

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

DATED 29th MARCH, 2004

PETITION NO.19 OF 2003

Data Access (India) Limited

....Petitioner

Vs

Mahanagar Telephone Nigam Limited

...Respondent

BEFORE:

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

For Petitioner

:

Dr.A.M.Singhvi, Senior Advocate with
Mr.H.S.Chandhoke,
Mr.Pankaj Agarwal and
Ms.Geetanjali Lakhota, Advocates

For Respondent

:

Mr.Arun Kathpalia, Advocate

(a) NTP-99 – Migration Package - clause 18.1 of License Agreement - dispute regarding component-A payable for the second year of service - if no component payable when there is no profit - held, claim of the petitioner rejected.

(b) Lending rate – clause 18.8 of the License Agreement – interpretation - no function of DoT, licensor, to find out prime lending rate of the State Bank of India every month - claim of the petitioner for refund of alleged payment made in excess in terms of Migration Package rejected.

ORDER

In this Petition filed under Section 14(a)(i) of the Telecom Regulatory of India Act 1997 (for short the "Act"), the petitioner, an International Long Distance Operator (ILDO) is holder of licence of International Long Distance Service from the Department of Telecommunication in the Ministry of Communication, Government of India, seeks refund of Rs.8,69,24,457.36p from the Respondent, Mahanagar Telephone Nigam Limited (MTNL) being the alleged excess amount charged by MTNL for

the period October 23, 2002 to December 20, 2002 under an Interconnect Agreement entered by the petitioner with MTNL. This Interconnect Agreement is for interconnecting the network of the petitioner with the network of MTNL in the service areas of Delhi and Mumbai.

The petitioner here was granted licence by the Department of Telecommunications on March 27, 2002. This was under the provisions of the Indian Telegraph Act 1885. The Interconnect Agreement with the MTNL was entered into on July 19, 2002 as it is stated that petitioner was desirous of Interconnecting its network with the network of MTNL in the service areas of MTNL which is Delhi and Mumbai. Clause 11 of the Interconnect Agreement is as under:-

“Each party agrees that the other is treated no less favourably than any of other ILDO by MTNL and any other access provider by ILDO in same service area with regard to commercial, interconnectivity and other aspects of the Interconnect Agreement.”

The complaint of the petitioner is that this clause was breached by MTNL in its Interconnect Agreement with Bharti Telesonic Limited (BTSOL), another ILDO. This Interconnect Agreement with BTSOL is dated August 1, 2002 and the licence by the DOT granted to BTSOL is dated March 14, 2002. This petition came to be filed on November 25, 2003. The petitioner contended that the Interconnect Agreement between MTNL and BTSOL came to its knowledge only on February 21, 2002 in an earlier petition (Petition No.4 of 2003) filed by the petitioner against MTNL on this very Interconnect Agreement. The earlier petition was also filed in this Tribunal and it was decided on March 10, 2003 when that petition was dismissed by this Tribunal. MTNL has contended in opposition of this petition that it is barred by res judicata or principles analogous to res judicata in as much as before filing of the petition the petitioner had knowledge of the Interconnect Agreement entered by MTNL with BTSOL. MTNL has given specific date which is December 20, 2002 when it says the Interconnect Agreement of BTSOL came to the petitioner's knowledge. This fact is denied by the petitioner and it is asserted that the Interconnect Agreement of the MTNL with BTSOL came to its knowledge only after the filing of Petition No.4 of 2003 which was filed on January 8, 2003 and during the pendency of its proceedings the said Interconnect Agreement was made known to the petitioner on February 21, 2003. It is also submitted that terms of both the Interconnect Agreements i.e. that of between the petitioner and MTNL and BTSOL and MTNL are entirely different.

Before we proceed further we may refer to two more clauses of the Interconnect Agreement and these are as follows:-

“Clause 6.3.2 (iii)

In case higher rates for termination and carriage are offered by another ILDO to MTNL, ILDO shall have to pay at higher rate. Similarly, if MTNL contracts lower rates for termination and carriage with another ILDO, such lower rates shall apply with ILDO also. On the same lines, if ILDO offers higher charge to another BSO/CMSP or NLDO, the same shall apply to MTNL as well. These revised rates for termination shall apply to MTNL as well. These revised rates for termination shall apply from the date they are applied for another carrier, under the identical terms and conditions.

Clause 6.3.2 (iv)

Minimum monthly guaranteed (I/C) traffic: ILDO shall guarantee MTNL 20 million minutes on send or pay basis except for the initial 3 months of the date of start of service where the minimum guaranteed traffic condition would not apply.”

In the earlier petition (Petition No.4 of 2003) filed on January 8, 2003 against the MTNL, petitioner claimed Rs.8,70,00,000 which it said had been wrongly charged by the MTNL in violation of the Interconnect Agreement between the parties. The interpretation, which this Tribunal had to render, was on Sub-Clause (iv) of the Clause 6.3.2 of the Interconnect Agreement. This clause provides that petitioner should pay to the MTNL a minimum charge on per minute basis and lays down the details relating to payment for incoming International Subscriber Dialing (ISD) calls. The dispute in that petition was as to what would mean by the term “incoming ISD calls”. Would that include the calls transmitting through the network of the MTNL? This Tribunal held that traffic incoming into and terminating into the network of the MTNL could only be included in Clause 6.3.2 (iv) and dismissed the petition by order dated March 10, 2003.

Dr.Singhvi learned counsel for the petitioner referred to Clause 11 and said that this clause was the contractual equivalent to Article 14 of the Constitution. He said it was the requirement of the Interconnect Agreement between petitioner and MTNL that the terms thereof would not be less favourable than in other similar Agreement entered into by MTNL with any other International Long Distance Service Provider. He stated that BTSOL has been given favourable terms and MTNL was duty bound to inform the petitioner of these terms and which should also have been granted to the petitioner and that MTNL had in fact accepted the stand of the petitioner when it agreed to provide similar terms to the petitioner as it had provided to BTSOL but that was only with effect from

December 21, 2002 and not October 23, 2002. However, it may also be noted that petitioner, before filing the petition, had also wanted the change from October 19, 2002.

One has now to find as to how these two dates have been mentioned. As far as first date is concerned one can refer to the date of Interconnect Agreement which is July 19, 2002, service starting on July 23, 2002 and when moratorium given in Clause 3.6.2(iv) expired after three months. But it was not clear as to the date December 21, 2002. According to Mr. Arun Kathpalia, counsel for respondent, it is the date when the petitioner met the MTNL officials and became aware of the Interconnect Agreement with BTSOL and that this date was indicated by the petitioner itself in its letter dated March 10, 2003 to MTNL.

As stated above, it has been the stand of the MTNL that Interconnect Agreement with BTSOL contains terms which are substantially different than those contained in the Interconnect Agreement with the petitioner. As to what are the differences we will presently examine but one thing remains that MTNL itself agreed to substitute certain clauses in the Interconnect Agreement with the petitioner with that of BTSOL. While MTNL said that this change would be effected from December 21, 2002 the petitioner says it should be October 23, 2002 as claimed in the petition.

After the Petition No.4 of 2003 of the petitioner was dismissed on March 10, 2003, on that very date the petitioner wrote a letter to Mr. Narender Sharma, Chairman-cum-Managing Director of MTNL. A reference was made in this letter to the decision of TDSAT and undertaking by the petitioner to make the payment to MTNL in terms of the judgment and request to MTNL not to encash the bank guarantee. Then there is the following para in the letter:-

"Since the dispute resolution has already taken place by means of TDSAT judgment dated 10.03.2003, we wish to place on record our agreement to the decision given by the TDSAT and we would not contemplate any further legal proceedings for review of the TDSAT order dated 10.03.2003 either in the same forum or in the Hon'ble Supreme Court of India, provided MTNL migrates Data Access to the tariff plan agreed with other operators i.e. Rs.4.75/- per minute without "Send or Pay" obligation at a date earliest possible by MTNL but not later than w.e.f. 20-December-2002."

Acting on this request of the petitioner, MTNL agreed and there was thus change in the terms of the Interconnect Agreement of the petitioner with the MTNL and this was conveyed by the letter dated April 17, 2003 of the MTNL which is as under:-

"Approval of the competent authority is hereby conveyed for following change in the terms and conditions of revenue sharing. The clause 6.3.2 (i), (ii), (iii), (iv), (v), (vi) enclosed at

Annexure 1 and were part of the earlier agreement will be replaced by Clause No.6.3.2 (i), (ii), (iii) of MTNL's agreement with M/s BTSOL which is placed at Annexure II. Thus, the portion at Annexure I will be replaced by the portion at Annexure II and will be effective w.e.f. 21.12.2002 as per the approval of the competent authority. Necessary action for billing may kindly be taken accordingly.

The approval is subject to the fulfillment of the commitments made by M/s Data Access India Ltd. in their letter dated 10.03.2003 addressed to CMD, MTNL (copy enclosed)."

I may set out these terms in the two agreements:-

DA INTERCONNECT AGREEMENT		BTSOL INTERCONNECT AGREEMENT	
6.3.2 Payment for Termination of Incoming ISD Calls.		6.3.2 Payment for Termination of Incoming ISD Calls.	
(i) For incoming international calls, ILDO shall pay to MTNL a minimum charge on per minute basis for termination as per details given below:-		(i) For incoming international calls, ILDO shall pay to MTNL a minimum charge of Rs.4.75 per minute for termination.	
	Total Charge Rs.Per minute (0000hrs-2400hrs)		
MTNL Delhi and Mumbai	4.40		
<p>Note:</p> <p>a) There shall not be any peak or off peak rates. The above rates shall apply for all 24 hours of the day for all days of the year.</p> <p>b) The applicable pulse rate for measurement of said minutes shall be 1 second rounded off to next higher minute on total calls in a month.</p> <p>c) The charges are independent of origination points of calls.</p>		<p>Note:</p> <p>a) There shall not be any peak or off peak rates. The above rates shall apply for all 24 hours of the day for all days of the year.</p> <p>b) The applicable pulse rate for measurement of said minutes shall be 1 second rounded off to next higher minute on total calls in a month.</p> <p>c) The charges are independent of originating points of calls.</p>	
(ii) ILDO shall deliver the incoming calls at POIs at all the Tandems of MTNL and further carriage from the POI to final destination shall be done by MTNL.		(ii) ILDO shall deliver the incoming calls at POIs at all the Tandems of MTNL and further carriage from the POI to final destination shall be done by MTNL.	
(iii) In case higher rate for termination and carriage are offered by another ILDO to MTNL, ILDO shall have to pay at higher rate. Similarly, if MTNL contracts lower rates for termination and carriage with another ILDO, such lower rates shall apply with ILDO also. On the same lines, if ILDO offers higher charge to another BSO/ CMSP or NLDO, the same shall apply to MTNL as well. These revised rates for termination shall apply from the dates they are applied for another carrier, under the identical terms and conditions.		(iii) The per minute termination and carriage charges as above are based on the RBI reference exchange rate of 1US\$ = Rs.49. In case the exchange rate for 1US\$ is more/less than Rs.49/- on the last day of previous month, the charges payable to MTNL shall be suitably enhanced/reduced for the incoming traffic of the following month. For example if on 30 th November, 2002, the exchange rate is 1 US\$ = Rs.50.225, the charge in the lowest slab shall be Rs.4.87 per minute for December, 2002.	
(iv) Minimum monthly guaranteed I/C			

traffic: ILDO shall guarantee MTNL 20 million minutes on send or pay basis except for the initial 3 months of the date of start of service where the minimum guaranteed traffic condition would not apply.

(v) It is agreed that ILDO shall pay MTNL, @ 50% of the settlement rate/ minute for termination of calls in MTNL's network subject to a minimum as specified in clause 6.3.2 (i). ILDO agrees to regularly provide copies of the latest applicable agreements with international carriers as filed with TRAI. Before the launch of the commercial services, ILDO shall supply copy of latest applicable revenue sharing agreement to the Corporate Office of MTNL as well as to the designated billing authority of MTNL. ILDO agrees to provide copy of latest applicable agreements with international carriers within 7 days of signing of such agreement.

(vi) The per minute termination and carriage charges as above are based on the RBI reference exchange rate of 1US\$ = Rs.49. In case the exchange rate for 1US\$ is more/less than Rs.49/- on the last day of previous month, the charges payable to MTNL shall be suitably enhanced/reduced for the incoming traffic of the following month. For example if on 30th November, 2002, the exchange rate is 1 US\$ = Rs.50.225, the charge in the lowest slab shall be Rs.4.51 per minute for December, 2002.

I might say that there is difference in the existing clauses of the Interconnect Agreement of MTNL with petitioner and those with the BTSOL. Mr.Kathpalia referred to Clause 6.3.5(v)^[1] of the Interconnect Agreement to submit that terms of the agreement with the petitioner were reviewed and change was effected by letter dated April 17, 2003 of MTNL which was by "mutual agreement" between the two Interconnecting Operators.

On May 7, 2003, the petitioner wrote another letter to MTNL and it was pointed out that according to the terms of the Interconnect Agreement for first three months i.e. till October 18, 2002, the condition of minimum monthly guarantee of traffic (Send or Pay) was not applicable. The petitioner said that therefore, w.e.f. October 19, 2002 the terms of the Interconnect Agreement with

BTSOL should have been made applicable and therefore, the change in the Interconnect Agreement should be w.e.f. October 19, 2002 and not from December 21, 2002. This request of the petitioner for change in the terms of Interconnect Agreement with effect from October 19, 2002 was a departure from its earlier request as contained in its letter dated March 10, 2003 which was accepted by MTNL. Petitioner did not give any reason for this variation in its stand when petitioner itself wanted any date for change in terms of the Interconnect Agreement earlier to December 20, 2002 which was agreed to by MTNL. Petitioner sent two more reminders and then on October 14, 2003 the MTNL did not accept the change as suggested by the petitioner and wrote as under:-

"Please refer to your office letter dated 23.08.2003 regarding amendment to the ILD Interconnect Agreement effective from October 19, 2002 (instead of December 21, 2003).

It has been decided by the competent authority that your request cannot be acceded and status, as communicated to your vide our office letter No.MTNL/RA/ILD/DA/2002 dated 17.04.2003 will be maintained in this regard."

It is thereafter that this petition came to be filed. I repeatedly asked Dr.Singhvi, learned counsel for the petitioner as to the significance of the date of December 21, 2002 given by MTNL for migration of the petitioner to the terms of Interconnect Agreement of BTSOL and why petitioner itself had given the date December 20, 2002. No clear answer was given to me except to say that the date is not material in as much as MTNL has agreed to the fact that terms of Interconnect Agreement with the petitioner were less favourable than that with the BTSOL. It was the assertion of the Dr.Singhvi that the Interconnect Agreement between BTSOL and MTNL came to the knowledge of the petitioner only after the petition No.4 of 2003 was filed. In the petition, this averment is stated at various places as follows:-

In Para 1 at page 2

"Since the terms of the BTSOL Interconnect Agreement were more favourable to the Petitioner w.e.f. October 23, 2002, the Petitioner desired that it be migrated to the BTSOL Interconnect Agreement terms upon expiry of three months of the start of service by the Petitioner. However, the Respondent, for reasons know to itself has effected the migration from December 21, 2002 (instead of October 23, 2002), and refused to accede to the Petitioners request for adherence to Clause 11 of the DA Interconnect Agreement. This decision was intimated to the Petitioner vide the Respondent's letter of October 14, 2003. Hence this Petition."

In Sub-Para (iv) of Para 4 at page 4.

"The petitioner was completely unaware of the exact terms thereof till February 21, 2003, when the Respondent filed the BTSOL Interconnect Agreement before this

Hon'ble Tribunal, during the course of proceedings in relation to Petition No.4 of 2003."

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In Sub-Para (ix) of Para 4 at page 6.

"Consequently, the Petitioner filed a Petition bearing No.4 of 2003 before this Hon'ble Tribunal. It is pertinent to point out that at no point of time, either prior to or at the time filing of the said Petition No.4 of 2003 before this Hon'ble Tribunal, the Petitioner was provided with a copy of BTSOL Interconnect Agreement by the Respondent, and was thus, completely unaware of the exact terms thereof. In fact, the Petitioner came to know of the specific terms of the BTSOL Interconnect Agreement only in the month of February 2003, when the Respondent on February 21, 2003, filed a copy of the BTSOL Interconnect Agreement before this Hon'ble Tribunal, at a time when final arguments were being addressed in Petition No.4 of 2003."

Mr.Kathpalia, learned counsel for MTNL drew my attention to letter dated December 21, 2002 written by the petitioner to MTNL which was filed by the petitioner in the earlier petition (Petition No.4 of 2003). At that time when there was a dispute between the petitioner and MTNL as to the term interpretation of incoming calls, MTNL started to invoke the bank guarantees. Discussions were held between the parties in a meeting on December 20, 2002. On the basis of these discussions petitioner wrote a letter dated December 21, 2002 to MTNL a portion of which I extract as under:-

"On the basis of the above, it has been agreed between Data Access and MTNL that;

- (i) Data Access will refer the dispute to TRAI/TDSAT as the need may be through a petition, a copy of which will be made available to MTNL.
- (ii) The process of dispute resolution as provided in the interconnect agreement will be followed by both parties to end the dispute.
- (iii) There is no payment default from Data Access since the invoice itself is raised on the basis of a contract provision which is under dispute.
- (iv) Through this is not a billing dispute, Data Access in good faith shall deposit an amount equivalent to 50% of disputes amount with MTNL which is as per provision of billing disputes of the interconnect agreement till such time the decision of TRAI/TDSAT is obtained in the matter.
- (v) To avoid further disputes arising out of the contract, MTNL agreed to migrate Data Access to the provisions of agreement of MTNL with BTSOL which does not have send or pay provision effective December 1, 2002.

On the basis of the above, our legal department will prepare the petition for submission to TRAI under copy to MTNL on priority.

In the meantime MTNL is requested to act on the following items on priority:-

- (a) To provide transit call charges invoice for November 2002 to enable us to arrive at the disputed amount against invoice of 10th December, 2002.
- (b) To issue necessary contract amendment for migration of Data Access to the same terms as agreed between MTNL and BTSOL so that no further bills are issued with errors like the November bill.

I trust you will find the above accurate and exactly what was mutually discussed and agreed upon and will initiate necessary actions at your end.

Warmest Regards,

Siddhartha Ray
Managing Director"

This letter was filed as Annexure-H in Petition No.4 of 2003 by the petitioner which petition was filed January 8, 2003. This letter shows in clear terms that on December 20, 2002 petitioner was well aware of the terms of Interconnect Agreement between BTSOL and MTNL and wanted the terms of that agreement. The question that arises for consideration is as to why the petitioner did not seek parity with the Interconnect Agreement between MTNL and BTSOL in its Petition No.4 of 2003 when issue had very much arisen before filing of that petition.

That apart, petitioner has made statements in the petition at various places which are false to its knowledge that it was not aware of the Interconnect Agreement between MTNL & BTSOL earlier to February 21, 2003. In fact after the letter dated December 21, 2003 was brought to my notice, Dr.Singhvi said there is reference in the letter dated December 21, 2002 of the petitioner to another Interconnect Agreement which is between the Tatas and MTNL. To that agreement the petitioner was also certainly made aware. When confronted with letter dated December 21, 2002 and the fact that the petitioner itself had sought review of the terms of the Interconnect Agreement with effect from December 20, 2002, Dr.Singhvi's response was that it could not be novation of contract and that in any case when the petitioner requested in his letter that the similar terms as that of BTSOL be given as from December 20, 2002, MTNL could not have stated that these would be given from December 21, 2002. To me it appears an argument in desperation. The date December 20, 2002 or December 21, 2002 is not of any consequence in as much as petitioner in its letter dated May 7, 2003

asked for the terms of Interconnect Agreement of BTSOL from October 19, 2002 and not from December 21, 2002. Again in its letter dated July 1, 2003, the petitioner wanted amendment of its Interconnect Agreement effective from October 19, 2002. Now, in the present petition the date given is that the change in the date in its Agreement should have been October 23, 2002. There is no explanation as to why in these earlier two letters aforesaid petitioner wanted the terms to be incorporated in its Agreement from October 19, 2002 and now it seeks change from October 23, 2002. Letter dated December 21, 2002 was not filed by the petitioner with the present petition which appears to be quite intentional in order to support its claim of its knowledge of the Interconnect Agreement with BTSOL only on February 21, 2003 and not to a date prior to this. And it was left to the respondent to refer to this letter in the file of Petition No.4 of 2003 which petition filed by the petitioner earlier for a claim arising out of the same very Interconnect Agreement dated July 19, 2002.

To meet the arguments of Mr.Kathpalia that petitioner itself wanted review of the terms of the Agreement under Clause 6.3.5(v) of the Interconnect Agreement, Dr.Singhvi said that Clause 6.3.5(v) applies only to incoming and outgoing rates and not to other terms of Agreement. I think this is too narrow a construction. In any case parties can certainly by mutual consent agree to change of the terms of the Agreement and there cannot be any legal bar to that. The petitioner itself in its letter dated March 10, 2003 wanted the terms of BTSOL Agreement to be incorporated in its own terms and said this change should not be later than December 20, 2002. The petitioner also stated in this letter that it did not propose to file appeal against the order dated March 10, 2003 of TDSAT in Petition No.4 of 2003 or take any further legal proceedings for review of that order either in the Tribunal itself or the Supreme Court provided MTNL agrees to migrate the petitioner to the tariff plan agreed with other operators. It was on these stipulations that MTNL agreed to the request of the petitioner and gave the same terms as that of BTSOL with effect from December 21, 2002 and it mentioned that "the approval is subject to fulfillment of the commitments made by Data Access India Limited in their letter dated March 10, 2002 addressed to CMD, MTNL (copy enclosed)." Dr.Singhvi however said that once having accepted the stand of the petitioner, MTNL was duty bound to effect migration of the petitioner to the Interconnect Agreement of BTSOL with effect from October 23, 2002. The petitioner itself wanted that terms could also be given from December 20, 2002 and it was agreed to by the MTNL. Petitioner could not go back on its own commitment and say that terms should be with effect

from October 23, 2002. It is not the case of the petitioner that the date December 20, 2002 was given in the letter of March 10, 2003 under any mistake, misapprehension or that it was a misprint. It is a different matter that the petitioner became wiser afterwards.

Dr.Singhvi said MTNL was duty bound to inform the petitioner of the terms of the Interconnect Agreement entered into with BTSOL in view of Clause 11 of the Interconnect Agreement with the petitioner. That could be so only if MTNL was of the view that BTSOL was given more favourable terms than those given to the petitioner. If the MTNL bonafide believed that the terms were different, it could not be said it was still duty bound to disclose the terms of the Agreement with BTSOL or any other third party to the petitioner. Grant of a licence by Central Government is not a secret or confidential document and it has to be assumed that the petitioner was well aware of the licence granted to BTSOL. It is also known to everyone that network of the MTNL is required for Delhi and Mumbai for any International Long Distance Operator (ILDO). It is not the case of the petitioner that it did ask for copy of Interconnect Agreement between the MTNL and BTSOL and it was refused. I therefore, do not find any force in the argument that and duty was cast on MTNL to give to the petitioner the contents of Interconnect Agreement it enters into with any party having an ILDO licence. Mr.Kathpalia submitted that by agreeing to the petitioner same terms as that of BTSOL, MTNL did not ever accept that the terms of BTSOL were more favourable than the petitioner and he said request of the petitioner was accepted to buy peace as was desired by the petitioner. Mr.Kathpalia pointed out the differences between the two Interconnect Agreements i.e. between the MTNL and petitioner and MTNL and BTSOL which are as follows:-

- a. Clause 6.3.2 of the agreement with the Petitioner while fixing a rate of Rs.4.40 as the charge per minute for an incoming international call terminating in the network of the Respondent takes into account two aspects (i) that the Petitioner would, subject to the minimum rate of Rs.4.40, pay to the Respondent @ 50% of the settlement rate/ minute as per its agreement with the foreign operator and (ii) the Petitioner shall provide a minimum guaranteed traffic of 20 million minutes of calls terminating in the Respondent's network.
- b. As against the rate of Rs.4.40 per minute, the agreement with Bharati stipulates a higher rate of Rs.4.75 per minute of incoming calls terminating in the Respondent's network.
- c. While Clause 6.3.2 of the agreement with the Petitioner stipulates a minimum guaranteed traffic of incoming terminating calls, at the same time Clause 6.3.3 of this agreement also provides for volume discounts in case of certain volumes being

achieved. It may be noted that no such provision finds place in the Agreement with Bharati.

- d. In the agreement with the Petitioner, the Petitioner was given the liberty to hand over all the traffic meant for the Respondent's subscribers directly through the designated gateway TAX's/Tandems/local exchanges for an initial period of three months with an extra charge for the carriage between the TAX and the further points as above stated. As against this the Agreement with Bharati permits the handing over of the traffic at the tandems only. In effect the agreement with the Petitioner permits it to operate with a much less infrastructure inasmuch as it need not have the infrastructure to hand over at the tandem and may hand over at the TAX directly. In this context Clause 13 and Clause 2.1.2.1 of the agreement with the Petitioner may be compared with Clauses 13 and 2.1.3 of the Agreement with Bharati.
- e. Clause 2.3.2 of the agreement with the Petitioner permits transit calls meant for termination in the network of any other service provider to be transited through the network of the Respondent subject to an agreement for the same between the Petitioner, the Respondent and the terminating service provider in writing. This facility of transitting the calls has not been provided to Bharati. In fact the Petitioner has misused the aforesaid provision and has without entering into tripartite agreement continued to transit calls without even making the necessary payment for the same.
- f. Accordingly, because of the aforesaid benefits and peculiarities of Clauses 6.3.4, Clauses 7.2.1.2, 7.2.2 and 7.6 of the Agreement of the Petitioner differ in content with the agreement with Bharati."

As pointed above the questions of difference were never gone into in as much as MTNL accepted the request of the petitioner to migrate and offered same terms as given in the Interconnect Agreement with BTSOL without entering into any dispute as to whether as to which clause of the Interconnect Agreement was more favourable to the petitioner though in the ultimate analysis it may appear that terms of BTSOL agreement are more favourable but that has to be seen from three angles i.e. commercial, interconnectivity and other aspects of the Interconnect Agreement. The petitioner desired migration to the BTSOL agreement from a particular date and it was given. There is therefore no merit in the petition.

Principle of res judicata is based on sound principles of law and is applicable to the proceedings before a judicial Tribunal. Petitioner could have sought relief in the earlier petition as the dispute had arisen by that time as is being sought by it now. It has been repeatedly held by the Supreme Court that the principle of res judicata is not a rule of technicality but is based on high public policy to bring about an end to litigation by giving finality to judgments inter parties and save a litigant from harassment a second time. Rule of constructive res judicata postulates that if a plea could have been

taken by a party in a proceeding between him and his opponent, he could not be permitted to take that plea against the same party in a subsequent proceeding. Here in both, the earlier petition and the present one, it is the Interconnect Agreement which is subject matter of dispute and from which rights are being claimed by the petitioner. The issue raised in the present petition was very much alive when the earlier petition was filed as can be seen from the letter dated December 21, 2002 of the petitioner to MTNL. The petition to my mind is barred by constructive res judicata or principles analogous to res judicata. This petition, therefore, fails on this ground as well.

The petition is dismissed with a cost. Counsel fee Rs.20,000/-. Separate proceedings under Section 340 of the Code of Criminal Procedure, 1973 are being initiated for making false statements in the petition which has been verified as oath.

Sd/-
J
(D.P.Wadhwa)
Chairperson

[1] 6.3.5 Review

The incoming and outgoing rates as above are valid until 31.03.2002 or till reviewed in accordance with this agreement. The first review shall be after 6 months of the date of contract and after each 3 months thereafter. However, the review can also be done subject to following events:-

- (i)
- (ii)
- (iii)
- (iv)
- (v) Mutual agreement between the two interconnecting operators.