

TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL
NEW DELHI

Dated 31st July, 2019

R.A. No. 3 of 2019

in

Telecommunication Petition No. 56 of 2015

Bharti Airtel Limited.

Vs.

Union of India

... Petitioner

... Respondent

R.A. No. 4 of 2019

in

Telecommunication Petition No.6 of 2017

Bharti Airtel Limited and Anr.

Versus

Union of India

...Petitioners

... Respondent

R.A. No. 5 of 2019

in

Telecommunication Petition No.55 of 2018

Bharti Airtel Limited

Versus

Union of India

...Petitioner

... Respondent

R.A. No. 6 of 2019

in

Telecommunication Petition No.181 of 2018

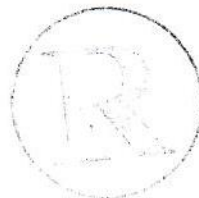
BhartiAirtel&Anr.

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... Respondent



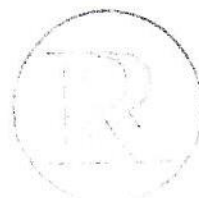
BEFORE:**HON'BLE MR. JUSTICE SHIVA KIRTI SINGH, CHAIRPERSON****HON'BLE MR. A.K. BHARGAVA, MEMBER**

For Petitioners : Mr. Ramji Srinivasan, Sr. Advocate
Mr. Harsh Kaushik, Advocate
Mr. Abhay Chattopadhyay, Advocate
Ms. Nikita Chitale, Advocate
Mr. Nikhil Ramdev, Advocate

For Respondent : Mr. Vikramjit Banerjee, Ld. ASG
Mr. Abhay Prakash Sahay, Advocate
Ms. Shruti Agarwal, Advocate
Ms. Sadapurna Mukherjee, Advocate

ORDER

A. K. Bhargava – TP No. 56/2015, 6/2017, 55/2018 and 181/2018 relate to the question of merger of petitioner companies and a combined judgment in these petitions was delivered by this Tribunal on 19-3-2019. Subsequently, Review Applications No. 3/2019, 4/2019, 5/2019 and 6/2019 have been preferred in respect of these petitions. Since mostly common issues are involved, a single order is being passed in bunch of these review applications as well. For the sake of convenience, RA 6/2019 arising out of TP 181/2018 will be generally referred to, unless specified.



2. Petitioner's grievance in TP 181/2018 arises out of the impugned letter issued by the respondent on 17-8-2018 which contains many conditions for taking on record the merger of M/s Bharat digital Networks Private Limited (BDNPL) with M/s Bharati Airtel Limited (BAL). These conditions mostly emanate from the "Guidelines for Transfer/Merger of various categories of Telecommunication service licenses /authorization under Unified License (UL) on compromises, arrangements and amalgamation of the companies" issued by the respondent (DoT) on 20-2-2014 (referred to as guidelines hereinafter) . Petitioner has challenged some of the conditions from impugned order dated 17-8-2018 as well as from the guidelines dated 20-2-2014.

3. The prayers made by the petitioner in TP 118/2018 are as follows

(i) *Set aside and quash the Impugned Conditions, i.e. Condition No. (a), (b),(c), (e), and (g), as contained / imposed vide the Respondent's communication dated 17.08.2018.*

(ii) *set aside and quash the following specific provisions of Clause 3 (i) of the "The Guidelines for Transfer/Merger of various categories of Telecommunication service license / authorisation under Unified Licence ("UL") on compromises, arrangements and amalgamation of the companies" dated 20.02.2014:*

"... In the event of judicial intervention in respect of the demands raised for one time spectrum charges in respect of spectrum holding beyond 4.4 MHz in GSM band / 2.5 MHz in CDMA band before merger in respect of transferee (i.e. acquiring entity) company, a bank guarantee for an amount equal to the demand raised by the Department for one time spectrum charge shall be submitted pending the final outcome of the court case."

(iii) *set aside and quash the following specific provisions of Clause 3 (m) of the "The Guidelines for Transfer/Merger of various categories of Telecommunication service license / authorisation under Unified Licence ("UL") on compromises, arrangements and amalgamation of the companies" dated 20.02.2014:*

"... The one time spectrum charge shall be payable as per provisions in Para 3 (i) above of these guidelines."

(iv) *Direct the Respondent to forthwith take on record the merger of the Petitioner No.1 and Petitioner No.2 companies and their respective licenses i.e. Unified Access Service Licenses and the ISP Category "A" service authorization under Unified License in the LSAs of Gujarat,*



Himachal Pradesh, Uttar Pradesh (East) and Uttar Pradesh (West) and allow the Petitioner No.1 to operationalize the BWA spectrum in 2300 MHz band of the Petitioner No.2 in the aforesaid LSAs forthwith;

- (v) Hold and declare that the restrictions under clause 5 of the Unified Guidelines dated 19.08.2013 i.e. regarding crossholding not to exceed a one year period, will not apply to the Petitioners in the facts and circumstances of the present case and also the time period consumed in prosecuting the Company Petition No. CAA - 31 (PB) of 2018 until the Impugned Letter dated 17.08.2018 and time period consumed in prosecuting the present Petition shall not be counted while determining the one year period under clause 5 of the Unified Guidelines dated 19.08.2013 and thus no penalty can be imposed upon the Petitioners on this account;
- (vi) Permit the Petitioner to make the necessary filings with the Registrar of Companies in respect of the merger of Petitioners;
- (vii) Grant compensation to the Petitioners as this Hon'ble Tribunal deems fits and proper and in the facts and circumstances of the present case;
- (viii) Pass such or any other order(s) in the facts and circumstances of the case."

4. Petitioner had also made interim prayers seeking stay of impugned conditions a, b and c and consequential relief. This Tribunal had vide order dated 30-8-2018 granted following interim relief to the petitioner

"...Having considered the entire facts and circumstances, we are persuaded to pass interim order in favour of the petitioner on the same terms as in the orders passed earlier on three occasions. Accordingly, we direct the concerned authorities of the Union of India to take the merger of two companies and license on record, subject to the under mentioned conditions and the final result of this petition:

1. The petitioner will be free to operationalize the spectrum subject to filing of an undertaking before this Tribunal that in case the petition fails, it shall pay to the Union of India a sum of Rs.185.625 crores [(as demanded in para (a)] of the impugned communication dated 17.8.2018 along with interest as may be determined by the Tribunal, within eight weeks' from the date of the final judgment.
2. The petitioner will abide by the rest of the terms and conditions imposed upon it by the impugned communication (Annexure P-1) subject to the following modifications:
 - (i) The stipulation as made in para (b) of the letter will remain stayed because it appears contrary to the order passed by the Bombay High Court.



(ii) The petitioner will submit the undertaking as demanded in para (c) and (e) of the impugned letter. But it is made clear that any condition of the undertaking or any omissions therefrom shall be without prejudice to the rights and contentions of the parties before the Tribunal and the validity of the conditions of the undertaking / omissions therefrom will abide by the final outcome of the petition.

(iii) The requirement indicated in para (g) of the letter will be treated to have been complied with till the matter is finally adjudicated.

This interim order shall govern the parties till it is vacated or modified after considering any further or new materials which may be brought on record on behalf of the respondent."

5. Consequent to the judgment dated 19-3-2019, petitioner filed a review application no. 6/2019 on 3-4-2019. The prayers made in the RA No. 6/2019 arising out of TP No. 181/2018 are as follows:

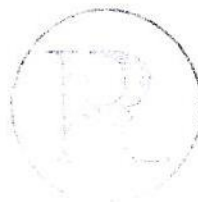
(a) Review / clarify the judgment dated 19.3.2019 passed in the present petition and hold that the conditions (b), (c), (e), Annexure III and (g), of the respondent's letter dated 17.08.2018, stand quashed and the prayers (i), (ii), (iii), (iv) and (iv) in the present petition i.e. 181 of 2018 stand allowed.

(b) Pass such or any other orders in the facts and circumstances of the case.

6. Petitioner also seeks review/clarification in respect of Para 3 of the Judgment dated 19-3-2019 which is as follows

"Since the merger has already been effected after long and arduous legal process, many of the prayers from the aforementioned long list are not relevant today. Some demands like BG for OTSC are a subject matter of other pending litigation. Accordingly, learned senior counsel for the petitioner has pressed remaining issues, mainly that pertaining to demand towards difference in entry fee. Learned ASG appearing for the respondent has also mainly addressed us on the issue of difference in the entry fee. We are therefore confining our findings to the issue of difference in entry fee in respect of these petitions."

7. Petitioner further contends that though the merger was taken on record by the respondent under the interim order dated 30-8-2018 of this Tribunal subject



to final outcome of the present petition, the respondent has not issued the final letter "taking on record the merger" as yet. Even though the merger has been effected under interim order, all the prayers of the petitioner remain relevant and hence the need and urgency for review.

8. At the outset we agree that Para 3 of the judgment dated 19-3-2019 contained error in some statements and that the judgment dated 19-3-2019 did not deal comprehensively with all the prayers made in the petition. Prayers made in the Review Application reflect those gaps. Accordingly, we direct that Para 3 and the observations/directions of the judgment dated 19-3-2019 should be read together with the observations/clarification/directions contained in this review order.

9. The conditions b, c and the proforma undertaking of impugned order (referred to as impugned conditions hereinafter) arise out of some clauses in Merger Guidelines dated 20-2-2014 that the petitioner wants quashed or made inapplicable. These clauses have been referred to in prayers (ii) and (iii). Accordingly, we shall examine these clauses of the guideline and impugned conditions together.

10. Impugned condition (b) challenged in prayer (i) of the petition is as follows

"(b) M/s. BAL shall submit a Bank Guarantee towards One Time Spectrum Charge (OTSC) for Rs. 1441.27 Crore towards the spectrum holding beyond 4.4. MHz in GSM band as per the clause 3(i) and 3(m) of the Merger & Acquisition Guidelines dated 20.02.2014 in the prescribe format enclosed as Annexure – I. Details of the afore-mentioned OTSC are enclosed as Annexure – II."



Clause 3(i) and 3 (m) of the merger guidelines as challenged in prayer (ii) and (iii) of the petition are also reproduced below

Clause 3(i)

"... In the event of judicial intervention in respect of the demands raised for one time spectrum charges in respect of spectrum holding beyond 4.4 MHz in GSM band / 2.5 MHz in CDMA band before merger in respect of transferee (i.e. acquiring entity) company, a bank guarantee for an amount equal to the demand raised by the Department for one time spectrum charge shall be submitted pending the final outcome of the court case."

Clause 3(m)

"... The one time spectrum charge shall be payable as per provisions in Para 3 (i) above of these guidelines."

11. Petitioner in RA 6/2019 submits that it has pleaded as to how the impugned condition (b) is bad in law in para 1(b), 3, 4(b) (i) - (viii), 5, 6, and 30(T-DD) of the petition. A careful perusal of these pleadings and the submissions in RA shows that the petitioner's concern is the bank guarantee (BG) for one time spectrum charges (OTSC). Mr. Srinivasan, learned senior counsel for the petitioner, makes submissions at two levels. He first questions the validity of clause 3(i) and 3(m) in the merger guidelines, which allow the respondent to ask for BG for OTSC in cases where judicial intervention is there. He submits that by this provision, respondent seeks to do indirectly what cannot be done directly. This, being a case of overreach of the judicial process, must be held as untenable and such clause should be set aside. Mr Srinivasan then points out that the demand for OTSC was challenged before the Hon'ble High Court of Bombay by *W.P No. 184/2013*, in which a clear interim order dated 28-1-2013 has been passed in petitioner's favour. Therefore, the respondent was not entitled in law to bypass the said order by seeking to securitize the said amount by way of BG in order to take the merger on record. He also cites this Tribunal's order dated 3-7-2018 in **TP 32/2016**



Reliance Communication vs. Union of India, in support of his arguments. He thus submits that the respondent is not entitled in law to overreach the order of Hon'ble High Court of Bombay and make securitization of the said amount by means of BG as a condition precedent to take merger on record.

12. Learned ASG Mr Vikramjit Banerjee and learned counsel Mr A. P. Sahay, appearing for the respondent DoT, also make submissions at two levels. They first defend the validity of relevant clauses in the merger guideline and then proceed to distinguish the interim orders of Hon'ble High Court of Bombay from that of *Reliance vs. Union* case in TP 32/2016 to oppose relief to the petitioner in respect of BG for OTSC.

13. Mr Sahay submits that the merger guidelines under question have been framed by the Government pursuant to policy decision which is not amenable to the present jurisdiction before this Tribunal. He stresses that policy formulation is under the purview of Central Government and the Courts do not usually interfere in such policy decisions. Mr Sahay relies upon the Hon'ble Supreme Court judgment in ***State of Punjab vs. Lubhaya Bagga, 1998(4) SCC 117 at 129*** "*when Government forms its policy, it is based on a number of circumstances on facts, law including constraints based on its resources. It is also based on expert opinion. It would be dangerous if Court is asked to test the utility, beneficial effect of the policy or its appraisal based on facts set out on affidavits. The Court would dissuade itself from entering into this realm which belongs to the executive.*" Mr. Sahay cites another case of ***State of M.P vs. Nandlal, (1986) 4 SCC 566***, in which the Hon'ble Supreme Court ruled that "*the Court must while adjudging the constitutional validity of an executive decision relating to economic matters grant*



a certain measure of freedom or 'play in the joints' to the executive... the Court cannot strike a policy decision taken by the State Government because it feels that another policy decision would have been fairer or wiser or more scientific or more logical. The Court can interfere only if the policy decision is patently arbitrary, discriminatory or malafide." Mr. Sahay further cites **UOI Vs. Assn. of Unified Telecom Service Providers of India; 2011 (10) SCC 543**, wherein the Hon'ble Supreme Court has held at Para 47 that *"...tribunal has no jurisdiction to decide upon the validity of the terms and conditions incorporated in the license of a service provider, but it will have the jurisdiction to decide 'any' dispute between the licensor and the licensee on the interpretation of the terms and conditions of the licence."* Mr Banerjee points out to provisions in clause 6 of the UL agreement that merger and acquisitions as well as transfer of licenses shall be subject to the guidelines issued from time to time by the licensor. He further submits that spectrum being a valuable and scarce natural resource, it is well within powers of the respondent to impose necessary and reasonable conditions to protect its interest. The condition of BG for OTSC needs to be looked at from this perspective and not as an attempt to overreach the judicial process. In this regard he also cites order dated 10-10-2014 of Hon'ble Madras High Court in **Aircel Ltd. Vs. Uoi bearing WP No. 9220-9221/2014** and claims that impugned condition b is in consonance with the ratio of this order. The said order was upheld by Division Bench of Madras High Court. Thereafter, it was challenged before the Hon'ble Supreme Court and no stay order was granted by the Apex Court.

14. There is clarity on both sides that this is not a case of statutory provision or a contractual obligation. Entities desiring merger need to seek approval of DoT



because these entities do not own the spectrum but have been given the right to use. They are also mandated to operate only under a licence granted by the respondent. DoT permits the merger of licenses under UL as per these policy guidelines, thereby serving the public interest in general and consumer interest in particular. Under these circumstances, it is natural that the approval for merger by DoT is expected to involve certain diligence and would not be mechanical or mere procedural as urged by Mr. Srinivasan. Demands and dues related to license and spectrum, and DoT's anxiety to securitize such demands and start on a clean slate, can be legitimately considered a part of this diligence. From that perspective, such conditions *per se* cannot be termed as arbitrary, discriminatory or malafide so as to warrant the extreme step of quashing such clauses. Mr Srinivasan however relates the meaning of "judicial intervention" in clause 3(i) to the stay on OTSC demands and wants clause 3(i) to be set aside for disregarding the judicial orders. We are aware that the conditions in a policy guideline are framed in general terms covering various scenarios and are to be made applicable after taking into account the facts of the case. Clause 3(i) and 3(m) in merger guideline are general in nature and do not presuppose judicial intervention of a specific kind. Hence, we find no need to quash or set aside clause 3(i) and 3(m) of the merger guideline. Accordingly, prayers (ii) and (iii) of the petition are disallowed.

15. Having said that, we hasten to add that application of such clauses cannot be at the cost of lawful rights of the other party and therefore such clauses are always open to interpretation depending on the facts of the case. This Tribunal has indeed interpreted a similar situation in its order dated 3-7-2018 passed in TP

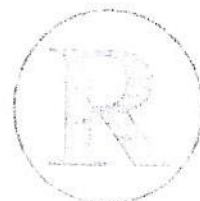


32/2016 wherein the need for submitting BG for OTSC for liberalisation of spectrum was dispensed with since the OTSC demands had been stayed by Hon'ble Calcutta High Court. Mr. Vikramjit Banerjee, learned ASG, at this stage points out a distinction between these two cases. He submits that in the *Reliance* case, there was a specific stay granted by the Hon'ble Calcutta High Court. In the present case Hon'ble Bombay High Court has only directed DoT not to take any coercive measure against the petitioner and the same cannot be read as stay of the demands towards OTSC. We find no substance in such hair splitting since the spirit of the orders and consequent result in both the cases is same. Mr Banerjee further relies on *Vodafone vs. Uoi in TP 198/2018* wherein this Tribunal vide order dated 21-1-2019 directed DoT to return some BG demanded by DoT as condition for merger, on the basis of stay order dated 24-1-2013 as passed by the Hon'ble Bombay High Court in WP (L) No. 168/2013. The Tribunal's order dated 21-1-2019 was challenged by DoT in the apex court. Through the order dated 8-7-2019, Hon'ble Supreme Court was pleased to admit the matter and stayed the order dated 21-1-2019 passed by this Tribunal. Mr Srinivasan however points out that the *Vodafone* case differs from the present case on facts since Vodafone had voluntarily decided to submit the BG for OTSC and was seeking refund later. On the other hand, he points out a similar case of merger involving the petitioner in TP 55/2018 (under consideration here), wherein, the respondent has been specifically prohibited from enforcing *inter alia* the impugned condition, until disposal of the said petition. Respondent challenged that order dated 10-4-2018 before the Apex Court in SLP (c) No. 11744 of 2018 which was dismissed by the Hon'ble Supreme Court vide its order dated 9-5-2018. We also find Mr Banerjee's reliance on Madras High Court order dated 10-10-2014 in *Aircel* case a little



misplaced. We have conceded that in case of merger and acquisition, DoT can as a policy seek securitization in case of judicial interventions. However, specific judicial orders need to be respected and therefore application of such general conditions cannot be without application of mind and "general" must be distinguished from "specific". If the effect of the judicial intervention is to make those demands "*non est*", securitization of those specific "*non est*" demands would not be sustainable. Orders of the court must be respected across the board, at all times, by all parties. In facts of the case, we are inclined to hold that the demand for BG as made in the impugned condition (b) is not sustainable, being contrary to the orders of the Bombay High Court.

16. Before leaving the issue of BG for OTSC, we notice the submissions in Para 4(b) (vi) of this petition. This para mentions that respondent vide demand letter dated 27-6-2018 has issued OTSC demands on Petitioner No. 1 amounting to Rs. 8414 Cr. in respect of spectrum holding beyond 4.4 Mhz. Petitioner submits that the revised demand is fully covered by the order passed by the Hon'ble High Court of Bombay dated 28-1-2013 since it is merely a recalculation and the basis of the imposition continues to remain stayed. We are unable to draw such conclusion since appropriate forum for pleading this is with the Hon'ble Bombay High Court. Mr. Srinivasan also brings to our attention this Tribunal's judgment dated 4-2-2019 in TP 219/2018 wherein OTSC demand for spectrum holding between 4.4 Mhz and 6.2 Mhz was held to be unsustainable. We are, however, unable to apply this to the present case so as to draw an inference amounting to modification of status of the OTSC demands challenged in Bombay High Court. Our clarification in para 13 in respect of impugned condition (b) is thus qualified



to the extent of specific restrain orders for specific amounts by the Bombay High Court.

17. In the facts of the case, we therefore hold that the respondent is not entitled to seek BG in respect of those specific OTSC demands in respect of which Hon'ble Bombay High Court has directed the respondent not to take any coercive action.

18. Impugned conditions (c) and (e) along with Annexure III, challenged in prayer (i) of the petition, are as follows

"(c) All demands relating to the licenses of the merging entities (viz. M/s. BDNPL and M/s. BAL) shall be cleared by any of the merging entities before taking the merger on record.

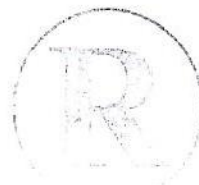
(e) M/s. BAL shall submit an undertaking to pay all past demands inclusive of anything remained unpaid of the past period in respect of M/s. BDNPL and M/s. BAL subject to the outcome of judicial process as per the prescribed format enclosed as Annexure – III"

19. Petitioner in the review application submits that it has pleaded as to how the impugned condition (c), (e) and Annexure III are bad in law in para 1(c), 4 (c, e) (i) – (iv), 6 and 30(EE-NN) of the petition. Careful perusal of these pleadings and the submissions in RA shows that the petitioner's concern is the unconditional undertaking asked by the respondent which it finds as offensive, being unreasonable, unfair and unjust. Mr. Srinivasan, learned senior counsel for the petitioner submits that the unconditional undertaking as is being sought by the respondent amounts to coercing the petitioner to give up all his rights to challenge the demands made by the respondent in a Court of Law and instead accept all demands of the respondent, present and future. It also seeks to make respondent the sole arbiter of all disputes, present and future. He submits that



this is clearly in teeth of section 28 of the Indian Contract Act 1872. He relies upon the judgment of the Hon'ble High Court of Bombay in **Hutchinson Global Services Pvt. Ltd. vs. DoT** wherein it held that *"...there can be no question of the petitioner being directed to furnish the undertaking to deposit the said amount as directed by the impugned order dated 27th February 2013 unconditionally. That would deprive the petitioner the right to challenge the orders if any in this regard"*. He also cites this Tribunal's order dated 19-11-2014 in **TP 499/2014** wherein it held that *"... the petitioner will submit the undertaking for obtaining the Unified License as may be asked for by the respondent. It is, however, made clear that any condition of the undertaking or any omission therefrom, shall be without prejudice to the rights and contentions of the parties before the Tribunal and the validity of the conditions of the undertaking/omissions therefrom as also certain provisions of the unified license will abide by the final outcome of the petition..."* Mr A. P. Sahay, learned counsel for the respondent, merely states that it is the petitioner who is approaching the respondent for merger with open eyes. He asserts respondent's power to ask for and put any restrictions, including for an unconditional undertaking under the guideline, if the petitioner chooses to opt for merger. He, however, obliquely mentions that such undertaking will be subject to judicial process.

20. A careful perusal of the undertaking reveals that some parts of the undertaking are indeed of a sweeping nature, requiring petitioner's apprehensions to be taken note of. Since this is a case of two entities merging into one, and since these entities have only a right to use the spectrum and not the ownership, we concede that the respondent may ask for suitable

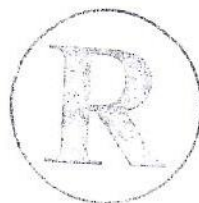


undertaking(s) relating to dues, demands and bank guaranties etc. However, by way of such undertakings, respondent can neither become sole arbiter of all disputes, nor can it deprive the petitioner of a fundamental right to seek lawful remedy. In facts of the case, we do not find it necessary to quash or edit the undertaking, but feel that it should be read with a clear understanding of petitioner's rights under the law. We therefore hold that notwithstanding anything contained in the impugned undertaking, any condition of the undertaking shall be without prejudice to the rights and contentions of the parties before a Court of Law and the validity of such conditions of the undertaking shall be subject to the outcome of the judicial process.

21. Mr. Srinivasan further submits that the requirement to clear "all dues" has to be only for "lawful dues" and in consonance with the right of the petitioner to seek legal remedies. There is no doubt that the respondent can receive only lawful dues and that such dues have to be in consonance with the rights of any party to seek legal remedies. Having stated the obvious and having removed the impediment in regard to the undertaking, we find no need for further elaboration.

22. Impugned condition (g), challenged in prayer (i) of the petition, is as follows

"g. Pursuant to the completion of Share Purchase Agreement between BAL and BDNPL (formerly "TDNPL") in August 2017, the cross holding conditions as stipulated in clause 5 of Unified License guidelines dated 19.08.2013 (as amended from time to time) is applicable against M/s. BAL and M/s. BDNPL since August 2017 for holding Access Spectrum by both the Companies in same Service Area of Gujarat, Himachal Pradesh, Uttar Pradesh (East) and Uttar Pradesh (West) and accordingly the same shall be made consistent within a period of one year i.e. up to August, 2018"



23. Petitioner in its review application 6/2019 submits that it has pleaded as to how the impugned condition (g) is inapplicable and misleading in para 1(d), 4 (g) (i) – (v), 5, 6, 17-28 and 30(OO-VV) of the petition. Careful perusal of these pleadings and the submissions in RA show that the petitioner's concern arises on account of the way clause 5 of UL guideline and clause 3(b) of the merger guideline are being treated by the respondent. Clause 5 of the UL guideline dated 19-8-2013 is as follows

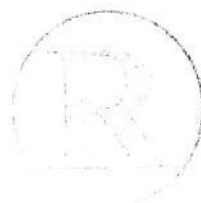
"In the event of obtaining access spectrum no licensee or its promoter directly or indirectly shall have any beneficial interest in another Licensee company holding access spectrum in the same service area. Any arrangement contrary to above shall be made consistent with the above within a period of one year from the date of grant of Unified License"

Clause 3(b) of the merger guideline is also reproduced below

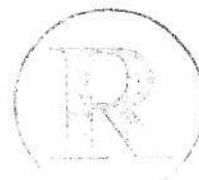
"A time period of one year will be allowed for transfer/merger of various licences in different service areas in such cases subsequent to the appropriate approval of such scheme by the Tribunal/Company Judge."

24. As per the dates of events provided by the respondent, BDNPL was purchased by BAL in the month of August 2017. It is further noted that NCLT sanctioned the merger scheme on 4-7-2018. BDNPL requested DoT to approve the merger On 16-7-2018. After a considerable delay, through the impugned letter dated 17-8-2018, DoT communicated its approval subject to fulfilment of certain conditions by the petitioner.

25. Petitioner's case is that it is in compliance with both the UL guidelines as well as merger guidelines in respect of cross holding and the respondent has wrongly imposed the impugned condition (g). Respondent on the other hand believes that



petitioner should have completed all compliances in regard to cross holding by August 2018 as per UL guideline and therefore the petitioner is already in default. Respondent contends that in such a case, merger approval cannot be granted, since condition (g) is not complied. We find such understanding of the respondent as flawed. Provision 5 in UL guideline and 3(b) in merger guideline are sequential in nature and time period accordingly should be counted in that sequence. Moreover, Clause 5 of UL talks of making arrangements to make cross holdings consistent with the provisions and not of specific approvals from DoT. In our considered view, both the provisions are interdependent and should be made consistent with each other in application. If purpose of such cross holding is the merger of two companies, such arrangements would include NCLT/High Court approval and then applying to DoT under the merger guidelines. Once application is made, deadline for approval will again be governed by the provision in the merger guideline and till such time is available to the petitioner, there need not be a conclusion that the arrangement is not consistent with the provisions of UL. Such conclusion can actually be drawn only when deadline as per the merger guidelines expires. In this case, petitioner had a deadline up to August 18 to comply with UL provisions. It obtained NCLT sanction on 4-7-2018 and applied to DoT on 16-7-2018 for approval. This was within the deadline of August 18. Having applied for the merger, clause 3(b) kicks in and provides for time up to August 2019. Thus, as explained earlier, impugned condition should have had timeline for compliance till August 2019. Petitioner has approached this Tribunal on 21-8-2018 after the respondent issued impugned order on 17-8-2018. Thus compliance can be effected only after final adjudication in this petition which is pending this



review. We therefore extend the time as given in impugned condition (g) by 12 weeks from the date of issue of order in this RA 6/2019.

26. We have so far adjudicated on prayer (iii), (ii) and (i) of the petition which was allowed in terms of our judgment dated 19-3-2019 for condition (a) and is now partially allowed in terms of our observation/direction in para above in respect of condition (b), (c), (e) and (g).

27. Prayer (iv) in the petition is to direct the respondent to take on record the merger of Petitioner1 and Petitioner2 companies and their respective licenses and to allow operationalisation of spectrum. The impugned order contains conditions which have been challenged and those which have not been challenged. DoT therefore needs to apply its mind in facts of the case and in light of our observations/clarifications/directions as contained herein together with our judgment dated 19-3-2019. This must be done expeditiously since the merger was taken on record under our interim order dated 30-8-2018. Accordingly, respondent is directed to consider petitioner's request for finally taking on record the merger, within 6 weeks in the light of our observations/clarifications/directions as contained in the RA 6/2019 together with our judgment dated 19-3-2019. Prayer (iv) is disposed of in these terms.

28. Prayer (v) in the petition is regarding cross holding. This issue has been discussed while dealing with impugned condition (g) in above paras. Prayer (v) is also disposed of in above term.



29. Prayer (vii) in the petition is for granting compensation to the petitioner. Although petitioner has included this prayer in the review application 6/2019, there are no relevant pleadings available in this regard in petition 181/2019. This issue has also not been specifically argued by the learned counsels from both sides. However, a similar prayer is made in TP 56/2015 as prayer (iii) and is mentioned in the RA 3/2019 as well. We find that some pleadings in this regard are made in para 58(OO-QQ) of the petition TP 56/2015 filed on 4-2-2015. Petitioner submits that inordinate and inexplicable delay, attributable to respondent due to failure to grant merger approval, has impaired launch of BWA/4G services resulting in loss. Petitioner also claims that impugned conditions are in breach of the contract and the guidelines and have caused loss and damage to the petitioner. We find these submissions of a general nature based on presupposition. No material has been supplied to substantiate such claims. In facts of the case, prayer (iii) of the petition 56/2015 and prayer (vii) of TP 181/2018 are disallowed.

30. To summarize, in reference to TP 181/2018 -

(a) Para 3 and the observations/clarifications/directions of the judgment dated 19-3-2019 should be read together with the observations/directions contained in this review order.

(b) Respondent is not entitled to seek BG in respect of those specific OTSC demands in respect of which Hon'ble Bombay High Court has directed the respondent not to take any coercive action.

(c) Notwithstanding anything contained in the impugned undertaking, any condition of the undertaking shall be without prejudice to the rights and



contentions of the parties before a Court of Law and the validity of such conditions of the undertaking shall be subject to the outcome of the judicial process.

(d) We extend the time as given in impugned condition (g) by 12 weeks from the date of issue of this order.

(e) Prayer (i) of the petition is thus partially allowed in terms of our observations/clarifications/directions above, along with our judgment dated 19-3-2019.

(f) Prayer (ii) and (iii) of the petition are disallowed.

(g) Respondent is directed to consider petitioner's request for finally taking on record the merger, within 6 weeks in the light of our observations/directions as contained in the RA 3/2019 together with our judgment dated 19-3-2019.

(h) Prayer (iv) and (v) of the petition are disposed of in above terms.

(i) Prayers (vii) in the petition is disallowed

31. Before concluding, we notice prayers in other linked petitions/RAs which are different in substance and deal with them as well in subsequent Para.

32. Prayer (ii) in TP 56/2016 is regarding the effective date of allocation of spectrum to offset the delay caused by the respondent. Although petitioner has mentioned this prayer in RA 3/2019, this issue has not been argued by the learned counsels from both sides. Pleadings in this regard are made in Para 58(HH-II). As per Para 58(HH), petitioner approached the respondent on 28-2-2014 for merger of licenses and respondent approved the merger vide letter dated 2-2-2015 and imposed certain illegal conditions (impugned conditions).

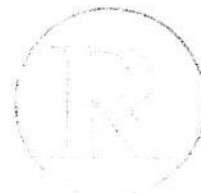


Petitioner alleges that this delay is completely attributable to the respondent and wants respondent to extend effective date of allocation of spectrum to offset the delay caused by the respondent. This argument presupposes that some of the conditions are illegal. We also find no such provision or vested right in the guidelines or license conditions for extending the effective date. In Para 58(II), petitioner relies upon this Tribunal's judgment dated 17-10-2012 in TP 341/2012 on the issue of "effective date" but does not elaborate as to how that is applicable in the case of merger. In facts of the case, we do not find this prayer sustainable. Accordingly, prayer (ii) in TP 56/2015 is disallowed.

33. Prayer (i) in TP 6/2017 also has an impugned condition (h) that is different and has also been mentioned in RA 4/2019 for quashing. This condition (h) is as follows:

"The scheme as approved by the respective High Court/Tribunal may be filed with the registrar of Company only after written approval of the Department of Telecom (the Licensor) for Transfer/merger of licenses from Transferor Company to Transferee Company."

A similar prayer (vi) is made in 181/2019 but not pressed in RA 6/2019. Such prayer however, is not part of the other two petitions. This issue has not been argued and the facts / current status in respect of this issue for all the four petitions are not made known. However, we take note of the corresponding pleadings in Para 37(FF-JJ) of TP 6/2017 in this regard. Petitioner's submission is that (i) respondent cannot insist upon any written approval to be issued by the respondent for filing the scheme with RoC under order dated 19-12-2016 of Delhi High Court (ii) respondent has firstly imposed illegal conditions a, b and e for approval and then is insisting that filing be made only after such approval, thus taking advantage of its own wrong (iii) order dated 19-12-2016 of the Delhi High



Court itself requires the petitioners to do the necessary filing within 30 days (iv) by imposing impugned condition h, respondent is trying to coerce the petitioner into complying with illegal conditions (v) through impugned letter dated 17-1-2017, the in-principle approval for the merger stands granted and hence no purpose will be served by obstructing the petitioners from proceeding with concerned filings before RoC. Respondent in reply submits in its defence that clause 4.7.1 of scheme of amalgamation stipulates that

"..Subject to the provisions of this scheme, this scheme shall become effective on the last of the following dates (" Effective Date") :

(a) The date on which the certified copies of the order of the Court approving this scheme are filed with the Registrar of Companies, National Capital Territory of Delhi and Haryana by the Transferor Companies and the Transferee Company; and

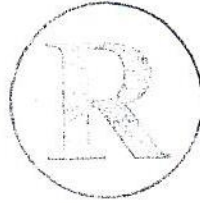
(b) Receipt of such other sanctions and approvals including sanction of any governmental authority (including the Securities and Exchange Board of India or the Department of Telecommunications) or stock exchanges as may be required by law in respect of the scheme being obtained"

Accordingly, respondent submits that vide Para 1(j) in letter dated 01.06.2016, it had already intimated to petitioner that approval of respondent will be necessary to file the sanctioned scheme of amalgamation in ROC. Respondent submits that above clause was never opposed by the petitioner. Hence same condition was also inserted in letter dated 17.01.2017 which appears as condition (h). We find that Hon'ble High Court in its judgment dated 19-12-2016 has taken note of DoT's letter dated 1-6-2016, dealt with "effective date" and has set out to state in Para 26 that *"....Consequently, sanction is hereby granted to the scheme under sections 391 to 394 of the Act. The company/petitioner will however, comply with the statutory requirements, in accordance with law."* In facts of the case, we find it sufficient to reiterate that the transferor/petitioner, as and when required, will



comply with the statutory requirements, in accordance with law. Impugned condition (h) in TP 6/2017 is disposed of with this observation.

34. RAs 3-6/2019 are disposed of in above terms.



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(S.K. Singh, J)
Chairperson

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(A.K. Bhargava)
Member

