TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL
NEW DELHI

Dated 19th March 2007

PETITION No.218 OF 2006

(M.A.No.126 of 2006)

M/s Reliance Infocomm Ltd., New Delhi …**Petitioner**

Vs.

1. The Chairman & Managing Director, MTNL, New Delhi. ...**Respondents**
2. The Executive Director, MTNL, New Delhi and
3. The Executive Director, MTNL, Mumbai

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

For Petitioner	Mr.J.J. Bhatt, Senior Advocate with Ms. Manali Singhal & Ms. Anjali Chandurkar, Advocates
For Respondents	Mr. Arun Kathpalia & Mr. Samir Sagar Vasishta, Advocates

ORDER

The Petitioner is a licensed Telecom Service Provider holding licenses for Unified Access Services (UAS) (erstwhile basic operator before migration), National Long Distance (NLD) and International Long Distance (ILD), whereby it can provide these services in various parts of the country including Delhi and Mumbai. The Respondents are functionaries of Mahanagar Telephone Nigam Limited (MTNL) which is a telecom service provider in the public sector in the service areas of Delhi and Mumbai. For ease of reference we would refer to Respondents 1 to 3 and MTNL as Respondent.

2. By this Petition, the Petitioner has challenged the determination of annual infrastructure charges and all subsequent revisions thereof by the Respondent for establishing interconnection between the networks of the Petitioner and the Respondent. These infrastructure charges are paid by the Petitioner to the

Respondent for placing its terminal equipment in the premises of the Respondent's telephone exchange buildings in Delhi and Mumbai for the purpose of establishing interconnection between the telecom subscribers of the Petitioner and the Respondent. According to the Petitioner, these charges have been determined by MTNL and subsequently revised by it without any rationale and have been fixed at exorbitant levels. The Petitioner has also challenged the demand notes issued by the Respondent imposing charges in triplicate for the same equipment shared for establishing interconnection for the Petitioner's ILD, NLD and UASL (Basic Services). According to the Petitioner the Respondent has charged the Petitioner thrice by treating points of interconnection of the Petitioner's ILD, NLD and UAS Licences separately despite the use of same equipment for all the services.

In the Petition, the Petitioner has also challenged the action of the Respondent whereby it has netted off the amounts demanded from the Petitioner on account of infrastructure charges from the dues owed to the Petitioner by the Respondent, which according to the Petitioner is in violation of the terms and conditions of the Interconnect Agreement between the Petitioner and the Respondent.

3. The following prayers have been made:

(a) Declare that the infrastructure charges demanded and recovered by the Respondents from the Petitioners, since the establishment of interconnection between the two parties till date are illegal, arbitrary and null and void.

(b) Declare that the infrastructure sharing charges should be determined on the basis of a mutually agreed cost based formula.

(c) Set aside the demand notes and provisional bills raised by the Respondents upon the Petitioners on account of infrastructure sharing till date and revise the same in accordance with the mutually agreed charges in terms of Prayers (a) and (b) above.

(d) Direct the Respondent to settle the dues of the Petitioner in terms of revised charges as per prayers (a), (b) and (c) above.

(e) Declare and direct to Respondent to hold mutual discussions with Petitioner to establish need based number of POIs.

(f) Declare and direct the Respondent to treat the same interconnecting link / equipment used for the Petitioner's NLD, ILD and UASL services as a single POI and charge once for the same and not thrice for the Petitioner's above mentioned licensed services.

(g) Declare and direct that the Respondent is not entitled to deduct / set off any amount from the rightful dues payable to the Petitioner, in terms of the Clause 7.3.1 (iii) of the Interconnect Agreement.

(h) Direct the Respondent to restrain from disconnecting or in any manner taking any coercive action pursuant to the demand notes and the bills raised on account of infrastructure sharing charges.

(i) Pass such further Order / Orders as this Tribunal may deem fit in the fact and circumstances of the case.

4. This case came up for hearing before us after arguments had been concluded in Petition 148/2005 (BPL vs MTNL) in which some issues are common with those that have arisen for our consideration in the present case. For this reason we reserved orders in the BPL vs MTNL case and have proceeded to pass our orders after completion of hearing in both the Petitions.

5. Unlike the position in Petition No.148/2005 (BPL vs MTNL), in the present Petition, the Respondent executed an interconnect agreement with Petitioner on 16-4-2003 for the service areas of Delhi and Mumbai. In particular Clauses 2.1.14 and 6.5 of the said Interconnect Agreement dated 16-4-2003 read as under:

> " *Clause 2.1.14 - Irrespective of who owns a transmission system of the link interconnecting one party's exchange to the exchange of the other party, each party subject to availability and feasibility may provide accommodation for the terminals of such equipment of the other party located in its premises. Each party may permit mounting of antennae for 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. Arrangements for installation, operation and maintenance of such equipment will be arrived at by mutual agreement. MTNL will provide the services for maintenance & operation of interconnect and link equipment at its end on chargeable basis on mutually agreed terms & conditions."*
>
> *"Clause 6.5 CHARGES FOR LEASING OF RESOURCES*

As per the clause 2.1.14, irrespective of who owns a transmission system of the link interconnecting one party's exchange to the exchange of the other party, each party subject to availability and feasibility may provide accommodation for the terminals of such equipment of the other party located in its premises. However permission to mount antennae for interconnection link shall not be mandatory and will be subject to availability keeping the long-term requirement of each party in view and mutual agreement. The charges for such accommodation and infrastructure shall be as prescribed by the Interconnection Provider from time to time. The installation of the link equipment may be done by the BSO itself and no separate space will be provided by MTNL. The end link equipment will be installed in the transmission room of various buildings where interconnection will be taken by BSO. After commissioning of the end link equipment, the same shall be taken over by MTNL for operation and maintenance and the staff of the BSO will not be allowed entry for day to day maintenance. The operation and maintenance charges for end link equipment at MTNL end will be charged from the BSO along with the rental for space and other infrastructure such as AC, power etc. MTNL will undertake the operation and maintenance of interconnect equipment installed by BSO in its premise & will charge the BSO for the same. The entry of BSO's personnel on a regular basis shall not be allowed in MTNL's premises but shall be for level II maintenance on need basis."

According to the Petitioner on a true and correct interpretation of the aforesaid clauses the charges payable by the Petitioner to the Respondent, which include not only rental for space but also other infrastructure such as AC, power, etc, and operation and maintenance charges for the end link equipment at the Respondent's end, have to be determined by mutual agreement between the Petitioner and the Respondent and in any event ought to be cost based, reasonable and realistic.

On the other hand in its reply the Respondent has taken the stand that this claim of the Petitioner is ex-facie contrary to a plain reading of Clause 2.1.14 and it was the sole discretion of the MTNL to provide accommodation for the terminals of Reliance Infocomm and no right whatsoever exists in favour of Reliance Infocomm for demanding the provision of such accommodation by MTNL. This is clear from the use of the words 'each party subject to availability and feasibility may provide accommodation.' Further, the clause makes it clear that in the event MTNL agreed to provide accommodation to Reliance Infocomm, the rental for such accommodation was to be determined and prescribed exclusively by the MTNL and in the event Reliance Infocomm wished to avail of such

accommodation it was liable to pay such rates as determined by MTNL. This is clear from the words 'Rental for use of such space and mounting shall be determined by the provider of such facility.' As such the contention of Reliance Infocomm, that Clause 2.1.14 specifically provides that such charges shall be determined on mutually agreed terms and conditions violates the plain language of the clause itself. Further it is pointed out by the Respondent that in the agreement wherever parties wanted to provide for something by mutual agreement, they specially stated 'mutual agreement' and, where it was not to be by mutual agreement, the clause itself so provided. The parties have thus knowingly used words such as 'may, shall, mutual' in the said clause. Wherever there was to be mutuality an appropriate expression has been used and wherever any right was to be the sole prerogative of a party, the Agreement so provided. Reliance Infocomm cannot now urge and import mutual agreement, where none was mandated or intended.

Further the Respondent points out that there is neither any right in Reliance Infocomm to insist upon space being provided, nor is there any right vested in Reliance Infocomm to determine what rate it should pay in the event it wishes to utilize space of MTNL.

In Petition 148 of 2005 (BPL vs MTNL) there was no such interconnect agreement between BPL and MTNL in regard to infrastructure space charges. We have had occasion to deal in that Petition the contention of MTNL that it is free to determine the charges for use of such space and that M/s BPL was not legally entitled to challenge this fixation. Also according to MTNL any dispute in this regard could not be called a telecommunication dispute and did not fall within the purview of Section 14A of the TRAI Act, 1997 being essentially a dispute between a landlord and tenant.

6. We have heard the arguments of the learned counsels in this regard and we are inclined to go along with the view already taken by us in the BPL vs MTNL matter (Petition 148 of 2005) that this is a telecommunication dispute between the telecom service providers. We quote our finding as below.

> *"It is an admitted position that the Petitioner as well as Respondent are service providers. It is also true that for the 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 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 arrangements for interconnection between telecom networks 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 as a mere dispute between a landlord and a tenant for use of space belonging to one by the other"

We see merit in the argument of the Learned Counsel for the Petitioner that none of the ingredients of a landlord – tenant relationship are present. Clause 6.5 of the Interconnect Agreement makes it clear that the entry of the Petitioner's personnel on a regular basis shall not be allowed in the Respondent's premises but shall be for Level II maintenance on need basis. For establishment of a landlord / tenant relationship exclusive possession of the premises has to be with the tenant. This is not the case here. In fact, the End Link Equipment is in the possession of the Respondent.

Clause 6.5 also makes it clear that after commissioning of the End Link Equipment the same shall be taken over by the Respondent for operation and maintenance and the staff of the Petitioner will not be allowed entry for day-to-day maintenance. In fact, the charges relate not only to use of space but also operation and maintenance of the interconnect equipment. We cannot ignore the stipulation in Clause 26.3 of the License Agreement which provides that the provision of any equipment and its installation for the purpose of interconnection shall depend on mutual agreement of the concerned parties. The charges for such interconnection also find a mention in clause 2.1.14 and 6.1.5 of the Interconnect Agreement between the Petitioner and the Respondent mentioned hereinabove. Clause 26.3 is extracted below:

"26.3. The provision of any equipment and its installation for the purpose of interconnection shall depend on the mutual agreement of the concerned parties."

Thus, the present dispute is clearly in relation to the Interconnect Agreement between two service providers.

We therefore hold that it is a dispute between two service providers and it is not a simple landlord vs tenant dispute, as such it falls within the purview of Section 14 of the TRAI Act.

7. We need to address the next issue whether in the light of the provisions of the Interconnect Agreement (Clauses 2.1.14 and 6.5 of the agreement dated 16-4-2003 have already been referred to in the earlier part of the order) the charges fixed by the Respondent for the use of such space would be open for scrutiny by the Tribunal in the event of a dispute like the present one between the Petitioner and MTNL.

According to Shri Bhatt, Senior Counsel for the Petitioner it is settled law that an instrumentality of a State, such as the Respondent cannot act unreasonably or unfairly even in the field of contractual rights. Our attention was drawn to the case of *'**Jamshed Hormusji Wadia vs Board of Trustees, Port of Mumbai & Anr. {Reported in (2004) 3 SCC 214, paras 17 and 18 }** wherein the Hon'ble Supreme Court inter alia held that the Constitution of India does not envisage or permit unfairness or unreasonableness in State action in any sphere of activities contrary to the professed ideals in the preamble. Exclusion of Article 14 in contractual matter is not permissible in the Constitutional scheme. In the field of contracts the State and its instrumentalities ought to so design their activities as would ensure fair competition and non-discrimination. They cannot augment their resources but the object should be to serve the public cause and to do public good by resorting to fair and reasonable methods.'* Again in the case of ***'ABL International Ltd. & Anr Vs Export Credit Guarantee Corporation of India Ltd. & Others {reported in (2004) 3 SCC 553}** the Hon'ble Supreme Court interalia held that when an instrumentality of the State acts unfairly, unjustly and unreasonably in its contractual, constitutional and statutory obligations, it really acts contrary to the constitutional guarantee founded in Article 14 of the Constitution. Once an instrumentality of the State is a party it has an obligation in law to act fairly, justly and reasonably to a contract which is the requirement of Article 14 of the Constitution.'*

Also, the decision of this Tribunal dated 3-3-2006 in Petition No. 123 of 2005 (AUSPI vs BSNL) was cited in which the Tribunal had held as under:

> *"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."*

In view of the above legal position we are inclined to hold that even if it were to be disputed that under the said interconnect agreement the infrastructure charges were required to be fixed by mutual agreement, it is quite clear that these need to be fixed in a fair and reasonable manner. Since it has been alleged that the infrastructure sharing charges in the matter before us have been fixed by the Respondent, in an arbitrary, unreasonable manner, we are of the view that this Tribunal would be right in examining this aspect.

8. In this background we have examined whether the charges fixed by the Respondent were fair and reasonable. The facts in brief are that in Delhi, the Petitioner has established interconnection with MTNL's network at ten Points of Interconnection (POIs) between 21-11-2002 and 15-3-2004 and in Mumbai interconnection has been established at ten Points of Interconnection (POIs) between 16-7-2002 and 20-2-06. Upto the year 2002-03 MTNL was charging approximately Rs.34 lakhs per POI and from 2003-04 onwards Rs.29 lakhs per POI for the POIs with STM 16. In Delhi for the 1 POI with STM 4, Respondent charged Rs. 30 lakhs per POI and for 2003-04 onwards it was charging Rs.25 lakhs. (STM is a measure of carrying capacity)

The Petitioner made a number of representations from 2002 onwards to MTNL stating that these charges were exorbitant. The Respondent replied to the Petitioner's letter stating that Delhi and Mumbai are political and commercial capitals of the country and market rents are very high.

For Mumbai POIs the Respondent was initially charging Rs.7.75 lakhs per annum per POI which was increased to Rs.21.85 lakhs per annum per POI w.e.f 1-4-2001. Thereafter the Respondent stated that it would be charging at the rate of Rs.8 lakhs per rack per annum with effect from 21-12-2003 and that the rate of Rs.21.85 lakhs per annum per POI was to hold good for the earlier period. Subsequently by a letter dated 20-6-2005 the Respondent gave option to the Petitioner to pay Rs.21.85 lakhs annually or to pay by the number of racks installed in the Respondent's premises at the rate of Rs.8 lakhs per annum per rack.

9. According to the Petitioner it has protested from time to time against the exorbitant and arbitrary infrastructure sharing charges billed to the Petitioner by the Respondent in respect of the Delhi and Mumbai Points of Interconnection and all payments have been made under protest. After the Petitioner was given an option to either pay Rs.21.85 lakhs per POI or to pay Rs.8 lakhs per rack on 20-6-2005, the Petitioner under protest has been making payment on the basis of Rs.8

lakhs per rack. The Petitioner has elaborately set out the correspondence that ensued between the parties in relation to the alleged exorbitant and unreasonable infrastructure sharing charges, separately for the Delhi and Mumbai POIs.

Further it is argued on behalf of the Petitioner that although the Respondent in its affidavit-in-reply dated 11-12-2006 has, in support of its contention, stated that the charges were fixed by several committees at corporate levels, in the present proceedings only two purported committee reports have been relied upon by the Respondent. The first such committee report relied upon had been produced before this Tribunal in Petition No.148 of 2005 (BPL Mobile Communications vs MTNL). This purports to give a break up of charges of Rs.21.85 lakhs per POI. The second committee report relied upon by the Respondent is an annexure to the letter dated 6-4-2004 addressed to the TRAI. The annexure to the said report which is undated purports to give a breakup of the charges of Rs.8 lakhs per rack which is only a pro-rata application of the earlier amount of Rs.21.85 lakhs to an area of 32 sqft. purportedly required for one rack.

It is also argued on behalf of the Petitioner that on a bare perusal of the said reports, it is apparent that these relate to charges for Mumbai POIs only, there is no basis or rationale whatsoever for revising the earlier rates and for charging Rs. 21.75 lakhs per POI or Rs.8 lakhs per rack. The committee report appears to have been made sometime in the year 2002-03. In fact, there is no fresh consideration of facts at all and even the charges of Rs.8 lakhs purportedly arrived at on the basis of a committee report are merely a reproduction of the figures that appear in the first report.

These arguments were rebutted by Shri Arun Kathpalia, Learned Senior Counsel for MTNL. He reiterated that the charges levied by MTNL for use of its space are certainly not arbitrary or excessive. Initially the charges levied were fixed at Rs.3,77,308/- per annum made effective from 1995 by the Mumbai Unit pursuant to an examination of the matter by a Committee. Since then there had been a sharp increase in the rentals, costs and other charges. Consequently, MTNL constituted a Committee at corporate level to decide the charges / rental to be collected for space, air-conditioning, power supply, maintenance etc, being provided in the MTNL's telephone exchange buildings. The committee, after taking into account various elements such as current land costs, electrical installation costs, air conditioning, maintenance costs, power back up etc. determined a rate of Rs.21,85,020/- per month for a room of approximately 20 square meters in its telephone exchange. All service providers using the aforesaid space facilities of MTNL were accordingly informed of the increase rentals for the

use of space. He further argued that MTNL is not charging excessively or arbitrarily is also clear from the rental deed placed on record by MTNL which shows that for use of 51 sqft, along with corresponding rights of 51 sqft, MTNL is paying Press Trust of India (PTI) a sum of Rs.30 lakhs per annum at Delhi. As compared to this, MTNL is only charging Rs.21.85 lakhs per annum for approximately 200 sqft in relation to its buildings which are located in commercially prime up-market localities. Further, the cost of construction of building of MTNL is much higher as they are designed to take a load of 600kg per sqmr. and the ceiling height is also one and a half times the normal ceiling height. Importantly, all service providers barring Reliance Infocomm and BPL have been paying charges as determined by the committee. It is significant to note that from 2004 to August 2006, when the present petition came up to be filed Reliance Infocomm had also been paying these charges.

Further he pointed out that a committee was constituted at corporate level to generally examine the rent /charges to be levied on a per rack basis. The committee determined a per rack space cost at Rs.8 lakhs per annum. Service Providers were offered the option of either paying on a per rack basis or paying on space allocated, at their option. Further Reliance Infocomm admits and agrees that space charges levied by MTNL would be 2 to 3 times more than cities like Jaipur, Bangalore, Chandigarh etc. BSNL for such cities is charging Rs.2.36 lakhs per annum rack per as against Rs. 8 lakhs per annum stipulated by MTNL. Therefore, MTNL's charges are neither excessive nor arbitrary.

Also he stated that it is not correct on the part of the Petitioner to suggest that MTNL has earlier charged Rs.7.5 lakhs per annum and that now its Delhi Unit is charging Rs.29 lakhs. This is not correct in that space charges earlier were Rs.3.77 lakhs and now are Rs.21.85 lakhs. Rs. 7.5 lakhs would be with regard to two separate spaces. As far as Rs.29 lakhs is concerned, it is clarified that space charges are Rs.21.85 lakhs. However, in terms of the decision of the committee constituted, separate charges are levied for use of ducts which charges, when consolidated with Rs.21.85 lakhs add up to Rs.29 lakhs.

10. We have had an occasion to examine these aspects substantially in Petition No.148 of 2005 (BPL vs MTNL) and our findings have been as under:

> *"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 that 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."

We feel inclined to go along with the view taken in Petition No.148 of 2005 (BPL Vs MTNL) in this Petition as well.

During the course of arguments, Learned Counsel for the Respondent showed us copy of a lease deed dated 3-5-2006 entered into between the Respondent and the Press Trust of India (PTI) to bring out the point that MTNL was paying a sum of Rs. 30 lakhs per annum for use of 51 sqft of space located on a terrace for setting up its transmission equipment. This was said to be much higher than the amount of Rs.21.85 lakhs per annum which MTNL was charging for approximately 200 sqft of space located within a building. We do not find this argument convincing enough for many reasons: (a) as mentioned earlier a charge of Rs. 21.85 lakhs is being demanded for actual use of 1sqmr (about 10sqft) of space and not 200 sqft, (b) production of a solitary lease deed does not by itself establish this rate as the competitive market rate, (c) a copy of an alleged lease deed produced in the course of arguments, cannot be relied upon. There is nothing to establish its correctness or authenticity nor it was put to the opposite party earlier to enable it to respond to it, (d) the proceedings of the technical committee do not clearly reveal whether the committee took into account the commercial rentals prevailing in the market.

We accordingly direct that the infrastructure charges demanded by the Respondent from the Petitioner since the establishment of interconnection between the two parties till date be reworked and the charges fixed in the year

2000 by MTNL be adopted as the starting point and be made applicable after incorporating an escalation amount at 10 % per year from 1-4-2001 onwards. This is the arrangement we have found to be reasonable in Petition No.148 of 2005 (BPL vs MTNL)

We also direct, as in Petition No. 148 of 2005 (BPL vs MTNL) that this arrangement will continue till such time as new charges are determined 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.

We have noticed that Petitioner has during this period made payments under protest and certain amounts payable to the Petitioner by the Respondent have been set off against these liabilities on account of the infrastructure charges. On a representation made by the Petitioner to us we had in our order on 12-12-2006 clarified that "deductions made by the Respondent from the payments which the Respondent is supposed to make to the Petitioner, shall be subject to final orders in this Petition."

We direct the Respondent to rework the liability of the Petitioner on the above basis within 30 days of this order and if any excess amounts have been paid by the Petitioner the same may be adjusted against the future demands, except such of the amounts which were payable to the Petitioner by the Respondent by way of IUC charges and which have been set off against those dues. We direct any such amounts be paid to the Petitioner and accounts settled as soon as the liabilities as directed above have been reworked by the Respondent.

11. In view of the above approach the grievances of the Petitioner regarding retrospective revision of the infrastructure charges as was sought to be done by MTNL does not survive. Our attention in this connection was drawn during the course of arguments, and we have taken note, that MTNL had subsequently agreed to levy the revised charges prospectively and not from 2001 vide its letter of 16-7-2004

12. The Petitioner has challenged the action of MTNL whereby contrary to Clause 7.3.1 (iii) of the Interconnect Agreement dated 16-4-2003, MTNL has set off the Interconnect Usage Charges payable to the Petitioner by MTNL against the

liabilities of the Petitioner determined by the Respondent in regard to the infrastructure usage charges.

Clause 7.3.1.(iii) of the Interconnect Agreement is extracted below:

"All payments due to MTNL/BSO will be paid without set off (netting) or counter claim and shall be free and clear of any withholding or deductions."

Learned Senior Counsel for the Petitioner argued that the Respondent cannot adjust any amounts claimed by the Respondent against payments to be made by it to the Petitioner as the same would be contrary to the terms of payment mentioned in the interconnect agreement dated 16-4-2003 which is clear from the bare perusal of the clause reproduced hereinabove. Further that the clause reproduced by the Respondent in its affidavit dated 9-1-2007 is not the correct clause. While reference is mentioned to the interconnect agreement between the Petitioner as an NLD operator and ILD operator the same are not the subject matter of the present petition and are not relevant for consideration of this Tribunal.

We have heard the Learned Counsel for MTNL in this regard. He stated that MTNL had proceeded to set off and deduct from the Interconnect Usage Charges payable to the Petitioner by MTNL, certain port charges which MTNL claims were due to MTNL but had not been paid by the Petitioner. MTNL has admitted that in regard to payments due to MTNL no set off (netting) is allowed.

We direct in this regard that the relevant provisions of the interconnect agreement which in our view do not permit this kind of setting off be complied with.

14. We now come to the last issue namely the alleged arbitrary and unreasonable action of the Respondent in charging the Petitioner thrice in respect of Basic Services, NLD Services and ILD Services for the same equipment / switch in respect of infrastructure sharing charges

According to the Petitioner, the Respondent was charging thrice for the same equipment/switch in respect of infrastructure sharing charges for NLD and ILD Services for interconnection established by the Petitioner for Basic / UAS services. In its affidavit dated 9-1-2007, the Respondent has stated that as per their decision dated 16-7-2004, the Respondent has been levying single charges from the said date. However, the said decision was operative prospectively and the

Petitioner's claim for bill raised by the Respondent in January 2003 or March 2003 was barred by limitation.

Learned Counsel for the Petitioner argued that because the bills raised stated 'provisional' they never attained finality and, therefore, the question of limitation as raised by the Respondent does not set in. According to him, this argument is an after thought. Also according to him, firstly the bills were not provisional with regard to separate charging and if at all they were provisional it was only with regard to quantum. Secondly, no party has ever treated the bill as provisional. Thirdly, Reliance Infocomm cannot on the basis of 'provisional' being reflected on the bill, claim retrospective operation of a prospective decision, merely because it is in its favour, while at the same time complaining against any retrospective levy in respect of previous bills which had also the same 'provisional' heading.

We do not see any justification in MTNL levying separate charges on the Service Provider for use of the same rack space in respect of each service being provided by it. Since provisional bills have been issued by MTNL in regard to these liabilities we direct MTNL to correct the aberration which should not be allowed to remain uncorrected.

15. We allow the Petition on the terms mentioned above.

……………..J
(Arun Kumar)
Chairperson

……………….
(Vinod Vaish)
Member

……………….
(D.P.Sehgal)
Member