

TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL

**TELECOM DISPUTES SETTLEMENTS & APPELLATE TRIBUNAL, NEW
DELHI DATED 27th April, 2005 APPEAL No. 11 of 2002 (M.A. No. 48 of 2002, M.A.
Nos. 15, 75 & 145 of 2004)**

Bharat Sanchar Nigam Limited ... Appellant
Vs
Telecom Regulatory Authority of India ... Respondent

APPEAL No. 12 OF 2002
(With M.A.49 of 2002, M.A.No.16 of 2004)

Mahanagar Telephone Nigam Limited Vs ... Appellant
Telecom Regulatory Authority of India ... Respondent
AND PETITION NO.25 of 2004

Cellular Operators Association of India & Ors ...
Vs
Bharat Sanchar Nigam Limited & Ors **BEFORE:** ... Petitioners
... Respondents

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

APPEAL No. 11 of 2002
For Appellant Mr.Maninder Singh with
Mr.Ankur Talwar,Advocates
For Respondent Mr. MeetMalhotra with
Mr.Raghvinder Singh,Advocates

APPEAL No. 12 OF 2002
For Appellant Mr.Arun Kathpalia with Mr.Gaurav
Liberhan, Advocates

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For Respondent Mr. Meet Malhotra with
Mr.Raghvinder Singh,Advocates

PETITION No.25 OF 2004

For Petitioners Mr CS Yaidyanathan, Senior Advocate with
Mr Manjul Bajpai,Ms Neyha Bhandar,
Ms.Jayne Kuriakose, Advocates

For Respondent No.1-BSNL : Mr Maninder Singh,
Mr Kirtiman Singh, Advocates

For Respondent No.2 For Mr. Arun Kathpalia, Advocate

Respondent No.3-TRAI Mr Meet Malhotra, Advocate

ORDER

By this common order we are deciding both the appeals, namely, Appeal No. 11 of 2002 (Bharat Sanchar Nigam Limited Vs Telecom Regulatory Authority of India) and Appeal No. 12 of 2002 (Mahanagar Telephone Nigam Limited Vs Telecom Regulatory Authority of India) as common issues are involved. We will also deal with Petition No.25, of 2004 filed by the Cellular Operators Association of India against Bharat Sanchar Nigam Limited & Others.

2. Both appeals have been filed against two identically worded letters dated 9 October 2002 communicated to Bharat Sanchar Nigam Limited (BSNL) and Mahanagar Telephone Nigam Limited (MTNL) by Telecom Regulatory Authority of India (TRAI). These letters convey approval of TRAI for issue of the Reference Interconnect Offers (RIO) by BSNL and MTNL respectively with the alterations indicated in an elaborate tabular statement which forms part of the letter. The draft Reference Interconnect Offers had been submitted by BSNL and MTNL to TRAI for approval as enjoined by the Telecommunication Interconnection Regulation (Reference Interconnect Offer) Regulation 2002 (2 of 2002) dated 12th July 2002. BSNL and MTNL were also directed in the said letters to immediately publish their RIOs after making the alterations indicated by TRAI.

3. BSNL has made the following prayer:-

- (a) Quash and set aside the letter dated 9.10.2002 issued by TRAI. (By this letter TRAI had suggested changes in the draft reference interconnection offer submitted by BSNL.)
- (b) Quash and set aside the requirement of publication of the RIO within 90 days from the issuance of the RIO regulation by the TRAI contained

in Clause 3.1 thereof.

- (c) Pass such other and further orders as this Hon'ble Tribunal may deem fit and proper in the facts and circumstances of the present case.

4. MTNL has made the following prayer:-

- (a) Quash and set aside the letter/Order/decision dated 9.10.2002 issued by the Telecom Regulatory Authority of India. (By this letter TRAI had suggested that changes in the draft reference interconnection offer submitted by MTNL.)
- (b) Quash and set aside the requirement of publication of the RIO within 90 days from the issuance of the RIO regulation by the Telecom Regulatory Authority of India contained in Clause 3.1 thereof: '(b) In the alternative and without prejudice to the foregoing if the impugned decision is held to be within the powers conferred by the RIO Regulations then the said RIO Regulations be quashed and set aside as being in complete contravention of the provisions of the Act.
- (c) Pass such other and further orders as this Hon'ble Tribunal may deem fit and proper in the facts and circumstances of the present case.

5. Petition No.25 of 2004 has been filed by Cellular Operators Association of India (COAI) and 5 Others challenging certain actions of Bharat Sanchar Nigam Limited (BSNL) in relation to its Reference Interconnect Offer, (RIO). The petitioners have drawn attention to Reference Interconnect Offer of BSNL published on its website on 8.7.2004 which was subsequently withdrawn on 28.7.2004. Certain stipulations in the said RIO published by BSNL and later on withdrawn by it, have been cited to state that BSNL is not implementing TRAPs RIO Regulation in its letter and spirit. The following prayer has been made in this petition:

- (a) Direct BSNL not to include any clause / provision in its RIO which is unfair., unjust, unreasonable and / or discriminatory to .CMSPs / UASLs,
- (b) Direct BSNL to apply its RIO to all CMSPs and UASLs i.e. including CMSPs holding Licenses prior to 12-10-2002.
- (c) Direct BSNL to ensure that it complies and conforms to TRAI directives, determination, regulation etc. in the matter of interconnections.
- (d) Direct BSNL to publish its RIO forthwith upon receipt of approval from TRAI.
- (e) Pass interim / ad-interim / ex-parte orders in terms of above papers.
- (f) Pass such other and further order as this Tribunal may deem fit in facts and circumstances of the case.

6.It would be useful to take note of some of the relevant provisions of the Telecommunication Interconnection (Reference Interconnect Offer) Regulation 2020 which we would hereinafter refer to as the RIO Regulation. The preamble reads as under:

“In exercise of the powers conferred upon it under section 36 read with clauses (ii), (iii) and (iv) of the sub section (b) of Section 11(1) of the Telecom Regulatory Authority of India Act, 1997 as amended by TRAI (Amendment) Act, 2000, to ensure effective interconnection between different service providers and to regulate arrangements amongst service providers of sharing their revenue derived from providing telecommunication services, the Telecom Regulatory Authority of India hereby makes the following Regulation.....

Some of the other relevant provisions of the RIO are as under:

“1. Title, Extent and Commencement

- (i) The Regulation shall be called “The Telecommunication interconnection (Reference Interconnect Offer)” Regulation. (The Regulation)
- (ii) The Regulation envisages publishing of Reference Interconnect Offer (RIO) by the telecommunication service providers holding significant market power based on the Model RIO annexed thereto as annex ‘B’. The RIO will stipulate the concerned service provider’s terms and conditions on which it will agree to interconnect its network with the network of any other service provider seeking interconnection. The interconnection seeker may either accept this offer in full and enter into an interconnection Agreement with the offerer i.e. the service provider on that basis or accept the offer pending execution of an individualized Agreement after negotiations.
- (iii) The Regulation is in addition and not in derogation of the other existing Regulations/Orders on interconnection.
- (iv) *The Regulation shall be deemed to have come into force with effect from the date of its publication in the official Gazette.* “

The RIO Regulation also defines the ‘interconnection provider’ and ‘interconnection seeker’ as under:

I. Definitions

In this Regulation, unless the context otherwise requires:

- (i) —(v) xxxxxxxxxx
- (vi) *“Interconnection Provider” means the service provider to whose network an interconnection is sought for providing telecommunication service.*
- (vii) *“Interconnection Seeker” means the service provider who seeks interconnection to the network of the interconnection provider. ”*

In other words, as per the RIO Regulation it is made mandatory for any service provider with significant market power to publish its Reference Interconnect Offer (RIO) which will form the basis of interconnection agreements to be executed hereafter with the other service providers. This RIO would contain the concerned service provider’s

terms and conditions on which it will agree to interconnect its network with the network of any other service provider seeking interconnection.

The criterion for deciding which service provider shall be deemed to have significant market power is also provided in the RIO Regulation.

Clause 3.1 of the RIO Regulation, whose validity and legality is being challenged by the appellants in the present appeals, seeks to compel the service provider with significant market power to publish its reference interconnect offer within 90 days of issue of the said Regulation.

This and relevant provisions of the RIO Regulation in this regard are reproduced below:

“3.1 A Service Provider with significant market power shall be required to publish within 90 days of issue of this Regulation, a Reference Interconnect Offer (RIO) describing inter-alia the technical and commercial conditions for interconnection based on the model RIO as at annex ‘B’ and the guidelines as at annex ‘C’ as modified from time to time, with the prior approval of the Authority. The RIO so published by the Service Provider shall form the basis for all interconnection Agreements to be executed hereafter “.

“3.2 A published RIO may undergo any change only with the prior approval of the Authority. Interconnection Agreements are required to be entered into by and between all Service Providers based on the RIOs so published, provided, however, that by mutual agreement the two parties concerned i.e. the interconnection provider and the seeker may modify and/or add to the terms and conditions stipulated in the published RIO for entering into an Individualized Agreement.

3.3 A Service Provider shall be deemed to have significant market power if it holds a share of 30% of total activity in a licensed telecommunication service area. These Services are categorized as Basic Service, Cellular Mobile Service, National Long Distance Service and International Long Distance Service.

3.3 The Authority may review the guidelines from time to time.

5. General - *If any dispute arises with regard to the interpretation of any of the provisions of the Regulation, the decision of the Authority shall be final and binding.*

6. Explanatory Memorandum - *The Regulation contains at Annexe A ’ an explanatory> memorandum that explains the reasons for the issuance of this Regulation. “*

7. The Explanatory Memorandum notified with the above Regulation is also relevant and is extracted below:

“Efficient Interconnection is a pre-requisite for sustainable competition.

Interconnection Agreements are required to be executed between Service Providers interconnecting their Networks with each other. These include Basic, Cellular Mobile, National and International Long Distance Operators.

Internationally there is a growing consensus for formulation of advance regulatory guidelines for establishing proper environment to facilitate interconnection. Availability of effective and expeditious interconnection is one of the most important factors in contributing to the growth of the telecom sector. Delay and disputes in the interconnection process hamper the growth and scuttle competition. With a view, therefore, to avoiding such incidences, a framework has been devised taking into consideration the practices followed in other countries as well as the situation in our country.

-An accepted-Regulatory principle in many countries is to ensure that the Service Provider with Significant Market Power publishes a Reference Interconnect Offer (RIO) stipulating the various technical and commercial conditions including a basis for Interconnect Usage Charges for Origination, Transit and Termination. Following these, the new entrants can seek Interconnection and agree upon specific usage based charges.

Taking' into account the above practice and experience regarding, interconnect issue, a model Reference Interconnect Offer (RIO) providing the basic framework has been prepared by the Authority in consultation with the service providers. Based on the given model, the Service Providers

with Significant Market Power shall submit their proposed RIOs to the Authority for approval, which when approved by the Authority should be published. This will, thereafter form the basis for all interconnection agreements to be entered into by/ancl with the issuer.

The model RIO consists of Articles and Schedules and is accompanied by Guidelines.

The model RIO, which is generic in nature, brings forth the various principles and elements involved in proper and effective interconnection. Schedules could be modified as per service requirements, mutually agreed charges and other items. Annexes could also be added as per requirements. Model RIO (Annexure-B) RIO Guidelines (Annexure-C).“

8. From the above, it is clear that the RIO regulations along with its Annexures provide a set of guidelines based on which the service provider is to draft its terms and conditions in the form of a proposed RIO and submit the same to the Telecom Regulatory Authority of India (TRAI) for approval and after approval publish the same. The RIO regulations stipulate the broad framework, structure and provisions on which the service provider is to make the offer of interconnection to the other service providers.

The Regulation in Section 1 provides that the interconnection seeker may accept the offer made in full as contained in the published RIO or negotiate with the service provider and reach an agreement for interconnection after negotiation.

9. It would be worth taking note at this stage that in the preamble to the RIO regulations it is mentioned that this regulation has been framed by TRAI in exercise of the powers conferred on it under Section 36 read with Section 11 (1) (b) (ii) (iii) and (iv) of the TRAI Act 1997 (as amended). The relevant portions of the said Act are reproduced below:-

“36. Power to make regulations - (1) The Authority may, by notification, make regulations consistent with this Act and the rules made thereunder to carry out the purposes of this Act”-----

“11. Functions of Authority — (1) Notwithstanding anything contained in the India Telegraph Act, 1885 (13 of 1885), the functions of the Authority shall be to -

(a) make recommendations

(b) discharge the following functions, namely (i)

(ii) notwithstanding anything contained in the terms and conditions of the license granted before the commencement of the Telecom Regulatory Authority of India (Amendment) act, ‘2000, fix. the terms and conditions of inter-connectivity between the service provider;

(iii) ensure technical compatibility and effective inter-connection between different service providers;

(iv) regulate arrangements amongst service providers of sharing their revenue derived from providing telecommunication services ”;

10. Both BSNL and MTNL have challenged the letters dated 9.10.2002 of TRAI by which it has suggested changes in the draft reference interconnection offer submitted by BSNL and MTNL to TRAI for its approval before publication by stating first that the same is non-transparent and is in violation of the RIO regulations and secondly that the RIO regulations cannot be construed to give power to TRAI to fix the terms and conditions of interconnectivity which BSNL and MTNL should be offering to the other service providers. BSNL and MTNL have also challenged the legal validity of Clause 3.1 of the RIO regulations as the way it has been interpreted by TRAI it has the effect of taking away the statutory right of appeal of BSNL/MTNL provided in the TRAI Act. Clause 3.1 is reproduced again for facility of reference:

“3.1 Service Provider with significant market power shall be required to publish within 90 days of issue of this Regulation, a Reference Interconnect Offer (RIO) describing inter-alia the technical and commercial conditions for interconnection

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based on the model RIO as at annex ‘B’ and the guideline as at annex ‘C’, as modified from time to time with the prior approval of the Authority. The RIO so published by the Service Provider shall form the basis for all interconnection Agreements to be executed hereafter ‘.

It has been stated by the appellants that the aforesaid time limit of 90 days would not be applicable in a case where TRAI chooses to make modifications/ changes in the proposed RIO, otherwise it would ignore the period of 30 days available for the statutory remedy of appeal provided under section 14(A) of the Act to the aggrieved parties.

11. Section 14 (A) of the Act is reproduced as under:

“ 14A. Application for settlement of disputes and appeals to Appellate Tribunal.

(1) The Central Government or a State Government or a local authority or any person may make an application to the Appellate Tribunal for adjudication of any dispute referred to in clause (a) of Section 14.

(2) The Central Government or a State or a local authority or any person aggrieved by any direction, decision or order made by the Authority may prefer an appeal to the Appellate Tribunal.

(3) Every appeal under sub-section (2) shall be preferred within a period of thirty days from the date on which a copy of the direction or order or decision made by the Authority is received by the Central Government or the State Government or the local authority or the aggrieved person and it shall be in such form, verified in such manner and be accompanied by such fee as may be prescribed.

Provided that the Appellate Tribunal may entertain any appeal after the expiry of the said period of thirty days if it is satisfied that there was sufficient case for not filing it within that period.

It is note-worthy in this context that the RIO regulation was notified by TRAI on 12 July 2002 which enjoins service provider with significant market power like BSNL and MTNL to publish the RIO with the prior approval of the TRAI within 90 days of issue of RIO Regulations. BSNL submitted its RIO for approval on 13th September 2002 and TRAI gave its partial approval indicating 29 modifications on 9.10.2002 with the direction that it should be modified immediately after incorporating the modifications. In the case of MTNL also the dates and sequence of events are similar.

The letter dated 9.10.2002 of TRAI to BSNL in this regard states as follows:

“The approved RIO may be placed on the WEB immediately and a press release issued informing that the RIO is placed on the WEB. Copies of the printed document may be supplied to the TRAI as soon as possible

12. We would like to dispose off the point raised regarding the right of appeal here itself. We are of the view that notwithstanding the stipulation that the RIO with the approval of TRAI has to be published within 90 days of notification of the regulation, the only harmonious way of interpreting the situation would be that the time taken from the date of submission of the draft RIO to TRAI for its approval and the date of its final approval by TRAI as well as the period during which the matter has remained in appeal as a result of which the service provider was not in a position to publish the said RIO would need to be excluded from the 90 days period. In any case there is the provision in Section 14A of the Act which enables TDSAT to entertain an appeal after the expiry of the said period of 30 days if the Tribunal is satisfied that it could not have been filed within that period. By this approach the aberrations that could arise in the implementation of the RIO regulation relating to the time limit of 90 days prescribed for publishing the RIO may be taken as resolved.

13. An important point raised by BSNL and MTNL is regarding the lack of transparency in the letter dated 9.10.2002 by which 29 modifications/changes have been indicated by the TRAI to the draft RIO submitted by BSNL and MTNL. Section 11(4) of the TRAI Act has been quoted in this connection which is reproduced as under:-

“ 11. Functions of Authority:-

(1) - (3) xxx xxx xxx xxx

(4) The Authority shall ensure transparency while exercising its powers and discharging its functions “.

14. The letter dated 9.10.2002 by which the 29 modifications/changes have been indicated by TRAI to BSNL and MTNL are in the form of tabular statement in which one column has the heading “Paragraph/Clause” and the second column is under the heading “Required alterations”. On a sample basis extracts of 5 paragraphs/clauses are being reproduced below:

<i>Paragraph/Clause</i>	<i>Required Alterations</i>
<i>1.1 Scope</i>	<i>At the end of this para add: “and the RIO Guidelines issued by the TRAI”</i>
<i>3.3.1 Testing 3.6</i>	<i>Replace the words “ 12months” by “6months”</i> <i>Renumber the existing paragraph as (a) and add the following paragraph (b):</i> <i>(b) Party B shall ensure that the capacities made available by MTNL are effectively used within a period of 6 months from the date of commissioning. After expiry of 6 months extendable to 9 months on request, MTNL shall be free to temporarily use the spare capacities as required, unless Party B surrenders the same and pays the cancellation charges as per the provisions of Clause 3.5</i>
<i>4.2.4CLI</i>	<i>The last sentence shall be replaced by the following sentence:</i> <i>“Neither Party shall suppress or modify the CLI in any manner that prevents the true CLI being detected by the receiving end. If any modification is required to be made this shall be mutually agreed in advance. ”</i>
<i>12.3. Costs of</i>	<i>Replace all text in this clause by the following:</i>

interconnections

12.3 Costs of Interconnection

12.3.1 the cost of up gradation / modifying interconnecting networks to meet the service requirements of the service shall be met by the Party seeking interconnection.

12.3.2 Two years after the initial interconnections is established, the issue as to who bears the cost of additional resources required shall be negotiated between the service providers. The general principle followed in this negotiations is that each Party should bear the incremental costs incurred for the additional ports required for meeting the QOS standards relating to its outgoing traffic to the other Party.

15. We would also deal with the question of lack of transparency at this stage itself before proceeding further. There is no room for any doubt that the communication dated 9 October 2002 of TRAI does not in any way explain the reasons for modifications/changes to the draft RIO submitted by BSNL and MTNL. The TRAI communication is more in the nature of a directive and does not at all explain the reasons for non-acceptance of the clauses proposed by BSNL and MTNL in their draft RIOS. The grievances of BSNL and MTNL regarding lack of transparency to that extent are fully justified. However, after the matter came up in an appeal before this Tribunal on 23rd October 2002, on which date status quo orders were passed by this Tribunal, BSNL, MTNL and TRAI were given an opportunity to sit across and sort out their points of difference. A number of sittings were held in furtherance to the above and substantial progress was made whereby some of the points on which there was divergence of views were resolved.

16. *Out of* the original list of points of difference in regard to MTNL now only 3 points of difference remain outstanding. In the case of BSNL out of 29 points of difference mentioned *initially*, as a result of the above efforts only a few still remain outstanding and by now it is clear to MTNL/BSNL why TRAI is not agreeing with them. The argument in regard to lack of transparency has therefore been substantially addressed by the above exercise and we will be suitably addressing in our order the question as to how to resolve the outstanding points of difference.

17. After hearing the extensive arguments made on behalf of the BSNL, MTNL, TRAI and COAI (Cellular Operators Association of India), we are inclined to assume that the RIO Regulations *of 2002* need to be seen as an attempt by TRAI to facilitate effective interconnection between the service providers and in particular between a service provider having significant market power and the one seeking interconnection with the latter. The model *RIO* also gives the broad framework and the various points that need to be addressed for the purpose of securing a smooth and

effective interconnection. In particular we find that the following stipulations in the Regulation need to be focused upon:

- (i) “The RIO will stipulate the concerned service provider’s terms and conditions on which it will agree to interconnect its network with the network of any other service provider seeking interconnection.
- (ii) “The RIO so published by the Service Provider shall form the basis for all interconnection Agreements to be executed hereafter”.
- (iii) “Based on the model RIO, the Service Providers with Significant Market Power are required to submit their proposed RIO’s to the Authority for approval, which when approved by the Authority is to be published to form the basis for all interconnection agreements to be entered into by/ and with the issuer.”
- (iv) “The RIO Regulation has annexed a model RIO based on which the Service Provider is to draft its own terms and conditions in the form of a Proposed RIO and submit the same to the Authority for its approval”.
- (v) “As per the RIO Regulations, it is the Service Provider who has to fix the terms of its RIO and after approval publish the same. This is further evidenced by the fact that the Service Provider seeking interconnection need not accept the published RIO and may negotiate with each other to alter, vary, amend and add terms and thereafter, enter into an Agreement, the terms of which could be substantially different from the ‘Model’ RIO”.
- (vi) “The power to fix terms and conditions of Inter-connectivity is not conferred by the said RIO Regulations as only the power to approve the terms and conditions laid down by the Service Provider in the Proposed RIO has been stipulated in the said RIO Regulations”.

There is no stipulation in the RIO Regulations to *adopt* the model RIO. All that the RIO Regulations require is that the Proposed RIO be based on the Model RIO.

18. There can be no doubt that the attempt sought to be made by TRAI, to facilitate interconnection making use of RIO regulations and the related “Model RIO” and the “Guidelines” would need to be in consonance with the conditions of the license given to the service providers and the powers available to .THAI under the Act in regard to interconnection. The RIO is basically an offer from the relevant service provider indicating its terms and conditions for the purpose of arriving at an agreement with any such service provider seeking the inter connection. The stipulation of prior approval of the Authority in clause 3.1 of the regulations would not give powers to TRAI to impose a set of new terms and conditions but would basically be to ensure that the basic structure of the model RIO is adhered to and the various points which have been identified in the draft RIO have been reasonably addressed. Any other intrusive approach

in the garb of “prior approval” would not be in accordance with the provisions of the TRAI Act and would also undermine the freedom of a service provider to enter into mutual negotiations and agreement with other services providers in the matter of interconnection which has been referred to in the licenses and finds mention in the RIO regulation. The use of model RIO cannot usurp the right of the Service Provider to first enter into an arrangement or agreement in exercise of the freedom of contract envisaged in the license.

19. In this regard an important issue has been raised in the appeals. Both BSNL and MTNL have challenged the approach and view point of TRAI that after the amendment of the Act in 2000, TRAI now has the powers to fix the terms and conditions of interconnection, under Section 11 (1) (b) (ii) of the Act, for old as well as new licenses irrespective of any terms and conditions stipulated in the licenses. There is also a divergence in views in regard to the interpretation of the non obstante clause under Section 11 (i) (b) (ii) namely,, “notwithstanding anything contained in the terms and conditions of the license granted before the announcement of the TRAI Act 2000” before the words “fix the terms and conditions of interconnectivity between service providers”.

Relevant portion of Section 11 is reproduced below for ready reference

“11. Functions of Authority: (1) Notwithstanding anything contained in the Indian Telegraph Act, 1885 (13 of 1885), the functions of the Authority shall be to

(a) make recommendations, either suo motu or on a request from the licensor on the following matters, namely:—

(i) need and timing for introduction of new service provider;

(ii) terms and conditions of license to a service provider;

(iii) revocation of license for non-compliance of terms and conditions of license;

(iv) measures to facilitate competition and promote efficiency in the operation of telecommunication services so as to facilitate growth in such services;

(v) technological improvements in the services provided by the service providers;

(vi) type of equipment to be used by the service providers after inspection of equipment used in the network;

(vii) measures for the development of telecommunication technology and any other matter relating to telecommunication industry in general;

(viii) efficient management of available spectrum;

(b) discharge the following functions, namely:-

(i) ensure compliance of terms and conditions of license;

(ii) notwithstanding anything contained in the terms and conditions of the license granted before the commencement of the Telecom Regulatory Authority of India

(Amendment) act, 2000, fix the terms and conditions of inter-connectivity between the service provider;

(Hi) ensure technical compatibility and effective inter-connection between different service providers;

(iv) regulate arrangements amongst service providers of sharing their revenue derived from providing telecommunication services;

(v) lay-down the standards of quality of service to be provided by the service providers and ensure the quality of service and conduct the periodical survey of such service provided by the service providers so as to protect interest of the consumers of telecommunication service;

(vi) lay-down and ensure the time period for providing local and long distance circuits of telecommunication between different service providers;

(vii) maintain register of interconnect agreements and of all such other matters as may be provided in the regulations;

(viii) keep register maintained under clause (vii) open for inspection to any member of public on payment of such fee and compliance of such other requirement as may be provided in the regulations;

(ix) ensure effective compliance of universal service obligations;

(c) levy fees and other charges at such rates and in respect of such services as may be determined by regulations;

(d) perform such other functions including such administrative and financial functions as may be entrusted to it by the Central Government or as may be necessary to carry out the provisions of this Act:

Provided that the recommendations of the Authority specified in clause (a) of this subsection shall not be binding upon the Central Government;

Provided further that the Central Government shall seek the recommendations of the Authority in respect of matters specified in subclauses (i) and (ii) of clause (a) of this sub-section in respect of new license to be issued to a service provider and the Authority shall forward its recommendations within a period of sixty days from the date on which that Government sought the recommendations:-----“

20. A great deal of arguments were addressed on sub-clause (ii) of clause (b) of Section 11(1) of the Act. This sub-clause we again reproduce as under:

“11(1) Notwithstanding anything contained in the Indian Telegraph Act, 1885 (13 of 1885), the functions of the Authority shall be to-

(b) discharge the following functions namely

(ii) notwithstanding anything contained in the terms and conditions of the licence granted before the commencement of the Telecom Regulatory Authority of

India (Amendment) Act, 2000, to fix the terms and conditions of inter-connectivity between the service providers; ”

The question which has been greatly debated is if this clause covers both the licenses issued prior to the amendment of the Act in 2000 and also to the licenses issued thereafter. Submission of BSNL has been that this would cover only the licenses issued prior to the amendment of the Act. However, contention of COAI and TRAI has been that it applies even to the licenses issued after the amendment to the Act in 2000.

The argument of TRAI and COAI proceeds thus:

(1) The Ordinance which preceded the amendment contains Statement of Objects and Reasons for the same. In this, salient features of the amendments effected by the Ordinance were mentioned and these were:

- “(i) a clear distinction has been made between the recommendatory/advisory and the regulatory functions of the Authority as envisaged under subsection (1) of section 11 of the Act;
- (ii) seeking of recommendations of the Authority in respect of matters specified in sub-clauses (i) and (ii) of section 11(1)(a) of the Act has been made mandatory for the Central Government;
- (iii) the functions of the Authority, inter alia, now include:-
 - (a) to fix the terms and conditions of inter connectivity between service providers;
 - (b) to lay down the standards of quality of service to be provided by the service providers and ensure quality of service;
 - (c) to make recommendations on efficient management of available spectrum;
- (iv) the composition of the Authority has also been changed. The Authority will now consist of a Chairperson and not more than two whole-time members and not more than two part time members to be appointed by the Central Government. The Chairperson and other members of the Authority shall be appointed from amongst persons having special knowledge of, and professional experience in, telecommunication, industry, finance, accountancy, law, management or consumer affairs;
- (v) tariff setting function of the Authority has been brought under the purview of subsection (2) of section 11;
- (vi) Further, the decisions of the Authority taken in discharge of its functions under sections (H)(1)(b), 11(2) and 13 which are appealable to the Appellate Tribunal shall not be subject to audit by the Comptroller and Auditor General of India;
- (vii) new provisions have been made for establishment of a Tribunal known as the Telecom Disputes Settlement and Appellate Tribunal for adjudicating disputes between a licensor and a licensee, between two or more service providers,

between a service provider and a group of consumers, and also to hear and dispose of any appeals from the direction, decision or order of the Authority”.

(2) If the sub-clause applies only to the license issued prior to the amendment it would lead to the anomalous position that TRAI has power to change the terms of those licenses but not of those issued after the amendment. There could not be two different conditions of interconnectivity between two types of licenses.

(3) When TRAI makes recommendations under sub-clauses (i) & (ii) of clause (a) of Section 11(1) as to the need and timing for introduction of new service provider and terms and conditions of license to a service provider, these would not include terms and conditions relating to interconnection. An exception, therefore, has to be read and that is that recommendations of the terms and conditions of the license have to be sans terms and conditions of interconnectivity between service providers.

(4) In various terms of licenses issued after the amendment of 2000 the wordings are “subject to TRAI’s directions/orders/determination/regulation. Thus the regulations framed under sub-clause (ii) of clause (b) would apply to both the licenses issued before and after the amendment to the Act.

Arguments of BSNL proceed thus:

(1) One has to go towards the plain reading of the provisions of the Act and reference to the statement of objects and reasons can be resorted to if there is any ambiguity. There is no ambiguity. The words in subclause (ii) “notwithstanding anything contained in the terms and conditions of the license granted before the commencement of the Telecom Regulatory Authority of India (Amendment) Act, 2000” are not superfluous and have to be given their meaning. If the argument of TRAI and COAI is to be accepted these words would not have any relevance in as much as the remaining words “fix the terms and conditions of interconnectivity between the service providers” could apply to both the licenses before and after the amendment. The words “notwithstanding....” preceding the words “fixed the terms....” would clearly show that this clause is relevant only for the purpose of licenses issued prior to the amendment. A Division Bench of Delhi High Court in the case of Mahanagar Telephone Nigam Ltd. Vs. Telecom Regulatory Authority of India (Civil Writ Petition No.6543 of 1999) decided on 17th January 2000, clearly laid down that TRAI has no authority to change the terms and conditions of the license and the contract entered into between the service providers. It is for the licensor to lay the policy, the terms of the license under Section 4 of the Telegraph Act of 1885 and also to frame rules and issue directions to TRAI under Section 25 of the Act. TRAI cannot overrule the terms and conditions of the license, the policy and the direction issued by the Central Government and

the rules framed under Section 35 of the Act.

- (2) In spite of the recommendations to the contrary of TRAI., Central Government could fix the terms and conditions of the license to a service provider which could include the terms and conditions of interconnectivity between the service providers. TRAI has no authority or power to change those terms and conditions, including even the terms and conditions of interconnectivity mentioned in the licenses.
- (3) Under clause (b) (ii) of Section 11(1) of TRAI Act (after amendment of 2000), TRAI has power only to change the terms and conditions of the license prior to the amendment in regard to terms and conditions of interconnectivity, to bring it at par with the terms and conditions of the license to a service provider issued after the amendment to the Act.
- (4) Any other interpretation could lead to making the Central Government, licensor, as subservient to TRAI. This is the only harmonious way of construction of different provisions of Section 11.

21. After examining the rival contentions we find substance in the submissions of BSNL. These are in line with the decisions of the Division Bench of the High Court in the case of Mahanagar Telephone Nigam Ltd. Vs. Telecom Regulatory Authority of India. Interpretation as put by TRAI and COAI would be contrary to this judgment. Words in the Act have to be given meaning unless of course the words are to be mere surplusage. It is nobody's case that the words "notwithstanding anything contained in the terms and conditions of the license granted before the commencement of the Telecom Regulatory Authority of India (Amendment) Act, 2000" are mere surplusage and be ignored. The argument of TRAI and COAI that sub-clause (ii) of clause (a) of Section 11 which talks of terms and conditions of license would not include the terms and conditions relating to interconnectivity between service providers, does not stand to reason. Admittedly, Central Government, as licensor, is not bound by the recommendations of TRAI. When the Central Government puts the terms and conditions of interconnectivity in the license it is not for the TRAI to say that these conditions are of no use or *suo motu* vary or over ride them. There is nothing in the Act, after its amendment, which would take away the effect of the law, as laid down by the High Court in the case of MTNL. Principles laid down in that judgment are quite explicit. TRAI is now empowered to fix the terms and conditions of interconnectivity between the service providers to whom licenses have been issued prior to the amendment to the Act in 2000. The extent to which this power can be exercised is to bring harmony with the terms of interconnectivity of licenses issued after the amendment of 2000 so that it is in conformity with the TRAI Act and the principles laid down in the said judgment.

Statement of objects and reasons for the amendment do not take away the plain language of the enactment. When terms and conditions of the license use the terminology like orders/ decisions/ determination/ regulation that would not mean that TRAI can

adopt any of the methods to rewrite or vary the terms and conditions of the license and these would need to be within the confines of the licensing framework and also be in conformity with the statute.

We cannot read in sub clauses (i) and (ii) of clause (a) of Section 11(1) that terms and conditions of the license would not include terms and conditions of interconnectivity between the service providers. TRAI would remain bound by the terms and conditions of interconnectivity of the service providers as given in the license issued after the amendment to the Act in 2000. It has power to change the terms and conditions of interconnectivity of the license issued prior to the amendment of 2000 to the extent that these are in conformity with the terms and conditions of interconnectivity contained in the license issued after

the amendment of 2000. This to us appears to be the only harmonious, construction to give effect to the provisions of sub-clause (ii) of clause (a) of Section 11 (1) and sub clause (ii) of clause (b) of Section 11(1) of the Act.

22. 'BSNL has argued that the service providers are entitled to their contractual freedom for entering into interconnection arrangement/agreement on the basis of mutual negotiations (as mentioned in the license conditions). According to BSNL this freedom of mutual negotiations (which is also provided in clause 1(ii) of the RIO Regulations 2002) would be taken away, even before the start of negotiations, if BSNL is required to revise its own terms and condition for accommodating the terms and conditions set by TRAI According to BSNL, TRAI cannot in exercise of its powers under 11(1)(b)(ii) in the name of fixing the terms and conditions of interconnection agreement/arrangement, modify, alter or supersede any terms of conditions of any existing interconnection agreement/ arrangement between the service providers. BSNL has cited in its support, para 32 of the judgment of the Division Bench of the Hon'ble Delhi-High Court dated 17.1.2000 in the case of "MTNL versus TRAI" which reads as under:

"Thus, it is clear that the Authority itself understood that its own function under section 11(1)(d) -was only to intervene in the event of the service providers not being able to arrive at an arrangement It is clear that an arrangement does not necessarily imply an agreement. However, these are matters in which the service provider must be first given, opportunity to arrive at an arrangement amongst themselves. The question of regulation -would only arise if the service providers are not able to arrive at an arrangement. The Authority may lay down guidelines regarding those arrangements, provided the guidelines are not contrary to the terms of a license or a policy decision taken by the Government"

The arguments of MTNL are almost similar to those put across by BSNL.

23. It is relevant to clearly understand the ratio of the judgment of the Delhi High Court Civil Writ Petition No.6543 of 1999 and CW No. 6483 of 1999, MTNL Vs TRAI

decided on 17.01.2000 (AIR 2000 Delhi 208) in regard to powers of TRAI. To eliminate any controversy in this regard, we would rely on the exact language used in the said judgment. The question that was taken up for decision was clearly stated 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 thereafter decide afresh whether or not the impugned Regulation and Tariff Order 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)

24. The Division Bench has made the following observations before giving its conclusions:

i) *“In earlier matters, before this Court, a question had arisen whether the recommendations of the Authority were binding on the Central Government and/or whether the Authority could issue directions to the Central Government. By a Judgment dated 12th October, 1999, in amongst others, L.P.A. No.437 of 1998 a Division Bench of this Court has held (for detailed reasons given therein) that the Authority had no power to issue any direction to the Government as a licensor (para23)*

ii) *“Not only from the above Judgment but from the provisions of the said Act, it is therefore clear that in matters such as the need and timing for introduction of new service provider, terms and conditions of license to a service provider, revocation of license, equipment to be used in the network by the service providers and in matters relating to the development of telecommunication technology or in any matter relatable to the telecommunication industry in general, the function of the authority is merely recommendatory and/or advisory. The Government is not bound to either seek the recommendation or advise or to follow it even if it is tendered. Thus in these matters the authority cannot impose on the Central Government (Which is. the Licensing Authority) its views”, (para 26)*

(iii) *“Further under Section 11(l)(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(l)(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 licenses. Thus, in fact the Authority has varied the terms and conditions of license. The Authority has overridden provisions in a contract between the parties and affected the rights created by the license. The authority has, in purported exercise of power under Section 11(l)(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)

In this behalf it is very pertinent to note that even though Section 11 start with a non-obstante clause which provides that the functions are to be exercised “Notwithstanding anything contained in the Indian Telegraph Act 1885 ” the section nowhere provides that the functions are to be exercised notwithstanding “any contract or any decrees or orders of courts It is well settled law that when the legislature intends to confer on a body the power to vary contracts or existing private rights, it has to do so specifically, in the absence of any provision authorizing the authority to vary private rights under existing contracts or licenses. No such power can be presumed or assumed This is the law as laid down by the Supreme Court in the case of Indian Aluminium Company vs Kerala State Electricity Board reported in AIR (1975). SC1967”. (para 32) .’

iv) *“.....To us it appears that the only manner in which the non recommendatory powers can be read in harmony with the recommendatory power is to see that the regulatory powers are exercised within the framework of the policy and decision taken by the central government and within the framework of the licenses issued by the central government. Thus, whatever is a recommendatory function will remain recommendatory. The Authority can only exercise or regulate within the framework as decided by the central government”. (para 33)*

v) *“ It must also be mentioned that section 11(l)(c) provides that the Authority is*

to ensure compliance of terms and conditions of license. Significantly the said Act gives no power to the Authority to vary terms and conditions of license “. (para 36)

vi) “Thus, when the Legislature intended to give to the Authority a power which was not to be merely recommendatory power but a directory power, the Legislature has done so specifically. Under section 11(1) (c) (d) (e)

(g) (h) (i) (j) etc. no such specific power to over ride decisions of the central government has been conferred on the Authority “. (para 37)

vii) “Thus, even though the Authority may be free to lay down regulations necessary for the purposes of carrying out the purposes of Act, it cannot by a regulation convert a power or a function which is merely recommendatory power or into a directory power or function. Thus, for example in the guise of a regulation the Authority cannot lay down or vary terms and conditions of a license to a service provider nor lay down the necessity or timing for introduction of a new service provider. In the guise of regulation, the Authority cannot lay down the type of equipment which is not to be used in the network nor the type of technology which is necessary for telecommunication. In the guise of regulation, the Authority cannot regulate matters related to the telecommunication industry i.e. matters in respect of which it is merely to render advise to the government. The powers to issue regulation under section 36 has to be exercised consistent with the provisions of the said Act and the rules framed by the government. This power cannot be used to subvert the said Act and to assume powers and functions not conferred by the said Act”., (para 41)

viii) “Thus, it is clear that the Authority itself understood that its own function under section 11(1)(d) was only to intervene in the event of the service providers not being able to arrive at an arrangement. It is clear that an arrangement does not necessarily imply an agreement. However, these are matters in which the service provider must be first given an, opportunity to arrive at an arrangement amongst themselves. The question of regulation would only arise if the service providers are not able to arrive at an arrangement. The authority may lay down guidelines regarding those arrangement, provided that the guidelines are not contrary to the terms of a license or a policy decision taken by the government”, (para 48)

The question posed by the Hon’ble Division 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 necessarily 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”, (para 50)

25. It is therefore quite clear that the Hon’ble Division Bench has laid down that TRAI in the performance of its regulatory functions does not have the power to over ride the license conditions or vary contracts or existing private rights unless specifically empowered under the statute.

26. During the course of arguments it was represented to us by the learned counsel of TRAI that the Division Bench judgment was with reference to the provisions of the un-amended Act and that the observations made therein would not hold relevance with reference to the Amended Act. In particular it was mentioned that in the un-amended Act, the Authority, did not have the power to fix the terms of interconnection in the manner in which this power had been specifically conferred on the Authority under section 11(b)(ii) of the amended Act. This power is stated to be analogous to the power given under Section 11

(2) of the Act in regard to fixing of tariffs.

For convenience, we are setting out in tabular form the functions of TRAI under Section 11 (1) of the Un-amended and Amended Acts:

Functions of TRAI under Section 11(1) of the old Act (TRAI Act 1997):	Functions of TRAI under Section 11(1) of the amended Act (TRAI Act (Amendment) Act 2000:
(a) recommend the need and timing for introduction of new service provider;	(a)(i) make recommendations, either <i>suo motu</i> or on a request from the licensor, on need and timing for introduction of new service provider;
(b) recommend the terms and conditions of licence to a service provider;	(a)(ii) make recommendations, either <i>suo motu</i> or on a request from the licensor, on terms and conditions of license to a service provider;
(c) ensure technical compatibility and effective inter-connection between	(b)(iii) ensure technical compatibility and effective interconnection between

- different service providers; different service providers.
- (d) regulate arrangement amongst (b)(iv) regulate arrangement amongst service providers of sharing their providers of sharing their revenue revenue derived from providing from providing telecommunication services; telecommunication services;
- (e) ensure compliance of terms and (b)(i) ensure compliance of terms and conditions of licence; conditions of licence;
- (f) recommend revocation of licence (a)(iii) make recommendations, either *suo* for non-compliance of terms and *motu* or on a request from the licensor, on revocation of license for non-compliance of terms and conditions of licence;
- (g) laydown and ensure the time (b) (vi) lay down and ensure the time period for providing local and for providing local and long distance circuits of telecommunication between different service providers; of telecommunication between different service providers:
- (h) *facilitate* competition and promote (a) (iv) make recommendations, either *suo* efficiency in the operation of *motu* or on a request from the licensor, on telecommunication services so measures to facilitate competition and as to facilitate growth in such promote efficiency in the operation of services: telecommunication services
- (i) protect the interest of the consumers of telecommunication or on a request from the licensor, on service; technological improvements in the facilitate growth in such services.

services provided by the service providers.

- (j) monitor the quality of service and conduct the periodical survey of service providers; b(v) lay down the standards of quality of service to be provided by the service providers and ensure the quality of service and conduct the periodical survey of such service provided by the service providers so as to protect interest of the consumers of telecommunication services;
- (k) inspect the equipment used in the network and recommend the type or on j request from the licensor, on type of equipment to be used by the service providers; (vi) make recommendations, either *suo motu* providers after inspection of equipment used in the network
- (l) maintain register of interconnect agreements and of all such other matters as matters as may be provided in the regulations; (vii) maintain register of interconnect agreements and of all such other matters as may be provided in the regulations; be the regulations; provided in the regulations;
- (m) keep register maintained under clause (1) open for inspection to any member of public on payment of such fee and compliance of such other requirement; (viii) keep register maintained under clause (1) open for inspection to any member of public on payment of such fee and compliance of such other requirement; be provided in the regulations; be provided in the regulations;
- (n) settle disputes between service providers;
- (o) render advice to the Central Government in the matters relating to the development of telecommunication technology; (a)(vii) make recommendations, either *suo motu* or on a request from the licensor, on the development of telecommunication technology and any other matter reliable to

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telecommunication industry in general;	other matter relating to telecommunication industry in general;
(p) levy fees and other charges at such rates and in respect of such services as may be determined by regulations;	(c) levy fees and other charges at such rates and in respect of such services as may be determined by regulations.
(q) ensure effective compliance of universal service obligations;	(a) (viii) make recommendations, either <i>suo motu</i> or on a request -from the licensor efficient management of available spectrum
(r) perform such other functions including such administrative and financial functions as may be entrusted to it by the Central Government or as may be necessary to carry out the provisions of this Act.	(i) notwithstanding anything contained in the terms and conditions of the license granted before the commencement of the Telecom Regulatory Authority (Amendment) Ordinance, 2000., fix the terms and conditions of interconnectivity between the service providers;
telecommunication technology and any	(b) (ix) ensure effective compliance of universal service obligations:
	(d) perform such other functions including such administrative and financial functions as may be entrusted to it by the Central Government or as may be necessary to carry out the provisions of this Act:

The following provisions have also been added in the Amended Act under Section 11(1) Provided that-the recommendations, of the Authority specified in-the clause-(a)- of this sub-section shall not be binding upon the Central Government:

Provided further that the Central Government shall seek the recommendations of the Authority in respect of matters specified in sub-clauses (i) and (ii) of clause (a) of this sub-section in respect of new licence to be issued to a service provider and the Authority

shall forward its recommendations within a period of sixty days from the date on which that Government sought the recommendations

Provided also that the Authority may request the Central Government to furnish such information or documents as may be necessary for the purpose of making recommendations under sub-clauses (i) and (ii) of clause (a) of this sub-section and that Government shall supply such information within a period of seven days from receipt of such request:

Provided also that the Central Government is a licence to a service provider if no recommendations are received from the Authority within the period specified in the second proviso or within such' period as may be mutually agreed upon between the Central Government and the Authority.

Provided also that if the Central Government having considered that recommendation of the Authority comes to a prima facie conclusion that such recommendation cannot be accepted or needs modifications, it shall, refer the recommendations back to foe Authority for its reconsideration, and the Authority may within fifteen days from the date of receipt of such reference, forward to the Central Government its recommendation after considering the reference made by the Government. After receipt of further recommendation, if any, the Central Government shall take a final decision.

We have already substantially addressed the matter relating to powers of TRAI and have tried to give a harmonious construction to the provisions of Section 11 (1)(b)(ii) of the Act so that it is in conformity with the principles laid down in the decision of the Division Bench of Delhi High Court in the case of *MTNL vs TRAI*

We have carefully gone through the argument about this' power being analogous to the power given under Section 11(2) of the Act in the context of the provisions contained in the license. In the licenses issued after the amendment there is a clear mention in the clause relating to tariffs that these would be charged as per TRAI Tariff Orders/directions/ restrictions/ determinations and regulations. The relevant portion of this stipulation in the format for Licenses of the Fixed Operators is reproduced below:

“76'. TARIFFS

18.1 The LICENSEE -will charge the tariffs for services as per the TRAI tariff orders/regulations/directions/determinations issued in this regard from time-to time. The LICENSEE shall also fulfill requirements regarding publication of tariffs, notifications and provision of information as directed by TRAI through its orders, regulations and directions issued from time to time as per the provisions of the TRAI Act, 1997".

On the other hand under the heading “network interconnection “ in the same license

there are several clauses laying down the terms of the license and. an analysis of these clauses brings out the following position.

Clause 17.1 provides that direct interconnectivity among all telecom service providers in a service area is permitted. Interconnect between the networks of different service providers shall be as per national standards of CCS No.7 issued from time to time by the Telecom Engineering Centre. However it is stipulated that if situation so arises, interconnection with R2MF signaling may be permitted by the licensor upon mutual agreement of licensees. (CCS No.7 and R2MF - are technical descriptions of signaling protocol for carriage of traffic, including at the point of interface)".

Clause 17.2 says that the number of points of INTERCONNECTION (POIs) of Cellular Mobile Service Providers with Basic Service shall be as per mutual agreement subject to compliance of prevailing determination, regulations or directions issued by TRAI under the TRAI Act, 1997.

Clause 17.3 stipulates the manner in which the LICENSEE shall interconnect with National Long Distance (NLD) and International Long Distance (INLD) service providers

Clause 17.4 gives the freedom of a LICENSEE to carry intra circle Long Distance traffic and gives it flexibility to make use of the service of other Basic Service Providers and also enter into mutual agreements with National Long Distance Operators (NLDO) for carriage of intra-circle long distance calls.

Clause 17.5 is important and is extracted in full below:

"The LICENSEE may enter into suitable arrangements with other service providers to negotiate interconnection Agreements whereby the interconnected networks will provide the following:

- a) To connect and keep connected, to their applicable systems.
- (b) To establish and maintain such one or more Points of Interconnect as are reasonably required and ore of sufficient numbers to enable transmission and reception of the messages by means of the applicable system.
- c) To meet all reasonable demand for the transmission and reception of messages .between the interconnected system".

Clauses 17.6 and 17.8 are also important and are extracted in full:

"17.6 The terms and conditions of Interconnection including standard interfaces, points of interconnection and technical aspects will be as mutually agreed between the service providers subject to compliance of prevailing regulations, directions and determinations issued by TRAI under TRAI Act, 1997'.

"17.8 The LICENSEE shall comply with any order, directions, determination or

regulation issued by TRAI under TRAI Act, 1997 as amended from time to time “.

Clause 17.7 stipulates that “the Licensees shall, for the purpose of providing the service, install own equipment so as to be compatible with other service/ access providers”.

Clause 17.9 mentions that the Licensees shall operate and maintain the licensed network conforming to quality of service standards to be mutually agreed between the service \ providers in respect of Network - Network interface subject to such other directions as Licensor or TRAI may give from time to time.

Clauses 17.10 and 17. 11 are important and are extracted below in full:

“17.10 The charges for access or interconnection -with other networks shall be based on mutual Agreements between the service providers subject to compliance of any determination, orders, directions, restrictions and regulations issued from time to time by TRAI under TRAI Act, 1997”

“17.11 The network resources including the cost of upgrading/modifying interconnecting networks to meet the service requirements of service will be provided by service provider seeking interconnection. However mutually negotiated sharing arrangements for cost of upgrading/modifying interconnecting networks between the service providers shall be permitted”..

27. It is thus clear that at several places in the license flexibility has been given to the Licensee to enter into mutually negotiated interconnection agreements. In some of the clauses (clauses 17.2, 17.6 and 17.10) language used is “ shall be as per mutual agreement subject to compliance of prevailing determination/regulation/ direction issued by the TRAI under TRAI Act. 1997”. There is one clause namely 17.8, which needs to be particularly noticed in as much as it states that “the Licensee shall comply with any order, direction,

determination or regulation issued by TRAI under TRAI Act 1997 as amended from time to time”. If this clause were to be read as an over arching provision it does not make sense why in other clauses language to the effect “as per mutual agreement subject to compliance of prevailing orders, direction, determination or regulation issued by TRAI under the TRAI Act 1997” has been used. Also in many of the clauses the conditions have not been made “subject to TRAI determination thereby implying that these are terms set by the Licensor which cannot be altered without the consent/determination of the Licensor”.

28. A harmonious way of interpreting the various clauses under the heading of ‘Network Interconnection’ would be to see the differentiation in as much as some of the clauses merely stipulate the terms set by the Licensor, another set of clauses allows the Licensee to interconnect on mutually negotiated terms, yet another set of clauses

provides that the mutual negotiated arrangements would be subject to compliance of any ‘determination, orders, directions and regulations issued *from* time to time by TRAI and finally there is a set of clauses which prescribe the standards of interfacing, the interconnection routing for NLD, INLD and intra circle long distance traffic and standards for quality of services. There is no doubt that importance has been given to mutual negotiations in settling the terms between the service providers in regard to different aspects of interconnection. The reasons could be that in interconnection matters, mutuality of interest is sought to be given incentive and in some specified matters the mutually negotiated arrangements need to be in compliance with orders / directions/regulations of TRAI.

29. There is, therefore, considerable difference in the stipulations in regard to the powers of TRAI in the license in regard to “tariffs” and those relating to “Network interconnection”. We do not see any merit in the argument that the conclusions reached by the Division Bench would not be applicable to the situation existing after the Amendment to the TRAI Act in 2000, On the other hand, we are more convinced than ever that the principles laid down in this judgement are extremely relevant and provide valuable guidance for deciding the contentious matters presently before us.

30. During the course of hearing, on special request we gave an opportunity to the Cellular Association of India to be heard on the legal issues which we have discussed above. We are thankful to the learned counsels of COAI for throwing light on this matter. We have taken their arguments and cases cited by them into account while reaching our conclusions. By and large they have supported the contentions of TRAI.

31. The learned counsels for BSNL had argued that clause 3.1 of the RIO Regulation be declared ultra vires as it was not in accordance with the TRAI Act 1997 (as amended). Specifically it was mentioned that it gave TRAI the power of “prior approval” before the terms of interconnectivity could be offered by the “service provider with significant market power” to the other service providers. Also it took away the right to appeal by making it mandatory for the RIO to be published within 90 days of issue of the RIO Regulations after approval by TRAI ”

32. On the argument of vires of clause 3.1, the learned counsel for TRAI argued that the RIO Regulation notified by TRAI had the character of a legislation and was not an executive order of TRAI. As such, the Tribunal did not have any jurisdiction to question the vires of this legislation.

We have had occasion to briefly deal with this issue while deciding the review petition no.2 of 2004 in Appeal No.2 of 2004 (BSNL Vs TRAI). The relevant extracts of the order of Tribunal in this case are as below:

“Regulations have to be consistent with the Act. What the Regulations envisage is

publishing of Reference interconnect Offer (RIO) by the Telecommunication Service Providers holding significant market power based on the model of RIO, which is annexed with the Regulations as Annexure-B. BSNL is stated to be a service provider holding significant market power. Regulation 3.2 needs to be seen in particular as it provides that “A published RIO may undergo any change only with the prior approval of the TRAI. Interconnection Agreements are required to be entered into by and between all Service Providers based on the RIOs so published, provided, however, that by mutual agreement the two parties concerned, i. e. the interconnection provider and the seeker may modify and/or add to the terms and conditions stipulated in the published RIO for entering into an Individualized Agreement. Reliance by TRAI is placed on Article 17.1 of the model RIO which is Annexure-B to the Regulations. This article deals with termination of the interconnection agreement between the parties. Article 17.2 deals with withdrawal of interconnection for nonpayment and Article 18 deals with disputes. As noted above Regulation

3.2 itself provides that all these Articles of the model RIO may be changed by parties by mutual agreement. How can a model RIO which can be even modified by the parties who enter into interconnection agreement be termed as having statutory proportions as far this Tribunal is concerned? How can any Regulation provide a different dispute settlement mechanism than provided in the Act? Any suds. Regulation or RIO contrary to the Act has no value. It has not been pointed out as to how our Order in any way contravenes the provisions of the Act.”

This was again considered in Appeal No.3 of 2005 (MTNL Vs TRAI) in which MTNL had challenged the decision of TRAI reducing the Access Deficit Charge (ADC) payable to MTNL by the Telecommunication Interconnection Usage Charges (4th Amendment) Regulations 2003 (1 of 2005). In this matter, TRAI had questioned the jurisdiction of this Tribunal to entertain appeal against the said regulation which had been framed by TRAI in exercise of its power under Section 36 of the TRAI Act, by stating that the regulation is in the nature of subordinate legislation and since it had become part of the main statute, it was beyond any challenge *by* the appellate body. The relevant extracts of the order of the Tribunal in this case are as below:

“The other question than arises is even if the Regulations are valid piece of subordinate legislation, how can jurisdiction of TDSAT be barred if any dispute arises under [he Regulation. For example, in the present case it is the contention of MTNL that its entitlement to ADC has been wrongly reduced by TRAI on various non-existent grounds. Who is going to consider that, if not the TDSAT an expert body? Jurisdiction which the High Court exercises under Article 226 and 227 of the Constitution is not the same as is exercised by an expert appellate body in appeal As Supreme Court_ itself has said in West Bengal Electricity Regulatory

Commission case (supra) that neither the High Court nor the Supreme Court would in reality be appropriate appellate forums in dealing with “this type of factual and technical matters”. Supreme Court also said that “it -would be more appropriate and effective if statutory appeal is provided to a similar expert body, so that various questions which are factual and technical that arise in such an appeal get appropriate considerations in the first appellate stage also. These observations made by the highest judicial authority i.e. Supreme Court fully apply to the present case before us which involves consideration of access deficit charge (ADC) a matter of highly complicated and technical nature. Arguments of TRAI is in complete variance with these observations of the Supreme Court. Moreover, Supreme Court has also held that at least one right of appeal be given to the aggrieved party. Arguments advanced by TRAI would deprive the aggrieved party the MTNL of the right to appeal In the case of the West Bengal Electricity Regulatory Commission we find that Supreme Court has found subordinate legislation to be valid. That is not so in the present case before us as we are also of the view that TRAI cannot frame Regulation under hose sub-clauses which do not provide for framing of Regulations. It has certainly power to issue directions.

We may also note that West Bengal Electricity Regulatory Commission case was also considered by Supreme Court in the case of COAI vs Union of India though in a different context. Supreme Court said “it maybe stated that three Judges Bench was considering the extent of jurisdiction of the High Court in exercise of its appellate power under Section 27 of the

Electricity Regulatory Commission Act, 1998 In West Bengal

Electricity Regulatory Commission case, Supreme Court held, as noted above, the Regulation to be valid piece of Regulation within the statute. That is not so in the present appeal before us.

In this view of the matter, we reject the submission of TRAI that it has effectually barred jurisdiction to hear the present appeal by framing Regulation under Section 36 of the Act. We rather hold that even if the Regulation in the present case is a subordinate legislation, validly made, any dispute arising thereunder is within the jurisdiction of TDSAT as conferred upon it by the Act and no subordinate legislation can take away that jurisdiction. Any clause in the Regulation which seeks to divest the TDSAT to adjudicate upon any dispute is non-est and has to be ignored.”

We would also *like* to mention that Division Bench of Delhi High Court in the Judgment (MTNL vs TRAI) -referred to above, while taking note of Section 36(1) of the Un-amended TRAI Act which gives a general power to TRAI by notification to make regulations consistent with the Act and the rules made there under to carry out the purposes of the Act also held that “this power is to be exercised consistent with the

provisions of the said Act and the rules formed by the Govt. This power cannot be used to subvert the provisions of the said Act and to assume powers and functions not conferred by the said Act". The Division Bench has observed that among the non-recommendatory functions assigned to TRAI under Section 11(1) of the Act only sub clauses (1), (m) and (p), specifically provide for framing of regulations whilst the others do not. There is no change in the amended Act in regard to Section 36(1). Sub clauses (1), (m), and (p) of Section 11(1) of the Un-amended Act are analogous to sub sections (b) (vii) and (b)-(viii) and (c) of Section 11(1) of the amended Act. The observations of the Division Bench therefore are equally valid with reference to the Amended Act.

In Appeal No.3 of 2005 (MTNL Vs TRAI), this Tribunal had also occasion to briefly consider whether TRAI can make regulations in the discharge of its functions in all the sub clauses of clause (b) of Section 11(1) and thereby divest jurisdiction of TDSAT as an appellate body conferred by the Act. This Tribunal has observed in its order dated 31st January 2005 as under:

“Can Regulations which are in the nature of a subordinate legislation overtake the provision of the Principal Act? If Regulations under sub clauses (i) to (ix) of clause (b) of Section I of the Act and also under clause (c) are all framed by the TRAI there will be no direction, decision or order of the TRAI which could be subject matter of appeal to TDSAT and that would in effect mean repealing clause (b) of Section 14 of the Act. We also put it to Mr Sanghi that if there is contravention of any direction issued by TRAI it is punishable under Section 29 and what will happen if there is contravention of any Regulation. He said it was for the Parliament to amend the law. There was no clear answer to our question as to what was the procedure which would have to be gone into before issuing direction of Regulation. It appears to us that procedure for issuing direction or Regulation has to be the same. As to what is the difference between a direction and Regulation, it was the submission of Mr Sanghi that direction can be given to a particular service provider and Regulation can be of general applicability. This is not correct as we have found in number of cases that direction also been issued which are applicable generally e.g. that what was in Appeal No.2 of 2004. It does not appear to us the right approach of the TRAI to clothe a direction in the garb of Regulation and then tell the TDSAT that it has no appellate power. Both the lower authority and the appellate authority have to exercise their respective jurisdiction as defined in the Act constituting them. “

Section 11 (i)(b)(iii) (earlier Section 11 (1)(c) of the unamended Act) and Section 11(i)(b)(iv) (Section 1(d) of the unamended Act) provides that TRAI has to ensure compliance with the terms and conditions of the license and to regulate arrangement amongst service providers. Delhi High Court in the aforesaid Division Bench judgment said that these powers are to be exercised qua service providers. TRAI cannot frame regulations under these provisions as in that case functions could be enforced against or

imposed on the Central Government. Under these provisions directions could be issued to only service providers and if regulations are framed then that would mean that functions of the TRAI could be enforced against or imposed on the Central Government as well which would lead to an absurd situation and would be clearly a method of trying to do indirectly what cannot be done directly.

It is settled law that the same authority/body cannot have legislative as well as adjudicatory functions. Delhi High Court in the aforesaid judgment observed that if the arguments on behalf of the TRAI were to be accepted then it would amount to saying that TRAI would adjudicate upon dispute arising from or as a result of its own regulations/directions which could never have been the intention of the legislature. The High Court held this view prior to the amendment of the Act and now the adjudicatory functions have been conferred upon the TDSAT. We were dismayed with the argument on behalf of the TRAI in the case of MTNL vs TRAI (Appeal No.3/2005) when we wanted to know that if any dispute arises under the Regulations framed by TRAI, could it be that it would be adjudicated by TRAI and jurisdiction of TDSAT to determine that dispute would be barred. His answer was in the affirmative. That would mean that Regulations which are in the nature of subordinate legislation overtake the provisions of the principal Act. Regulations even if they are a valid piece of subordinate legislation cannot provide that if any dispute arises with regard to interpretation of any of the provisions of the Regulations, the decision of the TRAI shall be final and binding. Such submissions on behalf of TRAI have to be outrightly rejected. Again in the face of the principle enunciated by the Delhi High Court that the same authority/body cannot have both legislative as well as adjudicatory functions and that the Act itself had to be amended establishing TDSAT to hear and dispose of appeal against any direction, decision or order of the TRAI under the Act, for TRAI to say, that it has still the power to adjudicate upon a dispute has no meaning. In this context observation of the Delhi High Court that “further, sub-clauses (1), (m) and (p) specifically provide for framing of regulations whilst other do not” becomes relevant. The Court was considering non-recommendatory functions of TRAI as given in Section 11 (1) (c), (d), (e), (g), (h), (i), (j), (m), (n), (p) and (q). The Court said:

“What must be noted that whilst the recommendations/advice were, obviously to the Central Government, all the other functions /powers are qua service providers only. In none of the non-recommendatory functions, does the Authority have any function or power qua the Central Government. Further, sub-clauses (l), (m), and (p) specifically provide for framing of regulations whilst the others do not”.

The question may arise if the Regulations can at all be challenged. It was submitted that High Court in the exercise of its power of judicial review under the Constitution can examine that question. But then Supreme Court in the case of Cellular Operations

Association of India & Ors. Vs Union of India & Ors.

- (2003) 3 SCC 186 has explained the width of the jurisdiction of the TDSAT.

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 subclauses (ii) and (iii) of Section (ii) (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.

We continue to hold that the RIO Regulations need to be in accordance with the TRAI Act, the licensing conditions and directions and rules by the Central Government under Sections 25, 35 of the TRAI Act. A harmonious interpretation would need to be made of the provisions in the regulations to see that these do *not* violate the TRAI Act. We have proceeded to deal with this matter keeping this in view.

33. As regards the question of right of appeal having been taken away, we have *already* dealt with this issue earlier and concluded that:

“the only harmonious way of interpreting the situation would be that the time taken from the date of submission of the draft RIO to TRAI for its approval and the date of its final approval by TRAI as well as the period during which the matter has remained in appeal as a result of which the service provider was not in a position to publish the said RIO would need to be excluded from the 90 days period. “

34. As regards the stipulation of “prior ‘approval’” by TRAI, we have already indicated elsewhere that ‘prior approval would only mean that the proposed RIO is in accordance with the law and licensing conditions. Specifically we have concluded that:

“The stipulation of prior approval of the Authority in clause 3.1 would not give powers to TRAI to impose a set of new terms and conditions but would basically be to ensure that the basic structure of the model RIO is adhered to and the various points which have been identified in the draft RIO have been reasonably addressed. Any other intrusive approach in the garb of “prior approval” would not be in accordance with the provisions of the TRAI Act and would also undermine the freedom of a service provider to enter into mutual negotiations and agreement with other service providers in the matter of interconnection which has been referred to in the licenses and finds mention in the RIO regulation.”

35. In the above background we now venture to look into the outstanding points of difference between TRAI and BSNL/MTNL in regard to the RIO to be published by BSNL/MTNL after approval by TRAI. One option we could have exercised was to remit the matter to TRAI for having a re-look in the light of the observations made by us in this Order and either convey its approval to the terms as indicated by BSNL/MTNL or if it so wishes to suggest variations or any changes clearly indicating their reasons for

doing so. However, in view of the material submitted before us during the course of hearing in this matter whereby the positions of BSNL/MTNL and TRAI have become fairly clear, and we have also given extensive oral hearing to the Counsels in this regard, we do not think it will serve any purpose to send the matter back to TRAI as that course will also delay the matter further. Subject to what we have stated above we deal with the points of difference as under:

36. Issues relating to BSNL:

(1) Scope and Date of applicability of the RIO (Reference-Preamble and clauses 1.1 and 1.2.1 of the draft RIO): BSNL wants the RIO to be made applicable for licences prospectively, i.e. after the date of publication of the RIO and also that the RIO should be made applicable to only those operators who were granted licenses after 12.10.2002. For those licensees who got their licenses prior to 12.10.2002 but have not signed the interconnection agreement with BSNL, they should continue to be governed by the terms and conditions of the Interconnect Agreement as applicable to the other licensees who have obtained licenses prior to 12.10.2002 and have also signed interconnection agreement with BSNL.

According to TRAI, the terms and conditions of the RIO would apply, with effect from the date on which the BSNL should have published its RIO under the RIO Regulations dated 12.7.2002 that is 90 days from the date of issue of the Regulation viz. 10.10.2002, to the following:

- (i) Interconnection agreement signed/to be signed on or after 10.10.2002 (date by which BSNL should have published their RIO)
- (ii) where no interconnection agreement exists, requests for new interconnections made on or after 10.10.2002 and
- (iii) Where interconnection agreement already exists as on 10.10.2002, requests for new interconnection. Any change sought for in the terms and conditions applicable to the interconnection already provided will have to be negotiated afresh.

In this regard there seems to be no alternative but to go along with the provision in the RIO Regulation that it would be applicable to those agreements which are executed after the publication of the RIO by the concerned service providers However service providers who have already signed interconnect agreement will be given option to migrate to the RIO regime notified with effect from the date when such RIO is actually published on a non-discriminatory basis.

On behalf of TRAI it was argued that because of the stay granted on 23.] 0.2002 by this Tribunal to BSNL and MTNL in the present matter, in the intervening period BSNL has gone ahead and signed interconnection agreements with various service providers and thereby has taken undue advantage of the stay granted,

The interim order dated 23.10.2002 in Appeal No. 11 of 2002 was in the following terms:

“Issue notice. Counsel appearing for respondent accepts notice. Reply be filed within two weeks. Rejoinder, if any, be filed within two weeks thereafter. In the meantime, there will be an interim order of status quo as of today without prejudice to the rights and contentions of both sides (t

Similar order was passed in Appeal No. 12 of 2002.

In this regard we would say that this was unavoidable as it could not have been the intention of the Tribunal to bring to a halt during pendency of the case all efforts to establish interconnection between various service providers in the telecom network in the country. It is not as if interconnection agreements were not taking place before notification by TRAI of RIO Regulations dated 12.7.2002. During the course of hearing in this matter it became quite clear to us that for the new arrangements that TRAI wanted to introduce, a great deal of dialogue and discussions between TRAI and BSNL/MTNL was necessary. At the same time the orders of TRAI dated 9.10.2002 lacked in transparency and suffered from many shortcomings. We therefore hold that BSNL/MTNL having in the meanwhile entered into interconnection agreements with other service providers was in no way an abuse of the legal proceedings before this Tribunal.

(2) Arrangement of POI (Stipulation of Network standards): (Reference - clauses 2.3 and 6.2 of draft RIO): BSNL wants to stipulate that interconnection be based on CCS 7 or on the R2 signaling system, if CCS 7 is not available, as per permissibility under the terms and conditions of the License Agreement

TRAI wants to stipulate that interconnection shall be based on CCS .7 or R2 system if CCS 7 is not available.

Although apparently there does not seem to be much difference between what TRAI and BSNL are wanting in this matter, BSNL’s stand is that use of R2 signaling system requires the approval of the licensor, which aspect has been omitted in the wordings given by TRAI.

It would be best to reproduce the words used in foe license, in the RIO, For example, in the recently executed license agreement in the Unified Access Service Providers’ License. Clause 26.1 states that:

“26.1 Interconnection between the networks of different Service Providers shall be as per National Standards of CCS No. 7 issued from time to time by Telecom Engineering Centre (TEC) and also subject to technical feasibility and technical integrity of the Networks and shall be within the overall framework of interconnection regulations issued by the TRAI from time to time. However, if situation so arises, interconnection with R2MF signaling may be permitted by Licensor”.

This approach has the merit of ensuring that the RIO does not over-ride the terms of the License agreement.

(3) Cost of augmentation and cost of Interconnection (Reference - clauses 3.4.2 and 12.3 of draft RIO): BSNL wants the interconnection seeker to bear the cost of up gradation/modifying the interconnecting networks i.e. the charges for augmentation required on account of providing interconnection and for additional capacity based on traffic observations so as to compensate BSNL for investment (not covered by existing interconnection charges regime) to be made for establishing new infrastructure including down stream network elements to handle additional traffic.

TRAI wants each party to bear the incremental cost incurred for additional ports required for meeting the Quality of Service standards relating to its out going traffic to the other party.

In our view such costs have to be borne by interconnection seeker in line with the license terms. For example, in clause 17.11 of the License agreement relating to Basic Telecom Service stipulates as under:

“17.11 The network resources including the cost of upgrading/modifying interconnecting networks to meet the service requirements of service will be provided by service provider seeking interconnection. However mutually negotiated sharing arrangements for cost of up grading/modifying interconnecting networks between the service providers shall be permitted. “

(4) Caller Line Identification (Reference-clauses 2.3, 4.2.4 of draft RIO): BSNL and TRAI have agreed to the wording “the Calling Line Identification without being tampered shall be mandatorily provided by the Interconnection seeker at the POI”. However, BSNL wants that in case CLI is found to be tampered with or missing, it would reserve the right to reject such calls or charge them at the highest applicable rates for carriage and termination of international calls at the originating/terminating POI as the case may be. TRAI has stipulated the following words in this regard “cases where CLI is found to be tampered with or missing shall be dealt with by BSNL in accordance with the instructions issued by the Licensor or TRAI from time to time“.

Further BSNL wants to stipulate that the CLI of the caller shall be transmitted to the receiving (incoming network whenever requested by that network in the course of the signaling procedures and wherever technically possible) network. Either party shall neither suppress nor modify the CLI at the time of switching and true CLI shall be passed across the interfaces.

TRAI wishes to have the following words:

“Subject to the instructions issued by the Licensor and/ or THAI, CLI of the caller shall be transmitted to the receiving (incoming) network. Neither party shall suppress or modify or tamper with the CLI in any manner flat prevents the true

CLI being detected by the receiving end”.

As regards the first part of the above, we, understand that the matter has linkages with national security and we see no reason as to why a lenient view should be taken in regard to transmission of such traffic. A stringent view in this regard seems to be very much in order. We see it quite in order to allow wording proposed by BSNL subject to a 3 days prior notice being given before exercising the right to reject and it may be stipulated that it should be “subject to other instructions issued by the Licensor from time to time in this regard”.

As regards the second part, it is true that on this subject matter Licensor has issued guidelines and there is a clear stipulation in the license in this regard. As such, in the stipulation given by THAI there is no need to mention “and/or TRAI” after the words “subject to the instructions issued by the Licensor

(5) Resolution of inter operator billing disputes: (Reference - clause 31.6.2.1 of the draft RIO): The point of difference in this regard is that while BSNL wants the dispute to be referred to CMD, BSNL as an expert whose decision should be final, TRAI wants that both parties should jointly appoint an Auditor for possible reconciliation of the matter with cost to be borne by both the parties. In case they fail to appoint an auditor jointly either of the parties can make the reference to TRAI for resolution of the matter.

According to BSNL, TRAI does not have jurisdiction for resolution of disputes under the TRAI Act which has already been so held by TDSAT in Appeal No.2 of 2004.

We may go along with the formulation given by TRAI in regard to appointment of an Auditor jointly by both parties for a possible reconciliation. We agree with TRAI that it would not be fair that the matter be referred to CMD, BSNL for final resolution of the dispute. However, in case the parties fail to appoint an auditor jointly or if for some reason the dispute persists, it would not be in order to stipulate that the parties go to the Licensor or TRAI as has been suggested by TRAI. Instead, the parties should approach TDSAT, as dispute resolution would lie in the domain of TDSAT under the TRAI Act,. This may be incorporated in the RIO.

(6) Security Deposit: (Reference - clause 11.7 of draft RIO): BSNL wants the interconnection seeker to ultimately furnish Bank Guarantee for two month’s average billed amount for each POI.

TRAI wants either a reciprocal obligation to furnish Bank Guarantee by both parties or the amount of Bank Guarantee to be based on net payments after adjusting the payments to be made by BSNL to the other parties for traffic terminated by BSNL in other party’s network.

Bank Guarantee based on net payments as suggested by TRAI, is in order because

both the parties are entitled to secure the payments due to them. This approach is also acceptable to BSNL. The only point of difference is that BSNL wants due importance to be given to this matter and had agreed to the TRAI suggestion that details be included in the Annexure and not in the main body of the RIO. Since TRAI did not approve the Annexures in its approval of 9.10.2002 BSNL does not want the matter to be secluded to Annexures. We direct that in the circumstances of the case this provision, as agreed upon between TRAI and BSNL, be incorporated in the main body of the RIO.

(7) Termination of Interconnect agreement for un-authorised activities:

(Reference clause 17.11 of draft RIO): BSNL wants immediate termination of interconnect agreement in case of misuse of POI by either party for unauthorized traffic, unauthorized services or violation of National Fundamental Plan, as well as for willful suppression, manipulation or tampering of CLI (Caller Line Identification).

TRAI wants a notice to be given in such cases to defaulting party before taking any strong action.

Misuse of POI (Point of Interconnection) and willful suppression, manipulation, tampering of CLI by an operator amount to compromising on network integrity and security and by pass of legitimate revenue to other operators. In such cases, immediate withdrawal of interconnection facility at the concerned POI (Point of interconnection) only, may be appropriate (instead of terminating the interconnect agreement itself for the entire service area which has a number of other POIs also) with a short term show cause notice to defaulting operator under intimation to licensor to resolve differences in technical perception on such issues, if any, before resorting to termination of interconnect facility . In one of the cases considered by TDSAT earlier a 10 day notice period for such purposes had been considered as reasonable.

(8) Guidelines as part of Interconnection Agreement (Reference - clause

1.1 of *draft* RIO): TRAI has desired that in clause 1.1, the interconnection agreement should be made subject to not only the license terms and the TRAI regulations/orders and directions but also made subject to the RIO "Guidelines".

BSNL has objected and has stated that the "Guidelines" are relevant only till the time the final agreement is executed and thereafter they cease to be of contractual relevance.

We see merit in the BSNL arguments. The utility of "Guidelines" is for the purpose of preparing the draft RIO and for finalization of the Interconnection Agreement. After the agreement has been entered into, the "Guidelines" have to give way to the stipulations in the Interconnection agreement itself.

37. Issues relating to MTNL:

(1) Caller Line Identification (Reference - clause 2.3 of draft RIO): In the draft RIO initially the wording proposed by MTNL was "Calling Line Identification (CLI)

without being tampered shall be mandatorily provided by the interconnection seeker at the Point of Interconnection (POI), in case CLI is found tampered or missing MTNL shall reserve the right to reject such calls". In its communication dated 9.10.2002 TRAI indicated to MTNL that the word "tampered" may be replaced by "significantly altered". Subsequently, TRAI has agreed to the word "tampered" being retained. MTNL has however, not received any formal communication in this regard.

There is a clear stipulation in the License Agreement on this matter. For example clause 41.19(iv) of the License Agreement for UASL states:

"Caller Line Identification (CLI) shall never be tampered as the same is also required for security purposes and any violation of this amounts to breach of security....."

As such, there should be no objection to the use of the word "tampered".

(2) Termination to Interconnect Agreement for unauthorized activities

(Reference — clause 17.11 of draft RIO): This is the same point which has been dealt with under item No.6 relating to BSNL discussed in para 34 above. The same position would hold for MTNL also.

(3) Withdrawal of Interconnection (Reference clause 17.2 of the draft RIO):

MTNL has stated that there is broad agreement in regard to the stipulation made by TRAI on the draft RIO of MTNL and only a slight fine tuning of the procedure under this clause is required. We, therefore, take it that this is no longer an outstanding issue before us.

38. By the approach mentioned above, we have tried to take care of the points of difference between BSNL/MTNL and TRAI arising out of the letters dated 9.10.2002 and this should now form the basis on which BSNL/MTNL may go ahead and publish their RIOs within 90 days of this order

We hold that the requirement enjoined on the service provider of publication of the RIO within 90 days from the issuance of the RIO Regulation by TRAI contained in Item 3.1 thereof should be interpreted to imply that the time taken by TRAI for the purpose of grant of approval and the time during which the matter was pending in appeal, would be excluded while computing the 90 days span. TRAI would also give due regard to our observations in this order while performing its function of giving prior approval stipulated for itself in Clause

3.1 of the RIO Regulation so as not to transgress the provisions of the TRAI Act/License conditions/any existing contracts or arrangements between the service providers and give due regard to the importance of allowing interconnect arrangements to be settled through mutual negotiations subject to the provision of the Act and guidelines of TRAI issued in accordance with the TRAI Act.

Petition No.25 of 2004

39. Initially the hearing in this petition had been deferred as it was thought that it could await judgment of this Tribunal in Appeal Nos. 11 & 12 of 2002 in which inter-alia, the constitutional validity of Clause 3.1 of RIO Regulations 2002 had been challenged by BSNL and MTNL. After having gone through the entire matter in great detail and taking into consideration the prayers made in this petition, we feel that this can be disposed off by us in this order itself.

The main issues raised by COAI with reference to the BSNI/s RIO are related to : (i) date of its applicability to all CMSPs / UASL licences; (ii) higher rate of interest made applicable by BSNL on delayed payments (stipulated interest rate or SBI's prevailing PLR plus 5% per annum compounded monthly, whichever is higher); (iii) cost of augmentation / upgradation / modifications.

Further, COAI has indicated in para 25 of its petition as follows:

“That there are various other clauses /provisions in the said BSNL’s RIO which are unfair, unjust, unreasonable and / or discriminatory. The petitioners reserve the right to deal with / challenge them as and when BSNL’s RIO is published again, in case the so published RIO of BSNL still contains such clauses /provisions”

At the time of hearing, on behalf of COAI a list of various other issues relating to the draft RIO of BSNL was handed to us; Since the RIO of BSNL is still to be published and it is with some effort than an equilibrium is sought to be reached in regard to the various points of difference between the TRAI and BSNL, it would not be proper for us to disturb this' equilibrium at this stage on the basis of the contentions raised by COAI. In our view the RIO to

be published by BSNL is essentially a matter to be finalized between BSNL and TRAI. In this view of the matter, COAI cannot raise any objections to the proposed RIO of BSNL, even before it is brought on WEB after prior approval of TRAI,

In regard to the three issues raised by COAI in their petition, relating to the RIO which BSNL had published and later on withdrawn, we have while dealing with the outstanding points of difference with TRAI pertaining to BSNL /MTNL taken into account the issue relating to the date of applicability of the published RIO being extended to all CMSPs and UASLs. The issue relating to cost of augmentation / upgradations /modifications has also been covered. We are given to understand that the issue relating to higher rate of interest on delayed payments has already been resolved between BSNL and TRAI.

In our view the purpose of any RIO is only to serve as a benchmark for mutual negotiations between the two operators resulting into the ultimate signing of the interconnect agreement. The basic aim is to: (i) increase transparency; (ii) shorten /

expedite commercial negotiations for signing the interconnect agreements; (iii) provide more certainty to new entrants to the market; and (iv) prevent unfair discrimination so as to accelerate development of telecom infrastructure in the larger interest of the public and healthy competition in the telecom sector. We have also held that the freedom of service provider to enter into mutual negotiations and agreements with other service providers in the matter of interconnection has to be given due recognition and should not be undermined.

Since the RIOs of BSNL/MTNL are still to be published we, therefore, do not consider it necessary go further into the prayers made in Petition No.25 of 2004 and would treat this matter as disposed of.

40. Appeals No. 11 of 2002 and 12 of 2002 were filed before the Tribunal in October 2002 and Petition 25 of 2004 in August 2004. It has therefore taken some time for the Tribunal to give final decision in the matter. During the course of the hearing, all out efforts were made mostly at the instance of the parties to the case, to see that the points of difference between BSNL/MTNL and TRAI were mutually sorted out. Considerable progress was seen after every renewed attempt that was made to bring both sides to discuss and mutually sort out the various issues. In view of the sharp polarization in the views of both the sides on a very large number of issues, it took them some time to close their differences and only towards the end the differences could be narrowed down to only a few issues. These we have addressed in our order.

41. In the above manner both the appeals No. 11 of 2002 and No. 12 of 2002 and Petition No.25 of 2004 stand disposed off. In the end we would like

to record our appreciation to the very sincere efforts made by learned counsels on either side, Mr. Maninder Singh, Mr. Meet Malhotra, Mr. Arun Kathpalia, Mr. CS Vaidyanathan, Mr. Manjul Bajpai, Mr. Ankur Talwar, Mr. Raghvinder Singh, Mr. Kirtiman Singh, Ms. Neyha Biandar, Ms. Jayne Kuriakose and Mr. Gaurav Liberhan to explain to us the legal and technical complexities in the case. There will be no orders as to costs.

Sd/-
(D.P. Wadhwa)
Chairperson

Sd/-
(Vinod Vaish)
Member

Sd/-
(D.P. Sehgal)
Membe