TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL
NEW DELHI

Dated February 4th, 2019

Telecommunication Petition No.219 of 2018

Reliance Communication Ltd. ... Petitioner
Vs.
Union of India ... Respondent

Telecommunication Petition No.220 of 2018

Reliance Telecom Ltd. ... Petitioner
Vs.
Union of India ... Respondent

BEFORE:

HON'BLE MR. JUSTICE SHIVA KIRTI SINGH, CHAIRPERSON
HON'BLE MR. A.K. BHARGAVA, MEMBER

For Petitioner : Mr.Salman Khurshid, Sr.Advocate
Mr.Saket Singh, Advocate
Ms. Shally Bhasin, Advocate
Mr. Chaitanya Safaya, Advocate
Mr. Prateek Gupta, Advocate
Mr. Surabhi Limaye, Advocate
Mr. Vaibhav Niti, Advocate
Mr.Vikramaditya Singh, Advocate
Ms. Alisha Panda, Advocate

For Respondent : Mr. Apoorv Kurup, Advocate
Mr. Isha Mital, Advocate
Mr. Avinash Rathi, Advocate
Mr. Ashim Dutta, DWA
Mohd. Ilyas,Consultant

Amicus : *Mr. Maninder Singh, Sr. Advocate*
Mr. Manjul Bajpai, Advocate
Dr. Shashwat Bajpai, Advocate
Mr. Prabhas Bajaj, Advocate
Mr. Jagjeet Singh Sahani, Advocate
Ms. Palak Verma, Advocate
Ms. Kanika Saran, Advocate
Mr. Parangat Pandey, Advocate

ORDER

A. K. Bhargava, Member – TP No. 219/2018 has been filed by Reliance Communication Limited (referred to as RCom hereinafter) and TP No. 220/2018 has been by filed by Reliance Telecom Limited (referred to as RTel hereinafter). Since both petitions involve similar issues, a common order is being passed. For discussion purposes, RCom's petition 219/2018 will be generally referred to, but we hasten to add that in some places we have used the references interchangeably. The prayers in TP No. 219/2018 are as follows

i) *direct the Respondent to forthwith recall, rescind, withdraw and/or cancel the orders dated 28, December, 2012 and 15th March, 2013 and the subsequent demand dated 20th March, 2013 made on the basis thereof;*

ii) *direct the Respondent to desist from giving any effect or further effect to or from in any manner acting in pursuance of the orders dated 28th December, 2012 and 15th March, 2013 and the subsequent demand dated 20th March, 2013 made on the basis thereof;*

iii) *quash and set aside the orders dated 28th December, 2012 and 15th March, 2013 and the subsequent demand dated 20th March, 2013 made on the basis thereof;*

iv) *stay of operation of the orders dated 28th December, 2012 and 15th March, 2013 and the demand dated 20th March 2013;*

v) *injunction restraining the Respondent either by itself or through its men. servants or agents from in any manner giving any effect or further effect to the orders dated 28th December, 2012 and 15th March, 2013 and the demand dated 20th March, 2013 made on the basis thereof or from taking any coercive step against the Petitioners for any purported default in complying with the same;*

vi) *direct the Respondent to return the Bank Guarantees of Rs. 2000.1 Crores furnished by the Petitioner under protest to securitize the One Time Spectrum Charge Dues*

Petitioners are aggrieved by the impugned order dated 28-12-2012 and it is pertinent to extract some part of this order also which is as follows:

"In pursuance of power conferred by Section 4 of Indian Telegraph Act, 1885 (Act No. 13 of 1885) the Central Government hereby prescribes the following rates of one time spectrum charges for GSM Spectrum charge for GSM spectrum held in 900 MHz and 1800 MHz by Telecom service providers.

i) *For Spectrum holding above 6.2 MHz (GSM) rates applicable for the period 01.07.2008 to 31.12.2012 shall be as per Schedule of Rates given in Annexure.*

ii) *For spectrum holding above 4.4 MHz (GSM), one time charge shall be effective from 01.01.2013 as per Schedule of Rates given in Annexure. Licensees may surrender spectrum beyond 4.4 MHz if they do not wish to pay the charge."*

On 15-3-3013 another order was issued in continuation of the above order, specifying the rates for CDMA spectrum holding above 2.5 Mhz. Impugned

demands of One Time Spectrum Charge (OTSC) have been raised based on the above orders. The impugned OTSC demand for RCom is Rs. 1757.89 Cr (vide order dated 20-3-2013) and is Rs. 173.47 Cr. for RTL.

2. The first thing we notice is that while these petitions have been filed in 2018, the impugned orders and demands have been issued in around 2012 and 2013. It has been explained by the petitioner that the impugned orders of the respondent were challenged before the Hon'ble Calcutta High Court by way of W.P. No. 10410(W) of 2013 in April 2013 since TDSAT at that time was not functional. Both these petitions have now been preferred pursuant to the liberty granted by the High Court vide its order dated 1-10-2018. Subsequently, we have heard both the parties extensively. Learned senior counsel Mr. Salman Khurshid has argued for the petitioners and learned counsel Mr. Apoorv Kurup has appeared for the respondent. While we were hearing the matter, Mr. Maninder Singh, learned senior counsel for the petitioner Vodafone wanted his petition also to be taken up since similar issues were involved, though he fairly conceded that there are factual matter and related questions in his petition which are somewhat different than those in the petition under consideration. Since it was not possible to take up the Vodafone petition together with these petitions, Mr. Maninder

Singh was given an opportunity to address us on points of law in the interest of justice. While doing so, we have made it clear that points of facts and law are generally intertwined in cases related to license and spectrum and therefore we shall entertain submissions only on common points of law. Mr. Singh has accordingly assisted us extensively and fairly and we have taken note of his submissions on common points of law. We also record here for propriety that Mr. Salman Khurshid has fairly disclosed in the beginning itself that he was a member of the EGoM whose decision has been relied upon by the respondent in this petition and he has voluntarily refrained from making submissions directly related to the EGoM decision. Learned counsel Mr. Saket Singh has appeared on behalf of the petitioner and addressed us mainly on the points related to EGoM.

3. We start by first listing some of the facts related to the license and spectrum acquired by the petitioners. We are dealing with 18 CDMA licenses of RCom and 8 GSM licenses of RTL in these two petitions. RCom was granted a license for Gujarat Circle in 1997 and on payment of requisite license fee, it was granted license bundled with spectrum in 17 other circles in 2001. RCom migrated to UASL upon payment of the prescribed fee for each of the 18 Circles on 14-11-2003. At the time of migration, RCom was providing Limited Mobile Services using

CDMA technology. RCom had been allotted 5 Mhz of spectrum in 11 circles and 3.75 Mhz in 7 circles.

4. Petitioner RTL was issued CMTS licenses in 7 Service Areas on 12-12-1995 which were amended to revenue sharing regime during 29-1-2001/25-9-2001 and also acquired similar license in one more Service Area on 27-9-2001. RTL migrated 7 of these licenses to UASL on 18-10-2007 and they have since expired on completion of tenure on 12-12-2015. Another license was migrated to UASL on 16-4-2009 and will expire in 2021. RTL has contracted 6.2 Mhz spectrum in all these circles. In Bihar circle it was allotted 1.8 Mhz on 23-10-2006, in addition to the contracted 6.2 Mhz spectrum.

5. We now trace some of the important aspects and events culminating in the impugned orders.

(a) NTP99 and later provision for UASL was marked by a shift from fixed fee regime to the revenue sharing regime and the migration to new regime was with the consent and acceptance of all concerned. The UASL licensees had to pay an entry fee and in addition were required to pay annual license fee and spectrum usage charge (SUC). The relevant clauses related to fee payable from the petitioner's UASL license in one of the Circles are extracted below

"18. FEES PAYABLE

18.1 Entry Fee

One time non-refundable Prescribed Entry Fee Rs. 78.01 Crores has already been paid by the Licensee.

18.2. License Fees :

In addition to the Entry Fee described above, the Licensee shall also pay License fee annually @ 12 (TWELVE)% of Adjusted Gross Revenue (AGR), excluding spectrum charges.

Annual License fee w.e.f. 1.4.2004 shall be @ 10(TEN)% of AGR. The Licensor reserves the right to modify the above mentioned License Fee any time during the currency of this Agreement.

18.3 Radio Spectrum Charges :

18.3.1 In addition to the_License Fee as per Clause 18.2 Annual Royalty and License Fee for wireless license for Base Stations and wireless subscriber terminals shall be payable to the Wireless Planning & Coordination Wing as a percentage of Adjusted Gross Revenue (AGR) earned from wireless subscribers. The said percentage of AGR shall be 2% or as amended from time to time for utilizing spectrum up to 5 + 5 MHz. While calculating the AGR for the limited purpose of levying such annual royalty and license fee, revenue from wire-line subscribers shall not be taken into account.

18.3.2 Further royalty for the use of spectrum for point to point links and other access links shall be separately payable as per the details and prescription of Wireless Planning & Coordination Wing. The fee/royalty for the use of spectrum/possession of wireless telegraphy equipment depends upon various factors such as frequency, hop and link length, area of operation and other related aspects etc. Authorization of frequencies for setting up Microwave links by Licensed Operators and issue of Licensees shall be separately dealt with WPC Wing as per existing rules.

The UASL provided that the licensee would be given 2.5 Mhz + 2.5 Mhz spectrum initially (also referred to as 'start-up' spectrum) in case of CDMA and that the contracted spectrum was 5 Mhz + 5 Mhz. We extract the relevant clause below

43.5(i) For wireless operations in SUBSCRIBER access network, the frequencies shall be assigned by WPC wing of the Department of Telecom from the frequency bands earmarked in the applicable National Frequency Allocation Plan and in coordination with various users, initially a cumulative maximum of up to u.4. MHz + 4.4 MHz shall be allocated in the case of TDMA based systems @ 200 KHz per carrier or 30 KHz per carrier on a maximum of 2.5 MHz+ 2.5 MHz shall be allocated in the case of CDMA based systems @ 1.25 MHz per carrier, on case by case basis subject to availability. While efforts would be made to make available larger chunks to the extent feasible, the frequencies assigned may not be contiguous and may not be the same in all cases or within the whole Service Area. For making available appropriate frequency spectrum for roll out of services under the licence, the type(s) of Systems to be deployed are to be indicated.

43.5(ii) Additional spectrum beyond the above stipulation may also be considered for allocation after ensuring optimal and effective utilization of already allocated spectrum taking into account all types of traffic and guidelines/ criteria prescribed from time to time. However spectrum not more than 5+5 MHz in respect of CDMA system or 6.2+6.2 MHz in respect of TDMA based system shall be allocated to any new Unified Access Services Licensee. The spectrum shall be allocated in 824-844 MHz paired with 869-889 MHz. 890-915 MHz paired with 935-960 MHz. 1710-1785 MHz paired with 1805-1880 MHz."

(b) The Government first indicated its shift in policy from the revenue share regime and prevalent practice of licensing in its press release dated

29-1-2011. It noted that while the earlier policy had paid rich dividends, time was ripe for making a directional shift and that there is enough of competition now to warrant a market driven process for allocation of 2G spectrum. It also said that in future, the spectrum will not be bundled with license and that the new policy of pricing would need to be applied equally to all players. Importantly, it called for adoption of an auction process for allocation and pricing of spectrum beyond 6.2 Mhz.

(c) Another important event that took place was the Apex Court Judgment dated 2-2-2012 in *CPIL vs. Union (2012) 3 SCC 1* (popularly known as 2G case). In this order, Hon'ble Supreme Court quashed 122 licenses and the allocation of spectrum granted by DoT to various Telecom Operators in January 2008. The Apex Court also held that the spectrum was *"a scarce, finite and renewable natural resource which is susceptible to degradation in case of inefficient utilization"*. While doing so, the Apex Court declined to interfere with the allocation of licences prior to 2007 by observing that:

"98. The argument of Shri Harish Salve, learned Senior Counsel, that if the Court finds that the exercise undertaken for grant of UAS licences has resulted in violation of the institutional integrity, then all the licences granted 2001 onwards should be cancelled does not deserve acceptance because those who have got licence between 2001 and 24-9-2007 are not parties to these petitions and legality of the licenses granted to them has not been questioned before this court."

(d) As per TRAI Act, TRAI is required to be consulted on review of license terms and conditions and it has been duly consulted. First time we hear of one time spectrum charge (OTSC) is in 2007 when TRAI issued recommendations on review of license terms and conditions, wherein it suggested that any licensee who seeks to get additional spectrum beyond 10 Mhz shall have to pay a onetime spectrum charge. While agreeing on the need for OTSC, DoT sought clarification on 9-7-2008 whether to levy suitable OTSC for additional spectrum beyond 6.2 Mhz. On 11-5-2010, TRAI issued recommendations on *"Spectrum Management and Licensing Framework"*. TRAI therein took the view that *"contracted spectrum for all access licences issued after 2001 is 5 Mhz / 6.2 Mhz for CDMA/GSM only. Therefore, even though the service provider will be assigned spectrum upto the prescribed limit, spectrum assigned beyond contracted amount will be paid for at the current price"*. There were further set of references by DoT followed by clarifications and recommendations by TRAI, particularly recommendations dated 8-2-2011 and clarifications dated 3-5-2011. DoT again referred back to seek clarifications which TRAI provided on 3-11-2011. In DoT's references, the question of start-up and contracted spectrum and the pricing of spectrum beyond the start-up spectrum crops up. TRAI reiterated its view that the contracted spectrum

is 6.2 Mhz/5Mhz (GSM/CDMA). *TRAI* also recommended that *"Its therefore upto the Government to take a decision if it wishes to modify the licence conditions. If the Government does so, then the Current Price, as estimated by the experts for spectrum upto 6.2 Mhz can be charged for spectrum beyond 4.4 Mhz upto 6.2 Mhz."*

(e) Subsequently, the TRAI recommendations and clarifications were considered by the Telecom Commission (TC) in 2012. The TC took the following important decision relevant in this case:

"For charging spectrum from 4.4 MHz to 6.2 MHz TRAI has recommended for amendment of the existing licences as the contractual spectrum is 6.2 MHz. In this regard, the Commission noted that the present UAS Licences, have the following stipulation:

23.5 ... The detailed guidelines for allocation of frequency spectrum and charges thereof etc., would be separately issued from time to time.

In view of the above present provisions, the Commission felt that the amendment to the licences for charging spectrum from 4.4 MHz to 6.2 MHz may not be required."

(e) It appears that subsequent to the TC decision, an EGOM deliberated on this issue as well as on the opinion of Ld. Attorney General that *"one-time spectrum charge should not be levied from any licensee for spectrum held up to 6.2 Mhz (GSM / 5 Mhz (CDMA)"*. Respondent has placed before us the minutes of meeting of EGOM dated 18-10-2012. The cabinet decided on this issue along the same

lines as recommended by EGoM. Some important and relevant observations from this are extracted below

"i. No one time spectrum charge be levied for spectrum holding up to 4.4 MHz.

ii. For all spectrum holdings beyond 4.4 MHz (GSM), a one-time charge be levied prospectively upon the existing operators at 2012 auction determined price. The date of applicability of the charge shall be the date of commencement of the first quarter following the date of the Cabinet Decision.

iii. For all spectrum 'held above 6.2 MHz (GSM), a one-time charge would be levied from July 2008 onwards... The price, pro-rated for the period of July 2008 up to the date of applicability of auction determined price, would be the 2001 entrée fee divided by 6.2, duly indexed using SBI PLR. ..."

Following this lengthy and widely discussed process, culminating in the cabinet decision, DoT issued impugned orders and followed up with impugned demands.

6. At the outset, Mr. Salman Khurshid fairly points out that while all his arguments are based on the premise that the petitioner is holding only the contractual spectrum, the spectrum holding exceeds 6.2 Mhz in one circle (Bihar). He submits that this circle also has peculiar facts and circumstances of its own and may be treated as a stand-alone case. We shall revert to the case of Bihar circle later. Going forward, we make it clear that our examination in these two petitions is based on the premise that the petitioner is holding spectrum only up to contractual spectrum limit of 5 Mhz in CDMA and 6.2 Mhz in GSM.

7. In the background of these events and facts, we now consider the stand of both the parties. Mr. Salman Khurshid, learned Senior Counsel for the petitioner, argues that (a) a telecom license is in the nature of a contract between the licensor and licensee and cites *Union of India vs. AUSPI (2011) 10 SCC 543 (para 39, 40)* and *Bharti Airtel Ltd. V. Union of India (2015) 12 SCC 1 (para 32, 34)* in support. Though the licenses are issued by the respondent in exercise of its statutory powers under Section 4 (1) of the Telegraph act 1885, but once executed they are governed by the laws of contract (b) It was petitioner's contractual entitlement under the license to receive spectrum upto 6.2 Mhz (GSM) / 5 Mhz (CDMA) (c) The entry fee paid by petitioner under the license was for the spectrum upto 6.2 Mhz (GSM) / 5 Mhz (CDMA). The demands raised by respondent are, therefore, in violation of contractual obligation (d) It is well settled that a contract between parties cannot be altered/modified by way of orders without a formal amendment (e) no amendment to the license conditions has been carried out to the effect that OTSC can be charged over-riding the contractual obligations. Hence no reliance can be placed on clause 5 of the license. (f) no public interest justification has been shown or established (g) in any case, powers under section 4 of the Telegraph Act are not unbridled and State

cannot act arbitrarily and at its sweet will (h) reliance on 2G case is misplaced since the Apex Court has not held these licenses of the petitioner as illegal. Mr. Maninder Singh, learned Senior Counsel adds that (i) Hon'ble Supreme Court has held in *Bharti Airtel Ltd. Vs. Union of India (2015) 12 SCC 1* (para 39) that the licensor being the Union of India, its discretion to stipulate terms and conditions is regulated by certain constitutional mandates apart from stipulations of any law applicable (ii) it is settled law that any license agreement under section 4 is an ordinary contract and not in the nature of a statutory contract. In support, he cites *India Thermal Power Ltd. Vs. State of MP (2000) 3 SCC 379 (para 11), KSEB & Anr. Vs. Kurien E. Kalathil (2000) 6 SCC (para 10-11)* and *Idea Cellular Ltd. Vs. Union of India TDSAT judgment dated 5-11-11 (60-62)* (iii) Impugned orders rely on Section 4 of the Telegraph Act. Such a course is not available to DoT in the wake of AUSPI and Bharti Airtel judgment of the Apex Court (iv) It is settled position of law that the grounds of any public order have to be discernible from the order itself and no other affidavits can be permitted for giving additional reasons for justifying the same, as is being attempted by the respondent (v) impugned orders vitiate the legal certainty principle (vi) Definite price is an essential element of the contract and unilateral amendment through impugned orders are in violation of section 29 of the Contract Act (vii) level playing field

includes significance of "Time" and it is impermissible to apply same norms and yardsticks to all the operators (viii) public interest does not mean revenue maximization.

8. The very basic proposition and simple test to be met by the respondent is that any lawful charge levied by it is either through law or through a contract or through novation of a contract with consent of the other party. Issue of migration to the UASL by the petitioner was a case of novation with consent, but impugned orders clearly do not fall in this category. The respondent however tries to sail on two boats by claiming its action to be in consonance with the provisions of the contract as well as within its statutory powers exercised in public interest. Learned counsel for the respondent Mr. Kurup argues that (a) in terms of clause 5 of the UASL, the respondent has the right to modify, at any time, the terms and conditions of the license, if it is expedient to do so in public interest (b) in terms of clause 16 of the UASL, the petitioner shall be bound by the terms and conditions of the license agreement, as well as such instructions as issued by the licensor (c) Further, clause 23.5 states that the detailed guideline for allocation of frequency spectrum and charges thereof etc. would be separately issued from time to time. (d) In addition, clause 43 and 43.5 (iv) give the licensor the right to modify and /

or amend the procedure of allocation of spectrum including quantum of spectrum at any point of time without assigning any reason. Having recounted the rights and provisions in support of impugned demands by the licensor, he further adds that - (i) Hon'ble High Court of Madras judgment dated 11-8-2016 in W.A. Nos. 1454 and 1455 of 2014, *Aircel Cellular Ltd. Vs. Union of India,* that upholds the levy of OTSC by the Government is applicable in this case also (ii) the prevailing policy regime requires that access spectrum be allocated through market process (ii) 2G judgment makes it mandatory for the government to allocate access spectrum through the process of auction (iii) an Empowered Group of Ministers (EGoM) found that allotment of new/additional spectrum (beyond 2.5 Mhz in CDMA/ 4.4 Mhz in GSM) to licensees without payment of market rate did not appear permissible in light of the 2G judgment. (iv) not charging existing spectrum holders of spectrum in excess of 2.5 Mhz in CDMA / 4.4 Mhz in GSM would lead to tremendous loss to the exchequer. (v) if such charge is not levied, it would be discriminatory when compared with new operators, including holders of quashed licenses. (vi) charging for such spectrum will be in public interest. Such wide range of arguments, advanced by the respondent, need to be tested in detail.

9. At the outset, Mr. Salman Khurshid fairly brings to our notice the Madras High Court Judgment dated 11-8-2016 in W.A. Nos. 1454 & 1455 of 2014, *Aircel Cellular Ltd. Vs. Union of India*, which had held that the levy of OTSC by the Central Government, in exercise of power conferred on it by Section 4 of Indian Telegraph Act, 1885 read with clause 13.1 of the UASL of M/s Aircel, is not arbitrary and in fact justified and enforceable. Mr. Kurup points out that Cause 13.1 of that license corresponds to the Clause 5.1 of the UASL in this petition. Further, the pleadings before the Hon'ble Madras High Court reveal that the contentions raised there correspond to the pleadings before this Tribunal, indicating that the High Court was seized of the complete fact pattern prior to the rendering of its decision. Mr. Salman Khurshid submits that both on facts and law, petitioner's case is different than that of the Aircel. According to him, the High Court proceeds on erroneous assumption that the respondent had in exercise of its power under Clause 5(ii) amended the licenses, while decision of the Telecom Commission discloses that no amendment to the licenses is required and none has been carried out. The petitioners before the High Court were allottees of spectrum up to 10 Mhz in GSM (except in case of one odd circle), and therefore could not have argued on behalf of those operators who held only the contractual spectrum of 6.2 Mhz. The High court also did not consider the decisions of this

Tribunal in COAI case (2009) and Dishnet's Case (2014). In these cases, this Tribunal has held that 6.2 Mhz is the contractual spectrum and there is no vested right to receive spectrum beyond 6.2 Mhz. Accordingly, treatment for those operators who received spectrum beyond 6.2 Mhz may have to be different than for those who received only the contractual spectrum. According to Mr. Salman Khurshid, on the basis of these distinguishing considerations, Madras High Court judgment ought not to be followed /applied in the present case. Mr. Maninder Singh also submits that Madras High Court judgment is inapplicable on the principles of *per incuriam and sub silentio.* He points out that Madras High Court judgment has been rendered taking into account the fact that the petitioners were aware of the consultation between the Union and TRAI on imposition of OTSC but however they did not object to such imposition or no documents portraying their objection in this regard were placed before the court. Had the petitioners submitted their objections to the said demand during the consultation process, the matter could be looked at from a different angle. Mr. Singh submits that objections were indeed raised during the consultation process by COAI, an association of the service providers. For this reason alone, the judgment of High Court is not applicable to other service providers. Mr. Maninder Singh further submits that the judgment of the Madras High Court does not consider - (a)

section 29 of contract Act (b) that provision of section 4 would not be available to DoT for amending any license agreement once the license agreement is already executed (c) the aspect that when demand letters are based only upon section 4 of the Telegraph Act, it is impermissible for DoT to place reliance on Clause 5(1), Clause 13(ii) or 14 (ii) or other clauses of the licenses. Besides, the judgment proceeded on the premise that the agreement itself was modified by DoT, which is *per se* incorrect. Therefore, according to Mr. Maninder Singh, the judgment of Hon'ble Madras Hugh Court is not a binding precedent having regard to the principles of *per incuriam* and *sub silentio.* In support of his contention on the principles of *per incuriam* and *sub silentio,* he places reliance on *MCD vs. Gurnam Kaur (1989) 1 SCC 101 (para 11, 12), State of U.P. vs. Synthetic s and Chemicals Ltd. (1991) 4 SCC 139 (para 39-42)* and *Foreshore Coop. Housing Society vs. Pravin D. Desai (2015) 6 SCC 412 (para 56-57).* In facts of the case, we are of the opinion that while it is important to keep the Madras High Court judgment in mind, it will be in the interest of justice to examine all the submissions made along with all the materials placed by the petitioner as well as the respondent. Based on such an examination only a specific finding can be rendered in the case involving 26 different licenses of the petitioner.

10. At first instance it is revealed that the impugned orders have been issued in pursuance of power conferred by Section 4 of Indian Telegraph Act, 1885. Mr. Maninder Singh submits that in view of the judgments of Hon'ble Supreme Court in the case of *AUSPI* and *Bharti Airtel,* respondent cannot resort to provision of Section 4. Although mentioning of the wrong provision would not invalidate an order, however, if two provisions operate in two completely different fields and are subject to completely different pre-conditions, it would not be permissible to contend that the order which mentions one of the said provisions could have been passed under the other provision (*Chandra Singh vs. State of Rajasthan – (2003) 6 SCC 545, para 37).* It is also settled position of law that the ground of any public order has to be discernible from the order itself and no further affidavits can be permitted for giving additional reasons for justifying the same (*Mohinder Singh Gill case – (1978) 1 SCC 405).* Once the impugned order itself says that it is under section 4, there is no permissibility of any contention to be made by DoT that the said order is under clause 5(1) , clause 13(ii) or 14(ii). On such grounds, Mr. Singh wants impugned orders to be quashed at the threshold. Mr. Kurup submits that the impugned orders could not be held to be void merely on account of the fact that they had been issued in pursuance of power conferred by section 4 of the Telegraph Act. The power to issue such notification is clearly traceable

when section 4 of the Telegraph Act is read with clause 5 and other relevant clauses of the UAS Licence. We are of the opinion that the respondents could have done better by being more elaborate (or more specific). However, that should not detain us from considering the dispute on merit, especially when the respondent has placed extensive materials before us and the petitioners have had access and opportunity to challenge them.

11. Clause 5 of the UASL, which is extensively relied upon by Mr. Kurup, is as follows:

"5.1 The LICENSOR reserves the right to modify at any time the terms and conditions of the LICENCE, if in the opinion of the LICENSOR it is necessary or expedient to do so in public interest or in the interest of the security of the State or for the proper conduct of the telegraphs. The decision of the LICENSOR shall be final and binding in this regard."

Since no issue of national security or proper conduct of Telegraph is involved here, Mr. Kurup rightly points out his right to modify at any time the terms and conditions of the license in public interest. We shall examine this right in terms of public interest in later paras. However, Mr. Salman Khurshid points out that even on respondent's admission, there has been no modification to the terms and conditions of the license. Instead, a mere instruction has been issued. As noted earlier, TRAI did recommend that the licenses need be amended if spectrum is to

be charged from 4.4 Mhz to 6.2 Mhz. However, Telecom Commission felt that amendment to the licenses may not be required for charging of spectrum from 4.4 Mhz to 6.2 Mhz, noting the provisions in clause 23.5. In view of the categorical stand of the respondent that no modification to license terms and conditions is required and instead clause 23.5 can be relied upon, we first examine the clause 23.5 of UASL.

12. Clause 23.5 of UASL is as follows

"23.5 The frequencies shall be assigned by WPC from the designated bands prescribed in National Frequency allocation Plan – 2002 (NFAP-2002) as amended from time to time. Based on usage, justification and availability, spectrum may be considered for assignment, on case by case basis. The frequencies assigned may not be contiguous and may not be same in all cases, while efforts would be made to make available larger chunks to the extent feasible. ***The detailed guidelines for allocation of frequency spectrum and charges thereof etc. would be separately issued from time to time."*** (emphasis supplied)

This is a general clause under technical conditions, applicable for allocation of frequencies. There is no dispute in regard to allocation of frequencies and in this case the frequencies for access spectrum stand allocated along with the provision for fee payable separately (clause 18 of the license). In spite of this, the respondent, relying upon the provision that *"the detailed guidelines for allocation*

of frequency and charges thereof etc. would be separately issued from time to time", tries to change the pricing again. According to the petitioner, when frequencies were allocated, then also no separate guidelines regarding pricing were issued. Even if an afterthought is permitted and the impugned order is taken as issued in terms of the guideline to "*separately issue from time to time*", it must pass the test of superceding the contractual terms by way of an instruction / guideline. Mr. Salman Khurshid cites *BSNL v. BPL Mobile Cellular (2008) 13 SCC 597 (para 43, 44, 51)* to emphasize that the circular letters cannot ipso facto be given effect to unless they become part of the contract and any novation in the contract was required to be done on the same terms as are required for entering into a valid and concluded contract. He also submits that if this provision is misused in this manner, respondent can repeatedly invoke it and levy any charge in future citing next auction based market price. We also take note of Mr. Maninder Singh's submissions on the principle of legal certainty and section 29 of the Contract Act. He cites *DDA vs. Joint Action Committee – (2008) 2 SCC 672* in support to contend that it would be impermissible to amend the contract to the extent of introducing new liabilities and that definite price is an essential element of contract and any unilateral amendment which would permit any change in essential element of the contract would fall foul of section 29 of the contract Act.

In view of these submissions, we are of the opinion that it will not be permissible to place reliance on clause 23.5 if the said spectrum was contracted spectrum and the contract covered the pricing of the said spectrum. We shall examine this aspect of contracted spectrum and pricing thereof in subsequent paras.

13. There appears to be an ambivalent stand taken by the respondent on the quantum of spectrum that the telecom operators including the petitioner are entitled to. Respondent has stated in its counter affidavit that the petitioner is not required to grant the petitioner spectrum up to 5 Mhz (CDMA) /6.2 Mhz (GSM). Mr. Salman Khurshid however states that from judgment dated 31-3-2009 in the *COAI v. Union (Petition 286/2007)* and the judgment dated 31-1-2014 in the *Dishnet v. Union (Petition 360/2012)*, it has been concluded that telecom operators are entitled to contracted spectrum up to 5 Mhz (CDMA) / 6.2 Mhz (GSM) under the license agreement. In the later judgment dated 31-1-2014 of *Dishnet v. Union (Petition 360/2012)*, this Tribunal has made the following findings:

"45. In light of the facts and circumstances and the materials relied upon by the petitioners and enumerated from serials (i) to (vii) (besides the statements made by the DoT and the findings recorded by the High Court and the Tribunal in proceedings related to petition no. 286 of 2007), it is difficult to avoid the conclusion that the UAS license is understood by the Government to mean that the licence holder was entitled to an aggregate of 6.2 Mhz in two tranches of 4.4

Mhz as the start-up spectrum and the additional spectrum 1.8 Mhz on satisfying the subscriber-linked criteria and further that the Government all through acted on that premise.

46. That being the position the stand taken by the Union of India in the present petition and the submissions made on its behalf in opposition to the claims of the petitioners appear to be a repudiation of how it understood and acted on the basis of the terms of the license. The submissions are no more than a justification and rationalization for a change of mind."

We have no reason to differ from the opinion of this Tribunal as spelt out above in respect of the contracted spectrum.

14. Mr. Salman Khurshid contends that the entry fee paid under UASL is for the entire contracted spectrum. Entry fee entitles the licensee to the licence as well as the spectrum to the extent of maximum limit prescribed. Mr. Kurup submits that the entry fee is not for the spectrum allotted beyond the start-up spectrum. Mr. Salman Khurshid points out that no separate entry fee is prescribed for the spectrum above the start-up and up to the contracted spectrum. One inevitable question that arises, therefore, is that if charges could be levied on such spectrum, why such charges were not levied on the start-up spectrum as well, i.e. why not charge the whole contracted spectrum. We need not dwell upon it since it is a hypothetical question. Respondent has taken a consistent stand that no OTSC is to be levied on start-up spectrum. Thus, while there is a serious dispute on the pricing of balance 2.5 Mhz (CDMA) / 1.8 Mhz (GSM) of the contracted

spectrum, there is no dispute on the pricing of start-up spectrum. Respondent apparently believes that within the contracted spectrum there are two classes – one that is not to be charged for OTSC and another that requires charging of OTSC. However, the only distinguishing feature between the two sub-classes is that second class of spectrum is allotted later, on fulfilling the criteria of optimal and efficient utilization of the earlier allotted spectrum. This method of allocation itself cannot create two sub-classes in terms of different pricing entitlement. In other words, there is no intelligible pricing criteria to distinguish two sub-classes created by the respondent, and such classification within the contracted spectrum should be held impermissible.

15. Regarding pricing, Mr. Salman Khurshid further submits that the respondent's own stand has been that the entry fee paid for acquiring the licenses was for the entire contracted spectrum of 5 Mhz (CDMA) / 6.2 Mhz (GSM) and the respondent has brought nothing on record which shows otherwise. In support of this contention he cites the Note dated 19-4-2008 by Finance Secretary which is self-explanatory and is reproduced below:

"We may recommend the following principles for pricing of spectrum –

(i) The start-up spectrum of 4.4 MHz for GSM (2.5 MHz for CDMA) may be exempted from upfront pricing both for new and existing operators.

(ii) Under the UASL licensing regime, there appears to be an implicit, indirect contractual obligation to allow further allotment of spectrum, beyond 4.4 MHz for GSM (2.5 MHz for CDMA), and up-to 6.2 MHz for GSM (5 MHz for CDMA) after payment of 1% additional spectrum usage charges and ensuring that already allocated spectrum has been optimally and efficiently utilized. This may effectively protect operators who have existing allocations up to 6.2 MHz for GSM (5 MHz for CDMA) from payment of any other charges, including the 'upfront' spectrum price. Since it may not be possible to charge operators already having allocations up to this range, the principle of equity and 'level playing field' would require that the operators, who get fresh allotment of spectrum up to 6.2 MHz for GSM (5 MHz for CDMA) too should not be charged for spectrum up to 6.2 MHz for GSM (5 MHz for CDMA)."

However, from the documents on record, we find that in its recommendation dated 11-5-2009, a committee constituted by DoT has dealt with this question and taken a different view for the first time. We find it useful to reproduce the relevant part of that recommendation below

"Some representations have been received stating that UAS licensees who have so far received only 4.4. MHz (or less) GSM spectrum, have a right to receive spectrum up to 6.2. MHz free of cost and without auction as per conditions 43.5 (i) and 43.5(ii) of the UAS License agreement. The Committee examined the license conditions and is unable to agree with this contention.

Condition 43.5 (i), (ii) and (iv) read as follows :

43.5(i) ....

43.5 (ii) ....

43.5(iv) The Licensor has right to modify and/or amend the procedure of allocation of spectrum including quantum of spectrum at any point of time without assigning any reason.

Condition 43.5(i) clearly states that initially a cumulative maximum spectrum of 4.4 MHz + 4.4 MHz in case of GSM or 2.5. MHz in case of CDMA will be allocated. Condition 43.5 (ii) clarifies that additional spectrum beyond 4.4 MHz and up to 6.2 MHz may be considered for allocation after ensuring optimal and efficient utilization of the already allocated spectrum taking into account all types of traffic and guidelines/criteria prescribed from time to time. Currently the criteria for additional allocation is rolling out the network and achieving specified subscriber numbers as stipulated in subscriber linked criteria dated 17.1.2008. This makes it clearly beyond doubt that initial start up spectrum which is received with license free of cost is only 4 MHz + 4.4 MHz in case of GSM or 2.5. MHz + 2.5 MHz for CDMA. The additional 1.8 MHz + 1.8 MHz for GSM and 2.5 MHz + 2.5 MHz for CDMA may be considered for allocation after efficient utilization of initial spectrum and after fulfilling the guidelines/criteria prescribed from time to time. Condition 43.5 (iv) further stipulates that Government has a right to modify and/or amend the procedure for allocation of spectrum including quantum of spectrum at any point of time without assigning any reason. From reading of all three conditions together it is clear beyond doubt that ***Licensee has a right to receive initial spectrum (4.4 MHz + 4.4 MHz or 2.5. MHz + 2.5 MHz, as the case may be) and Government is within its right to change the procedure for further spectrum assignment. Government is under no obligation to assign spectrum beyond this free of cost, or, without auction."*** *(emphasis supplied)*

It appears that the same impression as highlighted in the above recommendation has been carried forward in Telecom Commission (TC) and EGoM decisions which clearly state that all spectrum beyond start-up spectrum will be charged. We therefore find it appropriate to examine the reasons advanced by the committee. We have already dealt with the point raised above partly in paras 11 and 12 above. The committee's reasoning is that since spectrum beyond start-up and up to 2.5 Mhz (CDMA) / 4.4 Mhz (GSM) is allocated on consideration of optimal and

efficient utilization of already allocated spectrum, only start-up spectrum can be received free of cost by the licensee. We find no such provision or conclusion, implicit or explicit, in the clause 43.5 cited above. The clause merely provides condition for **allocation** of spectrum beyond start-up and up to the maximum stipulated quantity. This condition of "optimal and efficient utilization of already allocated spectrum" does not make any start-up spectrum free or spectrum beyond this and up to contracted quantity chargeable. No such linkage is shown anywhere in the license conditions. Committee's reliance on 43.5(iv) is also misplaced since it gives the right to modify and or amend the "**procedure of allocation of spectrum including quantum of spectrum"** only. Stretching this right to modify and or amend the already specified pricing of the access spectrum would be a case of stretching the imagination. We thus find the above conclusion of the committee as misplaced.

16. TC decision does not give any independent reason for the impugned demands but only alludes to clause 23.5 which we have dealt with. Minutes of the meeting of EGom dated 18-10-2013 acknowledge (indirectly, to be fair) that the entry fee paid by the licensees was for the entire 6.2. Mhz when they observe that *"6. ...The rate per Mhz to be levied would be the 2001 entry fee divided by*

6.2, duly indexed using SBI PLR and pro-rated, for the period from July 2008 upto the date of applicability of auction determined price". This appears to be contrary to the stand that entry fee was only for 4.4 Mhz and additional spectrum beyond it should be charged. However, EGoM minutes do throw some more light on this issue and we list below the main reasons given for taking such decision:

i. Existing telecom Operators who had not already been allocated the Contracted Spectrum (up to 6.2. MHZ/5 MHz) would demand the allotment of the balance spectrum up to up to 6.2. MHZ/5 MHz;

ii. Allotment of the remaining/balance Spectrum to these telecom operators without levy of a market rate, might not be consistent with the decision of the Hon'ble Supreme Court in the 2G Case.

iii. Not charging existing holders of 6.2/5 MHz for spectrum beyond 4.4/2.5 MHz would imply foregoing revenue of Rs. 14,100 crores.

iv. To maintain a level playing field OTSC ought to be levied even on existing telecom operators who had already been allocated the Contacted Spectrum up to 6.2 MHz.

Reason (i) is simply a deduction from the provisions in the contract indicating the contracted spectrum. Reason no. (ii) listed above is not relevant in this petition

since the petitioner had already been allocated the contracted spectrum. Reason (iii) relates to financial implication. Minutes of EGoM meeting indicate that if telecom operators like the petitioner holding spectrum of 5/6.2 Mhz are not charged for their holding beyond 2.5/4.4 Mhz, it would imply foregoing revenue of Rs 14,100 Cr. which will not be in public interest. Mr. Maninder Singh terms this as an exercise in extraction or to be more polite revenue maximization by the respondent. He further submits that revenue maximization does not mean public interest and cites *Special Reference No. 1/2012: In Re. : Natural Resource Allocation – (2012) 10 SCC 1 (para 116 to 120)* in support. If the State is trying to realize the revenue that is lawfully due, even belatedly, it may be an act of revenue realization and not maximization. However, statement of financial implication of an action does not by itself justify the action or makes it in public interest. It needs to be demonstrated that such revenue is lawfully due or unlawfully withheld by the petitioner. Respondent merely relies on its assumption that OTSC is not payable only for start-up spectrum. Other than this misplaced belief, we find no other justification or detail. Reason (iv) above talks about "level playing field" problem which arises from the EGoM's own decision that new allotments of spectrum from 2.5/4.4 Mhz to 5/6.2 Mhz should be charged. While we are not examining the legality of such a decision as not being part of this

petition, it is difficult to be persuaded that putting burden on one can justify putting burden on another. In any case, whether the principle of level playing field is applicable to justify such action needs to be tested. Mr. Maninder Singh contends that level playing field includes significance of "Time". Different entities differentiated by facts owing to "Time" element cannot be equated and it will be impermissible to apply same yardsticks to all such entities. We find no discussion or reason for applying a selective yardstick of OTSC to all, except for a statement of difficulty as a justification. In facts of the case, we are therefore not persuaded to accept Mr. Kurup's submission that the respondent's decisions including EGoM minutes of meeting dated 18-10-2013 provide enough reasons and justification for respondent's impugned orders in public interest.

17. Mr. Kurup further argues that the Hon'ble Supreme Court has upheld the Government's power of modification in a contract due to change in the prevailing policy (*Essar Steel Limited v. Union, 11 SCC 1)*. He refers to the press statement dated 29-1-2011 on "Policy for Spectrum Assignment and Pricing". This document notes that earlier policy paid rich dividend but needs to be revised. It hints at shift in policy to market driven process for allocation of spectrum and also that

spectrum will not be bundled with license. Relevant observation related to this case is extracted below:

"In future, the spectrum will not be bundled with license. ... In the event the license holder would like to offer wireless services, it will have to obtain spectrum through a market driven process. In future, there will be no concept of contracted spectrum and, therefore, no concept of initial or start-up spectrum. Spectrum will be made available only through market driven process.

.....

While moving towards a new policy dispensation, it is necessary to ensure a level playing field between all players. Hence going forward, any new policy of pricing would need to be applied to equally to all players. Additionally, assignment of balance of contracted spectrum may need to be ensured for the existing licensees who have so far been allocated only the start-up spectrum of 4.4 MHz. It may be recalled that show cause notices have been issued to certain licensees for cancellation. Only in respect of the licenses that will be found valid after the process is completed, the additional 1.8 MHz will be assigned on their becoming eligible, but the spectrum will be assigned to them at a price determined under the new policy."

This part of the policy statement explicitly does not deal with the situation where additional 1.8 Mhz has already been allotted. However, applying the pricing principle equally would imply charging for the allocated 1.8 Mhz also. This is the same view that has been adopted by EGoM and we have dealt with it already. We also note that as per TRAI Act, in the matter of modification in pricing of spectrum, TRAI needs to be consulted. A policy statement can at best initiate such a process. No doubt, such a process has been followed and we have recounted and dealt with it in detail in preceding paras.

18. We now revert back to clause 5 to consider another submission of Mr. Kurup to justify that the impugned orders were really in the nature of public interest. Mr. Kurup contends that the petitioners had not paid for the "intrinsic" value of the spectrum, a valuable natural resource held by the State in trust for the people of India. As such, this value had to be recovered in the public interest. There can be no cavil to the principle that spectrum is a scarce and valuable resource held by State in trust for people of India and that such value needs to be realized in public interest. Spectrum, by its inherent characteristics, helps people to communicate, thereby enhancing economic activities. This in turn adds to its own economic value. The "intrinsic" value of spectrum thus has both tangible and intangible part. Mr. Maninder Singh brings to our attention intangible benefits that accrue from speedier growth of telecommunication. Mr. Kurup wants us to look at tangible value of spectrum in terms of market price. A successful State policy generally balances the two aspects and keeps evolving over a period of time to keep the balance right. In this context, let us look at the "intrinsic" value of the spectrum that Mr. Kurup insists should be realized following the spirit of 2G judgment. According to Mr. Kurup, in addition to a variable value (annual revenue share like SUC and license fee), the intrinsic value is a fixed value (OTSC), derived

from an auction so that it is reflective of the market value. While an auction is certainly reflective of the market value, its yield is a function of time, market condition, technology and design of the auction itself apart from many other factors. Mr. Salman Khurshid informs us that some licenses of the petitioner were obtained after bidding pursuant to tenders invited by the respondent. Though majority of the licenses of the petitioner have not been issued through any bidding process but the petitioner has paid similar entry fee (and license fee and SUC in addition) at the time of migration to UASL regime which had linkage to the then market value. Respondent could have made provision in the license for escalation in value but we find no such provision in the license. Such licences have not been held to be void or illegal or un-enforceable. Therefore, according to Mr. Salman Khurshid, raising new demands mid-way due to policy shift is arbitrary and not in public interest. Mr. Maninder Singh reminds us of "Time" relevance while assessing and comparing a proposition like market value or intrinsic value which we have earlier taken note of. There is no denying that factors affecting market value like policies, design of bids or contract, technology, growth potential etc. all have time dependency. Mr. Maninder Singh further argues that applying future auctions to the past concluded and valid contracts is a classic case of shifting the goalpost, not permissible in law and also not in public interest. In facts

of the case, we do not find the submission on "intrinsic" value advanced by Mr. Kurup as tenable.

19. In view of the discussion in paras above, we are of the considered view that the respondent has not been able to justify its stand in respect of charging beyond the start-up spectrum but limited up to the contracted spectrum. On this issue the contentions advanced by Mr. Salman Khurshid and Mr. Maninder Singh are found to have more merit. Accordingly, we set aside the impugned orders and demands for OTSC on spectrum allotted beyond the start-up spectrum and up to the contracted limit of 5 Mhz (CDMA) / 6.2 Mhz (GSM), except in case of Bihar Circle.

20. Before concluding, we take up the issue of Bihar circle where spectrum allocated is admittedly more than 6.2 Mhz. Petitioner informs that it has later on surrendered the spectrum in excess of 6.2 Mhz to DoT but that matter is under litigation. We are also informed that the issue of OTSC in case of licensee holding more that contractual spectrum is also a subject matter of pending petitions by other telecom operators. In facts of the case, we find it prudent to maintain status quo in respect of OTSC demands for Bihar Circle, with liberty to both the

parties to take appropriate action in accordance with law, as and when pending legal issues are settled.

21. In case of T.P. 220/2018, there is no prayer regarding Bank Guarantee. However, prayer (vi) in Petition 219/2018 is for return of the Bank Guarantees of Rs 2000.1 Cr furnished by RCoM to securitize the OTSC dues. Entitlement for release of these Bank Guarantees is a clear consequence of the above findings. However no specific direction for release is required in view of such direction being already a part the Order dated 3-7-2018 passed by this Tribunal in T.P. No. 32/2016. Therefore, in respect of these Bank Guarantees, we do not think it necessary to pass any further order.

22. TP 219/2018 and TP 220/2018 are partly allowed in terms of directions in para 19, 20 and 21 above. No costs to either parties.

[redacted]

(S.K. Singh, J)
Chairperson

[redacted]

(A.K. Bhargava)
Member