

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

DATED 27th APRIL, 2005

PETITION No.9 OF 2001
(With M.A.Nos.14 & 29 of 2002)

Association of Basic Telecom Operators & Others ...Petitioners
Vs
Bharat Sanchar Nigam Ltd. ...Respondent

WITH

PETITION No.12 OF 2003

Association of Basic Telecom Operators & Others ...Petitioners
Vs
Bharat Sanchar Nigam Ltd. & Another ...Respondents

PETITION No.3 OF 2002
(M.A.Nos. 6 &7 of 2002)

Cellular Operators Association of India ...Petitioners
Vs
Bharat Sanchar Nigam Ltd. ...Respondents

APPEAL No.5 OF 2002
(With M.A.No.17 of 2002 & M.A.No.78 of 2004)

Bharat Sanchar Nigam Ltd. ...Appellant
Vs
Telecom Regulatory Authority of India & Others ...Respondents

BEFORE:

HON'BLE MR. JUSTICE D.P. WADHWA,
CHAIRPERSON
MR. VINOD VAISH, MEMBER
LT.GEN.D.P.SEHGAL (RETD.), MEMBER

PETITION No.9 OF 2001

- For Petitioners : Mr.Ramji Srinivasan with
Mr.Gagan Sareen, Advocates
- For Respondent : Mr.Maninder Singh, Mr.Ankur Talwar,
Mr.Angad Mirdha,Advocates

PETITION No.12 OF 2003

- For Petitioners : Mr.Ramji Srinivasan with
Mr.Gagan Sareen, Advocates
- For Respondent No.1-BSNL : Mr.Maninder Singh, Mr.Ankur Talwar,
Mr.Angad Mirdha,Advocates
- For Respondent No.2-MTNL : Mr Arun Kathpalia, Advocate

PETITION No.3 OF 2002

- For Petitioner : Mr.C.S.Vaidyanathan,Senior Advocate
with Mr.T.S.Murthy,,Advocates
- For Respondent : Mr.Maninder Singh, Mr.Ankur Talwar,
Mr.Angad Mirdha,Advocates

APPEAL No.5 OF 2002

- For Appellant- BSNL : Mr.Maninder Singh, Mr.Ankur Talwar,
Mr.Angad Mirdha,Advocates
- For Respondent No.1-TRAI : Mr.Meet Malhotra with
Mr.Raghvinder Singh, Advocates
- For Respondent No.2-ABTO : Mr.Ramji Srinivasan with
Mr.Gagan Sareen, Advocates

Catchwords:-

Telecommunication Interconnection (Charges & Revenue Sharing) Regulation 2001, Telecommunication Interconnect (Charges and Revenue Share) Regulation 1999 and Telecommunication Interconnection (Port Charges) Regulation 2001. Delhi High Court in MTNL Vs. TRAI – does not strike down 1999 Regulations in its entirety – only Clause 8 which gave overriding powers to TRAI in relation to the licence conditions struck down.

Validity of Interconnection Regulations [Telecommunication Interconnection (Port Charges) Regulations 2001 and Telecommunication Interconnection (Charges and Revenue Sharing) Regulation 2001) considered and not its validity as arguments on the power of TRAI to issue regulations not fully addressed.

Interconnect agreement – licensee to comply with the terms of Interconnect Agreement – jurisdiction of TRAI to vary the terms of port charges and access charges.

ORDER

In this order we are going to deal with four matters, namely, (i) Petition No.9 of 2001 submitted under Section 14(a)(ii) read with Section 14(A) (1) of the Telecom Regulatory Authority of India (TRAI) Act 1997 filed by Association of Basic Telecom Operators (ABTO) and Others against Bharat Sanchar Nigam Limited (BSNL), (ii) Petition No.12 of 2003 under Section 14(A)(1) of TRAI Act 1997 by ABTO and Others against Bharat Sanchar Nigam Limited (BSNL) and Mahanagar Telephone Nigam Limited (MTNL), (iii) Petition No.3 of 2002 submitted under the same provisions of the TRAI Act 1997 by the Cellular Operators Association of India (COAI) against Bharat Sanchar Nigam Limited (BSNL), (iv) Appeal No.5 of 2002 under Section 14(b) and 14(A) (2) of the TRAI Act by BSNL against Telecom Regulatory Authority of India and Others.

Although filed at different points of time there is almost a common history and background in the petitions and involves interpretation of Licenses issued at around the same point of time and the related Interconnect Agreements and Interconnect Regulations issued by Telecom Regulatory Authority of India (TRAI).

2. There is reference made to “License Agreement”, “Interconnection Arrangements”, “Interconnection Agreement”. “Interconnection Charges”. It would, therefore, be useful to understand clearly what is meant by these terms.

(a) **License Agreement:-** Under Section 4 (1) of the Indian Telegraph Act 1885, the Central Government has the power to grant a license on such conditions and in consideration of such payments as it thinks fit to any person to establish or maintain or work a telegraph in any part of India. Earlier, telecommunication services in the country were a government monopoly, being run and managed by the Department of Telecommunications (DoT) of the Central Government. Subsequently the Central Government took a policy decision to induct private sector which process has over the years continued to gain strength. The service providing functions of the Department of Telecommunications were also corporatised in the meanwhile and Bharat Sanchar Nigam Limited (BSNL) came into existence on 01.10.2000. The service providing functions of the Central Government in Delhi and Mumbai areas had been corporatised even earlier whereby Mahanagar Telephone Nigam Limited (MTNL) was created in 1986. For our purpose the Department of Telecommunications (DoT) is the Licensor and service providers (including BSNL and MTNL) are the Licensees.

(b) **Interconnection Arrangement and Interconnection Agreement:-** By its very nature, the telecommunication industry is a network industry. “Interconnection” in telecommunication parlance constitutes the mechanism by which one telecom service provider can connect his equipment, network and services to enable its customers to have access to customers service and network of other telecom service providers. By interconnection, the telecommunication network and

services of various service providers get linked with each other so that they function as a coherent system and a subscriber in any one network may have access to any other subscriber in a different network. An interconnection agreement specifies the commercial, technical, operational and related terms. As stated in clause 1.7.3.15 of the basic services license agreement, “Interconnection Agreement” for basic telephone services is meant to spell out “(1) Technical issues pertaining to interconnection, (2) Interconnect capacity – Planning and information system/aspects (3) Testing and commissioning of interconnect circuits. (4) Interconnect Performance standards, (5) Interconnection charges (6) Interconnect Billing systems and payments, (7) Liability, Indemnity and Intellectual Property rights, and (8) Disputes and arbitrations.

- (c) **Interconnection Charges:-** Interconnection involves linking of one telecom operator to the infra-structural facilities of another. Interconnection charges include charges for installing, maintaining and operating the points of interconnect, the charges for collecting the call at the point of interconnection and carrying it to the delivery point and payment for other supplementary services. In the matters before us we deal with two types of interconnection charges (i) port charges which constitute annual amounts paid by one operator who seeks to interconnect with another for physically establishing the interconnection; and (ii) access charges which constitute amounts paid to a Service provider for carriage/termination of telecom signal of another operator.

Petition 9 of 2001, MA 29 of 2002, Petition 12 of 2003:

3. Petition No. 9 of 2001 (ABTO and Others Vs BSNL) basically challenges the letters dated 28.4.2001 and 31.5.2001 of BSNL addressed to the Basic Service providers by which BSNL proposed new arrangements for interconnection charges falling in the description of ‘Access Charges’ and invited the Basic Operators for a discussion on that basis by a particular date failing which it would consider temporary suspension of the interconnection agreement.

The following prayer was made to the Tribunal:

- (a) set aside the impugned letters dated 28.4.2001 and 31.5.2001 issued by BSNL to each of the Private BSOs.
- (b) Direct BSNL to continue to provide and maintain interconnection with Private BSOs in accordance with the provisions of the Telecommunication Interconnection (Charges and Revenue Share) Regulation, 1999;
- (c) Direct BSNL to disclose and furnish to TRAI full and complete information regarding costing and other details of its unbundled network elements;
- (d) Impose exemplary and punitive fines on BSNL on account of the abuse of its dominant and virtual monopoly status.
- (e) Award costs of the present Petition; and
- (f) Pass such further or other orders as this Hon'ble Tribunal may deem fit and proper in the facts and circumstances of the case.

4. Interim order was issued by the Tribunal on 10/7/2001 directing maintenance of status quo and payment of admitted amounts in accordance with law in the following terms:

“Issue Notice. Reply on behalf of the Respondent be filed within 10 days. Rejoinder, if any, to the reply on behalf of the respondent be filed within 7 days thereafter. In the meantime, if the bill is raised by the respondent, the admitted amount of liability will be paid by the petitioner in accordance with the law. However, the amount in dispute will not be paid till the disposal of the Petition. The Petition is adjourned to 31st July, 2001”.

5. Additional Affidavit was filed on behalf of the Petitioners on 18/2/2002 for bringing on record subsequent developments. In particular these developments were:

- (i) On 02/11/2001, BSNL issued a Circular to its field offices reviewing the Interconnection charges (Access charges as well as Port charges for both

Basic and Cellular Services) and while superseding the Circular of Department of Telecommunications dated 01/10/99 and 25/10/99 declared that the Access and Port charges were to be charged at pre-May '99 rates (with effect from 1.5.99 the access charges and port charges based on the May '99 Interconnect Regulation of TRAI, hereinafter referred to as the "May '99 Regulations", had come into force through the above circulars of DoT). The letter made no reference to the points raised by BSNL in its impugned letters dated 28/4/2001 and 31/5/2001. It seems that the Field offices of BSNL had started raising demands based on the circular of 2.11.2001.

- (ii) The Basic Service Operators had drawn attention of BSNL in the context of the above Circular of 2.11.2001, to the interim orders of stay of the Tribunal dated 10.7.2001.
- (iii) TRAI on 14/12/2001 issued afresh the Telecommunication Interconnection (Charges and Revenue Sharing) Regulation, 2001 (5 of 2001).

This Regulation re-emphasized and reaffirmed each of the terms and provisions of the May 1999 Interconnection Regulations and further expressly declared in para 3(v)(a) as under:

“The existing charging arrangements, if any, between the interconnection seekers and interconnection providers shall hold good until changed with the concurrence of the Authority, or on the basis of a regulatory determination”.

On 28.12.2001, the TRAI also proceeded to issue the Telecommunication Interconnection (Port Charges) Regulation, 2001 (6 of 2001) specifically indicating the Port Charges and rationalizing some of the charges as compared to its previous determination in the May, 1999 Regulations”.

It was stated on behalf of the petitioners that the demands raised by BSNL based on its circular of 2.11.2001 be set aside in view of the above Regulations of TRAI.

6. BSNL replied to the above in its counter affidavit justifying its action and drawing attention to the following:

- (i) “That this Tribunal had passed an interim order dated 10.07.2001 in the present petition directing the petitioner to pay all admitted amounts i.e. as per the mutually agreed rates stipulated in the Interconnection Agreements between the Basic Operators and the Respondent.

The relevant portion of the said interim Order dated 10.07.2001 passed by this Hon’ble Tribunal is reproduced herein below:

“In the meantime, if the bill is raised by the respondent, the admitted amount of liability will be paid by the petitioner in accordance with law”.

This Interim Order dated 10.07.2001 was reiterated by this Tribunal by its order dated 8.3.2002 whereby the petitioners were directed to make payments of admitted liabilities and this was made subject to the final outcome of the present petition. The relevant portion of the said order dated 8.3.2002 passed by this Hon’ble Tribunal is reproduced hereunder:

“In the meantime, the interim order dated 10th July 2001 passed by this Tribunal will continue. Any payment made by the petitioners will abide by the result of this petition”.

- (ii) Clause 8 of Section VIII of the May ‘99 Interconnection Regulations of TRAI gave these regulations over-riding effect over the terms and conditions of the respective licenses and/or the conditions or charges in this regard prescribed by an originating/transit/terminating service provider and agreed upon and accepted by the parties. The relevant clause of the interconnection regulations is reproduced below:

“Section VIII

Residuary Clauses

8. Over-riding Effect

Provisions of this Regulation in respect of interconnection charges and revenue sharing shall have over-riding effect over the terms and conditions of the license of a service provider, as also any conditions or charges prescribed by an originating/transit/terminating service provider”

(iii) Thereafter, in pursuance of the above mentioned interconnection regulations, DoT issued a Circular dated 1.10.1999 to give effect and to provide for payment of Access Charges as per the rates laid down in the said regulations.

(iv) Hon'ble Delhi High Court in a Division Bench Judgment of 17.1.2000 (MTNL Vs TRAI) had declared Clause 8 of the Interconnection regulations to be ultra vires and void *ab initio*. This Judgment of the Hon'ble Delhi High Court had become final. According to BSNL the above mentioned judgment had the necessary consequence that, in the event of any conflict between the terms and conditions of the license agreement, or any interconnection arrangement, and the provisions of the interconnection regulations, the interconnection regulations would be void *ab initio* and the terms and conditions of the interconnection arrangement/license agreement would always remain binding between the parties.

BSNL further stated that it is a necessary and inevitable consequence of the above mentioned judgment of the Hon'ble Delhi High Court that from 1.5.1999 itself (i.e. the date on which the May '99 Interconnection Regulations came into force), the entitlement of the respondent to recover all the arrears towards non-payment of access charges at the agreed rate got restored. After the judgment of the Hon'ble Delhi High Court all the service providers, were under an obligation to clear all the arrears towards payment of access charges to the BSNL, and also automatically became liable to continue to pay the access charges at the pre-May '99 rates. Since there was clear and deliberate failure on the part of all the service providers in not clearing their admitted liabilities towards BSNL as stated above, the Circular in question only seeks to recover the admitted arrears and does not change the rates in any manner whatsoever that were agreed between the parties. Once the over-riding effect of the interconnection regulations was struck down, the necessary consequence was that the arrangement for access charges which was in place prior to the issuance of the said regulations would automatically get revived and all parties would be liable to pay the access charges on the agreed/admitted terms and conditions. According to BSNL, the circular dated 1.10.99 was issued pursuant to the May '99 Interconnection Regulations and to give effect to the overriding effect of these Regulations as per

Clause VIII of the Regulations, and automatically became non-existent in the eyes of law after the above-mentioned judgment of the Hon'ble Delhi High Court.

7. According to the Petitioners, for the following reasons, the contentions of BSNL in regard to the judgment of Hon'ble High Court of Delhi are incorrect:

(a) the Hon'ble Delhi High Court had no occasion to consider any provisions of Basic License Agreement/Interconnect Agreement executed with the DoT. Also Basic Service Operators were not a party in the said case.

(b) the challenge was primarily by the Cellular operators in relation to the 1st Amendment to the Interconnect Regulations notified in Sep '99 by TRAI relating to the Calling Party Pays Regime mandating payments of Interconnect Revenue Share to Cellular Operators by the Basic operators including DoT.

(c) that the Hon'ble Delhi High Court had only struck down the provisions of Regulation 8 of the May-99 Regulations. The remainder of the Interconnect Regulations, including provisions which stipulated prior reporting to the TRAI before effecting any change in the Interconnect Charges/Revenue Share Regime, continued to remain in force.

(d) the DoT/BSNL had themselves accepted this position(viz. the supremacy of the TRAI in evolving an Interconnection Access Charge Regime) and had not challenged the Delhi High Court order on this account..

(e) also that in any event DoT had already amended/novated the original License/Interconnect Agreement of 1997/1998 through their letters of 1.10.99, 12.10.1999 and 25.10.1999 incorporating the terms stipulated by TRAI in its May-99 Regulations; and

(f) further, immediately after the Judgment dated 17.1.2000 of the Hon'ble High Court of Delhi, the Government had effected an Amendment to the TRAI Act, 1997 w.e.f. 24.1.2000, thus vesting full and complete overriding powers in the TRAI to fix the terms and conditions of Interconnectivity.

8. In the meantime the petitioners filed MA No. 14 of 2002 pointing out that this was being done by way of abundant caution to meet any technical objection that the issue of Port Charges is not covered by Petition 9 /2001. Attention was drawn in this context to prayer (b) in Petition 9/2001 namely,

“(b) Direct BSNL to continue to provide and maintain interconnection with Private BSOs in accordance with the provisions of the Telecommunication Interconnection (Charges and Revenue Share) Regulation, 1999.”

By this MA, clarification was sought from the Tribunal that the interim order dated 10-7-2001 covers all demands contrary to the Interconnect Regulations of May 1999 till the final disposal of the petition or in the alternative an order may be issued by the Tribunal restraining BSNL from raising any demand which was inconsistent with the May 1999 Regulations etc.

BSNL objected that the pleadings in Petition 9/2001 did not include any reference to Port Charges and that the petition dealt with only access charges and wanted dismissal of the MA.

This was followed up soon after by a more detailed MA No.29 of 2002 whereby the petitioners sought amendment of Petition 9/2001 so as to include their contentions in regard to levy of revised Port Charges through the impugned circular of 2-11-2001. BSNL again objected stating that Petition No.9 of 2001 pertains to access charges as such the MA filed by the petitioner for amendment of the petition had no merit and deserved to be rejected.

9. Petition No 12 of 2003 has been filed by ABTO on 4-8-2003 against BSNL in this background by stating the following in paras 52 to 54 thereof:

“52. On the last date of hearing, in view of the objections continued to be raised by the Counsel for the Respondents that the Petition No.9 of 2001 could only examine a change to Access Charges and not to Port Charges and in view of the fact that the Counsel for the Respondent admitted that the Petitioners were free to file a separate Petition challenging Port Charges demanded under Circular dated 2-11-01 and that they would be within limitation, and in order to avoid any technical objections, and in deference to the observations made by this Hon’ble Tribunal, the Petitioners are filing the present Petition challenging the Claim / Levy Demand of Port charges vide Circular dated 2-11-01 as being contrary to the Interconnection Regulations of May 1999, the Circular dated 25-10-99 novating the Interconnect Agreement, the Reissued Interconnection Regulations of December 2001 and as bad in law, illegal, arbitrary and without jurisdiction. The Petitioners state and submit that this Hon’ble Tribunal had already granted Interim Directions in Petition No.9 of 2001, in addition to the Orders dated 10-7-2001 and especially in the Order dated 8-3-02, wherein this Hon’ble Tribunal has recorded that ‘any payment made by the Petitioners will abide by the result of this Petition.....’ Thus, the amounts paid by the Petitioners towards Port Charges have been paid without prejudice to the rights and contentions raised in the pending Petition No.9 of 2001 and that payments have been made by the Petitioners and accepted by the Respondents fully conscious of the fact that the matter was subjudice, and are liable to be refunded with interest, once this Hon’ble Tribunal holds in favour of the Petitioners.

Even otherwise, the calculation of charges for Ports is bad in law and totally incorrect in as much as there has been no aggregation of Ports at the same exchange upon renewal each year. Instead, BSNL has continued to treat these as independent requests for Ports at each renewal, even though they ought to have been taken on an aggregate basis and charges should have been calculated on a lower slab rate stipulated by the TRAI. Thus, BSNL / MTNL is liable to refund excess amounts charged even on this basis.

53. It is submitted that MA No.29 of 2002, seeking Amendments to include a challenge to Circular dated 2-11-01 and the demand and collection of Access and Port charges is pending. It is respectfully submitted that in the event this Hon’ble Tribunal deems it appropriate to consider the issue relating to the levy and collection of Port Charges separately, then this Petition may be taken to substitute all averments relating to Port Charges as have been raised in the Amendment Application No.29 of 2002 in Petition No.9 of 2001. This Petition is being moved only by way of abundant caution, and would be withdrawn, if the Hon’ble Tribunal allows the MA.29 of 2002 entirely to amend the Petition No.9 of 2001 to include a challenge to the levy of revised Port Charges.

54. It is further respectfully submitted that the contentions raised in Petition No. 9 of 2001 may be read as part of this Petition as well, since the matters in controversy arise out of common and identical Regulations and / or Agreements.”

10. Seeing the totality of the circumstances and the developments that have taken place after the filing of petition 9 of 2001 as brought out in the additional affidavit filed on 18-2-2002 by the petitioners, and the clear position that the impugned circular of 2-11-01 covers both Port charges as well as Access charges, we find it convenient to deal with the issues raised in regard to Port Charges by allowing the amendment of petition No.9 of 2001 itself as prayed for in MA No.29 of 2002 rather than deal with a separate petition and with this understanding we treat Petition No.12 of 2003 as withdrawn and, dismiss the same.

11. In regard to Port charges, the following prayer would need to be considered;

a) set aside the impugned Circular dated 2.11.01 issued by the Respondent No.1

b) pass any such further or other orders as this Hon'ble Tribunal may deem fit and proper in the facts and circumstances of the present case.

12. According to the petitioner, the port charges determined by DoT vide its letter of 25.10.1999, incorporating the terms stipulated by TRAI in its May '99 Regulations, would be applicable. The petitioner has further relied on all arguments in relation to the applicability of the Delhi High Court Judgment to the May '99 regulations and the DoT letter of 25.10.1999 that were made in relation to 'Access Charges' in Petition No.9 of 2001, which we have already discussed in detail earlier and need not be repeated here.

13. BSNL's contention is that the rates of port charges prescribed by the May '99 Regulations of TRAI became inapplicable and void ab initio after the judgment dated 17.1.2000 of the Hon'ble Delhi High Court. Till the coming into force of the Telecommunication interconnection (Port charges) Regulations 2001 (6/2001) dated 28.12.2001, the service providers (including the petitioners herein) were bound and obliged to pay Port Charges as per the rates stipulated in their respective interconnection agreements. Further those operators who have continued to pay Port Charges on the basis of the May '99 Regulations are liable and duty bound to pay to BSNL the

difference between the said rates and the rates stipulated in their respective interconnection agreements, till the date of the enforcement of the Port Charges Regulations of 2001 i.e. 28.12.2001. BSNL has pointed out that with effect from 28.12.2001, the rates specified in (Port Charges) Regulations 2001 are admittedly being charged and paid.

14. Since heavy reliance has been placed particularly by BSNL on the Division Bench Judgment dated 17.1.2000 of the Hon'ble Delhi High Court, in Civil Writ Petition No.6543 of 1999 and CW No.6483 of 1999, MTNL vs TRAI (AIR 2000 Delhi 208) we need to clearly understand the *ratio decidendi* of the said judgment. The judgment has been analyzed in depth by us in Appeals 11 & 12 of 2002, BSNL vs TRAI and MTNL vs TRAI, (decided on 27/4/2005). The question that was taken up for decision by the Division Bench has been very clearly stated in its own words as under:-

One of the common grounds in both the Petitions, is that the Telecom Regulatory Authority of India (hereinafter called the Authority) does not have any power to issue any Regulation which affect the rights of individuals under contracts or which seeks to override terms and conditions of licenses issued by the Central Government to various parties.(para 1)

It must be mentioned that the tariffs and charges laid down by the Authority are also being questioned on various other grounds. However, all parties have agreed that the question whether the Authority has power, be first decided Parties have agreed that if this Court holds that the Authority has power then the Authority will consider all objections and suggestions of all the parties and require any variation. Therefore, for the present, all parties have restricted their arguments only on the question as to whether or not the Authority has power to issue regulations as set out hereinabove". (para 2)

15. The specific matter which went to the Division Bench was related to the first amendment to the Interconnection Regulations '99 issued by the TRAI on 17.9.99 and the 5th amendment to the TTO-99, which had mandated that Cellular Operators could recover interconnection charge from fixed line operators including DoT. This was in the face of clear cut prohibition contained in the Cellular licenses that they would not be entitled to any interconnection revenue share from DoT. The Delhi High Court held that TRAI had no jurisdiction to amend the licenses. Section 11(1)(d) of the un-amended

TRAI Act empowered TRAI to only regulate existing revenue sharing arrangements between service providers and it could not under the garb of this provision re-write licenses of Cellular Operators which was only within the exclusive province of the Government. Para-31 of the Division Bench Judgment is quite explicit in this regard as under:

“Further under Section 11(1)(b) the Authority merely has a power to recommend terms and conditions of a license. We are told that many of the licenses which have been given by the Government to the Mobile operators contains 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 Sec.11(1)(d) i.e. in the guise of regulating the arrangement amongst the service provider 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 land line Operator. The Authority has also provided that its Regulation will prevail over all 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 functions 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 cannot 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 cannot do directly, it cannot do indirectly.(para 31)

16. The question taken up for decision by the Hon’ble Bench was answered as follows:

“For all the above reasons, it would have to be held that the Authority has no power to issue any regulation which in any manner converts the merely recommendatory or advisory function into a directory function. The directions and regulations which the Authority may issue and/or frame must necessary be within the framework of the said Act. The Authority has no power or function to change or vary rights of parties under contracts or licenses. It can only regulate within the terms and conditions of the license. 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. Therefore, the Telecommunication Interconnection Charges and Revenue Sharing (First Amendment) Regulation, 1999 (3 of 1999) issued on 17th September, 1999 stands quashed. Similarly Regulation 8 (of the Telecommunication Interconnection Charges and Revenue Sharing Regulation, 1999) which gives to the Authority a overriding power over the terms and conditions of license would also stand quashed”.(para 50)

It is, therefore clear that the Division Bench did not strike down the May '99 Regulations in its totality. Only Clause 8 thereof which gave overriding powers to TRAI in relation to the license conditions was struck down.

17. It would be useful in the above background to look into the provisions in the licenses issued to the Basic Service Operators and the Interconnect agreement, which according to BSNL had acquired a degree of sanctity whereby they could not be overridden by TRAI in accordance with the judgment of the Division Bench of the Delhi High Court.

18. The Basic Service Operators who were issued licenses in 1995 were required to also enter into an interconnect agreement and it was enjoined in clause 1.7.3.15 of the license that “the licensee shall also comply with the terms and conditions of the interconnect agreement along with the license agreement”. In the case of port charges the stipulation of rates is not contained in the license agreement but is contained in the interconnection agreement only. It would be relevant to reproduce the relevant provisions of the interconnect agreement:

“1.7.3.15 INTERCONNECT AGREEMENT:

LICENSEE shall also comply with the terms and conditions of the Interconnect Agreement along with this licence Agreement. The Interconnect Agreement spells out interalia procedures for: 1) Technical Issues pertaining to Interconnection, 2) Interconnect Capacity – Planning and Information system/aspects, 3) Testing and commissioning of Interconnect circuits, 4) Interconnect performance standards, 5) Interconnection charges, 6) Interconnect Billing systems and payments, 7) Liability, Indemnity and Intellectual Property Rights, 8) Disputes and arbitrations”.

“6.3 Connection Charges

6.3.1 (c) For the initial period of three years, the charges for terminating the interconnecting PCM links (port charges of DoT) shall be payable after opting by the LICENSEE for either of the two nformulae given

hereunder and the choice of the LICENSEE once made on the first occasions shall be treated as final for the total period and for entire Service Area:-

(i) The graded scale given below (excluding cost of infrastructure) of Interconnect port charges applicable separately for each exchange of the Circle/Service Area for various demand situations:

| <i>Sl.No.</i> | <i>Demand for No. of PCMs given by the LICENSEE to DoT in each exchange</i> | <i>Annual Interconnect port charge per PCM termination (excluding the cost of infrastructure viz.land, building, air-conditioning etc.) (in Rupees)</i> |
|---------------|---|---|
| 1. | 2 PCM | 2,16,200/- |
| 2. | 4 PCM | 1,08,100/- |
| 3. | 8 PCM | 54,100/- |
| 4. | 16 PCM | 30,600/- |
| 5. | 32 PCM | 20,400/- |
| 6. | 64 PCM | 15,400/- |
| 7. | 128 PCM | 12,900/- |

(ii) A fixed amount, irrespective of the number of terminations in each exchange for the Circle/Service Area, of Rs.54,100/- (Rupees fifty four thousand and one hundred only) per PCM termination per annum.

After expiry of the said period of three years, the aforesaid arrangements shall stand terminated where after DoT will provide the facility of interconnect on payment of the charges based on full cost including the cost of incremental infrastructure like land, building, air-conditioning etc.

Notwithstanding anything contained hereinabove, the directions or decisions on the subject by the Telecom Regulatory Authority of India shall be binding on either party and such decision or direction shall be implemented in good faith by both the parties.

Provided always that for a 64 Kbps Analogue port, the said charges shall be Rs.3,200/- (Rupees three thousand and two hundred only) per annum per port”.

19. It is, therefore clear that the interconnect agreement itself empowers the TRAI to issue direction/decisions that shall be binding on either party and such decision or direction shall be implemented in good faith by both the parties. We therefore are very clear that in the May '99 regulations when TRAI determined the port charges, it was well

within the power conferred on it under the interconnect agreement. That this determination would be binding on the related parties does not get determined by Clause 8 of the May '99 regulations but the provisions of the interconnection agreement itself. The subsequent sequence of events shows that these rates were brought into effect from 1.5.1999 through the DoT letter dated 25.10.99. The determination of port charges by TRAI under these circumstances was therefore totally in accordance with the conditions of the license and the powers conferred on TRAI by the interconnect agreement whose compliance constitutes one of the conditions of the license.

20. We see no merit in the contentions of BSNL regarding the applicability of the judgment of the Hon'ble Delhi High Court dated 17.1.2000 to have the effect, as put across by the learned counsel for the BSNL, that the port charges as per the rates originally stipulated in the interconnection agreement had become applicable. We are of the view that the letter dated 2.11.2001 of BSNL asking the basic service providers to pay port charges at the rates prevailing in the pre-May '99 period, together with arrears was misconceived and is based on an erroneous understanding of the legal implications of the Delhi High Court Judgment. We therefore order that this letter be treated as quashed.

21. We have already taken note that TRAI notified the Telecommunication Interconnection Regulations (Port Charges) 2001 on 28.12.01 bringing into effect revised port charges. In the circumstances of the matter, we hold that the port charges payable with effect from 1.5.99 would be as determined by TRAI in its May '99 Regulations and adopted by DoT in its letter dated 25.10.99 and these would continue to hold good till the coming into effect of the port charges regulations notified on 28.12.2001.

22. In regard to Port Charges, we therefore hold that:

- i) the demands raised by BSNL in its circular letter of 2.11.2001 in regard to port charges were without basis and are therefore set aside.

- ii) The port charges as determined by the May '99 Regulations of TRAI were payable to DoT/BSNL by the Basic Service Providers with effect from 1.5.99 till the coming into effect of the TRAI Port Charges Regulations of 28.12.2001.

23. We revert now to the issues relating to Access Charges which we have dealt with partly before getting into the area of Port charges.

24. We have looked into the provisions of the license agreement which is Annexure-2 of Petition No.9 of 2001. Clauses 1.7.8.6, 1.7.8.7 and 1.7.8.8 thereof do mention the rates of access charges for STD calls and ISD calls. However, Clause 1.7.8.9 mentions that the rates specified in the clauses above are based on the present tariff for unit call. These rates are liable to change as and when DoT tariff for unit call changes.

25. Further Clause 1.7.3.15 of the licenses refers to "Interconnect Agreement". The relevant portion is again extracted below:

"1.7.3.15 INTERCONNECT AGREEMENT:

LICENSEE shall also comply with the terms and conditions of the Interconnect Agreement along with this licence Agreement. The Interconnect Agreement spells out interalia procedures for: 1) Technical Issues pertaining to Interconnection, 2) Interconnect Capacity – Planning and Information system/aspects, 3) Testing and commissioning of Interconnect circuits, 4) Interconnect performance standards, 5) Interconnection charges, 6) Interconnect Billing systems and payments, 7) Liability, Indemnity and Intellectual Property Rights, 8) Disputes and arbitrations".

26. A sample Interconnect Agreement was available in Annexure-3 to Petition No. 9 of 2001. Clause 6.4 of the said agreement deals with access charges. Clause 6.4.4, 6.4.5. and 6.4.6 describe the access charges and these rates are the same as those mentioned in the licenses. Clause 6.4.7 repeats what is already mentioned in the license namely;

"It is agreed/acknowledged that the rates specified in clauses 6.4.4, 6.4.5 and 6.4.6 are based on the present tariff for unit call. These rates are liable to change as and when DOT tariff for unit call changes....."

27. It is thus clear that it is stipulated in the license as well as in the Interconnect Agreement that the access charges are liable to change as and when Department of Telecommunications' tariff for unit call changes. The sequence of events in this case tells us that in TTO-99, TRAI notified tariffs based on which the DoT tariffs changed e.g. in certain situations from Rs.1.40/- per metered call unit to Rs.1.20 per metered call unit and the measurement of pulse for the metered call unit also underwent changes. In this view of the whole matter, it appears to be very much in order that the need for change in the access charges as a result of the changes brought about in the DoT tariffs should have been addressed by TRAI, which was constituted as an impartial and independent regulator having requisite expertise in the handling of such matters. Under the provisions of the TRAI Act 1997, TRAI was empowered to "regulate arrangements amongst service providers of sharing their revenue derived from providing telecommunication services (Section 11 (1) (d) of the un-amended Act)". Since access charges involved sharing of revenue amongst service providers, TRAI was fully empowered to determine the access charges which it has done through May '99 Regulations. The determination by TRAI of access charges in the May '99 Regulations cannot therefore in this background be construed as re-writing of the license for basic services or the interconnect agreement. On the other hand the action was fully in consonance with the provisions of the license and the interconnect agreement. However, we would like to point out that we have some doubts whether issue of regulations was the right course to bring into effect this determination on access charges, as it could have been done also by issue of directions under the TRAI Act. However since we have not heard arguments on this issue, we would not like to go into this aspect while considering this matter.

28. We have already seen that the May '99 Regulations which determined the above interconnection access charges were not declared null and void by the Division Bench of the Delhi High Court. Only Clause 8 thereof which reads as under was declared illegal:

"8. Over-riding Effect

Provisions of this Regulation in respect of interconnection charges and revenue sharing shall have over-riding effect over the terms and conditions of the

license of a service provider, as also any conditions or charges prescribed by an originating/transit/terminating service provider”.

Based on the notification of the May '99 Regulations by TRAI, DoT issued a circular on 1st October '99 to all its field agencies modifying the access charges and bringing them in line with the May '99 Regulations. MTNL/DoT did not challenge the determination of access charges by TRAI. Even after the Delhi High Court Judgment of 17.1.2000, the rates of access charges continued to be the same. This position continued till 2.11.2001 when BSNL wrote to the Basic Operators informing them that because of the Delhi High Court Judgment the access charges determined by the May '99 Regulations ceased to apply and that BSNL had rescinded its letter of 1.10.1999 in regard to access charges and declared that the pre May '99 rates as determined by the interconnect agreement/license would be applicable and based thereon asked for payment of arrears. We find the letter of BSNL dated 2.11.2001 strange as in Jan 2000, TRAI Act had been amended to provide that: “Notwithstanding any thing contained in the license issued before the coming into effect of the Amendment, TRAI would fix the terms of interconnection”. This meant that in relation to the licenses given to the petitioners (who are basic operators), TRAI could fix the terms of interconnection without being put to any constraint arising out of any thing contained in the licensing conditions and TRAI could also regulate the revenue sharing arrangements. Since the fixation of access charges by TRAI in the May '99 regulations had not been struck down by the Division Bench there was no option but to treat these charges as the applicable charges particularly when DoT in turn had accepted these and got them implemented w.e.f. 1.5.1999 vide its letter of 1.10.1999.

In our view BSNL could not have taken upon itself to have unilaterally issued the impugned letters of 28.4.2001 and 31.5.2001 to the Basic Operators asking them to raise the access charges and then threaten them to start billing them at the demanded rates. This kind of unilateral action was against the provisions of the license as well as the interconnect agreement. It was against the provisions of the May '99 TRAI Regulations.

The letter dated 2.11.2001 of BSNL is obviously based on an erroneous understanding of the legal implications of the Delhi High Court Judgment and was clear afterthought on the part of BSNL as the rate of access charges determined by the May '99 regulations continued to apply till as late as 2.11.2001, in spite of the Delhi High Court judgment having been declared on 17.1.2000. In support of this argument, our attention was drawn to a representation dated 21.11.2000 made to TRAI by BSNL in which BSNL has clearly stated as follows:

“The access charges of Rs.0.48 for STD calls and Rs.0.66 for ISD calls applicable with effect from 01.05.99 vide TRAI regulation dated 28.05.99 are not based in proportionate to the cost incurred by the Operators for provision of access and carriage of traffic and it is, therefore, requested that these need a review”.

.....

“In view of what has been stated above, it is requested that there is an immediate need to review the present revenue sharing arrangement between private basic service operator and BSNL which is not only the long distance carrier but also the access provider at the terminating end. Earlier also, in response to the consultation paper on USC, we had submitted that the existing revenue sharing arrangement with BSO should be reviewed immediately. It is once again requested that to compensate all the carriers involved in completion of a telephone voice call for the work done and access deficit, the existing revenue sharing arrangement with basic service operators for local, STD and ISD calls may be reviewed immediately so that originating access provider, long calls may be reviewed immediately so that originating access provider, long distance carrier and terminating access provider are compensated duly and in a equitable manner.”

We are of the view that this letter of 2.11.2001 deserves to be quashed.

We find that TRAI issued its Interconnection Regulations on 14.12.2001 in which the access charges of the May '99 Regulations were reiterated and TRAI also held that till such time as the rates are not changed by TRAI the existing rates would continue to remain applicable. These Regulations which have come into effect on 14.12.2001 have been challenged by BSNL in Appeal No.5 of 2002 which we will deal with appropriately at the end as it is in the list of the four matters which we are addressing in our order.

29. For the purpose of Petition No.9 of 2001 as amended read with MA 29 of 2002, we therefore hold that:

- the letters dated 28.4.2001 and 31.5.2001 of BSNL to the private BSOs in regard to access charges were without any basis.
- Access charges as determined by the May '99 regulations of TRAI and which were adopted by DoT vide its letter of 1-10-1999 were payable to DoT/MTNL w.e.f. 1.5.99 till the coming into effect of the TRAI Interconnection Regulations of 14.12.2001.
- The demands raised by BSNL in its circular of 2.11.2001 in regard to access charges as well port charges were without basis and are set aside.
- The port charges as determined by the May '99 Regulations of TRAI were payable to DoT/BSNL by the Basic Service Providers with effect from 1.5.99 till the coming into effect of the TRAI Port Charges Regulations of 28.12.2001.

Petition No.3 of 2002

30. Petition No.3 of 2002 of the Cellular Operators Association of India, challenges the letter/circular dated 02/11/2001 of BSNL revising retrospectively with effect from 01/5/1999, the port charges to be levied from the Cellular Mobile Service Providers (CMSPs) at rates prevailing prior to May 01, 1999.

31. The facts in brief relevant for our purpose as culled out from the petition are as under:

- (i) Department of Telecommunications (DoT) issued licenses in 1994 & 1995 to various CMSPs to provide Cellular Mobile Telephone Services in various circles and metropolitan regions in India. The license conditions provided that the resources required for operation of the service for extending them over the network of the DoT and MTNL and any other Service provider licensed by the Authority would be mutually agreed to between the parties. These resources included physical junctions, leased

lines, and other communication elements. The licensees were required to apply for and obtain from DoT the determined resources.

- (ii) For the purpose of interconnecting its network with the network of the DoT, one of the resources essential for the said inter-connection included “Ports” in the DoT exchange for interconnecting the two networks. Port charges at the rate of Rs.96,000 per annum per 2 Mbps. port, were levied by the DoT vide its Circular No.842-70/96 dated September 27, 1996. These Port charges were applicable for the period up to July 1, 1997. For the period beginning July 2, 1997, the Port charges for both metro CMSPS and Circle CMSPS were prescribed “either as per graded scale or as per flat rate of Rs.54,100 per annum per 2 Mbps Port” vide DoT circular dated June 5, 1998.
- (iii) Thus, in the case of Metro and Circle CMSPS till April 30, 1999, Port charges were determined by the above mentioned circular of DOT
- (iv) On May 28, 1999, TRAI framed the Telecommunication Interconnection (Charges & Revenue Sharing) Regulations, 1999 (1 of 1999), (hereinafter referred to as ‘the May ‘99 Regulations to govern the inter-connection charges, and revenue sharing arrangements between the Service Providers. These Regulations were deemed to have come into effect on May 1, 1999. Port Charges for service providers other than Internet were specified in Schedule III of the Regulations.

| No. of PCMS | Annual Charge (Ceiling of Rs. Per Port) |
|----------------------|---|
| Up to 8 PCMS | 37,000 |
| Above 8 and up to 32 | 16,000 |
| Above 32 | 9,000 |

- (v) DoT issued a Circular on October 12, 1999 clarifying the charges to be levied by DoT from Licensed CMSPS in Metros/Telecom Circles for providing Interconnect junctions to them and superceding earlier relevant

circulars wherever applicable. The Circular stipulated that with effect from May 1, 1999, consequent to the issue of the Telecom Interconnection (Charges and Revenue Sharing) Regulations, 1999 by TRAI the Port Charges would be as follows:

| No. of PCMS | Annual Charge (Ceiling of Rs. Per Port) |
|----------------------|---|
| Up to 8 PCMS | 37,000 |
| Above 8 and up to 32 | 16,000 |
| Above 32 | 9,000 |

- (vi) The Hon'ble Delhi High Court in its order of January 17, 2000 ruled in the case of MTNL Vs TRAI that the TRAI did not have the power to change or vary rights of parties under contracts or licenses. The May 99' Regulations continued to hold the field except that Clause 8 thereof was quashed which gave overriding powers to TRAI in relation to the licenses/contracts on interconnection matters.
- (vii) Even after the order of the Hon'ble Delhi High Court, the regime for the port charges, as laid down by the DoT, vide its letter dated 12.10.1999, based on the TRAI Regulations dated 28th May, 1999 continued to prevail including after the creation of BSNL on 1/10/2000. In other words, notwithstanding the order of the Hon'ble Delhi High Court, the DoT/BSNL continued levying port charges which were in accordance with the May '99 regulations.
- (viii) Meanwhile the TRAI Act was amended with effect from January 24, 2000 and as per the amended Act, TRAI was empowered to fix the terms and conditions of Interconnectivity between the Service Providers notwithstanding anything contained in the terms and conditions of the Licenses granted before the commencement of Telecom Regulatory Authority of India (Amendment) Act, 2000.

- (ix) Since BSNL/DoT had clearly accepted the Port charges as prescribed by the TRAI and had brought them into effect from 1.5.1999, and demands raised on that basis had been duly paid by the service providers, the members of the Petitioner Association were surprised to receive the impugned circular i.e. of 2.11.2001, superceding earlier DoT Circulars, and seeking to levy port charges, “on pre 1.5.1999 rates. In doing so, BSNL purported to act based on the Judgment of the Hon’ble Delhi High Court dated January 17, 2000.
- (x) On December 28, 2001, TRAI issued the Telecommunication Interconnection (Port Charges) Regulation 2001 (6 of 2001) which revised the port charges payable. Thus, with effect from December 28, 2001 revised rates for port charges were brought into effect.

32. The Petition challenges the letter of BSNL dated 02/11/2001 in the above background with the following prayer:

- “(a) Quash the Circular dated 2.11.2001 issued by BSNL*
- (b) Declare that Port Charges for the period May 1, 1999 though December 27, 2001 are to be calculated as laid down in the Circular dated 12th October 1999 bearing reference no.201.1/2000 REG, issued by DoT.*
- (c) pass such further and other orders as the Hon’ble Tribunal may be pleased in the interest of justice, equity and good conscience”.*

33. BSNL in its reply has conceded that :

- (i) arrangement for computation of Port Charges, which was incorporated in the interconnection agreements signed with the private BSOs, was extended to the Cellular Operators by a Circular dated 5.6.1998, with a view to ensuring a level playing field between the cellular and the basic service providers. These rates were made operational with effect from 2.7.1997.

(ii) the above mentioned rates became the agreed/applicable rates on the basis of which port charges were calculated for Cellular Operators.

(iii) Meanwhile, the May '99 Regulations took effect from 1.5.1999, which prescribed revised rates for the computation of Port Charges and these were brought into effect by DoT circular of 12.10.1999..

(iv) BSNL contention is that the October 12, 1999 circular of DoT was issued based on the TRAI regulations of May '99 on the assumption that in view of Clause 8 of the regulations, these would have overriding effect on the existing agreements/license conditions. However, Clause 8 was declared null and void by the Division Bench Judgment of the Delhi High Court. As such automatically the impact of DoT circular of 12.10.99 ceased to have effect and the rates applicable pre-May '99 came into force. BSNL was justified in issuing its letter of 2.11.2001 asking for arrears with effect from 1.5.99 and for making it clear that the circular of 12.10.99 was no longer applicable.

(v) BSNL has conceded that new rates of Port charges came into effect from 28.12.2001 based on the TRAI Regulations on Port Charges notified on that date, under the amended provisions of the TRAI Act.

34. We have heard in detail the learned counsels for the two sides. We find that as on 2.11.2001 the port charges were those indicated in the DoT letter of 12.10.99. These were no doubt based on the TRAI Regulations of May '99. However, these rates were allowed to remain operative in spite of the Delhi High Court Judgment of 17.1.2000. There was, therefore, a considerable degree of acceptance of these charges by DoT as well as by BSNL which had come into existence on 1.10.2000 as successor to the service providing arm of DoT. We are unable to accept the argument that the October 12, 1999 circular of DoT was issued under pain of penal action for non-compliance of a statutory direction of TRAI. If it was so, the delay in corrective action is unduly long, extending to over 22 months. We do not see any merit in the argument that the circular dated

12.10.1999 automatically became non-existent after the judgment of the Delhi High Court. If indeed DoT/BSNL wanted to bring about any change based on the said judgment it should have been a conscious move within a reasonable period of time and not left to be treated as an automatic outcome from the said judgment, which does not speak about port charges nor has it struck down the TRAI Regulations of May '99.

35. We need not again go over into the details of the Delhi High Court Judgment of 17.1.2001 in relation to the present matter. If the essence of the said judgment was that TRAI did not have the power under the un-amended TRAI Act to rewrite or vary the terms of the licenses, in the present case there was no possibility of such a situation arising as in the Cellular licenses there was no stipulation in regard to port charges. These were determined by separate arrangements between the DoT and the licensees.

36. We have already gone into the questions relating to port charges payable by the Basic Service Operators in Petition 9 of 2001 where we have held as follows:

“In regard to port charges, we therefore hold that:

(i) the demands raised by BSNL in its circular letter of 2.11.2001 in regard to port charges were without basis and are therefore set aside.

(ii) The port charges as determined by the May '99 Regulations of TRAI were payable to DoT/BSNL by the Basic Service Providers with effect from 1.5.99 till the coming into effect of the TRAI Port Charges Regulations of 28.12.2001”.

Having noted that with a view to ensuring a level playing field between the cellular and basic operators, the port charges applicable to the basic operators have through out been extended also to the cellular operators, we see no reason why this equilibrium should be disturbed.

37. Accordingly we hold, as in the case of the basic operators, that

(i) the demands raised by BSNL in its circular letter of 2.11.2001 in regard to port charges were without any sound basis and are therefore set aside.

- (ii) the port charges as determined in the circular dated 12.10.1999 of DoT were payable by the cellular operators till the coming into effect of the TRAI Port Charges Regulations of 28.12.2001.

Appeal No.5 of 2002

38. This appeal has been filed by M/s Bharat Sanchar Nigam Limited (BSNL) challenging the Telecommunication Interconnection (Charges and Revenue Sharing) Regulations 2001 dated 14.12.2001 issued by Telecom Regulatory Authority of India (TRAI) (Respondent No.1). The challenge is to the extent that the regulations prescribe the access charges/revenue sharing, for local calls, STD calls and ISD calls between the BSNL and the Basic Service Operators. Apart from TRAI (Respondent No.1), the other respondents are the Association of Basic Telecom Operators (ABTO) and five other Basic Service Operators.

39. According to BSNL the impugned regulation to the extent it prescribed the access charges to be paid by the private basic service operators to the BSNL, was completely arbitrary, illegal, unrealistic, unreasonable and unsustainable that would result in unjust enrichment of the private basic operators at the cost of the appellant. It has been further contended that the impugned regulation was issued without any opportunity of hearing to the appellant – BSNL. Further, the impugned regulation had been issued without any consultation process and it was only on the day of issue of the regulation that a consultation paper was initiated by TRAI. According to BSNL there was no occasion for the TRAI to issue such a regulation as there was an interconnection agreement already signed between the private basic service operators and the appellant and TRAI was still to arrive at a proper cost based interconnection charges regime. The access charges, which had been determined only as an ad-hoc measure would also not adequately compensate BSNL for the work done for carriage and termination of calls received in its

network from the basic service operators. In the end BSNL has made the following prayer:

“(a) Allow the present appeal and pass an order quashing/setting aside Items 3,4 and 5 of Schedule I of the impugned regulation dated 14.12.2001 passed by TRAI, relating to access charges for local calls, STD calls in basic services and ISD calls in basic services.

(b) Pass such other further order(s) and this Hon’ble Tribunal may deem fit and proper in the facts and circumstances of the present case.”

40. For the sake of clarity we extract below the portion of impugned regulation in regard to which prayer has been made that it be quashed/set aside:

“SCHEDULE I
INTERCONNECTION CHARGE AND REVENUE SHARING”

| <i>ITEM</i> | <i>REVENUE SHARING FOR BASIC SERVICES</i> |
|--|---|
| <i>(1) Date of implementation</i> | <i>By 31st January, 2002</i> |
| <i>(3) Local calls</i> | <i>Bill and keep for each service provider.</i> |
| <i>(4) Domestic long distance calls (STD calls) in Basic Service</i> | <i>The originating/transit service provider to pay Rs.0.48 per unit of measured call for traffic delivered from its network to the network of the transit/terminating service provider for the call units measured at the point of interconnection for its further carriage from the point of inter-connection to destination, based on the STD pulse rate.</i> |
| <i>(5) International calls in Basic Service</i> | <i>The originating service provider to pay Rs.0.66 per unit measured call to the transit service provider as may be applicable, for the call units to be measured at the point of interconnection.”</i> |

41. Fortunately, for considering this matter, we can derive benefit from the sequence of events and the analysis which has already been discussed by us in some detail while dealing with Petition No.9 of 2001 which also deals with the access charges payable by the private basic service operators to the BSNL. Port Charges are not covered in the

impugned regulations. The regulations regarding Port Charges were issued by TRAI on 28.12.2001 and these were not challenged by BSNL.

42. We have already taken note while analyzing the issues raised in Petition No.9 of 2001 that as a result of the judgment of the Division Bench of the Delhi High Court of 17.1.2000, only clause 8 of the Telecommunication Interconnection (Charges and Revenue Sharing) Regulations '99, which we will henceforth refer to "the May '99 Regulations" of TRAI had been struck down. This was the clause which sought to give overriding powers to TRAI over the terms and conditions of the license/contracts/agreements entered into by the service providers. We have also taken note that the May '99 Regulations as such were not struck down by the said judgment. We have also seen how the provisions in the licenses of the basic service operators contained a stipulation whereby the access charges mentioned in the said licenses would be subject to change as and when the telecom tariffs underwent a change. In the chronological sequence of events, we had occasion to see that on 1.10.99, the Department of Telecommunications (DoT) had revised the access charges to be in accordance with the rates fixed for the same by the May '99 Regulations of TRAI and these were brought into effect from 1.5.99. These continued to remain applicable till 1.11.2001 until Bharat Sanchar Nigam Limited (the successor to the service providing functions of the erstwhile DoT) issued a letter to all the Basic Service Operators on 2.11.2001 pointing out that in view of the judgment of the Delhi High Court of 17.1.2000, automatically the circular of DoT dated 1.10.99 had become null and void and ceased to have effect, as a consequence of which the access charges at the rates prevailing before 1.5.99 had become applicable. We have analyzed this position in great detail while dealing with Petition No.9 of 2001 and have reached the conclusion that the letter of 2.11.01 of BSNL was not based on any sound reasoning and therefore needed to be quashed.

43. We had also taken note that the Telecommunication Interconnection (Charges and Revenue Sharing) Regulation 2001 had been notified by TRAI on 14.12.2001 and concluded that till the date of the said notification, the access charges determined by DoT in its letter of 1.10.99, which were in accordance with the May '99 Regulations of TRAI

would be applicable. This was on the understanding that with effect from 14.12.2001, the new regulations of TRAI would become applicable in regard to access charges.

It is in this background therefore that we have to consider the present appeal of BSNL challenging the correctness and sustainability of the TRAI regulations of 14.12.2001.

44. In its reply TRAI (Respondent No.1) has stated that the impugned regulation (of 14.12.2001) had mostly repeated the contents of the previous regulation of May '99. A few supplementary provisions had been introduced to provide greater flexibility for arriving at a mutual agreement between the service providers. It is also stated that TRAI was receiving a number of representations from Basic as well as Cellular operators for specifying interconnection charges and the revenue sharing regime. Acting on these representations. TRAI had come out with the impugned regulations although it was in the process of determining the cost based interconnection/ carriage charges. It pointed out that under the Amended Act of 2000, TRAI was empowered to issue the impugned interconnection regulation, as under Section 11(1)(b)(ii) and 11(1)(b)(iii) thereof, it was required to fix the terms and conditions of interconnectivity and also ensure technical compatibility and effective interconnection between the service providers.

45. In the context of what has been stated above, namely, that the 14.12.2001 regulations of TRAI had repeated the charges specified in the May '99 regulations, the relevant provisions in the 2001 regulation are extracted below for ready reference:

“Section IV

4. Revenue Sharing Arrangements

.....

(v) In the absence of a mutual agreement between the Interconnection provider(s) and seeker(s), in respect of revenue sharing, the revenue sharing will be as specified in the Schedules to this Regulation. In the event mutual agreement is not arrived at in respect of the Interconnection sought and/or revenue sharing therefore, within 30 days from the date of such request, both the parties will approach TRAI with the details of their network element costs and traffic

particulars for a determination in the matter. Pending such a determination, the existing arrangement, if any, will continue.

(v)(a) The existing arrangements, if any, between the Interconnection seekers and interconnection providers shall hold good until changed with the concurrence of the Authority, or by a regulatory determination.

46. It may be mentioned that the appeal of BSNL had been filed along with an application for condonation of delay. The impugned regulations were notified on 14.12.2001 whereas BSNL filed its appeal on 7.3.2002 i.e. after a delay of 51 days beyond the prescribed period of 30 days stipulated under Section 14(A)(iii) of the TRAI Act. BSNL has represented that it took time to take legal opinion and hold meetings and discussions for deciding to come up in appeal.. On the issue of condonation of delay, the ABTO had strongly pleaded for dismissal of BSNL's application. According to ABTO, the said appeal was filed by BSNL as an afterthought subsequent to ABTO contending in Petition No.9 of 2001 in an additional affidavit filed therein on 18.2.2002 that BSNL had not challenged the 14.12.2001 interconnection regulations (the impugned regulations). According to ABTO, the appeal does not raise any new issues; BSNL was fully aware that TRAI was engaged in an exercise to derive a cost based tariff and interconnection charges regime and that BSNL itself was delaying submission of necessary information and data to TRAI in this regard. Further, the interconnection charges determined by the May '99 regulations, were based on an elaborate consultation process in which BSNL had fully participated. The application of BSNL for condonation of delay was nevertheless allowed.

47. ABTO has given a very detailed reply to the submissions made by BSNL. According to ABTO, the 14.12.2001 regulations were necessary to bring about regulatory certainty. By these regulations, TRAI had not carried out any amendment to the licenses, it had given regulatory protection to the existing arrangements in regard to access charges which had continued till 1.11.2001 but had been disturbed by BSNL by its letter dated 2.11.2001 whereby it wanted to turn the clock back and revert to the pre-May '99 provisions in regard to access charges.

48. We have in the process of examining the issues in this appeal gone through the entire history of events leading to the December 2001 Regulations. We would not like to repeat the analysis on the basis of which we have concluded while dealing with Petition No.9 of 2001 that the access charges determined by DoT in its letter dated 1.10.1999 would be applicable till the issue of the impugned regulations on 14.12.2001. We find considerable merit in the contention of the ABTO that the impugned regulations had become necessary to bring about regulatory certainty in the access charges regime. Since BSNL tried to reverse on more than one occasion the position emerging from the access charges regime based on DoT letter of 1.10.1999 which was in accordance with the May '99 regulations of TRAI, the latest attempt being through the letter of 2.11.2001, the circumstances in which the impugned regulations were issued fully justified the issuance of the same. The interconnection charges and revenue sharing arrangements were no doubt, not cost based, but then the reasons for not having such an arrangement were fully understood and known by the parties concerned including BSNL. Ultimately as was pointed out to us during the course of hearing, the exercise initiated by TRAI did culminate in such an interconnection usage charges regime in May 2003. In the interim, it was therefore necessary to bring about a degree of regulatory certainty in regard to access charges which was sought to be disturbed by BSNL unilaterally by asking for higher access charges from time to time. In the totality of circumstances this action on the part of TRAI cannot be construed as arbitrary or unfair or that there was a deliberate attempt to enrich the private basic operators at the cost of the appellant. Since the vires of these Regulation of 2001 have not been specifically challenged on the ground that TRAI had no power to issue the same under sub-clauses (ii) and (iii) of Section 11(1)(b) of the Act and that only directions could issue under those provisions and also as no arguments were addressed, we would not like to consider this matter any further.

49. Taking all the above factors and circumstances in view, we find no merit in the appeal 5 of 2003 filed by BSNL and accordingly order its dismissal.

50. Petitions 9 of 2001 (with MAs 14 and 29 of 2002), 12 of 2003 and 3 of 2002 and Appeal 5 of 2002 are disposed off accordingly. It has no doubt taken us some time to give

our final decision. Some of the legal issues arising out of the Division Bench Judgment of the Delhi High Court 17-1-2000 were found to be in common with at least two other matters pending for consideration before the Tribunal and at the request of counsels we were required to give long and extended hearings which have helped us greatly in understanding the legal and technical complexities. We record our appreciation to the very sincere efforts made by the learned counsels on either side, particularly Mr.C.S.Vaidynathan, Mr.Ramji Srinivasan, Mr. Maninder Singh, Mr. Ankur Talwar, Mr. Gagan Sareen, Mr.Angad Mirdha and Mr. T.S.Murthy. There will no orders as to costs.

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

.....
(Vinod Vaish)
Member

.....
(D.P.Sehgal)
Member