

TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL**NEW DELHI****DATED 19th MARCH 2007****Petition No.148 of 2005**

BPL Mobile Communications Limited ...Petitioner
Vs.
Mahanagar Telephone Nigam Limited ...Respondent

BEFORE:

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

For Petitioner : Dr.A.M.Singhvi,Senior Advocate with
Mr.Rishi Agarwal,Advocate

For Respondent : Mr.Arun Kathpalia with
Mr.Vivek Malik,Advocates

ORDER

1. The Petitioner M/s BPL Mobile Communications Ltd. is a private cellular mobile telecom service provider in the city of Mumbai. The Respondent M/s Mahanagar Telephone Nigam Ltd (MTNL) is a telecom service provider for fixed and mobile services in Mumbai and Delhi and is in the public sector.

2. According to the Petitioner, in order to provide interconnection between its network and the MTNL network, it has installed certain end equipments by way of interconnecting links in the exchange buildings of the Respondent at Prabha Devi and Shivaji Park. These were installed on 1/4/1995 and 6/7/98 respectively. The area occupied for this purpose is stated to be 0.25 sq.mtr. (about 3 sq. feet) at Shivaji Park exchange and 0.63 sq.mtr. (about 7 sq.feet) at the Prabha Devi exchange. Initially the Respondent charged the Petitioner Rs.1.00 lakh per site per annum as lump sum amount based on a circular of the Department of Communications dated 25/4/1997 which is at Annexure 'A' to the petition. Around November 2000, the Respondent revised the charges for the use of the said space from Rs.1,00,000/- to Rs.3,77,408/- per annum with retrospective effect from 1995. This increase was accepted by the Petitioner since the previous fixation of rent was provisional in nature. However, around 1/7/2003 the Respondent

increased these charges from Rs.3,77,408/- to Rs.21,85,020/- per annum per exchange with retrospective effect from 1/4/2001. A copy of demand note dated 1/7/2003 is at Annexure 'B' to the petition, which indicated that this related to space and electricity charges and the period of the demand was indicated as 1/4/2003 to 31/3/2004. The Petitioner protested against the said increase vide its letters of 9/7/2003, 6/8/2003 and 5/2/2004. The Respondent replied vide its letter of 7/12/2004 that the demand made was in order and refused to reduce the same and informed that the total amount payable based on retrospective revision of rates w.e.f. 1/4/2001 upto 31/3/2005 was Rs.1,59,70,528/- By letters dated 11/2/2005 and 21/2/2005 the Respondent further informed the Petitioner that the revised charges would hold good only upto 21/12/2003 and that from 21/12/2003 onwards revised charges of Rs.8,00,000/- per annum per rack would become effective and the aggregate amount payable by the Petitioner for the period ending 31/12/2005 was Rs.2,46,71,710/-. The Petitioner protested vide its letter of 23/2/2005 (Annexure-1 to the petition). By its letter of 20/6/2005, the Respondent stated that the Petitioner had two options for payment of the said infrastructure charges viz.

- (a) Payment for 20 sq.mtr space at the rate of earlier tariff of Rs.21,85,020/- per annum, or
- (b) To pay by number of racks installed in Respondent's Mumbai premises for which charges were Rs.8.00 lac per rack per annum, and the option for charging thereof was to be conveyed to the Respondent.

The Petitioner continued to protest against the increases and as a consequence received a threat of disconnection from the Respondent vide letter of 2/7/2005.

According to the Petitioner the action of the Respondent, which is a public sector undertaking of the Central Govt., is arbitrary and illegal and is in violation of settled principles which govern the actions of such entities. Further, it is stated that the enhancement of rent for the miniscule space, not exceeding one square metre, in the Respondent's premises must be based on good reasoning and should not be at the extortionate levels which have been demanded by the Respondent. It is also stated that the benefit of interconnection is shared by both the operators i.e. the Petitioner and the Respondent for handling the two way traffic whereas the entire cost of interconnection was being borne by the Petitioner. According to the Petitioner, the Respondent has acted in an unreasonable, unfair and arbitrary manner and its retrospective revision of space usage charges for use of space of less than one square metre is lacking in objectivity and not based on any study or scientific evaluation and the Respondent has also failed to disclose the method of computation of the revised charges.

3. The following Prayers have been made:

- (a) that the Hon'ble Tribunal be pleased to set aside and quash the impugned letters dated 1/7/2003, 7/12/2004, 11/2/2005 and 21/2/2005 of the Respondent.
- (b) To direct the Respondents to forbear, restrain and desist from acting in pursuance of/or implementation of the impugned letter dated 2nd July 2005 and the impugned threatened action and/or from disturbing in any manner, the use of the said space of less than one meter at Prabha Devi and Shivaji Park Telephone Exchanges for the purpose of installing essential equipment of interconnecting link so as to enable inter-connectivity of Petitioner's and Respondent's telecom network and smooth flow of traffic in both directions.
- (c) Direct the Respondent to accept Rs.3,77,408/- per annum as the rentals, as fixed by the Respondent itself.
- (d) Direct the Respondent to pay to the Petitioner charges for using interconnecting links provided by Petitioner at its own cost in proportion to the Respondent's outgoing traffic since 12th July 2002, the date of RIO Regulation (2 of 2002).

In the context of the prayer in this regard the following interim order was given by the Tribunal on 20/12/2005:

“In the meantime, the Respondent is restrained from preventing the Petitioner from using the space at Prabha Devi and Shivaji Telephone Exchanges of respondent and/or disconnecting the Petitioner's interconnectivity with the Respondent on the condition that the Petitioner pays the amount that is being paid as on date until further orders of this Tribunal”

4. In its reply the Respondent has stated that the petition is not maintainable as the issues raised therein do not constitute disputes within the meaning of Section 14 of the TRAI Act of 1997. According to the Respondent this is a dispute relating to the question of rent/charges levied for use of space and is therefore not a dispute relating to telecommunication service as such it does not fall within the ambit of Section 14 of the TRAI Act.

5. The Respondent has denied that the actual area occupied by the equipment of the Petitioner is 0.25 sq.mtrs at Shivaji Park Telephone Exchange and that at Prabha Devi Exchange it is 0.63 sq.mtrs. According to the Respondent appropriate charges are being levied by the Respondent keeping in mind the cost/charges for infrastructure for providing accommodation, power supply, space, cable ducts after taking into consideration the investment made by the Respondent in the land and building and the prevailing market rates for the same. The initial charge of Rs.1 lakh per annum lump sum levied by the Respondent was only provisional in

nature and it was categorically informed to the Petitioner that the same would be finally calculated at a later date. The increase of the charge for the use of space to Rs.3,77,408/- per annum was thereafter calculated by the Respondent pursuant to a detailed examination of the issue by a Committee keeping in view various factors such as its fixed investment costs, provision of infrastructure, prevailing rates for land and building effective as of 1995 as had been agreed upon between the parties. The Respondent denies that the Petitioner could consider the same to be the final amount payable by the Petitioner without requiring any further revision. The Respondent has denied that it has arbitrarily and unilaterally increased the charges. In regard to the Demand Note dated 1/7/2003 raised by the Respondent on the Petitioner for the period 1/4/2003 to 31/3/2004 for an aggregate sum of Rs.21,85,020/- , it is stated that it was raised on the basis of the calculation taking into account land, building, apparatus and plants, electrical installations including power panels, cables, transformers, electrical fittings, air-conditioner, fire detection and fire fighting system, 25 KVA engine alternator, 50A power plant and 200 AH battery set and that the details of the said demand note were duly made available to the Petitioner.

According to the Respondent both the Exchanges are located in commercially prime up-market locations in Mumbai. Since there was a sharp increase in the rentals, costs and other charges, the Respondent constituted a Committee sometime in 2002 at Corporate level to decide the charges/rental to be collected for space, air-conditioning, power supply, maintenance etc. being provided in the Respondent's telephone exchange buildings. The Committee, after taking into account various elements such as current land costs, power back up etc., determined a rate of Rs.21,85,020/- for a room of approximately 20 square meters in its telephone exchange. All Service Providers, including the Petitioner, using the aforesaid space and related facilities of the Respondent were accordingly informed of the increased rentals for such use. Initially, it was proposed that the revised rates would be charged retrospectively from 2001 but subsequently the Respondent agreed that the charges would be levied prospectively with effect from the date the revised rates were notified. After elapse of sometime, a Committee was again constituted at corporate level by the Respondent to generally examine the rent/charges to be levied on a per rack basis. The Committee determined a per rack space charge at Rs.8.00 lakhs per annum and Service Providers were subsequently offered the option of either paying on a per rack basis or payment of minimum 20 sqm. of space at Rs.21,85,020/- per annum.

The Respondent has pointed out that all service providers have paid to the Respondent the revised rental/charges for the space occupied by them and the facilities used, either on a space allocated basis or on a per rack basis. The only defaulter is the Petitioner who is continuing to use the space provided by the Respondent, yet insisting on paying at rates fixed as of 1995. According to the Respondent, if the Petitioner is of the view that the space charges levied by the Respondent are high, it is at complete liberty to shift its equipment elsewhere. The stand of the Respondent is that the Petitioner, who has racks installed at Prabha Devi Telephone Exchange

and Shivaji Park Telephone Exchange, must pay either for each equipment/rack at the rate of Rs.8.00 lakhs per annum per rack or must pay on the basis of space at the rate of Rs.21,85.020/- per annum with effect from April 2003. The Respondent has also clearly taken the stand that the space usage charges cannot be maintained at the same level for all times under any valid commercial principles and that it was in no way the responsibility of the Respondent to provide space and other facilities to the Petitioner at subsidized rates. However, it was the Petitioner who was acting unfairly and even while using the space and facilities of the Respondent, was attempting to evade its liability for utilizing the space and facilities of the Respondent at its telephone exchange. According to the Respondent, the present petition, therefore, is merely an attempt on the part of the Petitioner to avoid the payment of the charges which it is lawfully liable to pay to the Respondent for installing its equipment on the Respondent's premises and for availing its facility. The Respondent has stated that the Petitioner is under no compulsion to utilize the space of the Respondent and is well aware that setting up a similar infrastructure at its own cost as is being provided by the Respondent will require an investment of crores of rupees. The Respondent is, therefore, well entitled to charge for the space etc. provided by it to the Petitioner.

6. Based on the pleadings we need to basically decide the following three issues in this case:

(1) Whether a dispute arising on the hiring of space by the Petitioner for the purpose of placing certain end equipment in the premises of the Respondent would be construed as one relating to payment of rent by a tenant to a landlord or licensee to a licensor and as such cannot be treated a dispute for the purposes of Section 14 of the TRAI Act. In short whether in this background the present petition is maintainable before this Tribunal.

(2) Whether the Respondent is free to impose charges for the use and occupation of such space as has been done in the instant case and such fixation of charges cannot be interfered with by the Tribunal.

(3) Relief that can be given to the Petitioner.

7. Based on the extensive arguments of Dr.Abhishek Singhvi, Senior Counsel on behalf of the Petitioner and Shri Arun Kathpalia, Counsel on behalf of MTNL we now proceed to deal with each of the above issues:

7.1 **Maintainability of Petition before the Tribunal:** The Scheme of the TRAI Act 1997 is such that the TDSAT has been conferred jurisdiction to adjudicate and decide 'any dispute' between two telecom service providers subject to the exceptions specified in the Act itself, namely,

“(A) the monopolistic trade practice, restrictive trade practice and unfair trade practices which are subject to the jurisdiction of the Monopolies and Restrictive Trade Practices Commission established under sub-section (1) of section 5 of the Monopolies and Restrictive Trade Practices Act, 1969 (54 of 1969);

“(B) the complaint of an individual consumer maintainable before a Consumer Disputes Redressal Forum or a Consumer Disputes Redressal Commission or the National Consumer Redressal Commission established under section 9 of the Consumer Protection Act, 1986 (68 of 1986);

“(C) dispute between telegraph authority and any other person referred to in sub-section (1) of section 7B of the Indian Telegraph Act, 1885 (13 of 1885):”

It is an admitted position that the Petitioner as well Respondent are service providers. It is also true that for purposes of providing the services to the general consumers interconnection link between the Petitioner and the Respondent has been made mandatory. For the purposes of providing interconnection certain equipment has to be placed at the Respondent's exchange by the Petitioner so that the network of the Respondent and the Petitioner's network could be interconnected with each other. The placing of the equipment at the Respondent's exchange is a part and parcel of providing the service and is unavoidable. The Respondent seeks to charge from the Petitioner certain amounts annually for providing space in its exchange for housing the interconnection equipment and related facilities. These charges are clearly related to the interconnection arrangements between the telecom network of the Petitioner and the Respondent. In our view since the dispute is directly related to the said charges and is between two telecom service providers, it is very much maintainable before this Tribunal. In our view it would be quite simplistic to treat it has a mere dispute between a landlord and a tenant for use of space belonging to one by the other.

7.2 Are the charges fixed by the Respondent arbitrary and unfair and whether this can be interfered with by the Tribunal.

The changes in rates brought about from to time by the Respondent are as below:

1.3.1995 to March 2003 (Rs.)	1.4.2003 to 20.12.2003 (Rs.)	21.12.2003 onwards (Rs.)	20.6.2005 (Rs.)
3,77,408 Per annum per site	21,85,020 Per annum per site	8,00,000 per bay per annum & therefore Rs. 88,00,000/- for Prabha Devi	Option between 8,00,000 per bay per annum or Rs.21,85,020 per annum per site.

While on the one hand it was argued on behalf of the Respondent that it was under no obligation to inform the Petitioner about the basis on which the rates were charged from time to time, the learned counsel for the Petitioner stated that it was a well settled legal position that the Respondent being a public sector entity and consequently an instrumentality of the state, it was expected to act in a fair and reasonable manner and in the matter of fixation of charges ought to have followed well established and easy to understand principles for laying down charges rather than fixing these at extortionate levels.

The learned counsel for the Respondent stated that all decisions relating to fixation of charges were made on the recommendations of duly constituted Committees and details of calculations were also made known to the Petitioner. In this regard he drew our attention to Annexure R-1 to its main reply which is the report dated 8/11/2002 of the Committee constituted by MTNL on infrastructure charges for space, power etc. to be levied on private operators. The set of papers enclosed as Annexure R-1 interestingly indicate that at some stage TRAI had intervened in this matter and the Committee constituted by MTNL considered the matter and apparently recommended a set of principles and also worked out and recommended infrastructure charges as per the statement enclosed at Annexure-V to the said report.

We have not been informed by any of the sides on the extent of involvement of TRAI in this matter and what was the outcome of the intervention of TRAI referred to in the minutes of the Committee set up by MTNL in 2002. It is however clear that the revised charges of Rs.21,85,020/- were based on the report of a Technical Committee constituted by MTNL which was an internal committee. Since the increase from Rs.3,77,408/-, (fixed sometime in 2000), to Rs.21,85,020/-, fixed in 2002), represented almost a five fold increase we tried to see the justification and reasoning given by the Technical Committee. From Annexure-V we find that a major component of Rs.21,85,020/- is constituted by costs attributable to land (Rs.1569000/-). The break-up of calculation under this head shows that a sum of Rs.8,02,000/- has been shown towards maintenance charges of land at 16.04 per cent of the total cost of the land of Rs.50.00 lakhs computed at Rs.1,25,000/- per sq.mtr. for an area of 40 sq.mtrs. and an amount of Rs.1,67,000/- has been shown as depreciation charges @ 3.34 per cent of the capital cost of the land.

These two amounts by themselves would add up to Rs.9,69,000/- which constitutes 44% of the charges levied. Also as indicated by the Petitioner the rates fixed earlier were on the basis of assumed area of 64 sq.ft. whereas in the new calculations a minimum area of 20 sq.mtrs (i.e.218 sq.ft.) has been assumed. This has to be seen in relation to the contention of the Petitioner that a space of less than one sq.meter is actually being utilized by the Petitioner for the placement of its equipment. The report of the Technical Committee does not adequately address these aspects and no light has been thrown on why different assumptions were being

made regarding the extent of land and building for the purpose of costing. We are definitely left with an impression that the calculations have been made without giving adequate justification for the various assumptions made which have a vital bearing on the end result. We do not see justification for loading on to the costs the element of depreciation of land when it has been stated in the reply of the Respondent at several places that the value of land is constantly increasing in Mumbai. We also see no justification in increasing the assumed area of usage of building which was taken in the year 2000 to be 64 sq.ft. for the purpose of the costing and in the year 2002 was increased to 218 sq.ft when the actual area stated to be occupied is less than 1 Sqm. (or about 10 Sqft.). The methodology of computation of charges that has resulted in the final figure of Rs.21,85,020/- appears to be vague and non-transparent and lacks in proper reasoning and justification which is unacceptable from an entity which is functioning as a public sector undertaking of the government. As regards the calculation of rates per bay/rack of Rs.8.00 lakhs per annum, although an option had been given that the Petitioner may pay with effect from 20/6/2005 either at Rs.8.00 lakhs per bay/rack or Rs.21,85,020/- per annum, this really does not offer any choice as according to the Petitioner its liability at Prabha Devi would go up on this basis from Rs.21.85 lakhs to Rs.88.00 lakhs per annum. Annexure R-4 to the reply of Respondent also confirms this position.

We find that the procedure followed by MTNL in the fixation of charges for use of space by the Petitioner is more of an exercise to somehow enhance these charges at regular intervals. We desist from using the word "extortionate" in this regard but we see that the line is very thin, in the facts and circumstances of the case, between the charges being described as exorbitant or extortionate. In fact we are confronted with a situation where in effect the Respondent is charging Rs.21.00 lakhs per annum for use of less than one sq. meter of space in its exchange. This translates to a rate of around Rs.17,500/- per sq. feet per month. Even assuming that this charge subsumes the cost of air-conditioning, power consumption and maintenance, it does appear to be an astronomical amount. Considering that this was an almost five fold increase within a period of three years over the earlier space usage charge of Rs.2500/- per month per sq. feet, which was by no means low, and the rationale for doing so has also not been made known we are unable to accept the arguments of MTNL that it has acted in a fair and reasonable manner even though it may have been based on the recommendation of a Technical Committee. Except for a bald denial that the area being utilized by the Petitioner in Shivaji Park Telephone Exchange was not 0.25 Sqm and similarly at Prabha Devi Exchange was not 0.63 Sqm, the Respondent has not elaborated as to why the assertion of the Petitioner in this regard was not correct and what was the actual area of usage. The minutes of the Expert Committee (p 69 of the Petition) also do not throw any light on this matter. We would not like to say anything on the subsequent price fixation per rack of Rs.8.00 lakhs per year which is resulting in further increasing the liability of the Petitioner more than four fold at the Prabha Devi Telephone Exchange except to say that it seems to be totally unjustified.

Under these circumstances we consider it a fit situation for the Tribunal to take note of the unreasonable, unfair and rather arbitrary manner in which the Respondent who is a telecom service provider in the public sector has sought to impose exorbitant charges for housing the end equipment whereby interconnection takes place at Mumbai between the telecom network of the Petitioner and the Respondent. We consider it apt in these circumstances to quash the demand notices issued by MTNL to the Petitioner and hold that the charges fixed in the year 2000 should prevail subject to 10% annual escalation being built into the amount from 1/4/2001 onwards, on which we shall elaborate subsequently. We direct that this arrangement will continue till such time as new charges are determined by MTNL based on sound logical reasoning. In order to ensure that there is a semblance of fairness and reasonability and Respondent is not tempted to adopt an arbitrary approach in this regard as it has done in the matter presently before us, we request TRAI who at one point of time had intervened in this matter to lay down guidelines at the earliest to ensure that the fixation of such charges by service providers including MTNL is not done arbitrarily and is based on use of sound criteria and reasonable rationale and based on a realistic assessment of the commercial rentals prevailing in the market. To the extent that this infrastructure is also utilized by the Respondent for its outgoing traffic, TRAI may also see to what extent the costs need to be shared by the Respondent.

7.3 **Relief:**

We deem it fit to set aside and quash the letters dated 1/7/2003, 7/12/2004, 11/2/2005 and 21/2/2005 of the Respondent. We also direct the Respondent to charge not more than Rs.3, 77,408 per annum as rentals as fixed by the Respondent in 2000 and accepted by the Petitioner. In para 21 of the Petition, the Petitioner has stated that it was its understanding that annual escalation charges of 5% to 10% could be applied depending upon location of the area. Also, this was stated in its letter dated 4-7-2005 addressed to the Respondent (Annexure-N to the Petition,p48). No agreement has been reached between the Petitioner and the Respondent in this regard, but in view of the understanding expressed by the Petitioner mentioned above and considering that the exchange buildings are located in prime locations we consider it reasonable to direct that an annual escalation of 10% be built into the above infrastructure charges for the period starting 1/4/2001 until the coming into effect of the new charges as and when these are determined afresh. MTNL may issue fresh demand for the past period on this basis to the Petitioner and we hope that the Petitioner would immediately discharge the liabilities in this regard as soon as it gets the demand.

8. The Petition is allowed in terms of the above order.

.....J
(Arun Kumar)
Chairperson

.....
(Vinod Vaish)
Member

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