

TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL

NEW DELHI

Dated 17th July, 2014

Petition No. 272 of 2013

Reliance Communications Ltd. ... Petitioner

Vs.

Union of India ... Respondent

BEFORE:

HON'BLE MR. JUSTICE AFTAB ALAM, CHAIRPERSON

HON'BLE MR. KULDIP SINGH, MEMBER

For Petitioner ... Mr. Navin Chawla, Advocate
Mr. Pranav Sarthi, Advocate

For Respondent ... Mr. K.P.S. Kohli, Advocate
Mr. Prashant Jain, Advocate for
Ms. Maneesha Dhir, Advocate

JUDGMENT

Kuldip Singh: The dispute in the present petition is with regard to penalty imposed on the petitioner for the violation of the terms and conditions of the License Agreement- Verification of subscribers in respect of 156 individual bulk customers detected in the monthly customer data base supplied by petitioner in the month of May, 2013 (for the period ending April, 2013).

2. The petitioner - M/s Reliance Communications Ltd. has been granted Unified Access Services License (UASL) under Section 4 of the Indian Telegraph Act, 1885, for Punjab Service Area. By way of present petition, the petitioner has challenged the imposition of penalty of Rs. 65,37,000/- levied by the respondent vide its impugned demand letter bearing No. 5-7/TERM Pb/Penalty/2012/RCL/22 dated 10.06.2013 and letter bearing No. 5-7/TERMMP/2010/Rep-Review/94 dated 11.07.2013 rejecting the representation of the petitioner against imposition of such penalty. The petitioner has further challenged the impugned demand notice dated 20.08.2013 demanding interest of Rs.1,79,233/- from the petitioner.

3. Before going into the facts of the case, we give a brief background of the customer verification process and its objective.

As per clause 41.14 [Part VI] of the UAS License Agreement, licensees are required, inter-alia, to do the following:-

- (i) make a complete list of their subscribers available on their website so that the authorized Intelligence Agencies can obtain the same at any time;
- (ii) Ensure adequate verification of each and every customer before enrolling it as a subscriber;

- (iii) Follow the instructions issued by the licensor in this regard from time to time.

Clause 41.14 of the UAS Licences reads as under :-

“The complete list of subscribers shall be made available by the LICENSEE on their website (having password controlled access), so that authorized Intelligence Agencies are able to obtain the subscriber list at any time, as per their convenience with the help of the password. The list should be updated on regular basis. Hard copy as and when required by security agencies shall also be furnished. The LICENSEE shall ensure adequate verification of each and every customer before enrolling him as a subscriber; instructions issued by the licensor in this regard from time to time shall be scrupulously followed. The SIM Card used in the User terminal shall be registered against each subscriber for his bonafide use. The LICENSEE shall make it clear to the subscriber that the SIM Card used in the user terminal against him is non-transferable and that he alone will be responsible for proper and bonafide personal use of the service.”

On 31.7.2008, the UAS License was amended to incorporate the following clause :-

”The Licensor shall have the right to direct the Licensee to warn, penalize or terminate the franchisee or agent or distributor or servant, after considering any report of conduct or antecedents detrimental to the security of the nation. The decision of the Licensor in this regard shall be final and binding and in any case the Licensee shall bear all liabilities in the matter and keep the Licensor indemnified for all claims, cost, charges or damages in this respect.”

4. Clause 41.14 of the License Agreement is a part of security considerations. The objective of this clause is that the identity as well as address details of any subscriber subscribing to the services of the licensee company should be readily available in case of need. We may note that in case of a fixed phone service, the premises where the phone is installed is well known in contrast to mobile service where the subscriber can be anywhere. It is more so in case of prepaid service for which the phone bill is not required to be issued to the subscriber and the subscriber can avail the services by purchasing prepaid vouchers and charging his account. In case of any need by a security agency, the details of such subscribers must be readily and correctly available. Since the matter may involve the security of the country, the importance of these details cannot be over-emphasized.

5. Department of Telecommunications (DoT) - Union of India has been issuing instructions from time to time for compliance with clause 41.14 of the license. It has also provided for a scheme of financial penalty for violation of terms & conditions of the license agreement in respect of subscriber verification. The Department has also been carrying out the audit of the licensees to ensure their compliance with the instructions issued from time to time. Vide letter dated 01.6.2010 the work relating to imposition of penalty has been de-centralized and put on Telecom, Enforcement, Resources and Monitoring (TERM) Cells set up under DOT in various license areas.

Subscribers, while subscribing to the services of a licensee, are required to complete a form which is called as the 'Customer Acquisition Form (CAF)'. The subscribers are also required to submit the proof of identity as well as proof of address, for which certain documents specified by the Department of Telecommunications (DoT) are to be provided. Licensees are also required to follow the guidelines issued in this regard from time to time. To ensure compliance with the instructions in this regard, TERM Cell of the concerned service area conducts monthly audits of the licensees on sample basis. On the total subscriber base of the licensee in that service area, a sample of one percent of the subscribers at random is taken and the licensee is asked to provide copies of the CAF Forms of the subscribers. These copies of CAF forms are checked for

compliance with the instructions and guidelines issued from time to time and in cases of non-compliance, the licensees are given a week's time to discuss the cases and make available the original CAFs. The initial report indicating the findings about compliance/non-compliance is also provided to the licensee. Based on the discussions with the service provider (licensee), the report is finalized and jointly signed by both. Based on this final report, the amounts of penalty are calculated in accordance with the telescopic rate that provide for increasing amounts of penalties for higher percentage of non-compliance. The service provider, if he so desires can make a representation to the Deputy Director General (DDG), TERM whose decision is final.

6. Vide circular No. 800-09/20010-VAS dated 09.8.2012, fresh instructions for verification of new mobile subscribers (pre-paid and post paid) were issued. These instructions were in supersession of the earlier instructions and were to be effective after three months from the date of the issue i.e. 09.11.2012. Para 6 of these instructions relates to bulk mobile connections and as per sub para (i) and (ii) of para 6, bulk mobile connections shall not be provided in case of individuals. Bulk connections mean 10 or more mobile connections. The relevant portion of the said para is as under :-

“6. Bulk Mobile Connection :

- (i) *Bulk mobile connection means 10 or more than 10 mobile connections issued in a single name to individuals or a company or an organization or at any given address by all the Licensed service providers in the service area.*
- (ii) *Bulk connections shall not be provided in case of individuals.”*

7. It is the contention of the petitioner that subsequent to the issuance of the above instructions by DoT, it immediately got its database scanned and from November, 2012 till the end of April, 2013 it did not allow 11205 numbers to be activated as they were falling in the category of “bulk subscribers”. But, however, in spite of its sincere and honest efforts, the software used by it failed to detect 156 such connections registered in the name of 12 individuals out of total subscriber base of 30,92,314 for the month of April, 2013. Petitioner contends that respondent has failed to appreciate that it acted bonafide and imposed the impugned penalty though the petitioner was following the instructions in this regard.

Respondent, however, contends that as per instructions, petitioner was required to submit a certificate of compliance to the TERM Cell at the end of first two months for the connections made compliant. Petitioner on 11.3.2013 submitted a certificate of compliance for existing bulk connections, stating that:

“With reference to the above captioned subject, we hereby bring to your kind notice & confirm that we have compliant bulk connection base as per above guidelines. We have terminated 106331 bulk MDN’s and rest 18155 are made compliant. Kindly accept this as a certification of confirmation on the same.”

8. Verification of subscribers is a very important requirement that needs to be strictly followed by the service providers. Such matters cannot be taken lightly. Though the petitioner claims that it had detected a number of bulk subscribers and terminated some of them and made them compliant and therefore, acted bonafide, it is responsible for the correct functioning of its software in this regard. We may note that even prior to the issuance of the instructions dated 09.8.2012, petitioner was required to know the exact number of bulk customers as per clause 41.19 (i) and 41.19 (v) of the UAS Licence, which reads as under :-

”41.19 (i) Utmost vigilance should be exercised in providing bulk telephone connections for a single user as well as for a single location. Provision of 10 or more connections may be taken as bulk connections for this purpose. Special verification of bonafide should be carried out for providing such bulk connections. Information about bulk connections shall be forwarded to respective (VTM) Cell of DoT, DDG(Security), DoT and any other officer authorized by Licensor from time to time as well as all Security Agencies on monthly basis.”

41.19(v) Bulk user premises should be inspected by the service providers at regular intervals for satisfying themselves about bonafide use of such facilities. A record of such inspection should be maintained and preserved for minimum one year, for inspection/ verification by the licensing authority or a designated officer of the authority.”

If the petitioner had been vigilant in terms of these clauses, these 156 subscribers would not have escaped its notice. We are, therefore, unable to agree with the contention of the petitioner.

9. Mr. Navin Chawla, learned counsel appearing for petitioner, submitted that penalty imposed is on the basis of 100% non-compliance whereas 156 bulk connections in the name of 12 persons are out of a total subscriber base of 30,92,314 and taking this as the base, the percentage of non-compliance shall be 0.005 and penalty of Rs.1.56 lakh could only be imposed against the penalty of Rs.65.37 lakhs.

We may note that as per the impugned letter dated 10.6.2013, there is a graded scheme of penalties as under :-

<i>Correct Subscriber Verification Percentage in a service area</i>	<i>Amount of Financial Penalty per Unverified Subscriber (Rs.)</i>
<i>Above 95%</i>	<i>1000/-</i>
<i>90% or more and upto 95%</i>	<i>5000/-</i>
<i>85% or more but less than 90%</i>	<i>10000/-</i>
<i>80% or more but less than 85%</i>	<i>20000/-</i>
<i>Below 80%</i>	<i>50000/-</i>

Mr. K.P.S. Kohli, learned counsel appearing for Union of India submitted that penalty has been imposed as per DoT's instructions vide letter dated 18.11.2010, as per which the cases reported separately may not be combined with the monthly sample CAF audit. These cases are to be separately investigated taking sample size as total number of cases or cases taken for investigation/surprise check and compliance percentage may be calculated out of these samples only. The relevant para of the letter is as under :-

“13.cases reported separately may not be combined with the monthly sample CAF audit for the purpose of calculating overall percentage compliance. These cases may be separately investigated/ audited. For the subscriber verification failure cases of these cases also, the financial penalty as subscriber in the DoT letter no. 800-52/2008-VAS-III(Part) dated 24.12.2008 shall be applicable. The sample size may be taken as the total number of reported cases or cases taken for investigation/surprise check and compliance percentage may be calculated out of these samples only.....”

Mr. Kohli argued that in this case, 156 numbers were taken up for investigation and all were found to be non-compliant resulting in 100% non-compliance. The penalty imposed was according to the prescribed graded scheme.

With regard to the submission of Mr. Kohli, let us examine the process of sampling and its objective.

The objective of sampling is to gather reasonably accurate information of the total population of which the sample forms a part. Ideally the examination of whole population is desirable but since in most of the practical cases, size involved is so large, a sample of the same is picked up and examined. If the sample is carefully chosen, the sample statistics are expected to be representative of population statistics. In the case of monthly audit of CAFs for compliance of DoT's instructions, the random sample selected by DoT is expected to be representative of the whole population. Though in such an important matter, 100% compliance is desirable, but the very fact that DoT – Union of India imposes graded penalties that increases with percentage of non-compliance, shows that 100% compliance is practically difficult if not impossible to achieve. As can be seen from the graded penalty scheme, a compliance of more than 95% attracts a penalty of Rs.1000/- per unverified subscriber as compared to penalty of Rs.50,000/- for compliance below 80%. Obviously, compliance of 95% and above is considered as good achievement. In the present case, 156 non-

compliance are found in the total population of subscribers, which is 30,92,314. We are unable to agree with the submission of Mr.Kohli that since these 156 cases were taken up for investigation this was the sample in terms of the letter dated 18.11.2010 and since all were found non-compliant, the non-compliance is 100%, for the simple reason that when the whole population is enumerated, there is no question of there being a sample. Had it been a random sample of say “X” number of subscribers out of which “Y” were found non-compliant, the percentage of non-compliance as per sample could be taken as that of the whole subscriber base. Surely, it is not the case of the respondent that it took a random sample but admittedly, 156 individual bulk customers were detected in the customer base supplied in the month of May,2013. This is definitely not statistical sampling on which graded penalty scheme of DoT – Union of India is based. We, therefore, find that penalty for this 156 non-compliant cases should be imposed taking the complete subscriber base for the month for calculating percentage non-compliance. In term of the DoT letter dated 18-11-2010 (Supra), this may not be combined with the routine monthly check and, therefore, taking this as a standalone case, the compliance is more than 95%.

10. It is accordingly directed as under:

(i) The respondent shall work out the penalty for 156 cases taking the complete subscriber base for the month of May,2013(for period ending

April,2013) as the total for the purpose of determining percentage non-compliance and intimate the same to the petitioner within two weeks.

(ii) The excess amount deposited by the petitioner in terms of the Tribunal order dated 29th August,2013, shall be returned to the petitioner along with interest @ 9% from the date of deposit and till the same is returned.

The petition is disposed of in above terms. Keeping in view the facts and circumstances of the case, there is no order as to costs.

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(Aftab Alam)
Chairperson

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(Kuldip Singh)
Member

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