

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

DATED 24th AUGUST, 2007

**APPEAL No.14 OF 2006
(M.A.No.134 of 2006)**

Bharat Sanchar Nigam Limited
B-613, Statesman House
B-148, Barakhamba Road
New Delhi

... Appellant

Versus

1. Telecom Regulatory Authority of India
MTNL Telephone Exchange Building
Jawaharlal Nehru Marg
Minto Road,
New Delhi-110002.
2. Cellular Operators Association of India
14, Bhai Veer Singh Marg,
New Delhi-110 001.
3. Association of Unified Telecom
Service Providers of India (AUSPI)
B-601, Gauri Sadan,
5, Hailey Road,
New Delhi-110 001.

... Respondents

AND

Appeal No.16 of 2006

1. Cellular Operators Association of India
14, Bhai Veer Singh Marg
New Delhi-110001
2. Aircel Limited
327, Anna Salai,
Teynampet,
Chennai-600 006
3. BPL Mobile Cellular Limited
BPL Centre,
1045/1046, Avinashi Road
Coimbatore-641018
4. Bharti Airtel Limited
H-5/12, Qutab Ambience,

Mehrauli Road,
New Delhi-110030

5. Birla AT&T Communications Ltd
(now Idea Cellular Ltd)
Suman Towers
Plot No. 18, Sector-11,
Gandhinagar-382011
6. Hutchison Essar Mobile Services Ltd.,
C-48, Okhla Industrial Area Phase-II,
New Delhi-110020
7. Spice Communications Pvt. Ltd.,
60-D, Sainik Farms,
New Delhi-110 062.
8. Reliance Telecom Ltd.,
Main Adm. Building,
Block No. GF-1, Village Meghapar/Padana
Taluka Lalpur., Distt. Hamnagar
Gujarat-361 280
9. Fascel Limited,
6th Floor, Saket-II, Ellisbridge,
Ahmedabad-380 006
10. Hutchison Essar South Limited
C-48, Okhla Industrial Area Phase-II,
New Delhi-110 020
11. Aircel Digilink India Limited,
C-48, Okhla Industrial Area Phase-II,
New Delhi-110 020
12. Hutchison Telecom East Limited,
Constantia Complex,
11, Dr. U.N. Brahmachari Street,
Kolkata-700 017
13. Hutchison Essar Cellular Limited
1045/1046, Aavinashi Road
Coimbatore-641018
14. BPL Mobile Communications Ltd,
BPL Centre, XL-5115,
Ashish Building, Shanmugham Road,
Kochi-682 031.
15. Dishnet Wireless Limited,
5th Floor, Spencer Plaza,
769, Anna Salai,
Chennai-600 002.

16. Aircel Cellular Limited,
5th Floor, Spencer Plaza,
769, Anna Salai,
Chennai-600 002.

17. Bharti Hexacom Ltd.,
H-5/12, Qutab Ambience,
Mehrauli Road,
New Delhi-110 030

...Appellants

Versus

1. Telecom Regulatory Authority of India
MTNL Telephone Exchange Building
Jawaharlal Nehru Marg
Minto Road,
New Delhi-110002.

2. Bharat Sanchar Nigam Limited
B-613, Statesman House
B-148, Barakhamba Road
New Delhi

...Respondents

AND

Petition No.319 of 2006

1. Cellular Operators Association of India
14, Bhai Veer Singh Marg
New Delhi-110001

2. Aircel Limited
327, Anna Salai,
Teynampet,
Chennai-600 006

3. BPL Mobile Cellular Limited
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New Delhi-110 020
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17. Bharti Hexacom Ltd.,
H-5/12, Qutab Ambience,
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- ...Appellants

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1. Bharat Sanchar Nigam Limited
B-613, Statesman House
B-148, Barakhamba Road
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2. Telecom Regulatory Authority of India
MTNL Telephone Exchange Building
Jawaharlal Nehru Marg
Minto Road,
New Delhi-110002.
- ...Respondents

BEFORE:

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

Appeal No.14 of 2006

For : Mr.Maninder Singh,
Appellant Mr.Yoginder Handoo,
Mr.Nitin Aggarwal,
Mr.Ayush Agrawal,Advocates

For : Mr.Meet Malhotra,
Respondent Mr.Ravi S.S.Chauhan,Advocates
No.1

For : Mr.Ramji Srinivasan,
Respondent Ms.Mandakini Singh,Advocates
No.2

For : Dr.A.M.Singhvi,Senior Advocate with Mr.Navin Chawla,
Respondent Mr.Amit Bhandari,Advocates
No.3

Appeal No.16 of 2006

For Appellants : Dr.A.M.Singhvi,Senior Advocate with

Mr.Navin Chawla, and
Mr.Amit Bhandari,Advocates

For Respondent No.1 : Mr. Meet Malhotra,
Mr.Ravi S.S.Chauhan,Advocates

For Respondent No.2 : Mr.Maninder Singh,
Mr.Yoginder Handoo,
Mr.Nitin Aggarwal,
Mr.Ayush Agrawal,Advocates

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Petition No.319 of 2006

For : Dr.A.M. Singhvi,Senior Advocate with
Petitioners Mr.Navin Chawla,
Mr.Amit Bhandari,Advocates

For : Mr.Maninder Singh,
Respondent Mr.Yoginder Handoo,
No.1 Mr.Nitin Aggarwal,
Mr.Ayush Agrawal,Advocates

For : Mr. Meet Malhotra,
Respondent Mr.Ravi S.S.Chauhan, Advocates
No.2

ORDER

The appellant has filed the present appeal challenging the decision/direction of the Telecom Regulatory Authority of India (hereinafter referred to as 'The TRAI') dated 11th September, 2006 whereby the TRAI has rejected the claim of the appellant for revenue sharing among operators in respect of roaming calls, national as well as international. According to the TRAI there is no justification for revenue sharing arrangement amongst the operators in respect of roaming calls. The TRAI is of the view that the appellant is only entitled to termination charge @ 30 paise per minute payable by the operators. Thus the TRAI has reiterated its

decision that the terminating operator should get only the termination charge as prescribed in IUC Regulation.

2. The occasion for the decision of the TRAI arose as BSNL having significant market share conveyed its scheme for additional revenue share over and above the prescribed termination charge for terminating roaming calls in its network. For this it relied on commercial agreements with other operators on reciprocal basis. To deliberate upon the issue as per its established practice, the TRAI undertook a comprehensive consultative process. It issued a Consultative Paper on 16th June, 2006 on “admissibility of revenue share between Visiting Network and Terminating Network for roaming calls”. Comments were invited from stakeholders. The comments so received were put up on TRAI’s website and were also deliberated upon with stakeholders in an open house discussion held on 17th July, 2006. In the consultation process it emerged that the terminating charge is cost based and is determined on the principle of work done even in case of roaming and that terminating network does not incur any additional cost for handling calls from roaming subscribers. The principle of cost based termination charge finds support in the Regulation. The TRAI has given detailed reasons for it in the Annexure to its impugned decision dated 11th September, 2006.

The appellant has challenged the decision of the TRAI on the following grounds:

- (a) Claims on sharing the revenue on roaming calls in the ration of 50 : 50 on reciprocal basis with the private operators is based on the interconnect agreements entered into by BSNL with the private operators. According to the appellant, TRAI has no jurisdiction to interfere with, override or supersede the interconnect agreements mutually entered into by the two parties.

- (b) The private operators are treating roaming calls as a special category and are charging accordingly. These charges are much more than the charges prescribed in the IUC Regulations. They are charging Rs.3 – 5 per minute for National and Rs.100 per minute for International Roaming Calls. Since the appellant's network is also being used for calls made by the roaming subscribers, the appellant claims that it is entitled to a share from additional revenue being generated by private operators based on the principle of work done.
- (c) According to appellant, the respondent has undertaken this exercise on getting complaints from private operators. The TRAI has heard the competing parties and given its decision. This amounts to exercise of role of an adjudicator, which the TRAI does not enjoy. The TRAI has only a regulatory power. But this is not an exercise of regulatory power. Adjudicatory function is in exclusive domain of the TDSAT. The impugned order of the TRAI is thus without jurisdiction.

3. The appeal was heard concurrently along with Appeal No.16 of 2006 and Petition No.319/2006. Hence, this common order.

(a) Interconnect Agreements

4. Mr. Maninder Singh, learned counsel for the appellant stated that the appellant and private operators had entered into interconnection agreements as per terms of which the appellant is entitled to revenue share on national and international roaming calls. These interconnect agreements with the private operators were finalized after mutual negotiations. He further said that in order to implement IUC dated 23.3.2006, appellant had issued circulars in which one of the terms was for revenue share. Some of the operators, according to Mr. Maninder Singh, raised frivolous complaints on this circular which gave rise to a consultation paper issued by the TRAI followed by the decision now under challenge. He further contended that it is an admitted position that the provision for revenue share on roaming charges on reciprocal basis are in

existence in the interconnection agreements between the BSNL and the private operators executed from year 2005 onwards. A copy of an agreement dated 25.11.2005 is placed as a sample in petition No.319/2006 and a sample agreement is also placed in the appeal of the BSNL being Appeal No.14/2006 dated 26.09.2006. The circular of BSNL was mere implementation of the interconnection of networks agreements which included revenue share for roaming calls as one of the clauses and the private operators knew this all along.

5. We were made to go through relevant clauses in the interconnect agreements. There is no mention of revenue share in the main body of the agreements. In the main body of the agreements it was only stated that roaming calls will be treated as separate calls, as separate category. The clauses of main agreement referred to by appellant in this behalf are:

“Clause 2.1.5.1 The CMTS PROVIDER will not be permitted to transmit or handover to BSNL at the Point of Interconnect provided under the agreement, unless mutually agreed, the traffic originated from Network of any other service provider. Inter-network call forwarding shall not be permitted to each other’s network. The use of any supplementary service across the networks shall be based on mutually agreed terms and conditions between the two parties.

Clause 2.1.5.2. Calls from fully mobile subscribers of other telecom service providers of different service area (National Roaming) or other country (International Roaming), roaming in the network of CMTS PROVIDER shall be treated separately for the purpose of charging and routing.”

These clauses have nothing on revenue sharing. It is only in the Annexure to Schedule-VI to the main agreement that revenue share of calls is mentioned. Dr. Abhishek Singhvi and Mr. Navin Chawla, learned counsel for the private operators argued that the contention of BSNL that circulars were issued by it to implement the IUC, is a farce since the IUC does not make a mention of roaming calls and neither for sharing the revenue for such calls. If the interconnect agreements based on mutual negotiations were meant to implement IUC, then how could such

agreements include points which are not in IUC. They further contended that such additional charge amounts to additional termination charge getting accrued to the appellant which is against the spirit of IUC. The impleaded respondents also contended that agreements were got signed from them by BSNL under duress with threat of disconnection of points of interconnect. It was also brought to our notice by Mr. Chawla that some agreements were signed even after the order now under challenge. The counsel for respondents brought to our notice a judgment of the Delhi High Court in C.W.P. No. 23105 of 2005 which gives freedom to TRAI to fix the terms of interconnection. According to Dr. Singhvi, the judgment of TDSAT relied upon by BSNL which was based on Delhi High Court judgment does not hold water since the Single Judge Delhi High Court judgment has been re-visited by the Division Bench of Delhi High Court. We heard the arguments by both the sides on the validity of interconnect agreement and jurisdiction of TRAI to ensure efficient interconnection. We would like to concentrate on the basic issue of revenue share whether it can be introduced by parties beyond the IUC laid down by TRAI.

6. The appellant's case for revenue sharing is based on an alleged provision for this purpose in the interconnect agreements which the appellant claims to have with the private operators. The onus lies on BSNL to show that the Agreement contains such a clause. We have noticed above that the learned counsel for appellant was unable to point out any specific clause in the agreements regarding revenue sharing. Clauses 2.1.5.1 and 2.1.5.2 quoted above do not contain any such provision. The appellant has tried to fill this gap by drawing attention to a Schedule to the agreement and then to an Appendix to the Schedule to the agreement. The preamble to the Schedule claims that the schedule is as per the IUC Regulations. The Schedule has nothing on revenue sharing. It may be pointed out here that this is admitted case of the parties that the IUC Regulations are totally silent on revenue sharing. The Schedule contains an Appendix and in a table to the Appendix the concept of revenue sharing has been introduced. The respondents challenged the manner in which revenue sharing is sought to be introduced. They do not deny

having signed the agreements but they plead duress in this behalf saying that they had no alternative but to sign agreements otherwise they would not have been able to function because the BSNL was threatening to disconnect the service to them. We are unable to persuade ourselves to approve the manner in which the appellant has tried to introduce revenue sharing in the mutually arrived interconnect agreements. BSNL being a Government undertaking should have displayed a fair and honest conduct and such crucial clause ought to have found place in the main body of the agreement. Revenue sharing is fundamental issue for both the parties having significant financial repercussion. It should have formed part of the main agreement. The manner in which it has been inserted in the Appendix to the Schedule to agreement gives credence to the argument of the respondent that it has been surreptitiously introduced in the Appendix to the Schedule to agreement.

7. The IUC Regulations issued by TRAI, starting with first Regulation in 2003, cover the charges to be paid by one operator to the other for carriage and termination of the calls. The charges for origination have been kept under forbearance. The IUC also covered Access Deficit Charge (ADC) to be paid on various types of calls by the operators. The IUC, however, does not cover the roaming calls. The charges to be levied by operators for roaming calls are covered under a separate Tariff Order issued by TRAI. The charges for roaming calls are being recovered from the roaming subscribers by the operators within the limit laid down by the Tariff Order. Whatever amounts are being charged by the private operators from their subscribers is the prerogative of the private operators as they confine themselves within the IUC Regulation and the Tariff Order issued by TRAI. The appellant does not automatically get the right to share this revenue of the private operators. No rule/regulation permits this type of revenue sharing. Revenue share is a term used by the Government wherein licensor directs the licensees to pay the license fee based on the percentage of their gross revenue. Other than this, in multi-network scenario, the operators are entitled to their share of charges for

origination/carriage/termination/ADC etc., for which the IUC Regulation is issued from time to time. Mutual agreements are subject to IUC Regulations. In a conflict the IUC Regulations will prevail. We have already noticed that IUC Regulations do not contain any provision for revenue sharing. The appellant has on its own started making claim for revenue sharing on the basis of alleged provision in mutual agreements. This has been turned down by the TRAI through the impugned order. The TRAI enjoys this power by virtue of Section 11(1)(b)(iv) of TRAI Act. We are unable to find fault with the impugned decision of the TRAI. The argument of the appellant is, therefore, rejected.

(b) Profits being made by Private Operators

8. BSNL contends strongly that the operators are treating roamers' calls as special and not as local calls and these very operators are charging tariff for such roaming calls much beyond the IUC. Mr. Maninder Singh, learned counsel for the appellant states that the whole exercise is anti-consumer. This way the consumers end up paying more. The contention of the appellant, therefore, is that if the private operators do not charge such extra revenue, he has no claim. It is only for the extra revenue earned by private operators that the appellant is trying to chip in for a share. During the hearing, the learned counsel for the respondent, TRAI, stated that an exercise has already been undertaken and the routing of calls of roamers has been weighted and new charges have been prescribed which are cost-based. Resultantly, national roaming charges have been reduced by 56%. Thus it was said that since the new regime which is operative has brought in cost-based roaming charges, there was no case for the appellant to agitate. In any case, according to the impleaded respondent COAI, the appellant has no case to ask for any share of revenue of other operators. We find that basic premise of appellant asking for a share in the revenue is because of the alleged extra revenue being generated by private operators. This cannot become a legitimate cause for asking for a share in this revenue.

(c) Whether the impugned direction is without jurisdiction

9. On the issue raised by the appellant that this was virtually an adjudication process based on complaints received from some private operators for which TRAI has no jurisdiction, the counsel for respondent TRAI stated that it was not an exercise to adjudicate disputes. He said that a few operators did write to the TRAI about the unjust demand of BSNL for sharing their revenue. A consultation paper was issued on 16-6-07 where views of all stakeholders including appellant were taken. After hearing the concerned parties, TRAI came to a decision which is in discharge of its regulatory function. Mr. Meet Malhotra contended that sub-clause (iv) of clause (b) of sub-section (1) of section 11 of the TRAI Act, 1997 specifically confers powers upon TRAI to **“regulate arrangement amongst service providers of sharing their revenue derived from providing telecommunication services”**. He said that BSNL is unnecessarily diverting the attention of the tribunal by citing the order dated 27-4-2005 in Appeal No. 11 & 12 of 2002 wherein the Tribunal had held that the TRAI cannot override the terms and conditions of license agreements and the terms of interconnectivity. He further said that the said order of the Tribunal is not applicable in this case as the power of the TRAI under sub-clause(iv) of clause (b) of sub-section (1) of section 11 of the TRAI Act, 1997 (which relates to regulation of arrangement amongst service providers of sharing their revenue) is independent of its power conferred under sub clause (ii) of clause (b) of sub-section (1) of section 1 of the TRAI Act, 1997 which relates to discharge of functions in relation to fixing the terms and conditions of interconnectivity between the service providers and is recommendatory. He relied upon a recent judgment of the Delhi High Court in CWP No. 24105 of 2005, dated 9-7-07. The High Court has observed:

“.....We cannot accept the argument that the law does not empower TRAI to fix terms of interconnection”(para no.49).

per para 48—“ The amending Act has bifurcated the functions of the TRAI. It must now make recommendations under section 11(1) (a) and by virtue of section 11(1)(b) must discharge several functions, including fixing the terms and conditions of interconnectivity between service providers, maintain interconnect agreements etc., as we have already adumbrated above.....(para no. 48).”

10. Mr. Malhotra stated that it was a deliberate exercise as a result of which decision was communicated vide the impugned letter that BSNL has no case for revenue share. We agree with the respondent TRAI and do not find any merit in this issue raised by the appellant. The regulator has to get views, comments, suggestions and even complaints from various stakeholders and must act on them in accordance with the TRAI Act to mitigate these difficulties and also to ensure proper interconnections between the networks. TRAI has discharged its function as the statute mandates it to do. To hold that TRAI was performing adjudicatory function in facts of the present case would render TRAI completely non functional. What the TRAI did was part of its normal procedure in discharge of its functions. We reject the argument that the impugned order is in the nature of an adjudicatory order which is beyond the jurisdiction of the TRAI.

11. The appellant relied upon our judgment in appeal No. 7 of 2005 wherein based on the complaint from BSNL about likely grey market and likely misuse of NLD and ILD calls to be passed as roaming calls, TRAI had issued regulation whereby an ADC of 30 paise per minute for national roaming and Rs. 3.25 per minute for international roaming was introduced. According to Mr. Maninder Singh, TRAI by granting this ADC had accepted BSNL's demand of revenue share which was given in the form of ADC. He said that even in that appeal, BSNL had said that there case was for revenue share and not ADC. This was done to put a stop to likely misuse of private operator's NLD/ILD calls as roamers' calls as alleged by BSNL. This we had struck down in Appeal No. 7 of 2005 on the basis that Regulator could not take recourse to ADC for such an action to stop likely misuse of networks by operators. We observed that surely the TRAI had other measures to check this. This was an appeal filed by COAI against TRAI in which BSNL was impleaded party. BSNL's stand was also that it was not interested in ADC but revenue share with the private operators. On this issue of revenue share, we had specifically

mentioned in the judgment that we would not like to comment anything on this aspect since it was not a part of the Appeal. The Appeal was filed by COAI against TRAI and BSNL was only an impleaded party since it was the recipient of ADC.

12. As noted above, the respondents have challenged the mutual agreements on the ground of duress. Their plea is that they had no option but to sign the agreements as BSNL is in a dominating position and without utilizing its service the private operators could not survive. We are unable to accept the plea of duress made by the respondent. There is no duress simply because a party has to enter into a contract by reason of the fact that the other party is one of the monopoly suppliers.

13. As a matter of fact when we are rejecting the claim of the appellant for revenue sharing with private operators allegedly based on mutual agreements, no other point really needs to be considered. When the foundation of the case goes nothing is left. In our view the appellant has not been able to make out a case for revenue sharing on the basis of mutual interconnect agreements. We further hold that even if such a provision was there in the interconnect agreements which the BSNL has with private operators, the TRAI was legally competent to interfere with the same and therefore, the impugned decision of the TRAI dated 11th September, 2006 cannot be challenged by the appellant. TRAI enjoys a statutory mandate in as much as Section 11(1)(b)(iv) of the TRAI Act requires it to regulate arrangements amongst service providers for sharing their revenue from private telecommunication services. This power of the TRAI overrides private arrangements or agreements between the parties and as a matter of law, the TRAI is empowered to lay down provisions which may require modifications or supersession of such mutual agreements. In pursuance of the said power the TRAI has ruled against revenue sharing. The said order is binding on the appellant. The argument raised by the appellant is qua the power of the TRAI to interfere with mutual interconnect agreements. We reject the argument and uphold the power of the TRAI in this behalf in view of Section 11(1)(b)(iv) of the TRAI Act.

14. The appeal has no merit and is dismissed. No costs.

15. With this Order, Appeal No. 16 of 2006 and Petition No. 319 of 2006 also stand dismissed.

.....**J**
[Arun Kumar]
Chairperson

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