

**TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL
NEW DELHI**

DATED 4TH FEBRUARY, 2004

PETITION No.13 OF 2003

M/s Kartic Chundhar & Co. and Another	...Petitioners
Vs	
Principal General Manager, Department of Telecommunications, Ernakulam & Ors.	...Respondents

ALONG WITH

PETITION No.14 OF 2003,

M/s Batliwalla & Karani and Another	...Petitioners
Vs	
Principal General Manager, Department of Telecommunications, Ernakulam & Others	...Respondents

**PETITION No.15 OF 2003,
(With MA No. 26 of 2003)**

V.L.Jose & Others	...Petitioners
Vs	
Principal General Manager, Department of Telecommunications, Ernakulam & Others	...Respondents

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**PETITION No.16 OF 2003,
(With MA No. 24 of 2003)**

M/S Dinesh V. Baliga & Another	...Petitioners
Vs	
Principal General Manager, Department of Telecommunications, Ernakulam & Others	...Respondents

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**PETITION No.17 OF 2003
(WITH MA No. 25 OF 2003)**

M/S Jyothiss & Another	...Petitioners
Vs	
Principal General Manager, Department of Telecommunications, Ernakulam & Others	...Respondents

AND

PETITION No.18 OF 2003

M/s Chakkappayi Cycle Works, Kunnamkulam & Others	...Petitioners
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Vs.
Telecom General Manager, Trichur & Others

...Respondents

BEFORE:

**HON'BLE MR. JUSTICE D.P. WADHWA,
CHAIRPERSON**

For Petitioners : Mr.M.T.George Advocate
For Respondents : Mr. Maninder Singh with Mr.Ankur
Talwar,Advocates

Petition U/s 14 (a) – DOT enhanced annual rental for the P-Wire Telephone Circuit – Writ Petition before High Court - Common order for approaching TDSAT –DoT’s case that petition not maintainable u/s 14 (a) (iii). Held that different petitions can to be treated as petitions by a group of consumers if common issue involved. TRAI issued Telecommunication Tariff Order-1999 (TTO-99) - Rates of P-wire leased circuit to be fixed by DoT – Words/phrases - “Leased Circuits”, “Reporting requirement”, “Forbearance”- DoT’s case that three requirements to be met (i) prior approval from Authority for “Forbearance” (ii) reporting forbearance (iii) no reporting –forbearance – Present case ‘no reporting forbearance’ - Tariff could be fixed by licensor – Held - Action of authority arbitrary and unreasonable – Petition allowed - “Forbearance” in para 3 (c) of the TTO means the service provider was free to fix the rate – Rates so fixed should be reasonable – Impugned tariff to be amended and excess amount to be refunded.

ORDER

This batch of six petitions filed under Section 14(a)*¹ of the Telecom Regulatory Authority of India Act, 1997 (for short 'Act) raises common issue for decision by this Tribunal. In fact four more petitions on the same issues were also filed along with these six petitions, but those could not be proceeded with as necessary fee was not paid by the petitioners in those petitions. I am, therefore, to decide the dispute in regard to these six petitions.

The petitioners are challenging the enhancement of annual rental from Rs.1500/- per kilometer for the P-Wire Telephone Circuit taken by them

*¹14. Establishment of Appellate Tribunal.- The Central Government shall, by notification, establish an Appellate Tribunal to be known as the Telecom Disputes Settlement and Appellate Tribunal to-

- (a) adjudicate any dispute –
 - (i) between a licensor and a licensee;
 - (ii) between two or more service providers;
 - (iii) between a service provider and a group of consumers

from the Department of Telecommunication (now BSNL) for the period from 1.4.99 to 31.3.2001.

When the petitioners received bills dated 5.6.1999 they found that the respondent charged @ Rs.24,558/- as rent and also demand of arrears on pro-rata basis was claimed for a period from

1.4.99 to 30.6.99. Thereafter, they stated that subsequently the tariff was reduced to Rs.5000/- per kilometer w.e.f. 1.1.2000. Again it was reduced w.e.f. 1.4.2001.

Petitioners in all these petitions had earlier filed writ petitions in the Kerala High Court which were disposed of by common order dated 30.5.2002 with a direction to file petitions before this Tribunal in view of the provisions of the Act as amended by Act 2 of 2000 (w.e.f. 24.1.2000). Thereafter, these petitions came to be filed before this Tribunal. Petitioners have challenged the enhancement of annual rental for their P-wire connections for the period from 1.4.99 to 31.3.2001.

Para 4 of the order of the High Court would be relevant for our purpose which I reproduce:

"4. In the instant case, as already noted, there is a dispute regarding the tariff fixed for P-Wire connections for the category below 64 Kbps. Hence it can be treated as a case falling under the new Section 14(a)(iii) of the Act namely a dispute between the service providers and a group of consumers. In the above circumstances, it is for the petitioners in all these cases either independently or collectively to file application under the new Section 14A of the Act before the Tribunal constituted under the new Section 14 of the Act. If the petitioners file such application before the said authority within a period of six weeks from today, the same will be disposed of by the Tribunal in accordance with the procedure provided under Section 14A on merits.

On notice being issued BSNL filed its reply on 15.1.2004. A preliminary objection has been raised that in sub-clause (iii) of clause (a) of Section 14 these petitions are not maintainable. This provision gives jurisdiction to the Tribunal to adjudicate any dispute "between a service provider and a group of consumers" It is the contention of Mr. Maninder Singh, learned counsel for the respondents, that the petitioners in these six petitions cannot be termed as group of consumers and this Tribunal will not, therefore, have jurisdiction to try these petitions. On 11.11.2003 an order was made treating all the petitions as filed together as they raised similar question. This order of 11.11.2003 is reproduced hereunder:

"All these petitions have been separately filed. Earlier a view was taken that perhaps separate petitions could not be entertained in view of sub clause (iii) of clause (a) of Section 14 of the Act inasmuch as a group of consumer would normally mean some persons together forming a group. Earlier we had given an opportunity to the petitioners to file an application for clubbing all the petitions. An application has been filed, it being M.A. No.40 of 2003 in Petition No.15 of 2003. That apart, it appears to me that though it could be said that a group of consumers would mean a number of consumers together filing the petition that would not bar this Tribunal to entertain the petitions though separately filed and raising similar issues to be treated as petitions by a group of consumers. Accordingly, treating these petitions as filed by group of consumers, I direct notices to be issued. Mr. Maninder Singh accepts notice. He may file his reply within four weeks. Rejoinder, if any, be filed two days before the date fixed.

M.A. No.40 of 2003 is disposed of.

Mr. M.T. George who appears for petitioners in Petition No.15 of 2003 states that he is appearing for petitioners also in Petition Nos. 16 & 17 of 2003 and Mr. P.V. Dinesh who appears for petitioners in Petition Nos.13 & 14 of 2003, states that he is also representing petitioner in Petition No.18 of 2003.

All these petitions, including Petition No.18 of 2003, be listed for directions/further proceedings in January, 2004.

Registry to indicate next date to the parties, one week in advance”.

This order was passed in the presence of counsel of all the parties. On 15.1.2004 respondents filed their reply. I have reproduced para 4 of the order of the High Court of Kerala above. These petitions have been filed in pursuance of the order of the High Court. It is neither legal nor possible for this Tribunal to ignore the directions of the High Court. Moreover, we have to take a pragmatic view of the matter. Provisions, relied upon by Mr. Maninder Singh to support his challenge, is enacted for the benefit of the consumers and we have to give it liberal construction. These six petitioners though have filed separate petitions but since they raise a similar question, they can be treated to have been filed by a group of consumers. In that view of the matter the objection taken by Mr. Maninder Singh is rejected. I may also note that Mr. Maninder Singh also referred to Consultation Paper No.1 /2004 dated 7.1.2004 issued by Telecom Regulatory Authority of India mooted a proposal for appointment of Ombudsman. This proposal issued by the Authority has no relevance in the present case. It is also not made clear to me under which provision of law, rule or regulation such a proposal has been mooted by the Authority. It is, therefore, not necessary to refer to any such proposal.

Earlier rental of P-wire leased circuit was fixed by the Department of Telecommunication in the Central Government under the provisions of the Indian Telegraph Act, 1885. However, sub-section (2) of Section 11 of the Act which defines functions of the Authority (Telecom Regulatory Authority of India) empowers the Authority to prescribe the rates at which telecommunication services within India and outside India shall be provided. This sub-section is reproduced hereunder:

“(2) Notwithstanding anything contained in the Indian Telegraph Act, 1885 (13 of 1885), the Authority may, from time to time, by order, notify in the Official Gazette the rates at which the telecommunication services within India and outside India shall be provided under this Act including the rates at which messages shall be transmitted to any country outside India:

Provided that the Authority may notify different rates for different persons or class of persons for similar telecommunication services and where different rates are fixed as aforesaid the Authority shall record the reasons therefore”.

Under the powers so conferred on the Authority the Telecommunication Tariff Order-1999 (TTO -99) was issued which came into effect w.e.f. 9.3.999. Earlier to TTO-99 tariff had been fixed by the Department of Telecommunication in the exercise of Rules made Under Section 7 of the Indian Telegraph Act, 1885. Section IX of the Indian Telegraph Rules, 1951 provides for “Charges for Private Wires” and it is as under:

"Section IX – CHARGES FOR PRIVATE WIRES

Annual Rental

- | | |
|---|---|
| 1. (a) Internal Private Wires | Rs.400 (effective from 1.12.1986) |
| (b) External private wires (with or without relay set).
[effective from 1.11.1992] | Rs. Fifteen hundred per kilometre chargeable distance per annum per pair. |

Provided that in the case of private wires exceeding five kilometers of chargeable distance (effective from 1.11.1992) the minimum period of hire shall be 3 years and the security for the service shall be regulated under Rule 445 and obtained from the subscriber before the provision of service.

2. Omitted (effective from 1.8.1988)
3. The chargeable distance of External Private Wires shall be 1.25 times of the radial distance between the two points to be connected (effective from 1.8.1988).
4. Rental for Private Wires given on casual basis for short periods shall be levied on pro rate basis at one and a half times the rates of rentals prescribed in sub-section 1 above. The minimum period of hire should be one month".

After the TTO -99 came into force rates of P-Wire leased circuit were left to be fixed by DoT (now BSNL). If we refer to TTO-99 which is a statutory document we find that Section II "Leased Circuits"^{*2}, "Reporting Requirements"^{*3} and "Forbearance"^{*4} have all be defined. Section III relates to

^{*2}"Leased Circuits" mean telecommunication facilities leased to subscribers or service providers to provide for technology transparent transmission capacity between network termination points which the user can control as part of the leased circuit provision and which may also include systems allowing flexible use of leased circuit bandwidth.

^{*3}"Reporting Requirement" means the obligation of a service provider to report to the Authority at least five working days before implementing any new tariff for telecommunication services under this Order and any changes thereafter.

^{*4}"Forbearance" denotes that the Authority has not, for the time being, notified any tariff for a particular telecommunication service and the service provider is free to fix any tariff for such service.

Tariffs for Telecommunication Services and clauses (3), (4) and (7) which provide for "Tariffs", Forbearance and "Reporting Requirement" are as under:

3. Tariffs

Tariffs for various telecommunication services and their dates of implementation shall be as set out in Schedules I to IX.

4. Forbearance

Where the Authority has, for the time being, forbore from fixing tariff for any telecommunication service or part thereof, a service provider shall be at liberty to fix

any tariff for such telecommunication services;

Provided that the service provider shall comply with the reporting requirements in respect of such tariff.

5.
6.
7. Reporting Requirement

(i) All service providers shall comply with the Reporting Requirement in respect of tariffs specified for the first time under this Order and also all subsequent changes.

(ii) No service provide shall alter any tariff of any telecommunication service or any part thereof without complying with the Reporting Requirement.

(iii) Unless the Authority intervenes within the mandatory notice period of five working days, the service provider may implement the proposed tariff”.

Schedule IV of TTO-99 deals with “Leased Circuits” and para (3) provides rates of leased circuits of different speeds and are as under:

“(3) Ready Reckner Tariff for leased circuits of Speed:

- | | |
|---------------------|--|
| (3.a) 64 Kbps | As specified in Annex 1 to this schedule |
| (3.b) 2 Mbps | As specified in Annex 2 to this schedule |
| (3.c) Below 64 Kbps | Forbearance.” |

It would be seen that for leased circuits of speed below 64 Kbps, DOT (BSNL) was left free to fix the tariffs and for speed of 64 kbps rates have been specified in Annexure-I. If we look at Annexure-I it gives details of tariff for leased circuits of speed of 64 Kbps and above for distance of 5 Kms. and above. For distance of 5 Kms. and speed of 64 Kbps the annual tariff is Rs.24,558/-. Mr. Maninder Singh, learned counsel for the BSNL submitted that where TTO-99 provides “Forbearance” though the operator was free to fix tariff but there could yet be three requirements (i) prior approval from Authority for forbearance, (ii) reporting forbearance, (iii) no reporting – forbearance. In the present case he said that there was no reporting requirement of the “Forbearance” and any tariff could be fixed by licensor. However, he also submitted that the Authority having the overall power of regulating the tariff could still require the operator i.e. the licensee to fix lower rates of tariff by amending TTO-99 or otherwise. That contingency, however, he submitted, did not arise in the present case.

On the basis of TTO-99 DOT (now BSNL) issued circular dated 13.4.99 fixing tariff for distance upto 5 kilometres @ Rs.24,558/-, which was tariff for 5 Kms. as per Annexure I of Schedule IV, as noted above. This was w.e.f. 1.4.99. Thus even though the leased

circuits of the petitioner was of a speed below 64 Kbps the tariff fixed was the same as was for speed of 64 Kbps. This sudden increase of tariff from Rs.1500/- to Rs.24,588/- would shock any consumer. The question that arises for consideration is if DOT (now BSNL) could fix tariff, as the TTO-99 provided for forbearance, for speed below 64 Kbps for a distance less than 5 Kms., same amount as fixed for speed of 64 Kbps for distance of 5 Kms. To me it appears it could not be so. How could an authority say that I would charge the same tariff for leased circuit of speed less than 64 Kbps for a distance less than 5 Kms. the same tariff as provided for speed of 64 Kbps for distance of 5 Kms. merely because TTO-99 provides for rate of leased circuit of speed below 64 Kbps at the will of the licensor? Any action of the authority has to be judged on the touchstone of reasonableness. Here, I find the action of the DOT (now BSNL), the licensor, for increasing the tariff from Rs.1500/- to Rs.24,588/- on the strength of TTO-99 to be arbitrary and unreasonable and rather quite illogical and irrational. Now look at what happened subsequently. Thereafter, tariff was rationalized and by circular dated 24.2.2000 tariff in respect of P-Wire upto 64 Kbps was fixed at Rs.5,000/- per kilometer per annum chargeable for a distance of less than 5 Kms. w.e.f. 1.1.2000. Tariff was further revised w.e.f. 1.4.2001 by circular dated 12.4.2001 giving rates chargeable for the distance less than 15 Km. Revised rates were specified for each kilometer upto the distance of 15 Kms. starting with Rs.4,500/- for the first kilometer. Thus under this circular dated 12.4.2001 charges for leased circuit with speed upto 64 Kbps were fixed and these were Rs. 4500/- for 1st Km. per annum, for 2 Kms. distance Rs.6500/-; for 3 Km. Rs.8500/-; for 4 Kms. Rs.10,000/- for 5 Kms. Rs.11,500/- and so on. After this circular of 12.4.2001 fixing tariff w.e.f. 1.4.2001, petitioners do not have any grievance.

Mr. Maninder Singh submitted though DOT (now BSNL) had absolute right to fix the tariff in view of "Forbearance" under TTO-99 yet the rates were rationalized w.e.f. 1.4.2001 taking into account various considerations like technical, economical and financial. It is not necessary for me to look into those considerations which led to the fixing of tariff w.e.f. 1.4.2001 as there is, as stated above, no challenge to the tariff fixed after 1.4.2001. The question which the petitioners ask is: where were those considerations when the rates were enhanced for chargeable distance from 1 Km. to 5 Km @ Rs.24,588/- w.e.f. 1.4.99. It is admitted case of the parties that the petitioners were having "Leased Circuits" for a distance less than 5 Kms. and having speed below 64 Kbps. I do not think that there is any legal justification for the DOT (now BSNL) to fix tariff @ 24588/- for a distance of 1 Km. to 5 Kms for "Leased Circuits" having speed below 64 Kbps which amount under Annexure -I of

Schedule –IV of TTO-99 was for a distance of 5 Kms. of "Leased Circuit" with speed of 64 Kbps. When the speed is less than 64 Kbps and the distance also less than 5 Kms., the rental has to be less than Rs.24,558/-. It is therefore quite apparent that DOT (now BSNL) did not go into this question at all when it fixed the rental of Rs.24,558/- for P-Wire of "Leased Circuit" with speed less than 64 Kbps and distance of less than 5 Kms. It would appear this question was only subsequently gone into by DOT (now BSNL) when it rationalized the whole thing and w.e.f. 1.4.2001 rental was fixed @ Rs.4500/- for first Km. for a distance less than 5 Kms. where as noted above, speed of "Leased Circuit" of P-Wire was less than 64 Kbps.

When under TTO-99 tariff for a distance of 5 Km. with speed of 64 Kbps was fixed at Rs.24,558/- it would never mean that the tariff at the same rate could be fixed for any distance which is less than 5 Kms. with a speed even below 64 Kbps. "Forbearance" in para 3 (c) of the TTO aforesaid was intended merely to convey that a service provider was free to fix the rate. But the rate so fixed should be reasonable and had to be less than what was fixed for distance of 5 Km. and speed of 64 Kbps. Consumers forming a group can certainly raise a dispute that the rate charged by service provider, even though it had taken benefit of "Forbearance" clause was arbitrary in the circumstances of the case. Action of DOT (now BSNL) was therefore erroneous when it fixed tariff for P-Wire @ 24,558/- even for a distance of 1 Km with speed less than 64 Kbps. The tariff had to be Rs.4500/- for every Km. of distances less than 5 Km. effective from 1.4.99 as subsequently fixed. To this extent all these petitions are allowed. The impugned tariff as fixed by DOT (now BSNL) shall stand modified in terms of this order effective from 1.4.1999 i.e. @ Rs.4500/- annually for distance of 1 Km. upto 5 Kms. of P-Wire of speed below 64 Kbps. Any excess amount realized from the petitioners shall be refunded. Petitioners thus become entitled to the refund of the excess amount paid by them and this amount may be adjusted by the BSNL in subsequent bills that may be raised against the petitioners. In case petitioners are not enjoying the facility of P-Wire "Leased Circuit" the excess amount shall be refunded by the BSNL within 8 weeks from today. Petitioners in Petition No.13,14,18/2003 will be entitled to cost to the extent fee of Rs.5000/- each and Petitioners in Petition No.15,16 and 17 shall be entitled to the cost to the extent of Rs. 6,000/- each [Rs.5000/- + Rs.1000/-(fee for Misc. Application)] paid by them for filing of these petitions. The amount of cost may also be adjusted by the BSNL in future bills that may be raised against the petitioners and if there is no P-Wire connection with any of the petitioners the cost shall be paid within 8 weeks as well.

As these six petitions were treated as filed by group of consumers a further direction is issued to BSNL to refund the excess amount to all the consumers similarly situated as the petitioners herein in terms of this order irrespective of whether they have filed any petition under Section 14 (a) of the Act or not.

.....J
(D.P. Wadhwa)
Chairperson

Sd/-