TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL
NEW DELHI

DATED 9TH SEPTEMBER 2005

PETITION No.45 OF 2005
(M.A.Nos.126,143,164, 169 & 196 of 2005)

1. **Tata Teleservices Limited**
   10th Floor, Tower-I, Jeevan Bharti Bldg
   New Delhi-1
2. **Maharashtra Tata Teleservices Ltd.**
   Ispat House, BG Kher Marg, Worli
   Mumbai – 18 ….Petitioners

Versus

Bharat Sanchar Nigam Ltd
Statesman House, Connaught Place ….. Respondent
New Delhi-1

BEFORE
HON'BLE MR JUSTICE N SANTOSH HEGDE, CHAIRPERSON
MR. VINOD VAISH, MEMBER
LT.GEN.D.P. SEHGAL (RETD.), MEMBER

For Petitioners		: Mr Soli J Sorabjee, Senior Advocate with Mr C.S. Vaidyanathan, Sr.Advocate Mr.Ramji Srinivasan, Ms Ruby Singh Ahuja, Ms.Simran Brar, Mr Gagan Sareen, Mr.Mohd.Akram, Advocates.
For Respondent		: Mr Goolam E.Vahanvati, Solicitor General with Maninder Singh, Mr Ankur Talwar, Mr Sunil Fernandes, Mr Kirtiman Singh, Advocates
For Interveners	COAI	: Dr.A.M. Singhvi, Senior Advocate with Mr.Manjul Bajpai, Mr Navin Chawla, Mr Sushmit Pushkar Ms.Neyha Bhandar, Advocates.
	DoT	: Mr Gopal Jain, Advocate

ORDER

The petitioners are interrelated Companies, whom we would hereinafter refer to as M/s TTL. They have in this petition filed on 3/5/2005, challenged the action of M/s Bharat Sanchar Nigam Limited (BSNL) whereby the Fixed Wireless Phones of the Petitioners, branded as 'WALKY', have been treated as Limited Mobility Phones or

The petitioners are interrelated Companies, whom we would hereinafter refer to as M/s TTL. They have in this petition filed on 3/5/2005, challenged the action of M/s Bharat Sanchar Nigam Limited (BSNL) whereby the Fixed Wireless Phones of the Petitioners, branded as 'WALKY', have been treated as Limited Mobility Phones or WLL(M) phones. BSNL has by its impugned letter dated 14/01/2005, addressed to the Petitioners, with copies marked to all the heads of its field units (known as Circle heads), informed them of this reclassification and has demanded increased Interconnection Usage Charges (IUC) /Access Deficit Charges (ADC) on telephone traffic to and from these Fixed Wireless Phone (FWPs) for the period from 14/11/2004 to 13/01/2005. The petitioners have been asked to pay the additional amounts immediately on receipt of the said letter. Further the petitioners were asked to stop the operation of the WALKY service using numbering levels of fixed services without paying the IUC charges, including ADC, applicable to Limited Mobility Services as this was contrary to the terms of the license, the IUC Regulations and also the agreed terms and conditions of the Interconnection agreement. BSNL has also asked for the details of such amounts to be paid by M/s TTL to BSNL.

M/s TTL protested to BSNL by their letter of 27/01/2005 and also sent their representations to Telecom Regulatory Authority of India (TRAI) complaining of the unilateral action of BSNL.

Unmindful of these representations BSNL issued a further circular dated 09/03/2005 asking its Circle heads to collect the necessary traffic information and the Circle heads in turn started raising demand notes and insisted that if these amounts were not paid, they would disconnect interconnection facilities. BSNL quoted Clause 6.4.9 of the Interconnection Agreement executed with Basic Service Operators in 2002, which reads as under:

> *"If BSNL detects that WLL mobile subscribers originated calls are being handed over or have been made over at any port not meant for carrying such calls, BSNL shall be free to charge the BSOs @ Rs.1.14 per metered unit for all the calls recorded on these ports from the date of provisioning of that POI* or for the preceding two months whichever is less apart from taking other legal actions including disconnection of POIs or temporary suspension of the interconnection agreement".*
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> *(* POI means Point of Interconnection)*

The Petitioners having failed to get any relief from BSNL in spite of the various representations asking them to desist from such unilateral action have filed this petition.

2. The following prayer has been made:

"……. that this Hon'ble Tribunal be pleased to:-

(a) set aside BSNL's letter/circular dated 14/01/2005 read with its further Circulars dated 19/01/2005 and 09/03/2005 and all consequential Demand Notes as being illegal, arbitrary without jurisdiction and bad in law.

(b) Award costs of the Petition; and

(c) Pass such further orders as may be deemed fit and proper in the facts and circumstances of the case.

An application for interim stay was also submitted, MA 126 of 2005.

3. Soon after filing of this petition, BSNL raised a demand vide its notice of 12/5/2005 and threatened the petitioners regarding invocation of Bank Guarantee and disconnection of Points of Interconnection in case the amount indicated in the said demand was not paid on or before 20th May 2005. Through M.A No.169 of 2005 documents have been filed pertaining to the developments by which stay on the enforcement of the impugned letter of 12/5/2005 and the subsequent letters/communications demanding IUC (ADC) was obtained from the Hon'ble Delhi High Court.

A Single Judge Bench of the Delhi High Court after detailed hearing had passed an order dated 30/5/2005, in Writ Petition No.8709-10/2005 filed by the Petitioners, prima facie holding that the action of the BSNL was unilateral and directed BSNL not to enforce the impugned letter of 14/1/2005 and the subsequent letters demanding differential IUC (ADC) to the extent of 50 per cent and directed the petitioners to deposit the balance 50 per cent charges with the BSNL within a period of 4 weeks. The learned single judge also made the following observations:-

"It is clarified that the observations in the course of this order are not meant to be construed as an expression on the merits of the case and are solely meant for the purpose of examining the controversy with a view to decide the interim application: this arrangement shall continue till the Tribunal is properly constituted and proceeds to decide the issue of appropriate interim relief. The parties are directed to approach the tribunal immediately, after its due constitution. The tribunal is at liberty to pass such orders as it may deem appropriate, including variation, modification, or vacation of the terms of these directions".

The petitioners filed a Letters Patent appeal before the Vacation Bench of the Delhi High Court and a Division Bench of Hon'ble Delhi High Court vide its order dated 22/6/2005 granted a complete stay in favour of the petitioners as follows:-

"Learned counsel for the appellant submits that in view of the prima view finding by the learned Single Judge that there cannot be unilateral change in Interconnection User Charges, the learned Single Judge fell in error in coming to the conclusion that within the realm of writ jurisdiction limited relief shall be granted to the appellant. Counsel submits that a direct consequence of the finding of the learned Single Judge there cannot be a unilateral alteration of Interconnection User Charges would be that the action of the respondent would be not only arbitrary but without authority of law and therefore in the facts and circumstances of the case since the Tribunal is not functioning a complete stay ought to have been granted".

Meanwhile BSNL also moved an appeal before the Division Bench of the Delhi High Court against the order of the learned Single Judge and the same was listed together with the petitioners' Letters Patent appeal on 4/7/2005. Taking note that this Tribunal had resumed hearing after a new Chairperson had assumed office, the appeals as well as the writ petition were disposed of as follows with the agreement of both the parties:

"Now the Tribunal is constituted and has already taken cognizance of the matter, therefore, this Court is not required to entertain these proceedings. We are informed by learned counsel for the original petitioner that the next date for hearing fixed by the Tribunal is 12/7/2005 and the intervening period is of merely one week. It would, thus, not be appropriate for this Court to pass any order. Learned Counsel for BSNL requested that they may

be permitted to move the Tribunal even before that date so that the amount can be recovered from the original petitioner.

It goes without saying that it is open for BSNL to move the Tribunal even before the returnable date of 12/7/2005 to press for its relief for recovery of the amount. Suffice it to say that the Order, which is made by the Division Bench on 22/6/2005, will be now subject to the orders that may be passed by the Tribunal in the subject matter.

Appeals are disposed of in the aforesaid terms.

This Order is passed in view of the agreement arrived at by the parties. In view of this, the original writ petition being WP(C) No.8709-10/2005 also stands disposed of by consent of learned counsel for the parties. A copy of this Order be placed in the said writ petition".

4. The main arguments advanced in support of the petition are summarized as under:

- The (Fixed Wireless Phones) FWP phones service of the petitioners has been in existence since 1997 and has been deployed by various Basic Service Operators as part of the Fixed Wireless Services. The Basic License of 1997 mandates the licensees to deploy Wireless Services as the preferred technology in the last mile (also known as Local Loop). Originally the Wireless Terminals (FWTs) were large, bulky and heavy and had several accessories like separate antenna, separate battery, separate Network Interface Unit and a separate telephone instrument. Over a period of time technological developments have resulted in all these features getting combined into an Integrated Fixed Wireless Phone (FWP), also called Desk Top Phone.

- WLL(M) refers to mobile handsets and not portable FWPs. In the well known WLL case, Cellular Operators Association of India Vs Union of India & Ors, (2003) 3 CLJ 337 (TDSAT), decided on 8-8-2003, Department of Telecommuncations had taken the stand that FWPs are portable and cannot be equated to a mobile phone. BSNL/DoT were aware that all private BSOs were providing Wireless Service through WLL(F).

- Telecom Engineering Centre of Department of Telecommunications(TEC) has also recognized the distinction between FWPs and WLL(M) phones. The Desk Top Phones used by the Petitioners are classified as Fixed Wireless Phones whereas the phones which make use of handsets used within the SDCA are termed as WLL(M) phones.

- Even the High Powered Committee set up by the Government in 1999 (Group on Information Technology) had approved the grant of WLL(M) service facility only in relation to handsets. In the well known WLL case, Cellular Operators Association of India (COAI) had challenged the use of handsets by the Basic Service Operators but there was no objection to the continued use and deployment of FWPs by the BSOs even though they were equally portable.

- The licensor and TRAI have been fully aware throughout that these FWPs are portable and ADC has been allowed to them notwithstanding such portability, holding them to be Fixed Services.

- TRAI was fully aware of the need to provide ADC to private BSOs including the Petitioner who were providing FWPs which were classified as Fixed Phones. IUC Regulations of 29/10/2003 make this aspect quite clear.

- COAI had represented to the TRAI on 09/12/2004 seeking withdrawal of ADC on these FWPs by stating as follows:

"Eligibility of ADC Funding

2. We would like to submit that this provision competitively disadvantages the cellular operator. This is on account of the fact that the fixed wireless services being provided by the FSPs/UASLs are classified as fixed services and thus entitled to ADC. However, these services are for all intents and purposes tantamount to full cellular services and can be offered seamlessly throughout the service area. This creates a non-level playing field and competitively disadvantages the cellular operator vis-à-vis the fixed wireless service providers, in fact it may be noted that a large UAS

operator is prominently advertising its fixed wireless as a mobile service (WALKY).

3. It is submitted that this anomaly needs to be addressed as part of the Authority's proposed recommendation on ADC.

4. In fact, we firmly believe that with the introduction of unified access licensing and the complete waiver of all rural roll out obligations for the fixed operators, there is absolutely no justification in continuing to provide them with ADC funding.

……………………

6. In the light of the above, we would like to strongly reiterate our submission that the authority should, in the proposed regime, revise the eligibility for ADC as suggested by us above.

That ADC should not be payable for Fixed Wireless Phones that are usable over entire service area and to Operators who do not have rural roll-out obligations."

- TRAI had declined to withdraw the grant of ADC to these BSOs and had declared that they should continue to retain the ADC and has further declared that it would conduct a review of the regime by issuing a Consultation Paper and inviting the participation of the stakeholders.

- DoT had issued show cause notice to the Petitioners on 06/01/2005. Thereafter the Petitioner has complied with the requirement to impose conditions and restrictions on the subscribers' ability to transport/move/relocate or shift the Subscriber Terminal Equipment from the place of installation, breach of which attracts suspension/disconnection of the telephone facility, as evident from the Customer Application Form itself. There has been no determination by the DOT in response to the reply dated 21/01/2005 submitted by the Petitioner to its Show Cause Notice dated 06.01.2005.

- None of the Licenses, either those issued in 1997 or the conditions/permission granted vide letter dated 25.01.2001 permitting use of Handsets, or subsequent Licenses issued in the year 2002 or even the Universal Access Services Licence executed on 01.06.2004 (w.e.f. 14.11.2003) contained any restriction on the use and provision of FWPs.

- TRAI has issued a Consultative paper on 17/03/2005 where questions have been posed with specific reference to Fixed Wireless Lines. Question 2.7 is particularly relevant and reads as under:

> *"If ADC is to be given for WLL(F) lines, what criteria should be determined with regard to the range of portability/mobility of WLL(F)'s subscriber terminal and the specifications of the subscriber terminal so that clear distinction can be made between WLL(F) and WLL(M)/Mobile services?"*

In the light of these questions and the open Consultation Process initiated by the TRAI, which is underway, it would be pre-mature for this Tribunal to hold that FWPs would not be entitled to ADC or that BSNL would be entitled to recover the arrears of ADC on these phones.

- Despite specific requests by BSNL invoking the TRAI's jurisdiction under Regulation 6 of the Interconnection Regulations of 2003, vide its letter dated 04.01.2005, the TRAI has elected to hold the open Consultation Process before deciding on the various issues. BSNL is also participating in this Process. Having elected to participate in the Consultation Process and having invoked the jurisdiction of TRAI, it was not open to BSNL to go ahead and unilaterally declare these FWPs to be WLL(M) Phones vide its impugned letter of 14.01.2005 and consequently demanding the arrears of ADC from the Petitioner. Further, any intervention by the Hon'ble Tribunal on the question posed by the TRAI would amount to interdicting the Consultation Process engaged in by the TRAI in a transparent fashion wherein all stakeholders are being involved, including other BSOs, who are not party before this Hon'ble Tribunal in the present proceedings.

- Significantly, BSNL's impugned letter dated 14/01/2005 admits that it was informed that these FWPs deployed since many years by the Petitioner had only been renamed as "Walky" and that the Numbering Levels remained

the same. There is thus no justification to warrant BSNL to conclude that a new service was being offered by the Petitioners w.e.f. November 2004. BSNL has further declared in its impugned letter dated 14/01/2005 that from the advertisements it is clear that the Petitioner was providing Limited Mobile Services. It is a matter of record that the advertisements have been modified in the second week of January itself consequent to letters received from TRAI and the DoT and therefore, BSNL could not have relied upon the said advertisements any longer.

- Both TRAI as well as DOT's Notice dated 06/01/2005 declare that the Services being offered by the Petitioners were in fact Fixed Wireless Services and that the advertisement purported to mislead the subscribers by suggesting that they were Mobile Services when, in fact, fixed services ought to have been provided. M/s TTL have withdrawn the advertisements, in compliance with these directions and have shown cause to both, the DoT by letter dated 21.01.2005 and to TRAI by letter dated 05.02.2005, yet there has been no determination by the DoT or the TRAI holding the Petitioner in breach nor has been there any rejection of the response of the Petitioner.

- The allegations of BSNL and DOT have been that the service has changed from November 2004 i.e. when the advertisements were issued. Petitioners submit that both before and after advertisements, the regime was the same, and the advertisements cannot change the nature of the service.

- The general directions dated 04.03.2005 issued by the TRAI and the General Clarifications dated 23.03.2005 issued by the DoT employ a language that is identical to what has been suggested by the COAI in its representation dated 29.12.2004. In requiring the Operators to confine their Services to strictly within the Customer's premises, BSNL & COAI have in effect demanded that the signals transmitted through airwaves ought not to be receivable outside the four walls of a Customer's premises. If that be the interpretation, then the said direction would be impossible to

implement and this is within the knowledge of the DoT and TRAI. Because it was only in the nature of a clarification, the Petitioner has reported compliance to the extent it is technologically possible, by limiting portability to within the range of 1 or 2 Base Transmitting Stations (BTS). Numerous compliance reports were filed with the DoT and the TRAI from time to time and the Petitioner has not received a single reply rejecting the said compliance reports.

- Even TRAI in its Show Cause Notice dated 15.1.2005 asked the Petitioner to show cause why the FWPs deployed by it should continue to be categorized as Fixed and not as Mobile Phones. The Petitioner having responded to the Show Cause Notice, TRAI has not till date categorized the said Phones as WLL(M) Phones and has, therefore, accepted the explanation offered by the Petitioner. Thus, where the Expert Body itself has decided against re-classifcation of the FWPs to WLL(M), it is not open for BSNL to have unilaterally done so.

- The reason why the TRAI has not held the Petitioner to be non-compliant is because of the latter's sincere and general attempts to comply with its directions. It has succeeded in restricting the portability of the FWP to a limited restriction zone and has thus achieved the intention and objective of the TRAI as set out in Para 2.26 of the Consultation Paper where it described the intention and the objective behind its direction dated 04/03/2005 "These Phones should not be in a position to offer Mobility … .. in other parts of the city". Thus, the TRAI intended to disable a subscriber from transporting the Terminal from one end of the town to the other and continuing to use it. That objective has been successfully achieved by the Petitioners whereby the telephone has been limited to only a cluster of 1 or 2 BTSs.

- Not only BSNL's action is illegal, arbitrary and unilateral, it is also violative of the law laid down by this Tribunal while deciding Petition No. 9 of 2001, ABTO Vs BSNL and Others, (2005) 5 CLJ, 334 (TDSAT),

wherein this Tribunal on 27-4-2005 set aside a similar unilateral action by BSNL in attempting to revise the Access Charges without reference to the TRAI as under:

> *"In our view BSNL could not have taken upon itself to have unilaterally issued the impugned letters of 28/04/2001 and 31/05/2001 to the Basic Operators asking them to raise the access charges and then threaten them to start billing them at the demanded rates. This kind of unilateral action was against the provisions of the licences as well as the interconnect agreement. It was against the provisions of the May'99 TRAI Regulations".*

Having unilaterally classified the FWPs as WLL(M) Phones, BSNL has also altered the IUCs and ADC payable on these Phones. Its actions are based on its unilateral Notice dated 14/01/2005. No reference has been made to the TRAI. It has breached the provisions of Reporting Requirement set out in Regulation 5 of the said Regulations that mandate the Reporting Requirement of at least 45 working days before effecting any such change. Its argument that it had not altered or modified the application of IUC regime and that it was only "correctly slotting" these FWP Phones as WLL(M) Phones is far fetched and misconceived. Its allegations that the Petitioner had altered the nature of the Phones and the Service from Fixed Service to a WLL(M) Service is also misconceived and without any basis. Presumably, when all the other aspects of the Service continue to remain the same, namely the tariff, the routing, the numbering, interconnection etc. BSNL appears to have concluded that Service has changed only on the basis of the advertisements.

- Even the said advertisements need to be read in the context of the service provided. The use of the words 'mobility' only highlights the portability of the FWP that makes it easier for the subscriber to shift residences without having to rewire the new premises and carry the phone with him without any change of numbering required within the SDCA. This portability cannot be equated with mobility and likewise, the mere use of the word "mobility" cannot alter or

change the true nature and character of the Services that continue to remain the same. Similar advertising latitude, has not been objected to by the Licensor/TRAI when "Airtel" has claimed Full Network Coverage even in Remote Jungles and "Hutch" claims that "our Network follows you", even though both these statements may be exaggerations. Likewise, "Hutch TV" is not the same as the real TV. However, a subscriber is not likely to be misled by such advertisements.

- The action of the Respondent is clearly discriminatory. It has targeted only the Petitioner. Vide its Notice dated 06/06/2005, it has attempted to alter the tariff and pulse rate only in respect of the calls being made to the Petitioners' phones which is highly discriminatory and in violation of the non-discriminatory provisions mandated by the TRAI's Regulations. On the other hand, calls from BSNL's phones to other Operators show a lower pulse rate. Consequently, BSNL's actions are anti-competitive and serve to discourage calls to the Petitioner's phones.

- BSNL has already deployed lakhs of FWPs that are identical to the Phones deployed by the Petitioner. It has not disclosed whether and how these phones are deployed and under what Numbering Scheme and Routing Plan. Admittedly, till very recently the BSNL itself was providing these FWPs as Fixed Line. If it has altered the status of its FWP phones to WLL(M) phones, it has not cared to inform either the TRAI or the other Operators who would consequently be entitled to claim appropriate refunds from BSNL in respect of ADC wrongly recovered by BSNL itself. Likewise, BSNL would also be subjected to consequential penal action by the Licensor. A copy of the TRAI's General Direction dated 04/03/2005 and DOT's General Clarification dated 23/03/2005 have been addressed to BSNL and MTNL also. BSNL must therefore be asked to produce a copy of the Show Cause Notice received by it from DOT as well as its reply to the same. Indeed, the websites of both BSNL and MTNL specifically make reference to Mobile Services under the WLL

System with the use of only Handheld Terminals as distinct from Fixed Wireless Terminals/Fixed Wireless Phones.

- BSNL does not want to wait for the decision of the TRAI which is the only authority in law empowered to pass any order on the issue but has taken upon itself the duties of TRAI and wishes to collect ADC charges which are neither due nor payable but are an illegal demand. The attempt by the BSNL to collect such charges is an endeavor to destroy the market of the Petitioner. In case such charges are payable to BSNL then the Petitioner will be left with no option but to increase the tariff. For instance, a Fixed to Fixed FWP Walky local call is charged at Rs.1.20 for 3 Minutes. This means Rs.0.40 per minute. Out of this, 30 paise per minute is paid to BSNL as Terminating Charge for local calls, and the Appellant retains 10 paise per minute. On other hand, if this FWP is treated as WLL(M), then additional ADC of 30 paise per minute would have to be paid to BSNL on these calls, whereas the Appellant is recovering only 10 paise per minute from the consumer. Thus, Appellant would be required to pay 60 paise per minute to BSNL whereas it is charging only 40 paise per minute. This would result in raising the tariff by at least 30 paise per minute and this means a 3 minute call would now have to be priced at Rs.2.10 instead of the earlier Rs.1.20. This will destroy the market of the Petitioner, which is precisely the objective of the Respondent. Therefore, the Petitioner will have to charge the tariff for a mobile phone while providing a fixed phone to the consumer which is not only prejudicial to the consumers' interest but will also result in loss of consumer base to the Petitioner. The present consumers of the Petitioner who are only interested in fixed phone will shift to BSNL or MTNL as presently only these two players have a monopoly position in providing fix phone to the interested consumers. Thus the Petitioner will suffer irreparable harm and injury which cannot be compensated in terms of money. In fact, any increase in the tariff by the Petitioner will lead to a situation where either the consumer will shift to BSNL in case they are interested in fixed phone or will shift to other mobile operators. This also explains the reasons as to why Cellular Operators are also canvassing that FWP should not be allowed to retain the ADC charges.

This is a fraudulent attempt on the part of the BSNL to snatch the market of the Petitioner. The Petitioner will suffer irretrievable injury as the entire consumer base will shift to BSNL and it is not possible for the Petitioner to get back the present consumers and to put the clock back. In case, the POIs are disconnected, the entire business of the Petitioner will come to a standstill. The Petitioner had made investments worth Rs.5000 crores on the clear understanding of DoT and TRAI and other operators that FWPs are fixed phone and the rules and regulations applicable to fixed wireline phones will also be applicable to fixed wireless phones. Any paradigm shift to this approach is not only prejudicial to the interest of the Petitioner but also to public at large. In view of the above, it is in the interest of justice and equity that impugned Circular dated 14/01/2005 and the various Demand Notices issued by BSNL be set aside by this Hon'ble Tribunal.

5. BSNL has refuted the above contentions of the Petitioners.

5.1 In the first part BSNL has refuted the contention of the Petitioners that by the circular dated 14/01/2005 it has sought to reclassify the service of the petitioners and has acted in a unilateral manner contrary to the Interconnection Usage Charge Regulations. In support of this contention it has been pointed that on 04/01/2005 BSNL had submitted complaints to TRAI and DoT stating that the petitioners are providing WLL(M) service under the garb of Fixed Wireless Phones (FWP) and that they were using the fixed numbering plan even for their Walky service and thus have treated the WLL(M) service as fixed service thereby evading the payment of Access Deficit Charges (ADC) relevant to a WLL(M) service which was payable to the BSNL. On 06/01/2005 the DoT issued a show cause notice to the petitioners. TRAI also on the same day issued directions to the petitioners in this regard. It was only after issue of the show cause notice/directions by DoT and TRAI respectively that the respondent issued the circular on 14/01/2005 wherein it was stated that the "Walky" service of the petitioners is a WLL(M) service and would be treated accordingly under the IUC regulations. Since for providing the Walky service

the numbering plan meant for fixed telephones was being used, BSNL asked for details of the Walky service from the Petitioners for computing the Access Deficit Charges amount.

On 04/03/2005 TRAI issued a direction to all service providers to strictly ensure that terminals used for the fixed wireless service should be confined to the premises of the subscriber where the telephone connection is registered. and that any violation would amount to violation of the relevant clauses of the license. DoT also issued separate direction on 23/03/2005 directing that the terminal used for fixed wireless service should be strictly confined to the premises of the subscriber where the telephone connection is registered. It further clarified that wherever such restriction cannot be imposed, it shall be treated as WLL(M) service for all purposes which inter alia include Numbering plan, Interconnection Usage Charges, Interconnection arrangements etc. The petitioners have admitted in their reply dated 23/03/2005 sent to TRAI and DoT that their Walky service cannot be strictly restricted to the premises of the subscribers. According to BSNL both DoT and TRAI consistently and repeatedly informed all service providers including the petitioners that FWP service should not be operated beyond the premises of the subscribers and in case of failure of meeting this condition the payment of IUC/ADC charges would be as applicable for WLL(M) service.

BSNL has pointed out that Access Deficit Charges (ADC) forms one of the three components of Interconnection Usage Charges (Termination charges, Carriage Charges and Access Deficit Charges). ADC was meant to subsidize the fixed service telephone providers for providing telecom service whose costs they were not able to recover particularly in the rural areas. BSNL has been the major recipient of ADC as it has the largest network of fixed service telephones, and in the rural areas in particular, BSNL has been discharging its obligations for spreading of telephony whereas the other fixed line operators have not been able to do so because of various constraints one of which is the inability to recover the cost of such service through the tariff

mechanism. In the amended Interconnection Usage Charge Regulations 2005, Access Deficit Charges for all inter circle calls from Cellular Mobile and WLL(M) to Cellular Mobile to WLL(M) are to be collected and paid to BSNL, as such it was the bounden duty of BSNL to recover all Access Deficit Charges which are due to BSNL and which are necessary for BSNL to discharge its social obligations.

According to BSNL, they have not made any changes in the rates as prescribed under the IUC regulations. What they have sought to do is only to recover the requisite amount of ADC in accordance with the IUC regulations. Therefore, there was no requirement on the part of BSNL to approach any forum for seeking any declaration before issuing the communications dated 14/01/2005 and 12/05/2005. The "reporting requirement" which is alleged to have been breached by BSNL in the instant case relates to the obligation of a service provider to report to TRAI at least 45 days before implementing any new interconnection usage charge under the regulation and any changes thereafter. As such, it was under no obligation to fulfill any "reporting requirements' in this regard.

5.2 The next portion of BSNL's defence is focused on how and why the petitioners' Walky service is to be treated as a WLL(M) service and not FWP-WLL(F) service.

According to BSNL, the amended IUC regulations of 29/10/2003 clearly stipulate varying rates of interconnection usage charges and Access Deficit Charges under three main heads i.e. (i) GSM – Cellular Mobile Phone (ii) WLL(M) Phone and (iii) Fixed Phones. The regulatory regime therefore, clearly and consistently makes a distinction between the Basic Service i.e. Fixed Wireless Services and WLL(M) for the purpose of payment of IUC and ADC. While the Fixed service providers do not have to pay any ADC, the

WLL(M) service providers have been placed under statutory obligation to pay IUC and ADC.

Regulation 2(xxviii) clearly defines as under:

" WLL(M) means limited mobility telephony service using wireless in local loop technology within a Short Distance Charging Area".

The above definition has to be kept in view in the light of the series of advertisements by the petitioners from on or around November 2004.
The Petitioners had publicized that the following features in their "Walky" Service; – "FREEDOM OF MOBILITY AT LANDLINE RATES', GO MOBILE AT LANDLINE RATES", "AVAIL ALL THE BENEFITS OF A MOBILE PHONE INCLUDING SENDING AND RECEIVING SMS ETC". The advertisements further held out that the consumers could now enjoy 'full mobility' at 'landline rates' and that the subscribers could move with their Walky phones from one place to another including from their homes to the streets and from one town to another town. Meaning thereby that while a subscriber of the petitioners "Walky" service effectively owned mobile phones, the petitioners did not bear any liability of paying ADC charges applicable for providing WLL(M) service. Although the Petitioners are stated to have withdrawn their advertisements after getting notices from DoT and TRAI, the withdrawal of advertisements has not resulted in the withdrawal of mobility features from the Walky service of petitioner. The Walky service of the petitioner remains a limited mobility service even after the withdrawal of the advertisements as is quite clear from the admission of M/s TTL to DOT and TRAI in reply to the show cause notices.

TRAI and DoT had clearly clarified in March 2005 that fixed line service has to be confined within the registered premises of the subscriber and any service which cannot be so restricted would not be a fixed service but would be treated as WLL(M) service. The petitioners have submitted to DOT and TRAI that their Walky service cannot be restricted to operate within the

subscribers' premises only and it is very much capable of being used outside the subscriber's premises and within the SDCA

According to BSNL, the Petitioners contention that the WLL(M) mobility is through use of a hand held instrument is entirely misconceived. The Interconnection Usage Charges Regulation make no reference to an instrument but to service providers and ADC charges are applicable for different type of calls which are in turn co-related to the nature of service (Fixed, WLL(M) or Cellular) and not to any kind of instrument.

Thus based on the "Walky" advertisements of the petitioners and the admissions contained in their 'compliance report" submitted to TRAI and DoT in which it is clearly stated that the service cannot be confined within the subscriber's premises the conclusion is unmistakable and inevitable that the service provided by the petitioner is WLL(M) and not FWP.

5.3 BSNL has also refuted the contention of the petitioners in regard to their stand that TRAI was engaged in a consultative process in regard to ADC charges vis-à-vis WLL service and also whether WLL(F) service could be treated as WLL(M) in view of the portability inherent in the use of WLL(F), hence it was premature on the part of the BSNL to have taken the impugned action as they could easily have awaited the completion of this exercise.

According to BSNL the consultation paper issued by TRAI on 17/03/2005 after its direction dated 04/03/2005 (wherein it is clarified that fixed wireless phone is to be confined to the subscriber's premises) essentially deals with the issue whether any ADC should be paid at all to the WLL(F) service. The IUC Regulations of 29/10/2003, the TRAI direction of 04/03/2005 and the IUC amended Regulations of 06/01/2005 continue to remain operative and have not been kept in abeyance by the act of TRAI getting engaged into the said consultation process.

5.4 Accordingly it was stated that BSNL is lawfully entitled to receive the ADC charges treating the Walky service as WLL(M) and its action to recover the said ADC amount is fully in accordance with the IUC Regulations and the Interconnection Agreement between BSNL and the petitioners.

6. In the above background, we now proceed to take up one by one the key legal arguments that have been put across by the learned counsels representing the petitioners and the BSNL.

6.1 Learned Senior Counsels for the Petitioners Shri Soli Sorabjee and Shri C S Vaidyanathan have vehemently argued that the action of BSNL of issuing the circular dated 14/01/2005 was unilateral, illegal and arbitrary. According to them BSNL should have approached either the DoT (as licensor) or the TRAI (as regulator) for giving their findings on whether the "Walky" service being provided by the petitioners could be regarded as WLL(M). In support of this argument, the decision of this Tribunal, in Petition Nos.9 of 2001, (ABTO & Ors Vs BSNL) 12 of 2003, (ABTO & Ors VS BSNL & Anr) 3 of 2002 (COAI Vs BSNL)and Appeal No.5 of 2002, (BSNL Vs TRAI & Ors) decided by a common order dated 27/04/2005, (2005) 5 CLJ 334 (TDSAT), has been cited, namely ....

> *"In our view BSNL could not have taken upon itself to have unilaterally issued the impugned letters of 28/4/2001 and 31.5.2001 to the Basic Operators asking them to raise the access charges and then threaten them to start billing them at the demanded rates. This kind of unilateral action was against the provisions of the licenses as well as the interconnect agreement. It was against the provisions of the May '99 TRAI Regulations……."*

It has been further argued that by altering the Interconnection Usage Charges and ADC payable by treating the Walky service as WLL(M), BSNL has committed breach of the "reporting requirements" stipulated in Regulation 5 of the IUC Regulations which mandate that before effecting any

such change the regulatory authority should be intimated at least 45 days in advance.

We consider it relevant to reproduce below the Circular of 14.1.2005 as well as the consequential Circulars of 19.1.2005 and 09.3.2005.

Circular of 14 January 2005

"Bharat Sanchar Nigam Limited
(A Government of India Enterprises)
611, Statesman House, B-148, Barakhamba Road
Connaught Place, New Delhi-110 001.

No.316-4/2004-Regln. *Dated: 14th January, 2005*

To
M/s Tata Teleservices Ltd
VSNL Bhawan, First Floor
Opp: Savitri Cinema
Greater Kailash Part-I
New Delhi-110 048.

Subject:- Providing of M/s Tata Indicom Service "WALKY"

It has come to the notice of this office that M/s TTL is offering WLL service under the brand name 'WALKY'. M/s TTL have also been advertising through newspapers and brochure for publicity/marketing of the brand 'WALKY'. As per the language of the advertisement and brochures which reads as "The Tata Indicom Walky combines the best features of the mobile phone and the landline. It gives you features like freedom of mobility, Caller Line Identification and the. SMS, Phone book and Missed Call details while retaining the extremely low tariffs of a land line"this service is a limited mobile service. Also as per pamphlet of M/s TTL, the said 'WALKY' is available in both fixed wireless and limited mobility versions. Further M/s TTL vide its letter No.Nil dated 21-12-2004 have informed that you have renamed your FWT services to WALKY and the levels of FWT and WALKY are same.

2. Since IUC applicable for limited mobile services are different from fixed line wireless services, there appears to be an attempt by M/s TTL to evade the IUC charges including ADC payable to BSNL for limited mobile

services by providing limited mobile services in the disguise of fixed services.

3.The BSNL calls upon M/s TTL to immediately pay the entire amount of Interconnect Usage Charges including ADC as per Clause 6.4.9 of the Interconnect Agreement for all its calls of Limited Mobile Service through its WALKY Scheme handed-over to BSNL on the BSNL Trunk Groups meant for fixed line traffic, for the period of last two months i.e. from 14.11.2004 to 13.01.2005. Thus, the difference of the IUC charges including the ADC in this regard should be paid by M/s TTL immediately on receipt of this communication. Also, the ADC paid by BSNL to M/s TTL for the calls originated by limited mobile and cellular/fully mobile subscribers of BSNL and terminated on the numbering levels of WALKY should be refunded to BSNL. Further the tariff information of the inter circle STD calls originated from/received in the numbering levels of WALKY and terminated in/originated from the network of other mobile and fully mobile service providers and the incoming and outgoing ILD calls to/from the numbering levels of WALKY are to be given to the respective BSNL Circle Offices for billing of ADC payable to BSNL for such calls. You are also called upon to immediately stop the operation of above-mentioned WALKY service using numbering levels of fixed services, without paying the IUC charges including ADC which is applicable for Limited Mobile Services, as the same is contrary to the license conditions, IUC Regulations and also to the agreed terms and conditions of the Interconnection Agreement.

4. It is intimated that the details of the amount to be paid by M/s TTL to BSNL in the terms mentioned above, should also be furnished enabling the BSNL to confirm and verify the correctness thereof in terms of the Interconnection Agreement including its clause 6.4.9.

Sd/
(Mahipal Singh)
Jt.DDG (Regulation)

Copy to: All CGMs, BSNL Telecom Circles/Metro Districts/Maintenance Region/T & D Circle for information and necessary action."

Circular of 19th January 2005

"Bharat Sanchar Nigam Limited
(A Government of India Enterprises)
611, Statesman House, B-148, Barakhamba Road
Connaught Place, New Delhi-110 001.

No.316-4/2004-Regln. Dated: 19th January, 2005

To

All Private Access Providers & NLDOs

Subject: Providing of 'WALKY/' limited mobile service by M/s Tata Teleservice Ltd d and 'Unlimited Cordless' limited mobile service by M/s Reliance Infocomm Ltd. On fixed line numbering levels.

This has reference to the above mentioned limited mobile services 'WAL:KY' and 'Unlimited Cordless'services being offered by M/s Tata Teleservices Ltd. And M/s Reliance Infocomm Ltd respectively on fixed line numbering levels, thereby evading the ADC payable to BSNL.

2. In this regard, notices have been given by BSNL to M/s Tata Teleservices and M/s Reliance Infocomm to stop such services on fixed numbering levels and for paying the ADC paybvle to BSNL in this case. A copy of the notices given by BSNL to M/s Tata Teleservices and M/s Reliance Infocomm is enclosed for your information.

3. You are requested to submit the traffic data information for inter circle STD calls made from your network of limited mobile and fully mobile service to and received from the fixed numbering levels of 'WALKY' and 'Unlimited Cordless'services as per existing procedure as prescribed in Annexure III and IV of IUC Circular No.208-20/2003 Regln. Dated 28.1.2004 issued by this office.

Sd/-
(Mahipal Singh)
Jt.DDG (Regulation)

Circular of 9th March 2003

"Bharat Sanchar Nigam Limited
(A Government of India Enterprises)
611, Statesman House, B-148, Barakhamba Road
Connaught Place, New Delhi-110 001.

No.316-4/2004-Regln. *Dated: 9th March, 2005*

To
All the CGMs, BSNL
Telecom Circles/Metro Districts/Maintenance Region/T & D Circle

Subject: Providing of M/s Tata Indicom service 'WALKY' for WLL-M services.

Please refer to this office letter of even number dated 14.01.2005 on the above subject in which it was intimated that M/s Tata Teleservices Ltd (TTL) are offering Limited Mobile WLL-M services under the guise of fixed line wireless services under the brand name 'WALKY'.

2. M/s TTL was directed to immediately pay the entire amount of interconnect Usage Charges including ADC as per Clause 6.4.9 of the Interconnect Agreement for all its calls Limited Mobile Service through its 'WALKY' scheme handed-over to BSNL on the BSNL Trunk Groups meant for fixed line traffic, for the period of last two months, i.e. from 14.11.2004 to 13.01.2005.

3. Also, the ADC paid by BSNL to M/s TTL for the calls originated by limited mobile and cellular/fully mobile subscribers of BSNL and terminated on the numbering levels of 'WALKY' service has to be refunded to BSNL by M/s TTL.

4. Further, the traffic information of the inter circle STD calls (not routed through BSNL) originated from/.received in the numbering levels of 'WALKY' service and terminated in/originated from the network of other limited mobile and fully mobile service providers and the incoming and outgoing ILD calls to/from the numbering levels of 'WALKY' service are to be given to the respective BSNL Circle Offices for billing of ADC payable to BSNL for such calls.

5. In this regard, no report has been received from you. You are therefore requested to intimate the details in this matter at the earliest. It

may also be ensured that the traffic originating from numbering levels of 'WALKY' between M/s TTL and BSNL may be accepted only on the trunk group meant for WLL(M) calls.

Sd/-
(Mahipal Singh)
Jy. DDG (Regulation-1)"

The communication of 14/01/2005 to M/s TTL clearly brings out the basis on which BSNL has treated the Fixed line service of M/s TTL as a limited mobile service and BSNL has demanded payment of the relevant interconnect usage charges and the ADC that was payable to BSNL as per the prevalent IUC Regulations. Clause 6.4.9 of the Interconnect Agreement has been quoted by BSNL in the above connection, which is quoted below for convenience:

> *"If BSNL detects that WLL mobile subscribers originated calls are being handed over or have been made over at any port not meant for carrying such calls, BSNL shall be free to charge the BSOs @ Rs.1.14 per metered unit for all the calls recorded on these ports from the date of provisioning of that POI* or for the preceding two months whichever is less apart from taking other legal actions including disconnection of POIs or temporary suspension of the interconnection agreement".*
>
> *(*POI means Point of Interconnection)*

While the rates mentioned in the above clause of the interconnect agreement are not the current rates as prescribed by TRAI, the interconnect agreement does entitle BSNL to take action if WLL(M) calls are not routed to the ports at the Points of Interconnection, meant for such calls.

During the arguments it has not been contested by the petitioners that the advertisements referred to in the Circular of 14.1.2005 were not issued nor is it the case of the petitioners, that they did not advertise the features in relation to their brand "Walky", which have been mentioned in

the Circular letter of BSNL. It is also not the contention of the petitioners that the IUC inclusive of ADC is not different for WLL(M) as compared to the Fixed Line Service. The question therefore to be decided by us is whether as on 14.1.2005 BSNL was entitled to issue the said circular letter on the basis of the information that was available to BSNL as on that date.

We find in this regard that the petitioners have not disputed that the main beneficiary of ADC is BSNL and that if the Walky service is to be regarded as WLL(M), the relevant ADC charges would be payable to BSNL. It is, therefore, clear that BSNL could not have remained silent in a situation where a fixed line service was being widely publicised as having features of mobility and which prima facie therefore could not be regarded as a "Fixed Service" but had all the features of WLL(M) service. Also the interconnect agreement between BSNL and M/s TTL entitles BSNL to take action including raise a demand for payment of requisite IUC charges for calls originated from a WLL(M) phone.

As regards the decision of this Tribunal dated 27.4.2005 that has been cited on behalf of the petitioners, (2005) 5 CLJ, 334 (TDSAT) we find that it cannot be applied to the present case as the facts and circumstances under which the above cited observations of this Tribunal were made were entirely different and have no relevance to the present case. The said observations of the Tribunal were made in the context of a situation where BSNL took upon itself to issue letters to the basic operators demanding higher access charges which were not in accordance with the charges notified in the Interconnection Usage Charges Regulations of TRAI and which had been adopted and implemented by DoT as the predecessor of BSNL by its circular of 1.10.99 addressed to all its field agencies. Apart from the letters of 28.4.2001 and 13.1.2001, BSNL by its letter dated 2.11.2001 wrote to the basic operators informing them that because of the judgment of the Delhi High Court in MTNL & Ors Vs TRAI & Anr, 84

(2000) DLT 70 (DB) of 17th January 2000, the access charge determined by the May '99 Regulations would cease to apply, BSNL therefore rescinded the DOT letter dated 1.10.1999 in regard to access charges and declared that pre-May '99 rates would therefore, become applicable with retrospective effect. It is, therefore, clear that in this matter there was a clear attempt on the part of BSNL to change the rates of access charges that had been duly determined on the basis of the TRAI Regulations by DoT, the predecessor of BSNL, and these rates had continued to operate for a considerable length of time extending to more than 20 months even after the said Delhi High Court judgment.

The Tribunal held the action of BSNL as unilateral and contrary to the Regulations..

In the matter presently before us the situation is quite different. There is no attempt on the part of BSNL to change the Interconnection Usage Charges. The provocation to treat the fixed line "Walky" as WLL(M) had indeed being given by the petitioners themselves and whatever has happened subsequently is in consequence to the extensive publicity by which this service has been promoted, through the media and other marketing efforts, as having all the best features of mobile phones including the freedom of mobility. As mentioned already BSNL could not have remained a silent spectator and its interconnect agreement with M/s TTL entitled it to raise the demand as contained in the letter of 14/01/2005 and the subsequent letter of 19/01/2005 and 9/03/2005.

6.2 The point in regard to the reporting requirements in our view does not carry much weight as the IUC Regulations have stipulated the reporting requirements as follows:-

> *"(xix) "Reporting Requirement" means the obligation of a service provider to report to the Authority at least 45 working days before implementing any new Interconnection Usage Charge for telecommunication services under 'this Regulation' and any changes thereafter".*

Since no new interconnection charges has been introduced nor any change made in the Interconnecting Usage Charge as notified by TRAI, in our view there has been no breach of the said reporting requirements.

6.3 It has been argued before us in considerable detail that the basic license of 1997 mandated the licensees to deploy wireless as a preferred technology in the last mile (last mile in simple words means the link between a customer's premises and the Exchange). It was also explained to us how the equipment at the subscribers end was essentially very large, bulky and heavy in the case of fixed wireless terminal, with separate accessories like antenna, battery and what is called a network interface unit, apart from a separate telephone instrument. Technological developments have resulted in the integration of the separate parts into one single integrated wireless phone, also called the desk top phone. This has further evolved into a handset which is the one being used in the WLL(M) service being provided by the service providers. It is the contention of the petitioners that the WLL(M) service is distinguishable from the fixed line service in as much as WLL(M) is based on use of a mobile hand set. A distinction is sought to be drawn by the petitioners between the "mobility" feature of a hand set like that generally used in a WLL(M) service and a Mobile Cellular service and the "portability" feature associated with a fixed wireless phone like the desk top Walky phone of the petitioners. The learned counsel for the petitioners drew our attention to the submissions made in the case popularly known as the "WLL Case" [Cellular Operators Association of India Vs Union of India & Ors) (2003) 3 CLJ 337 (TDSAT)] and it was sought to be brought about that the limited mobile service based on hand set was to be regarded as WLL(M) and that parties in that litigation were reconciled to accepting the portability associated with a fixed wireless phone that did not make use of a hand set. It is the case of the petitioners that the fixed wireless telephones based on use of a

portable contraption at the subscribers end as distinct from a hand set, has been in existence since long (i.e. around 1997) and this portability is inherent in the use of such an equipment and this could not be equated with the mobility of a WLL(M)_or mobile phone.

The learned Solicitor General Shri Goolam E. Vahanvati appearing for BSNL on the other hand argued in considerable detail that the regulatory regime clearly and consistently has made a distinction between the basic services and WLL(M) service for the purpose of payment of Interconnection Usage Charges and ADC. The fixed wireless service is clearly a part of basic service. The WLL(M) service has been clearly defined under Regulation 2 (xxviii) which reads as under:-

> *"WLL(M) means limited mobility telephony service using wireless in local loop technology within a Short Distance Charging Area".*

The regulatory regime does not make any reference to use of any particular subscriber end equipment and the Interconnection Usage Charges make reference to "service" only. Since the Walky service of the petitioners is capable of operating outside the subscribers premises and within the SDCA, it is squarely covered by the definition of WLL(M).

On behalf of the petitioners it was stated that soon after they got notices from the DoT and TRAI they have withdrawn the advertisements proclaiming their service as having all advantages of a mobile phone. However, according to BSNL the withdrawal of advertisements has not resulted in any change in the features of the Walky service. And it does not in any way alter the ground situation that the service offered by the petitioners is a limited mobility service and not a fixed line service.

In this connection we take note of the show cause notice of 6.1.2005 and 15.1.2005 issued by DoT and TRAI respectively to the petitioners . The show cause of DoT dated 6.1.2005 stated the following:

> *"that a complaint had been received from COAI that TTSL is providing fixed wireless terminals as mobile terminals and such terminals are being*

openly advertised and promoted as "WALKY – Enjoy freedom of mobility as landline rates; and

that TTSL is supposed to provide services within the scope of its license agreement and it is expected that by way of advertisement or promotion of its services, the subscriber should not be misled.

Therefore, DoT asked TTSL to explain within 15 days of receipt of the said letter, as to why provision of such service is not in violation of various clauses of license agreement and not limited to clause 2 of the license agreement."

The show cause notice of TRAI dated 15.01.2005 inter alia stated the following:

"that it had come to the notice of TRAI through TTSL's advertisement in print/electronic media, as well as through complaints from various operators and an operator Association that TTSL is providing "WALKY" which is available in Fixed Wireless and Limited Mobility version. That the same is being advertised as "WALKY- Enjoy freedom of Mobility at landline rates"; that TTSL appeared to be providing mobile service and circumventing the ADC charges notified in the interconnection Usage Charges Regulation, 2003 (4 of 2003)dated 29th October, 2003. And therefore, TRAI called upon TTSL to furnish the per minute ADC charges collected/retained for all types of calls through the said services:

that the Numbering Plan Administrator has fixed different numbering schemes for fixed, WLL(M) and Mobile services. That TTSL was supposed to follow the Numbering Plan scheme as per clause 23.4 of the UAS Licence. An therefore, TRAI called upon TTSL to explain as how the above referred service is consistent with the numbering allocation done by the Number Plan Administrator and is consistent with the licence.

TRAI also called upon TTSL to explain as to why if the above service is providing mobility it should be categorized as Fixed Service and not WLL (with limited mobility) or a mobile service.

That in view of the above, TRAI required TTSL to explain as to why necessary action under the TRAI Act not be taken against TTSL for the above violation".

From the above it therefore appears that prima facie the petitioners could not provide the features and in particular "portability" of the kind provided in the Walky service without getting into the category of WLL(M) service. It may be

true that the WLL(M) service as is being provided in the normal course would be having features of a hand set which may be much more technologically evolved than the desk top portable set being provided under the brand Walky by the petitioners. Be that as it may, the position nevertheless remains that the desk top Walky phone of the petitioners was admittedly capable of operating outside the subscribers premises and it could therefore not be regarded as a fixed phone operating within the subscribers premises only.

It is noteworthy that on behalf of the petitioners it has also been clearly stated that the directions dated 4.3.2005 of TRAI and the general clarification dated 23.3.2005 issued by DoT (which we would deal with in the later part of this order) enjoining the fixed wireless telephones to be confined strictly within the subscribers premises were incapable of being technologically implemented. Further it was pointed out by the petitioners to TRAI in response to the said communication that in their 'Walky' fixed line service it was technologically possible to limit mobility only to within the range of one or two base stations.

7. Shri Soli Sorabjee, Learned Senior Counsel for the petitioners has cited some case laws in support of the arguments that the mere issue of an advertisement would not change the nature or the character of the service or product. In this view of the matter since BSNL's impugned letter of 14.1.2005 was based on the advertisements issued by the petitioners which were subsequently modified, the basis for the said letter having gone the action of BSNL could not be held to be justified.

In support of his arguments Shri Soli Sorabjee cited the decision of the Supreme Court in Collector of Central Excise, Bombay-III Versus Chowgule & Company (Hind) Pvt Ltd (Case No.1997(91)E.L.T.518 (S.C)). In this case the respondent company was manufacturing certain resins which were in the category "Alkyd Resins" which had been exempted from central excise duty. However the respondent company advertised its product in the market as "Maleic Resins", an

item which had been subjected to excise duty. Even though the report of chemical analysts had clearly indicated that the product was not Maleic Resins, since the respondent company had advertised its sale in the market as Maleic Resins, the Department of Revenue wanted to impose excise duty on the same. The Central Excise Tribunal did not accept the contention of the Department of Revenue. In appeal the Full Bench of the Supreme Court agreed with the stand point of the Tribunal in the following words.

> "*…….. We are, therefore. of the opinion that except relying on the advertisement issued by the respondent, there was no material on record to support the contention canvassed before the Tribunal and before us by the Revenue. We, therefore, do not see any merit in this appeal and dismiss the same with no order as to costs".*

Another case cited was Leukoplast (India) Private Ltd and Others Versus Union of India and Others (Case No.1985 (20)E.L.T.(Bom.)), in which the Hon'ble Supreme Court held in the context of the attempt by the Department Revenue to levy excise duty on "Handyplast" (a surgical dressing used to cover minor wounds and injuries) because it had been advertised by the manufacturer as a medicine, whereas in reality it was not a medicine.

> "*……….for the purpose of classification for levy, the advertisements are of no value or help. Advertisements are published by the manufacturers of a product in order to attract consumers and have nothing to do with the classification of the same product for levying duty.*

and further,

> *……….Advertisements are made to attract the consumers and had nothing to do with the classification of product for the purposes of levying duty. Thus, the fact that the petitioners had stated in their advertisements that Leukoplast helps to heal a wound is of no importance and does not advance in any manner the case of the respondent"……………*

In the cases cited above, the question had definitely arisen whether the product being advertised was in reality something else. Since the "Resin" and the "Handyplast" were found in reality to be different from what had been advertised,

the Court held that mere advertisement of these products would not bring them within the ambit of the excise net.

In the matter being considered before us in the instant petition, we are however, left in no manner of doubt that the "Walky" service of the petitioners could not be regarded as anything else than WLL(M). M/s TTL have admitted on more than one occasion that their Walky service is capable of operating outside the subscribers premises and can only be restricted to a "Restriction Zone" within the SDCA (Short Distance Charging Area – the area within which a WLL(M) is supposed to operate). In fact, in the compliance report filed by M/s TTL dated 31/03/2005 addressed to TRAI, it has been made abundantly clear that the "Walky" service is capable of being used outside the subscribers premises and within the SDCA. The following extracts of this report are relevant:

> *…….. "2. The Regulator would surely be aware of the inherent "soft handover" nature of CDMA technology due to which CDMA terminals (FW or mobile) utilize signals from various BTSs thereby leading to better utilization of radio network and proving to be extremely spectrally efficient. Therefore, the implementation of any restriction would require considerable changes to the network which need time, effort and considerable resources to complete something which DoT/TRAI requires to provide. Nevertheless under constraints of time, some actions have been initiated which are detailed further in this letter"……*

We therefore find that the cases cited above do not have relevance to the matter to be decided by us because while deciding the nature of service rendered by the petitioners, we are not basing our conclusions solely on the advertisements issued by the petitioners, on the contrary we have taken into consideration the features provided in the instrument provided by the petitioners, in particular, its capability of being operated outside the subscriber's premises, admission of the petitioner as to its mobility and the incapacity of the petitioners as service providers to restrict the mobility of the "Walky" instrument to within the confines of the subscriber's premises, among other factors. We have taken note of the advertisements by the petitioners in the above factual background. Hence we do

not find ourselves in agreement with the arguments in this regard on behalf of the petitioners. Mere withdrawal of the advertisements would not provide the justification for the petitioners to continue a service which admittedly has features of limited mobility outside the subscribers premises.

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8. According to the petitioners it had not yet been conclusively decided as to what should be the portability of a fixed wireless phone. Also TRAI had not yet re-categorized such phones as WLL(M) and has seemingly accepted the explanation of petitioners in answer to the show cause notice that it was not technologically possible to confine the portability within the premises of the subscribers. Further, it was stated that this is a matter pending consideration of TRAI based on the consultation paper floated by TRAI on 17.3.2005. BSNL's action has therefore been described as hasty and precipitate, as BSNL should have awaited the final outcome of the above exercise initiated by TRAI.

TRAI has indeed floated a Consultation Paper dated 17/3/2005 and as indicated in the Preface of the said document, this Consultation paper addresses a wide range of issues, namely,

"The Authority has now come out with a Consultation Paper which addresses a wide range of issues, including:

(a) Justification of ADC on Fixed Wireless Lines and admissibility of ADC for non-BSNL Fixed Line Operators.
(b) ADC as Percentage of Revenue, and its various variants including mixed models, higher ADC on NLD and ILD calls etc.
(c) Interconnection Usage Charges (Carriage and Termination issues) including those for incoming international calls, and whether to have differential rates for carriage and termination.
(d) Implications of increasing disbursement of USO Fund on the quantum of ADC payable.

In parallel, the Authority would examine the present ADC charges within 3 to 6 months of the implementation date (1st February 2005), based on latest traffic inputs. This data has already been called from the Operators".

The background of the Consultation is briefly indicated in Chapter-I thereof as follows:

"1.1 In the fast changing technological era, intense competition, dynamic changes and new issues as a result of various developments are thrown open on regulatory and licensing front. The issues need to be resolved without disturbing the growth in the telecom sector while adhering to licensing requirements. A number of such issues were discussed in the 6th January 2005 IUC regulation. In the background of these developments including availability of more minutes for the Carriage segment as a result of rapid increase in the subscriber base especially for GSM and CDMA Mobile services and the likely reduction in lease line charges, there is a need for reviewing the cost-based Interconnection Usage Charges for Carriage, Transit, Termination and even on admissibility and type of Access Services covered under Access Deficit Charges Regime".

One of the points considered in the Consultation paper relates to whether ADC should be admissible for Wireless Access. In this regard para 2.26 of the Consultation Paper states as follows:

"2.26 For ADC purpose, present calls to/from WLL(F) are being treated similar to calls to/from fixed lines. TRAI received complaint from a certain Operator Association which stated that "Fixed Wireless services being provided by the FSPs/UASL's are classified as fixed services and thus entitled to ADC. However, these services are for all intents and purposes tantamount to full cellular services and can be offered seamlessly throughout the service area. This creates a non-level playing field and competitively disadvantages the cellular operator vis-à-vis the fixed wireless service provider". The Authority has very recently asked all Service Providers that FWTs should provide services to the subscriber at the fixed address only, the intention being that these phones should not be in a position to offer mobility through other Base Stations located in other parts of the city. Service needs to be locked to a particular RF Sector of a base station, otherwise issues of ADC and comparison with Limited or full mobility takes place".

It would be useful to take notes of the rationale for providing ADC funding to fixed lines in the words of TRAI, contained in para 2.28 of the said Consultation Paper:

"The first criteria is linked to the fact that ADC funds have been provided to fixed line service providers to cover the shortfall in revenues for access (i.e. the deficit), and in a situation of incomplete tariff re-balancing, sustain

the service even with intense competition in the long distance market. The Authority recalled in this context that either due to the Regulator or the Government, an upper limit was imposed on the fixed line rental charged by BSNL, and the other fixed line service providers were also constrained since BSNL has been the market leader in this regard. Consequently an access deficit arises because the revenues from rental charged are much below the cost based rental, with the latter being calculated based on the capital cost for the local call portion of the network (please see the Regulations of 24th January and 29th October 2003 for more detail). A major portion i.e. about three fifths of the cost base for estimating the cost based rental is accounted for by the capital expenditure in the last mile portion of the network. Thus, when fixed line service providers give last mile connections through radio, there is a major decrease in the capital costs for the last mile, and hence in the overall costs used to calculate the cost based rental".

Paras 2.30 and 2.31 bring out the position that fixed line services based on use of wireless system involve lower costs than wire line based systems, hence there is much lower access deficit.

The circumstances under which ADC on WLL(F) has been allowed have been explained thus in paras 2.32 and 2.33:

"2.32 In the context of Admissibility of ADC on WLL(F), relevant paragraph from the explanatory memorandum of 6th January 2005 Regulation is reproduced below:

The Authority did consider whether the other fixed line operators should not be provided any ADC at all, but reached the conclusion that till some method is implemented for distinguishing calls to/from WLL(F) from other fixed lines, it is important that for maintaining the sustainability of the ADC regime the "other fixed line operators" should continue to retain the relevant ADC charge for their outgoing calls. The Authority will soon conduct a review of the regime and then consider any further charges that may be required in the regime.

2.33 For distinguishing calls to/from WLL(F) from other fixed lines TRAI may request Numbering Plan Administrator to allot different levels for WLL(F) as they have already done in case of WLL(M)".

The Consultation Paper has also posed the question on need to determine criteria with a regard to range of portability/mobility of WLL(F)'s subscriber terminal in the following words:

"2.6 Whether ADC should be given for WLL(F) lines? Should any distinction be made between Rural and Urban WLL(F) lines?

2.7 If ADC is to be given for WLL(F) lines, what criteria should be determined with regard to the range of portability/mobility of WLL(F)'s subscriber terminal and the specifications of the subscriber terminal so that clear distinction can be made between WLL(F) and WLL(M) Mobile services?"

We need to view the above Consultation Paper in the background of the clear determination by TRAI contained in its letter of 4/3/2005 whereby access providers have been strictly enjoined to ensure that the terminal used for fixed wireless service should be strictly confined to the premises of the subscriber and no misleading advertisements are issued in this regard. Since this is an important communication of TRAI we would reproduce the same below:

"TELECOM REGULATORY AUTHORITY OF INDIA
A-2/14, SAFDARJUNG ENCLAVE, NEW DELHI-110 029

File No.406-2/2004-FN *Dated 4th March 2005*

To

All the Access Providers

Subject: Issues relating to WLL(F) services

The Authority has noted that fixed wireless services were being provided through fixed wireless terminals which the location of the network access point was fixed and end user terminal was connected to it. Recently it has come to the notice of the Authority that new terminals being deployed by access providers do not have any fixed network Access Point physically located at the address of the subscriber. In this regard certain complaints including those of misleading advertisements have also been received by the Authority and subsequently show cause notices were issued to the concerned operators. The responses given by the service providers were not found to be in order.

As the issue of mobility has implication with respect to applicability of ADC, the Authority direct you to strictly ensure that the terminal used for fixed wireless services should be strictly confined to the premises of the subscriber. All Access Providers should also ensure that there are no misleading advertisements in the electronic and print media. It should also be further noted that it is licensee's responsibility to ensure that the subscriber terminal is operated in

accordance with the terms of the license for fixed lines. Any violation will attract action against you under the relevant clauses of the license Agreement.

This issues with the approval of the Authority.

Sd/-
(R.K. Bhatnagar)
Advisor (FN)".

In fact it is also important to take note hereitself of the DoT communication dated 23/3/2005 on this subject matter which also makes it clear that the terminal used for fixed wireless services should be strictly confined to the premises of the subscriber where the telephone connection is registered. It has been further stated that:

"wherever such restriction cannot be imposed it shall be treated as WLL(M) feature for all purposes which inter alia includes Numbering plan, Interconnection Usage Charges, Interconnection arrangements etc.".

In view of the importance of this document, we would reprodu*ce it below:*

"No.10-10/03-BS-II/Vol.VI
Government of India
Department of Telecommunication
Licensing Cell (Basic Services Group)

1406, Sanchar Bhawan
20, Ashoka Road
New Delhi-110 001.
23rd March, 2005

To
All the UASL Licensees
BSNL and MTNL

Sub: ***Clarification regarding Fixed Wireless Terminal in UAS/Basic Service License.***

With reference to the subject mentioned above, the undersigned is directed to clarify that the terminal used for fixed wireless services should be strictly confined to the premises of the subscriber where the telephone

connection is registered. It should also be noted that it is licensee's responsibility to ensure that the subscriber terminal is operated in accordance with the terms of the License for fixed lines including this clarification.
This is to further reiterate that separate level with allocated SDCA based Link Numbering is to be used for Wireline & Fixed Wireless Services.

Wherever such restriction cannot be imposed, it shall be treated as WLL(M) feature for all purposes which inter-alia includes Numbering plan, Interconnection Usage Charges, Interconnection arrangements etc.

Sd/-
(Subhash Chander)
ADG (BS-II)
011-23036536".

In our view the circular letter of TRAI dated 4-3-2005 and the clarificatory letter of DoT dated 23-3-2005 are clear determinations on the existing regulatory / licensing position in regard to portability / mobility of WLL(F) phone. The Consultation Paper of TRAI has taken note of the circular mentioned above issued by TRAI restricting the portability/mobility of a WLL(F) subscriber and equipment within the premises of the subscriber. It is also clear that this has not been kept in abeyance by TRAI pending the deliberations on the consultation paper. We are therefore of the view that the consultation process initiated by TRAI is part of a larger exercise relating to review of ADC and whatever regime is put in place in pursuance thereof would have prospective effect.

On going through the language of the above two communications of TRAI and DOT we have no hesitation in concluding that these are intended to bring out clearly the existing licensing/regulatory position in regard to the WLL(F) service and cannot be regarded as laying down any new regulations/licensing conditions.

9. An intervention application was filed through M.A.No.143 of 2005 by the Cellular Operators Association of India and 5 others stating that the applicants are very much affected by the petitioners passing off their mobile service as fixed service. Further, it was stated that the applicants have been continuously agitating

the issues involved in Petition No.45 of 2005 before various fora and therefore, are a necessary and appropriate party in the present proceedings. Subsequently, through M.A No.196 of 2005, an application was submitted by the applicants in M.A.No.143 of 2005, seeking withdrawal of two applicants, namely M/s Aircel Limited and M/s Aircel Cellular Limited from M.A.No.143 of 2005, which was allowed.

The intervention application was opposed by the petitioners. In their reply the petitioners stated that the matter between the petitioners and BSNL raised in petition No.45 of 2005 arises out of the interconnection agreement between the parties concerned and the incorrect interpretation of BSNL of a provision in the interconnection regulations. This was therefore a contractual issue and was therefore of no concern to the applicants seeking intervention in the petition. It was further stated that no prejudice would be caused to the applicants if they were not allowed to intervene in the present proceedings.

In the interest of justice, however, we came to the view that no harm would be caused by giving an opportunity of being heard to the applicants as requested in M.A.No.143 of 2005. Accordingly Dr A.M. Singhvi, senior counsel was heard in this matter on behalf of the applicants. M.A. 143/2005 was disposed of accordingly.

It was pointed out by Dr Singhvi that under the IUC regulations for an intra circle call made by a cellular or WLL(M) subscriber to a fixed phone, an ADC of 30 paise was payable to the fixed service operators till 31/1/2005 and in the period thereafter under the IUC regulations, the same is now payable to BSNL. Tatas “Walky” was supposed to be fixed. As such, an ADC of 30 paise per minute becomes payable whenever a call is made by a cellular subscriber to its network. In terms of a direction issued by TRAI and the clarifications issued by DoT fixed wireless means that the fixed instrument can be moved about only within the customers premises. If the service being provided is treated as WLL(M), then it

would not be entitled to receive any ADC from the cellular operators. Also, in addition, the petitioners would have to pay ADC of 30 paise to BSNL on each call made from its WLL(M) network to any fixed line network. According to the learned counsel; the petitioners are providing WLL(M) service but pretend that the same is fixed wireless service. In this manner a double fraud is being committed as follows:

- As Fixed Wireless the Petitioner has collected 30 paise ADC from the Cellular Operators till 31/01/2005
- As Fixed Wireless the Petitioner is forcing the Cellular Operators to still continue paying BSNL the same 30 paise as ADC after 31/01/2005.
- Despite being WL:L(M), by pretending to be Fixed Wireless the Petitioner does not pay BSNL anything in form of ADC.

10 During the course of the proceedings, a request for hearing was also made on behalf of the Department of Telecommunications (DoT). Accordingly Shri Gopal Jain, learned counsel was given an opportunity to make his submissions on behalf of DoT. He stated that the petitioners have changed the character of their fixed line service sometime in November 2004 and this "new" service was not a fixed service but a "limited mobile service". The DoT has received several complaints on the basis on which a show cause notice was issued on 6/1/2005 to the petitioners which was replied to on 21/1/2005 by the petitioners who admitted that fixed wireless phone being provided by them combined the advantages of both land line and mobile phone and the petitioners had identified a new area of growth in which there was an untapped and latent demand within homes and offices. DoT did not find the reply satisfactory and accordingly a clarification was issued on 23.3.2005 which stated that the terminals used for fixed service should be strictly confined to the premises of the subscriber and it was the responsibility of the licensee to ensure that subscriber terminal was operated in accordance with the terms of the license for fixed lines. It was further clarified that if such restriction could not be imposed, it would be treated as WLL(M) service.

According to the learned counsel for DoT, it was for the petitioners to ensure that they put in place technical arrangements and install appropriate software to restrict their service as a "fixed service".

11. During the course of hearing it was pointed out to us by the learned counsels for the petitioners that BSNL had not taken any action against similarly situated fixed line operators who were making use of WLL(F) technology. In particular attention was drawn to the 'Garuda' service of MTNL which had been advertised as having mobility all over Mumbai with the caption "Jahan Aap Wahan Garuda FW" and introduced into the market as a 'Fixed Wireless Terminal'. It was stated that there were other fixed service providers who were providing almost similar services but BSNL had not taken any action. In fact it was also pointed out that BSNL itself was providing limited mobile service making use of Fixed Wireless phones.

The learned counsel for BSNL, Shri Maninder Singh categorically gave the answer on behalf of BSNL that action against others had been initiated and that BSNL had taken the requisite corrective action in regard to its own fixed line services making use of WLL(F). We requested the counsel to put this down in an affidavit which was duly submitted on behalf of BSNL on 29/7/2005.

The following portions of the said affidavit are extracted below for convenience:

> *"That in compliance with the observations made by this Tribunal, the respondent – BSNL seeks leave of this Hon'ble Tribunal to annex the similar notice dated 14.1.2005 and the demand notice dated 12.5.2005 for the Chennai Circle: copies whereof are annexed herewith and marked as Annexure R-18 and Annexure R-19 respectively. Annexure R-19 show that BSNL Chennai Telecom has raised an invoice of Rs.27,52,517/- on RIL for the period 14 November 2004 to 13 January 2005. It was also stated in Exhibit R-19 that RIL's bank guarantee to BSNL Chennai Telecom was to be encashed. However, action could not be taken in the matter because the matter was sub-judice.*

That with reference to the issue raised with regard to Garuda service of the MTNL, it has already been submitted before this Hon'ble Tribunal that Garuda service of MTNL is also treated as WLL(M) service. The BSNL confirms that it is taking steps to immediately raise bills in relation to the user of Garuda service by the MTNL subscribers treating it to be a WLL(M) service and the bills are in accordance with the IUC charges including the ADC component in accordance with the TRAI Regulations".

In these circumstances we do not see any merit in the argument that M/s TTL have been singled out for any discriminatory treatment by BSNL.

12. In view of the above we do not find any merit in the contentions of M/s TTL in this petition and disallow the same with no orders as to costs.

…………………J
(N.Santosh Hegde)
Chairperson

………………
(Vinod Vaish)
Member

…………….
(D.P.Sehgal)
Member