

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

Dated 29th March, 2016

Telecommunication Petition No.271 of 2013

(MA No.174 of 2013 and MAs Nos.234 & 242 of 2014)

Cellular Operators Association of India & Ors.Petitioners

Versus

Union of IndiaRespondent

BEFORE:

HON'BLE MR. JUSTICE AFTAB ALAM, CHAIRPERSON

HON'BLE DR. KULDIP SINGH, MEMBER

For Petitioners : Dr. A.M. Singhvi, Sr. Advocate
Mr. Ramji Srinivasan, Sr. Advocate
Mr. Navin Chawla, Advocate

For Respondent : Mr. Abhay Prakash Sahay, Advocate

ORDER

By Aftab Alam, Chairperson – This Petition is filed on behalf of two associations, [Cellular Operators Association of India (Petitioner No.1) and Association of Unified Service Providers of India (Petitioner No.2)] that jointly represent all the major telecom operators in the country; besides the two

associations, two companies of the Bharti group are petitioners 2 and 3, eight companies of the Vodafone group are petitioners 3 to 11, two companies of the Reliance group are petitioners 15 and 16, two companies of the Tata group are petitioners 17 and 18, and three other telecom companies are petitioners 12, 13 and 14. Veritably thus, all the private operators in the telecom sector have come together to question and assail the action of the Department of Telecommunication (DoT) in imposing penalty for non-submission of EMF radiation self-certificate for the “new” Basic Transceiver Stations (BTS) sites by the due date. The penalty is at the rate of rupees five lakh for each BTS but as the number of stations held liable for imposition of penalty is very large, the total amount of penalty against each of the operators runs into huge figures. Needless though to say, that before the Tribunal the legality and validity of the charge would be judged strictly in accordance with law, regardless of the amounts of penalty-especially in a matter as important as compliance with the radiation norms.

In order to examine the matter properly, it is necessary to take note of the following facts that are beyond any controversy. On 4 November 2008 the Government of India (the Licensor) amended the UAS licence making it compulsory that the Base Transceiver Station (BTS) Emissions for public exposure should conform to the limits/levels as prescribed by the International Commission

on Non-Ionising Radiation Protection (ICNIRP) and further mandated that the compliance with the ICNIRP standards would be in the form of self-certificate submitted by the licensee. The amendment was brought about by incorporating into the UAS licence, clause 43.6A, which is as under.

“43.6A. Licensee shall conduct audit and provide self certificates annually as per procedure prescribed by Telecommunication Engineering Centre (TEC)/or any other agency authorized by Licensor from time to time for confirming to limits/levels for antennae (Base Station Emissions) for general public exposure as prescribed by International Commission on Non-Ionizing Radiation Protection (ICNIRP) from time to time. The present limits/levels are reproduced as detailed below:

Frequency Range	E-Field Strength [Volt/Meter (V/m)]	H-Field Strength ([Amp/Meter (A/m)]	Power Density [Watt/Sq. Meter (W/Sq.m)]
400 MHz to 2000 MHz	$1.375f^{1/2}$	$0.00037f^{1/2}$	$f/200$
2GHz to 300 GHz	61	0.16	10

(f = frequency in MHz)

Note: The compliance in the form of Self Certificate shall commence six months after the date of issue of prescribed test procedure by TEC or any other agency authorized by Licensor.”

In furtherance of the amendment in the licence, the Telecom Engineering Centre (TEC) issued the test procedure that was intimated to the licensees by letter dated 9 November 2009. A few months later, on 8 April 2010 the DoT issued a circular of which the relevant portions are extracted below.

“2. TEC has since issued the test procedure No.TEC/TP/EMF/001/01.SEP-2009 which has been intimated to the Licensees vide letter dated 09.11.2009.

3. In view of the above, following instructions are issued for meeting the ICNIRP guidelines:

(i) All existing BTSs should be ICNIRP guidelines compliant by 08.05.2010 as the TEC test procedure has been circulated on 09.11.2009. Therefore, all BTSs should be self certified as meeting the radiation norm. Self certification should be submitted to respective Telecom Enforcement Resource & Monitoring (TERM) Cells of DOT by 15.05.2010.

(ii) All new BTS sites should start radiating only after self certificate has been submitted to relevant TERM Cells.

(iii)

(iv)

(v)

(vi) If a site fails to meet the EMR criterion a penalty of Rs.5 lakh shall be levied per BTS per service provider. Service providers must meet the criterion within one month of the report of TERM cell in such cases after which the site will be shut down.”

The circular makes a distinction between “existing” BTSs (paragraph 3.i) and “new” BTSs (paragraph 3.ii) and directs that the existing sites should be ICNIRP compliant by 8 May 2010 and the new sites should start radiating only after self-certificate has been submitted in respect to those sites. *The circular does not clarify what is meant by “new” site.* But as we shall presently, by a later circular 8 May 2010, the date by which the “existing” BTSs were required to be ICNIRP guidelines compliant, was fixed as the date dividing the “existing” sites and the “new” sites. The next thing that needs to be noted is that the circular

prescribed the penalty of rupees five lakh for a site that failed to meet the EMR criterion; *no penalty was spelled out for non-submission of the self-certificate.*

It appears the DoT felt that the dead line of 8 May 2009 was unrealistic. This may be, one may surmise, on account of the very large number of BTSs that were already in existence¹ and/or due to some unresolved technical issues in the test procedure. But the fact is that the DoT vide its circular dated 8 June 2010 extended “the time line for self-certifying the BTSs by 6 months” and directed that “the self-certification should be submitted to respective TERM Cells by 15.11.2010”.

At this stage the two sides were evidently in regular discussion over the issue of implementation and enforcement of the radiation standards and it was in this background that the DoT issued the circular dated 13 August 2010 in which after making a reference to a meeting held on 10 August, it was reiterated that 15 November 2010 remained the deadline for submission of self-certificate in respect of the existing sites. It was also stated in the circular that “technical clarification, if any, shall be provided by TEC”, clearly implying that there were technical issues that still needed to be sorted out. In this circular it was also stated that *non-submission of self-certificate for any site would be at par with the site being non-*

¹Around 5 lakh on 8 May 2010, according to the DoT.

compliant with the radiation norms and would attract the penalty as prescribed for sites in breach of the norms. The circular is as under:

“Kindly refer to the meeting taken by Hon’ble MOS (C&IT) on 10.08.2010 on the above mentioned subject.

In this regard, as discussed in the meeting, it is reiterated that the self certification for existing BTSs shall be completed and the self certificates shall be submitted to the respective TERM Cells by 15.11.2010 as already instructed vide this office letters of even no. dated 8th April 2010 and 8th June 2010. Technical clarification, if any, shall be provided by TEC.

Any BTS site for which self certificate is not submitted by above mentioned date shall be treated as non-compliant to the radiation norms and penalty as prescribed shall be imposed.”

Further meetings appear to have taken place between the two sides following which the DoT issued another circular on 27 August 2010. In this circular certain relaxations were made in regard to the contents of the self-certificate and, *more importantly, 8 May 2010 was fixed as the dividing line between the “existing” sites and the “new” sites.* The relevant portions of the circular are as under.

“This is with reference to the meeting held in TEC on 17.08.2010 to discuss the issues raised by the Service Providers with regard to supplement document circulated vide this office letter dated 04.08.2010. Vide above letter, the comments to the associations viz. COAI and AUSPI and BSNL & MTNL were sought. Comments from COAI and BSNL were received. The issues were deliberated in the meeting of 17.08.2010 and following was clarified:

2. With reference to points raised by AUSPI at para 4, it was clarified that all the BTS installed before 8th May 2010 needs to be self certified and certificate submitted by 15.11.2010. BTS installed after 8th may 2010, must be self certified

before it starts radiating as per instructions dated 8th April 2010. Regarding comments of AUSPI on supplement document, following were clarified:

(i) Electromagnetic mapping by software simulation is not mandatory for certification.

(ii) Either of the approach, self certification or electromagnetic mapping by software may be adopted.

(iii) There was a typographical error regarding broadband measurement test where the 1% of the reference level is mentioned. It shall be corrected as 10% in place of 1% by TEC.

(iv) TEC shall specify the minimum size for the sign boards. Also with regard to the suggestions on signage, the necessary modification shall be issued by TEC in order to convey adequate warning. The supplement document shall be issued by TEC after incorporating above changes.

3.

4. In view of time constraint pointed out by all Service Providers in Self Certifying the BTS sites, for the first time of self certification for existing sites (before 8th May 2010) for which the self certificates are to be submitted by 15.11.2010, the requirement of photograph and layout for individual sites has been made optional. However, for the shared sites all the documents as prescribed by TEC in the test procedure shall be submitted. Also, for subsequent annual certifications, the certificates for which shall be submitted by 15th of November every year, all the requirement of photograph and site layout etc. shall be required to be fulfilled for all the sites.”

The circular dated 27 August 2010, apart from fixing the date that drew the line between “existing” sites and “new” sites clearly shows two things; one, the technical issues concerning self-certification were still not free from doubt and clarifications continued to be issued and two, having regard to the very large number of BTS sites, there was a serious constraint of time in meeting the deadline

and therefore, the requirement of photograph and lay out for individual sites was made optional.

On 3 September 2010 the DoT issued another circular in which after making a reference to the earlier circular dated 27.08.2012 it was stated that on 27.08. 2010 TEC had issued the Supplement on Test Procedure for Measurement of Electromagnetic Fields from Base Station Antenna which could be obtained from TEC.

On 2 November 2010 the DoT issued another circular addressed to all DDGs (TERM) Cells. Paragraphs 3, 4, 5, 12 and 14 of the circular, that are relevant for the present are as under:

“3. TEC has issued the test procedure on the subject vide GR no. TEC/TP/EMF/001.01 SEP2009 and supplement procedure vide Addendum (TEC Doc. No. TEC/TP/EMF/001/01.SEP-2009) Issue 2: Aug 2010. The same are to be followed for self certification and measurement of EMF Radiation from BTS. Format for submitting the Self Certification is also provided in the above referred GR of TEC.

4. Self Certification by TSPs for meeting the ICNIRP limits as specified in TEC GR and DOT letter dated 08.04.2010, may be based on any of the methods specified in TEC Addendum (Issue 2) as referred in para 3. However, TERM cells evaluation will be based on measurements only. It is also to mention that for this purpose 10% of ICNIRP general public reference level is to be taken for E field limit. (Refer sub clause (d) of clause 2.0 of TEC Addendum Issue 2).

5. A site may be compliant or non-compliant on the basis of above evaluation. A compliant site may become non compliant at a later date due to change in the surroundings like a building coming up in the range of measurement

from the BTS or addition of new sites in the area or any other reasons including engineering changes by Service Providers and if the such cases comes to the notice of TERM Cell by public complaint or otherwise, the same may also be tested.

12. TSPs who have not submitted the self certified test results to TERM Cells yet may submit it immediately and in any case, not later than 15.11.2010. TERM Cells shall start the testing from 16.11.2010.

14. For the sites found non-compliant by TERM Cells, a penalty of Rs.5,00,000/- (five lac only) per BTS shall be imposed on the TSPs as per DoT instructions referred above. Service Provider must meet the criterion within one month of the report of TERM Cell in such cases, failing which site will be shut down.”

On 3 November 2010 the DoT issued another circular in response to certain representations made by the service providers. The circular clarified that among the different methods prescribed under the Supplement of Test procedure issued by TEC, the service provider could choose the method most suitable to it as per the site requirement. It was further stated that the photograph of the site clearly provided the status of the neighbouring buildings to the site and, therefore (in reversal of the concession made in the circular dated 27 August 2010), the site photograph could not be dispensed with. This circular further reiterated that self-certification for all sites must be submitted by 15 November 2010 and further that any site for which self-certificate was not submitted would be treated as non-compliant with the EMF radiation norms and the prescribed penalty would be imposed.

It appears that the service providers were unable to meet the deadline of 15 November 2010 and on 31 March 2011 the DoT issued another circular in which it was stated that self-certificates submitted till the date of issuance of the circular would be considered as submitted in time. It was, however, stated that no further extension of the time for submission of self-certification would be allowed.

On 21 December 2011 the DoT issued another circular stating that self-certificate for any site would be submitted every two years instead of every year as directed earlier.

On 11 January 2012 another circular was issued on the subject of Imposition of Penalty in case of non-compliance of instructions on EMF radiation norms. By this circular the power of imposition of penalty was decentralized and the power of imposition and collection of penalty was delegated to the TERM cells.

On 11 October 2012 the DoT issued the circular finally laying down the Scheme of Penalty in case of violation of terms and conditions of Licence and related instructions of Licence on the matter of EMF Radiation. The relevant provisions of the circular are as under:

“2.1 **BTS non-compliant to EMF Radiation norms:**

2.1.1 If a BTS is found non-compliant to EMF radiation norms, a penalty of Rs.5 Lakh per BTS shall be imposed on the Licensee.

2.1.2 In case, a shared BTS site is found non-compliant to EMF radiation norms, a penalty of Rs.5 Lakh per BTS shall be imposed separately on each and every participating Licensee.

2.1.3 If, the BTS/shared BTS site is not made compliant to the EMF radiation norms within one month (30 days) the same shall be shut down in addition to the levy of financial penalty as mentioned above. In case of shared sites, BTS of each and every participating Licensee will need to be shut down.

2.2 Non-submission of Self Certificate in time:

2.2.1 In case, a Self Certificate, as prescribed in Licence Agreement or through instruction issued from time to time, is not submitted by the Licensee to the respective TERM Cell within due date, a penalty of Rs.5 Lakh per BTS shall be imposed on the licensee. In case of shared BTS site, self certificate is to be submitted by each and every participating licensee separately.

2.2.2 In addition to imposition of above penalty, the BTS shall be shut down on expiry of one month (30 days) from due date of self certification if the self certificate is not submitted even within this period.

2.3 Non-submission of Self Certificate in time (old cases):

2.3.1 In all such cases for which the time for submitting self certificate has expired on 31.03.2011 and self-certificate was not submitted within due time, a penalty of Rs.5 Lakh per BTS per service provider (Licensee) shall be imposed.

2.3.2 In case of new BTS (s) installed after 8th May 2010, for which the self certificate was not submitted prior to starting the radiation, a penalty of Rs.5 Lakh per BTS per service provider (Licensee) shall be imposed.”

This petition, which as noted in the opening lines of the judgement is filed collectively by the all the service providers seek to challenge the certain provisions of this circular and the penalties imposed and demanded in terms of those provisions. The two main reliefs claimed in the petition are as under:

“(a) Set aside and quash Clauses 2.2.1, 2.2.2, 2.3.1 and 2.3.2 of the impugned Circular/letter bearing File No.800-15/2010-VAS dated 11.10.2012 issued by the Respondent;

(b) Declare that the Respondent cannot levy any penalty on the Petitioners on basis of Circulars dated 13.08.2010, 27.08.2010, and /or 03.11.2010 or any other circular on ground of delay in submission of the Self Certificates for the BTS sites installed prior to 11.10.2012.”

We have heard Dr. Singhvi, Mr. Ramji Srinivasan, Senior advocate and Mr. Navin Chawla, counsel appearing for the petitioners and Mr. Abhay Prakash Sahay, counsel appearing on behalf of the respondent. On hearing counsel for the parties and going through the respective pleadings and the written notes of submissions submitted on behalf of the two sides, the two questions that primarily arise for consideration may be stated thus:

1. Whether in the facts and circumstances of the case, the scheme of penalty framed under the circular dated 11 October 2012 that provides for penalty for non-submission of self-certificate for a BTS at the same rate as for a BTS non-compliant with ICNIRP guidelines, regardless of any other consideration can be said to reasonable, fair and just?
2. Whether the extension of time till 31 March 2011 for submission of self-certificates in regard to the radiation norms would equally apply in case of BTSs that were commissioned after 8 May 2010 and those sites too would not be liable to any penalty if self-certificates regarding those sites were filed by 31 March 2011 or sites that began radiating after that date (being “new” sites) could do so only *after* a self-certificate was submitted

as directed in the circular dated 8 April 2010, notwithstanding the extension of time for the “existing” sites?

From the facts as noted above it is clear that from the beginning, with the issuance of the circular dated 8 April 2010 with the view to ensure that all BTSs followed the radiation norms, things were in a flux. The condition that non-submission of self-certificate in regard to a BTS would be treated at par with the BTS being non-compliant with the radiation norms and would attract the same penalty was spelled out in the third circular in the series issued on 13 August 2010, when the first date fixed for submission of self-certificate (1 May 2010) under the first circular was already over. The date, that cut off the “new” sites from the “existing” sites was fixed retrospectively by the fourth circular in the series issued on 27 August 2010. Most importantly, though the test procedure for measurement of electromagnetic fields from BTS antenna is said to have been finalised on 3 September 2010, from the circulars issued by the DoT it is evident that issues relating to the test procedure continued to be the subject of discussion between the service providers and the DoT until the supplement was issued by TEC as late as on 27 August 2010.

On behalf of the DoT, it is submitted that the test procedure was issued on 9 November 2009 and the supplement issued on 27 August 2010 merely contained

some clarifications. It had no material bearing on the process of self-certification by the service providers and it cannot be made a ground for delay in submission of self-certificates. It is contended that the mere fact that TEC issued a supplement on test procedure does not imply that the previous procedure lacked clarity or was in any manner incapable of compliance or unworkable. It was just an addendum and not an alteration. It is also stated that Vodafone had submitted self-certificate on 16 July 2010 in accordance with the earlier test procedure.

Having regard to the stand taken by the DoT, it would be useful to take a brief look at the test procedure issued by TEC on 9 November 2009 and the supplement to it issued on 27 August 2010.

The Test Procedure for Measurement of Electromagnetic Fields from Base Station Antenna No. TEC/TP/EMF/001/01.SEP 2009 issued by the TEC on 9 November 2009 is a document running into 39 pages. It describes the test procedure for measurement of EMF for GSM, CDMA, W-CDMA, 3G AND WI-MAX etc. environments. The test procedure is premised on compliance with ITU-T Recommendations K.52 titled “Guidance on complying with limits for human exposure to electromagnetic fields” and K.61 (2003), “Guidance to measurement and numerical prediction of electromagnetic fields for compliance with human exposure limits for telecommunication installations”. The document gives the

values of EMF exposure limits laid down by ICNIRP, which the service providers are required to comply with.

The document discusses the EMF exposure zones namely the Compliance zone, Occupational zone and Exceedance zone and gives the *theory* for exposure level assessment. It provides the classification of installations as ‘Inherently compliant’, ‘Normally compliant’ and ‘Provisionally compliant’. Paragraph 7 of the document provides the *theoretical framework* for the procedure for determining the installation class and paragraph 8 highlights two techniques for evaluation of EMF as ‘Calculation Method’ and ‘Field Measurement Approach’. Para 9 gives the detailed *theory* for the calculation methods. Para 10 gives the details for another method, namely, Field Measurement Approach. It gives the details of the test instruments required, calibration of instruments, check points for measurement, functional test for measuring instruments and measurement results. The document also highlights the safety signs as ‘warning sign’ for a zone where the power density exceeds the limits prescribed for general public but is less than the limits for workers and a ‘Danger sign’ for a denied access zone where the field power density is even more than the maximum limit for RF workers/occupancy exposure. A format for a summary report is also provided.

The addendum to the test procedure was issued by TEC on 27 August 2010 under the caption ‘Supplement on Test Procedure for Measurement of Electromagnetic Fields from Base Station Antenna’. Though called a “Supplement”, the addendum is a detailed document running into 20 pages with four annexures giving the formats for verification of a BTS for compliance with EMF exposure levels. These formats are for methods based on a) Calculation of EIRP/EIRP_{th}, b) Software Simulation, c) Broadband Measurement, and d) Frequency Selective Measurement.

The addendum acknowledges that a number of representations seeking clarification were received from associations of Service Providers and it is intended to address the issues on which clarifications were sought and to provide assistance to the TERM cells for audit verification of EMF compliance.

The Supplement explains the methodology, calculations, measurements and report formats for verification as to whether or not a BTS is compliant with the radiation norms. It specifies four methods from which following the most suitable one for a particular site, the operators are required to self-certify that their BTSs are EMF compliant after estimation of Electro Magnetic Radiation in a 20 meter radius based. The methods are as under:

- (a) Calculation of EIRP/EIRP_{th}
- (b) Electromagnetic Mapping by Software Simulation

- (c) Broadband Measurements
- (d) Frequency Selective Measurements

The addendum also highlights the responsibility of the service providers at shared sites.

Para 3 of the addendum gives details of compliance by calculation of EIRP/EIRP_{th}. More complex scattering environments as envisaged in a shared BTS site having multiple antennas mounted on a single tower or roof top, would require detailed Electromagnetic mapping using appropriate software based on ray tracing method. Section 5 of the addendum gives details of compliance by measurements. The measurements are indicated in cases where EIRP calculations and electromagnetic mapping by software simulation show power density exceeding 30% of ICNIRP levels prescribed for general public. The document provides the specifics for compliance by measurements and the conditions when the broadband measurements are to be followed by frequency selective measurements.

The addendum deals with many likely settings and situations in which the compliance verification of EMF radiation of BTSs may actually have to be conducted and gives details of appropriate procedures to be followed in each case. *Though the name addendum suggests that it provides some minor additions to the original document, the fact is that while the original document set out the*

theoretical and dealt with radiation patterns etc., the addendum addresses many practical situations that may arise in the field and indicates the most appropriate method for different situations. It also provides for the formats for certification of BTS for compliance based on different methods in much more details than the first document.

On a careful perusal of the “test procedure” and the “supplement”, we are unhesitatingly of the view that the supplement had a material bearing on the massive exercise of self-certification of the BTSs and until it elucidated the process from the practical point of view, the service providers were handicapped in submission of the self-certificate of compliance. That Vodafone, which is one of the largest operators was able to submit the self-certificates by 16 July 2010 does not mean that the test procedure issued by TEC on 9 November 2009 was complete and self-contained and the supplement was superfluous. In our view, therefore, the supplement cannot be discounted in fixing any reasonable time-frame within which the service providers should be required to submit the self-certificate of compliance in regard to their BTSs.

Taking thus an overall view, it would appear that the DoT started the process to ensure compliance with the EMF radiation norms for all BTSs without first laying down a firm plan. It is seen above that major decisions that would impact

the service providers adversely were taken as the process unfolded and this eventually led to the situation where almost the entire industry is faced with huge penalties. In our view, the scheme of penalty should have formed part of the circular dated 8 April 2010 that commenced the process to ensure that BTSs complied with the radiation norms. But as seen above the scheme of penalty came at the very end, i.e., on 11 October 2012, more than 18 months after the submission of self-certificates was accepted on 31 March 2011. It is like first asking the game to start and then to lay down the rules as the game proceeds and even after it has long concluded.

For this reason alone, the scheme of penalty framed under the circular dated 11 October 2012 cannot be said to be reasonable, just and fair. Consequently, no penalty imposed in terms of the scheme can be sustained.

Moreover, the strongest argument against the soundness and legitimacy of the impugned scheme of penalty ironically comes from the DoT itself. It is an admitted position that at the time the present petition was filed before the Tribunal, the DoT constituted a committee to comprehensively review the issues like the late submission/non-submission of self-certificates relating to “existing” sites and “new” sites and up-gradation of existing sites etc. The committee submitted its

report on 29 August 2013. Following the report, the DoT has issued yet another circular on 20 November 2013 laying down a fresh scheme of penalty. The latter scheme framed during the pendency of this petition before the Tribunal has a much reduced and graded penalty for delayed submission of self-certificate in respect of any site in the following manner:

“3.6 In case of delayed submission of self-certificates from due date, penalty as under shall be imposed:

Delay from due date	Total Penalty per BTS per incidence
Up to 15 days	Rs.5,000/-
Beyond 15 days and upto 30 days	Rs.20,000/-
Beyond 30 days and upto 60 days	Rs.50,000/-

In addition to imposition of penalty as above, the BTS shall be shut down on expiry of 60 days from due date of self-certification, if the self-certification is not submitted even within this period.

Significantly, this scheme recognises and maintains the distinction between delayed submission of self-certificate of compliance for a BTS and a BTS being actually non-compliant with the radiation norms. In case of a BTS found actually non-compliant with the EMF radiation norms, the amount of penalty is very correctly enhanced to Rs.10 lakh per BTS.

The scheme of penalty laid down under the circular dated 20 November 2013, naturally supersedes the impugned scheme of penalty under the circular dated 11 October 2012 but expressly states that the scheme would operate prospectively from the date of the issuance of the circular.

An executive instruction or directive imposing penalty or creating any liability of any kind or taking away any rights can indeed operate only prospectively. But a scheme of penalty that rationalizes and simplifies the scheme of penalties and makes it less burdensome for the service providers should have been logically made applicable to pending cases as well. At this stage, however, without going into the question whether or not the latter scheme of penalty can be more appropriately applied to the present case, one thing is clear and it is that when a committee appointed for the purpose took into consideration all the relevant facts and circumstances, it considered it reasonable not only to make a distinction between delayed submission of self-certificate for a site and a site being actually non-compliant with the radiation norms but also considered it reasonable and proper to have a graded rate of penalty for delayed submission ranging from Rs.5,000/- to Rs.50,000/- in place of the flat rate of Rs.5 lakhs per BTS being equal to penalty for a BTS being actually non-compliant with the radiation norms.

Coupled with the above is the question of the dividing line between the “existing” site and the “new” site. On going through the circular dated 8 April 2010, where the distinction is first made (though without defining the criteria for the “new” site), it can be reasonably assumed that sites commissioned after the issuance of the circular or may be after the issuance of the test procedure by TEC

on 9 November 2009 would be the new sites. But as it happened, the DoT fixed 8 May 2009 (the date falling six months after the test procedure issued by TEC within which compliance in form of self-certification was to be completed) as the date dividing the existing and the new sites. On behalf of the DoT, it is contended that that is a valid classification between the two sets of BTSs; one existing prior to 8 May 2010 and the other, set up after 8 May 2010. These are two distinct classes in themselves and there is a valid rationale and nexus in fixing 8 May 2010 as the cut-off date, which is six months after the date (9 November 2009) when the DoT intimated the operators about the Test Procedure prescribed by TEC and in terms of amendment to the Licence Agreement (Clause 43.6A) the compliance in the form of self-certificate would commence six months after the date of issue of prescribed test procedure by TEC or any other agency authorized by the Licensor. Fixing a cut off date for determining the existing BTSs to be ICNIRP guidelines compliant and saying that new BTS installed after the cut-off date should start radiating only after submitting the self-certificate is in the discretion of the DoT and the matter does not warrant any judicial interference.

There can be no quarrel with the legal proposition. But the course of events clearly show that even the dividing line fixed by the circular dated 27 August 2010 was not firmly adhered to but it appears quite blurred and flexible. Circular dated

13 August 2010 stated that self-certification for existing BTSs must be submitted by 15 November 2010 without making any clarification whether “existing” meant BTSs existing as on 8 May 2010 or on 13 August 2010. Though circular dated 27 August 2010 again brought back the distinction between BTSs installed before 8 May 2010 and after that date, it is to be noted that till that date, more than 3 months had already passed and TEC has already issued a draft supplementary procedure which was under discussion. The circular dated 31 March 2011 categorically states that “Self-Certificate submitted by 31 March 2011 shall be considered as Certificates submitted in time”. Therefore, this circular by which the final extension of date was granted once again did not make any distinction between a BTS existing as on 8 May 2010 or installed thereafter but makes a blanket direction that all self-certificates submitted by 31 March 2011 were to be treated as compliant.

In the above circumstances, we find it very difficult to follow why BTSs in respect of which self-certifications were submitted by 31 March 2011 should be held liable to the full penalty of Rs.5 lakhs per BTS even though those might have been commissioned after 8 May 2010.

Thus both the two questions framed above are answered in favour of the service providers and against the DoT holding that (i) the scheme of penalty under

the circular dated 11 October 2012 is unreasonable, unjust and unfair and no penalty in terms of the scheme can be sustained and (ii) that no BTSs in respect of which self-certificates were submitted by 31 March 2011 can be held liable for penalty for non-submission/delayed submission of self-certificates.

The impugned penalty demands are accordingly set aside.

The DoT is directed to frame a fresh scheme in light of the recommendations of the committee constituted by it on 26 July 2013 and the observations made in this judgement and to consider the case afresh in light of the new scheme as directed.

The petition stands allowed to the extent as indicated above. There will be, however, no order as to costs.

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(Aftab Alam)
Chairperson

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(Kuldip Singh)
Member

The present petition was filed on 26 August 2013. A significant development took place after the filing of this petition in that the DoT issued yet another circular on 20.11.2013 by which the scheme of penalty for violation of EMF Radiation norms was much refined and rationalized. We shall advert to this circular and take a look at it in greater detail in due course.

Note on “Test Procedure for Measurement of Electromagnetic Fields from Base Station Antenna”

A letter dated November 9, 2009, was addressed by the DoT to all CMTS/UAS operators. In this letter, a reference was invited to the amendment in the license agreement regarding limits/levels for antenna (Base Station Emission) for general public exposure. It was informed that Telecom Engineering Center (TEC) had developed a test procedure for measurement of electromagnetic fields from BTS antenna. The operators were asked to submit periodical compliance in the form of self-certification regularly.

However, since the test procedure was issued on 9 November 2009, it is reasonable to assume that sites being set up after that date would be considered as the “new” sites and those Sites must start radiating only after submission of self-certificate.