

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

Dated 30th October, 2018

Telecommunication Petition No. 500 of 2014

Cellular Operators Association 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 COAI : Mr. Meet Malhotra, Sr. Advocate
Mr. Manjul Bajpai, Advocate
Mr. Jagjeet Singh Sahani, Advocate
Mr. Palak Verma, Advocate
Mr. Ravi S.S.Chauhan, Advocate
Ms. Pallak Singh, Advocate

For Petitioner Nos.19 & 20 : Mr. Akshay Bajpai, Advocate
Mr. Madhur Mahajan, Advocate
Mr. Prateek Gupta, Advocate

For Petitioner Nos.21 & 22 : Mr. Mansoor Ali Shoket, Advocate
Mr. Nitin Kala, Advocate

For Respondent : Mr. Abhay Prakash Sahay, Advocate

ORDER

By S.K. Singh Chairperson – On hearing the parties in detail on various dates, we find that the issues are simple but interesting. Petitioner No.1 is a registered Society which rightfully boasts that most of the Cellular Licensees/Unified Access Service Licensees in India are its members. The other petitioners are some of its members.

2. Without wasting time, it is useful to reproduce the contents of paragraph 1 of the petition which explains the nature of challenge posed by the petitioners to the alleged arbitrary levy of “fee” for testing the Electromagnetic Fields (Radiation) exposure at Base Transceiver Station (BTS) sites, by the TERM Cell:

“A. To charge for testing the Electromagnetic Fields (EMF) exposure from the Base Transceiver Station (BTS) installed by the Petitioners-Operators beyond 10% of the total BTS sites of a TSP as the same would impose a financial burden on such TSP without any authority of law.

B. Demand such fee on basis of Notional/Backlog testing. Such demand has been raised retrospectively for a period commencing from November, 2010 though it was raised for the first time only in January, 2014. These demands are illegal as they are based on tests carried out on shared/co-located sites, in the past, where the sharing operators were neither informed, nor made aware, nor were test certificates issued to them when such tests were conducted. It is also

admitted by the TERM Cell that Test Certificate for these sites were never issued to the concerned TSP at the time when these sites were tested.

C. Levy exorbitant charges stated to be cost of test for audit by conducting a single test but charging the fee from multiple TSPs. It is most respectfully submitted that the levy of such fee has been converted into a mandatory extraction of money from the petitioners far in excess of what is permissible under the Circular issued by the Respondent itself leading to undue enrichment.”

3. In the light of challenge noted above and the relevant facts, the petitioners seek the following reliefs:

- “a) In the facts and circumstances of the case, it is therefore, most respectfully prayed that this Hon’ble Tribunal may be pleased to: Declare that the Respondent is not entitled to demand a sum of Rs.10,000/- as cost of test for audit of EMF exposure at a site;
- b) In the alternative, declare that the Respondent is not entitled to demand;
 - i) A fee of Rs.10,000/- from each sharing Telecom Service Provider on testing of a shared site;
 - ii) A fee of Rs.10,000/- for each of the BTS installed by a Telecom Service Provider at a site for catering to different technologies like 2G, 3G etc.;
 - iii) A fee of Rs.10,000/- per site for more than 10% of the total BTS sites of the service provider, whether individual or shared, annually from a Telecom Service Provider;

- iv) A fee of Rs.10,000/- per site on basis of notional testing and /or on a retrospective basis.
- c) Pass an ad-interim ex-parte order staying all demands of Rs.10,000/- for each BTS per Service Provider raised by the Respondent as cost of test for audit of EMF exposure from BTS;
- d) Pass such further and other order(s) as this Hon'ble Court may deem fit and proper in the facts and circumstances of the case.”

4. There is no dispute that the Department of Telecommunications (DoT) of Union of India (respondent) is within its rights and justified in having a scheme for testing of EMF exposure at BTS sites through a technical expert body of its own, the TERM Cell, and a fee for such testing is also justified but the dispute has arisen on account of later developments which, according to petitioners, have exposed the Telecom Service Providers (TSPs) to unjustified high amounts of fees. Hence, now almost all aspects of the testing fee are under challenge.

5. It has been vehemently argued and submitted by Mr.Meet Malhotra, Sr. Advocate, for and on behalf of petitioners that:

- (i) Rs.10,000/- is not justified by the concept of “fee” which is being claimed as the cost involved in conducting the required test. It has been shown that on public complaint, the same test is (since October 2012) being done by a Government Company – TCIL only for Rs.4,000/- per site. Presently, DoT is also charging the public

at same rate of Rs.4,000/- per site (This lower rate is not in dispute). The testing equipments are provided at site by the TSPs.

- (ii) The injury is worsened because respondent is exceeding the limit of testing only 10% BTS, without there being public complaints to justify such action in terms of declared policy through circulars dated 08.04.2010(**Annexure – P1**) and 10.12.2010 (**Annexure– P4**).
- (iii) In January, 2014 the respondent have raised excessive bills for testing fee of past periods. Since these could not be for actual tests for which prior information and arrangements are necessarily required, these are for deemed tests at shared sites. The resultant number being in excess of 10% of sites, is unjustified but is being explained by claiming backlogs during past years. These are unjust claims and arbitrary charges.
- (iv) The testing has to be for the site, notwithstanding the number of BTSs there and hence there is no justification for levy of a high testing fee of Rs.10,000/- (Rupees Ten Thousand) per BTS, instead of per site when the site testing would necessarily require satisfactory radiation exposure by all the BTSs at any particular site. Only when a site is found non-conforming, testing of each

BTS may be required so as to secure compliance at the earliest and then only separate fee at reasonable rates may be justified.

6. Since the policy relating to fees and testing of sites/BTSs is relevant and is evident from paragraph 3 of the circular dated 08.04.2010, that paragraph 3 is extracted herein below:-

“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) The TERM Cell will test up to 10% of new BTS sites randomly at its discretion. Additionally, the BTS sites against which there are public complaints, shall also be test by TERM Cell. The testing shall be done as per procedures prescribed by Telecom Engineering Center (TEC) from time to time.
- (iv) The cost of test for audit of EMF exposure from BTS shall be borne by the Mobile Service Operator, which shall be Rs.10,000/- (Rs. Ten Thousands only) for one site/per Service Provider.

- (v) Tools and equipments for testing would be provided by the concerned Mobile Service Provider to the TERM cell.
- (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.
- (vii) The BTS site details would be hosted on Telecom Engineering Center (TEC) website on submission of self-test and registration with TERM cell, giving the test result and mentioning that the BTS site is self-certified by the service Providers. Nature of compliance will be mentioned against each BTS i.e. self-certified, TERM certified and not certified. After the BTS site has been tested by TERM cell, status of the BTS site will be changed to be “TERM certified”.
- (viii) The service providers also have the option of getting all the BTS sites tested from TERM cell by paying the requisite fee. TERM cell will test such sites at their discretion depending upon the availability of resources with them. If they are not able to test such sites either the test fee shall not be accepted or will be refunded within a month’s time, if a commitment to test the site within next 6 months is not given.”

7. The aforesaid circular has been clarified by the circular dated 10.12.2010 (**Annexure P-4**) and the part relevant for the issue at hand is only to the extent that “The TERM Cell will test annually upto 10% of total BTS sites **(including**

existing and new sites), in place of upto 10% new BTS sites, randomly at its discretion. Additionally, the BTS sites against which there are public complaints shall also be tested by TERM Cell.” **(emphasis added)**

8. On behalf of petitioners, the facts and submissions noted above were sought to be supported by referring to the contents of a representation by the petitioner No.1 and another Association, AUSPI, dated 06.03.2014 (**Annexure P-20**). The letter shows protest against demand for Test Certificates for “Backlog Sites”. It was pointed out that the provision is for testing upto 10% sites and there is not mandate that this percentage has to be actually achieved every year or else a backlog will be carried forward. It was also suggested that testing fee be levied only for actual number of sites tested in the year, i.e., for actual effort and not for deemed testing at shared sites. Paragraphs 4 to 10 of this representation read as follows:

“4. It is further noted that in some cases, the test fees sought to be recovered for a particular year is in excess of the actual no.of sites tested in that year. Further, there are also cases of duplication, where test fee is being imposed for sites already tested and fees already paid. It is submitted that these are not in consonance with the instructions/Circulars of DoT as elaborated hereinabove.

Recommendation:

5. **We thus request DoT to kindly direct the TERM Cells, only to raise bills based on above justification which is based on**

actual effort and not extrapolate this to fulfil work not executed on the ground for past period.

6. **TEC Test Procedure.** We would also like to take this opportunity to highlight that the test as designed by the TEC test procedure is comprehensive for all emitters at a site and the effort deployed for one BTS is the same for all other BTS at the same site. This TEC procedure envisages testing and compliance for a complete site and not for a singular BTS at a site and that is actually how it is implemented on the ground. The tests are done on a site (geography) basis and not BTS basis as the EMF exposure testing prescribed by the TEC is on a cumulative basis and not on a BTS basis. The TEC test procedure as well as the DoT guidelines also requires that the site has to be collectively compliant.

7. It is respectfully submitted that in view of the above, recovering a testing fee from every operator at a share site is most unfair and unjustified as only one test is being done.

8. Further, the actual of testing is not Rs.10,000 but far lower. It may be noted that in respect of the tests that were carried out by TCIL in Mumbai, TCIL is charging only Rs.4,000/- per test. It is quite evident that the charge of INR 10,000/- which was envisaged in year 2010 has been revised downwards by the market conditions.

9. It is also pertinent to note that the TERM Cell levies an Audit Fee of Rs.10,000 per BTS even though all resources (equipment, vehicle to site etc.) for the test are provided by operators. We are constrained to understand the effort that the fee is being charged by the Government for the provision of all facilities/resources for the test by the industry.

Recommendation:

10. **In view of the above, it is submitted that the test fees ought to be based on the actual cost of conducting the test, applied on per site basis and not per BTS basis, with due consideration for the resources and equipment being provided by the service providers, so as to not be construed as unjustified fees.”**
9. Reply, if any, to the above letter/representation is not on record. It appears, however, that replies on the issues raised have been sent to individual TSPs by the concerned offices of TERM Cell. Replies given to TTSL dated 23.05.2014 (**Annexure P-15**) and dated 17.06.2014 (**Annexure P-16**) have been cited by way of illustrations to support the submission that the TERM Cell has arbitrarily ignored the relevant provisions of the circulars and the limit upto 10% and has insisted on its right to charge the same fees from all BTSs at a shared site even when there is no direct testing, and even in excess of 10% ceiling.
10. The counter version appearing from the counter affidavit and submissions seek to justify the testing fee of Rs.10,000/- by describing and relying upon the activities of TERM Cell in general terms, including the routine administrative duties in the office along with the laudable purpose of testing the EMF radiation. The cost factor, however, has been left totally untouched even while comparing the fee under the circular with that of Rs.4,000/- charged by TCIL (and also by DoT) on public complaints. There is a hint of subsidy for the public demanding the tests but ultimately no such stand has been taken or pressed. Paragraph 5 of

the counter affidavit addresses as many as VI issues. Out of them statements in relation to issues I and V contain the above counter version. But the facts necessary to justify the charging of Rs.10,000/- per BTS from TSPs when TCIL and DoT are charging only Rs.4000/- from the public, are not there at all.

11. The contents of letter dated 07.01.2014 (**Annexure P-7**) sent by the TERM Cell, Odisha to Vodafone show that as many as 619 BTSs are claimed to have “also been tested as shared sites” while carrying out BTS EMR testing from November 2010 to November, 2013. On this reasoning a lump sum testing fee of Rs.61,90,000/- was demanded on 07.01.2014. Similarly, by a letter dated 06.05.2014, testing fee for 754 shared BTS was demanded in one go from Tata Teleservices Ltd. Representation dated 20.05.2014 against such demands for shared sites and against its justification by relying upon alleged backlog from 10% ceiling on annual testing was produced for our perusal for better appreciation of its rejection vide letter of DoT dated 23.05.2014 (**Annexure P-15**).

12. The aforesaid grievances of petitioners have also been replied through paragraph 5 of the counter affidavit (as Issues Nos.II & III). The justification is that while testing a shared site, all BTSs at that site get tested and therefore, demand of fee is justified against each BTS at a shared site. It is also sought to be justified on the basis of provisions governing penalty on each BTS at a shared site, if site is found non-compliant with radiation norms. By way of issue

No.IV, testing of more than 10% of BTS sites of a TSP have been replied by taking the stand of necessity and need for flexibility in such a matter.

13. Mr. Sahay, learned counsel for the respondent justified the stand of the respondent which has been noted above as the counter version, based upon paragraph-5 of the counter-affidavit. According to him, TCIL or even DoT has a limited role to play when it conducts test of EMF radiation at any site on the basis of public complaints whereas the TERM Cell has many additional administrative duties like maintaining of the records and therefore there is nothing wrong on its part in charging Rs.10000/- as the testing fee. He also justified charging of fee for all the BTSs at a shared site because they all get tested and receive certificates when radiation test is conducted for the shared site. He also submitted that there is nothing wrong in holding of tests even in a routine way over and above the ceiling of 10% because it can be ultimately adjusted in case less sites were tested in the past. Adjustment may also be possible against tests permissible in the future.

14. On behalf of the petitioners, learned senior counsel has advanced a legal submission that in the present case, it is the case of the respondent that it is charging Rs.10000/- as a 'fee' to meet the cost of required testing of a BTS site. Now when the same testing on public complaints is being done even by DoT only for Rs.4000/- per site, there is no justification to charge a higher fee by the TERM Cell of DoT for conducting the same test. According to learned senior

counsel, the respondent have acted unfairly in charging the TSPs much higher fee for regular tests when in fact the tests conducted on complaint would involve the same cost. Such arbitrary action is against the law of the land and it also violates the well-known concept of a 'fee' vis-à-vis 'tax'. In a fee of present nature, the charge should be justified by reasonable cost flowing from the concept of *quid pro quo*. In support of this proposition he has placed reliance upon several Supreme Court judgments including one in the case of **Calcutta Municipal Corporation & Ors Vs. Shrey Mercantile (P) Ltd & Ors, (2005) 4 SCC 245.**

15. In respect of aforesaid submission, learned counsel for the respondent has produced before us a report of the Committee constituted by TEC on 20.7.2009 for a study of issues relating to implementation of relevant guidelines on Electromagnetic Fields adopted by Telecom Commission for Telecom Sector in India. This Committee consisting of five officers recommended not only a penalty of Rs.5 lakhs for failure to meet the EMR criteria per BTS per service provider but also recommended the cost of required test as Rs.10,000/- for one site /per service provider. However, nothing further was produced to justify the said cost in the light of undisputed fact that only Rs.4,000/- is being charged as the cost of such test conducted on public complaints.

16. On considering the relevant facts and the law settled by the Apex Court, we have no difficulty in holding that the respondent have failed to justify the

testing fee of Rs.10,000/- for one site / per service provider. The case of the petitioner is further strengthened by the undisputed fact that a Government Company, TCIL as well as DoT are charging only Rs.4,000/- per site as the testing fee. The cost for such test cannot differ when it is conducted by TERM Cell of DoT on regular basis throughout the year as compared to the cost when such test is required to be conducted occasionally by TCIL or DoT on a public complaint. Hence, the charging of Rs.10,000/- as cost for testing charge by way of fee is found to be arbitrary as well as against the principle of *quid pro quo*. Henceforth, till revised on a rational basis and justified by the actual cost, such fee shall be charged as Rs.4,000/- in place of Rs.10,000/-.

17. On going through the declared policy of the respondent contained in Circulars dated 8.4.2010(Annexure P-1) and 10.12.2010 (Annexure P-4), it is clear that except cases of testing on public complaints, for normal testing of BTS sites, there is a ceiling of 10% comprising of old as well as new BTS sites which can be randomly tested at the discretion of the TERM Cell. The words 'up to' denotes that such randomly selected sites should not cross the ceiling of 10% in ordinary circumstances but it does not mandate that in any given year this ceiling has to be achieved. Hence, tests conducted in subsequent years cannot be adjusted by treating that there can exist a backlog under the policy noted above. Such a concept used by the respondent to justify crossing of the ceiling in a casual manner is clearly against the policy and the petitioners are

justified in challenging such an interpretation of the policy by the respondent. It is declared that no backlog can be claimed by the respondent for justifying the crossing of ceiling of 10% in subsequent years. By crossing such ceiling the respondent will cause financial burden to the petitioners against the intention that manifests from the policy itself. Such action would be unjust and impermissible. We declare accordingly.

18. In the light of the above discussion, the excessive bills for accumulated testing fee of past years as challenged in this petition are found to be unjust and therefore, fit to be set-aside.

19. The plea of the petitioner that testing is required for the site, notwithstanding the number of BTS available at a shared site and therefore there is no justification for levying of separate testing fee per BTS, instead of per site is found to have merit. The radiation limits for a shared site require testing of the site. If that is done and the radiation limits are found to be within acceptable norms, there can be no justification for presuming that there has been a separate test for individual BTS installed at such a shared site. If in the facts of a particular case, more than one test is required for such a site, then further testing fee will be justified and can be realized from those who share the site, in equitable and just proportions. In case, for any good reasons there is a necessity to subject a particular BTS at a shared site to individual and separate test, then testing fee for such BTS can also be justified. It goes without saying that notice

for testing of individual BTS must be given so that there is no controversy that individual BTS was/were actually tested or not and that fees are not being levied for 'deemed testing' as alleged in this petition.

20. For the sake of records, it will be proper to indicate that learned counsel for the respondent sought to raise the plea of limitation on the ground that the relevant circulars and policy decisions under challenge are of the years 2009 and 2010 whereas the present petition has been filed in the year 2014 alleging that certain demands raised in 2014 for earlier periods were unjustified. According to him, the cause of action arose with the issuance of the circulars or the clarification. He submitted that representations against some provision in the circular filed by the Association of Cellular Operators was also rejected long back and therefore the policy is too old and stale to be challenged in 2014. On the other hand, it was pointed out that no such objection has been taken in the reply filed on behalf of the respondent and the issue of limitation is always a mixed issue of facts and law. In absence of pleadings of essential facts to support the plea of limitation the issue was not pressed beyond a point more so in view of the fact that such policies have legislative flavor and individual TSPs will have a fresh cause of action when they receive demands under challenge which are of recent period. Further, for the plea of arbitrariness and violation of Article 14 of the Constitution of India, the cause of action will arise whenever the respondent introduce a lesser set of fee for same or similar testing. Acts of

alleged arbitrariness will thus have different dates by way of cause of action and constitutional rights may not get defeated by statutory pleas of limitation. However, since the issue of limitation was not carried beyond the initial submission, it requires no further discussion. The reliefs claimed in this petition have to be treated as reliefs not barred by limitation because the respondent have failed to show otherwise.

21. In view of the aforesaid findings and discussions, the petition is allowed to the extent indicated above. As a result, the petitioners are found entitled to the following reliefs:

- 1) Henceforth, the respondent is entitled to demand by way of cost / fee for EMF radiation test, only @ Rs.4,000/- per test even at a shared site, till the fee is revised in future on any rational basis;
- 2) Ordinarily one testing fee shall be charged, unless for good reasons further testing is required of the whole site or of any particular BTS for which fee may be charged at the rate already indicated;
- 3) Ordinarily, the ceiling of 10% for random testing of BTS sites on annual basis shall be observed. Excessive testing cannot be justified on the ground of any less testing in the past.

However, minor variations on account of factors beyond control will not render the testing invalid and fee for such testing may be justified; and

- 4) In view of the above reliefs, the benefit of interim orders flowing to the petitioners are made available to them from the date of the interim order passed on 20.11.2014. In other words, the interim order is made absolute to the extent of relief granted above.

The petition is allowed to the aforesaid extent.

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(S. K. Singh, J)
Chairperson

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(A.K. Bhargava)
Member