

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

DATED 3RD MARCH,

2006

PETITION No.123 OF 2005

Association of Unified Telecom
Service Providers of India (AUSPI)
B-106, Gauri Sadan
5, Haily Road
New Delhi-110 001
Through its Secretary General

...Petitioner

Vs

Bharat Sanchar Nigam Ltd.
611, Statesman House
148, Barakhamba Road
New Delhi-110 001
Through its Chairman and Managing Director

...Respondent

BEFORE:

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

For Petitioner : Mr.J.J.Bhat,Senior Advocate with
Mr.Ramji Srinivasan,
Mr.Anjali Chandurkar,
Ms.Shalini M.Gupta,
Mr.Priyabrat Tripathy,
Mr. Md. Akram, Advocates

For Respondent : Mr.Maninder Singh, Mr.Yoginder
Handoo and Mr.Tejeev Singh Bhatia,
Advocates

ORDER

The present Petition is filed under Section 14(a) of TRAI Act, 1997 challenging various orders, the demand notices threatening disconnection of the Points of Interconnect (POIs) of the Member Service Providers of the Petitioner Association in the event of failure to meet the alleged arbitrary and unilateral demands raised by the Respondent and its field units.

2. The Petitioner is the Association of Unified Telecom Service Providers of India (AUSPI) representing the interests of its Members who are at present Unified Access Service Providers. The Members of the Petitioner Association were the erstwhile Private Basic Service Operators (BSOs) before migrating to the UASL regime.

3. The Respondent is a Company registered under the Companies Act and is a wholly owned Government of India enterprise. The Respondent has license to provide all types of services of telecommunication. The Respondent was originally a part of the Government of India as Department of Telecommunications and it has been corporatised and formed into the Respondent Company with effect from 01.10.2000.

4. Each service provider connects its network with the other service provider's network by interconnecting its Trunk Automatic Exchange (TAX) / Mobile Switching Centres (MSCs) with that of the other through a transmission link. These transmission links normally consist of optical fibre cable between the two exchanges and connected through terminal equipments at both ends of this Optical Fibre. Alternatively, this could be connected through a microwave link provided at both ends. The service provider asking for interconnection with the other operator is called interconnection seeker and the service provider providing the same is called interconnection provider. As per the TRAI Regulation, the later entrant is the interconnection seeker. The said interconnection links between the two exchanges can be either active or passive. An active link involves Optical Lines Terminal Equipment (OLTE) at both ends and passive link involves only connection through copper wire on one end which is passive interconnection and the other end where OLTE is placed, is called active end. In the Petition under consideration, the Members of the Petitioner Association had asked for interconnection links from the Respondent where in some cases the links were provided as active links and in some other cases due to constraint for availability of space or for some other reasons like Trade Union problems, the Respondent's end was provided with passive end. For providing passive interconnection, the petitioners had to hire premises outside the respondent's premises where the equipment was housed and from this end to the respondent's premises only cable was extended for interconnection to the respondent's network.

5. Whereas there is no problem between the members of petitioner association and the respondent for payment for active links, they have objected to the respondent's Orders dated 29.4.05 and 7.9.05 for conversion of some existing Passive Links to Active Links and laying down exorbitant rental charges for the Passive Links.

The petitioner association has challenged the allegedly unilateral and arbitrary actions of respondent in issuing the above-mentioned impugned orders/notices and has prayed for the following:

“(a) Call for the records and proceedings pertaining to the orders dated 13th May 2004, 29th April, 2005 & 7th September, 2005 and after examining the validity, legality and propriety, the same be quashed and set aside.

(b) Set aside the Demand Notices dated 7th June 2005, 10th June 2005, 2nd July 2005, 8th July 2005, 22nd August 2005 & 4th October 2005 and all other similar demand notices issued by Respondent or its field units on the issue of infrastructure charges for passive links.

(c) Direct the Respondent and/or its field units to provide connectivity on Passive Links to the members of the Petitioner Association wherever agreed earlier and at the choice of the members of the Petitioner Association being the interconnection seekers.

(d) Award costs of this Petition; and

(e) Pass such further Orders as this Hon’ble Tribunal may deem fit and proper.”

6. The Petitioners have also asked for an interim relief as under:

“(a) Ex Parte restrain the Respondent from in any manner acting upon or proceeding with or taking any steps under the impugned Notices and Orders dated 13th May, 2004, 29th April, 2005 and 7th September, 2005 or effecting any recovery pursuant thereto or taking any coercive steps, including disconnection of Pols or encashment of Bank Guarantees, pending the hearing and final disposal of the present Petition;

(b) Direct the Respondent and its field units not to disturb the status quo in respect of provisioning of Pols to the Members of the Petitioner Association using Passive / Active Links and continue to provide connectivity on Passive Links wherever agreed earlier and at the choice of the Members of the Petitioner Association being the Interconnection Seekers; and

(c) Any other relief which may be deemed fit by this Hon’ble Tribunal in the facts and circumstances of the case.”

7. When the case came up for directions on 28.10.2005, the learned Senior Counsel for the petitioner submitted that there was likelihood of disconnection and prayed for interim order. The Respondent contended that since the Petitioners have not made payment against the demands raised, hence it had every right to disconnect them. Following order was passed by the Tribunal at that stage:

“With a view to protect the interests of the subscribers, we think it appropriate that there should be no immediate disconnection. However, we direct every member of the petitioner association to pay 50% of the demanded amount within one week from today. Failing which, the restraint on disconnection will stand vacated.

List this matter for directions/further proceedings on 11th November, 2005.”

8. The case was finally heard on 14th February, 2006. The learned Senior Counsel for the Petitioner states that the respondent is asking them to shift from Passive Links, where existing, to Active Links and in case not done they are threatening that there will be no augmentation of Points of Interconnect (POI). Secondly, he said that the charges for the Passive Links have been fixed arbitrarily at the rate of Rs.15,000/- per E1 p.a. per passive link which is an exorbitant rate.

9. According to the Petitioner, Clause 2.1.3 of the interconnect agreement between the Petitioner and the Respondent dated 25.1.02 lays down that the BSO shall be responsible for providing the required transmission links from/to his network to/from BSNL's network at interface points under Clause 2.1.2, at local/tandem and TAX levels, initially as well as for augmentation from time to time. These links include passive transmission links.

10. Clause 2.1.10 states that irrespective of who owns a transmission system of the interconnecting link, each party, subject to the availability and feasibility may provide accommodation for the terminals of such equipment of the other party located in its premises. Each party may also permit mounting of antennae for the interconnect link owned by the other party on its transmission towers subject to feasibility. Rental for use of such space and mounting shall be determined by the provider of such facility. The Clause stipulates that arrangements for installation, operation and maintenance of such equipment will be arrived at by mutual agreement. The learned Counsel for the Petitioner said that subsequently addenda to this interconnect agreement was issued vide No. 115-2/2001-Regin/Bihar dated 21.9.05.

11. “Clause 6.3.3 - Other Charges” of this addenda is reproduced as under:

“It shall not be mandatory for BSNL to provide any infrastructure to UASL which UASL himself is supposed to arrange. In case the UASL is not able to bring his interconnecting transmission link upto the BSNL's designated exchange for the POI, BSNL may subject to availability and payment of the prescribed charges by UASL, provide inter exchange junctions on PCMs from the exchange upto which the UASL has brought its transmission link to the location of POI. These charges shall be same as

prescribed by TRAI for leased lines from time to time or on R&G terms and conditions as the case may be.

For any other infrastructure like space in BSNL's building, provision of power supply, air conditioning, mounting of antennas on towers or building tops if feasible, the charges and other terms and conditions for the same shall be as prescribed by BSNL from time to time separately."

12. The Petitioner contends that while the respondent is relying on the second-half of Clause 6.3.3 of the addenda for fixing the charges for use of the building space, power supply and air conditioning etc., this clause is not applicable to passive links since in case of passive links no equipment is placed in the premises of the respondent. It is only the copper cable which is taken inside the premises and connected to the distribution frame. It therefore states that such charges for use of space, electricity, air conditioning etc are applicable only to active links where equipment is placed in the premises of the respondent which requires space, air conditioning and electricity consumption etc. The Petitioner contends that provision of Clause 2.1.3 of the interconnect agreement, where it is mentioned that the charges will be decided based on mutual agreement, is applicable in their case where Passive Links are provided. Mr. Bhatt, learned Senior Counsel for the Petitioner also quoted Respondent's letter No.116-14/96-PHC(Pt) dated 19.2.01 (Annexure P-3 of the Petition) addressed to its Circles which lays down the guidelines for rental charges for provision of facilities such as accommodation, power supply, tower space, cable ducts etc to the private licensed service providers which are applicable only for active links. In case of passive link, it reiterated its stand that it is only the cable duct which enters the respondent's premises and since no physical equipment is kept in the premises of the respondent, the interconnect agreement provides for mutual agreement for charging rental for the same which will be hardly any amount since neither air conditioning nor electricity and nor space is used for this particular facility. Mr. Bhat accepted the fact that charges have to be paid for Passive Links also and that Petitioner had given undertaking to the respondent that they will pay rentals for using the space and facilities of respondent as and when decided by them but the same have to be reasonable and justifiable.

13. The Petitioner contends that it is not that they had voluntarily asked for passive links. It was submitted that when they asked for active link, the respondent had denied provision of space for active link and in some cases the space was withdrawn. Consequently, the members of petitioner association hired the space near the premises of the respondent and from there extended the leads to the respondent's premises as passive

connectivity. We were made to go through two letters from the respondent wherein the space was denied initially for active link and the other where space was withdrawn, extracts of which are as under:

Letter No. CS/RCPL/PRPKT-nna-2002-49 dated 10.5.02 for denial of space

*“Kindly refer your office letter dated 13-4-2002. It is hereby informed that on reviewing the situation of space at Pathankot and Gurdaspur. **It is not possible to provide space at Pathankot and Gurdaspur at present, against your requirement.**”*

Letter No.Engg.WPG-94/BSO/Relaince/14 dated 15.5.02 for withdrawal of facilities

*“This is in supersession of this officer letter No.Engg.WPG-94/BSO/Relaince/9 dated 24.01.2002. Due to technical reasons **BSNL Chandigarh is forced to withdraw the space** allotted vide above said letter to M/s Reliance Communication Pvt Ltd, in both the places, i.e., Sec-17 and Sec-34 Chandigarh. The money deposited against the demand note for the same will be adjusted in the BSNL cable/duct damages to be recovered from M/s Reliance.*

The inconvenience caused is regretted”

14. The learned Counsel for the Petitioner also quoted some other letters where space was not provided. He quoted letter No.R&C/Mobile/Reliance/ Vol.IV/ dated 08.11.02 where the respondent has quoted the BSNL Unions against entry of private operators in BSNL premises where the respondent directed the petitioners to place outdoor cabinet outside the boundary wall of the Exchange. The Petitioner contended that having forced them to settle for passive link, now the respondent is asking the petitioners to shift to active links at places wherever it can provide space. It stated that it is not a universal phenomenon that in all Exchanges of BSNL, the links are to be changed to active links. The Petitioner states that this changeover is being enforced only where the respondent is in a position to provide space. The petitioner further states that since it has already created infrastructure outside the premises of the respondent incurring lot of expenditure, the existing arrangement should continue since changeover will cause heavy financial loss to the petitioner members.

15. The Petitioner also submits that wherever passive links were provided, the respondent had directed the petitioners to provide protective devices equipment like the Gas Discharge (GD^{*}) Tubes, Integrated Protective Magazine (IPM) Devices* etc at the end of passive transmission link terminating into Respondent’s equipment which was abided by in letter and spirit. Mr. Bhat stated that while talking of the protective devices for safety of the equipment, High Speed Digital Subscriber Line (HDSL) was not mentioned as one of these devices and it was limited only to GD Tubes and the IPMs. He said that he considers it very necessary to bring to the notice of

the Tribunal at this stage only that the Respondent is taking the plea that HDSL is also meant for safety which is not correct.

16. The Petitioner said that its members had been directed vide the Respondent's letter No. 115-15/2002-Regln dated 13.04 to shift to active links wherever the Respondent is in a position to offer infrastructure but in the same breath the letter also states that where such infrastructure cannot be provided, the passive links may be permitted. The learned Senior Counsel said that it was rather surprising that if policy is to be followed, it should be followed in all cases and the respondent cannot make distinction depending on its convenience. He said that the Petitioners were highly aggrieved to see the contents of this letter where it is mentioned that if the private operators do not shift to active links, the Respondents may link such cases with the augmentation of POIs of concerned private operator. He said that it was nothing but high handedness.

17. The Petitioner contends that this letter is against the interconnect agreement and since the passive links have been provided because of the constraints on behalf of the Respondent, it prayed for quashing of this letter by the Tribunal.

18. The Petitioner further contended that after one year of issue of the impugned circular mentioned above about changeover from passive to active links, the Respondent vide its letter NO. 103-4/2004/Comn. dated 29.4.05 has laid down the charges for passive links @ Rs.15,000/- per E1 p.a. per passive link. It is stated in this impugned letter that these charges include electricity charges, light, power etc. The Petitioner was dismayed to see these exorbitant rentals fixed by the Respondent since no equipment is placed in the premises of the Respondent; it is only copper wire duct for which this amount cannot be justified. The Petitioner therefore requested the Respondents vide letter No. RIL/BSNL/05-06/0095 dated 24.5.05 to withdraw these infrastructure charges @ Rs.15,000/- per E1 per passive link p.a. being not justified. The learned Counsel for the Petitioner further stated that when the demand notices were received this Petition was filed. He said that the letter No.115-15/2002-Regln. dated 7.9.05 states that the BSNL may continue to charge for passive links at the rate of Rs.15,000/- per E1 per annum irrespective of the fact whether such passive link involves HDSL modem in their premises or not. He said that this was a clear indicator that Respondent was only interested in collecting this unjustified exorbitant rental. He said that it cannot be justified that same rental is fixed with or without an equipment. He said that it is only the active link which requires sharing of infrastructure and not passive link

and charges for passive link have to be worked out mutually on reasonable basis as per the Clause 2.1.3 of the of the interconnect agreement.

19. Responding to the arguments of the Petitioner, Mr. Maninder Singh, learned Counsel for the Respondent said that as per the Interconnect Agreement Clause-4, the BSO *“shall comply with all security and safety practices and procedures notified from time to time by the licensor/BSNL or any other competent authority authorized by the law.”* The Respondent stated that it was insisting on the petitioners to shift from passive links to active links for ensuring safety of their costly equipments. He quoted that there was an incident where due to lightning their equipment got damaged because of inadequate safety precautions. He stated that since for passive links, only a copper wire link is connected it is prone to lightning which can damage their equipment. It is for this reason that the Respondent has undertaken this exercise to convert all the passive links where space is available in the Respondent’s premises to active links since active links are much safer. Mr. Maninder Singh stated that the contention of the petitioner that they had asked for active links and the same were not provided and, in turn, passive links were provided, is not wholly true. He said that in some cases, the Members of the Petitioner Association had asked for establishment of passive links in rural areas as the cost of establishing of passive links with regard to one or two E-1’s was considerably low.

20. The Respondent relied on Clause 6.3.3 – other charges of addenda to interconnect agreement - where it is agreed between both the parties that for any other infrastructure like space, power supply, air conditioning, mounting of antennae, the charges and other terms and conditions for the same shall be as prescribed by BSNL from time to time separately. He said that this was an agreed term between the two parties and the Petitioners had given undertaking that they will pay these charges as and when decided by the Respondent. He said that under these circumstances, the Petitioner has no cause to represent. He said that passive links directly terminating at highly capital intensive equipment of BSNL have high risk of damaging the equipment amounting to losses of crores of rupees. Such damage can be reduced by installing protective devices at both **ends**. He also said that the Petitioner’s ends are safe because their end switches are protected since it is connected via active equipment, i.e., OLTE. The Respondent also contended that HDSL modems are used for protecting the equipment from high volt electricity when the link is through copper wire and therefore according to him modems are necessary so as to protect the equipment from getting damaged. This plea is also made in reply affidavit of the Respondent.

21. The Petitioner in rejoinder contended that the stand of the Respondent is unfair because it is not stopping the passive links altogether and he said that if it was a question of safety to the equipment, which in any case is a necessity for both ends, the Respondent would not take risk at places where no space is available. According to it, it is therefore a matter of convenience for the respondent. He also said that safety equipment has been provided by the Petitioners and nowhere was it mentioned that HDSL will be used as safety equipment. He therefore said that the safety was a bogey used by the Respondent. Mr. Bhat also justified his stand by saying that Petitioners themselves do not want to take chance since damage to the respondent's equipment will result in loss of revenue to them also.

22. The Respondent brought to our notice BSNL letter No.116-14/96-PHC(Pt) dated 19.2.2001 vide which these rentals were only adhoc charges at that stage. This para 2 is extracted as under:

Extracts of Para 2 from Letter No.116-14/96-PHC(Pt) dated 19.2.2001

“Adhoc charges were fixed @ Rs. 2 lakhs per site for radio links and Rs. 1 lakh per site for cable based links and to that effect circulars were issued vide No.s 116-14/96-PHC dated 25.4.97 and 4.5.98 for cellular mobile and basic service providers respectively.”

He therefore pleaded that being adhoc charges these could be changed by the Respondent at any time.

23. The Petitioner questioned this contention of the Respondent stating that these adhoc charges stated in the letter quoted by the Petitioner are for active links and not for passive links. We also tend to agree with the Petitioner since the language of the para is for radio links and cable based links which meant active links and not passive links. In any case, the Petitioner had, during arguments, submitted that this circular of 19.2.01 was pertaining to active links only and not passive links.

24. On the argument of the Petitioner that Respondent cannot change the links from passive to active, the Respondent said that Para 2 of letter No. 115-15/2002-Regln. dated 13.5.2004 empowered it to change the transmission links from passive to active wherever it was in a position to provide space for the same. At places where the Respondent is not in a position to provide space for keeping OLTE in their premises, the Petitioners have been asked to provide HDSL equipment to be placed in the premises so that copper wire is not connected directly to the switching equipment of the Respondent to ensure protection of the same. The Respondent

however questioned this concept of placing HDSL equipment in their premises and said that this is an exercise to justify charging rentals @ Rs. 15,000/- per E1 p.a. per passive link. The Respondent here submitted that to establish a passive link no infrastructure of the respondent is used. It is only copper cable terminating in the MDF/DDF/IDF. Of course, the contention of the Respondent is that the whole exercise had been done to provide protection to their equipment and since the Petitioners had given undertaking to pay the charges to be determined by the Respondent, it has fixed Rs. 15,000/- as the rate per E1 p.a. per passive link. The Respondent submitted that the TDSAT could review this rate.

25. The Petitioner also stated that the Respondent cannot fix these charges for the past periods whereas it was the contention of the Respondent that the charges are being levied from the date of provisioning of the links as per the agreement and there is nothing retrospective about it.

26. On the question of Respondent's stating that private operators themselves have only active links for connecting their equipment, Mr. Bhat said that there was no dispute among private operators since there were no charges involved. Therefore, mutually both ends have been connected through active links. Mr. Bhat said that Petitioners have no grievance against the Respondents in fixing the charges for passive links but these have to be on some reasonable basis. To charge the same amount whether HDSL equipment is provided or not goes to prove that no principle for charging this amount is followed by the Respondents.

27. Having heard the arguments and having gone through the documents produced by both the parties, we find that the Respondent (BSNL) has asked the Petitioners to change over the passive links to active links basically to ensure the safety to their equipment. We fully agree with the contention of the BSNL, and which is also agreed by the Petitioner, that the safety of equipment has to be ensured by both the parties. We have taken note of the BSNL's Letter No. 115-15/2002-Regln. dated 13.5.04 whereby the Respondent had directed the Members of Petitioner Association to provide safety equipment at Respondent's end by providing GD Tubes and IPMs. It has been admitted by the Petitioners that the same has been provided. In this letter there is no mention of HDSL as safety device. We however, find from the reply affidavit given by the Respondent that HDSL is also considered as protection device by them. If that be so, then along with GD Tubes/IPM equipment, HDSL would also have been mentioned in BSNL's letter dated 13.5.04 specifically as part of the safety equipments. This, then would have made obligatory requirement for the Petitioners to provide the same at the Respondent's end.

We therefore feel that the safety equipment as stipulated and laid down by the Respondents has been provided by the Petitioners and they have no case. Therefore we feel that only to ensure safety, the conversion of passive links into active links is not justified.

28. The question before us is whether the Respondent is justified in asking all the members of the Petitioner Association to convert their existing passive links to active links. We find from the letter of the Respondent in this regard and also as argued by both sides that this is being done on selective basis, i.e., it is to be done only in cases where space and infrastructure is available with the Respondent. If it was being done as a policy, in that case, our thinking and perception would have been different. Since we have already taken a view that all the safety precautions are being made by the petitioners and the passive links have been functioning so far, it will be rational and pragmatic conclusion for us to say that these should continue as hitherto fore. It is an admitted fact by way of documentary proof provided along with Petition that the Respondent was not able to provide space at some places and in fact at some other stations it had withdrawn the space already provided thereby virtually forcing the Petitioners to establish passive links. Therefore, their direction now to convert the passive links to active links is not justified.

29. The last question before us is to decide whether the rentals of Rs.15,000/- per E1 per passive link p.a. are justified or not. Though we are an expert body but we would not like to go into the details of factors considered by the respondent to arrive at this figure. Suffice it to say that there has to be a clear distinction between the charges being levied for active links where equipment is placed in the premises and those for the passive links where only copper cable duct enters the premises which may run along the walls and may not use the space at all. While we find from a letter of Respondent that an amount of Rs.2 lakhs is charged for active link, which means rentals for the space, electricity and air-conditioning etc. in addition to the connectivity of E1s. This amount of Rs. 2 lakhs when converted purely in terms of per E1 charges, works out to rentals for connectivity of approximately 13 to 14 E1s. Therefore, when compared with charges for Passive Links, rentals for 13 to 14 E1s will be equal to rentals for one Active Link. It is a fact that Active link comprising OLTE is capable of connecting large number of E1s. The rentals for the two types of links, i.e., active and passive therefore give an impression that there is an imbalance because in the latter case neither the space is being utilized nor the air-conditioning which in case of active links is being used. We therefore direct that the Respondent should work out a realistic formula for charging of rentals for passive links based on actual use of infrastructure.

30. In view of the above, since we have directed that existing passive links will continue as hitherto fore, we direct that Respondent should allow augmentation of the POIs in future wherever required. For this, of course, the Respondent can increase the rentals on the formula they will work out themselves.

31. Petition disposed off accordingly.

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

.....
(Vinod Vaish)
Member

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

* The above are protective devices to provide safety to electronic equipment against high current and high voltage surges.