08	29	3	24-Dec-09	15	11-Aug-10	15	0
3	P.No.702 of 2012	Tamil Nadu	22-Apr-08	34	3	19-Feb-10	17	02-Mar-11	17	0
4	<b>P.No.703 of 2012</b>	<b>West Bengal</b>	09-Jan-09	25	3	01-Sept-10	14	10-Jan-12	11	3
5	P.No.704 of 2012	Kerala	15-May-08	15	2	17-Feb-10	8	05-Jan-11	8	0
6	P.No.705 of 2012	Orissa	24-Apr-08	30	3	23-Feb-10	15	17-Feb-11	15	0
7	P.No.706 of 2012	UP(E)	10-Sep-08	47	5	16-Apr-10	26	27-Jun-11	25	1 (extra/spare)
8	P.No.707 of 2012	UP(W)	25-Sep-08	37	4	08-Jan-10	21	28-Jun-11	21	0
9	P.No.708 of 2012	Maharashtra	10-Sep-08	35	4	14-Jul-10	20	28-Jun-11	20	0
10	P.No.709 of 2012	Gujarat	25-Sep-08	29	3	26-Jul-10	15	27-Jun-11	15	0
11	P.No.710 of 2012	Punjab	10-Sep-08	22	2	09-Aug-10	13	09-Sep-11	13	0
12	P.No.711 of 2012	Haryana	4-Dec-08	21	2	22-Jul-10	14	09-Dec-11	14	0
13	P.No.712 of 2012	H.P.	4-Dec-08	12	1	15-Jun-10	8	25-Nov-11	8	0
14	P.No.713 of 2012	Rajasthan	23-Sep-08	33	3	29-Jul-10	17	07-Dec-11	17	0
15	P.No.714 of 2012	Madhya Pradesh	28-Aug-08	68	7	5-Aug-10	35	24-Aug-11	35	0
16	P.No.715 of 2012	Bihar	3-Oct-08	62	6	26-Mar-10	31	12-Aug-11	31	0
17	<b>P.No.716 of 2012</b>	<b>J &amp; K</b>	24-Dec-08	22	2	21-Sep-10	12	13-Dec-11	2	10
18	<b>P.No.717 of 2012</b>	<b>Assam</b>	22-Dec-08	27	3	7-Sep-10	14	20-Dec-11	12	2
19	P.No.718 of 2012	Mumbai(metro)	09-Sep-08	1	1	18-Aug-10			1	0
20	<b>P.No.719 of 2012</b>	<b>Kolkata(metro)</b>	5-Dec-08	1	1	15-Sep-10			0	1

Coming to the facts enumerated in the table, the fourth column in the table mentions the date of allocation of spectrum under that licence; the fifth column states the total number of districts in the service area (mentioned in column no.2) to which the licence pertained and the sixth, the number of districts that comprised 10% for the first phase roll-out; the seventh column states the dates of registration with TERM on completion of first phase roll-out; the eighth column shows the number of districts in the respective service areas that were covered in the second phase of roll-out and the ninth, the dates of registration with TERM on completion of the second phase roll-out; the tenth column is important as it shows that in fifteen out of twenty service areas TERM issued certificates attesting that roll-out obligations were fully discharged.

In the service area of West Bengal (at serial no.3) TERM had issued certificates for eleven out of fourteen districts that were covered in the second phase roll-out. But during the pendency of this petition a show cause notice in respect of that service area was served on Unitech raising the demand for liquidated damages. Unitech gave its reply to the show cause notice and the matter rests at that stage. The decision of the DoT on its reply has so far not been communicated to Unitech. In that situation Mr. Malhotra requested that the case relating to West Bengal circle area may be taken up later awaiting the decision of

the DoT in the matter. As requested by Mr. Malhotra Petition no.703 of 2012 relating to West Bengal circle (performance bank guarantee for Rs.5 crore) is separated from the batch to be taken up for hearing later at the appropriate stage. This leaves nineteen petitions by Unitech.

In the service area of UP (East) (serial no.7), out of twenty six, the TERM has issued certificates for twenty five districts and only in respect for one district certificate has not been issued. In J&K service area (serial no.17), out of twelve, certificates are issued only for two districts. In Assam service area (serial no.18), out of fourteen, certificates are issued for twelve districts. And in the Kolkata metro service area (serial no.20) certificate has not been issued.

Here it is important to note that in some of the different districts of UP (East), J&K, Assam and for the Kolkata metro service area certificates are not issued not because on being tested the coverage was found to be deficient but because notwithstanding the registration, the TERM failed to carry out the tests.

Here it is also relevant to note that as per the instructions contained in the circular dated 29 October 2009 the TERM are required to carry out the tests for coverage normally within five months from the date of registration. We are conscious that the circular uses the word “normally” and hence, cannot be said to fix any rigid time limit. We are also willing to make allowance for the fact that as a result of a large number of UAS licences that were issued at the same time, cases

for testing the roll-out criteria came up in very large numbers, all at one time. The TERM did not have the necessary wherewithal to complete the testing in all the service areas within a short time. But whatever allowance we may be willing to make for this, it can never justify not carrying out the tests even after two and half years after registration. In any event after such a long delay it is no longer possible to carry out the test regarding the roll-out criteria with reference to the dates of registration in the different circles.

It, however, needs to be clarified here that we have taken note of the aforesaid facts for the sake of the record. For, as noted in the opening part of the judgment it is the definite case of the DoT that it has no claim of any liquidated damages against Unitech for non-performance of the roll-out obligations under the terms of the licences in the nineteen circles to which the nineteen petitions relate. The DoT refuses to release the nineteen bank guarantees and insists on holding on to those guarantees on the pretext of securitizing any demands that it might possibly have against the petitioners at some time in future.

Mr. Nitin Rai, learned counsel appearing for the DoT submitted that though called as “Performance Bank Guarantee” the bank guarantees were intended to cover not only the liquidated damages for non-performance of the roll-out obligations but also penalties for violation of any other terms of the UAS licence. Mr. Rai pointed out that sub-clause 5 of clause 21 expressly empowers the licensor

to encash “FBG as well as PBG in case of any breach in terms and conditions of the licence by the licensee”. Learned counsel submitted that it is thus obvious that the performance bank guarantees could also be invoked and encashed for any breach of the terms and conditions of the licence and it was not confined only to the liquidated damages for non-performance of the roll-out obligations.

Learned counsel further submitted that under clause 35.2 though the amount of liquidated damages for failure to discharge the roll-out obligation could not exceed Rs.7.00 crores, the amount of the bank guarantee that the licensee was obliged to give was Rs.20/10/5 crores for category A/B/C service areas and this also suggested that the cover of the performance bank guarantee was meant to extend beyond the liquidated damages for non-performance of the roll-out obligations.

He further submitted that clause 4 of the Proforma for the performance bank guarantee also indicated that the bank guarantee extended to cover any breach of the licence. Clause of the performance bank guarantee is as under:

4. We, the Bank hereby also undertake to pay the amounts due and payable under this guarantee without any demur, merely on a demand from the Authority stating that the amount claimed is due by way of loss or damage caused or would be caused to or suffered by the Authority by reason of breach by the said LICENSEE **of any of the terms or conditions contained in the said Licence** or by reason of the LICENSEE's failure to perform any of its obligations under clause 34 of the said Licence. (emphasis placed by Mr. Rai)

Mr. Rai, however overlooks that apart from clause 4, all other clauses of the performance bank guarantee expressly provide that the guarantee would remain in force for a period of three years (vide clause 6.a) and it was by way of security for the due observance and performance of clause 34 of the terms and conditions of the UAS licence (vide the opening paragraph and clauses 2, 3 and 5 of the proforma).

Mr. Rai also overlooks that in four earlier cases the Tribunal has repelled the stand taken by the DoT based on the aforesaid provisions and has held that the DoT cannot withhold the performance bank guarantees and must release those bank guarantees in case the licensee discharges the roll-out obligations as provided in clause 34 of the licence.

In the case of *Sistema Shyam Teleservices Ltd. Vs. Union of India*<sup>3</sup> the Tribunal dealt with clauses 21, 34 and 35 of the UAS licence and the letter dated 10 February 2009 by which amendments were made in clauses 8.1, 34 and 35 of the licence and held that a performance bank guarantee cannot be invoked in a case where performance by a licensee is not an issue and upon successful completion of roll-out obligation, the performance bank guarantee must be released to the licensee. The performance bank guarantee can only be invoked when the licensor

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<sup>3</sup> Judgment dated 29.09.2011 in Petition No.314 of 2011

suffers any damages due to the licensee's failure to carry out the roll-out obligations.

In the case of Aircel Ltd.Vs. Union of India <sup>4</sup> the Tribunal once again considered clauses 21 and 34 of the UAS licence and the amendments introduced by the letter 10 February 2009 and following the decision in Sistema Shyam directed for the release of the bank guarantee in favour of the licensee.

In the case of Etisalat DB Telecom Pvt. Ltd. Vs. Union of India <sup>5</sup> the Tribunal once again referred to clauses 21 and 34 of the UAS licence and the amendments introduced by the letter dated 10 February 2009 and following the earlier decisions in Sistema Shyam and Aircel Ltd. directed for the release of the bank guarantees.

In the case of Videocon Telecommunication Ltd. Vs. Union of India<sup>6</sup> the Tribunal yet again considered clauses 24 and 34 of the UAS licence and the amendment introduced by the letter dated 10 February 2009. It also noticed the judgment of the Supreme Court cancelling 122 licences and the orders by which the operators under the cancelled licences were allowed to operate the services up-to 18 January 2013. In this case also, referring to the earlier decisions in Sistema Shyam, Aircel and Etisalat DB, the Tribunal held that once the roll-out obligations are complied with the performance bank guarantee must either be

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<sup>4</sup> Judgment dated 11.04.2012 in Petition No.491 of 2011

<sup>5</sup>Judgement dated 26.07.2012 in Petition no.443 of 2011

<sup>6</sup>Judgement dated 29.10.2012 in Petition no.450 of 2011

released or returned and directed the Union of India to release the bank guarantees to the licensee.

Mr. Rai however submitted that in the aforementioned cases, the Tribunal did not notice clause 11.2 of the UAS licence and submitted that in the case of S. Tel Pvt. Ltd. Vs. Union of India<sup>7</sup> when the provision of clause 11.2 was brought to the notice of the Tribunal the Chairperson in his separate judgment left the question open.

Clause 11.2 of the UAS licence provides as under:

11.2 On termination or surrender or expiry of the LICENCE, the Bank Guarantee shall be released to the LICENSEE **only after ensuring clearance of all dues**, which the LICENSEE is liable to pay to the licensor. In case of failure of the LICENSEE to pay the amounts due to the LICENSOR, the outstanding amounts shall be realized through encashment of the Bank Guarantee without prejudice to any other action(s) for recovery of the amounts due to the LICENSOR without any further communication to the Licensee.

(emphasis placed by Mr.Rai)

In our considered, view clause 11.2 of the licence does not in any way improve the case of the respondent; neither clauses 35.2 and 11.2 of the UAS licence nor clause 4 of the performance bank guarantee, either separately or cumulatively can be read to override the mandatory stipulation in clause 21.1 of the licence that on fulfilling the roll-out obligations, the balance PBG **shall be**

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<sup>7</sup>Judgement dated 26.09.2012 in Petition no.375 of 2012

released on receipt of certificate issued by TEC in respect of coverage. It thus follows that the provisions relied upon by the counsel cannot justify the withholding of the performance bank guarantee by the Union of India even after the roll-out obligations are fully discharged and even though the Union of India admittedly has no claim of damages against the licensee resulting from the non-performance of the roll-out obligations as provided under clause 34 of the licence.

If the submission of the Union of India is accepted, it would mean that even after fully discharging the roll-out obligations, the licensee, bearing great expense, must keep alive, apart from the financial bank guarantee, the performance bank guarantee till the entire period of the licence may long thereafter, until the licensor chooses to take a view whether it would lay a claim against the licensee for breach of any of the terms of the licence. Such an interpretation of the provisions of the licence would be wholly unacceptable.

On a harmonious reading of clauses 21, 34, 35.2 and 11.2 of the licence and clause 4 of the performance bank guarantee all that can be said is that in case the licence is cancelled or terminated for some serious breach of any of its terms within one year (in case of a metro service area) or within three years (in case of the other service areas), that is, before the time for the roll-out obligation is over and the licensor is still in possession of the performance bank guarantee besides the financial bank guarantee, then in case the aggregate amount of the damages,

penalties and other claims exceed the financial bank guarantee, it would be open to the licensor to also invoke the performance bank guarantee to the satisfaction of its claim.

In this case it is repeatedly noted that the Union of India has no claim of damages against Unitech Wireless Pvt. Ltd. in any of the nineteen service areas relating to the non-performance of the roll-out obligations. The Union of India has, therefore, no right to withhold the performance bank guarantees submitted by the petitioner in those service areas. This is the legal position.

Before concluding the matter, however, it would be appropriate to look a little deeper into the facts of the case and to see the amount of securitization already available to the Union of India.

The Union of India has the following securities to satisfy its claim against Unitech that may (or may not) arise in future:

- (i) The financial bank guarantees submitted by Unitech that aggregate to the sum of Rs.325 crores remain in the custody of the Union of India.
- (ii) The Union of India had earlier imposed liquidated damages against Unitech for its alleged failure to complete the first phase roll-out. Unitech challenged the imposition of the liquidated damages in petition no.2 of 2011. By an interim order passed in that petition Unitech was directed to deposit 60% of the amount of the liquidated damages claimed

by the Union of India which amounted to Rs.57.81 crores. Unitech deposited the money as directed by the Tribunal. Petition no.2 of 2011 was heard along with a large number of petitions and was finally allowed by the judgment and order dated 13 January 2012, directing the Union of India to refund the deposited amount along with interest. The operative order passed in the case is as under:

“The Respondents are further directed for refund of the amount deposited by the Petitioner pursuant to our interim orders with interest at the rate of 12 percent per annum. The Petitioners shall, however, furnish Performance Bank Guarantees within two weeks from the date to the extent of the impugned demand, if the same has been reduced or directed to be reduced by orders of this Tribunal in any proceedings. The Respondent should return the amount within four weeks.”

Against the judgment and order passed by the Tribunal, the Union of India has gone in appeal before the Supreme Court in Civil Appeal no.25442 of 2012 in which the Supreme Court has passed the following order:

“Delay condoned.

The appeal is admitted.

There will be an interim order staying the interest payable on the principal amount, in terms of the impugned judgment of the Appellate Tribunal.”

It is thus to be seen that the stay granted by the Supreme Court is only in respect of the interest on the principal amount (@ 12%) that was directed by the Tribunal.

Later on, however, interpreting its order dated 13 January 2012, the Tribunal by order dated 3 May 2012 passed in MA nos.56 and 90 of 2012 in petition no.48 of 2011 held that the money deposited by the licensees (including Unitech) would be refunded subject to furnishing a bank guarantee for a sum equivalent to the deposited amount. It is stated on behalf of Unitech that it was unable to furnish the bank guarantee and consequently the amount of Rs.57.81 crores deposited by it in terms of the interim order remains in possession of the DoT.

- (iii) As per the direction of the Supreme Court, Unitech carried on the services under the cancelled licence till 18 January 2013. In the meanwhile, following the direction of the Supreme Court, the auction of spectrum, freed from the cancelled licences was held on 12 and 14 November 2012. In that auction M/s Telewings Communications Services Pvt. Ltd. was a successful bidder for spectrum in six circles, Andhra Pradesh, Bihar, Gujarat, Maharashtra, UP(East) and UP(West) where Unitech was operating under the cancelled licences. In those six circles, Unitech continued to operate till M/s Telewings was granted the

Unified Licence and the permission to have Unitech's resources transferred to itself. Telewings was granted Unified Licence on 27 November 2013 for the six circles and the approval for taking over Unitech's resources for authorization of Access Service in the five states vide letter dated 27 November 2013 by the DoT. It is significant to note here that as one of the conditions for grant of licence and the permission for taking over Unitech's resources vide paragraph (vii) of the letter of intent No.20-365/2012-AS-I (Vol.-II) dated 5 November 2013, both Telewings and Unitech have given undertakings to DoT comprehensively binding themselves to make payment of all the dues against Unitech arising from the 20 cancelled licences as well as charges for the spectrum held from 02.02.2012 till the date of resource transfer to Telewings at the price fixed by the Supreme Court. The undertakings furnished by Unitech and Telewings are brought on record as Annexures C (colly), D and E (colly) to MA no.24 of 2014.

We fail to understand what further securitization the DoT should need in regard to a claim which is yet to be conceived and which may not come into existence at all.

In light of the discussions made above, we come to the inescapable conclusion that the action of the DoT in withholding the performance bank

guarantees submitted by Unitech is completely untenable both in law and on facts. The nineteen petitions referred to above are accordingly allowed with costs quantified at Rs.25,000/- per petition. The amount of cost should be paid to Unitech or adjusted against any lawful dues against it within three months from today failing which the provisions of section 20 of the TRAI Act will come into play.

### **Etisalat**

As regards Etisalat, the first thing to note is that it had obtained 15 licences for 15 circles and had submitted performance bank guarantees for each of those circles. Etisalat earlier came to the Tribunal in petition no.443 of 2011 seeking release of 11 out of the 15 performance bank guarantees submitted by it. The petition was allowed by judgment and order dated 26 July 2012 and the DoT was directed to release the performance bank guarantees to Etisalat. The DoT has not preferred any appeal against the judgment and order passed by the Tribunal and the matter in so far as the 11 performance bank guarantees is concerned, has attained finality.

In the present four petitions Etisalat seeks release of the remaining performance bank guarantees submitted for Bihar, Madhya Pradesh, Delhi and Mumbai service areas.

The second relevant fact in regard to Etisalat is that the proceedings for its winding up are currently pending before the Bombay High Court in Company Petition no.114 of 2012. In the winding up proceedings the High Court on 3 July 2012 passed an interim order in Company Application no. 134 of 2012 with Company Application (L) no.191 of 2012 restraining the DoT, BSNL, MTNL and any tax authority from invoking the bank/performance bank guarantee(s) of any nature furnished by Etisalat. We were informed that no SLP has been filed against that order but the DoT has moved the High Court itself for vacating the interim order. We were not informed what order, if any, has been passed on the petition filed by the DoT. What is of importance for the present, however, is that in the winding up proceedings the DoT has filed an additional affidavit, as late as on 19 June 2013, in which it is clearly averred that with the exception of Bihar no liquidated damages is proposed against Etisalat on the ground of violation of the second phase roll-out obligations. The following extract from the additional affidavit filed by the DoT being relevant for the present is reproduced below:

**“As regards Para 11:** It is submitted that a SCN for imposition of LD in respect of Bihar LSA of M/s EDB/Allianz is under submission. The amount of Rs.7.00 crores is proposed in the proposed in the LD’s show cause notice due to default in 2<sup>nd</sup> phase rollout obligations. However, it appears that, SCN referred in para 11 of the report if corresponding to item 6 of para 2 of report. In spite of the expiry of period given in SCN, company has not given reply but sought additional time. The issue is under examination.

**As regards Para 13:** It is submitted that in 14 LSA's (other than BIHAR LSA) Licensee has completed the 2<sup>nd</sup> phase rollout registration in time, therefore no LD is proposed on the ground of violation of 2<sup>nd</sup> phase rollout obligations.”

In view of the stand taken by the DoT, petition no.658 of 2012 relating to Bihar (performance bank guarantee for Rs.2 crores) is taken out of the batch to be heard at a later stage. Hence, we proceed to dispose the remaining three petitions.

While dealing with the case of Etisalat it would be proper to point out a point of distinction between the cases of Etisalat and Unitech. Unitech as noted above continued to carry out its operations till 15 February 2013 as directed by the Supreme Court. Etisalat however stopped operations immediately on the pronouncement of the judgment by the Supreme Court on 2 February 2012 holding the grant of licences to it to be illegal. The Supreme Court in its order dated 15 February 2013 had observed that it would separately decide the issue relating to the liability of the licensees who discontinued their operations between 02.02.2012 and 15.01.2013.

But that alone, in our considered opinion, will give no justification to the DoT to hold on to the three performance bank guarantees submitted by Etisalat. Moreso, as DoT has avowedly no claim of liquidated damages in the three circles pertaining to which the bank guarantees are submitted. We, accordingly, allow the three petitions being 659, 672 and 722 of 2012 and direct the DoT to release the

three bank guarantees to Etisalat. In these petitions there shall be no order as to costs.

In the result the nineteen petitions filed by Unitech are allowed with costs as indicated above and the three petitions filed by Etisalat are allowed without costs.

Petition no.703 of 2012 by Unitech and petition no.658 of 2012 by Etisalat will be taken up later.

.....**J**  
**(Aftab Alam)**  
**Chairperson**

.....  
**(Kuldip Singh)**  
**Member**

/sks/