

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

DATED 3rd MAY 2005

APPEAL No.31 OF 2003

Bharat Sanchar Nigam Limited ... Appellant
Statesmen House
Barakhamba
New Delhi-110001.

Vs.

Telecom Regulatory Authority of India Respondent
A-2/14, Safdarjung Enclave
New Delhi-110029.

AND

PETITION No.20 OF 2004

Cellular Operators Association of India Petitioner No. 1
14, Bhai Veer Singh Marg
New Delhi-110001.

Bharti Cellular Limited Petitioner No. 2
H-5/12, Qutab Ambience,
Mehrauli Road
New Delhi-110030.

Bharti Mobile Limited Petitioner No. 3
H-5/12, Qutab Ambience,
Mehrauli Road
New Delhi-110030.

BPL Mobile Cellular Limited Petitioner No. 4
BPL Centre
1045/1046, Avanashi Road
Coimbatore-641018.

FASCEL Limited
6th Floor, Sakar-II, Ellisbridge,
Ashrma Road
Ahmedabad-380006.

..... Petitioner No. 5

IDEA Cellular Limited
Suman Tower, Plot No. 18,
Sector No. 11
Gandhinagar-382011

..... Petitioner No. 6

Vs

Bharat Sanchar Nigam Limited
Statesmen House
Barakhamba Road
New Delhi-110001.

..... Respondent No. 1

Telecom Regulatory Authority of India
A-2/14, Safdarjung Enclave
New Delhi-110029.

..... Respondent No. 2

Department of Telecommunications
Ministry of Communications,
Sanchar Bhavan
20, Ashoka Road,
New Delhi-110001.

..... Respondent No. 3

BEFORE:

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

APPEAL No.31 OF 2003

For Appellant

: Mr. Maninder Singh with
Mr.Angad Mirdha, Advocates

For Respondent-TRAI

: Mr.Meet Malhotra,
Mr.Raghvinder Singh, Advocates

PETITION No.20 OF 2004

For Petitioners : Mr. C.S.Vaidyanathan, Senior Advocate with
Mr.Manjul Bajpai,
Ms. Neyha Bhandar,
and Ms. Jayne Kuriakose, Advocates

For Respondent No.1-BSNL : Mr. Maninder Singh with
Mr. Angad Mirdha, Advocates

For Respondent No.2-TRAI : Mr. Meet Malhotra with
Mr. Raghvinder Singh, Advocates

For Respondent No.3-Union of India (DoT) : None

Catchwords:

Direct Connectivity – direction dated 22.07.2003 of TRAI making direct connectivity mandatory – licence providing for direct connectivity permissible – direction of TRAI contravening licence conditions set aside.

Level playing field – BSNL to stop charging 0.19 paise from cellular operators by way of transit charges for accessing BSNL Cell-One subscribers – order applicable from the date of judgment.

ORDER

In this order we are dealing with Appeal No 31of 2003 (Bharat Sanchar Nigam Limited (BSNL) vs Telecom Regulatory Authority of India (TRAI)) and Petition No. 20 of 2004 (Cellular Operators Association of India (COAI) and 6 others vs TRAI) Both these matters are closely interlinked and were heard concurrently by us.

2. Appeal No.31 of 2003 has been filed by Bharat Sanchar Nigam Limited (BSNL) under Sec14 A of the Telecom Regulatory Authority of India Act, 1999 (the TRAI Act)

challenging the letters / directions dated 22nd July 2003, whereby TRAI has directed under Section 13 of the TRAI Act, that direct connectivity should be made between the networks of different service providers at the earliest and not later than three months from the date of issue of directions

3. According to BSNL the impugned letter / directions of TRAI dated 22-7-2003 are without jurisdiction and contrary to the terms of the license agreement signed by the basic operators as well as the cellular operators and have been passed in a non-transparent manner in violation of the principles of natural justice. It has been further stated that there is no justification for making direct connectivity between the different service providers mandatory, it would result in grave technical difficulties, would adversely affect the quality of service and would therefore not be in the larger consumer interest.

The appellant has prayed for the following:

- (a) Quash and set aside the direction / communication / order dated 22-7-2003 passed by the TRAI
- (b) Pass such other / further orders as this Hon'ble Tribunal may deem fit and proper in the facts and circumstances of the present case.

The appeal was filed on 5-9-2003. While no ad-interim stay was given, the assurance on behalf for TRAI, was recorded on 29-10-2003 that till the matter is pending before the Tribunal, no adverse order will be made against the appellant for any non compliance with the impugned order.

4. The impugned letter/ direction of TRAI dated 22nd July is 2003 is reproduced below for convenience:

“TELECOM REGULATORY AUTHORITY OF INDIA

File No.101-13/2003-MN

22nd July 2003

To

All Service Providers (BSOs/CMSOs including BSNL/MTNL)

Subject: Direction under Section 13 of TRAI Amendment Act on Direct connectivity between networks of Service Providers.

TRAI has been receiving representations from several service providers (CMSPs and BSOs) regarding the issue of providing Direct Connectivity between the network of two service providers. The various representations received were analysed in terms of ensuring a level playing field and protecting consumer's interest. The issue was also discussed by Authority with BSOs/CMSPs including BSNL on 30.6.2003.

2. Need for Direct connectivity:

Transiting traffic between service providers in the same service area entails avoidable transit charges that are eventually passed on to the consumer by the service provider in the form of higher tariffs. Further, even from traffic engineering point of view this carriage may not be desirable especially in situations when the subscriber numbers are likely to grow. It would not be techno-economically viable for a large amount of traffic to follow the transit route unnecessarily. In order to estimate such traffic, data was also called for to have a considered opinion on the justification of direct connectivity between BSNL Cellular and other Pvt. CMSPs. From the data obtained, it was observed that the data justifies direct connectivity amongst service providers in most of the areas. The Authority is therefore, of the opinion that direct interconnection should be mandated. Even otherwise, the TRAI's IUC Regulation 2003 does not have a provision of any transit traffic between operators within the same service area.

3. Level Playing Field :

As per the license conditions of CMSPs (fourth operator), it is mandatory for CMSPs to provide interconnection to all eligible Telecom Service Provider. However there is no such stipulation in Basic service provider's license. Mandating provision of interconnectivity on one class of service provider would tantamount to discrimination and in the opinion of the Authority would be against level playing field principle.

4. In the interest of consumers and to maintain level playing field, the Authority is of the view that in all cases where at least one of the two parties desires a direct connectivity, the direct connectivity between the network of two service providers in the same service area should be provided. The direct interconnection could be through a transit switch and/ or transmission media. However in exceptional cases where sufficient traffic is not there and direct interconnection may not have techno-economic justification, service provider could work out mutual arrangements for traffic routing through transit service providers. This transiting of traffic could be through any Basic Service Operator.

5. In view of the above, BSNL's/MTNL's cellular network also have a case for direct connectivity with Pvt. CMSP's/BSO's network in the same service areas. Similarly Pvt. BSOs and CMSPs shall also preferably have direct connectivity with other BSOs and CMSPs in their service area. For cases of overflow/disruption of traffic on direct interconnection route, transit arrangements shall continue to be permitted based on mutual agreement between the service providers.

6. In order to ensure effective interconnection between different service providers and to fix the terms and conditions of interconnectivity between the service providers as per clauses 11(1)(b)(ii) & (iii) of TRAI (Amendment) Act 2000, the Authority hereby directs under Section 13 of TRAI Amendment Act 2000 that connectivity should be made between the service provider at the earliest and not later than three months from the date of issue of this direction.

7. However, transiting of traffic in the exceptional cases mentioned in para 4 above and/ or in the cases of overflow/disruption of traffic on direct interconnection route, may be permitted through any BSO based upon mutual agreement between the service providers.

8. For any changes in the existing arrangements as a result of this directive, a smooth change over without affecting the services to consumers should be worked out with information to TRAI.

This issues with the approval of the Authority.

(Rajendra Singh)

Advisor (MN)”

5. It would be useful to give a brief account of the historical background.

The Government of India in / around the mid 1990's took a policy decision (as part of the National Telecom Policy of 1994) to permit private companies to offer

telecom service to the public. For this purpose, license agreements were signed between the said company and the Government of India (DOT). These companies were permitted to offer telecom services to consumers as per the mandatory terms and condition of their respective license agreements signed with the Central Government.

At the time of tender for grant of licenses to the private companies, separate bids were invited for each telecom circle. Different / independent licenses were signed for each Telecom Circle. Therefore, every new licensee was permitted to offer services only within the boundaries / confines of its respective circle and not beyond the same.

Since the initial stages itself, the private operators were not permitted to interconnect their networks directly. It was clearly provided in the license agreements of both the basic service providers as well as the cellular mobile service providers that any call between the networks of two private operators shall be transited through the network of the appellant - BSNL (then DOT)

In this regard the relevant clause of the license agreement signed by the Government for basic operators is reproduced herein below:

“1.7.3 CONNECTIVITY TO DOT NETWORK.

1.7.3.1 -1.7.3.3.....

1.7.3.4 interconnectivity between LICENSEE’s network as specified in the license and the network of any other LICENSEE of SERVICE shall be only through DOT’s network. The LICENSEE shall not directly or otherwise extend any type of service to DOT subscribers through the DELs provided by DOT.”

There was also no term / clause in the license agreement of the Cellular Operators which permitted direct interconnectivity between two operators and traffic between any two operators was required to be routed through the network of the then DOT (now the appellant). One of the relevant terms of the license agreement signed by the cellular operators with the Central Government is reproduced below”

“11 Prior approval of the Authority shall be obtained by the Licensee before he enters into any agreement with another licensee on Telecom operations either in the same territorial circle or in any other territorial circle.”

The Central Government evolved a new Telecom Policy (NTP 99) in / around the year 1999, which was announced on 26-3-1999. This new policy of 1999 involved a departure from some of the features of the National Telecom Policy of 1994, under which licenses to the private operators had been granted. One of the policy decisions taken by the Central Government as part of the NTP 1999 was to permit the entry of more private operators in each telecom circle and to put in place a multipoly regime. Under the NTP 99 the Central Government also decided to permit direct connectivity to certain kinds of calls (i.e. terminating traffic) between different service providers. The relevant portions of the NTP 99 as announced by the Central Government are reproduced herein below:’

“3.1 Access Providers

3.1.1. Cellular Mobile Service Providers

Direct interconnectivity between licensed CMSPs and any other type of service provider (including another CMSP) in their area of operation including sharing of infrastructure with any other type of service provider shall be permitted.....”

Pursuant to the adoption of the NTP-99 a letter dated 9-8-2000 was issued by the Central Government (DOT) addressed to the existing private cellular operators, inter alia

informing them that direct connectivity between two service providers only for the purpose of terminating traffic had been permitted by the Central Government, subject to mutual agreement.

The permissibility of direct connectivity was also incorporated by the Central Government in the new license agreements which were signed under the NTP 99. The relevant clause of the Cellular License agreement is reproduced herein below:

“35 Direct interconnectivity between licensed CMSPs and any other Telecom Service provider (including another CMSP) in the same Service Area:

Direct interconnectivity between licensed CMSPs and any other Telecom service provider (including another CMSP) in the same Service Area is permitted for the purpose of only terminating traffic of each other; intimation shall have to be given to the LICENSOR within 15 Calendar days of establishing such direct interconnectivity. Such interconnection shall be as per mutual agreement between the service providers. The interconnection shall have to be withdrawn in case of termination of the respective licensed networks of another CMSP or other Telecom service providers within one hour or within such time as directed by the LICENSOR in writing, after receiving intimation from the LICENSOR in this regard.”

In this regard TRAI has drawn our attention to the following relevant aspects of the BSO license and CMSP license read as follows:

BASIC SERVICES LICENSE

“Clause 2.5 – Direct interconnectivity among all Telecom Service Providers in the licenses service area is permitted. Licensee shall interconnect with Cellular Mobile Service Providers at the station of Gateway Mobile Switching Centre (GMSC) or Mobile Switching Centre (MSC), unless mutually agreed otherwise, subject to compliance of prevailing regulations, directions or determinations issued by TRAI under TRAI Act, 1997.”

“Clause 17.2 - The number of points of interconnection of Cellular Mobile Service Providers with Basic Service Providers shall be as per mutual agreement subject to compliance of prevailing, determination, regulation or direction issued by TRAI under the TRAI Act, 1997.”

“Clause 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.”

“Clause 17.8 – The Licensee shall comply with any order, direction, determination or regulation issued by TRAI under the TRAI Act, 1997.”

LICENSE AGREEMENT OF CELLULAR MOBILE TELEPHONE SERVICE:

“Clause 16.1 – The licensee shall be bound by the terms and conditions of this license agreement as well as by such orders/ directions / regulations of TRAI as per provisions of the TRAI Act, 1997 as amended from time to time and instructions as are issued by the Licensor / TRAI.

Network Interconnection

“Clause 27.1 - 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”

“Clause 27.2 - 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 meet all reasonable demand for the transmission and reception of messages between the interconnected systems.”

“Clause 27.5 - It shall be mandatory for the LICENSEE to provide interconnection to all eligible Telecom Service Providers.....”

“Clause 28.4 - The network resources including the cost of upgrading / modifying interconnecting networks to meet the service requirement of the licensee will be mutually negotiated keeping in view the orders and regulations issued by TRAI from time to time.”

6. BSNL has challenged the power of TRAI to pass any order, direction or regulation which has the effect of either altering, modifying or superseding any license condition. According to BSNL the terms and conditions of the licenses are finally determined by the Government as licensor and if the licensor has provided in the license certain significant stipulations on interconnection between different service providers, TRAI does not have the jurisdiction to alter or supersede any such terms and conditions. According to BSNL it has been specifically and consciously stipulated in the Basic and Cellular licenses issued after the amendment of the TRAI Act of 2000 that direct interconnectivity shall be 'permissible'. It has not been made mandatory. This extends an unequivocal choice to the telecom operators that whenever they do not desire to have direct interconnectivity it cannot be made mandatory for them by any authority other than the licensor ie. the Government of India.

BSNL's contentions are two fold:

- (i) that TRAI does not have power having regard to Section 11 (1)(a)(ii) of the Act since this would be a matter relating to the terms and conditions of service providers where the power of the Authority is only to make recommendations.
- (ii) that having regard to Section 11(1)(b)(ii) such a power exists only in relation to the terms and conditions of licenses granted prior to the commencement of the Telecom Regulatory Authority (Amendment) Act, 2000.

BSNL 's argument is that the TRAI cannot prescribe terms and conditions of interconnection which override either the terms of license or the contractual

terms of interconnection agreements. It has been further argued that TRAI's power to fix terms and conditions of interconnection are limited to the licenses issued before January 24, 2000. Regarding the licenses issued after January 2001, BSNL contended that the new license only permits TRAI to regulate arrangement and agreements negotiated by BSNL. In other words, it was the argument of BSNL that TRAI's power to fix terms and conditions of interconnectivity flows from the Act in respect of service providers licensed before 24-1-2000 and that the said power flows from the license in respect of licenses issued after 24-1-2000. This power which flows from the licenses (issued after 24-1-2000) is clearly not prescriptive but is merely to enforce the terms and conditions of license, even when such terms have to do with interconnectivity. TRAI's impugned direction is therefore without jurisdiction.

For convenience relevant portion of Section 11 of the Act is reproduced below:

“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;
- (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;
- (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 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 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“

TRAI's submissions are as under:

BSNL's contentions are entirely misconceived and proceed on a complete misunderstanding of the scope of Section 11(1). Whilst Section 11(1)(a)(ii) provides that for recommendatory powers in relation to terms and conditions of licenses to service providers, this is subject to a very important exception, namely in regard to terms and conditions of interconnectivity. Apart from fixing terms and conditions of interconnectivity it is also the function of TRAI to ensure effective interconnection. These are matters covered by Section 11(1)(b)(ii) & (iii). It is, therefore, the legislative mandate that TRAI is required to fix terms and condition of interconnectivity and to ensure effective interconnection. There is therefore no question of this not being within TRAI's jurisdiction. Section 11(1)(b)(ii) & (iii) and generally matters provided for under Section 11(1)(b) bring out the vital functions of the Regulator. The Regulator is not a mere spectator. The Regulator is required to monitor connectivity, to fix the terms of interconnectivity and to ensure technical compatibility for more effective interconnection. This can only be done if the Regulator constantly monitors interconnectivity and after fixing the grounds of interconnectivity monitors effective interconnection on a continuous basis.

Turning to the second argument with regard to the non obstante clause of the Section 11(1)(b), it was stated on behalf of TRAI that the non obstante clause is provided to legislatively undo the effect of the judgment which had been given by the Delhi High Court. As far as the terms and conditions of licenses granted prior to the Amendment Act of 2000 are concerned the functions of the Regulator were held to be merely recommendatory. Section 11(1)(b)(ii) is intended to undo the effect of this judgment completely. The non obstante clause applies to all agreements, before and after the Amendment. It is specifically and expressly provided that whatever be the terms and condition of the interconnectivity in the licenses, (whether prior to or after the Amendment Act, 2000) the responsibility and the functions to fix the terms and conditions of interconnectivity between service providers is vested in the Authority. This is the only way in which Section

11(1)(b)(ii) can be read. According to TRAI, any other construction makes nonsense of the amendments and the plain and clear intention of the legislature. The impugned directive has the effect of making a permission clause (of direct connectivity) in the license into a mandatory requirement. It was argued that had the license, even, barred, direct connectivity, the same could have been prescribed by the TRAI, notwithstanding the barring provision in the license. To read the TRAI Act in the manner and context that BSNL is seeking to do, will have the effect of not giving natural meaning to the plain words of the Act, promoting an interpretation which leads to absurdity and hardship and tends to make the Act unworkable, and its objectives unachievable.

In the amended Act, TRAI has been give specific powers to fix terms and conditions of inter connectivity which are not at variance with other provisions of the Act and which fulfill the objects and reasons for the amendment of the Act.

The Delhi High Court in its Division Bench judgment and order in CWP Nos. 6543 and 6583 of 1999 decided on 17-1-2000 had held,

- (a) that invocation of the recommendatory power of TRAI was not a sine-qua-non for the licensor to issue new licenses or amend terms of existing license
- (b) that there was no explicit power under the (un-amended) Act by which, TRAI could override terms and conditions of license and / or private right under contract (such as an interconnection arrangement or agreement)
- (c) that TRAI cannot have both Legislative as well as Adjudicative functions.

All these issues were resolved by amending the Act in January 2000. The objects and reasons of the Amending Act reveals the explicit intent to remedy all the aforesaid shortcomings of the old (unamended) Act, as brought out in the aforesaid judgments of the Delhi High Court. Accordingly, amendments were made to:

clarify the extent, nature of and conditions attended and consequent to the recommendatory functions of the TRAI (Section 11(1)(a) and provisos added by the Amended Act.)

- (a) by introducing a new provision in the regulatory functions of the TRAI by inserting Section 11(1)(b)(ii) which reads.

“Notwithstanding anything contained in the terms and conditions of 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 providers.”

- (b) separate the regulatory and disputes settlement function of the TRAI, (amending Section 14 and creating a separate Adjudicatory body, TDSAT)

To get around the clear meaning of the aforesaid provision, BSNL seeks to interpret the aforesaid provision of “..... fix the terms and conditions of interconnectivity” as only applicable to licenses granted before 24th January 2000. However, the words “Notwithstanding.....2000” simply mean “despite the licenses granted before 24th January 2000.....fix the terms and conditions of interconnectivity...”

According to TRAI, the non obstante clause has been used to overcome the peculiar phraseology of licenses issued before 24-1-2000. The intention is clear. Notwithstanding the bar which may be read in the licenses granted before 24-1-2000, TRAI has the power to fix terms and conditions of interconnectivity. The non obstante clause clarifies and does not curtail the substantive power of TRAI to fix the terms and conditions of interconnectivity. This is not only to give words their natural meaning but the meaning so given fits in harmoniously with the scheme of the Act.

If Section 11(1)(b)(ii) is read in this light, no controversy survives. The Act, read as a whole, then reads cohesively, logically and with a harmony which ensures that the objectives of the Act are achieved.

7. All these issues have been addressed by us in great detail very recently while dealing with Appeals 11 & 12 of 2002 filed by BSNL and MTNL against TRAI and Petition No.25 of 2004 filed by Cellular Operators Association of India and Others vs BSNL decided by us on 27th April 2005. In these matters we were specifically required to go into the powers of TRAI under Section 11(1)(b)(ii) of the Act for old as well as new licenses. We had concluded as under:

“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.”

Further in regard to the language used in the licenses stating that the licensor shall comply with any orders, directives, determinations or regulations issued by TRAI under TRAI Act, 1997 as amended from time to time, we have in the same order stated as under:

“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.”

Following the conclusions mentioned above we are of the view that the letter / direction of TRAI dated 22nd July 2003 mandating direct interconnectivity has resulted in modification in the license conditions, of licenses issued after the amendment of 2000 in the TRAI Act, and as such this was not in accordance with the provisions of the Act.

We further hold hold that the language ‘licensee shall comply with any order, direction, determination or regulation issued by TRAI under TRAI Act, 99.....’ used in the licenses, on which great stress has been laid by the learned counsel for TRAI, is to be harmoniously interpreted to mean that such orders, directions, determinations or regulations need to be in accordance, and not in conflict, with the license conditions.

8. BSNL has raised many other grounds for challenging the impugned letter / directive of TRAI. These relate to lack of transparency and violation of natural justice and absence of process of consultation. It is mentioned that imposition of direct connectivity would lead to wastage of resources through the setting up of new transmission networks and also through some of the existing infrastructure being rendered surplus. Also that there was no techno-economic justification given to make

direct interconnection mandatory, there was no satisfactory reasoning given as to how this approach was to be matched with the Interconnect Gateway concept mooted in the RIO Regulations of TRAI dated 12-7-2002. During arguments it was pointed that this was in conflict with the idea of the Interconnect Gateway Switch mooted in the TRAI Consultation Paper issued on 13-4-2004. All these have been contested by TRAI. We would not like to get into the details in this regard here as we would touch upon these issues briefly while dealing with Petition 20 of 2004. These are, however, relevant to indicate that as and when TRAI considers it fit to recommend to the licensor that direct connectivity between the service providers needs to be mandated in the license, all these aspects would need to be adequately addressed in a transparent manner.

9. In the above background we allow the prayer of BSNL and quash and set aside the impugned letter/ directive dated 22-7-2003 of TRAI.

Petition No.20 of 2004

10. This petition has been filed by the Cellular Operators Association of India and others seeking implementation of direct connectivity by BSNL CellOne mobile service operator with other cellular operators as mandated in, inter alia, the cellular operators licenses, the TRAI's Interconnection Regulation dated 29th October 2003, National Telecom Policy 1999 (NTP 99), Department of Telecommunication's letter dated 9th August 2000 and for ensuring a level playing field.

11. The petitioners have prayed for the following relief in their petition:-

- (a) Direct BSNL to seek direct connectivity with the CMSPs in all Service Areas for its Cellular Services;
- (b) Strike down Item 6 of Clause E – POI of CMTS at Level I TAX of Annexure-I of BSNL's Circular dated 28.01.2004 to the extent that it prescribes a charge of Rs. 0.49 per minute instead of 0.30 paise per minute for a CMSP mobile call to BSNL Cellone in the same SDCA and up to 50 km intra circle;
- (c) Hold as illegal Item 1.A of Clause 6 of Para B.III of Annexure I of BSNL's amendment Circular dated 28.04.2003 regarding POI at Level I TAX of BSNL, to the extent that it prescribed a charge of 0.60 paise per minute instead of a charge of 0.40 paise per minute for a CMSP mobile call to BSNL Cellone in same SDCA and up to 50 km;
- (d) Direct BSNL to refund the transit charge of Re 0.20 / 0.19 per minute collected by BSNL from the CMSPs for all private CMSPs Cellular Calls transited by BSNL through its PSTN Network and terminated on BSNL CellOne / Cellular Network with effect from 01.05.2003, together with interest at a rate which will be 5% above the Prime Lending Rate (PLR) of State Bank of India computed from the date of each respective payment by CMSPs until the date of actual refund thereof;
- (e) Direct BSNL to pay to the CMSPs all amounts charged by BSNL towards Lease Lines, Port Charges and Set Up costs for all E1s required for BSNL CellOne / Cellular traffic in both directions from October 2002, together with interest at a rate which will be 5% above the Prime Lending Rate (PLR) of State Bank of India computed from the date of payment by CMSPs until the date of actual refund thereof;
- (f) Direct BSNL to refund all the charges levied by BSNL on CMSPs at the rate of Rs. 1.20 per three minutes for all CMSPs calls to BSNL CellOne after the CMSP Licence amendment dated 29.01.2001 until 01.05.2003

together with interest at a rate which will be 5% above the Prime Lending Rate (PLR) of State Bank of India computed from the date of each respective payment by CMSPs until the date of actual refund thereof;

- (g) Grant interim/ad-interim/ex-parte order(s) in terms of the above prayers;
- (h) In the interim, direct BSNL not to raise any demand note(s) / bill(s) towards Set UP costs, Port Charges, Lease Line Charges or any other charge with respect to either the existing Points of Interconnect / Links or the Points of Interconnect / Links augmented hereafter, at Level I TAX carrying the cellular calls from / to BSNL CellOne, including the augmentation costs, until final disposal of the present Petition;
- (i) In the interim, direct BSNL not to levy any transit charge at the rate of Rs. 0.19 or at any other rate per minute from CMSPs for CMSPs mobile calls meant for BSNL CellOne Network;
- (j) Pass such other and further orders, as this Hon'ble Tribunal may deem fit and proper in the facts and circumstances of the case.

12. A brief background and the facts leading to the present petition are as under:-

TRAI issued IUC Regulation dated 29th October 2003 whereunder TRAI has mandated Direct Connectivity between Service Providers. The relevant clause (b) of Schedule-II of the said IUC Regulation is reproduced as under:-

“Direct interconnection between Access Providers is mandatory. For exceptional cases of Intra-SDCA transit, operators may decide the charges through mutual negotiation. However, this should be lower than Rs. 0.20 per minute.”

(It will be in the fitness of things to point out here that the directions of TRAI dated 22-7-2003 making direct interconnection mandatory had retained an

option that where direct interconnection is not possible due to various reasons the same can be done through PSTN network)

Pursuant to this IUC Regulation of 29th October 2003, BSNL issued a Circular dated 28th January 2004, wherein a charge of Rs. 0.49 per minute for a call from Cellular Mobile network to another Cellular Network transited by BSNL will be charged. This charge included Rs. 0.30 towards call termination and Rs. 0.19 towards transit. It is obvious that in the case of direct connectivity this Rs. 0.19 charge can be obviated.

This petition basically revolves around one point that BSNL CellOne (the Cellular Service of BSNL) must have Direct Connectivity to other cellular networks so that this Rs. 0.19 being charged from consumers be done away with. Secondly, in accordance with RIO Regulation of TRAI, the Cellular Mobile Service Providers who now have their networks want BSNL CellOne to become Interconnect Seeker and cater for infrastructure to connect its CellOne Mobile Switching Centres (MSCs) with MSCs of other CMSPs in the same service area.

13. While arguing the case Mr. C.S. Vaidyanathan, Senior Advocate & learned counsel for the Petitioners, stated that the Direct Connectivity is in the interest of consumers and also Service Providers and that the best option available is to provide a level playing field to all the Service Providers including BSNL. According to Mr. Vaidyanathan, Direct Connectivity is ideal from the following angles:-

Transit charges could be avoided which ultimately become a burden on the consumers.

Easier to engineer traffic rather than going through another switch/gateway.

Techno-economically it is not desirable to have transit routing.

Mobile communication is proliferating at a rapid pace resulting in increase in the traffic by the day and, therefore, it is advisable to have direct connection between the networks.

Mr. Vaidyanathan went on to say that Direct Connectivity actually results in optimum utilization of resources. On the other hand transiting calls create an unnecessary load on the transit switch and wastes resources. He said that BSNL is barely able to match the future requirement of ports and PSTN Switches for its own traffic. The Level-I TAX which is being used by BSNL for provision of its fixed traffic, National Long Distance Traffic as also International Long Distance Traffic is also being used for its cellular traffic thus overburdening the Level-I TAXs. They are not in a position to meet ever increasing demand of CMSPs networks. He substantiated this by relying on the data of demands of EI Media pending with BSNL which has not been provided. He said that most of the Cellular Mobile Service Providers (CMSPs / BSOs) are already directly connected to each other. This Interconnectivity is in place because it results in optimum utilization of national resources. In fact, if the transit of calls is continued, BSNL will require more capacity in its Level-I TAX thus requiring additional capital expenditure whereas direct connectivity will not require additional expenditure in increasing the capacity of Level-I TAXs.

Mr. Vaidynathan said that the violation of IUC Regulation by BSNL CellOne in not seeking Direct Connectivity is affecting the CMSPs and UASLs in several ways:-

CellOne network calls are being transited through BSNL Fixed Network and for this transit, BSNL Fixed Network charges Rs. 0.19 per minute from the Cellular Operators as transit charge. This is undue advantage to BSNL at the cost of consumers being anti-competitive.

When initially cellular operators sought interconnection with Level-I TAX they established Ports of Interconnect (POIs) for which they paid. The infrastructure was created by them for use by them and also paid by them. These POIs were dimensioned to suit the limited traffic to BSNL's PSTN subscribers only. With the increase in traffic these are not adequate and quality of service is becoming poor.

As per TRAI's direction dated 19th August 1998, CellOne, which is a latter entry must ask for Interconnection Link to CMSPs and pay for the same.

He further stated that TRAI's Regulation has also mandated Direct Connectivity in order to obviate the necessity of subscribers paying 19 paise per minute for cellular to cellular call. He said that after the Direct Connectivity was permitted by the DoT every CMSP established transmission medium to directly connect with each other in their service area. He also said that it is only the CellOne which is not directly connected and the whole purpose seems to be to collect 19 paise for each call which is actually a burden on the subscriber making the call.

14. Replying to this arguments learned counsel for the Respondent, Mr. Maninder Singh, stated that as per the National Telecom Policy 1994 (NTP 94), licensor had mandated DoT to have infrastructure ready to absorb the traffic from the private networks. Therefore, the BSNL created the additional infrastructure for such additional calls. As per the National Telecom Policy 1999 (NTP 99) direct connectivity is permissible and not mandatory and the licenses say the same. He said that TRAI has no jurisdiction to amend Licenses. License is a contract which cannot be amended through a Regulation which makes the Regulation bad in law.

Mr. Maninder Singh, also said that the connections through Level-I TAX were equivalent to connections through Gateway Switch. He said that this was the most economical way of giving interconnectivity where resources can be saved rather than connecting the networks directly. He explained this with the help of a diagram. He brought to our notice that a Consultation Paper dated 13th April 2004 was issued by TRAI wherein also there is a mention of a Gateway Switch. The purpose of this Consultation Paper was to arrive at an ideal solution in the multi-operator multi-service scenario and it was clearly mentioned that the Consultation Paper was on interconnect-exchange-cum-inter-carrier billing house and on the issues related to interconnection architecture. He said that he was shocked that after getting all views on the consultation paper, TRAI has come out with Direct Connectivity rather than Gateway Switch. He said that by Direct Connectivity each operator will be connecting to the other network directly which will amount to creation of wasteful additional infrastructure. He said that if all the operators are connected to Gateway Switch it is ideal and more economical. He strengthened his arguments based on the consultation paper that connectivity through Gateway Switch is the ideal answer.

Mr. Maninder Singh went on to state that in case CellOne has to now go in for direct connectivity with all cellular operators in the service area it will require enormous creation of additional infrastructure which will entail an expenditure of more than Rs. 600 crore and wastage of Rs. 100 crore of additional capacity which earlier had been created for expansion of their network to accommodate CMSPs. He said that additional infrastructure had been created for the benefit of CMSPs in accordance with DoTs directions and this cannot be lost sight of.

Mr. Maninder Singh also said that the TRAI direction has left option open to CMSPs to have the connectivity as well through Level-I TAX in places where it was not possible to have direct connectivity. This was a matter of convenience and was not acceptable to BSNL.

As regards charges of Rs. 0.19 he justified by saying that it was as per the IUC Regulations of TRAI and since the calls were transited through Level-I TAX the charges were inevitable.

He also confronted the concept of 'Seeker' and 'Provider' and said that this right existed from the beginning since network of BSNL was being used, the same position should continue even after expansion of network of CMSPs.

Strengthening the case further for the Respondent, Mr. Maninder Singh, learned counsel, stated that increase in traffic flow as quoted by the petitioner was a fallacy. He said that though the network was expanding the traffic in terms of minutes was decreasing. He submitted a chart showing the number of subscribers vis-à-vis traffic flow in minutes in respect of some Circles.

Mr. Maninder Singh, reiterated again the aspect of validity of the order of TRAI to make interconnect mandatory which is in contravention to the authority vested in TRAI since they cannot amend the conditions of the license. He said that if the license condition states permissibility of interconnect there is no question of TRAI making it mandatory.

15. In response to the arguments put forward by the Respondent, Mr. Meet Malhotra, learned counsel for TRAI, stated that, the reliance on Consultation Paper by the Respondent on 'Gateway Switch' was not in order since it was only a process to arrive at a correct decision. He stated that the concept Gateway Switch was thought of as one option but was dropped due to technological and other problems envisaged. This was not a final solution but only a consultation paper and was meant as a preliminary paper to get the views of all stakeholders including BSNL. He refuted the argument put forward by the learned counsel for BSNL. He also said that TRAI as per Statute had the power to issue the Regulation. He said that TRAI was the only authority to ensure level playing field among all operators and regulate the development of infrastructure.

On being questioned about the future plans of TRAI, on the 'Interconnect Gateway Switch' in view of the advance in technology, extension of networks, multi operator and multi service scenario where dynamic allocation of bandwidth was thought of, he replied that TRAI was not planning to come out with a Gateway based solution of interconnect in the near future. He said that it was not technologically feasible for the time being. He could not specifically tell us the time frame as to when TRAI proposes to have connectivity through Gateway, if at all. He, however, stated that in the near future TRAI would be coming up with another Consultation Paper on the subject.

16. Mr. C.S. Vaidyanathan stated that if TRAI now comes out with a solution of connectivity through Gateway Switch, the infrastructure created by them for direct connectivity will go waste. He said that in view of this and even otherwise because of the other problems which he has stated earlier direct connectivity between the Mobile

Switching Centres (MSCs) is the answer. He also said that BSNL should not have any problem in direct connectivity since the MSCs and Level-I TAX at most of the places are co-located and can be easily connected. Since most of the operators have interconnected directly and it is only CellOne which needs connection, he submitted that they should be directed to have direct connection by laying their infrastructure to the respective MSCs of the CMSPs.

17. From the arguments of petitioners and respondents the following issues emerged:-

- (a) Whether TRAI could make direct interconnectivity mandatory through the Regulations of October 2003.

We have already given our detailed reasoning in this regard while dealing with Appeal 31 of 2003 and have concluded that TRAI could not in exercise of its powers under the TRAI Act, override the license conditions and make direct connectivity mandatory either by direction under Section 13 or by Regulations under Section 35 of the Act. The TRAI Regulations of October 2003 were issued on 29-10-2003 and both the matters, namely, Appeal No.31 of 2003 and Petition No.20 of 2004 have been before this Tribunal in which the powers of TRAI to mandate Direct Connectivity have been under challenge. It does not stand to reason that what is held to be beyond the powers of TRAI under the Act and cannot be done by issue of a direction could be carried out by TRAI through a Regulation. We have already held on a number of occasions that Regulations of TRAI have to be consistent with the Act. {In Review

Petition 2 of 2004 in Appeal No.2 of 2004 (BSNL vs TRAI), and again in our order of 27-4-2005 in Appeal No.11 of 2002 (BSNL vs TRAI), Appeal No.12 of 2002 (MTNL vs TRAI) and Petition No.25 of 2004 (COAI vs BSNL)}.

- (b) We have no reason to question that the overall infrastructure created by DoT and later on by its successor namely BSNL, by enhancing capacity of switches was necessary for providing connectivity to the cellular operators. Similarly, POIs also must have been enhanced. We feel that keeping in view the rapid growth, BSNL will have to in fact, create still more infrastructure for its Fixed Network and also its rapidly expanding Cell One network.. The CMSPs are also placed in a similar situation and they may have already created the requisite infrastructure for direct interconnection. All this may also have to be re-engineered or some may go waste in case Gateway concept is followed.

Seeing the pending demands of CMSPs on BSNL about E-1 connectivity, we are not very much convinced about the argument of infrastructure going waste. The connectivity between the CMSPs and Level-1 TAX of BSNL which has so far been provided will continue to be used for transiting calls to the PSTN network (Fixed Telephone) and to other networks. In fact keeping the future expansion in mind this connectivity may not be adequate to cater for the calls to these networks and also the BSNL Cell One operations, as subscribers are likely to enhance to larger

numbers in the near future. Therefore, the technological requirement of Direct Connectivity between the MSCs of CMSPs and the MSCs of BSNL Cell One needs to be addressed in a comprehensive manner.

It is logical that the media use/infrastructure created for interconnection in accordance with the IUC Regulation of Interconnection entail some expenditure. This should be shared between the two operators who by mutual agreement are going to have direct connectivity. We do not want to give any directions on the interconnection which has already been created between the operators, which have been arrived at by signing MOUs / agreements between them. Wherever, till the date of this order, infrastructure has been created for connections from the Cellular Operators to Level-1 TAX the same will be used for the termination of calls to the PSTN subscribers as well as to CellOne subscribers. In the near future since both the CMSPs and BSNL CellOne are likely to enhance their capacities manifold, the present connectivity will fall short of the requirements. In the interest of level playing field, direct connectivity between the CMSPs and the BSNL CellOne may be encouraged in the future by mutual agreement on the basis of costs being shared between the CMSP and BSNL CellOne.

- (c) Concept of Gateway: The two sides are differing on this approach and have diametrically opposite views. While the cellular operators have gone in for direct connectivity and still favour this mode of interconnection,

BSNL favours the interconnectivity through a Central Gateway. But BSNL is in favour of Level-1 TAX of PSTN as Gateway and not any other Switch as Gateway. There is no doubt that resource-wise, interconnectivity through Gateway will be more economical. However, from a technical point of view this Gateway, which will form a hub to transit and switch calls to other operators may eventually become a bottleneck. In case this Gateway Switch fails the whole operation of mobile network of all operators would come to a grinding halt. In case of direct connectivity, if one link fails it will lead to failure of communication between only two operators whereas with others it will continue. In contrast, however, in the case of connectivity through a Gateway Switch if one media connecting operator to gateway fails, his network would be completely out of communication with rest of the network. However redundancy is generally built into the telecommunication network at the planning stages to take care of such situations. In any case TRAI has still not come out with a recommendation and will take time and, therefore, we feel that till such time the matter is comprehensively dealt with by TRAI and final decision is taken thereon by the licensor, direct connectivity should remain permissible.

- (d) Seeker/Provider Concept: This issue was discussed at length by both the parties. All the MSC's of cellular operators are connected to Level-1 TAX of BSNL for their calls to PSTN subscribers. This gives the facility

to cellular mobile subscribers to transit calls through the Level-1 TAX to BSNL CellOne subscribers and also PSTN subscribers of Basic Service Networks including BSNL. Infrastructure was created by BSNL to support the other cellular networks for their transit calls and terminating calls on PSTN. BSNL entered into cellular operations through their CellOne at a later date. BSNL CellOne has however utilized the connectivity of BSNL PSTN with the other cellular operators for getting connected to their networks and thereby the related cellular subscribers.

BSNL charges Rs.0.19 per minute from the cellular subscribers for transiting calls through its Level-1 TAX. While this may be justified for providing terminations to these calls to the BSNL PSTN network or for providing connectivity to the networks of other operators, it is also being charged for accessing BSNL CellOne subscribers. The cellular operators have paid port charges to BSNL for the Level-1 TAX connectivity. On the other hand BSNL CellOne is getting the benefits of connectivity to the other cellular operators without paying the PSTN transit charges and makes use of existing ports meant for such cellular operators for getting the PSTN transit connectivity for their traffic. On considerations of level playing field it appears that BSNL is not justified any longer in charging transit charges to the extent of 19 paise for accessing BSNL CellOne subscribers.

18. We, therefore, direct the following on the prayer made in Petition No.20 of 2004:

Prayer (a): In view of our conclusion that TRAI does not have the authority to override the license conditions for making direct connectivity mandatory, either by direction under Section 13 or by regulation under Section 36 of the Act, we are unable to accede to the prayer of the petitioners that we direct BSNL to seek direct connectivity.

Prayer (b) (c) & d): On considerations of level playing field, we direct that BSNL should stop charging 0.19 paise from cellular operators by way of transit charges for accessing BSNL CellOne subscribers, wherever the MSCs of both BSNL CellOne and Private CMSOs are connected to the same BSNL switch. We are of the view that our direction will take effect from the date of this judgment and we authorize TRAI to make this part of the regulatory regime. In the totality of circumstances there is no necessity to consider refund of transit charges collected by BSNL so far, for transit of calls of private CMSOs to BSNL Cellone through Level-1 TAX.

Prayer (e) & (f): This involves reopening the arrangements that were operated as per the regulatory regime during the said period. Therefore, we do not grant this prayer.

Prayers (g) to (j) for interim/ad-interim/ex-parte order(s), fall through as this is a final order.

19. It has taken us some time to decide these matters. Considerable time was taken away in resolving the issue relating to sharing of data with BSNL by TRAI in regard to

telecom traffic which was referred to in the impugned letter of TRAI dated 22-7-2003 and which TRAI was reluctant to disclose to BSNL. Extended hearings had also to be given on the request of counsels of either sides in regard to the legal and technical issues.

20. Appeal 31 of 2003 and Petition 20 of 2004 stand disposed off in the above manner. We record our appreciation to the very sincere efforts made by learned counsels on either side. Mr. Maninder Singh, Mr. G.L. Sanghi, Mr. Meet Malhotra, Mr. C.S. Vaidyanathan, Mr. Manjul Bajpai, Mr. Angad Mirdha, Mr. Raghvinder Singh, Ms. Neyha Bhandar, Ms. Jayne Kuriakose to explain to us the legal and technical complexities in the case.

21. There will be no orders as to costs.

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

.....
(Vinod Vaish)
Member

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