

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

DATED 14th SEPTEMBER, 2007

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Petition No.125 of 2005

M/s Bharti Televentures Limited
(Formerly known as M/s Bharti Telenet Ltd.)
Qutab Ambience (Near Qutab Minar)
H-5/12, Mehrauli Road,
New Delhi-110030.

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...Petitioner

Vs.

1. Bharat Sanchar Nigam Ltd.
Statesman House,
B-148, Barakhamba Road,
New Delhi-110001
Through its Chairman and Managing Director
 2. Mahanagar Telephone Nigam Limited
12th Floor, Jeevan Bharti Tower-1
124, Connaught Circus
New Delhi-110001
Through its Chairman and Managing Director
 3. Telecom Regulatory Authority of India
MTNL Telephone Exchange Building,
Jawahar Lal Nehru Marg,
Minto Road, New Delhi-110002.
Through its Secretary
- Respondents

BEFORE:

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

For Petitioner : Mr.Ramji Srinivasan,
Ms. Mandakini Singh, Advocates

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

Mr. Ayush Agrawal, Advocates

For Respondent No. 2 : Mr. Arun Kathpalia,
Mr. Vivek Malik, Advocates

ORDER

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The petitioner has license to provide International Long Distance (ILD) services and National Long Distance (NLD) services. The ILD service provided by the petitioner is basically network carriage service for providing international connectivity to the networks operated by access services providers and NLD service providers in India to the networks operated by foreign operators. The NLD service for the purpose of petitioner's licence means picking up, carriage and delivery of inter-Circle traffic from and to the network of other access providers. The respondent No. 1, BSNL provides inter alia access services as well as NLD services. Respondent No. 2, MTNL, is providing both cellular and fixed line service in metro cities of Delhi and Mumbai.

2. The petitioner executed interconnect agreements with Respondents Nos. 1 & 2 for interconnecting the network of the petitioner with the respondent's network for handing over of calls carried by it to the respondents' networks.

3. As per the interconnect agreements, the respondents No. 1 & 2 were supposed to raise bills on the petitioner based on bulk billing of traffic, i.e., duration of calls in terms of seconds aggregating into minutes. The billing accordingly was commenced by the respondents but was unilaterally amended vide Respondent No. 1's circular dated 24.4.2003 and Respondent No. 2's circular dated 30.4.2003 respectively changing the same to MCU/pulse rate based billing. According to the petitioner, this was done in an arbitrary and unilateral manner, thus, costing the petitioner much more than what it should cost as per the interconnect agreements, thereby

unduly enriching the respondents. Aggrieved by this act of the respondents, the petitioner has prayed for setting aside the respondents' circulars modifying the billing mechanism to MCU/pulse rate based billing and has asked for refund of the excess amount collected along with interest.

4. Learned counsel for the petitioner, Mr. Ramji Srinivasan referred to various clauses of agreement with BSNL and stated that exactly similar agreements were in place with MTNL - Respondent No. 2 also. It was submitted by the petitioner that ILD interconnect agreement's Clause 7.5.1 provides that the bills issued by BSNL will be based on bulk record. This clause is reproduced as under :-

**“7.5. SETTLEMENT OF DISPUTES REGARDING WRONG/
EXCESS BILLING.**

7.5.1. The bills issued by BSNL based on bulk record shall be *final.* In case of difference up to 0.25% +/- with the *billing record of ILDO, the amount billed by BSNL shall be treated as final. If the difference is more than +/- 0.25% but upto +/- 2%, payment shall be made by ILDO. However, reconciliation of variance shall be carried out by both parties and will be subject to dispute resolution mechanism. Variance beyond this limit also shall be subject to dispute resolution mechanism as specified in the interconnect agreement. However, ILDO shall pay to BSNL the undisputed amount plus 50% of the disputed amount subject to a minimum of an amount equal to previous month's billed amount immediately.*

5. Similarly, Clause 6.6.1 of the NLD Interconnect Agreement states that **“Access charges shall be billed by BSNL based on bulk billing of traffic recorded by BSNL at the point of interconnection.”** Mr. Ramji Srinivasan also made us go through the Interconnect Agreement and Schedule-I of the same dealing with access charges and revenue sharing, relevant clauses of which are reproduced below :-

SCHEDULE-1

ACCESS CHARGES AND REVENUE SHARING

“I. Payment for carriage and termination of Outgoing ISD Calls when ILDO's tariffs are applicable.

I(i). Minimum per minute charge payable to BSNL for carriage and termination of ISD calls originated in India and handed over by BSNL's network to ILDO's ILD network for carriage and termination outside India, when ILDO's tariffs as filed with TRAI on 26.4.2002 and approved by TRAI are applicable.

I(vi). The applicable pulse rate for measurement of minutes for payment of revenue share as above shall be 1 second.

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II(i)(e). The applicable pulse rate for measurement of said minutes shall be 1 second.”

6. Similar Clauses for NLD agreements were also quoted by the petitioner. It was further submitted that the TRAI issued IUC Regulation, 2003 in January fixing cost-based IUC laying down that settlement of such costs will be on a per minute basis. The relevant para of IUC Regulations, 2003 is reproduced below :-

SCHEDULE-VI

Schedule for International Long Distance Calls

“Access Deficit Charge for both incoming as well as outgoing calls from international long distance calls shall be Rs. 5 per minute. In addition origination/termination charges of Rs. 0.50 / 0.50 per minute shall be payable to BSO. Carriage charges to NLDO as per Schedule II shall also be applicable. In addition ILDO is required to pay towards settlement rates for Outgoing and incoming traffic between India and distant countries to the distant International carriers. Difference between Retail Tariff and Wholesale Tariff, i.e., IUCs paid for origination/ termination and carriage of calls on the national network and the international settlements paid to foreign operators may be shared through mutual negotiations.”

7. It was submitted that the bills were being raised till April 2003 as per the interconnect agreement but the problem started when the respondent BSNL issued a circular unilaterally

changing the billing method from bulk billing to MCU/pulse rate based billing which came into force w.e.f. 1.5.03. MTNL issued similar circular on 30.4.03. It was further submitted that TRAI issued IUC Regulation 2003 in October, which also supports cost-based IUC and settlement of such cost on per minute basis. The relevant para is reproduced below :-

SCHEDULE-III

Access Deficit Charge (ADC)

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“3.3 Reconciliation and Settlement of ADC : *ADC, carriage and termination payments would be based on aggregated usage in seconds (on bulk basis). The settlement would be for the aggregate total seconds expressed in terms of minutes, with the figure being rounded off in terms of the nearest minute, over the settlement period as applicable in the Interconnect Agreement. Failing agreement amongst Service Providers on the settlement period, the settlement shall be done on monthly basis on bulk basis.”*

8. The Respondent No. 1 further issued a circular on 28.4.2004, amending its circular of 29.10.2003 in line with October IUC Regulation.

9. It was submitted by Mr. Ramji Srinivasan that this whole exercise had been done to extract more charges from the petitioners. Instead of 1second pulse, variable pulse durations in seconds were brought into force which was at total variance with the original agreement entered into. The counsel for the petitioner gave an example of two calls – one of 55 seconds and other of 65 seconds durations. He said while the call of a 55 seconds was also being charged for duration of one minute and that of 65 seconds for higher duration whereas as per the agreement these calls should cost only for 2 minutes. He drew our attention to Annexure-13 showing a comparative chart where billing on MCU basis for the same duration of calls was much more than billing on bulk basis. He submitted that millions of such seconds have aggregated into crores of rupees and this action of the respondent has been unilateral and against the spirit of the agreement and also against the IUC Regulations. He submitted that the respondents had the capability of raising bills on bulk minute basis since in the subsequent letters, the respondents

have raised observations with respect to bills on per minute basis. The petitioner therefore submitted that the respondents' demands on the revised MCU pulse rate based billing based on their circulars changing over to MCU pulse rate based billing be set aside and the respondents be directed to refund the excess amount charged along with interest.

10. Respondent No. 1 contended that this petition is not maintainable since it is fully covered by this Tribunal's Order dated 11.11.2005 in Petition No. 48 of 2004. It was submitted that exactly same issue was raised and same circulars were questioned by the petitioner and the judgment squarely covered these issues. Mr. Maninder Singh made us go through the relevant portions of Petition No. 48 of 2004 where also in the prayers same relief was sought as is being sought by the petitioner in this case. Learned counsel for the petitioner however objected to this and said that the present petitioner was not a party to that petition and he also said that the agreement of one second pulse billing was entered into by the respondents with the petitioner as NLD and ILD licensee. Such agreements were not entered into with the other licensees and therefore this petition is very much in order.

11. In Petition No. 48 of 2004 Bharti Cellular was one of the petitioners as a cellular operator. It is a fact that various entities of Bharti got merged with Bharti Televentures but that does not mean that the present petitioner as NLD and ILD licensee was covered by the earlier petition since it was not one of parties as petitioner. The group may be same but licensee companies are different. It has also been submitted by the petitioner and agreed to by the respondent that the Clause **“the settlement must be on the aggregate total seconds expressed in terms of minutes”** finds place in NLD/ILD interconnect agreements of the petitioner with respondents. Though it is a fact that this clause was challenged by petitioner in Petition No. 48 of 2004, this clause of the agreement found in NLD/ILD Interconnection Agreement was not existing in the agreement signed by the Bharti Cellular Limited as cellular licensee. Another aspect which is not common in the two cases is that while in Petition No. 48 of 2004, the petitioner and respondent were accessing each other's networks and paying to each other the

access charges; whereas in the Petition under consideration, the calls are carried by NLD/ILD operator into the petitioner's network and it is one-way billing. We therefore feel that this Petition is very much in order. It is a different matter that all these service providers including NLD/ILD operators were covered by the circular issued by BSNL wherein it incorporated the MCU billing but our judgment covered only the petitioners where in that memo of parties in Petition No. 48 of 2004, the present petitioner as NLD/ILD licensee was not a party. Therefore the principle of res judicata is not violated in this case and the Petition is maintainable. The respondents have entered into agreement with the petitioner for billing on per second aggregated into minutes basis but changed the same subsequently by issuing circulars unilaterally. According to the petitioner, the reasons for such a change were not communicated to the petitioner. It was submitted by the respondent that it had taken approval from the TRAI before issuing such a circular. We were shown the approval given by TRAI to implement the IUC regulation and charges proposed in the circulars now being impugned and questioned. The circulars were issued after both the regulations, i.e., January 2003 and October 2003. The respondents during the arguments relied heavily on judgment in case of Petition No. 48 of 2004 from where Mr. Maninder Singh, the learned counsel quoted various reasons for non-availability/delay in implementation of CDR, lack of technological capability and requirement of large number of trunk groups to be created to meet the IUC Regulation. We were made aware of these facts which are contained in the order in Petition No. 48 of 2004. In those cases also billing was done on MCU basis rather than on aggregated per minute basis. While taking the approval of TRAI, the respondent had communicated its constraints, particularly to MCU billing requirement of large number of additional trunk groups, which it could ill afford. While giving approval for MCU billing, TRAI had taken this into account.

12. While the petitioner has asked for refunds of the excess amounts charged by the respondents, by way of changed system of billing, along with interest, the respondent BSNL has again relied on Petition No. 48 of 2004 where we had stated that no refunds will be permissible.

The question of refunds discussed in Petition No. 48 of 2004 pertains to refund on account of carriage charges and access charges. In the instant case only the clause of access charges is applicable. It is a fact that while disposing of Petition No. 48 of 2004 we had stated that in totality of circumstances no refund is permissible. In the present Petition though it is only one-way traffic where the respondents are charging the petitioner for the access and no consumers are involved, but in view of the approval of TRAI and our judgment in Petition No. 48 of 2004, we find no merit in refund claim made by the petitioner.

13. The petition is dismissed.

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(Arun Kumar)
Chairperson

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(D.P.Sehgal)
Member