

TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL

NEW DELHI

Dated 1st July, 2015

Petition No. 101(C) of 2015

Clear Media (India) Pvt. Ltd.

...Petitioner

Vs.

Ministry of Information & Broadcasting

... Respondent

BEFORE:

**HON'BLE MR. JUSTICE AFTAB ALAM, CHAIRPERSON HON'BLE
MR. KULDIP SINGH, MEMBER**

For Petitioner

: Mr. Krishnan Venugopal, Sr. Advocate
Mr. Kaushik Mishra, Advocate
Mr. Shivendra Singh, Advocate

For Respondent

: Mr. Rajeev Sharma, Advocate
Ms. Radhalakshmi R., Advocate

JUDGMENT

Kuldip Singh:

The petitioner is operating FM (Frequency Modulation) Radio Broadcasting Service in Delhi for which it has been granted a license under section 4 of the Indian Telegraph Act, 1885. It has filed the present petition challenging the Notices dated 1.7.2014 and 24.2.2015 and clause 31 and clause 9.4 of Information Memorandum dated 21.1.2015, issued by the Ministry of Information and Broadcasting (MIB) who is the respondent herein.

The respondent, vide the impugned notice dated 1.7.2014 and the Information

Memorandum dated 21.1.2015, has asked the FM Phase-II licensees who wish to migrate to Phase-III License for a fresh period of 15 years to execute a fresh Grant of Permission Agreement (GOPA) which is to be effective from 31.3.2015 and to pay a Non Refundable One Time Migration Fee (NOTMF) at the time of execution of GOPA. The petitioner, who is a Phase-II licensee, is aggrieved by this cutoff date of 31.3.2015 as well as clause 9.4 (C) of the Information Memorandum that provides for a three year lock-in period before the largest Indian shareholder can dilute its equity below 51%.

Facts of the case

The respondent had opened up the FM Broadcasting service for private sector privatization in the year 2000 by granting 22 licenses, including three for Delhi, under Phase-I licensing policy. These license were granted for a period of 10 years. The licensees were required to pay an annual license fee as prescribed under the licenses. 21 of these licenses are operational at present.

On 13.07.2005, the respondent notified FM Radio Phase II policy. As per this policy, the licensees were required to pay a one-time entry fee (OTEF) that was based on a blind auction and an annual fee @ 4% of the Gross Revenue subject to a minimum of 10% of the reserve OTEF for the city. There were 284 successful bidders in the phase II auction. Out of these, 221 channels are operational at present.

In the meanwhile, the Phase-I licensees, who were required to pay a defined license fee annually, were finding the same too onerous. The matter was under consideration of the respondent as well as the regulator TRAI and pursuant to the recommendations of TRAI, the phase-I licensees were offered migration to the

phase-II regime retrospectively with effect from 01.04.2005 by paying a one-time entry fee based on the average of the successful bids in each city. 21 phase-I licensees migrated to the phase-II regime with effect from 01.04.2005 and their licenses are, therefore, valid till 31.03.2015.

In January 2006, auction of phase-II licenses was held in cities with population of more than 3 Lakhs. The petitioner was the fourth successful bidder in Delhi and was awarded FM spectrum band to operate its radio station in Delhi. It paid a one-time entry fee (OTEF) of Rs. 13.33 crores and was granted a license on 14.06.2006 for ten years. As per the license, the effective date of the same was to be reckoned from the date of operationalization of the channel or one year from the date of signing of the license whichever occurred first. As the petitioner operationalized its channel on 01.09.2006, its license is expiring on 31.08.2016.

On 25.07.2011, the respondent notified the phase-III policy for expansion of FM broadcasting through private agencies. Subsequently, a migration policy for phase-II licensees to phase-III was also made part of the same. On April 9, 2013, the respondent made a reference to TRAI. As per the letter written by the Secretary MIB to Chairman TRAI, there were some additional benefits in phase-III regime in terms of increased limit of FDI+FII¹ and substantial cost reduction due to networking of channels as well as permission to carry some additional content. As per the letter, in view of the additional benefits, there may be a case for charging migration fee from phase-II operators who opt to shift to phase-III regime. The issue relating to charging of migration fee was discussed in the Inter-Ministerial Committee on January 9, 2013

¹ Foreign Direct Investment, Foreign Institutional Investors.

wherein it was decided that the TRAI may be authorized to give recommendations on the same after hearing all stake holders. TRAI was requested to give its recommendations under Section 11(1) (a) (VIII) of TRAI Act, 1997 .

TRAI , however, sought a clarification from the respondent stating that it had come to its notice that both the policy guidelines as well as the GOPA indicate the date of migration from phase II to phase III as July 25, 2011. However, the additional benefits cannot be availed retrospectively from July 25, 2011 as the existing phase-II operators will be authorized to avail these only after signing of GOPA for migration. It was further stated that if a decision on migration has already been taken it was not clear what TRAI was required to do. On August 29, 2013, the respondent wrote to TRAI stating that as per para 31.5 of the FM radio phase-III guidelines the cut-off date for automatic migration to phase-III was the date of issue of these guidelines i.e. July 25, 2011. As per this letter since this deadline was already over and no broadcaster had migrated to phase-III, it was decided to charge a migration fee with the amount of the same to be decided in consultation with TRAI. It was further stated that since TRAI has to give its recommendations regarding charging of migration fee from existing operators on their migration from phase-II to phase-III, it may also recommend the date of migration as both these matters are interconnected.

The TRAI issued a consultation paper on 3.12.2013 inviting comments from various stakeholders on various issues. On February 20, 2014, the TRAI gave its recommendations. The summary of its recommendations is as under:

“ Summary of Recommendations

2.1 The Authority recommends acceptance and early implementation of its “Recommendations on Prescribing Minimum

Channel Spacing, within a License Service Area, in FM Radio Sector in India” dated 19th April,2012.

2.2 The Authority recommends that the period of permission for the existing operators, who migrate from Phase-II to Phase-III, should be fifteen (15) years from the date of migration.

2.3 The Authority recommends that a cutoff date, for the existing FM radio operators, for migration from Phase-II to Phase- III of FM Radio broadcasting should be fixed by MIB after the completion of auction process for Phase-III of FM Radio. Such a cutoff date for migration should not be later than 31st March 2015.

2.4 The Authority recommends that an explicit provision needs to be incorporated in the Notice for Inviting Applications (NIA) to permit an existing Phase-II operator to bid for an additional channel (frequency) in existing cities, where it already has an operational FM channel, subject to the condition that if it is able to win another channel in the existing city, then it would have to migrate all existing channel(s) also to Phase-III on such terms and conditions as may be prescribed by MIB.

2.5 The Authority recommends that the migration fee should be :

(a) Group X cities (17 cities where no frequencies are available for auction, refer Annexure-IV):

Higher of -

Phase-II average bid of the target Group X city multiplied by a factor of 1.5; or

Phase-II highest bid of the target Group X city increased by the average increase in auction prices in Group Z cities (vis-a-vis their reserve prices) in the same category in Phase-III.

(b) Group Y cities (26 cities where 1/3rd or less of the total frequencies are available for auction, refer Annexure-IV):

Higher of-

Phase-II average bid of the target Group Y city multiplied by a factor of 1.5; or

Phase-II highest price of the target Group Y city increased by the average increase in auction prices in Group Z cities (vis- a-vis their reserve prices) in the same category in Phase-III.

...but, the lower of

The above; and

Phase-III auction price obtained in the target Group Y city.

(C) Group Z cities (42 cities where more than 1/3rd of the total frequencies are available for auction, refer Annexure-IV):

The actual auction price obtained in Phase-III.

Categories A+ and A are deemed to be alike and therefore, considered together.

2.6 In all cases, the residual value of Phase-II permission , calculated on a pro rata basis, should be deducted from the migration fee.

2.7 The Authority recommends that the methodology for determining the reserve price for fresh cities in Phase-III should be reconsidered as the current methodology might jeopardise the auction.”

With regard to the cutoff date, following submissions were made on behalf of the petitioner:

The cutoff date of 31.3.2015 is arbitrary and unreasonable. TRAI's recommendation of 31.3.2015 as the cutoff date is based solely on the consideration that the licenses of the phase I migrants ended on that date. It was argued that only 21 out of a total of 242 licenses, those of Phase-I operators, are expiring on this date. TRAI has not given a single reason justifying the necessity for a single cutoff date even though it expressly recorded that most of the stakeholders wanted the cutoff date to be based on the expiration date of their respective licenses. With regard to the submissions, reliance was made on Parameshwaran Match Vs. Supdt. Of C.E² (para 10) and Kallakurichi T.R.O.A. Vs. State³ (paras 32 & 33).

Fixing a single cutoff date of 31-3-2015 for migration of Phase-II FM radio licensees to Phase III results confers favor on licensees who migrated from phase I to phase II with retrospective effect from 1.4.2005 and whose licenses

² (1975) 1 SCC 305

³ (2013) 2 SCC 305

ended on 31.3.2015, and discriminates against phase II licensees who operationalized their licenses after the phase II auction in January 2006 and whose licenses, therefore, end between 2016 and 2019. Relying on a judgment of the Constitution Bench in Ganga Sugar Corpn. Vs. U.P⁴, It was submitted that unequals cannot be treated equally. With regard to the submission on discrimination, reliance was also placed on State of W.B. Vs. Anwar Ali Sarkar⁵ (para 46).

Mr. Krishnan Venugopal, Ld Sr. Advocate appearing for the petitioner submitted that this date is discriminatory and puts the petitioner at a disadvantage vis-a-vis the Phase-I licensees who have had the benefit of the full 10 year period of their licenses and, therefore, to garner revenue and profits. The petitioner has operated the license for a lesser period and is at a disadvantage. He argued that a broadcaster may make losses initially and the break-even and profits may come as late as the eighth or ninth year of operations. Thus the later class would find it very difficult to finance the huge increase in the Non-Refundable One-Time Migration Fee (NOTMF) for phase III. This disparity in treatment has only increased as a result of the respondent's decision to extend the licenses of the phase I migrants beyond the expiration date of 31.3.2015 in violation of clause 4.1 of GOPA for phase II.

⁴(1980) 1SCC 223

⁵ AIR 1952 SC 75

While making the recommendation for this cutoff date, the rationale given by TRAI was if the date of migration is kept after the auction process for Phase-III, the Phase-II operators will be aware of the migration fee; it is important to ensure that the cutoff date of migration should not be after 31.3.2015, as existing 21 permissions will expire on that date. Mr. Venugopal submitted that the rationale of keeping 31.3.2015 as the cutoff date was that the same should not be applied retrospectively and since the same has already passed, the rationale no longer exists.

It was submitted that since the respondent has modified the recommendations of the TRAI which were based on the rationale that the cutoff date should not be applied retrospectively, it was bound to make a fresh reference to the TRAI in accordance with the 5th Proviso to Section 11 of the TRAI Act. The respondent must, therefore, seek recommendations of the TRAI under sub clause (ii) of Section 11(i)(a) of the Act.

The petitioner has also challenged the three year lock-in period before which the largest Indian shareholder may not dilute its equity holding below 51%, as prescribed in clause 9.4 (C) of the Information Memorandum, on the ground that it is irrational and arbitrary and violative of Art. 14. It was submitted that the only rationale offered by the respondent for applying clause 9.4 (C) to the existing licensees who migrate from phase II to phase III is that the intention is to discourage fly -by-night operators. But phase II licensees have already completed a five year lock-in period and can never be characterized as fly-by-night operators as they have demonstrated their commitment by broadcasting for six to ten years. Mr. Venugopal submitted that

as per the clause the same has to start from the date of operationalization of the channels and since the channel of the petitioner is already operationalized on 01.09.2006, the same should not apply to the petitioner.

Mr Rajeev Sharma, Ld. Advocate appearing on behalf of the respondent, however, submitted that no right of the petitioner is taken away as the migration to phase III is completely optional and is more in nature of a concession or benefit to existing permission holders. In terms of the phase II policy, the petitioner had no right to seek a fresh license or an extension but if the petitioner exercises the option to migrate to phase III regime, it is guaranteed a fresh license for 15 years without its having to participate in the auction process.

We agree with this submission. Clause 4 of GOPA regarding term of permission is as under:

”4 Term of Permission

4.1 The permission shall be valid for a period of ten (10) years from the effective date as defined below. **There shall be no extension and the Permission, unless cancelled or revoked earlier, shall automatically lapse and expire at the end of the aforesaid ten years’ period and the Permission Holder shall thereafter have no rights whatsoever to continue to operate the Channel after the date of expiry of the Permission.”**
(Emphasis supplied).

We may note here that the petitioner is free not to migrate to the phase III regime in which case it will enjoy the full term of its agreement. In terms of the GOPA, it cannot claim any extension or a fresh license as a right. The offer

to migrate to the phase III regime carries a number of benefits such as a fresh 15 year license; higher FDI (Foreign Direct Investment) cap; right to hold multiple channels in a city; networking; right to carry news; and right to cover sporting events. The petitioner can get all these benefits just by paying the NOTMF and without having the need to participate in the auction process.

On the question of discrimination, we may note that out of the 242 licenses operational at present, only 21 (phase I licensees) have completed their complete term but the other 221(phase II licensees) are on the same footing as the petitioner. Further only the petitioner has challenged the same. Mr. Sharma submitted that in such matters, the test to be applied is not that of mere inequality. The person alleging discrimination has to prove not inequality but hostile unequal treatment. With regard to his submission, he relied on *The Twyford Tea Co. Ltd. and Anr. Vs. The State of Kerala and Anr*⁶, The Apex Court in that case observed as under:

“16..... The burden is on the person complaining of discrimination. The burden is proving not possible ‘inequality’ but hostile ‘unequal’ treatment.”

Mr. Sharma further submitted that the equality clause is not violated, if due to some fortuitous circumstance arising out of a peculiar situation some persons get an advantage over the others. We agree for more than one reason. Firstly, there is no allegation of any discrimination vis-a-vis the 221 phase II licensees, the group to which the petitioner belongs. The grievance of the petitioner is for only 21 licensees that belong to the group of phase I licensees

⁶ (1970) 1 SCC 189

who earlier migrated to the phase II regime retrospectively with effect from 1.4.2005 and whose licenses have expired on 31.4.2015. Further, if the migration takes from a prospective date, how will the intervening period be regularized for these 21 licensees and if they are asked to migrate from 31.3.2015 while the others are given a choice will it not be discriminatory against them? Besides, there could be administrative difficulties if the date of migration is kept as the date of expiry of the existing licenses. The migration fee will be determined immediately after the auction but the licenses may expire a year or more thereafter. How will a price discovered on one date and paid by some be applicable to the others on a future date? Mr. Venugopal suggested that there could be some interest charged for the period but we have our doubts. As per petitioner itself, there may be auctions later this year and the prices may drop substantially. If that happens who will pay the migration fee as well as interest thereon and where will be the level playing field for those who migrate to the phase III in the intervening period?

Be that as it may, we are conscious of the fact that the scope of judicial review of policy decisions taken by the executive is extremely limited and the mere availability of more than one possible alternatives cannot be a ground for our intervention. We agree with the submission of Mr. Sharma that a policy has to be tested on the touch stone of unreasonableness and can only be struck down if it is found to be so irrational that no reasonable person would have come to that conclusion. We do not find this to be the case.

On the question of three year lock-in period, this too being in the realm of the policy of the respondent, for the same reasons as above we are not

inclined to intervene. We may note that the purpose of the lock-in period during which the majority shareholder may not dilute its equity below a certain prescribed limit is to prevent a trading in the licenses. No doubt, the petitioner, as far as its existing license is concerned, has already covered this period. It is not barred from diluting its equity in the same in accordance with the rules and procedure prescribed in this regard. Phase-

III license is, however, a separate new license. Had the petitioner sold its existing business and participated in the auction for the phase III license, it would definitely be required to follow all the terms and conditions of the same including the lock-in period. Simply because it is given an option to get this license without participating in the auction, how can the petitioner be given relaxations in the terms and conditions on which it is given. We may reiterate here that it is under no obligation to migrate to the phase III regime and if it voluntarily chooses to do so, the residual portion of the onetime fee paid by it for the existing license on a pro rata basis will be adjusted. The phase III license will then be a fresh license for all purposes and we fail to understand how it can claim a relaxation in the lock-in period on the ground that it had already operationalized the channel under the older license. Had it been the case of extension of its existing license or migration to phase III for the residual portion of the existing license, it could have been a different matter but under the circumstances, we do not find any merit in the submission.

With regard to the submission that the respondent has modified the TRAI recommendations and should have referred the matter back to it, we agree with

the submission of Mr. Sharma that the scheme of Section 11 is that the decision of the Government is final and binding. The fifth proviso is only procedural and cannot override the substantive provision in the first proviso. In the case of *Bharti Airtel Ltd. and Ors. Vs. Union of India and Ors.*⁷, one of the submissions was that under the TRAI Act, the authority, constituted under Section 3, is under an obligation to make recommendations either suo moto or on a request of the Central Government regarding the terms and conditions of a license to service provider and efficient management of available spectrum. The Government of India in violation of such statutory stipulation ignored the recommendation made by the authority and put the spectrum to auction. The Apex Court, while examining the scheme of Section 11 of the TRAI Act, had held as under:

“75.....In our opinion, the fifth proviso only stipulates the procedure to be followed by both the bodies- TRAI and the Government of India- in the decision making process but it does not whittle down the vigour of the first proviso which in no certain terms declares that the Government of India is not bound by the opinion of the TRAI insofar as the recommendations made by TRAI with respect to matters falling Under Section 11(1)(a).”

We may note that the respondent has kept the cutoff date as 31.3.2015 and, therefore, followed the TRAI recommendation to that extent. Since the auction was not held prior to that date, there is a modification that this date is applied retrospectively but so far as the decision to migrate to phase III is

⁷ MANU/SC/0613/2015

concerned, it was stated that the petitioner can take the same after the auction process and when the migration fee is known to it.

In view of the foregoing, we see no merit in the petition and the same is dismissed with no order as to costs.

(Aftab Alam)
Chairperson

(Kuldip Singh)
Member