

TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL
NEW DELHI

DATED 22nd December, 2006

APPEAL NO. 2 of 2006

(With M.A. No.58 of 2006)

1. Cellular Operators Association of India,
14, Bhai Veer Singh Marg,
New Delhi -110 001
2. Aircel Limited
No.327, Anna Salai,
Teynampet, Chennai – 600 006
3. BPL Mobile Communications Ltd. (BMCL)
127, Manmala Tank Road,
Taikalwadi, Mahim (West), Mumbai-400 016
4. Bharti Cellular Ltd.,
H-5/12, Qutab Ambience,
Mehrauli Road, New Delhi-110 030
5. Idea Cellular Ltd.
Suman Towers,
Plot No.18, Sector 11,
Gandhinagar-382 011
6. Hutchison Essar South Limited
C-48 Okhla Industrial Area,
Phase II, New Delhi 110 020
7. Aircel Digilink India Limited (CMTS)
C-48 Okhla Industrial Area,
Phase II, New Delhi 110 020
8. Hutchison Essar Limited CMTS
Peninsula Corporate Park,
Ganpatrao Kadam Marg, Lower Parel
Mumbai 400 013
9. Hutchison Telecom East Limited CMTS
Constantia Office Complex,
11 Dr. U N Brahmachari Street
Kolkata 700 017
10. Reliance Telecom Ltd.
Main Admin. Building,
Block No.GF-1, Village Meghpar/Padana,
Taluka Lalpur, Dist. Jamnagar,
Gujarat-361 280.

...Appellants

Vs.

1. Telecom Regulatory Authority of India,
A-2/14, Safdarjung Enclave,
New Delhi – 110 029.
2. Bharat Sanchar Nigam Limited,
611, Statesman House,
B-148, Barakhamba Road,
New Delhi – 110 001
3. Mahanagar Telephone Nigam Ltd.,
Jeevan Bharti Tower-1,
12th Floor, 124, Connaught Place,
New Delhi – 110 001

...Respondents

BEFORE:

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

For Appellants	:	Mr. Navin Chawla with Mr. Ratnesh Kumar Singh, Advocates
For Respondent-TRAI	:	Mr. Meet Malhotra with Mr. Raghvinder Singh, Advocates
For Respondent-BSNL	:	Mr. Maninder Singh with Mr. Yoginder Handoo and Mr. Tejveer Singh, Advocates
For Respondent-MTNL	:	Mr. Arun Kathpalia with Mr. Vivek Malik, Advocate

ORDER

1. The Appellant No.1 is a society registered under Societies Registration Act, 1908 and the other appellants are private GSM cellular operators, who are members of appellant No.1 and have been issued licences by the Central Government, Department of Telecommunication (DoT) under Section 4 of Indian Telegraph Act, 1885 to establish, maintain and operate cellular mobile telephone services/unified access services in their respective service areas. The Respondent No. 1 is regulatory authority established under section 3 of the TRAI Act, 1997 as amended by the Act, 2000.

2. This appeal under Section 14 read with Section 14A of the TRAI Act is filed by the appellants challenging the impugned direction dated 27.02.2006 issued by Respondent No. 1 holding that the differential tariffs levied by private GSM operators operating in the four States of Maharashtra, West Bengal, Tamil Nadu and Uttar Pradesh for calls

terminating in the network of BSNL/MTNL in another service area within the same State, is discriminatory and inconsistent with the amended licence conditions notified by the DoT on 20.05.2005. When the case was first listed on 20th March 2006 we observed that the appeal pertains to the differential tariff of calls from private operator to another private operator vis-à-vis calls made from private operator to BSNL network. We, therefore, directed that BSNL be impleaded as another respondent. Subsequently, on 22nd March 2006 we directed that MTNL also to be impleaded as respondent on the same ground as BSNL.

3. For grant of licences, India was divided into four metro service areas of Delhi, Mumbai, Kolkata and Chennai and various telecom circles which were roughly contiguous to the states of India. In the first phase, licences were granted for the four metro service areas in 1994 and thereafter in the Circles/States in 1995. These licences were area specific and defined the geographical limits within which the licensee may operate and offer the services.

4. In the above manner, Mumbai, Chennai, Kolkata and Delhi became separate metro service areas for which separate licences were issued by the DoT. Separate and distinct licences were issued for the States of Maharashtra, Tamil Nadu and West Bengal excluding the three metropolitan cities of Mumbai, Chennai and Kolkata respectively. As far as State of Uttar Pradesh is concerned, the same was divided into two Telecom circles, i.e., U.P. (East) and U.P. (West) with separate licences for U.P. (East) and U.P. (West).

5. The Respondent No.1 has laid down Inter Connect Usage Charges (IUC) to include termination charges, carriage charges and access deficit charge for use of network elements of other operators. These charges for inter-circle calls are different from those for intra-circle calls. On 20th May, 2005 the Government of India notified that inter-service area connectivity between access providers within Mumbai Metro and Maharashtra Telecom Circle, Chennai Metro and Tamil Nadu Telecom Circle, Kolkata Metro and West Bengal Telecom Circle and U.P. (East) and U.P. (West) Telecom Circle service areas respectively, is permitted subject to the condition that the access provider will operate within the existing licensed service area and shall not be permitted to create infrastructure outside their licensed service area for the purpose of inter-service area connectivity. It was further provided that the access provider may take leased lines for such connectivity. In paragraph 4 of the said notification, it was stated that with the above arrangement, calls within a state in the above mentioned four states including the respective metros would be treated as intra-service area calls for the purposes of routing as well as ADC.

6. This appeal pertains to these four service areas where the metros were merged with the state circles and the calls from metros to the remaining areas of the respective states and in case of U.P. (East) and U.P. (West) circles from one to the other, were to be treated as intra-circle calls. The appellants were charging one tariff for calls made from an appellant's network to another appellant's network, whereas they were charging higher tariff for calls made from appellant's network from the metros to the BSNL and MTNL networks in the remaining areas of the state. For ease of understanding, it will be better to explain the issue with the following example :-

A subscriber on a private operators' network calling from Mumbai to another private operators' subscriber at Nasik was being charged at less rate as compared to a call made by the same subscriber at Mumbai to BSNL subscriber at Nasik.

7. The Respondent No.1 vide letter No. 101-15/2005-MN dated 27th February 2006 observed that this differential tariff was discriminatory and inconsistent with the amended licence condition notified by the DoT on 20th May 2005 and

therefore directed the appellants to immediately discontinue such differential tariff and asked for compliance within 15 days of issue of this direction.

8. The appellants have filed this appeal against the above directions and have prayed for the following reliefs:-

To set aside and quash the directions issued vide circular No.101 15/2005-MN dated 27th February 2006 by the respondent;

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

Pending final decision on the application, the appellants seek issue of the following:-

To grant an ad-interim ex parte stay of the operation of the impugned directions issued vide circular No.101-15/2005-MN dated 27th February 2006 by the respondent;

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

9. After hearing the learned Counsel for the appellants in regard to the interim prayer on 2nd March 2006, we did not consider this case fit enough for interim order to be passed. The relevant para of the order dated 22nd March, 2006 is as under:-

"We have heard the learned counsel for the appellants in regard to interim prayer. We think that this is not a case in which interim order should be passed. We think it appropriate that the appeal should be heard expeditiously. Hence we direct the parties to complete the pleadings, if any, within four weeks."

10. On this, the appellants filed a writ petition, WP(C) No.5428/2006, in the High Court of Delhi, which was disposed of with the following order:

"The reasons which convinced the Hon'ble Tribunal to arrive at the conclusion that the Appeal was not a case in which interim Order should not be passed have not been articulated. Learned Counsel for Respondent No.1 states that till date no action has been taken by Respondent No.1 predicated upon the impugned Direction/Order dated 27.2.2006, which is in Appeal before the learned TDSAT. He further submits that if any punitive action is intended to be taken against the Petitioner, it would be presaged and preceded by a Show Cause Notice, which has not been issued.

Keeping in view the fact that the TDSAT has in its wisdom fixed the Appeal for Final Disposal on 27.04.2006, it would be expected that no punitive or coercive action is taken by Telecom Regulatory Authority of India (TRAI) at least till the next date of hearing before TDSAT. Learned counsel for Respondent No.1 states that TRAI shall abide by the observations in this Order.

The Writ Petition stands disposed of in the above terms. Parties shall have liberty to approach the Court if the circumstances so warrant."

11. The matter was finally heard on 28.11.2006 and 29.11.2006.

12. Mr. Navin Chawla, learned Counsel for the appellants stated that the TRAI had laid down IUC regulations comprising of access deficit charge, carriage charge and termination charge for transiting of calls from one network to another. He further said that while ADC and termination charges were of fixed nature, the carriage charges were based on the principle of work done. He said that the tariffs were different for intra-circle calls as compared to inter-circle calls.

While till May 2005, the three metros in Maharashtra, Tamil Nadu and West Bengal circles and the U.P. (East) and U.P. (West) circles were treated as separate circles, these were merged in the respective state circles to form four single service areas respectively, i.e., Mumbai Metro and Maharashtra, Chennai Metro and Tamil Nadu, Kolkata Metro and West Bengal and UP(East) & UP(West). Therefore the calls between Mumbai and other areas of Maharashtra circle which were earlier treated as inter-circle, now became intra-circle calls as per the directions of DoT. Inter-circle calls could be routed only through a National Long Distance Operator (NLDO), i.e., the originating network will handover call to NLDO who will carry it to terminating network whereas intra-circle calls could be routed by direct connectivity between the networks within the circle. He said that direct connectivity between the metros and the respective state

circles under appeal was not existing since the metros were separate circles till the notification of DoT in May, 2005 and because infrastructure could be created within the licensed service area only and not beyond. He said that while the direct connectivity could be achieved between the networks of private operators but it could not be achieved between private operators and BSNL network.

13. Arguing further in support of appellants' point Mr. Chawla said that consequent to amendment to the said service areas, the BSNL vide their Circular dated 24.5.2005 stated that calls will not be accepted through NLDO because the calls in these service areas were to be treated as intra-Circle calls. The same Circular at the same time stated that till such time as addenda to agreements is signed and thereafter till Points of Interconnect (Ps of I) are provided the existing arrangements will continue and the calls will be treated as inter-circle calls only. He also referred to the clarification issued by the Govt of India, DoT, vide letter No. 842-503/2004-VAS/52 dated 16.6.2005 which is reproduced as under :-

"It is clarified that the Access Providers also have the option to continue with the existing interconnect arrangement for routing of calls in these service areas. However, the calls will be treated as Intra-service area calls and IUC/ADC shall be as per prevailing TRAI Regulation.

*The IUC and ADC shall be applicable as per TRAI's prevailing Regulation/ Determination/Direction/Order.
The tariff and roaming charges will be as per applicable TRAI's Tariff Order."*

14. Mr. Chawla stated that on receipt of the above clarifications, the appellants represented to the DoT that till such time direct connectivity was established between BSNL network and their networks, the existing arrangement should be allowed to continue. He further reinforced his point by stating from the pleadings in appeal that the appellants had requested the Respondent No. 1 to instruct BSNL to provide leased lines to Cell One in a time-bound manner so that the anomalies between the Government decision of 20.5.2005 and BSNL Circular of 24.5.2005 be reconciled. He stated that BSNL in their Circular dated 24.5.2005 itself had stated that existing arrangement shall continue including handover of such calls to BSNL through NLDOs, thus, BSNL treated the traffic as inter-Circle traffic and therefore charged ADC accordingly. He said that BSNL's Circular also stated that new Ps of I shall be commissioned after the access provider signed addenda to interconnect agreement with BSNL for which even the text was not given by the BSNL so that they could initiate steps to establish Ps of I in these four states.

15. Mr. Chawla said that in view of this, appellants had no choice but to continue working as hithertofore and the calls to BSNL/MTNL subscriber were therefore handed over at the originating point and BSNL/MTNL carried the same on their networks. He contended that since BSNL was charging more for carriage of these calls as compared to calls between the appellants' networks, this gave rise to higher tariff for calls between appellants' networks and BSNL's network. This was explained with the help of a diagram for a call originating from Mumbai and terminating at Pune and vice versa as under:-



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Scenario I : Call from Mumbai to a Subscriber of a Private Network in Pune

Call A to B : Direct Connectivity

IUC Charges = Nil Carriage + 30 p termination = 30 p / minute

@ Scenario II : Call from Mumbai to a Subscriber of MTNL/BSNL in Pune

Call A to C : Through private NLDO

IUC Charges = Rs. 0.65 Carriage + 30 p termination + 30 p/minute

ADC=Rs. 1.25/ minute

\$ Scenario III : Call from Mumbai to a Subscriber of MTNL/BSNL in Pune

Call A to C : Through BSNL (Routed through Nagpur Level I TAX)

IUC Charges = Rs. 1.10 Carriage + 30 p termination = Rs. 1.40 / minute

He explained the net effect of the applicability of IUC charges for Cell-to-Cell Call between Mumbai and Pune as per Regulations by way of the Table below :

IUC Charges (Per Minute)	Direct Connectivity A	Connectivity through Private NLDO B	Connectivity through BSNL NLD C
Origination	Forbearance	Forbearance	Forbearance
Carriage	Nil	Rs. 0.65	Rs. 1.10
Termination	Rs. 0.30	Rs. 0.30	Rs. 0.30
ADC	Nil	Rs. 0.30	Nil
Total IUC Charges	Rs. 0.30	Rs. 1.25	Rs. 1.40

16. The contention of the appellants in sum was that they were charging the subscriber more since routing of calls to networks of Respondent Nos. 2 & 3 was costing them more; the main cause for the same being non availability of direct connectivity between them and BSNL/MTNL networks. According to Mr. Chawla such differential tariff, therefore, was justified. He reinforced his point of non-provisioning of direct connectivity by the appellants on the ground that in the directions issued by DoT on 20 May, 2005 direct connectivity was permitted and not mandated.

17. The Counsels for Respondents 1 & 2 however refuted these above arguments and stated that except for writing a letter to DoT no effort was made by the appellants to provide direct connectivity as they had done between themselves. Counsel for Respondent No. 2 stated that he was at a loss to understand as to why appellants wrote to DoT to instruct BSNL to provide leased lines knowing fully well that this was not DoT's task and they had to approach NLDOs for taking leased lines. The appellants had to arrange leased lines and ask Respondents 2 & 3 for Ps of I only.

18. Mr. Meet Malhotra, the learned Counsel appearing for Respondent No.1 submitted that nowhere the appellants have stated in their appeal about non-provision of Ps of I which were asked by the appellants. Even in the Rejoinder, there is not even a single word of denial of provision of Ps of I by the Respondent No. 2. The only pleading made by the appellants is on non-grant of leased lines by BSNL which is not tenable since Respondent No. 2 is not under obligation to provide leased lines.

19. He further added that it was the duty of the appellants to arrange the leased lines for establishing direct connectivity with the BSNL network as they had done to connect each other's network by taking leased lines. While arguing further for the appellants' case, Mr. Chawla said that even if the appellants had taken leased lines, they would have been just waiting outside BSNL's premises since BSNL was not providing the Ps of I. Mr. Maninder Singh, learned Counsel for BSNL however said that it was a bogey being raised by the appellants since they never approached the BSNL for provision of Ps of I. He stated that immediately on issue of letter by the DoT when the metro circles were merged with the respective state circles, BSNL had issued a Circular on 24.5.2005 asking the appellants to sign addenda to the existing interconnect agreements for provision of Ps of I. However, no effort was made by the appellants to this effect. Learned Counsel for BSNL also stated that in another case before TDSAT, Respondent No.2 had stated on affidavit that wherever the payments have been made, the Ps of I were being provided within 90 days. He further stated that in these four service areas, no demand was ever placed on BSNL. Mr. Chawla however

persisted with his argument showing us some of the demands placed by the appellants for some E-1 connectivities and Ps of I. He also said that the appellants requested DoT vide their letter No. SN/COAI/098 dated 1.7.2005 that BSNL could carry their calls directly from Mumbai to Pune rather than through Nagpur level-1 TAX which would have reduced the charges automatically.

20. We observed that some demands for Ps of I/E-1 connectivity were placed by the appellants on BSNL but as late as in December 2005, January 2006 & February 2006. We see no reason that in case infrastructure for direct connectivity could be created for connecting amongst themselves the networks of the appellants, the same could not be done for connecting the MSCs of appellants' networks to those of BSNL/MTNL networks in the four service areas under consideration in this appeal. The appellants could have made use of the similar leased lines as they had between their networks and asked for Ps of I from the BSNL for the MSCs located in these four service areas which was not done. The learned Counsel for the Respondent No. 1 stated that no effort was made by the appellants to create this direct connectivity and they took recourse to the easier way of handing the traffic to the BSNL as NLDO and continued charging the consumers higher tariffs. He also said that in case the appellants had failed in getting the Ps of I from Respondents Nos. 2 & 3, they could have reported the matter to Respondent No. 1 or could have taken legal course and come to this Tribunal for directions to BSNL/MTNL to provide Ps of I for direct connectivity. We find merit in this argument of Mr. Meet Malhotra.

21. Mr. Maninder Singh stated that this was done by design by the appellants with the aim of attracting BSNL/MTNL subscribers to their networks, by charging higher tariff for calls to Respondent Nos. 2 and 3 networks. We however are not much convinced about this argument since by charging higher tariff from their own subscribers, the appellants themselves ran the risk and peril of these very customers leaving them and joining Respondent Nos. 2 and 3.

22. Mr. Chawla stated that the tariff being charged by the Appellants from the subscribers was a matter between the operator and the subscriber. He said that it was covered by the TRAI under the clause for forbearance where maximum charges which could be levied were laid down with the condition that the same had to be reported to TRAI. He said that the appellants were limiting their tariffs to the laid down maximum charges and the same was being reported to the TRAI. Therefore, there was no cause as such to issue the impugned notice by Respondent No.1. The learned Counsel for the Respondent No.1 however, said that while forbearance was being adhered to, the appellants were directly discriminating between the same class of subscribers which was against the directions of TRAI. According to him Clause-6 of the Tariff Order prescribes that no service provider shall in any manner discriminate between subscribers of the same class and such classification shall not be arbitrary. Clauses 2(k) and 6 of the Tariff Order defines non-discrimination which is reproduced as under :-

“Non-discrimination” means that service provider shall not in the matter of application of tariffs, discriminate between subscribers of the same class and such classification of subscribers shall not be arbitrary.

*Clause 6. **Non-discrimination:** No service provider shall, in any manner, discriminate between subscribers of the same class and such classification shall not be arbitrary.”*

23. There was argument from both the sides on the issue whether this non-discrimination clause is applicable to the class of subscribers making call to another private network from a private network as compared to the class making call from the same private network to BSNL/MTNL network. According to appellants' contention, these were two different classes since the routing of the call was different and BSNL was charging higher amount for the latter category of calls.

The respondent's contention, however, was that the same subscriber or two subscribers from the same house making calls from the same network to another private network or to BSNL network located at the same destination form the same class. The interpretation of the respondents seems to be more logical since one consumer making a call to a BSNL end-subscriber could not be a different class from the same consumer making a call to a BSNL end subscriber located at the same destination. The consumer remains the same but the tariff for two calls is different. We therefore, feel that it is a clear discrimination for the same class of subscribers which is against the basic definition laid down in Clause 2(k) of the Tariff Order. In the light of this, we, therefore, do not agree with the contention of the appellants that this additional tariff being charged from the consumers could be acceptable under the clause of forbearance. Forbearance for the same class of subscribers will imply laying down a tariff which will be same for the same class of subscribers for different networks under the clause of non-discrimination.

24. Mr. Chawla also stated that the TRAI had itself permitted to have differential tariff on its own network and quoted a Supreme Court Judgment in Civil Appeals Nos. 109-25 of 1999 with No. 15 of 2005 decided on January 4, 2005 [Pallavi Refractories and Ors. Vs. Singareni Collieries Co. Ltd. And Ors.] to support his case. He argued that as per this judgment, the two unequals need not be treated as equals. We have perused the judgment. In the facts of that case the Supreme Court found classification justifiable. In the facts of the present case, in our view, the classification is not possible. Whether classification is possible or not, is a question of fact and has to be decided on the basis of facts in a given case. We do not find any merit in the argument of Mr. Chawla based on the said judgment, particularly in view of the clause of discrimination which makes this judgment not applicable in the instant Appeal.

25. While concluding the arguments, Mr. Maninder Singh, learned Counsel for Respondent No. 2 stated that even when the connectivity has been provided in some of the service areas under reference, appellants continued to charge the differential tariffs. He produced a print out of the same from the website of one of the appellants.

26. Having gone through the documents produced by both the parties and having heard arguments we are of the view that the appellants did not make adequate effort to provide direct connectivity between the appellants' MSCs and the BSNL/MTNL's MSCs which would have brought tariffs at par for calls made within the appellants' network and between the appellants and respondent Nos. 2 and 3's networks. We are also left with the impression that DoT and BSNL could have taken a more pro-active approach to ensure that the requisite leased lines and Ps of I were made available for establishing direct connectivity in a time bound manner which would have helped achieving the transition sought to be brought about by the DoT notification of 20-5-2005 in a more smooth manner. Be that as it may, we do not agree with the argument put forth by the appellants about the protection to them for charging higher tariff under the clause of forbearance. The clause of non-discrimination is very clear and self-explanatory which has been defied by the appellants. We do not find any merit in the appeal and the same is dismissed. M.A. No. 58 of 2006 also stands disposed.

.....J
[Arun Kumar]
Chairperson

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[Vinod Vaish]
Member

.....
[D.P. Sehgal]
Member