

Qualcomm vs Reliance: BWA shadow-boxing is getting real

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Is the battle royale for broadband wireless access in India's troubled telecom space — between a mighty American telecom giant and a 'probably-by-proxy' Indian behemoth — headed for a quick resolution?

Yes, if the recent judgment given by the Telecom Disputes Settlement and Appellate Tribunal (TDSAT) is taken to its logical conclusion.

In the dispute between Qualcomm Incorporated and other petitioners and the Department of Telecommunications, government of India, the TDSAT order states: "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".

This would imply that Qualcomm can finally expect to obtain a licence and spectrum for which it has already paid over \$ 1 billion and has now agreed to cough up some more.

In India though, one has got used to many a slip between the cup and the lip, especially when positioned at one end of the spectrum is a US-based *Fortune* 500 giant and an Indian giant which is part of the Reliance Industries Limited (RIL) group of companies.

For nearly two years, 21 months to be precise after, after Qualcomm made a winning bid for BWA (broadband wireless access) licences for the four telecom circles of Delhi, Mumbai, Kerala and Haryana in June 2010, and more than a year after the government had accepted US\$ 1 billion by way of fees, the American company is still waiting for its internet service provider (ISP) licence without which it cannot offer BWA services.

The DoT had found several reasons to prolong its consideration of Qualcomm's winning bid. On 21 September 2011, the department had faxed a communication to the Indian affiliate of the US company saying that the DoT had rejected its ISP application.



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Eyebrows were raised because of the mere technicalities on the basis of which the DoT had sought to reject Qualcomm's bid to get a licence and also on account of the fact that DoT was holding disputed licence fee dues of one of Qualcomm's associates, a large portion of which had been settled and closed by the department in 2009.

Qualcomm had, meanwhile, learnt unofficially that DoT was unwilling to give it four ISP licenses for the four telecom circles, even though it had paid four times the licence fees for the four different companies that had been set up to provide BWA services.

The US company was told that the NIA (notice inviting applications) mandated only one ISP licence. It also learnt that DoT was considering invalidation of the ISP licence because Qualcomm Incorporated had not informed it about the nomination of the four local companies within a window of three months.

Egging the government on from the sidelines was Qualcomm's competitor, Infotel Broadband Services (which is part of the RIL group headed by Mukesh Ambani). A company representative wrote to the government: "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".

"In 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", wrote Kapil Dev Kumar, senior vice-president, Infotel, in a letter to DoT Secretary R Chandrashekhar, on 22 September 2011.

The point that Qualcomm had belaboured with the DoT – and later with TDSAT – is that there was nothing in the NIA about the number of ISP applications that could be made.

The company went by the simple logic that since the auction was circle-wise, the applications should also be made circle-wise and that its decision to set up four separate firms was in tune with what had happened when third-generation (3G) spectrum had been auctioned and when every service area was handled by a different company. Nevertheless, Qualcomm said that it would be happy to secure one licence instead of four different ones.

Qualcomm also argued that the NIA document had a clause that said that the nominee of the winning bidder should apply for an ISP license within three months of being declared winner. Accordingly, it applied for ISP licenses within the three-month window through its locally incorporated companies, which were all subsidiaries of Qualcomm Asia Pacific Pte Ltd, which, in turn, is a wholly-owned subsidiary of Qualcomm Incorporated in the US.

Qualcomm had incorporated four Indian subsidiaries, Wireless Business Services Pvt Ltd (for Maharashtra), Wireless Business Services (Delhi) Pvt Ltd, Wireless Business Services (Kerala) Pvt Ltd, and Wireless Business Services (Haryana) Pvt Ltd, for the four circles in which it had won. These companies had applied for ISP licences on 9 August 2010, well within the required three-month period.

It may be recalled that the government wanted to hasten the process of allowing international players to participate in the 3G auctions and did not have sufficient time to allow them to apply for and get clearances from the Foreign Investment Promotion Board (FIPB) before participating in the auction process.

The FDI limit allowed in the telecom sector being 74 percent, it was stipulated that global operators would have to induct local partners or locally-registered companies, which would then apply for ISP licences because only locally incorporated companies could get an ISP licence necessary for running BWA services.

There was a third issue that cropped up when Qualcomm was arguing its case before the TDSAT. In paragraph 41 of its response to Qualcomm's petition, the DoT said that once a licence was granted to Qualcomm, it would have to apply for spectrum and then the delay of filing its nomination would be examined. This, Qualcomm claimed, was totally contradictory to the terms of the NIA, in which clause 4.6 stated that once a licence was issued, spectrum would be granted (automatically).

If these were technicalities, the DoT purported to stymie Qualcomm through a more complex process. The licence agreement had a clause (iv) that said: "In respect of all licences granted under Section 4 of the Indian Telegraph Act, 1885, Indian Wireless Telegraph Act, 1933 to you or any of your promoter(s) /partner(s) or associate(s)/sister concern, you are required to furnish a certificate/declaration to the effect that all dues to the Department of Telecommunications (including WPC wing) stand cleared up to the date of issue of this letter. The authority reserves the right to verify the same".

That was the trump card that the DoT purportedly had up its sleeve for Qualcomm had a 13 percent partner/stakeholder called Tulip Telecom Ltd that had an ISP licence since 2005. Tulip gave a no-dues certificate, which was submitted along with other papers to the DoT within 10 days of receiving the letter, but DoT wanted time to check if Tulip had any pending dues.

On 30 November 2011, the DoT raised a demand on Tulip for Rs 146 crore for the assessment years 2009-10, 2010-11 and followed it up with another demand on 6 February 2012 for Rs 264

crore by reopening past 'settled' cases relating to earlier financial years starting from 2005-2006. Another battlefield had been opened.

Tulip filed a representation with DoT to re-evaluate these demands because, it argued, the revenue emanating from its non-licence (manufacturing) business had been added together to its licence revenues for calculating licence fees. This was strange because Tulip claimed the dispute had been resolved earlier when, in 2009, DoT had raised a similar demand for the financial years 2006-07 and 2007-08 for Rs 192.5 crore, which had been reversed after Tulip's representation, and thereafter reduced to Rs 2.42 crore and settled on 15 October 2009.

Qualcomm waited a while for Tulip to settle the issue with the DoT but offered to clear Tulip's dues by giving an undertaking/bank guarantee to pay in case Tulip did not pay. Qualcomm's new offer was made through a fresh petition dated 23 January 2012.

This was the dispute that came to the TDSAT for its consideration. In its order of 24 February, the TDSAT said: "The petitioner, however, is ready and willing to deposit the aforementioned amount of Rs 410.36 crore claimed by the respondent towards the licence fees demanded from Tulip Telecom Ltd subject to certain conditions, which form part of an affidavit affirmed by Mr Parag Kar (representative of Qualcomm)" on 22 February 2012.

The counsel for the DoT submitted in addition that should any refund have to be made to the petitioner, it would be without interest; that acceptance of the amount deposited by Qualcomm should be subject to an undertaking by Tulip Telecom that the arrangement is acceptable to it and additional interest, if any, would be paid by Tulip in terms of the licence agreement.

Justice SB Sinha, chairperson of TDSAT, and PK Rastogi, member, ruled that a Category A ISP licence should be issued in favour of Qualcomm within one week of the date of deposit of Rs 410.36 crore without any need for Tulip Telecom accepting this arrangement and that Qualcomm should follow the procedures for obtaining spectrum from the WPC (Wireless Planning and Coordination) wing of the DoT in terms of the letter of intent read with Clause 4.6 of NIA.

The clause reads that the DoT "shall" issue a letter of intent allocating frequencies to a successful bidder upon receipt of the bid amount and the department would "assign the specified spectrum" upon the successful bidder obtaining either a UAS (unified access service) licence or an ISP Category A licence.

The bottomline is that within a week of Qualcomm paying Rs 410.36 crore, the DoT will have to grant Qualcomm its ISP licence with assigned spectrum following automatically. Will the story end here? Time alone has the answer.

What the Tulip case is all about

Tulip Telecom Limited has faced two sets of demands from the DoT over the years: Rs 146 crore raised on 30 November 2011 for the financial year 2009-10 and 2010-11 by the Controller of Communication Accounts and Rs 264 crore raised on 6 February 2012 by reopening the past settled case for the financial years 2005-06, 2006-07 and 2007-08. A fresh demand for 2008-09 was thereafter raised. The 2005-06 dispute was settled by DoT in 2008. The 2006-07 and 2007-08 disputes were settled by the DoT in 2009.

DoT had initially raised a demand of Rs 192.5 crore that it later brought down to Rs 2.5 crore, after Tulip explained that DoT had erroneously included revenue generated out of its non-licence manufacturing business while calculating licence fees. Tulip paid this demand of Rs 2.5 crore on 15 October 2009. All this was cleared well before Qualcomm won its BWA bids for four circles. But, suddenly, Tulip was slapped with a Rs 410-crore demand all over again.