

TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL**NEW DELHI****Dated 27th July 2006****(a) APPEAL No.3 OF 2005**Mahanagar Telephone Nigam Limited
Appellant

.....

Vs

Telecom Regulatory Authority of India

.....Respondent

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(b) APPEAL No.4 OF 2005Association of United Telecom Service Providers of India
.....Appellant

Vs

Telecom Regulatory Authority of India

.....Respondent

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

For Appellant MTNL

: Mr.Goolam E. Vahanvati, Solicitor General of India with
Mr.Arun Kathpalia,
Mr.Vivek Malik, Advocates

For Appellant AUSPI

: Mr. Ramji Srinivasan with
Ms.Mandakini Singh,Advocates

For Respondent -TRAI

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

In both the appeals the notification of TRAI dated 6-1-2005 [Telecommunication Interconnection Usage Charge (4th Amendment) Regulation (1 OF 2005)] has been challenged. The appellant in Appeal No.3 of 2005, Mahanagar Telephone Nigam Limited also referred to as MTNL, is a public sector telecom service provider having its operations in the cities of Delhi and Mumbai and apart from various telecom services is a leading provider of fixed line telephones in these two cities. The appellant in Appeal No.4 of 2005 is an Association of Private Basic Service Providers (AUSPI) i.e., private operators providing fixed line telephone service in their respective licensed areas. By this notification Telecom Regulatory Authority of India (TRAI) has brought into effect significant changes in the Access Deficit Regime and in particular the following changes have been brought about:

- (i) Reduction in Access Deficit Charges (ADC) values. For domestic calls these have been reduced from current levels ranging from Rs.0.30/minute, Rs.0.50/minute and Rs.0.80/minute across various call types and distance slabs to a uniform level of Rs.0.30 /minute. For international calls, ADC value has been reduced from Rs.4.25/minute for both incoming and outgoing calls to Rs.2.50/minute for outgoing calls and Rs.3.25/minute for incoming calls.
- (ii) For all intra-circle calls from Cellular Mobile/WLL-M to Fixed Line, the access deficit amount will be paid to Bharat Sanchar Nigam Limited (BSNL), a public sector telecom operator providing fixed line telephone service across the length and breadth of the country. (excluding the cities of Delhi and Mumbai)

- (iii) For all incoming ILD calls to fixed line, ADC on all incoming calls to Private FSP's (fixed service providers) and MTNL will no longer be available and BSNL would be paid the ADC.
 - (iv) For all inter circle calls from Cellular Mobile / WLL-M to fixed line the ADC would be collected by the NLDO from the origination service provider and the ADC paid to BSNL
 - (v) Earlier all fixed service providers (i.e. also MTNL) were getting the ADC amounts arising out of (ii),(iii) and (iv) above.
2. MTNL has prayed for setting aside the impugned notification. At the time of filing of the petition, MTNL had prayed for stay on implementation of the said notification which was to come into force on 1st February 2005. By our order of 24-1-2005 we had held after hearing the counsels that there were no sound reasons for grant of stay.
3. The application of intervention in the above matter of Association of United Telecom Service Providers of India (AUSPI) was treated as an appeal. Both the appeals have been heard together by us as common issues are involved. AUSPI has prayed for setting aside of the TRAI notification of 6-1-2005 and as an alternative has made the following additional prayer:

“Alternatively, set aside the impugned decision contained in the Telecommunication Interconnection Usage Charges (4th Amendment) Regulation (1 of 2005) dated 6-1-2005 to the extent para 3.2 (a), (e) and (f), and direct that the corresponding provisions of the October, 2003 will continue to apply till completion of final exercise by the TRAI,”

4. In the order of 24.1.2005, this Tribunal had considered the objection of TRAI questioning the jurisdiction of TDSAT to hear this matter on the ground that it relates to the challenge of a Regulation framed by TRAI in exercise of its powers under Section 36 of TRAI Act and the vires of such a Regulations could not be examined by TDSAT. The Tribunal had rejected the submission of TRAI in this regard and had held that any dispute, even arising as a result of a regulation framed by TRAI would fall within the jurisdiction of TDSAT, as this was conferred upon it by the TRAI Act, and any subordinate legislation cannot take away that jurisdiction. It was also held that any clause in the regulation which seeks to divest the powers of TDSAT to adjudicate upon any dispute is non-est and has to be ignored. Against this decision of TDSAT, TRAI filed a Writ Petition in the Delhi High Court (WP(C) 2838/2005). In its judgment of 23rd December 2005 the Hon'ble Delhi High Court upheld the contention that merely because TRAI had notified its decision as a regulation it cannot have the effect of converting its directions into statutory regulations. It was held that the real purpose of TRAI was to give effect to a decision taken under Section 11 of the Act and therefore, there is no prohibition to the maintainability of the appeal before the TDSAT.

At the request of the learned counsels for the parties, proceedings in the appeals were adjourned to await the judgment of Hon'ble Delhi High Court. Arguments in the appeals were heard after pronouncement of the said judgment.

5. The main grounds of appeal of MTNL are that the changes being brought about in the existing ADC regime are based on incomplete and defective data; the decision has been taken in undue haste as part of an interim review, it discriminates between one basic operator and the others without any rational basis causing heavy depletion in ADC amount that would have accrued to MTNL had the regime not been changed; it proceeds on completely erroneous basis of 'exceptional growth in the mobile subscriber base which is totally irrelevant for the purpose of increase in outgoing calls in so far as BSOs like MTNL are concerned, and it has arbitrarily been decided that ADC amounts on only outgoing calls would accrue to MTNL and the private fixed service providers completely ignoring that in the preceding 10 months there has been no significant growth in the outgoing calls.
6. The main ground of appeal of AUSPI is that by the impugned notification the Private Fixed Line Service Providers (as also MTNL) would no longer be entitled to receive ADC on the three specified incoming call streams, while their main competitor Bharat Sanchar Nigam Limited (BSNL) would not only continue to be eligible to get ADC on calls terminating on BSNL's Network but also get the ADC denied to the FSPs on the incoming calls on their fixed networks. It has been further stated that while TRAI has described the impugned

Regulation as an interim Regulation, there is no justification or basis for disrupting the status-quo when the final decision is still to be arrived at after considering and hearing the views of all the stakeholders.

In particular it is stated that the impugned Regulation deserves to be reviewed principally on the following major grounds:

- (a) Discrimination – TRAI has discriminated between BSNL and other FSPs and is violative of Article 14.
- (b) Procedure – TRAI has failed to follow correct procedure and has passed an interim order and has disrupted the status quo without proper analysis of data, which is yet to be called for and analysed.
- (c) Flawed Assumptions – Various assumptions made by the TRAI in January 2005 Regulations are flawed and without any basis.
- (d) Reduction in ADC - Customer / Public Interest – Appellant submits that the reduction of ADC will reduce tariff as the same will be passed on to the customer yet the same ought to have been done without discrimination between various players. Instead, FSPs have been dealt twin blows.
- (e) Severe loss to FSPs on account of proposed changes by the impugned Regulation, running into hundreds of crores rupees.

7. In its reply TRAI has denied all the points put across on behalf of MTNL and the intervener (AUSPI).

8. We would not like to repeat the factual information and the justification given by TRAI for its notification of 6-1-2005 as we had covered this ground in our order of 31-1-2005 while rejecting the prayer of stay. We had in our order of 31-1-2005 taken note of the rationale and the justification given by TRAI in regard to the impugned notification. Briefly stated we had in particular noted the following key aspects:

- (1) The need for review of the ADC Regime notified in the 29-10-2003 Regulation was explained by TRAI as follows:

“3. The exceptional growth in subscriber base* has resulted in a substantial change in the situation that was considered for determining the ADC regime notified in the Regulation of 29th October 2003. The large unanticipated increase in Mobile subscriber base has led to a much higher number of total minutes, which fund the overall ADC amount. Thus even with the same amount of ADC funds to be collected, the per minute ADC charge can be lower due to the increase in minutes on which the ADC charge is applied. Inter-alia, taking this important factor into account, the Authority has conducted another review of ADC regime based on its Consultation Paper of 23rd June 2004.”

* 21 million in September 2003 to 46 million in November 2004

“8. The large expected increase in subscriber base will also provide a substantial rise in the minutes that will fund the ADC for fixed service providers. Further, these minutes will, to a significant extent, be external to the BSNL i.e. the ADC funding itself will increasingly become a smaller portion. These major developments will give us with an additional basis to further decrease the ADC per minute charges, or if the ADC is funded through a revenue share regime then for a decrease in the revenue share imposed for funding ADC. As already stated earlier by the Authority, the ADC regime will ultimately merge with the USO regime.”

- (2) The approach followed in the Review leading to the notification of 6-1-2005 was spelt out by TRAI as under:

“9. In the present review, the Authority’s assessment is based mainly in the increased minutes available to fund the ADC. The main focus of the

ADC regime has been BSNL, and in the revised regime, the Authority has provided BSNL with the same ADC funds as were specified under the regime notified in the Regulation of 29th October 2003. However, even with the same amount of ADC funding, the per minute ADC charge would go down due to the larger base of subscribers and consequently of the relevant minutes of use.”

“10. In reviewing the ADC regime, the Authority also examined the ADC regime that should apply to all fixed line service providers other than BSNL. The Authority recalled that even in the ADC regime notified in October 2003, these service providers were not treated at par with BSNL because under that regime only BSNL received the ADC from mobile to mobile calls and international calls to / from mobile. In the revised ADC regime too, the other fixed line service providers are not treated in the same manner as BSNL. The Authority feels that there is good basis for this dissimilar treatment, If it takes account of the lower cost of access involved with fixed line with wireless terminals, i.e. fixed line with radio link in the last mile and the spread of subscribers in urban and rural areas. (Table 3)”

“11. However, BSNL and other fixed service providers are being treated in a similar way by the Authority if we consider that in the revised scheme, the Authority is providing to BSNL the same overall amount of ADC as in the regime notified in October 2003 and all other fixed operators also, are being given overall similar ADC value as was specified in that Regulation.”

- (3) A Tabular Statement (Table 3) has been given in the Explanatory Memorandum indicating the Percentage distribution of Fixed Wireless Telephone lines in the total Fixed Subscriber Base of Fixed Operators and Percentage of Rural lines in total

Fixed Lines provided by Fixed Operators as on 30-9-2004.

TABLE 3

Percentage distribution of FWT lines in the total fixed Subscriber Base of Fixed Operators and Percentage of Rural Lines in total Fixed Lines provided by Fixed Operators as on 30th September 2004

Service Provider	Circle / Service Area	% of Fixed Wireless line in Operator's Fixed Lines	% of Rural Lines in Operator's Fixed Subscriber Lines
BSNL	All India (except Delhi and Mumbai)	2.60	35.20
MTNL	Delhi & Mumbai	1.09	0.00
Bharti	Delhi, MP, Tamil Nadu, Karnataka, Haryana, Chennai	3.46	0.08
TATA	Maharashtra, Mumbai, Andhra Pradesh, Tamil Nadu, Chennai, Karnataka, Delhi, Gujarat	77.39	0.23
Shyam	Rajasthan	18.49	3.37
HFCL	Punjab	24.53	0.45
Reliance	All circles except Assam and North East	97.27	0.66
TOTAL		7.70	28.93

Based thereon TRAI had consciously decided that operators other than BSNL should be treated differently in terms of ADC support provided to them. The Authority has stated as follows:

“12. Based on the above, the Authority has decided that operators other than BSNL should be treated differently from BSNL in terms of the ADC support provided to them. In this background, and keeping also the objective of providing the same overall ADC funding to BSNL as in the estimation provided in the Regulation of 29th October 2003, the Authority has conducted further calculations and has decided that all the operators other than the BSNL should get ADC funding only from their outgoing calls. The ADC generated by all the incoming calls that were earlier provided to these (non-BSNL operators, would now be provided to BSNL. This is required to keep the incidence of the ADC charge low, to make ADC regime sustainable, and to obtain the requisite funds for the ADC being provided to the operator who is presently providing virtually the entire rural telephony.”

- (4) The Authority has addressed the charge of discriminatory treatment being given vis-à-vis BSNL to other Fixed Line Operators as follows:

“39. The Authority recalled that BSNL and the other fixed line operators were not treated in the same way even under the existing ADC regime notified in the Regulation of 29th October 2003. In the existing regime, therefore, all the ADC arising from mobile / WLL-M to mobile /WLL-M calls, as well as from international calls to or from mobile/WLL-M, was being given only to BSNL. The other fixed line operators did not receive any ADC from these calls.

40. However, if we consider the Authority's decision that in the revised ADC regime, BSNL and the rest of fixed line operators will respectively get the same ADC amounts as specified for the existing ADC regime, both BSNL and the other operators are being treated similarly. The Authority also noted that with the same ADC amount to be funded and the minutes of use having gone, the ADC charge per minute can be reduced.

41. The issue of whether the ADC regime applicable for BSNL and other fixed line operators should be the same can also be seen in terms of two important criteria., namely the distribution of subscriber base for which access deficit would arise, and second the distribution of subscribers in urban and rural areas. As shown by Table 3 given earlier in this Explanatory Memorandum, the position of BSNL, and the other line operators is very different when they are compared on the basis of these criteria

42. The first criteria is linked to the fact the ADC funds have provided to fixed line service providers to cover the shortfall in revenue 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 of 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 portion of the network (please see the Regulations of 24th January and 29th October 1993 for more details). 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. In this

regard, the Authority does not agree with the point that consumer equipment cost should be included for estimating overall Access Deficit.

43. The second criteria is linked to provision of rural services, and the likely average monthly rental revenue received by various operators. Table 3 also shows the relative presence of the subscriber base of various operators in rural and urban areas, and it is evident that compared to BSNL, the other operators are based in relatively lucrative areas. This also implies relatively higher monthly rentals and even ARPU, for the other fixed line operators compared to BSNL.

44. Based on the above, the Authority has decided that operators other than BSNL should continue to be treated differently from BSNL in terms of the ADC regime applicable to them. This implies preferential treatment in terms of ADC funds for the operator who is presently providing virtually the entire rural telephony.

45. In this background, and keeping also the objective of providing the same overall ADC funding to BSNL as in the estimation provided in the Regulation of 29th October 2003, the Authority has conducted further calculations, and has decided all the operators other than BSNL should get ADC funding only from their outgoing calls. The ADC generated by all the incoming calls that earlier provide them with the ADC funding, would now be provided to BSNL. The calculation of the Authority show that such a regime would be more than adequate to provide the other fixed line operators with the relevant ADC funds.”

9. Briefly stated, the ADC compensates for the “below cost rentals” of Fixed lines telephones, especially in rural areas, and the free calls provided to the subscribers by the Basic Service Providers (also called Fixed Telephones). Other services such as Cellular Mobile and Wireless in Local Loop with limited mobility (WLL-M) do not require ADC as the rental and call charges in these segments are supposed to cover the costs.

10. Shri Goolam Vahanavati, Learned Solicitor General of India argued the case on behalf of MTNL. He pointed out that there was a fundamental fatal flaw in the basic approach of TRAI. On page 475 of the Explanatory Memorandum to the impugned notification it is mentioned that the figures taken to consider the ADC estimates for the IUC Regulations of 29-10-2003 have been taken from Table 7 of the Explanatory Memorandum of the 29-10-2003 Regulation, however surprisingly, the Consultation Paper dated 26-6-2004 puts these figures under a Table 3.1 and states that this a Summary of the ADC Estimates in the IUC Regulations dated 20-10-2003 and while the notes below the table qualify the ADC figure as Rs.5335 crores, this figure was not

there in the Regulations of 29-10-2003. Therefore the indication in the notes below the said Table that out of the amount of Rs.5335 crores, BSNL was to be provided Rs.4700 crores is not borne out by the Regulations of 29-10-2003. As regards the other basic service providers the only clear inference is regarding the figure of Rs.995 crores the total ADC deficit sought to be funded to them, as this is the differential figure between Rs.6330 crores (total access deficit calculated) and Rs.5335 crores. (calculated as ADC requirement of BSNL). The foot notes under the Table referred to above seem to indicate that access deficit of Rs.635 crores was meant to be provided to the private basic operators but this is also not borne out by the Regulations of 29.10.2003.

According to him this is a fundamental error made in the Consultation Paper which is repeated in para 35 of the Explanatory Memorandum of the impugned decision which, once again, states that the ADC deficit, specifically in the Regulations of 29-10-2003, was about Rs.5300 crores in the aggregate with about Rs.4880 crores for BSNL and about Rs.550 crores for other fixed line operators. He further argued that if BSNL’s figure was to be reduced to Rs.4700 crores from Rs.5335 crores, as was suggested in the Consultation Paper of 26th June 2004, then a corresponding figure of reduction in the figure of Rs.995 crores should have been worked out. Even if one is to proceed on the basis that there was some exercise undertaken in the 29-10-2003 Regulation to reduce the entitlement of BSNL by about 12%, there is no reason why the same yardstick should not be applied to the other basic service providers. It is not understood how Rs.995 crores became Rs.550 crores. There is no explanation of this figure.

He pointed out that though a specific query was raised in the Consultation Paper whether ADC funding under the proposed regime should be provided only to BSNL or also to other basic service providers, this question has been answered in the Explanatory Memorandum

by stating that it should continue for all. Thus there appears to be no doubt that TRAI came to the conclusion that other basic service providers should not be excluded. Whilst stating that there could be dissimilar treatment, it nevertheless maintained that all other fixed line operators should be given overall ADC values as was specified in the October 2003 Regulations. A glaring mistake has been committed in the determination of what should be the Access Deficit charges payable to operators other than BSNL. The figure of Rs.550 crores assumed in this regard is totally arbitrary. The mistake made in June 2004 is repeated in the Regulations framed on 6-1-2005 as such the whole exercise is vitiated.

11. For the sake of convenience in addressing the related issue, we reproduce below the relevant extracts and Tables referred to in the above arguments.

1.1. Extract of para 52 in the Explanatory Memorandum of the IUC Regulation of 29-10-2003.

“52. The estimated access deficit for BSNL is shown in Table 7, which indicates the impact of various components on the access deficit calculated. The total access deficit amount to be funded for BSNL, after correction for net revenues from local calls and including the deficit on account of “0 to 50 kms.”, is Rs. 5,335 crores. If we take the other basic service operators also into account, and apply the BSNL access deficit per subscriber without the Government compensation to BSNL, the total access deficit amount increases to Rs. 6,330 crores.

Cost based rental per sub per month	in Rs	361
Total cost of rental	in Rs crores	14865
Total Rental revenue	in Rs crores	6425
Total Rental deficit	in Rs crores	8441
0-50 kms call deficit	in Rs Crores	216
Free call deficit (taken into account in local call surplus)	in Rs crores	0
Total deficit	in Rs crores	8657
Surplus & compensations		
Local call surplus & funding from surplus in termination charge	in Rs crores	1456
Government compensations	in Rs crores	1865
Net Access Deficit	in Rs crores	5335

11.2 Extract of para 3.5 of the Consultation Paper on Access Deficit Review dated 23-6-2004.

“3.5 To begin with we consider the estimates for the IUC Regulation of 29th October 2003. Table 7 of the Explanatory Memorandum to that Regulation shows the following estimates for the Access Deficit that were calculate for BSNL

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Table 3.1 Summary of the ADC Estimates under the IUC Regulation of 29-10-2003

(a)	Total deficit to be taken for estimating ADC	Rs. 8,657 crores
(b)	Deduct from above:	
	- Local call surplus & funding from surplus in	
	- Local calls	Rs. 1,456 crores
	- Government compensations	Rs. 1,865 crores
(c)	Net Access Deficit	Rs. 5,335 crores

Notes:

- (1) For the reasons mentioned in the Regulation, of the above amount of Rs. 5,335 crores, BSNL was provided about Rs. 4,700 crores as ADC in the scheme that was implemented.
- (2) As shown in Table 7 of the Regulation’s Explanatory Memorandum, the total deficit to be taken for estimating ADC has been calculated by deducting from the relevant capital expenditure, the amount of rental revenue.”

12. Shri Meet Malhotra, Learned Counsel for TRAI in reply stated that the contentions of the learned Solicitor General were factually incorrect. It was explained that vide para 52 of the Explanatory Memorandum to the IUC Regulations dated 29-10-2003 TRAI estimated Rs.5335 crores ADC for BSNL and when the BSNL's access deficit per subscriber was applied in calculating ADC of other Basic service operators, the total ADC (including BSNL and Other BSOs) was increased to Rs.6330 crores. Thus the amount of Rs.995 crores was estimated to be the ADC payment for MTNL and Other BSOs. In fact access deficit of other BSOs including MTNL was calculated based on the parameters adopted in calculating ADC for BSNL, which covered urban, semi urban and rural lines. Since MTNL and other BSOs have only urban and semi urban lines, therefore, actual access deficit was much less than the estimated ADC. The Respondent had clearly mentioned in para 101 of Explanatory Memorandum of IUC Regulation, 29-10-2003 that Access Deficit is being funded to the extent of Rs. 5340 crores. The decision to fund Rs.5340 crores against Rs. 6330 crores at that point of time was taken keeping in view the growth pattern of subscriber base and traffic minutes and corresponding effect of higher realization of ADC by BSNL, MTNL and other BSOs.

He further pointed out that TRAI did due diligence by loading per minute ADC on number of minutes (prevailing at the time of the issue of the October 2003 Regulation) to fund the ADC of Rs.5340 crores (Rs.4792 crores for BSNL, and Rs.548 crores for other BSOs including MTNL). In view of the exponential growth in the subscriber base and hence traffic minutes, the Authority came to the conclusion that this amount may go up to Rs.6330 crores. Further in para 100 of Explanatory Memorandum of IUC Regulation 29-10-2003 TRAI mentioned that the Authority also did not want to disturb the prevailing structure of the regime at present, without introducing a larger change in methodology. The Authority had therefore, decided to provide ADC for BSOs also, but the amount collected through ADC by BSOs including MTNL would in effect be lower than the proportionate ADC correspondingly received by BSNL. In the same para, TRAI also mentioned that the Authority will look in greater detail at the data applicable to BSOs and will move to a regime under which the BSOs will not get ADC funding unless it was proved on the basis of data that such funding is justified in the interim transitional phase.

Accordingly, learned counsel of TRAI pointed out that the submission made on behalf of MTNL that the 'notes' which qualify the figure of Rs.5335 crores were not in the Regulation of 29-10-2003, is factually incorrect.

In regard to the other submissions he clarified that the figures which were quoted in the Consultation Paper, were approximate figures rounded off to the nearest unit. The actual figure is Rs.5340 crores against Rs.5300 crores. Similarly figure of Rs.4700 crores quoted in Consultation paper and Rs.4800 crores quoted in para 35 of the impugned Regulation is Rs.4792 crores. Likewise figure of Rs.550 crores quoted in the impugned regulation is Rs.548 crores in actual. It is a general practice that in consultation papers or in speeches the approximate figures are quoted for convenience of the stakeholders to remember the figures as such. The averments in this regard made by the Appellants pointing out the discrepancies raise no issues and need to be ignored.

Shri Malhotra further argued that in view of the benefit being enjoyed by the Appellant of operating only in urban and semi urban areas the growth in traffic minutes and subscriber base is much higher in case of Appellants in comparison to the BSNL. Therefore, TRAI has decided that Appellants be funded to the extent of Rs.550 crores only (as against Rs.995 crores). This is amply justified by the traffic data furnished by other BSOs and MTNL itself submitted in its affidavit vide page no 23 of the paper book (para 36) that it had received ADC payments in a year to the tune of Rs.666 crores under the October 2003 Regulation. The distribution of ADC between BSNL and MTNL and other BSOs was not a simple arithmetical exercise, it was a complex exercise carried out by the Respondent on the basis of various

parameters including traffic minutes, pattern of call routing, subscriber growth, distribution of subscribers in urban, semi urban and rural areas etc.

He argued that the Respondent has clearly addressed the issue of dissimilar treatment vis-à-vis BSNL in para 10 and 11 at page 44 of the paper book. The Authority has stated in these paras that it is providing to BSNL the same overall amount of ADC as in the regime notified in October 2003 and all other fixed operators also are being given overall similar ADC values as was specified in that regulation.

In the end Shri Malhotra argued that Access Deficit compensation does not arise out of any legal right. It arises out of TRAI's consideration of smoothening the transition process by providing support during the transition period in a situation where cost of access is not recovered from the revenues from access under the prevailing tariff regime due to constraints in the market and other factors and that TRAI has provided the same order of ADC as was specified under the regime notified in the Regulation of 29-10-2003.

13. Learned counsel for AUSPI Shri Ramji Srinivasan adopted the arguments of learned Solicitor General on behalf of MTNL. However, in the rebuttal submissions he put across the following additional arguments:

- (i) On the basis that there was a sudden and unanticipated growth of mobile traffic, leading to increase in traffic and consequently increased accumulation of ADC, the Respondent vide the impugned Regulation reduced the number of streams through which ADC was accruing to MTNL as well AUSPI members. As a consequence there has been a steep decline in the ADC entitlements of MTNL and AUSPI members, as compared to BSNL and the proportion of decrease of ADC to the Appellants was greater than that effected for BSNL.
- (ii) The explosive increase in mobile traffic was evident even before 6-1-2005 and yet the Consultation Paper of June 2004 did not consider this as a ground for effecting any decrease in the ADC or values admissible to the Members of AUSPI.
- (iii) The questions posed in the Consultation Paper were different from the reasons given now to justify the Interim Regulation. An affidavit cannot improve the case of a party, getting better as it grows older.
- (iv) The TRAI has ignored completely the fact that number wise as well as percentage wise, the increase in fixed subscribers of AUSPI members / private operators being at least 3 to 4 times compared to BSNL would justify the increase in the Access Deficit Quantum and not lead to a decrease and certainly would also not justify retaining the ADC at the same levels, as stated by TRAI.
- (v) Though tariff was a forbearance item, BSNL had not raised local call tariffs nor had it raised rentals. Consequently the private BSOs were also forced to match the below cost rates offered by BSNL in both urban and rural areas. It has not been denied that private BSOs also operate in both urban and rural areas much like BSNL and unlike MTNL. It has not been denied that BSNL operates in lucrative metros, towns and A Class cities wherein it has no reason to incur any Access Deficit if it were to raise its rental in these forbearance areas.

- (vi) The fact of BSNL having more rural lines than other private operators, was a fact already taken into consideration in the IUC Regulations of 29-10-2003. There was no justification to raise this as a ground again for review of ADC by this Interim Regulation.
- (vii) If BSNL's monthly rental was Rs.156 it was recovering a rent of about Rs. 160, its ADC quantum should have been reduced to Rs.3436 crores and yet it was pegged at about Rs.4400 crores. This increased ADC accruing to BSNL continued irrespective of and despite the
- a) huge unanticipated boom in mobile traffic
 - b) diversion of the streams of revenues of BSOs to BSNL; and
 - c) BSNL's requirement of ADC has come down drastically because its number of fixed lines were dropping sharply resulting in a negative growth.
- (viii) TRAI had not called for any data whatsoever for determination of any deduction in the cost of access of any of the private BSOs and therefore, it had no basis to conclude that the BSOs requirement of ADC had come down.

14. These points were answered by learned counsel for TRAI. According to him as far as AUSPI is concerned, the key issue is the quantum of ADC provided to it, not the manner in which it is provided. In the January 2005 IUC Regulation also, the Authority decided to fund the same total amount of ADC to fixed line operators, which was specified and provided under the October 2003 IUC Regulation. Therefore, no net reduction was done by the TRAI in the ADC amount in January 2005 IUC Regulations vis-à-vis October 2003 Regulation. Had the Authority, in January 2005 regime given ADC on all such calls on which ADC was given in October 2003 Regulation, the amount of ADC funds given to these operators would far exceed the relevant amount of ADC specified for them.

In regard to AUSPI being similarly situated as BSNL in urban and rural areas it was pointed out that Table 3 of January 2005 IUC Regulations shows that BSNL has more than 1/3rd of its subscribers in rural areas while others have hardly any. It is well established that deficit on land lines in rural areas is much higher than in urban or semi-urban regions. Thus it is evident that BSNL and other private operators are not in a similar situation.

As regards the argument of higher additions to the fixed line subscriber base of AUSPI the learned counsel for TRAI argued that for the two largest operators within this group, which together account for 3/4th of the fixed line subscriber base of BSOs other than BSNL and MTNL, about 96% of the increase in subscriber base during the period October 2003 to December 2004 was accounted for by wireless subscribers. For the group as a whole (namely, BSOs other than BSNL and MTNL), about 82% of the increase in fixed line subscribers during the period October 2003 to December 2004 was by wireless subscribers. Since the very admissibility of ADC on such lines was doubtful (though being funded) owing to the much lower cost of installation, the BSOs with a large proportion of the total subscriber base using wireless lines could not be placed on the same footing as BSNL.

In the end he stated that neither MTNL nor the other fixed line operators have filed any evidence to show how much ADC for the relevant year had actually been collected by them. Yet both MTNL and other BSOs claimed that there was a shortfall. MTNL in oral

submission stated that they have recovered Rs.441 crores. This was not substantiated on any affidavit. The Authority believes that actual collection was far more, however, assuming that MTNL collected Rs.441 crores (subscriber base of MTNL is less than 50% of the total subscriber base of MTNL and AUSPI for the relevant period), it substantiates TRAI's argument that total ADC collected by MTNL and AUSPI was in the region of Rs.900 crores. AUSPI did not even orally submit what ADC collections were made. He argued that it was strange that without disclosing the actual collections, AUSPI wanted the argument to be accepted that the amount collected was less than what was sought to be provided by TRAI.

15. During the course of consideration of this matter it was pointed out to us that in February 2006, TRAI has notified another Interconnection Usage Charges (Sixth Amendment) Regulation (of 2006) which has come into effect on 01/3/2006. Events have therefore overtaken us to that extent. We are to decide at this juncture whether there are good enough reasons for setting aside the impugned notification which came into effect on 1/2/2005 and continued to be in force until the coming into being of the Regulations of 2006.

16. After taking into consideration the contentions put across to us by the parties, we first take the point on which great stress has been laid on behalf of the appellants namely that the quantum of Access Deficit that has been made available to the parties as a result of the January 2005 regime was not at the same level as in the regime notified in October 2003. It has been argued on behalf of MTNL that it would receive "substantially less than the amount" which was stipulated for it under the October 2003 regulation. This is in the context of the assertion made by TRAI in its Explanatory Memorandum that TRAI has provided the same order of ADC as was specified under the regime notified in the Regulation of 29/10/2003.

17. We have the benefit of hindsight in this matter as the actual amounts that have accrued by way of ADC are now known to the parties concerned. We gave an opportunity to MTNL and AUSPI to let us know the amounts collected during the course of one year. Learned counsel for MTNL stated in an oral submission that it has recovered Rs.441 crores. However no affidavit was submitted in this regard and learned counsel for TRAI expressed his doubts that the amount was far more. Assuming that the amount collected by MTNL was Rs.441 crores, the amount collected by MTNL and AUSPI combined would not be less than Rs.882 crores as MTNL was having approximately 50 per cent of the total subscriber base of MTNL and AUSPI. We gave opportunity to AUSPI to divulge the amount of ADC but they did not disclose the amount even orally.

18. We have already seen the relevant portion of the Explanatory Memorandum of the IUC Regulation of 29/10/2003 wherein the Net Access Deficit of BSNL has been calculated as Rs.5335 crores and it is mentioned that "if we take the other basic service operators also into account and apply the BSNL access deficit per subscriber without the government compensation to BSNL, the total access deficit amount increases to Rs.6330 crores. This implies that the access deficit amount pertaining to other basic operators was computed at that time as Rs.995 crores.

TRAI however made it clear in Para 101 of the same Explanatory Memorandum of IUC Regulation dated 29/10/2003 that the total access deficit being funded would be to the extent of Rs.5340 crores. This therefore represented a reduction of around 15 per cent from the amount originally computed of Rs.6330 crores. It appears that the grievance being nursed by MTNL is in regard to the foot note appearing under Table 3.1 in the Consultation Paper on Access Deficit Review dated 22/6/2004 wherein it is mentioned that out of the amount of Rs.5335 crores access deficit which is sought to be funded under the IUC Regulation 2003, BSNL was provided about Rs.4700 crores as ADC

thereby implying that other basic operators were being funded to the extent of Rs.635 crores only. The underlying grievance is that whereas the reduction in the case of BSNL was only Rs.5335 - 4700 = 635 crores which constitute 12 per cent reduction, in the case of other basic service operators the amount made available by implication was only Rs.635 crores, as against the contemplated Rs.995 crores which represented 35 per cent decrease. However, in the light of the figures computed from the information received regarding the actual amount collected by MTNL by way of ADC during the year and the estimation made on that basis of the total amount collected on this account by other basic operators (i.e. MTNL and AUSPI) which comes to Rs.882 crores, this grievance of MTNL does not hold ground. If the reduction of 12 per cent is made to the amount originally computed ADC figure of Rs.995 crores, the reduced amount comes to around Rs.870 crores which corresponds roughly to the amount which actually accrued to MTNL and AUSPI during the year. We therefore reject the contentions of the appellants in this regard as devoid of any merit.

19. We have already taken note of the rationale and justification given by TRAI for the impugned notification. We find it strange that MTNL and AUSPI, and MTNL in particular, have challenged the approach of TRAI that the exponential increase in the mobile subscriber base called for a revision in the ADC regime. In our view it seems quite reasonable for a conclusion to be drawn that the substantial increase in the mobile subscriber base would result in increased minutes which would fund the overall ADC amount and therefore a balancing exercise was called for so that the amount collected by way of ADC, the burden of which is ultimately falling on the consumers, should roughly correspond to that intended to be funded to the basic service operators including the BSNL. TRAI has also explained at length why it has consciously decided to give differential treatment to BSNL in regard to ADC funding. In Table 3 of the Explanatory Memorandum to the Notification dated 6/1/2005 the percentage distribution of Fixed Wireless Lines in the total subscriber base of basic operators and the percentage of rural lines in the total fixed lines of the basic operators as on 30th September 2004 has been indicated. This table clearly indicates that while in the case of BSNL about 35.20 per cent of its fixed lines are rural lines in the case of other operators it is a negligible percentage. It has also brought out very clearly that the proportion of “fixed wireless lines”, the capital cost of which is much lower than the conventional fixed line, in the total fixed lines is quite high in the case of most of the private operators while it is a very small figure in the case of BSNL and MTNL.

20. It seems that one of the main grounds of grievance of MTNL and AUSPI is that they are getting lesser amount by way of ADC as compared to BSNL. In fact during the course of arguments it was mentioned to us, particularly on behalf of AUSPI, that they are not opposed to the overall reduction in ADC funding as contemplated by TRAI. What they were really opposed to is the relatively higher amount being made available to BSNL as compared to other basic service operators. One of the arguments on behalf of AUSPI in this regard is that more number of fixed lines are being added into the system each year by the private basic operators than those being added by BSNL. This called for higher ADC payments being made available to the basic service operators. We find that TRAI has addressed all these points adequately in considerable detail in the Explanatory Memorandum issued along with the impugned notification of 6/1/2005 and we have extracted relevant portions of the same and referred to them in the earlier part of this order. We are not convinced by the arguments made on behalf of AUSPI in this regard.

21. Based on the above, we are of the view that there is no merit in the appeals filed by MTNL and AUSPI and accordingly dismiss the same with no orders as to costs.

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(N. Santosh Hegde)
Chairperson

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(Vinod Vaish)
Member

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(D.P.Sehgal)
Member