TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL
NEW DELHI

DATED : 24th April, 2002

APPEAL No.9 OF 2001

Bharti Cellular Limited … Appellant
Vs
Union of India and Another … Respondents

BEFORE:

HON'BLE MR. JUSTICE SUHAS C. SEN, CHAIRPERSON
MR.R.U.S.PRASAD, MEMBER
MR.P.R.DASGUPTA, MEMBER

For Appellant	:	Mr. Rajiv Nayar, Senior Advocate wtih Mr. Sandeep Sethi & Mr.Sumit Mehta, Advocates
For Respondent No.1-Telecom Regulatory Authority of India (TRAI)	:	Mr. Meet Malhotra with Mr. Raghvinder Singh, Advocates
For Respondent No.2–Union of India	:	Mr. Navin Chawla with Mr. Kirit Javali, Advocates

Migration Package - shift from fixed Licence Fee to Revenue Share - observation of Delhi High Court, that it is the duty of TRAI to ensure that benefits are passed on to the consumers - 12th Amendment of TTO - computation methodology of refunds to Subscribers - monthly / yearly basis - held: charges collected on monthly basis, therefore refunds also shall be on monthly basis and not on cumulative basis - refund cannot be less than zero.

ORDER

This is an appeal under Section 14(B) read with Section 14 A(2) of the Telecom Regulatory Authority of India Act, 1997 filed by Bharti Cellular Limited, New Delhi against the manner of methodology for calculation of refunds to cellular mobile telephone subscribers, as laid down under Telecommunication Tariff (Twelfth Amendment) Order, 2000 dated 25th January, 2001.

2. The Appellant who holds a licence to provide cellular mobile telephone service in Delhi has pointed out that the pattern of tariffs under which telecommunication services were to be provided by the service providers was laid down under the Telecommunication Tariff Order 1999 by the Telecom Regulatory Authority of India on 9th March, 1999. This order had put a ceiling limit on tariffs, insofar as cellular mobile telephone services were concerned, at the rate of Rs.600/- for monthly rental and Rs.6/- per minute of airtime used by the subscriber/consumer. The cellular operators were however free to offer alternative packages to their subscribers wherever no tariff was notified under T.T.O. (Telecommunication Tariff Order) for any telecommunication service, after giving a mandatory notice of 5 days to the Telecommunication Regulatory Authority of India.

3. In the wake of the New Telecommunication Policy (NTP, 1999) which became effective from 1st August, 1999, the Telecommunication Regulatory Authority of India (TRAI) issued the T.T.O. (Fifth Amendment) Order 1999 on 17th September, 1999 to rationalize the tariff structure. This became necessary as the New Telecommunication Policy permitted the service providers to transfer from the fixed licence fee payment regime to revenue-linked licence fees which reduced the liabilities of the service-providers to a considerable extent. As a part of the new tariff structure, the Fifth Amendment order also introduced a "Calling-Party-Pays" (CPP) regime for cellular mobile services under which the calling party was required to pay airtime charges and pay additional specified charges if the call was to another network. Thus the significant changes brought about under the Fifth Amendment of the T.T.O. 1999 were :

a) introduction of Calling-Party-Pays (CPP) regime;
b) restructuring of tariff through reduction of monthly rental from Rs.600/- to Rs.475/- per month and the airtime charge from Rs.6/- to Rs.4/- per minute.

4. This could not be brought into operation in view of a Public Interest Litigation (PIL) field by several organizations like Telecom Watchdog, a consumer organization and MTNL before Delhi High Court on the grounds that the implementation of the "Calling-Party-Pays" (CPP) regime would be beneficial to the Cellular Mobile Service Operators and detrimental to others. This Civil Writ Petition No.6543 of 1999 was decided by Delhi High Court on 17 January, 2000. In its decision, Delhi High Court quashed the Fifth Amendment of T.T.O. dated 17 September, 1999 primarily on the ground that in laying down the CPP regime TRAI had transgressed its statutory authority by amending the terms and conditions of the licence of a service provider, viz., DoT and MTNL – a right which could be exercised only by the Government and by no other authority. The Court in its order observed :

> *".....under Section 11 (1) (b), the Authority merely has a power to recommend terms and conditions of a licence. We are told that many of the licenses which have been given by the Government to the mobile operators contain a condition that the DoT will not pay any access fee to the cellular operators. The cellular operators have accepted the license on this condition. Yet in purported exercise of the power under Section 11 (1) (d), i.e. in the guise of regulating the arrangement among the service providers of sharing their revenue for providing telecommunication services, the Authority has, under the impugned Regulation, purported to provide that cellular operators will receive 80 paise per pulse from the landline operator. The Authority has also provided that its Regulation will prevail over all licenses. Thus in fact the Authority has varied the terms and conditions of license. The Authority has overridden provisions in a contract between the parties and affected the rights created by the license. The Authority has, in purported exercise of power under Section 11 (1) (d), converted a recommendatory function into directory power. It is for the government to decide what are to be the terms and conditions of a license to a service provider. The Authority can not either directly or indirectly vary the terms and conditions which are laid down by the Government in a license to a service provider. What it can not do directly, it can not do indirectly.*
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> *.....As we are holding that Authority has no power to issue regulations of the nature that it has purported to do, the regulations will have to be set aside."*

5. However, the Court also noted that the Fifth Amendment Order of the T.T.O. by TRAI showed that TRAI had taken note of the fact that there was substantial reduction in the licence fee payable by cellular operators to the Government because of migration to revenue sharing arrangement. The Court observed : *"in our view, it is the duty and function of the Authority to ensure that the benefit which the cellular operators have received is passed on to the customers. As seen above, it is function of the Authority to safeguard the interest of the consumers. We are quite sure that the Authority will keep this in mind and issue necessary directions in this behalf."* Taking note of this observation of the Court the cellular operators, including the Appellant, volunteered to the Court that they shall charge, with effect from 1st November, 1999, reduced subscriber tariff of Rs.475/- per month towards rental and Rs.4/- per minute air time charge till the final determination by TRAI of standard

package and tariffs. This was recorded by the Court in its Order Sheet of 21st January, 2000 with the following observations :

> *"We are happy to note that the Cellular Operators have on their own agreed to reduce as set out above. Court is not passing any order. Cellular Operators cannot be bound to make any statement they do not want. If TRAI is concerned, then it may issue such directions as it likes and if it can do so. We are to day only recording statement on behalf of Cellular Operators. We only clarify that in case any Cellular Operator wants to also introduce its system of free in coming calls, they should be free to do so."*

6. On 25th January, 2001 the TRAI notified the Telecommunication Tariff (12th Amendment) Order, 2000 in which it sought to specify the amount of refunds that shall be made by cellular service providers to subscribers of cellular mobile services as a result of reduction in the licence fee payable by the service providers, following their acceptance of migration from the fixed licence fee regime of revenue sharing. For this specific purpose, the monthly rental was fixed @ Rs.422/- and the airtime charges @ Rs.4.65 per minute. It was however, further stipulated that monthly refund amount "cannot be less than zero". The Appellant has its grievance against this particular stipulation.

7. The contention of the Appellants is that 12th Amendment Order of the T.T.O. notified on 25th January, 2001 provides for calculation of refunds for two different periods – 1) August, 1999 to January, 2000 and 2) February, 2000 onwards. The standard tariff package introduced by T.T.O., 1999, namely monthly rental of Rs.600/- and air time charge of Rs.6/- per minute was operative during August, 1999 to January, 2000. However, on 21st January, 2000, the cellular operators had voluntarily indicated to Delhi High Court that they were reducing the tariff to monthly rental of Rs.475/- and airtime charge of Rs.4/- per minute. Thus for the period August, 1999 to January, 2000 there was a voluntary reduction both in the monthly rental as well as air time charges even though the standard tariff package of T.T.O., 1999 (monthly rental of Rs.600/- and airtime charge of Rs.6/- per minute) remained operative. Therefore, there was no issue in determination of refund for the period August, 1999 to January, 2000 and the amount due to the subscribers had been duly refunded by the Appellant. The controversy is with respect to the period from February, 2000 onwards when the Operators were charging Rs.475/- towards monthly rental and Rs.4/- per minute air time charges usages as against the notified notional tariff of Rs.422/- monthly rental and Rs.4.65/- per minute air time usages introduced by the 12th Amendment Order. The formula for refund as determined by TRAI in the 12th Amendment Order for metro standard tariff subscribers from February, 2000 until determination of a new standard package for metros, was as under :

> *"In metros, calculations show that for standard tariff subscribers, the revised standard tariff offered by service providers has a higher rental by Rs.53.00 (Rs.475/- - Rs.422/-) compared to the benchmark standard tariff package estimated with reduced licence fee. The charge however is lower by Rs.0.65 (i.e. Rs.4.65 – Rs.4/-) per minute. Accordingly, the refund amount shall be Rs.53.00 per subscriber less Rs.0.65 multiplied by actual minutes of airtime usage……."*

8. It is the contention of the Appellants that since the determination of refund by virtue of the 12th Amendment Order (notified on 25th January, 2001) was to be done for a prior period from February, 2000 to January, 2001, it is only just and fair that the refund amount is calculated by the service provider as per the basis provided in the 12th Amendment Order on a cumulative basis for the said period, accounting the monthly rental for 12 months at the given differential rates of Rs.56/- and the air time charge at the given differential rates of Rs.0.65 per minute as prescribed. The Appellant contends that TRAI is wrong in calculating the refund amount on a monthly basis and that it should really calculate the refund amount for a cumulative period of 12 months i.e. from February, 2000 to January, 2001 which was actually "a pre-paid platform". The Appellant further contends that since the 12th Amendment Order specifically talks of the refund amount being computed in terms

of actual minutes of airtime usage, it is a negation of its own formula to lay down that there cannot be any negative adjustment. The Appellant has therefore contended that it is entitled to calculate the refund amount for the period of 12 months from February, 2000 to January, 2001 cumulatively and separately as under :

i) Rs.53/- x 12 months as the total amount due to the subscriber on account of reduction of monthly rental from Rs.475/ to Rs.422; and

ii) Rs.0.65 multiplied by the actual minutes of air time usage during the aforesaid 12 months, due from the subscriber on account of the higher air time tariff (Rs.4.65 from Rs.4/-) per minute.

9. This, the Appellant contends, would ensure that the net amount refundable to the subscriber would not, and could not be, less than zero and that the subscriber would in no event be required to pay any amount to the operator, much less retrospectively.

10. In its response the TRAI has pointed out that the specific objective of the 12th Amendment of the T.T.O. was to specify the formula to be adopted for the purpose of refund from February, 2000 onwards to the subscribers as urged by the Delhi High Court in its Order. While doing so, TRAI had taken due note of the fact the cellular service providers had themselves voluntarily reduced their charges for rental and airtime. Therefore, what the TRAI notified was basically a pattern and methodology of refund to the subscribers as it had become imperative in terms of the High Court Order, even though the High Court had quashed the 5th Amendment of T.T.O., 1999 on a separate issue. It was stressed by the Respondents that the entire refund order envisages a month-to-month refund process as the billing cycle for cellular subscribers is generally one month. Therefore, the refund for each month has to be necessarily treated independently and not cumulatively for a period of 12 months as urged by Appellant. It has therefore been contended by the Respondents that the question of netting off negative amount in a particular month against the positive calculation in other months can not arise in this set up. It was also argued by the Respondents that the Appellant has merely sought to selectively attack one part of a pre-stated formula on the basis of which the TRAI worked out refund due to subscribers from the service providers. It was urged that TRAI had to estimate the amount and manner of the refund due to the customer of about 28 service providers offering about 50 tariff packages across 21 circles. It had to work out a uniform refund for three categories i.e. a) standard package; b) pre-paid package; and c) alternative package. It was pointed out that the Appellant has raised a dispute only in respect of a selected segment of refund methodology applicable to the standard package and has apparently no grouse about the formula in respect of pre-paid and alternative packages. Again in respect of the standard package, the Appellant has accepted the notional figures assumed by TRAI for the purpose of refund and has only challenged the last part of the formula that the refunds cannot be less than zero in a month. The Respondent also has drawn attention to the fact that even though there were 28 service providers who were affected by this Order, no other service provider has chosen to contest the methodology, or any part thereof, adopted by the TRAI.

11. We have carefully gone through the pleas made by the appellant and the respondent. It has been an admitted fact that the Twelfth Amendment of the Telecommunication Tariff Order dated 25th January, 2001 was occasioned by the observations of Delhi High Court that "it is the duty and function of the Authority to ensure that the benefit which the cellular operators have received is passed on to the consumers." Thus there is substance in the argument of the Respondent that the entire exercise was to work out a workable methodology and mechanism through which the subscribers could be given their refunds in the wake of the substantial benefits which accrued to the cellular mobile operators as a result of the shift from a fixed licence fee to a revenue-sharing regime. The basic details of this methodology have not been challenged by the Appellant; it has only objected to the computation of refunds on a monthly basis and the stipulation that such refunds can not be less than zero. According to the Appellant, the computation should be on a cumulative basis as it was for a prior period, i.e., from February, 2000 to January, 2001. In other words, the Appellant would like to compute the refund amount on a cumulative basis, accounting the monthly rental for 12 months at the given differential rate of rs.53 (Rs.475 – Rs.422) and the air-time charge at the given differential rate of Rs.0.65 (Rs.4.65 – Rs.4.00) per minute and make the payment of the resulting refund amount. We find no valid reason to accept this point. The bills were admittedly raised on monthly basis during the relevant period and

payments were presumably received accordingly. Under the circumstances the refunds should also be on a monthly basis, and not on a cumulative basis. Considering the benefits which the service providers received as a result of the shift of the licence fee regime to a revenue-sharing arrangement the stipulation of the Authority, that the monthly refund amount to the subscribers should in no case be less than zero, can not be considered as unreasonable. We have also noted that in the balance sheets of the relevant period produced by the Appellant the entire amount of Rs.21 crores, which is payable by the Appellant as refund in terms of the Twelfth Amendment of the T.T.O. and which is the subject matter of the current dispute, has been shown as a liability. In our opinion, this liability needs to be discharged without any further loss of time.

12. As a result of what we have discussed above, we consider that there is no merit in the appeal and is accordingly dismissed. The parties will bear their own cost.

……Sd/-……J
(Suhas C Sen)
Chairperson

……Sd/-…….
(R.U.S. Prasad)
Member

……Sd/-……
(P.R. Dasgupta)
Member