

Supreme Court of India

Delhi Science Fortum & Ors vs Union Of India & Anr on 19 February, 1996

Equivalent citations: 1996 AIR 1356, 1996 SCC (2) 405

Author: S N.P.

Bench: Singh N.P. (J)

PETITIONER:

DELHI SCIENCE FORTUM & ORS.

Vs.

RESPONDENT:

UNION OF INDIA & ANR.

DATE OF JUDGMENT: 19/02/1996

BENCH:

SINGH N.P. (J)

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SINGH N.P. (J)

AHMADI A.M. (CJ)

VENKATASWAMI K. (J)

CITATION:

1996 AIR 1356

1996 SCC (2) 405

JT 1996 (2) 295

1996 SCALE (2)218

ACT:

HEADNOTE:

JUDGMENT:

(With W.P.(C) Nos. 716/95, 801/95, 818/95, 2/96, 3/96) WITH TRANSFER CASE NOS. 4 - 6 OF 1996

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(Arising out of Transfer Petition Nos. 304-307 of 1995) National Telecom Federation of Telecom Emnloyees & Ors.

V.

Union of India & Ors.

**J U D G M E N T** N.P. SINGH, J The petitioners in different writ petitions have questioned the power of the Central Government to grant licences to different non-Government Companies to establish and maintain Telecommunications System in the country and the validity of the procedure adopted by the Central Government for the said grant.

In February 1993, the Finance Minister in his Budget speech announced Government's intention to encourage private-sector involvement and participation in Telecom to supplement efforts of Department of Telecommunications especially in creation of internationally competitive industry. May 13, 1994 National Telecom policy was announced which was placed in the Parliament saying that the aim of the policy was to supplement the effort of the Department of Telecommunications in providing telecommunications services. Later, guidelines for induction of private-sector into basic telephone services were announced and a Committee was set up to draft the tender documents for basic telephone services under the Chairmanship of G.S.S. Murthy. Ministry of Communications published the 'Tender Documents for Provision of Telephone Service'. It specified and prescribed the terms and conditions for the basic services and it also conceived foreign participation but as a joint venture prescribing a ceiling on total foreign equity so far the Indian Company was concerned was not to exceed 49% of the total equity apart from other conditions.

Pursuant to the notice inviting tenders, tenders were submitted for different circles, but before licences could be granted by the Central Government, writ petitions were filed in different High Courts as well as before this Court. All writ petitions filed before different High Courts were transferred to this Court to be heard together.

Telecommunications has been internationally recognized as a public utility of strategic importance. The variety of Telecommunications services that has become available globally in the last decade is remarkable. It is being realized that economy is increasingly related to the way this Telecom infrastructure functions for purpose of processing and transmission of information, which has acquired central stage in the economic world today. The special aspect about Telecommunications is inter- connectivity which is known as 'any to any requirement'. Because of the economic growth and commercial changes in different Parts of the world, need for inter-connectivity means that communication systems have to be compatible with each other and have to be actually inter-connected. Because of this, there is a demand even in developing countries to have communication system on international standards. Even after several decades of the invention of the telephone system, in almost all countries Telecommunications was the subject of monopoly supplied with the public network operator normally being the State owned Corporation or Government Department. Then it was not thought due to different considerations that such right could be granted to private sectors denuding the right of the monopoly of the Government to maintain and run the system of Telecommunications. The developed countries first took decision in respect of privatization of Telecom which amounted to giving up the claim of exclusive privilege over such system and this led to the transition from monopoly to a duopoly policy in many countries. India, although a developing country also faced a challenge in this sector. By and large it was realized that this sector needed acceleration because of the adoption of liberalized economic policy for the economic growth of the country. It appears that the policy makers were faced with the implications for public welfare vis-a-vis the sector being capital intensive. How the network is well

maintained so as it reaches the largest number of people at a price to be paid by such users which can be held as reasonable? This issue was also inter-related with the defence and national security of the nation. Different committees and bodies constituted from time to time examined the Telecom policy which could be adopted by the nation from different aspects and angles.

The counsel appearing in some of the writ petitions questioned the validity and propriety of the new Telecom Policy itself on the ground that it shall endanger The national security of the country, and shall not serve the economic interest of the nation. According to them, telecommunication being a sensitive service should always be within the exclusive domain and control of the Central Government and under no situation it should be parted with by way of grant of licences to non-Government Companies and private bodies. The national policies in respect of economy, finance, communications, trade, telecommunications and others have to be decided by the Parliament and the representatives of the people on the floor of the Parliament can challenge and question any such policy adopted by the ruling Government. In the case of R.K. Garg etc. etc. v. Union of India & Ors., (1982) S.C.R. 347 a Constitution Bench of this Court said:

"Another rule of equal importance is that laws relating to economic activities should be viewed with greater latitude than laws touching civil rights such as freedom of speech, religion etc. It has been said by no less a person than Holmes, J. that the legislature should be allowed some play in the joints, because it has to deal with complex problems which do not admit of solution through any doctrinaire or straight jacket formula and this is particularly true in case of legislation dealing with economic matters, where, having regard to the nature of the problems required to be dealt with, greater play in the joints has to be allowed to the legislature. The court should feel more inclined to give judicial deference to legislature judgment in the field of economic regulation than in other areas where fundamental human rights are involved."

In *Morey v. Dond*, 354 US 457 Frankfurter, J said:

"In the utilities, tax and economic regulation cases, there are good reasons for judicial self-restraint if not judicial difference to legislative judgment. The legislature after all has the affirmative responsibility. The courts have only the power to destroy, not to reconstruct. When these are added to the complexity of economic regulation, the uncertainty, the liability to error, the bewildering conflict of the experts, and the number of times the judges have been overruled by events-self limitation can be seen to be the path to judicial wisdom and institutional prestige and stability."

What has been said in respect of legislations is applicable even in respect of policies which have been adopted by the Parliament. They cannot be tested in Court of Law. The courts cannot express their opinion as to whether at a particular juncture or under a particular situation prevailing in the country any such national policy should have been adopted or not. There may be views and views, opinions and opinions which may be shared and believed by citizens of the country including the representatives of the people in the Parliament. But that has to be sorted out in the Parliament which has to approve such policies. Privatization is a fundamental concept underlying the questions about the power to make economic decisions. What should be the role of the State in the economic

development of the nation? How the resources of the country shall be used? How the goals fixed shall be attained? What are to be the safeguards to prevent the abuse of the economic power? What is the mechanism of accountability to ensure that the decision regarding Privatization is in public interest? All these questions have to be answered by a vigilant Parliament. Courts have their limitations because these issues rest with the policy makers for the nation. No direction can be given or is expected from the courts unless while implementing such policies, there is violation or infringement of any of the Constitutional or statutory provision. The new Telecom Policy was placed before the Parliament and it shall be deemed that Parliament has approved the same. This Court cannot review and examine as to whether said policy should have been adopted. Of course, whether there is any legal or Constitutional bar in adopting such policy can certainly be examined by the court.

The primary ground of the challenge in respect of the legality of the implementation of the policy is that Central Government which has the exclusive privilege under Section 4 of the Indian Telegraph Act, 1885 (hereinafter referred to as the 'Act') of establishing, maintaining and working telegraphs which shall include telephones, has no authority to part with the said privilege to non-Government Companies for the consideration to be paid by such companies on basis of tenders submitted by them; this amounts to an out and out sale of the said privilege.

The expression 'telegraph' has been defined in Section 3(1):

"3(1) 'telegraph' means any appliance, instrument, material or apparatus used or capable of use of transmission or reception of signs, signals, writing, images and sounds or intelligence of any nature by wire, visual or other electromagnetic emissions, Radio waves or Hertzian waves, galvanic, electric or magnetic means.

Explanation - "Radio waves" or "Hertzian waves" means electromagnetic waves of frequencies lower than 3,000 giga-

cycles per second propagated in Space without artificial guide."

Section 4 of the Act is as follows:

"4. (1) Within India the Central Government shall have the exclusive privilege of establishing, maintaining and working telegraphs:

Provided that the Central Government may grant a licence, on such conditions and in consideration of such payments as it thinks fit, to any person to establish, maintain or work a telegraph within any part of India:

Provided further that the Central Government may, by rules made under this Act and published in the Official Gazette, permit, subject to such restrictions and conditions as it thinks fit, the establishment, maintenance and working-

(a) of wireless telegraphs on ships within Indian territorial waters and on aircraft within or above India, or Indian territorial waters and

(b) of telegraphs other than wireless telegraphs within any part of India.

(2) The Central Government may, by notification in the Official Gazette, delegate to the telegraph authority all or any of its powers under the first proviso to sub-

section (1).

The exercise by the telegraph authority of any power so delegated shall be subject to such restrictions and conditions the Central Government may, by the notification, think fit to impose."

There is no dispute that the expression 'telegraph' as defined in the Act shall include telephones and telecommunications services. Sub-section (1) of Section 4 on plain reading vests the right of exclusive privilege of establishing, maintaining and working telegraphs in the Central Government, but the proviso thereof enables the Central Government to grant licence, on such conditions and in consideration of such payments as it thinks fit, to any person to establish, maintain and work telegraph within any part of India. It is true that the Act was enacted as early as in the year 1885 and central Government exercised the exclusive privilege of establishing, maintaining and working telegraphs for more than a century. But the framers of the Act since the very beginning conceived and contemplated that a situation may arise when the Central Government may have to grant a licence to any Person to establish, maintain or work such telegraph including telephone within any part of India. With that object in view, it was provided and prescribed that licence may be granted to any person on such conditions and in consideration of such payments as the Central Government may think fit. If proviso to sub-section (1) of Section 4 itself provides for grant of licence on condition to be prescribed and considerations to be paid to any person, then whenever such licence is granted, such grantee can establish, maintain or work the telephone system in that part of India. In view of the clear and unambiguous proviso to sub-section (1) of Section 4, enabling the Central Government to grant licences for establishment, maintenance or working of telegraphs including telecommunications, how can it be held that the privilege which has been vested by sub-section (1) of Section 4 of the Act in the Central Government cannot be granted to others on conditions and for considerations regarding payments? According to us the power and authority of the Central Government to grant licences to private bodies including Companies subject to conditions and considerations for payments cannot be questioned. That right flows from the same sub-section (1) of Section 4 which vests that privilege and right in the Central Government. Of course, there can be controversy in respect of the manner in which such right and privilege which has been vested in the Central Government has been parted with in favour of private bodies. It cannot be disputed that in respect of grant of any right or licence by the Central Government or an authority which can be held to be State within the meaning of Article 12 of the Constitution not only the source of the power has to be traced, but it has also to be found that the procedure adopted for such grant was reasonable, rational and in conformity with the conditions which had been announced. Statutory authorities have some times used their discretionary power to confer social or economic benefits on a particular section or group of community. The plea raised is that the Act vests power in them to be exercised as

they 'think fit'. This is a misconception. Such provisions while vesting powers in authorities including the Central Government also enjoin a fiduciary duty to act with due restraint, to avoid 'misplaced philanthropy or ideology'. Reference in this connection can be made to the cases: Roberts v. Hopewood, (1925) A.C. 578; Prescott v. Birmingham Corporation, (1954) 3 All E.R. 698; Taylor & Ors. v. Munrow (1960) 1 All E.R. 455; Bromley London Borough Council v. Greater London Council and another, (1982) 1 All E.R. 129.

As such Central Government while exercising its statutory power under first proviso to Section 4(1) of the Act, of granting licences for establishment, maintenance and working of Telecommunications has a fiduciary duty as well. The new experiment has to fulfill the tests laid down by courts for exercise of a statutory discretion. It cannot be exercised in a manner which can be held to be unlawful and which is now known in administrative law as Wednesbury principle, stated in Associated Provincial Picture Houses Ltd. v. Wednesbury Corp, (1947) 2 All E.R. 680. The aforesaid principle is attracted where it is shown, that an authority exercising the discretion has taken a decision which is devoid of any plausible justification and any authority having reasonable persons could not have taken the said decision. In the case of Bromley LBC (supra) it was said by Lord Diplock:-

"Powers to direct or approve the general level and structure of fares to be charged by the LTE for the carriage of passengers on its transport system, although unqualified by any express words in the Act. may none the less be subject to implied limitations when expressed to be exercisable by a local authority such as the GLC ..... "

As such Central Government is expected to put such conditions while granting licences, which shall safeguard the public interest and the interest of the nation. Such conditions should be commensurate with the obligations that flow while parting with the privilege which has been exclusively vested in the Central Government by the Act.

A stand was taken that even if it is assumed that because of the proviso to sub-section (1) of Section 4, the Central Government can grant licences in respect of establishing, maintaining or working of telecommunications to Indian Companies registered under the Indian Companies Act, such power should have been exercised only after framing of rules under Section 7 of the Act. In support of this stand, attention was drawn to second proviso to sub-section (1) of Section 4 which says that 'the Central Government may, by rules made under this Act' permit subject to such restrictions and conditions as it thinks fit, the establishment, maintenance and working -

(a) of wireless telegraphs on ships within Indian territorial waters and on aircraft within or above India, or Indian territorial waters and

(b) of telegraphs other than wireless telegraphs within any part of India.

It was pointed out that clause (b) of the second proviso to sub-section (1) of Section 4 shall govern the grant of the licence under the first proviso to sub-section (1) of Section 4 as well because both provisos contemplate grant of licence/permit for telegraphs within any part of India to any person

by the Central Government. At first blush this argument appears to be attractive, but on closer examination, it appears that whereas the first proviso to sub-section (1) of Section 4 contemplates the grant of a licence, second proviso to be same sub-section (1) of Section 4 speaks about permitting establishment, maintenance and working of telegraphs other than wireless telegraphs within any part of India. It need not be pointed out that the concept of grant of licence to establish, maintain or work a telegraph shall be different from granting Permission under the second proviso to establish, maintain or to work a telegraph within any part of India. They do not conceive and contemplate the same area of operation. It may be relevant to point out that so far clause (b) of second proviso is concerned, it excludes wireless telegraphs, which restriction has not been prescribed in the first proviso. The second proviso was introduced by Act No.VII of 1914. From a copy of the Bill which was introduced in the Council of the Governor General of India in respect of adding one more proviso to sub-section (1) of Section 4 of the Act, it appears there was no clause (b). In the Statement of Objects and Reasons of the said Amendment, it was said that the second proviso was being introduced, for establishment, maintenance and working of the wireless telegraphs on ships within Indian territorial waters. However, in the Amending Act, clause (b) aforesaid was also introduced enabling the Central Government, by rules to permit, subject to such restrictions and conditions, the establishment, maintenance and working of telegraphs other than wireless telegraphs within any part of India. According to us, there is no question of clause (b) of the second proviso controlling or over-riding in any manner the first proviso which does not speak of the grant of licence by any rules made under the said Act.

Section 7 enables the Central Government to make rules consistent with the provisions of the Act for the conduct of all or any telegraphs established, maintained or worked by the Government or by persons licensed under the said Act. Clause (e) of sub-section (2) of Section 7 prescribes that rules under the said Section may provide for conditions and restrictions subject to which any telegraph line, appliance or apparatus for telegraphic communication shall be established, maintained, worked, repaired, transferred, shifted, withdrawn or disconnected. there is no dispute that no such rules have been framed as contemplated by Section 7(2)(e) of the Act. But in that event, it cannot be held that unless such rules are framed, the Power under sub- section (1) of Section 4 cannot be exercised by the Central Government. The power has been granted to the Central Government by the Act itself, and the exercise of that right, by the Central Government, cannot be circumscribed, limited or restricted on any subordinate legislation to be framed under Section 7 of the Act. No doubt, it was advisable on the part of the Central Government to frame such rules when it was so desired by the Parliament. Clause

(e) to subsection (2) of Section 7 was introduced by Amending Act 47 of 1957. If the conditions and restrictions subject to which any telegraph - telephone line is to be established, maintained or worked had been prescribed by the rules, there would have been less chances of abuse or arbitrary exercise of the said power. That is why by the Amending Act 47 of 1957 the Parliament required the rules to be framed. But the question is as to whether specifically vested in it by first proviso to Section 4(1) of the Act? Even in absence of rules the power to grant licence on such conditions and for such considerations can be exercised by the Central Government but then such power should be exercised on well settled principles and norms which can satisfy the test of Article 14 of the Constitution. If necessary for the purpose of satisfying as to whether, the grant of the licence has

been made strictly in terms of the proviso complying and fulfilling the conditions prescribed, which can be held not only reasonable, rational, but also in the public interest can be examined by courts. It need not be impressed that an authority which has been empowered to attach such conditions, as it thinks fit, must have regard to the relevant considerations and has to disregard the irrelevant ones. The authority has to genuinely examine the applications on its individual merit and not to promote a purpose alien to the spirit of the Act. In this background, the courts have applied the test of a reasonable man i.e. the decision should not be taken or discretion should not be exercised in a manner, as no reasonable man could have ever exercised. Many administrative decisions including decisions relating to awarding of contracts are vested in a statutory authority or a body constituted under an administrative order. Any decision taken by such authority or a body can be questioned primarily on the grounds: (i) decision has been taken in bad faith; (ii) decision is based on irrational or irrelevant considerations; (iii) decision has been taken without following the prescribed procedure which is imperative in nature. While exercising the power of judicial review even in respect of contracts entered on behalf of the Government or authority, which can be held to be State within meaning of Article 12 of the constitution courts have to address while examining the grievance of any petitioner as to whether the decision has been vitiated on one ground or the other. It is well settled that the onus to demonstrate that such decision has been vitiated because of adopting a procedure not sanctioned by law, or because of bad faith or taking into consideration factors which are irrelevant, is on the person who questions the validity thereof. This onus is not discharged only by raising a doubt in the mind of the court, but by satisfying the court that the authority or the body which had been vested with the power to take decision has adopted a procedure which does not satisfy the test of Article 14 of the Constitution or which is against the provisions of the statute in question or has acted with oblique motive or has failed in its function to examine each claim on its own merit on relevant considerations. Under the changed scenarios and circumstances prevailing in the society, courts are not following the rule of judicial self-restraint. But at the same time all decisions which are to be taken by an authority vested with such power cannot be tested and examined by the court. The situation is all the more difficult so far the commercial contracts are concerned. The Parliament has adopted and resolved a national policy towards liberalization and opening of the national gates for foreign investors. The question of awarding licences and contracts does not depend merely on the competitive rates offered; several factors have to be taken into consideration by an expert body which is more familiar with the intricacies of that particular trade. While granting licences a statutory authority or the body so constituted, should have latitude to select the best offers on terms and conditions to be prescribed taking into account the economic and social interest of the nation. Unless any party aggrieved satisfies the court that the ultimate decision in respect of the selection has been vitiated, normally courts should be reluctant to interfere with the same.

Tender documents for provision of telephone service were issued inviting tenders in respect following Telecom Territorial Circles:

(1) Andhra Pradesh, (2) Andaman & Nicobar Islands, (3) Assam, (4) Bihar, (5) Gujarat, (6) Haryana, (7) Himachal Pradesh, (8) Jammu & Kashmir, (9) Karnataka, (10) Kerala, (11) Madhya Pradesh, (12) Maharashtra (including MTNL Bombay), (13) North East, (14) Orissa, (15) Punjab, (16) Rajasthan, (17) Tamilnadu (including Madras Metro Distt.), (18) Uttar Pradesh, (19) West Bengal (including



Calcutta Metro Distt.), (20) Delhi (MTNL Delhi).

In the Tender Documents the aforesaid Telecom Territorial Circles were put under three categories as Category A, Category B and Category C service areas. In category A - A.P. Circle, Delhi (MTNL), Gujarat Circle, Karnataka Circle, Maharashtra Circle (including Bombay MTNL), T.N. Circle (including Madras Metro District); in Category B - Haryana Circle, Kerala Circle, M.P. Circle, Punjab Circle, Rajasthan Circle, U.P. West Circle, U.P. East Circle, W.B. Circle (Including Calcutta Metro District); and in Category C - Andaman & Nicobar Islands Circle, Assam Circle, Bihar Circle, H.P. Circle, J&K Circle, N.E. Circle, Orissa Circle were specified. It was said the DOT/MTNL shall continue to operate telephone service in the Service Areas mentioned aforesaid. It was further said that in respect of International, National and Inter-service Areas, Telephone Traffic will be routed through the Long Distance Network of DOT (Department of Telecommunications). The eligibility conditions for bidders which were specified in Clause 2.1 Part I Section II of the Tender Documents:

"2.1 ELIGIBILITY CONDITIONS FOR BIDDERS:

i) Indian Company: The bidder must be an Indian Company registered, before the date of submission of bid, under the Indian Companies Act, 1956. However, the bidder must not be a Government Company as defined in the Indian Companies Act, 1956.( 19 )

ii) Foreign Equity : Total foreign equity in the bidding Company must not exceed 49% of the total equity.

iii) Networth : Networth of the bidder Company and its promoters, both Indian and Foreign, as reflected in the latest audited balance sheet, must not be less than the amount mentioned in Table I for each category of Service Areas provided that the networth of a Foreign promoter shall not be taken into account for this purpose if its share in the equity capital of the bidder Company is less than 10%. A bidder Company which meets the minimum requirement of networth for a Service Area of one category may bid for any number of Service Areas of that or lower category.

----- Total Category of Service  
Networth of Areas (one or more the Bidder Service Area) for which bid can be  
Company submitted.

----- Rs. 50 Crores C Rs.200 Crores B  
and C Rs.300 Crores A, B and C

----- Networth in foreign currency shall be converted into  
Indian Rupees at rates valid for 16.01.1995 as declared by the Reserve Bank of India.

Networth is defined as the total in Rupees of paid up equity capital and free reserves.

iv) Experience : The bidder must have experience as a service provider and a network operator of a public switched telephone network with a minimum subscriber base in terms of DELs served (excluding ISDN lines and mobile telephone lines) as on 01.01.1995 of not less than 500,000 (5 Lakh) lines. For the purpose of eligibility with regard to experience of a promoter Company which has an equity of 10% or more in the bidder Company and which is a service provider and a network operator of a public switched telephone network, Will also be added to the experience of the bidder Company.

NOTE:

1. Subscriber base refers to the Subscriber who are being provided telephone service.
2. Telephone service - see Section IV.

V) Any number of Indian Companies as well as foreign Companies can combine to promote the bidder Company, However, an Indian, Company cannot be part of more than one such joint venture. The same restriction applies to a foreign Company.

Clause 2.2 required the bidder company to submit apart from other documents mentioned therein:

- (i) Copy of Certificate of incorporation of the bidder company from the Registrar of Companies.
- (ii) Memorandum and Articles of Association of the bidder company.
- (iii) Networth and experience calculation sheet as per Annexure 1.
- (iv) Annual reports for the last five financial years of the bidder Company as well as all the promoter Companies which have to be taken into consideration for the purpose of evaluating networth and experience.
- (v) A comprehensive detailed document containing Company profile, a five year perspective network plan, a five year financial plan with funding mechanism. Details of management and technical expertise etc.
- (vi) Copy of the agreement between Indian and foreign Company.
- (vii) Approval of the Government of India for the terms of foreign participation, if already taken, otherwise copy of the application submitted to the competent authority of Government of India, in this regard together with proof of submission.
- (viii) Certificate from the competent authority in the Government of India to the effect that the total foreign equity in the bidder company does not exceed 49%.

(ix) Documentary evidence in support of the experience claimed and other items quoted in the bid.

Clause 12 provided for the award of tenders. The relevant part is as follows:

" The maximum number of Service Areas, a successful bidder can be licensed for, is dependent upon the total network of the bidder. A successful bidder can be awarded X, Y, Z numbers of category A B and C areas respectively if the total network calculated as ; per Clause 2.1 (iii) above equals or exceeds Rs.(300X + 200Y + 50Z) Crores.....

TELECOM AUTHORITY is free to restrict the number of service areas for which any one Company can be licensed to provide the SERVICE."

(emphasis supplied) Section III contained different conditions including in respect of Security in Clause 16. Section IV provided the condition relating to technical service. In the same Tender Documents service tariff was also specified.

Pursuant to the invitation of tenders aforesaid different Indian Companies including Indian Companies with foreign equities submitted their tenders.

The Tender Evaluation Committee comprised of the following members for evaluation of the bids for basic telephone service:

Shri B.S. Karandikar, Member (Production).. Chairman Shri S.D. Chaturvedi, Jt. Secretary (T).. Member Smt. Runu Ghosh, DDG (LF).. Member Shri S.K. Jain, DDG (TX).. Member Shri M.K. Garg, DDG (VAS).. Member Shri O.P. Choudhary, DDG (BS)... Member & Convenor All the tenders were placed before the said Committee which after evaluating all the bids received submitted its report. We are not concerned with the details of the said report, but it shall be proper to refer to some salient features which have bearing on some of the issues raised in these writ petitions. As one of the tenderers M/s HFCL - Bezeq had emerged as the highest bidder in nine circles, the Committee reported.

"Multiple H1 Bids from a Single Bidder:

(1) The Committee observed that in nine Circles, only one bidder viz. M/s HFCL Bezeq have emerged as the highest bidder. If all the nine Circles are awarded to this bidder, it would result in a kind of private monopoly with M/s HFCL emerging as the single largest dominant Private undertaking in this sector with over 75% share of additional DELs over a period of three years.

(2) The main purpose of allowing the private sector to enter into Basic Service was to complement the efforts of DOT in reaching the target of 'telephone-on-demand' situation by 1997, covering all villages as early as possible and providing telecom services of world standard. If we entrust the development of telecom in so many

major Circles to only one bidder and that bidder is not able to deliver the number of lines promised due to inability in a short time to mobilize the very large resources required for providing services in so many Circles, then development of Telecom in the country will be stunted.

(3) Further, Telecom being a very sensitive sector from the point of view of national security, private foreign investment should be more evenly distributed and the predominance of any one foreign country (which would result from one bidder with a specific foreign partner getting a majority of Circles) should be avoided. (4) Taking all these factors into consideration, imposition of a limit on the maximum number of Circles to be allotted in 'A' & 'B' category circles, seems to be called for. The restriction can be as follows:

(i) Out of category 'A' & 'B' circles bid, not more than three circles should be allotted to any single bidder. This restriction need not apply to category 'C' circles which have evoked poor response from the bidders.

(ii) Subject to this restriction, the H1 bidder should be given an option to choose the Circles.

(iii) The Circles which are vacated by H1 bidder after exercising the above option will need to be offered to the rest of the bidders in the descending order of their ranking for matching the package offered by the H1 bidder. (5) The Committee felt that the gap between H1 and the H2 bids in such Circles referred to in para B 4(iii) above is so wide that there appears to be remote possibility of any of the bidders matching the H1 package. In such a situation, the Department may have to go in for retendering for these Circles. However, the Committee noted that if we invite fresh bids through an open tender for both technical/commercial as well as financial bids, this process would take a very long time and the main purpose of allowing the private sector to participate in the operation of Basic Service, which was to meet the objectives of the National Telecom Policy would be defeated. The Committee, therefore, felt that the purpose will be served by inviting fresh financial bids only, from among those bidders except H1 who have already participated in the original tender and whose bids have been found technically and commercially compliant. The Committee observed that for this purpose, an important issue will be fixation of Reserve Price below which no offer would be accepted. The normal procedure would have been to keep the levy quoted by the highest bidder as the reserve price, since the highest bidder has not withdrawn his offer but would be prevented from accepting these Circles on account of the proposed restriction placed on the number of Circles to be allotted to any single bidder. But since all bidders for a particular Circle would have already refused to match the highest levy before calling for fresh financial bids, no purpose would be served by keeping that levy as a reserve price."

From the aforesaid recommendations of the Committee it appears that it recommended that out of category 'A' and 'B' service areas not more than three service areas be allotted to any bidder; no such restriction was to be applied to category 'b' service areas which had evoked poor response from the bidders. It also recommended that while applying the above restrictions the H1 bidder may be given an option to choose from the service areas where he had offered the package with highest ranking. It is no doubt little surprising as to how and why M/s HFCL - Bezeq offered such high bids in nine circles. But it is an admitted position that in view of the recommendations of the Tender Evaluation Committee capping system was introduced and aforesaid M/s HFCL - Bezeq was allotted only three circles i.e. Delhi, U.P. (West) and Haryana so far categories 'A' and 'B' circles are concerned. In respect of the other 'A' and 'B' circles although the said M/s HFCL - Bezeq was the highest bidder, the offer was not accepted because in that event it would have led to a virtual monopoly, the said M/s HFCL Bezeq having emerged as a single largest dominant private undertaking.

The learned counsel appearing in different writ petitions have attacked this policy of capping. However, in spite of repeated queries, none of them could satisfy as to how in this process the said M/s HFCL - Bezeq had been a gainer or the nation has been a loser. It was pointed out that if this capping system would not have been applied, then a much higher amount would have been received because of the high tenders submitted by said M/s HFCL - Bezeq for other circles which on principle of capping was denied to the said Company. It was also Submitted that in any event, no choice should have been given to the bidders to select the circles and in respect thereof unilateral decision should have been taken by the Central Government. As pointed out above, the decision regarding capping and putting a limit in respect of category 'A' and 'B' circles bid to not more than three was recommended by the Tender Evaluation Committee which appears to have been accepted by the Central Government. Unless it is alleged and proved that the Tender Evaluation Committee's decision in respect of capping was because of any bad faith or due to some irrational consideration, according to us the Central Government cannot be held responsible for that decision. It may be mentioned at the outset that in none of the writ petitions there is any whisper much less any allegation of malafide against the members of the Tender Evaluation Committee stating any one of them had a bias in favour of one bidder or the other or that they have acted on dictate of any higher authority, abdicating their functions entrusted to them.

Some of the petitioners urged that policy of capping was applied after receipt of the tenders. This is not correct. In the Tender Documents as quoted above it had been clearly stated that 'Telecom Authority is free to restrict the number of the service areas for which one Company can be licensed to provide the service'. As such, it cannot be urged that the decision regarding capping restricting the award of licence in category 'A' and 'B' circles to one bidder to three was taken with some ulterior motive or purpose, not being one of the terms specified and prescribed in the tender documents.

It was also pointed out in respect of M/s HFCL- Bezeq that its networth was shown at Rs.4,622 crores, but the break up of the networth of different Companies which are the partner Companies thereof, it shall appear that one foreign Company holding only 26% equity share has shown networth of Rs.4,116 crores i.e. 89.05% whereas the Indian Company Consortium Leader HFCL having equity share of 44% has shown its networth was Rs.62 crores i.e. 1.34%. As already pointed

out above clause 2.2 of Section II of Part I of tender documents required the bidder Company to produce the copy of the agreement between the Indian and Foreign Company including the approval of the Government of India for the terms of foreign participation and certificate from the competent authority in Government of India to the effect that total foreign equity in the bidder Company does not exceed 49%. It was stated during the hearing of writ petitions on behalf of the aforesaid M/s HFCL - Bezeq that it had produced the copy of certificate of incorporation of the said Company from the Registrar of Companies including Memorandum and Articles of Association. The terms and conditions of tender documents restricted the bidder Company that it shall not have total foreign equity in excess of 49%. In the instant case, the foreign Company admittedly does not have foreign equity in excess of 49%. It was also pointed out on behalf of the respondents that when the tender document prescribed about the networth of the bidder Company, it did not mean the actual investment of that amount. If a foreign Company having equity less than 49% has networth to fulfill the requirement of the bidder Company, its bid had to be examined by the Tender Evaluation Committee as has been done in the present case. Counsel appearing for writ petitioners and M/s HFCL - Bezeq were heard on the question as to whether clauses 2.1 and 2.2 of Section II of the Tender Documents in respect of Eligibility Conditions had been complied with by aforesaid M/s HFCL Bezeq. Mr. Venugopal, the learned counsel appearing for the said respondent pointed out that 30.3.1995 was the date fixed for submission of the tenders which was later extended to 23.6.1995. He further stated that the said respondent submitted different documents specified in clause 2.2 of Section II of the Tender Documents along with the bid and as such there has been full compliance of clauses 2.1 and 2.2. None of the counsel appearing in different writ petitions challenged this statement. The counsel for writ petitioners did not allege any bias against the Tender Evaluation Committee suggesting that it has favoured the said M/s HFCL

- Bezeq so far the grant of licence in the three circles mentioned above are concerned. It can be said that the petitioners in different writ Petitions have primarily questioned the right and propriety of the Central Government to grant licences to non-Government Companies. No direct attack was made in respect of procedure for selection adopted by the Tender Evaluation Committee.

On behalf of petitioners it was urged that Circle 'C' and North Easter Regions have been neglected while implementing the National Telecom Policy. Objections were also raised in respect of rates of charges for I.S.D. and S.T.D. It is not possible for this Court to issue specific directions on those questions. It need not be pointed out that whenever a new policy is implemented there are teething problems. But they have to be sorted out.

On behalf of the petitioners, it was also submitted that neither there was any justification nor any national basis for debarring the Government Company from submitting their bids. Although it is not necessary for this Court to express any opinion on that question because according to us that shall amount to a policy matter, but it can be said that the new Telecom Policy is based on privatization with foreign participation. Government undertakings like MTNL were already functioning in Delhi and Bombay and in spite of that it was felt that telecommunication should be handled by non-Government undertakings with foreign participation to improve the quality of service and to cover larger areas. In this background, there is no question of Government undertaking being ignored or discriminated while awarding the licences in different service circles.

The counsel appearing in some of the writ petitions laid great stress on non-creation of a separate Telephone Regulatory Authority after amending the Act and non delegation of the power by the Central Government to such Authority to supervise the functioning of the new Telecom Policy in the country.

It appears that almost all the countries of the world who have privatized the telecommunications, have constituted Regulatory Authorities under the different enactments. In United Kingdom under the Telecommunications Act, 1984 a Regulatory Authority has been constituted to secure that the telecommunications services are provided throughout the United Kingdom and to supervise the connected issues. Such Authority has to promote the interests of the consumers, purchasers and other users in the United Kingdom (including in particular those who are disabled or of pensionable age) in respect of prices charged for and the quality and variety of, telecommunications services provided. It also maintains and promotes effective competition between persons engaged in commercial activities connected with telecommunications in the United Kingdom. The Authority is also responsible to encourage persons providing telecommunication services and telecommunication apparatus in the United Kingdom to compete effectively in the provision of such services and supply of such apparatus outside the United Kingdom. In United States the Federal Communication Commission- created by the Communication Act, 1934 is a primary federal regulator of the communication industry. The Federal Communication Commission is currently organized into six bureaus. As a general rule the operating bureaus are authorized to enforce existing Commission decisions and policies. Wireless Telecommunication Bureau has the responsibility to supervise all wireless technologies including Cellular services. In Canada the Telecommunication Act which is the primary statute relating to telecommunication came into force in 1993 replacing variety of statutes. It contains different provisions to review the functioning of the telecommunications and vests power in authorities in respect of supervision and implementation of the said policy. In Australia, AUSTEL is responsible for regulation of telecommunication services, equipment and cabling under Telecoms Act, 1991. AUSTEL determines standards relating to network integrity and safety, compliance with recognized international standards and end-to-end quality of service. In France, General Directorate for Post and Telecommunications, 'DCPT' has the responsibilities of determining and adapting the economic and technical framework for post and telecommunications activities, ensuring the conditions of fair competition among the various competitors in the telecommunications field. There are other supervisory and advisory bodies assisting the regulation of the telecommunications. In Japan the Telecommunications Technology Council has over all responsibility to coordinate the services, with outside administrative bodies and various manufacturers, users, institutes and other organizations in establishing the standards for Japan. Similar is the position in many other countries developed as well as under-developed.

It appears that the Telecom Regulatory Authority of India Ordinance, 1996 has been promulgated after the hearing of the writ petitions concluded. From the preamble of the said Ordinance it appears that object thereof is to establish the Telecom Regulatory Authority of India to regulate the telecommunication services, and for matters connected therewith or incidental thereto. Section 2(i) defines 'telecommunication service'. Chapter II contains provisions in respect of the establishment of the Telecom Regulatory Authority of India and conditions of service in respect of Chairperson and members thereof. The Chairperson shall be a person who is or has been a Judge of the Supreme

Court or who is or has been the Chief Justice of a High Court. A Member shall be a person who is holding the post of Secretary or Additional Secretary to the Government of India or to any equivalent post in the Central Government or the State Government for a period of three years. The term of the Chairperson has been fixed at five years from the date on which he enters upon his office. So far the Member is concerned, he has to hold office for a term of five years from the date on which he enters upon his office or until he attains the age of 62 years, whichever is earlier. The other conditions have been prescribed in the said Chapter. Chapter III prescribes the powers and functions of the said Authority. Section 11 opens with a non-obstante clause saying that notwithstanding anything contained in the Indian Telegraph Act, 1885, the functions of the Authority shall be as specified in the said Section including to ensure technical compatibility and effective inter-relationship between different service providers, to ensure compliance of licence conditions by all service providers, to facilitate competition and promote efficiency in the operation of telecommunication services, to protect the interest of the consumers of the telecommunication services, to levy fees at such rates and in respect of such services as may be determined by regulations. Sub-section (2) of Section 11 says:

"Notwithstanding anything contained in the Indian Telegraph Act, 1885, the Authority may, from time to time, by order, notify the rates at which the telecommunication services within India and outside India shall be provided under this Ordinance including rates at which messages shall be transmitted to any country outside India."

Sub-section (2) of Section 11 has also a non-obstante clause giving over-riding effects to said sub-section over anything contained in the Indian Telegraph Act, 1885. In view of the aforesaid sub-section, the Authority may from time to time by order notify the rate at which telecommunication services within India and outside India shall be provided. Sub-section (3) of Section 11 enjoins the Authority not to act against the interest of the sovereignty, integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality. In view of Section 12 if the Authority considers it expedient so to do, it may by order in writing call upon any service provider at any time to furnish in writing such information or explanation relating to its affairs as the Authority may require. It can also appoint one or more persons to make enquiry in relation to the affairs of any service provider. The Authority can also direct any of its officers or employees to inspect the books of accounts or other documents of any service provider. The Authority has been vested with the powers to issue such directions to service providers 'as it may consider necessary', for proper functioning by the service provider. Section 13 also reiterates the said power of the Authority by saying that for its functions under sub-section (1) of Section 11, the Authority can issue such directions from time to time to service provider as it may consider necessary. Chapter IV contains provision in respect of settlement of disputes. Section 29 provides for penalty if any person violates the directions of the Authority and Section 30 prescribes for punishment if the offence is alleged to have been committed by a Company. With the establishment of the Telecom Regulatory Authority of India, it can be said that an independent telecom Regulatory Authority is to supervise the functioning of different Telecom service providers and their activities can be regulated in accordance with the provisions of the said Ordinance.



Section V of Tender Documents contains financial Conditions. Clause 2.0 thereof says:

"TARIFF: Tariff for the SERVICE provided by the LICENSEE shall not be more than DOT's Tariff. Tariff is subject to regulation by Telecom Regulatory Authority of India, as and when such an authority is set up by the Government of India."

The aforesaid condition provides that licensee shall not charge tariff for service more than DOT's tariff and such tariff shall be subject to regulation by Telecom Regulatory Authority of India. This condition shall safeguard the interest of the persons to whom services are provided by the licensees.

The new Telecom Policy is not only a commercial venture of the Central Government, but the object of the policy is also to improve the service so that the said service should reach the common man and should be within his reach. The different licensees should not be left to implement the said Telecom Policy according to their perception. It has rightly been urged that while implementing the Telecom Policy the security aspect cannot be overlooked. The existence of a Telecom Regulatory Authority with the appropriate powers is essential for introduction of plurality in the Telecom Sector. The National Telecom Policy is a historic departure from the practice followed during the past century. Since the private sector will have to contribute more to the development of the telecom network than DOT/MTNL in the next few years, the role of an independent Telecom Regulatory Authority with appropriate powers need not be impressed, which can harness the individual appetite for private gains, for social ends. The Central Government and the Telecom Regulatory Authority have not to behave like sleeping trustees, but have to function as active trustees for the public good.

Subject to the directions given above, the writ and Transferred Cases petitions are dismissed. However, there shall be no orders as to costs.