

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

Dated 15th November, 2018

Telecommunication Petition No. 133 of 2015

Cellular Operators Assn. of India & Ors. ... Petitioners

Vs.

Union of India ... Respondent

BEFORE:

HON'BLE MR. JUSTICE SHIVA KIRTI SINGH, CHAIRPERSON

HON'BLE MR. A.K. BHARGAVA, MEMBER

For Petitioners (No.1-5 and 10) : Mr.Meet Malhotra, Sr.Advocate
Mr.Manjul Bajpai, Advocate
Dr.Shashwat Bajpai, Advocate
Mr.Ravi S.S.Chauhan, Advocate
Mr.Jagjeet Singh Sahani, Advocate
Ms.Palak Verma, Advocate
Ms.Pallak Singh, Advocate
Mr.Sharad Agarwal, Advocate
Ms.Anirudh Gupta, Advocate

For Petitioner (No. 6 and 7) : Mr.Mansoor Ali Shoket, Advocate
Mr.Nitin Kala, Advocate

Mr.Jibran Tak, Advocate

For Respondent : Mr. Abhay Prakash Sahay, Advocate
Mr. Indra Bhusan Prasad, Advocate

JUDGMENT

A.K. Bhargava, Member: Cellular Operators Association of India (COAI) and a number of Telecom service Providers (TSPs) have filed this petition on 18-3-2015, challenging the manner in which penalties are imposed by the respondent (Department of Telecom) in case of non-compliance of radiation norms on EMF exposure by Base Transceiver Stations (BTSs). Their specific prayers are as follows

“(a) Set aside and quash:

(i) Clause 2.1.2 and 2.1.3 of circular bearing No. 800-15/2010-VAS dated 11.10.2012

(ii) Clause 11(1) and Clause 11(5) of Test Procedure for Measurement of electromagnetic Fields from Base Station Antenna (for Telecommunication Sector) bearing no. TEC/TP/EMF/001/02.OCT.2012 issued by Telecommunication Engineering Centre And

(iii) Clause 9 and 12 of circular bearing No. 800-15/2010-VAS dated 20.11.2013

(b) Declare that the respondent cannot levy any penalty on the sharing TSPs/BTS that are otherwise compliant with the EMF exposure norms laid down by the respondent by relying upon clauses in circulars dated 8.4.2010, 2.11.2010 and / or 11.10.2012

(c) Restrain the respondent from in any manner imposing penalties or taking any coercive steps for seeking recovery of such penalties on the petitioners which has been levied on the sharing TSPs or on BTS that are otherwise

compliant with EMF exposure norms laid down by the respondent.

(d) Direct that such penalty which has been levied on the sharing TSPs or on BTS that are otherwise compliant with EMF exposure norms laid down by the respondent and have been paid by the operator petitioners be refunded.”

2. It is important to note and understand the relevant part of the circulars mentioned in the aforesaid prayers. In 2008, obligation was cast upon the TSPs to implement some basic guidelines regarding the EMF emissions by BTSs which are as follows:

“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 conforming 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:

<i>Frequency Range</i>	<i>E-FieldStrength Volt/Meter(V/m)</i>	<i>H-FieldStrength (Amp/Meter(A/m)</i>	<i>Power Density(Watt/Sq. Meter (W/Sq.m))</i>
<i>400MHZ to 2000 MHz</i>	<i>1.375f^{1/2}</i>	<i>0.00371^{1/2}</i>	<i>f/200</i>
<i>2 GHz to 300 GHz</i>	<i>61</i>	<i>0.16</i>	<i>10</i>

(f = frequency in MHz)”

The Department in 2011 revised the radiation limits for general public exposure from BTS and reduced limits/levels by 1/10th as prescribed by ICNIRP. Meanwhile, the Telecom Engineering Centre (TEC) of DoT issued test procedure in 2009 and DoT followed up by issuing detailed instructions to TSPs on implementation of radiation norms on EMF exposure by BTSs vide its circular dated 8-4-2010. Clause 3 (vi) of this circular states that *“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.”

Later, DoT further elaborated on scheme of penalty in case of violation of EMF radiation norms vide circular dated 11-10-2012. Clauses 2.1.2 and 2.1.3 of this circular are relevant and are reproduced below

“2.1.3 In case a shared BTS site is found non-compliant to EMI 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.”

This penalty of Rs. 5 lakh was revised to Rs. 10 Lakh vide circular dated 20-11-2013 and reiterated imposition of penalty on each and every BTS in case of a shared site. The relevant clauses in this regard are extracted below

“9. In case of non-compliance of actual EMF radiation norms, a penalty of Rs. 10 Lakhs per BTS per incidence shall be imposed...

11. The instructions issued vide letter dated 8-4-2010 and 11-10-2012 shall stand amended to above extent. These instructions shall be applicable from the date of issue of this memorandum. The above-said penalties will be imposed on per incidence basis. The licensor may take any other action as per terms and conditions of license agreement in addition to imposition of below mentioned financial penalty.

12. Separate penalty will be payable by the service providers for their each and every BTS in a site belonging to different technologies, type of service, license held etc.”

3. There is no dispute regarding imposition of penalty for violation of EMF norms in the case of a site deploying single BTS only. Petitioner’s challenge is

mainly in respect of shared sites. Sharing of passive infrastructure on a BTS site is a common and commendable characteristic of the Indian Telecom industry. There is no restriction on number or technology for BTS deployment at a particular site. Thus, there can be 3 to 4 TSPs deploying 6 to 8 BTSs and such sharing is generally restricted only by demand and logistic constraint of passive infrastructure. All such deployment of BTSs at a particular site must conform to EMF radiation norms. Process of conformance is based on self-certification, self-testing, use of best practices and random testing by DoT as per prescribed test procedure. Scheme of penalties which are both punitive and a deterrent, supports this process which aims to ensure that the EMF exposure to humans remains below the prescribed limit. Mr. Meet Malhotra, learned counsel for the petitioners agrees that the norms for EMF radiation must be met by all TSPs and does not seriously dispute the imposition of penalty in case these norms are violated. His challenge is mainly on the manner in which this penalty is imposed, especially in case of a shared BTS site. In case of non-compliance of EMF norms at a shared site, DoT levies same penalty of Rs. 10 Lakh on each and every BTS even though individually they may be radiating within the prescribed norms. Mr. Malhotra submits that basically it is a 'site' that is declared compliant or non-compliant by the TERM cell of DoT. Therefore, the penalty should be for the 'site' and not for each BTS at the site. DoT's prescription of penalty thus leads to disproportionate and arbitrary penalty being levied, incumbent not upon the incident of default but on the number of TSPs sharing the site. Mr. Malhotra further argues that in this manner, innocent parties are being penalized for no fault of theirs. TSPs have no control over the operation of other TSPs sharing the site. They are also not agent of each other. Therefore, no vicarious liability can be fastened on a TSP if another TSP is found to be non-compliant with the exposure norms. Mr. Malhotra also relies on

the *COAI v. TRAI*, (2016) 7 SCC 703 which dealt with call drop case and held that the penalty payable by TSPs for call drops which are not due to its fault is violative of Article 14 and 19(1)(g).

4. The respondent justifies the imposition of penalty on all participating TSPs of a shared site on the ground of joint and collective responsibility. Mr. A. P. Sahay, learned counsel for the respondent submits that the cumulative value of radiation at any place depends upon the number of BTSs operating in the vicinity, their respective radiated power, heights of various towers, the frequency bands of operation etc. As there are a lot of variables involved in the process, it is not possible to divide the limits further for each operator. In view of this, joint responsibility has been fixed to ensure that they coordinate and install new BTSs or make any changes in the technical parameters of existing BTSs through the process of cooperation among themselves. Mr. Sahay also submits that dividing the penalty amongst TSPs of a sharing site will dilute the provisions and will not be enough of a deterrent.

5. While Mr. Malhotra concedes the argument of joint responsibility in cases where it is not possible to attribute non-compliance to a particular BTS (i.e. all BTSs are individually compliant but collectively the site is non-compliant), he points out that the scheme of penalty should still be tested on the principle of proportionality. The penalties thus must be divided and not applied equally on all. Having made this point, his main grievance is that even in a situation where it is possible to identify the source of non-compliance through Frequency Selective Measurements, penalties are being imposed on compliant BTSs as well in the name of joint responsibility. He submits that where it is possible to identify the culprit by way of tests conducted by TERM cell as per TEC

procedure, the argument of collective responsibility simply does not hold good. Therefore, penalizing each and every participating BTS without any reason amounts to non-application of mind and is arbitrary and unjust in such cases.

6. Mr. Sahay explains that Broadband Measurement gives only the overall picture of radiation but not the actual contributions by each radiation emitting source. In Broadband Measurement technique, if the power exceedance level is 50% beyond the prescribed DoT limits, then Frequency Selective Measurements is performed to check the power levels of each individual operator's BTS by putting the operating frequency of that operator by extrapolating to maximum load on Transmission Channel. Overall compliance is determined by calculating the RMS value of all exposure ratios of each individual BTS. If the RMS value is greater than 1, then that shared site is declared as Non-compliant. It is incorrect to say that by use of Frequency Selective measurement technique, DoT can find those TSPs whose BTSs are making the site non-compliant. Frequency selective measurement is used to find out the ratio of field strength of each operator with respect to the prescribed exposure limits of that frequency band in which that operator is radiating. FSM is an Extrapolation Technique to actually extrapolate the real time readings measured on maximum traffic load condition.

7. Mr. Malhotra denies the assertions made by Mr. Sahay and in his defence gives a live example contained in a show-cause notice dated 6-6-2017 issued by TERM Cell to Vodafone for EMF non-compliance of a site in Karnataka. As per the calculation sheet attached with this notice, Airtel 4G-TDD has exposure ratio of 1.6 (we call it a rogue source to distinguish it from others) while all other antennas have exposure ratio ranging from 0.0016 to 0.6 and overall exposure ratio is 1.85. Here one emitting source on its own is violating overall exposure

limit and if this source is taken out, all other emitting sources individually and collectively meet the prescribed norm. Mr. Malhotra submits that this is a clear case where innocent TSPs are getting punished for the fault of one clearly identifiable rogue source.

8. Mr. Sahay, in response, submits a counter example (though hypothetical) which we find very instructive and therefore reproduce below for illustration:

Example : A shared site has 10 BTSs, on frequency selective measurement, following exposure ratios are found:

A: 1.5, B: 0.6, C: 0.6, D: 0.45, E: 0.4, F:0.35, G: 0.3, H: 0.25, I: 0.2, J: 0.15

RMS for checking overall compliance = 1.916 RMS for checking overall compliance = 1.192 (if we exclude contribution of Operator A)

From the above example, it is seen that even after excluding the contribution of rogue BTS (i.e. BTS 'A'), the site is non-compliant to actual EMF norms. This cleverly crafted example however tells only half the story and in no way justifies uniform application of penalty on all BTSs. In the given example, there may be several ways of apportioning the responsibility, both for punitive as well as deterrent purposes. One option can be to penalize A as first incidence for clear non-compliance and penalize rest of the BTS proportionately for non-compliance as collective responsibility. Alternately, by iterative process if B and C are excluded, the site in example becomes compliant with overall compliance = 0.3162. Thus, BTS B and C can be penalized as second incidence in addition to BTS A. Further to rationalize, penalty may be imposed on a per site basis and such penalties may be apportioned proportionately to the exposure levels in a reasonable manner. If it is felt that this will reduce the level of penalty to the extent that it will not be enough of a deterrent, the penalty per site may be increased reasonably. For example, assuming an average occupancy per site

being 3, the penalty per site for non-compliance may be fixed as 30 Lakhs. With that assumption, rogue BTS-A in this example pays Rs. 30 Lakhs and since site remains non-compliant even after removing A, all the remaining BTSs may be levied Rs. 30 Lakh proportionately as collective responsibility as one option or Rs. 30 Lakh may be divided between B and C as another option. There may be other scenario and other options as well. But refusal to look into such option, in our opinion, amounts to non-application of mind and arbitrary action. The point we are trying to make is that with testing and due diligence, it is possible to rationalize the manner in which penalty is levied and DoT should undertake such exercise in right spirit. By suggesting this, we are in no way advocating dilution of penalty and in fact want the scheme of penalty to be strong and effective since it is a matter linked to public health and safety. In fact, deterrence is diluted for a rogue BTS when presently it is required to pay the same penalty as the other innocent BTSs at that site. Therefore, there can be no excuse to penalize innocent (when proven) arbitrarily in the name of collective responsibility. There can also be no excuse for ignoring the principle of proportionality to the extent that the result appears to be unjust and arbitrary. Thus, while we agree with the principle of collective responsibility where individual responsibility in a shared site is difficult to assign, DoT should rework the scheme to make it more rational and just, especially in cases where identification of the rogue BTS(s) can be done with testing and due diligence.

9. In the facts of the case, we find no reason to interfere with the impugned circulars, except to the extent below

(a) It is directed that in case of a shared site, penalty be imposed on a per 'site' and 'per incidence' basis for non-compliance of EMF radiation norms.

Respondent is at liberty to revise and fix such per site penalty as it deems fit so as to serve the purpose of being a deterrent.

(b) Apportioning of such penalty on participating BTSs may be done in a manner that is rational, just and proportionate, especially in cases where source of non-compliance is identifiable through proper testing and due diligence.

(c) It is directed that such revised scheme of penalty be worked out expeditiously, preferably within twelve weeks. The revised scheme of penalty will be applicable from the date of its publication. Till such time of the publication, interim relief in terms of prayer (c) already granted by our interim order will continue. All the cases covered by our interim order will also be finally governed by the revised scheme.

The telecom petition 133 of 2015 is allowed in part and disposed of in above terms. No costs to either side.

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(S. K. Singh, J)
Chairperson

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(A.K. Bhargava)
Member