

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

**DATED 26th May, 2006**

**APPEAL NO. 6 of 2005**

Videsh Sanchar Nigam Limited ... Appellant  
Having its registered office at  
Videsh Sanchar Bhavan,  
Mahatma Gandhi Road,  
Mumbai-400 001

Vs.

Telecom Regulatory Authority of India A-  
2/14, Safdarjung Enclave,  
New Delhi-110 209

Union of India, Through its  
Secretary Ministry of  
Communications &  
Information Technology,  
Department of Telecommunications,  
Sanchar Bhavan,  
20, Ashoka Road,  
New Delhi

... Respondents

**BEFORE:**

**HON'BLE MR. JUSTICE N. SANTHOSH HEGDE,  
CHAIRPERSON**

**MR. VINOD VAISH, MEMBER**

**LT. GEN. D.P. SEHGAL (RETD.), MEMBER**

For Appellant : Mr.U.Hazarika with  
Mr.S.S.Choudhary and  
Mr.Nitin Khare, Advocates

For Respondent No. 1-TRAI : Mr.Meet Malhotra  
Mr.Raghvinder Singh, Advocates

For Respondent No.2-DoT : Mr.M.A.Chinnaswamy, Advocate with  
Mr.Govind Singhal, Director(BS-III),  
Departmental Representative

## ORDER

Videsh Sanchar Nigam Limited (“VSNL”), the appellant in the instant appeal is in the business of offering International Long Distance (ILD) Service and National Long Distance (NLD) Service for which it has been granted license under section 4 of the Indian Telegraph Act, 1885. The appellant was a fully Government owned company till February 2002 when part of the Government stake was divested. The respondent is an authority constituted under the Telecom Regulatory of India (TRAI) Act, 1997. By virtue of functions conferred upon it, it regulates the telecom industry. The present appeal is filed against the direction issued by TRAI under section 13 read with section 11(1)(b)(i) and (iv) of the TRAI Act, 1997, wherein the appellant has been directed by the respondent vide its letter No. 416-1/2004-FN dated 21st March 2005 to stop the sale of outbound calling cards on grounds of lack of competence under NLD/ILD license and for security reasons. It is the contention of the appellant that the respondent issued a show-cause notice vide No. 416-1/2005-FN dated 8th April 2005 based on some allegations made by some external sources about introduction of such cards by it without disclosing details of such sources and such letters. The appellant further contends that the respondent virtually reiterated the contents of the directive in the said show cause notice. It states that the following direction dated 21st March 2005 has been issued to it:

“In view of the above stated facts you are directed under Section 13 read with Section 11(1)(b)(i) & (iv) of the TRAI Act 1997 to stop the sale of the cards immediately and the sale of cards can be continued only after obtaining the approval of the Licensor. You are required to send compliance within 3 days from the date of issue of the direction.”

It has prayed for the following:

to allow the present Appeal and quashing and setting aside the impugned order and directive of 21 March 2005 (Annexure-1); and/or

to quash and set aside the show cause notice dated 8 April 2005 (Annexure-15);

(i) direct the Respondent to ensure compliance of its directive of 24 July 2002; and/or

Until such time the directive of 24 July 2002 is implemented, make it mandatory for all access providers to enable services of calling cards on their network by National Long Distance Operators (NLDOs) and International Long Distance Operators (ILDOS).

pass such other order or orders as this Hon’ble Tribunal may deem fit

and proper in the facts and circumstances of the case,

When the appeal came for directions on 25th April 2005, we directed the appellant to implead Department of Telecom as co-respondent since as per the respondent TRAI, the alleged letters mentioned by the appellant had been written to the DOT who in turn forwarded the same to the respondent. Respondent's directive and show cause notice were allowed to remain operative and DOT was impleaded as respondent No.2. No stay was granted. The case was finally heard on 12.05.2006.

It is contended by the appellant that the calling cards have been issued in accordance with the license issued to it by the licensor and the said calling cards work using Intelligent Network (IN) configuration. It states that the nature of service using the IN Technology for making NLD/ILD calls through these calling cards was presented to the TRAI on 29th December 2004. It states that the calling cards can access the IN switch which is interactive switch through a toll free number from any of the telephones of Tata Tele Service Ltd. (TTSL) and Tata Tele Services Maharashtra Ltd. (TTSML) since the intelligent network switch has been connected to the switches of these two access providers. The calling cards cannot be used on any other access provider's lines. It states that the objection has been raised by the respondents that the appellant is directly accessing the subscribers which as per the license condition is not permitted and secondly no data is available at the switch about the calling parties, thereby denying the security agencies from intercepting such calls which is a security hazard. It states that the contention of the respondent is not correct as regards security since the data is available on their switch and can be produced when required. During the arguments it came out that the data is available at IN Switch established by the appellant and the same is not available at the switch of the access provider, i.e., TTSL/TTSML, which according to the respondents is a condition as per the license.

On the issue of directly accessing the subscriber, the relevant extract from clause 2.2 of the ILD License is reproduced as under:

Clause 2.2:

“... ILD service provider shall not access the subscribers directly which should be through NLD service provider or Access Provider...”

Similarly, the copy of the NLD license is reproduced as under:

“2.2 (a) The NLD Service means picking up, carriage and delivery of switched bearer telecommunication service over a long distance network i.e., a network connecting different Short Distance Charging Areas (SDCAs). However, for the present LICENCE, the LICENSEE will only

pick up, carry and deliver Inter- Circle traffic which goes outside or across from one circle to another, from and to the network of Access Providers, excluding purely intra-circle traffic except when such pick up, carriage and delivery is by way of mutual agreement with Basic Service Provider in accordance with their respective agreed terms.”

The contention of the appellant is that it is not directly accessing the called subscribers, but is going through its sister concern and through IN platform and is therefore not violating these clauses of the license on “Direct Access”.

The Respondent No.1, however, confronts this interpretation. The learned Counsel for Respondent No. 1, Shri Meet Malhotra states that the appellant is directly accessing the subscribers from its IN platform, which is in violation of the relevant clause of the license that it has to access through Access Provider or NLD operator. Having gone through the clauses of the license, we are not very convinced with the appellant’s argument about the routing of the call through IN Switch not being direct which actually appears to be direct access to the subscriber, which is in contravention of the license provision.

The appellant raised another issue that the service through calling card was provided in accordance with the clause of network inter-connection in the ILD License which mandates that the subscribers can have a free choice to make ILD calls through any ILD service provider. This clause is reproduced hereunder:

“17.1 It shall be mandatory for all NLD service providers and all ILD Service providers to provide interconnection to each other whereby the subscribers could have a free choice to make international long distance calls through any ILD service provider. International Long Distance traffic should be routed through network of NLD service providers, to the ILD service providers gateways for onward transmission to international network. “

The appellant contends that it has created this facility of calling cards system to enable the subscribers to have their own choice of selecting an ILD service provider which is in accordance with the provisions of the license where choice of carrier is offered to the calling subscribers.

The appellant further contended that this facility of calling cards has been provided in accordance with the Regulation and not in violation of the license but on the contrary is in accordance with requirement in the license that the license provider afford selection of the carrier to the subscribers. It quoted from TRAI direction No. 404-1/2000-FN dated 24th July 2002 (Annexure-2) where the complete procedure for the same is enunciated. According to the appellant,

the system gives a facility to the subscriber to choose access provider in advance or at the time of calling by dialing the extra digits called Carrier Access Code (CAC). The selection can be either on call by call basis or on permanent basis for the subscriber making an ILD call. It states that the TRAI vide the aforesaid letter had given time frame for implementation of the same, which was adhered to by the appellant. The appellant also quoted the Department of Telecommunications (DOT) letter No. 10-50/2001-BS-I dated 27.02.2002 (Annexure-3), where appellant was one of the four service providers approved by the DOT to provide this facility for selection of carrier for the subscribers for NLD and ILD operators. To support its case, the learned Counsel for the appellant referred to TRAI letter No.404-I/2000-FN(Vol.II) dated 14.02.2003 (Annexure-5), where it has mentioned that carrier selection will continue to be mandatory. It also contended that to afford this facility on calling cards, the appellant had forwarded the tariff plan to the TRAI well in advance. The contention of respondent, however, on this whole issue was that this facility was to be provided to ILD and NLD operators only from the access providers and not through calling cards. It referred to the relevant license condition for NLD operators where it is stated that an NLD operator will only pick-up, carry and deliver switched bearer telecommunication service over a long distance network. In this context we would like to reproduce relevant extracts from letter No.404-I/2000-FN dated 24th July 2002 (Annexure-2) which has also been quoted by the appellant to support its arguments:

“Consequent upon the opening up of the National & International long distance service markets, the customer has multiple choice to route his long distance calls through long distance carriers chosen by him. As per provisions in the License Agreement & the policy directive of the government, this has to be done by dialing four extra digits called Carrier Access Code (CAC) after ‘0’ (for NLD calls) & ‘00’ (for ILD calls), which will enable the switching system of the Access Providers (BSOs /CMSOs) to identify the long distance carrier selected by the subscriber, and route the call accordingly. ...” “... Accordingly, the Authority has decided to issue this direction to the operators concerned so that they carry out the required system modifications within a stipulated time frame, and provide the customers both the facilities i.e. ‘Call by Call’ Carrier selection as well as Carrier Pre-selection. ...”

“... the Authority has come to the conclusion that the implementation of Carrier Selection i.e. both Call by Call and Carrier Pre-selection (CPS), is technically feasible in all the switching systems of the CMSOs, without any major system software modification. The same is true as far as it

relates to all new technology switching systems installed in the BSO 's network.”

The above direction of respondent No.1 implies that implementation of this system for NLD/ILD operators is allowed from Access Provider (BSOs) network. We would also like to quote excerpts from Para 1.3 of the same letter: “... *This direction has been formulated based upon the principle that the choice of carrier must lie with the caller. The caller would be able to exercise this choice in respect of both domestic long distance as well as the International long distance carrier. However, the facility may not be available at all places simultaneously, as it would depend upon the type of the switching system and the feasibility of their up-gradation to meet the requirement of Carrier Selection. In any case the question of exercising a choice would arise only if, from the area of service to which the customer belongs, the NLDO or the ILDO is in a position to pick up calls for long distance carriage by interconnecting his network to that of the Access Providers' networks.*” The content of the foregoing extracted para also brings in the importance of access provider networks from where the access has to be provided. In the case of appellant, this is being provided through IN Switch, virtually bypassing the access provider network since this facility is being offered from the IN platform created by the appellant. The basic service operators network, i.e., TTSL and TTSML is only being used as piggyback arrangement for this facility.

The appellant while arguing the case also submitted that license clearly states that ILD service provider either itself or through access provider may provide billing services to its customer as per clause 20.1 of the license. It states that this has been done through the calling cards and there is no violation of license condition on this. Clause 20.1 of the ILD License is reproduced below:

“20.1 ILD service provider, either itself or through Access Provider, may provide billing services to its customers. For this purpose, a suitable technical/commercial arrangements can be mutually made ‘with the Access Providers/National Long Distance Service providers. No separate charge shall be levied for itemized billing. The LICENSEE shall also maintain necessary records for the billing cycles as specified by the LICENSOR or TRAI from time to time. “

Appellant contends that clause 17.1 and clause 20 require a subscriber to be given a choice of LD carrier and such LD carrier can bill the subscriber directly. It made us go through the definitions of customer/subscriber and submitted that harmonious reading of these definitions with the above clauses empowers it to bill the subscriber/customer directly.

The respondent had no objection to this but it stated that billing aside, the introduction of calling cards by the appellant was total violation of the license condition and the appellant was overstepping it. The respondent also made a mention that by this billing the appellant is avoiding payment of ADC to BSNL and is depriving the licensor by avoiding payment of part of revenue as license fee which otherwise normally would be its obligation. This aspect is covered later separately.

The appellant also brought to the notice of the Tribunal that one of the reasons given by respondent No. 1 in the impugned direction and impugned show cause notice is security. During the argument the appellant has taken the position that all the security obligations and stipulations mentioned in the license under section 23 have been met by it fully. Even sub-section 23.16 of the license which mandates that the appellant shall maintain all records including called and calling numbers, date, duration and time etc. with regard to the communications exchanged on the network for a period of one year or as directed for scrutiny by the licensor/security agency is also being fully met. However, the respondent vehemently contested this issue stating that this requirement was not being met by the appellant. The respondent contends that this data is to be maintained on the switch of the basic service operator which can facilitate monitoring/interception by the security agencies. In the instant case, however, it is being maintained at IN platform of the appellant, which is contrary to the provisions of the license. The learned Counsel for respondent No.1 quoted case *of Reliance Infocomm Limited Vs. Union of India* in *Petition No.3 of 2005*, where also the records were kept at IN platform of the service provider which in the eyes of law was found to be untenable. In this case we had held that the service provider must maintain the records of the calls including the CLI of the calling subscriber at the switch which should be available to the authorities if need be. Clause 24.3 of the license stipulates the licensee to provide all tracing facility of such calls or communication etc. to the authorized officers of the Government including Police, Customs, Excise, Intelligence Department officers etc. when such information is required and Clause 26 of the license provides the authority to this licensor or its authorized representative right to inspect the sites used for extending the service. Detailed reading of the clauses of license on security reveal that the appellant is not really violating these conditions/stipulations. It is maintaining the records which can be produced for the agencies/authorities for necessary tracing/action. We do not find anywhere that it has to be specifically on the Switch of Access Provider. But, the fact is that this service, ie. Calling cards is unauthorized under the ILD/NLD license and if that be so the question of having data of an unauthorized service has no meaning. Though we are not much impressed with the contention of the respondent about violation

of security clause by the appellant but on ground of eligibility of service under ILD/NLD license we grant to the respondents that appellant is at fault.

The learned Counsel for the appellant also stated that similar service was being offered by BSNL and MTNL based on IN technology and the cards of BSNL and MTNL were being interchangeably used over each other's network. It also stated that neither of these operators have NLD/ILD service and were carrying on this activity which is not authorized, whereas the appellant having got the license for ILD and NLD service is not being permitted to continue with this service. The respondent, however, contended that the cards were being issued by BSNL/MTNL being access providers. This is distinctly different from the cards being provided by ILD/NLD operator which is not authorized to do so as ILD/NLD license. The contention of the respondents was that in case the service provider like TTSL and TTSML had introduced this service, the case would have been different.

We find that the service being offered by BSNL/MTNL is exactly the same as done by the Appellant is through IN Platform only difference is that the appellant is NLD/ILD license whereas BSNL/MTNL are UAS licensees and are access providers. We have no hesitation to observe that the security aspect, however, is exactly the same for both cases, i.e. both are using IN Platform and both have records available at IN Switch with only difference between the two being type of license held.

It may be worthwhile for us to comment about *Reliance* case (cited supra). In that case Reliance while using HCD service had violated the license condition in a different manner. Reliance were routing in bound ILD calls and were processing these over the network of other operators as LD or local calls by charging the CLI which was an offence. This case pertains to outbound calls. We do agree that call data in both cases were being maintained on their respective switches. Still, the ratio of the judgement in the *Reliance* case is not applicable in the instant case.

The appellant contends that it launched the calling cards in March 2004 and forwarded the tariff plans to TRAI who in December 2004 asked it to explain the nature of service, which was explained and presented. However, a show cause notice vide letter No. 416-1/2005-FN dated 22.02.2006 (Annexure-14) was issued to the appellant of which the appellant sent a detailed reply vide its letter dated 07.03.2005 (Annexure-15). Vide its letter No.416-1/2004-FN dated 21.03.2005 (Annexure-1) the appellant was directed by the respondent to stop the sale of cards immediately stating that the sale of cards could be continued only after obtaining the approval of the licensor. The appellant contends that it

was not given opportunity to be fully heard by the authority. It quoted Appeal No.7 of 2001 *VSNL Vs. TRAI* to support its case that the concerned authority in TRAI should have heard it in the interest of natural justice. The respondent No. 1, however, contended that this was not correct and the appellant was given time and opportunity to represent its case and reply. The learned Counsel for the respondent said that as per section 35 of TRAI Act, any member can be nominated by the authority and accordingly appellant's case was heard by the Secretary, TRAI.

The respondent contended that the main aim and objective of the appellant was to save on revenue and carriage charges. On the revenue aspect it stated that being on Tax holiday for Two years the appellant was able to retain the whole revenue generated through this service a percentage of which otherwise would have been paid as license fee. Had this service been offered by TTSL or TTSML, these access providers would have paid percentage of revenue generated as license fee. The Respondent therefore contended that the whole exercise was to hoodwink the licensor, respondent no.2 to save this license fee. It said that by entering into this activity under the ILD/NLD license, the appellant was not paying the ADC. It stated that as NLDO the appellant is entitled for only carriage charges but the sale of calling cards service has other components, i.e., ADC to be paid to BSNL, termination charges etc. which are now being retained by the appellant, in clear violation of IUC Regulation.

Learned Counsel for respondent no.2, Department of Telecommunications stated that he had nothing more to say and all the issues have been squarely covered by learned Counsel for respondent No. 1.

Having gone through the documents produced in the pleadings and having heard the arguments in detail from the learned Counsels of the petitioner and the respondents, we have come to the conclusion that the appellant is not authorized to provide the service of calling cards for making out-bound long distance calls under the conditions and clauses provided by NLD/ILD license. This service can only be provided under the license of basic service operator or UAS License. By introducing this service, the IN Platform established by the Appellant is directly accessing these subscribers which is not allowed as per the license conditions. We also find that the revenue generated by the appellant and also the access deficit charge is retained by it because it is on tax holiday for two years. The licensee is under obligation to pay a part of the revenue generated as license fee. Had the licensee introduced this service through the access providers of the same group of companies, i.e., TTSL and TTSML, the revenue generated as also the other charges like ADC would have been paid to respondent No.2 and other operators as per the IUC Regulation. On the issue of

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implementation of respondent No. 1's letter dated 24th July 2002 prayed by the appellant for offering the facility for choice of the carrier for NLD/ILD licence, the facility is to be provided through the access providers. Therefore, its prayer for implementation of this directive also falls.

The appeal is dismissed.

Sd/-  
(N.Santosh Hegde)  
Chairperson

Sd/-  
(Vinod Vaish)  
Member

Sd/-  
(D.P.Sehgal)  
Member