

Lobby power: Why Qualcomm may bite the dust on BWA

Apr 17, 2012

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It may have conquered the world of global telecommunications. But when it comes to India, American multinational Qualcomm, a *Fortune* 500 company, is at the end of its tether. It has had to bite the dust at the hands of the government of India's Department of Telecommunications (DoT) and the not-so-hidden hand of emerging telecom giant in India, Infotel Broadband Services, which is part of the Mukesh Ambani-led Reliance Industries Limited (RIL) group.

Why has Qualcomm aroused the intense ire of RIL? Is it because the US technology bigwig is trying to tie up with RIL's biggest competitor in the broadband wireless access (BWA) space, that is, Bharti Airtel, India's largest (and one of the world's biggest) mobile telecom players?

Left-oriented observers may enjoy the plight of an American multinational suffering in the hands of a homegrown capitalist. But it may be worth wondering what the rule of law and the presence of order means in the context of the country's scandal-ridden telecom sector.

What indeed was the law and what was the order in the ongoing tussle among Qualcomm, the DoT and the RIL group? Those who thought the victors in this battle had been decided by an order of the Telecom Disputes Settlement & Appellate Tribunal (TDSAT) were wrong. (See [Firstpost story](#) *Qualcomm vs Reliance: BWA shadow-boxing is getting real*, 9 March 2012.)



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For nearly two years after winning BWA (broadband wireless access) licences for the four telecom circles of Delhi, Mumbai, Kerala and Haryana on 21 June 2010 and more than a year after the government had accepted \$ 1 billion by way of fees and an additional Rs 410 crore by way of settlement of a disputed tax liability of an associate company, Tulip Telecom, Qualcomm is still not sure about the exact duration of its internet service provider (ISP) licence.

The saving grace for Qualcomm is that it has at least obtained an ISP licence, which it received on March 15 following a TDSAT directive to the DoT after a protracted delay. But the US firm may have to be satisfied with a licence that has a duration of 18 years, two years less than the 20-year period that it thought it had paid the DoT for its ISP licence. Otherwise, argue its competitors, the playing field will not be level.

It was in 2011 itself that the Yankee senses smelt something fishy. It found that every winner of a BWA bid other than itself was receiving ISP licences. These licences in the BWA space were awarded to successful bidders in response to DoT's 25 February 2010 Notice Inviting Applications (NIA) No: P-11014/13/2008-PP, for auction of 3G (third generation) and BWA spectrum.

Qualcomm thought it had played straight and won the bid fair and square. Little did it realise that there would be many a slip between the cup and the lip, that DoT did not intend giving Qualcomm its ISP licence easily and that the Mukesh Ambani group would lobby hard against the US multinational. The fact is that the DoT had pointed out several technical errors in Qualcomm's application even after it had accepted more than \$1 billion by way of licence fees.

It may be recalled that in order to urgently maximise revenues, the DoT had permitted foreign companies to participate in the BWA auction process without first getting local partners and without obtaining necessary clearances from the Foreign Investment Promotion Board (FIPB). Both Qualcomm and the Mauritian company, Augure (that won the BWA spectrum for Madhya Pradesh and received its ISP licence in June 2011), had to go through an elaborate process for securing FIPB (Foreign Investment Promotion Board) and other approvals, which were not required for Indian companies.

This gave these companies a head start compared to Qualcomm and Augure. The latter did not have to obtain FIPB clearance till it got its ISP licence in May 2011 and spectrum a month later. Augure invested 49 per cent in an Indian company whereas Qualcomm invested 74 per cent in Wireless Business Services Pvt. Ltd., which had a minority stake of 13 per cent by two Indian companies, Tulip Telecom and GHC (Global Holding Corporation, which is part of a mobile tower renting company called GTL or Global Telecom Limited). Unlike Augure, Qualcomm was not eligible for automatic clearance from the FIPB since its stake was 74 per cent.

Qualcomm thought it would first obtain an ISP licence, get spectrum, then tie up with a local partner and finally, seek FIPB clearance. It clearly underestimated the competition. Infotel Broadband Services wrote to the DoT on 22 September 2011, stating: "We recall that, as part of the BWA auction bid application, prospective new entry bidders were required to give an undertaking that if the licence application by the bidders nominee is not made within three months of declaration of auction results, or if the licence application is rejected, its spectrum could be revoked".

Indeed, several such letters have reportedly been written seeking parity with Qualcomm. The US company had unofficially learnt that DoT was unwilling to give it four ISP licenses for the four telecom circles (it had paid four times the licence fees for the four different companies) and was told that the NIA mandated only one ISP licence. It also learnt that DoT was considering invalidation of the ISP license because Qualcomm Inc had not informed the government about nomination of local companies within the three months window which the company claimed was not a requirement in terms of the NIA.

Qualcomm was officially informed of the DoT decision to reject its application for the ISP Category 'A' licence on 21 September 2011, by a letter dated 7 September that year. Matters eventually went to the TDSAT where Qualcomm's position prevailed, after it agreed to pay up all the disputed tax liabilities of its local partner Tulip Telecom on the condition that it would get the money back should the liabilities be held to be wrongly imputed.

The TDSAT order observes: "We hope and trust that keeping in view the fact that DoT in this case has not adopted any adversarial approach, the application for allocation of spectrum filed by the petitioner shall be considered and disposed of as expeditiously as possible".

On 15 March 2012, DoT issued an ISP category 'A' Licence (Licence No. 820-1106/10-LR dated 15-03-2012) to Wireless Business Service Private Ltd (WBS, Qualcomm's Indian entity) for 20 years. On 19 March, Qualcomm wrote to DoT's Wireless Advisor seeking issuance of spectrum to WBS in line with the TDSAT order of 24 February 2012.

On 20 March WBS filed an application for spectrum online with the Wireless Planning & Coordination wing of the DoT (Application No. 2012105152). The spectrum allocation has not yet arrived but the buzz in the bazaar is that even if the allocation comes, Qualcomm will not get the licence for 20 years but for 18 years.

The speculation is courtesy a leaked letter from the RIL camp. As earlier reported, Infotel had been insistent that in a "true spirit of justice and fairness", the DoT should ensure that the effective date for all spectrum holders is the same and, accordingly, the "effective date of our spectrum assignment should be shifted and deemed to be the effective date in which Qualcomm's spectrum is assigned". This is what Kapil Dev Kumar, senior vice-president, Infotel, wrote in a letter to the Secretary, DoT, R. Chandrashekhara on 22 September 2011.

It is now being suggested by sources in the Reliance lobby that Qualcomm received its licence after two years in March because of its own errors. Hence, it should be penalised by cutting two years from its 20-year licence period. Otherwise, Qualcomm would get an unfair advantage, it is being contended. This, however, is not the TDSAT's position.

While ordering that DoT would have to issue Qualcomm an ISP license within seven days of payment of Rs 410.36 crore (on account of the disputed tax liability of its associate Tulip), the tribunal asked Qualcomm to apply for BWA spectrum in the prescribed proforma immediately after getting the ISP licence and ordered DoT to process Qualcomm's spectrum application as per NIA's clause No. 4.6, (which calls for automatic assignment of spectrum after ISP licence has been granted) and not 3.7 (which calls for issuance of penalties for breach of licence and NIA conditions).

In paragraph 41 of DoT's response to the Qualcomm petition dated 19 October 2011, DoT had stated that it would like to revisit the issue of alleged delay in filing of ISP application by Qualcomm once the company had made its application for ISP spectrum as per the NIA.

However, the TDSAT clearly linked its Letter of Intent of 10 October 2011 with clause 4.6 of the NIA and thus restricted the flexibility of interpretation to clause 4.6.

In India's world of emerging telecom technologies, "crossed connections" evidently matter more than law as it stands. As the government readies itself for the second round of auction of spectrum for fourth generation (4G) players by the end of the year, the scenario promises to get murkier still.