TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL
NEW DELHI

DATED 23RD JANUARY 2009

Appeal No.8 of 2007

Bharat Sanchar Nigam Limited … Appellant
v.
Telecom Regulatory Authority of India ... Respondent

Appeal No. 9 of 2007

Mahanagar Telephone Nigam Limited … Appellant
v.
Telecom Regulatory Authority of India ... Respondent

BEFORE:

HON'BLE MR. JUSTICE ARUN KUMAR CHAIRPERSON
HON'BLE DR. J. S. SARMA MEMBER
HON'BLE MR. G. D. GAIHA MEMBER

Appeal No. 8 of 2007

For Appellant Mr. Maninder Singh
Mr. Yoginder Handoo
Mr. Kunal Sood
Mr. Mansimran Singh, Advocates

For Respondent Mr. Saket Singh, Advocate

Appeal No. 9 of 2007

For Appellant Mr. Samir Vasisht, Advocate

For Respondent Mr. Saket Singh, Advocate

ORDER

Bharat Sanchar Nigam Limited (BSNL) and Mahanagar Telephone Nigam Limited (MTNL) have filed these appeals challenging the Domestic Leased Circuits Regulations 2007 (10 of 2007) dated 14.9.2007 issued by the Respondent -Telecom Regulatory Authority of India (TRAI) (*hereinafter referred to as* **Authority**). The pleadings in both the cases being similar, it was decided to take up and dispose of these two appeals together. The arguments on behalf of BSNL were marshalled by Mr. Maninder Singh. Mr. Vasisht, counsel for MTNL adopted his arguments. As such, for convenience, we will refer to the arguments of Mr. Maninder Singh as those of the counsel for Appellants.

2. The Appellants' claim is that the impugned Regulations have been issued by the Respondent without jurisdiction and that they have been issued in complete disregard of the terms and conditions of the licences granted to service providers when, in fact, as per the TRAI Act, it is incumbent upon the Authority to ensure that the licence conditions are implemented. It is also their contention that instead of the Respondent sending recommendations, if considered necessary, to the Government, the Authority has itself issued the impugned Regulations without any power to do so. It is also their contention that under the TRAI Act, 1997, TRAI has been constituted for the *Regulation of telecommunication services* and that Domestic Leased Circuits (hereinafter referred to as **DLC**) do not constitute a telecommunication service. Likewise, the Appellants' case is that since a leased circuit does not constitute a facility for the general class of consumers of the seeker, it does not fall within the purview of providing interconnection and any Regulation in this regard by TRAI is completely without jurisdiction and void *ab initio*. On merits, the Appellants contend that these Regulations make it mandatory for a service provider to provide its infrastructure to another service provider to enable the latter to discharge its obligation to a subscriber to provide the domestic leased circuits. In doing so, the impugned Regulations seek to create obligations which are not permissible under the licence conditions, and not within the jurisdiction of TRAI as per the TRAI Act, 1997. They contend that the licence conditions in the Unified Access Services Licence **(UASL)** stipulate that the licensee shall make its own arrangement for installation, networking and operation of all infrastructure for providing the services. While it is open to the Appellants to provide its infrastructure as part of a contract, TRAI cannot impose such an obligation on them. In short, the Appellants challenge the impugned Regulations on the ground that they are arbitrary, irrational, and impermissible, without jurisdiction and void *ab initio*. The Appellants pray that the Tribunal may quash the Domestic Leased Circuit Regulations 2007 (10 of 2007) dated 14.09.2007 as illegal, *non est* and void *ab initio*, besides passing any such orders as the Tribunal may deem fit and proper.

3. Arguing that the Appellants' contentions are devoid of merit, the Respondent states that the impugned Regulations have been issued in consonance with the provisions of the TRAI Act. It is pleaded that DLC fall squarely within the definition of 'telecommunication service' and also form part of interconnection. The Respondent's contention is that leased circuit is crucial for the development of various segments of economy using Information Technology and that it is essential to provide DLC in an atmosphere which is free from anti-competitive and monopolistic tendencies so as to ensure that consumers get the best price and the best service. Its contention is that the impugned Regulations aim to provide a broad framework based on transparency, predictability and reasonableness. The basic objective of issuing the DLC Regulations is to ensure effective utilisation of resources with flexibility given to the service providers to use this resource in consumer interest and to ensure growth in telecom sector and reasonableness. According to the Respondent, the impugned Regulations do not impose any obligation on any specific single service provider but uniformly apply to all service providers in the telecom sector. It is also contended that the impugned Regulations have been issued only to bring in clarity and enforceability to the Telecommunication Tariff Order, 1999 as amended from time to time; and that it is pertinent to note that the said Telecom Tariff Order has never been challenged. The Respondent also pleads that the DLC Regulations have been issued by the Respondent in exercise of the powers conferred upon it

under Section 36 of the TRAI Act, read with sub-clauses (ii), (iii), (v) and (vi) of section 11 of the TRAI Act and is in the nature of subordinate legislation and as such an appeal against the subordinate legislation is not maintainable before this Tribunal.

4. In dealing with this case therefore, the following issues arise for determination:

A. Whether TRAI has jurisdiction to issue the impugned Regulations?
B. Whether the impugned Regulations are arbitrary, deserving to be set aside?
C. Whether the Appellants are entitled to any relief?

5. Before we set out to address ourselves to the issues posed above, it is necessary to first settle the threshold challenge posed by the Respondent that this appeal is not maintainable before this Tribunal in as much as the impugned Regulations are in the nature of subordinate legislation, laid before the Parliament, and that it is only the Parliament which can modify or annul these Regulations. The Respondent has taken support of the judgement of the Hon'ble Supreme Court in **West Bengal Electricity Regulatory Commission v. CESC Ltd [AIR 2002 SC 3588]** as also in **L. Chander Kumar v. Union of India and others [JT 1997 (3) SC 589]**. We have noted that although the Respondent raised this issue in its pleadings, this was not pursued in the course of arguments as also evidenced by the written submissions. As such, it would not be inappropriate to dismiss this contention straightaway. Nevertheless, we will deal with this contention since it has been raised.

6. In its judgement dated 28.4.2005, in the case of Videsh Sanchar Nigam Limited v. Union of India (Appeal no. 5 of 2005), this Tribunal had dealt with the issue of maintainability of Appeals against the decisions /orders of TRAI. In that case, the issue was one of maintainability of an appeal against a tariff order. The Respondent- TRAI- had contended, in that case too, that the Tariff Order having been issued as subordinate legislation, TDSAT could not hear an appeal against the same. At that time too, the Respondent had relied on the *West Bengal Electricity Regulatory Commission Case*., cited *supra*. Rejecting this contention, this Tribunal had pointed out that "Section 11(2) of the Act does not itself lay down any factors, principles or guidelines for fixing tariff. The only guiding principle would appear to be the preamble to the Act where the interest of service provider is also required to be protected. Can it still be argued that no right of appeal lies against the order of TRAI fixing tariff? Would not in that case Section 11(2) be struck down by the courts as conferring arbitrary powers? Only safeguard is the observance of principles of natural justice and acting in transparent manner with right of appeal. Moreover, if that was so as is contended by TRAI, there was also no need for explanation to Section 23 of the Act aforementioned." The Explanation to Section 23 of the TRAI Act, dealing with Accounts and Audit of the Authority, reads as follows: *"Explanation, -- For the removal of doubts, it is hereby declared that the decision of the Authority taken in discharge of its functions under clause (b) of sub-section (1) and sub-section (2) of section 11 and section 13, being matters appealable to the Appellate Tribunal, shall not be subject to audit under this section."* It is clear from this explanation that the Authority is exempt from audit of its decisions or orders or directions only because these are appealable in this Tribunal. In the case cited in para 6 above, this Tribunal further observed that "under clause (b) of Section 14, TDSAT is empowered to hear and

dispose of appeal against any direction and decision and order of the TRAI under the Act. There is no limit imposed by the Act on the exercise of power of the TDSAT as an appellate body hearing appeal from the order of TRAI made under Section 11(2) of the Act. Appeal against the order of TDSAT lies to Supreme Court only on a substantial question of law. It is the TDSAT which is the final fact finding body. In the decision of the Cellular Operators Association of India & Ors. v. Union of India & Ors. – [**(2003) 3 SCC 186]**, Supreme Court defined the powers of the TDSAT. Sinha J in his concurring judgment said as under:

"TDSAT was required to exercise its jurisdiction in terms of Section 14-A of the Act. TDSAT itself is an expert body and its jurisdiction is wide having regard to sub-section (7) of Section 14-A thereof. Its jurisdiction extends to examining the legality, propriety or correctness of a direction/order or decision of the authority in terms of sub-section (2) of Section 14 as also the dispute made in an application under sub-section (1) thereof. The approach of the learned TDSAT, being on the premise that its jurisdiction is limited or akin to the power of judicial review is, therefore, wholly unsustainable. The extent of jurisdiction of a court or a tribunal depends upon the relevant statute. TDSAT is a creature of a statute. Its jurisdiction is also conferred by a statute. The purpose of creation of TDSAT has expressly been stated by Parliament in the amending Act of 2000. …. (Para 27). The Tribunal also quoted Chief Justice Pattanaik and Justice Sema who observed in the same case that "the jurisdiction of the Tribunal under Section 14 cannot be held to be a supervisory jurisdiction, in view of the language of the statute as well as the fact that it is the only forum for redressing the grievance of an aggrieved party inasmuch as the appellate jurisdiction to this Court is only on a substantial question of law and the jurisdiction of a civil court for filing a suit is also ousted. It has already been held by us that the Tribunal has the power to adjudicate any dispute…"

7. Dealing with the *West Bengal Electricity Regulatory Commission Case,* the Tribunal referred to the Observations of the Hon'ble Supreme Court which held that "there is no doubt that the power of the High Court as an appellate court is coextensive with that of the trial court. But then the next question would be: is such power wholly unlimited or in any manner controlled by any principle in law? ….. We have perused the above judgments as also the arguments of learned counsel, and we have no hesitation in holding that the appellate power of the High Court statutorily is not hedged in by any restriction, but in our opinion, the High Court merely because it has unrestricted appellate power, should not interfere with the considered order of the Commission unless it is an expert body". The Tribunal then observed that "Here lies a difference between the High Court and the TDSAT, an expert appellate body….the Supreme Court commended on the constitution of the TDSAT and in fact, suggested constitution of a similar appellate body under the Electricity Regulatory Commission Act, 1998 to hear appeals against the order of the State Electricity Commissions…. As noted above, against any order or decision, appeal against the order of TRAI lies to TDSAT. No limitation can be imposed on the power of the TDSAT while hearing the appeal. An appellate body can confirm the order appealed against, modify it, reverse it or even remand the matter to the lower Authority. TDSAT can certainly go into the question if there was any need for the TRAI to examine any issue, the procedure adopted by it and the correctness of its order. TDSAT in itself, can modify the tariff fixed by TRAI."

8. The Telecom Regulatory Authority of India (TRAI) and the Telecom Disputes Settlement and Appellate Tribunal (TDSAT) have both been set up under the TRAI Act, 1997. As seen from the Preamble to this Act, the objective in setting up of these institutions is to regulate the telecommunication services, adjudicate disputes, dispose of appeals and to protect the interests of service providers and consumers of the Telecom sector, to promote and ensure orderly growth of the Telecom sector and for matters connected therewith or incidental thereto. It is not disputed that provision of any telecommunication service is guided by the license and that in the issue of licences, it is the Central Government, which is the licensor, that is supreme. Clause 16 of the Universal Access Service License (UASL) reads as follows:

"16. **General**
16.1 The LICENSEE shall be bound by the terms and conditions of this Licence Agreement as well as by such orders/directions and/regulations of TRAI as per provisions of the TRAI Act, 1997 as amended from time to time and instructions as are issued by the Licensor/TRAI.
16.2 All disputes relating to this Licence will be subject to jurisdiction of Telecom Disputes Settlement and Appellate Tribunal (TDSAT) as per provisions of TRAI Act, 1997 including any amendment or modification thereof."

9. It is the contention of the Respondent that the impugned Regulations have been issued in furtherance of the licence conditions which, according to it, provide for provision of DLC. As can be seen from clause 16 of the licence, all disputes relating to the licence are subject to the jurisdiction of the TDSAT. This being so, the Respondent cannot take the plea that an appeal against the Regulations is not maintainable before this Tribunal.

10. A similar contention was raised by the Authority before the Delhi High Court in civil writ petition no. 2838/2005 in TRAI v. TDSAT and another in relation to The Telecommunication Interconnection Usage Charges (Fourth Amendment) Regulation (1 of 2005) dated 6.1.2005. Examining this issue, Justice Mittal observed as follows:

"25. The conflict of jurisdiction between an expert appellate tribunal as the TDSAT vis-a-vis the expert board has arisen for consideration in cases hitherto before the Apex Court. It has been authoritatively held that the limitations on the jurisdiction of the Tribunal have to be found in the statutory provisions whereunder it is created and the intention of the legislature has to be gathered therefrom. Unless the jurisdiction of the appellate authority is fettered by the statute, it would have the same authority and jurisdiction as that of the expert board under the statute. It can exercise its discretionary jurisdiction in the same manner as the board.

26 to 30. .....

31. Examination of the scheme of the TRAI Act, 1997 shows that there is no restriction in the powers of the TDSAT which is an expert forum constituted under Section 14 of the statute.....

37. The authority and jurisdiction of an appellate expert forum, its importance and necessity, therefore, cannot be belittled or narrowed down by strict or a narrow interpretation of the statutory provisions. .....

54. It is well settled that a tribunal is fully empowered to examine an issue relating to its jurisdiction. ....”

11. The Delhi High Court cited the observations of the Hon’ble Supreme Court in **Sukhdev Singh v. Bhagat Ram [(1975) 1 SCC 421]** where the Apex Court observed that "there is no substantial difference between a rule and a regulation inasmuch as both are subordinate legislation under powers conferred by the statute. A regulation framed under a statute applies uniform treatment to everyone or to all members of some group or class. The Oil and Natural Gas Commission, the Life Insurance Corporation and Industrial Finance Corporation are all required by the statute to frame regulations inter alia for the purpose of the duties and conduct and conditions of service of officers and other employees. These regulations impose obligation on the statutory authorities. The statutory authorities cannot deviate from the conditions of service. xxxxx This court has repeatedly observed that whenever a man's rights are affected by decision taken under statutory powers, the court would presume the existence of a duty to observe the rules of natural justice and compliance with rules and regulations imposed by statute."

12. The Delhi High Court went on to observe as follows:

“66. It is the contention of the petitioner to the effect that TRAI can make regulations in respect of all its functions under all statutory provisions and that the jurisdiction of the TDSAT to examine disputes in respect thereof would be barred. If this objection were to be sustained, it would not be open to any person to impugn any action of the petitioner on the ground that the same was an exercise of legislative powers under the statute. Such could never have been the intention of the legislature. The result, in case such a contention was to be sustained, would be that the jurisdiction of TDSAT to examine the disputes being raised by different persons including service providers would be ousted in almost all the cases inasmuch as the TDSAT has been held to be legally incapable of examining the vires of the statutory provisions and subordinate legislation which confer power and jurisdiction on the tribunal”

13. We feel that this should set at rest all doubts regarding the maintainability of these appeals before this Tribunal. We accordingly reject the contention of the Respondent in this regard. We would also like to point out that once a principle has been unequivocally settled and continues to hold ground, it was not appropriate for the Respondent to continue to make the same submissions before this Tribunal.

14. Having dealt with the threshold challenge, and before we proceed to deal with the issues listed in para 4 above, it would be useful to set out the concept of DLC and recapitulate the background of the entire issue, so as to facilitate a better appreciation of the issues involved.

15. The impugned Regulations are titled the Domestic Leased Circuits Regulations, 2007. According to these Regulations, *Domestic* Leased Circuit means "a leased circuit to the premises of a subscriber when such premises are located within India." A *Leased Circuit* is defined as "virtual private network using circuit or packet switched (Internet protocol) technology apart from point to point non-switched physical connections or transmission bandwidth and to which the public network is not connected." *Local Lead* of Domestic Leased Circuit means "the leased circuit between the premises of a subscriber to the nearest exchange which includes Short Distance Charging Center, point of interconnection and point of presence of the service provider from whom the subscriber obtains the Domestic Leased Circuit." Thus, a DLC is a two-way link provided by the telecom service providers for the exclusive use of a subscriber so as to connect two or more sites of the customer. There are two ways of providing a DLC. One is to provide a physical leased circuit which connects the sites of the customer without going through an exchange. The other is to connect the customer sites to the exchanges and create a Virtual Private Network (VPN). Although using the medium of exchange/s, a VPN is structured in such a way that privacy and security are maintained through appropriate procedures and protocols. It is an essential element that a VPN is not connected to a public switched network. In a physical leased circuit, since both sites of the customers are connected through a leased line, there is no local lead. But, in a VPN there is a local lead which connects the customer's site to the point of presence of the service provider, which is usually the exchange. While traditionally, this link has been provided through copper wire, currently optic fibre /wireless based media are deployed as local lead for higher capacity links. It is possible that the other site of the customer is located within the Short Distance Charging Area. It is equally possible that the other site is located far away, including in another part of the country, in which case the point of presence of the service provider is connected to the point of presence of the National Long Distance Operator (NLDO) (who may or may not be the same service provider), carried to the corresponding point of presence of the NLDO on the other side, and thereafter carried to the customer's corresponding site through the point of presence of the service provider who is providing the DLC. The circuit is thus completed.

16. On 17.11.2006, the Authority issued a Consultation Paper to discuss various issues related to promotion of competition in country's Domestic Leased Circuits (DLC) market, seeking the views of stakeholders thereon. Stating that the services provided by the service providers to their end-users largely depends on the quality and timely availability of such leased circuits, the paper states that the new telecom service providers are generally dependent on the transmission infrastructure in the form of leased circuits from the existing/incumbent operators. The paper notes that the incumbents have 68% of the total transmission network in the country and quotes a 2005 report by Gartner that a limited number of players compete and only the incumbent carrier BSNL can provide comprehensive national coverage, as a result of which the prices in India are high compared to other markets such as China. The paper states that excepting the 'trunk segment' connecting metros and major cities, the DLC services market in India lacks effective competition. It also states that private operators have not found it attractive enough to go beyond the Metros and major cities. Identifying the overarching presence of the incumbent, absence of interconnect Regulations and regulatory costs in obtaining the right of way and other associated costs as factors inhibiting promotion of competition, the paper states that the Authority considers it appropriate to continue with tariff Regulation in the DLC market until such time the competition becomes

adequate and effective. Identifying the local lead i.e., the last mile as a vital link between the customer and local exchange, the paper notes that this is the most capital intensive element of the telecom infrastructure. Since this cost for a new operator can be substantial, and that they find it uneconomical, the paper states that it is in the national interest of economic efficiency that existing infrastructure is fully utilised. It also poses the question whether it is appropriate to mandate a 'build or buy' option for last mile for new entrants or whether it should be left to mutual commercial agreement among the service providers. Simultaneously, the paper also states that besides initial capital costs, the maintenance cost of the local lead is also high resulting in poor utilisation of resources for local lead and poses the question whether sharing of last mile infrastructure could make business sense, simultaneously recognising the possibility that such sharing could discourage creation of access network and a resultant shortage in this segment in the future. Stating that customers need to have resources from operators of their choice for expanding their network and ensuring quality of service, the paper states that several corporate users have requested for review of the current terms and conditions of incumbents who were not permitting setting up of the Closed User Group (CUG) network by obtaining leased lines from private service providers. [A CUG is basically used for internal communication within the group of organisations with commonality of interest; this group is established only for intra-group communication and does not involve provision of any Telecom service to any third party]. Based on the recommendations of the Authority, the DOT had issued instructions on 15.7.2003 regarding utilisation of resources by CUG customers through multiple licence service operators. The paper states that even though instructions have been issued, the new operators are finding it difficult to procure the support of incumbents because of various factors including the lack of local leads, which the incumbents are reluctant to permit essentially because of security considerations. Accordingly, the paper states that there is need to deliberate on the option of making the prime service provider of the CUG network responsible for security. The paper also states that the need or otherwise for interconnection Regulations for DLC segment needs to be discussed and states in this context that many regulators abroad have mandated interconnection for data services as well. It states that there is need to discuss as to whether an operator with Significant Market Power (SMP) in the DLC market can be regulated for DLC provision as well, similar to mandated interconnection for voice services. Finally the paper poses five issues for consultation. Having issued this consultation paper on 17.11.2006, the Authority held open house discussions on the subject on 29.1.2007 after receiving the comments of various stakeholders and subsequently issued, on 14.9.2007, the Domestic Leased Circuits Regulations, 2007, which are in challenge before us.

17. The Explanatory Memorandum to these Regulations sets out the various aspects including the examination of the comments made and issues raised by stakeholders on the issues that were posed in the consultation paper. This explanatory memorandum states that the Domestic Leased Circuits market is growing at a very fast pace and that the revenue thereof which was of the order of Rs. 1405.63 core in 2006-07 is projected to reach Rs. 3000 crore by 2008 and Rs. 4500 crore by 2010. Stating that the leased lines are a key component for the economic growth of the country, the memorandum identifies e-business, e-governance, BPO and IT industry, Manufacturing and Banking sectors as well as Government and Education sectors as those where there will be a significant growth of DLC requirement. The explanatory memorandum states that the Authority is of the view that the customer should have the ability to choose their preferred service provider of DLC without

artificial and anti-competitive constraint on limiting their choices, as they are able to do in other segments of the telecom sector. Accordingly, the Authority is of the opinion that service providers should meet other service providers' request for a complete DLC or access in terms of local lead and that, after due diligence, the Authority decided to issue these Regulations so as to provide a framework which would ensure transparency, predictability and reasonableness to allow the provision of DLC/local lead in non-discriminatory manner. At the same time, it states that the Authority has not opted for compulsory mandation.

18. On the factors that limit competition in the DLC market in India, the explanatory memorandum concludes, after taking note of the steps taken by the Government, that there should be a mandation to provide local leads, that further steps need to be taken to enhance competition to exploit the full potential of the DLC segment and to remove the remaining limiting factors. The memorandum however does not state what exactly are the 'limiting factors'; how 'competition' is defined and why mandation is required. The consultation paper had indicated that barring the North-East, Himachal Pradesh, Jammu & Kashmir and Andaman & Nicobar, each of the Telecom Circles has at least 3 private operators and 2 to 3 IP-II operators, besides the public sector operator (BSNL/MTNL). In some cases, the number is larger. On the issue that the operator with Significant Market Power (SMP) should be mandated to provide local lead for DLC, the Authority concludes that the concept of SMP is not very relevant at this stage and that mandation for provision of DLC already exists in the Telecom Tariff Order 2005. After examination of the issues relating to security, the Authority concludes that it should be the responsibility of the prime service provider who is having an agreement with the customer. On considering provision of DLC as an interconnection element, the Authority does not arrive at any conclusion but states that the Authority would prefer to watch the developments after the promulgation of the Regulations and that inclusion of provision of DLC/leased circuits in the Reference Interconnect Order is not being considered necessary at this stage.

19. We now proceed to deal with each of the issues listed in para 4 above. The contention of the Appellants is that the impugned Regulations have been issued without jurisdiction. The arguments on this count are as follows:

(i) That a Domestic Leased Circuit is not a telecommunication service;
(ii) That provision of DLC does not constitute an Interconnection;
(iii) That the impugned Regulations violate the conditions of the licence issued by the licensor to the service providers;
(iv) That the Authority has no power to issue the Regulations when as per the TRAI Act, the Authority ought to send recommendations to the Central Government;
(v) That the provisions of the TRAI Act do not provide for the issue of the impugned Regulations.

20. The first contention of the Appellants is that TRAI which has been constituted under the TRAI Act can regulate only in respect of a telecommunications service. In this connection, reference was made to the preamble of the TRAI Act which states that it is an Act to provide for the establishment of TRAI and TDSAT *to regulate the telecommunication services*. According to the Appellants, the definition of the term 'leased circuit' show that the same does not constitute a 'telecommunication service' as defined in the TRAI Act. Refuting this argument,

the Respondent, in its pleadings, invited attention to the judgements passed by this Tribunal on 19.3.2007 in petition no. 148 of 2005 as well as in petition no. 218 of 2006, to show that leased circuit is a telecommunication service. Its contention is that the impugned Regulations will ensure effective utilisation of national resource.

21. We have examined the matter. Insofar as the judgements in the two petitions mentioned by the Respondent, we find that they do not have any relation to the present case. The dispute in those cases related to the charges levied by MTNL on the petitioners for the terminal equipment that was placed in their exchanges by way of interconnecting links and it was held that the dispute between the two parties was one between telephone service providers. In the present case, it would be useful to go by the definitions given above as well as the definition of the term 'Telegraph' in the Indian Telegraph act, 1885. The term 'Telegraph' has been defined in the Indian Telegraph Act to mean "any appliance, instrument, material or apparatus used or capable of use for transmission or reception of signs, signals, writing, images and sounds or intelligence of any nature by wire, visual or other electro-magnetic emissions, radio waves or Hertzian waves, galvanic, electric or magnetic means." The definition of the term 'telecommunication service' in section 2 (k) of the TRAI Act reads as follows: " '**telecommunication service'** means service of any description (including electronic mail, voicemail, data services, audio tex services, video tex services, radio paging and cellular mobile telephone services) which is made available to users by means of any transmission or reception of signs, signals, writing, images and sounds or intelligence of any nature, by wire, radio, visual or other electro-magnetic means but shall not include broadcasting services; provided that the Central Government may notify other service to be telecommunication service including broadcasting services."

22. Now, the term 'Service' is not defined in the TRAI Act or any of the Regulations. On the other hand, the license agreement for provision of Unified Access Services, signed between the licensor and the service provider, defines 'Service' in clause 2 which reads as follows:

"2. This LICENCE is granted to provide SERVICE as defined in Para 2.2 of this LICENCE AGREEMENT, on a non-exclusive basis in the designated SERVICE AREA.....

2.2 (a) The services cover collection, carriage, transmission and delivery of voice and and/or non-voice MESSAGES over the LICENSEE's network in the designated SERVICE AREA and includes provision of all types of access services. In addition to this, except those services listed in Para 2.2 (b) (i) licensee cannot provide any service/services which require a separate license. .....

2.2 (b) (i) Further, the LICENSEE can also provide Voice Mail, Audiotex services, Video Conferencing, Videotex, E-Mail, Closed User Group (CUG) as Value Added Services over its network to the subscribers falling within its SERVICE AREA on non-discriminatory basis. The Licensee cannot provide any service except as mentioned above, which require a separate license. However, an intimation before providing any other VALUE ADDED SERVICE has to be sent to the LICENSOR and TRAI." **(emphasis supplied)**

23. The definition of the term ‘leased circuit’ in the impugned Regulations reads as follows: "(d) “leased circuit” means virtual private network using circuit or packet switched (Internet Protocol) technology apart from point-to-point non-switched physical connections or transmission bandwidth and to which the public network is not connected;" It is seen that The Telecommunication Tariff Order 1999 defines leased circuits to mean telecommunication facilities leased to subscribers or service providers to provide for technology transparent transmission capacity between network termination points which the user can control as part of the leased circuit provision and which may also include systems allowing flexible use of leased circuit bandwidth.” During the course of arguments, the counsel for Appellants referred to Para 4.8 of the consultation paper issued by the Authority in November 2006 which states that a ‘Closed User Group’ is basically used for internal communication within the group of organisations with commonality of interest and not to provide any telecom service to any third party. The counsel argues that this clearly shows that leased circuit provided for a closed user group is not a telecom service. We are unable to agree with this contention. Para 4.8 of the consultation paper states that the circuit provided to a closed user group is not intended to provide any telecom service (by the CUG) to any third party. This does not in any way mean that what is being provided to the CUG in itself is not a telecommunication service. Provision of a leased circuit involves provision of bandwidth, and this is a telecommunication service. The definitions of the terms ‘Telegraph’ as well as ‘telecommunication service’ clearly indicate that what is being provided by way of a leased circuit is a telecommunication service. Besides, the licence itself lists out that CUG is a permitted activity, so long as it is on its own network and to the subscribers falling within its Service area. We will revert to this aspect separately when we examine the issue regarding ‘interconnection’ in paras 24 to 30 below. But for the moment, these definitions make it clear that provision of a leased circuit is a telecommunication service. It is noteworthy that as far back as 1999, the Telecom tariff Order included leased circuits in its definitions and has also stipulated the tariff for providing the same. It could not have been possible to do so unless a leased circuit was itself a telecom service. We accordingly reject the contention of the Appellants and hold that provision of a leased circuit is a telecommunication service.

24. The next contention of the Appellants is that provision of DLC does not constitute an ‘Interconnection’ and therefore the impugned Regulations are without jurisdiction. According to the Appellants, the definition of a leased circuit either by the Authority or by the International Telecom union (ITU) shows that it is a dedicated link to be provided by a service provider for the exclusive facility of a consumer and is therefore not interconnection. Their contention is that since the impugned Regulations are issued invoking the provisions of section 11 of the TRAI Act and since this section deals only with issues of interconnection, and since the leased circuit does not constitute interconnection, the impugned Regulations are void *ab initio*. The contention of the Respondent on the other hand is that the Appellants are trying to take a very narrow definition of the term interconnection and that the definition provides for a situation where the customer of one service provider may have access to the customers of other service providers or to the networks alone or services alone of other service providers. Viewed in this context, he argues, leased circuit does constitute interconnection and that the impugned Regulations are therefore perfectly legal.

25. We have examined the different interpretations. The International Telecom Union defines a leased circuit as "a two-way link for the exclusive use of a subscriber regardless of the way it is used by the subscriber ...". TRAI has, in Regulation 3 of the impugned Regulations, defined leased circuit as follows "... (d) "Leased circuit" means a virtual private network using circuit or packet switched (Internet protocol) technology apart from point-to-point non-switched physical connections or transmission bandwidth and to which public network is not connected ...". From both these definitions, it is clear that a leased circuit is meant for the exclusive use of a subscriber and is not intended to be connected to a public switched network.

26. Now, let us turn to the term 'interconnection'. Interconnection is provided for in the licence conditions as well as in the Regulations issued by the Authority. The term interconnection is not defined in the TRAI Act nor does it figure in the Indian Telegraph Act. As indicated by the Counsel for Respondent, the various licences issued by the Department of Telecommunications, which is the licensor, state that 'interconnection' will be as defined by TRAI. The Telecommunication Interconnection Usage Charges Regulation 2003 issued by TRAI defines 'interconnection' to mean "*the commercial and technical arrangements under which service providers connect their equipment, networks and services to enable their customers to have access to the customers, services and networks of other service providers."* According to the Counsel for Appellants, while the TRAI Act does provide for interconnection between service providers, a dedicated link to be provided by one service provider for any of its own consumers, for the exclusive facility of that very consumer, does not constitute interconnection. The Appellants' case is that since a leased circuit does not constitute a facility for the general class of consumers of the seeker (service provider seeking the DLC or Local Lead), it does not fall within the purview of providing interconnection and any Regulation in this regard by TRAI is completely without jurisdiction and void *ab initio*.

27. There are two main aspects in dealing with this issue. Firstly, a perusal of the definition of the term 'interconnection' shows that it is intended to enable one set of customers to have access to another set of customers. The Respondent has argued that it is not essential that there should be two sets of customers and that it is sufficient if a customer of one service provider has access to the service of another service provider. Let's test this argument. Let us take the case of a client 'X' who wants a leased circuit for his business, from place 'R' to 'S'. While at place 'R', there are two service providers 'A' and 'B', at place 'S', only 'B' is present. Let us assume that the client prefers the service provider 'A'. In order to provide service to client 'X', the service provider 'A' seeks and obtains a circuit from service provider 'B' at place 'S'. Having obtained the same, he provides a leased circuit to the client 'X' from place 'R' to place 'S'. Once he has obtained the circuit from 'B' at place 'S' and as long as he is paying 'B' for the same, the service to client 'X', right from place 'R' to place 'S', is being provided by 'A' only and the consumers or Network or service of 'B' do not come into the picture. In other words, there is a single service provider. The argument of the counsel for Respondent is that the definition of the term interconnection contemplates a situation where customers of one service provider may have access to the services alone of the other service provider. He therefore agrees, by his own argument, that 'Interconnection' necessarily involves two or more service providers. But as seen from the example above, in

case of a leased circuit there is only one service provider. Therefore, leased circuit does not constitute a case of interconnection.

28. It is also relevant to refer ourselves to the Telecommunication Interconnection Usage Charges Regulation 2003 issued by the respondent on 29.10.2003. The terms ‘interconnection provider’ and ‘interconnection seeker’ have been defined very clearly. ‘Interconnection provider’ means the service provider to whose network an interconnection is sought for providing telecommunication services. ‘Interconnection seeker’ means the service provider who seeks interconnection to the network of the interconnection provider. In other words, interconnection involves interconnection to the network. That this is so is also evidenced by the manner in which the impugned Regulations have been issued. If truly the respondent believed that provision of DLC is a case of interconnection, the terms ‘interconnection seeker’ and ‘interconnection provider’ would have been used in the impugned Regulations. On the other hand, a new terminology -- *specified service provider* -- is used. There are two categories of service providers -- specified service provider who makes the request and specified service provider to whom request has been made.

29. It is also to be noted that at para 2.3.2 of the explanatory memorandum to the impugned Regulations, in relation to issue no.2 -- whether the operator with significant market power (SMP) be mandated to provide local lead for DLC and also for engineering CUGs to other operators -- the Respondent states that “narrowing the obligation to only selected service providers would be a retrograde step. The concept of SMP is therefore not very relevant at this stage.” The concept of SMP has been incorporated in the Interconnection Usage Charges Regulation of 29.10.2003 where it has been defined as "a service provider having a share of at least 30% of total activity in a licensed telecommunication service area." The consultation paper states, at para 2.2.5, that the incumbents have 68% of the total transmission infrastructure available within the country. Of the two incumbents -- BSNL and MTNL -- BSNL operates in virtually the entire country since MTNL operates only in the two cities of Mumbai and Delhi. Yet, the respondent feels that the concept of SMP is not relevant at this stage. More telling is the respondent’s response to issue no.4 listed in the consultation paper -- considering the provision of DLC as an interconnection element and its inclusion in RIO (Reference Interconnect Offer). The explanatory memorandum states that "the Authority noted that as per normal practice, RIO is issued by Significant Market Power (SMP). As mentioned earlier, different service providers may be significant market power in different access technologies and asymmetric regulation in the local segment is not considered necessary at this stage. The Authority has therefore preferred to watch the developments after promulgation of these regulations and inclusion of provision of DLC/Leased Circuits in RIO is not considered necessary at this stage."

30. Counsel for Respondent pointed out that worldwide, a leased circuit is treated as part of interconnection regulatory system in several countries such as France, Singapore, Malaysia, and the United Kingdom. A quick perusal of the international scenario indicated at Annexure – A4 to the consultation paper shows that different countries follow different regimes. While France mandates the incumbent to include certain services in the RIO Malaysia decided to assess the competition on a case-by-case basis. The European commission follows the

pricing mechanism and in Japan, type I operators are subject to price ceiling. In the United States of America, each state sets its own regulation. Local private circuits are deregulated in some states while others they are deregulated in metropolitan areas. We do not wish to go into this aspect since there is not sufficient material before us to adequately appreciate the nuances of each country's practice in the light of their own laws governing the issue. Comparison can only be between comparables. In any case, this issue is not material for these appeals.

31. For reasons indicated in Paras 24 to 30, we uphold the contention of the Appellants that provision of a leased circuit does not constitute an Interconnection.

32. The next contention of the Appellants is that the impugned Regulations are violative of the licence conditions. According to them, the Authority has issued the impugned Regulations invoking the provisions of section 11 (1) (b) (i) to (vi) of the TRAI Act. The Appellants' claim is that the impugned Regulations have been issued by the Respondent in complete disregard of Section 11 (1) (b) (i) which enjoins upon the Authority to ensure compliance of the terms and conditions of license. The learned counsel for Appellants argued that granting a licence along with its attendant conditions is the exclusive power of DoT. The licence conditions are to be decided / incorporated only by the Department of Telecommunications. The TRAI Act, 1997 lays down that as regards licence conditions / terms of licence, TRAI can only make recommendations and cannot modify the same by itself. Referring to the letter dated 15.7.2003 issued by the DOT, he stated that the licensor itself has clarified that the arrangement between the various service providers is to be resolved through mutual agreements between themselves.

33. The Appellants contend that while the Unified Access Services Licence conditions stipulate that the licensee shall make its own arrangement for installation, networking and operation of all infrastructure for providing the services, the impugned Regulations make it mandatory for a service provider to provide and even establish its infrastructure for another service provider, who is not complying with the licence conditions, to enable the latter to discharge its obligation to a subscriber to provide the domestic leased circuits. In doing so, the impugned Regulations seek to create obligations which are not permissible under the licence conditions, and which are, therefore, not within the jurisdiction of TRAI as per the TRAI act. Stating that TRAI has no jurisdiction under the Act to make such Regulations which have the effect of amending, altering or modifying the terms and conditions of the telecommunication license, the Appellants cite this Tribunal's judgement dated 27.4.2005 in Appeal no.s 11 of 2002 (BSNL v. TRAI) and 12 of 2002 (MTNL v. TRAI) where, relying on the judgement of the Delhi High Court in the case of **MTNL v. TRAI – [2000 AIR DEL 208]**, it was held that TRAI has no jurisdiction to override the terms and conditions of licence granted to the service providers by the DOT. The same principle was reiterated by the Tribunal in its judgement dated 03.05.2005 in Appeal no. 31/2003 (BSNL v. TRAI).

34. The Respondent rebuts the case of the Appellants, in citing the judgement in Appeal no.31 of 2003, as irrelevant, and cites instead the Tribunal's judgement dated 24th of August 2007 in Appeal no. 14 of 2006 (BSNL v. TRAI and others) where it held that TRAI was legally competent to interfere with private agreements, and that TRAI Act requires it to regulate arrangements among service providers and that this power overrides private arrangements and, as a matter of law, TRAI is empowered to lay down provisions which may require modifications or suppression of such mutual agreements. The Respondent also states that the DLC Regulations do not disregard or override the terms and conditions of licence issued to service providers in any way. In fact, the contention of the Respondent is that the Regulations actually facilitate the furtherance of the licence conditions since the circular dated 15.7.2003 issued by the licensor indicates that provision of DLC has been permitted under the licence. Vide this circular, the licensor has allowed the sharing of DLC resources amongst multiple service providers and utilisation of the DLC resources and that this condition has to be read as part of the licence. The counsel for Respondent pointed out that the Regulations do not specify compulsory mandating but only provide the procedure for an activity permitted under the licence. In this context, he argued that sub-clause (vi) of clause (b) of sub-section (1) of section 11 of the TRAI Act specifically confers upon the Respondent the power to “lay down and ensure the time period for providing local and long-distance circuits of telecommunication between different service providers". The Respondent also stated that the rejoinder filed by the in Appeal No.9 of 2005 wherein the 1st Appellant has admitted that leased lines/circuits are taken by subscribers/consumers as well as by Telecom service providers and that the provisions of section 11 (1) (b) (vi) of the Act, only applies to leased lines for local and long-distance circuits for telecommunication. The Respondent also contends that the provision of leased circuits is part of the license conditions and that the Authority had not altered the conditions in any way.

35. In their rejoinder, the Appellants contend that the judgement of the Tribunal in appeal no. 14 of 2006 has no relevance to the present case since the Tribunal did not lay down that the licence conditions are not to be followed or that TRAI is not obliged to ensure compliance with licence conditions.

36. We have examined the relative contentions of both the parties. As indicated above, the Respondent's contention is that the provision of DLC is already contained in the licence conditions by virtue of the circular dated 15.7.2003 of the Department of Telecommunications and that the impugned Regulations are only in furtherance of the licence conditions. In other words, the Respondent agrees that it has no Authority to change the terms and conditions of the licence issued to the service providers and that what it is doing is only acting in furtherance of the conditions already stipulated. In order to appreciate this argument properly, it is necessary to examine the conditions of the licence. But for specific variations, if any, the licence conditions are generally common for all service providers.

37. Clause 2.6 of the licence reads as follows:

"2.6 LICENSEE shall make its own arrangements for all infrastructure involved in providing this service and shall be solely responsible for installation, networking and operation of necessary equipment and systems, treatment of subscriber complaints, issue of bills to its subscribers, collection of revenue, attending to claims and damages arising out of his operations."

38. Clause 34 of the licence reads as follows:

"34. Roll-out obligations:

34.1 LICENSEE shall be solely responsible for installation, networking and operation of necessary equipment and systems for provision of SERVICE, treatment of SUBSCRIBER complaints, issue of bills to its subscribers, collection of its component of revenue, attending to claims and damages arising out of his operations.

34.2 LICENSEE shall ensure that

(i) At least 10% of the District Headquarters (DHQs) will be covered in the first year and 50% of the District Headquarters will be covered within three years of effective date of licence.
(ii) The licensee shall also be permitted to cover any other town in a District in lieu of the District Headquarters.
(iii) Coverage of a DHQ/town would mean that at least 90% of the area bounded by the Municipal limits should get the required street as well as in-building coverage.
(iv) The District Headquarters shall be taken as on the effective date of licence.
(v) The choice of District Headquarters/towns to be covered and further expansion beyond 50% District Headquarters/towns shall lie with the Licensee depending on their business decision.
(vi) There is no requirement of mandatory coverage of rural areas."

39. Clause 33 of the licence reads as follows:

"33. <u>Sharing of infrastructure between UASPs and any other Telecom Service Provider in their area of operation</u>:

The sharing of infrastructure by the LICENSEE is permitted as below:

(i) Sharing of "passive" infrastructure viz., building, tower, dark fibre etc. is permitted.
(ii) Provision of point-to-point bandwidth from their own infrastructure within their Service Area to other licensed telecom service providers for their own use (resale not to be permitted) is also permitted.
(iii) Sharing of switch by the LICENSEE for providing other licensed services is permitted."

40. Clause 5 of the licence reads as follows:

*"5. <u>**Modifications in the Terms and Conditions of Licence**</u>*

5.1 The LICENSOR reserves the right to modify at any time the terms and conditions of the LICENCE, if in the opinion of the LICENSOR it is necessary or expedient to do so in public interest or in the interest of the security of the State or for the proper conduct of the telegraphs. The decision of the LICENSOR shall be final and binding in this regard.

41. The circular dated 15.7.2003 of the Department of Telecommunications is reproduced here under to facilitate a clear understanding of the issue.

Government of India
Ministry of Communications & IT
Department of Telecommunications
Sanchar Bhavan, 20, Ashoka Road
New Delhi – 110001
(LR cell)

No. 824-42/2000-LR *Dated 15.07.2003*

To
All Basic/NLD/ILD Operators

Sub: Utilisation of resources by CUG customer through multiple licensed service operators for setting up of CUG network

The above matter has been considered by Department of Telecommunications and I am directed to intimate you in this regard as follows: --
1. Under the terms and conditions of existing licence, wherever permitted, operators are free to provide leased lines to their customers for setting up of Closed User Group (CUG) network. CUG may be a network of leased lines connected in a particular configuration. Customers do not require any approval/permission from DOT for availing the facility of leased lines through licensed telecom operators.
2. The arrangement of telecom resources from various service providers for setting up CUG network as requested by customer is to be resolved by entering into mutually agreed commercial agreements between the operators.
3. DTS circular No. 112-8/94-PHC (Pt) Dated 31.05.2000 will not be applicable in the multi-operator scenario.
4. It shall be responsibility of operators to ensure that the telecom resources are used for genuine and lawful purposes.

Sd/-
(Rajvir Sharma)
Director (LR-III)
Tel. 2303 6509

(emphasis supplied to facilitate better understanding)

42. From an analysis of the licence conditions listed above, it is clear that the licence conditions stipulate that each service provider should install and operate its own network as well as equipment and systems in accordance with the roll out obligations stipulated in clause 34. The sharing of infrastructure has been stipulated in clause 33 of the licence and it clearly prohibits resale. What is permitted is the sharing of dark fibre. The use of the term *dark fibre* clearly stipulates that the fibre should not be used for providing any service to another subscriber by the service provider who is taking the dark fibre. The moment the *dark fibre* is used for sending any communication, it becomes a *lit fibre*. That is why the licence clearly stipulates the term *dark fibre*. Besides, the licence condition also clearly prohibits resale. In the example given Para 27 above, if the service provider 'A' uses the dark fibre for providing a CUG network for client 'X', it amounts to resale of this resource which is clearly prohibited.

43. In so far as the CUG network is concerned, the circular dated 15.7.2003 Department of telecommunications clearly provides that it relates to *utilisation of resources by CUG customer through multiple licensed service operators*. What is permitted by the circular dated 15.7.2003 is utilisation by the CUG customer. Clause 1 of this circular clearly states that customers do not require any approval/permission from DOT through licensed telecom operators. In other words, if a subscriber wants to set up a CUG network, it is for that

subscriber to approach different service providers to provide the leased lines. And such service providers have to be licensed service providers and each of the service providers has to be licensed to operate in that service area.

44. Another important aspect is that, as brought out in para 22 above, the licence conditions stipulate that CUG is a permitted activity, so long as it is on the service provider's network and to the subscribers falling within its Service area. We will revert to this aspect separately. Clause 2.2 (b) (i) states that the licensee cannot provide any service except as mentioned therein, and any other service would require a separate licence. It is apparently only to overcome this clause that the DOT had issued the circular dated 15.7.2003 providing a certain facility to the CUG customers but not to the service providers. There is no indication in that circular that service providers can enter into agreements between themselves or that the resources must be shared. Any such interpretation would be going far beyond the intention behind the circular issued by the Central Government as licensor.

45. An examination of the impugned Regulations does not indicate that they are in conformity with the licence conditions as well as the letter dated 15.7.2003 from the Department of Telecommunications. Clause 2 of the Regulations states that "these Regulations shall be applicable to every service provider who can access the subscribers directly for provision of leased circuits under the terms and conditions of its licence." Clause 4 in chapter II of the Regulations reads as follows:

4. Request for Provision of Domestic Leased Circuits or Local Lead of Domestic Leased Circuit. ..... (1) Any specified service provider,..
(a) who has an obligation under a contract with its subscriber or has any other arrangement with its subscriber to provide Domestic Leased Circuits; and
(b) who does not have adequate Domestic Leased Circuits or resources for to provide the same under such contract or arrangement,
may make a request in writing to any other specified the service provider for providing Domestic Leased Circuits or Local Lead of Domestic Leased Circuit, as the case may be.

(2) ....."

46. Clause 5 of the Regulations reads as follows:

"5. Obligation of the specified service provider, to whom request has been made under regulation 4, to provide Domestic Leased Circuits or Local Lead of Domestic Leased Circuit (s)..... (1) The specified service provider to whom request has been made under regulation 4 for provision of the Domestic Leased Circuits or Local Lead of Domestic Leased Circuit (s), as the case may be, shall, within thirty days of receipt of such request, send to the specified service provider who made such request (hereafter referred to as requesting specified service provider),.....
(a) a confirmation of its ability to provide the Domestic Leased Circuits or Local Lead of Domestic Leased Circuit, as the case may be;
(b) a demand note giving therein the relevant details...."

47. From these Regulations, it is clear that any specified service provider can make a request to any other specified service provider for providing the leased circuit. In clause 3 (n) of the Regulations providing the definitions, the term 'specified service provider' is defined as "a service provider who has been allowed under

the terms and conditions of its licence to access the subscribers directly for provision of Domestic Leased Circuits." Clause 3 (m) defines the term 'service provider' to mean "the Government as a service provider and includes a licensee". Reading these two together with clause 2 relating to applicability of the Regulations, quoted above, means that any licensee who has been allowed under the terms and conditions of its licence to access the subscribers directly for provision of leased circuits under the terms and conditions of its licence and who has an obligation under contract with its subscriber or has any other arrangement with its subscriber to provide domestic leased circuits and who does not have adequate DLC or resources for to provide the same under such contract or arrangement may make a request in writing to any other specified service provider for providing DLC or local lead of DLC as case may be. Now, as has been mentioned in Para 34 above, the contention of the Respondent is that the impugned Regulations are in furtherance of the licence condition which is alleged to have been amended by the circular dated 15.7.2003. Even assuming that the circular dated 15.7.2003 has the effect of amending the licence conditions, it is clear that the circular relates to the utilisation of resources by the CUG customer who has to make the request as is indicated in Para 2 thereof. In other words, this is a facility given to the CUG customer and not to the service provider. Only if a CUG customer makes a request to more than one service provider who are licensed to operate in the service area, can they enter into mutually agreed commercial agreements. Otherwise they cannot. So, the conditions to be satisfied are that it should be a request from a CUG customer; and that the service providers, to whom such a request has been made by the CUG customer should be licensed to operate in the given service area/s. If so, they can resolve the matter by entering into mutually agreed commercial agreements. It is noteworthy that the circular is in the nature of facilitation to the customer so that every such customer does not have to approach the DOT for approval/permission for availing the facility of DLC through licensed telecom operators. The CUG customer may, therefore, take the help of several service providers separately.

48. But, the impugned Regulations do not seem to respect the intention or even the language of the circular even as the Respondent claims that it is acting in pursuance of this circular. As per the Regulations, **any** specified service provider can make a request to **any other** specified service provider if it does not have adequate DLC or resources for to provide the same. The Regulations are patently flying in the face of the circular. While clause 5 of the licence empowers the licensor to modify the licence conditions at any point of time, the circular dated 15.7.2003 is not a modification of the licence conditions. There is nothing in the TRAI Act which empowers the Authority to modify, *suo motu*, the licence conditions. Section 11 (1) (a) (ii) enables the Authority to *make recommendations*, either *suo motu* or on a request from the licensor on terms and conditions of licence to a service provider. Therefore, what the Authority had to do, in the event it felt necessary, was to make necessary recommendations to the Central Government which is the licensor and since the Act provides that the recommendations of the Authority shall not be binding upon the Central Government, it would have been upto the Central Government to consider and take a decision thereon. Instead, the Authority issued the impugned Regulations.

49. The argument of the learned counsel for Appellants is that it has already been settled by this Tribunal that the Authority has no power to override the licence conditions. There is also a difference of opinion between the

Appellants and the Respondents in so far as section 11 (1) (b) (ii) is concerned. The subsection reads as follows: *(ii) notwithstanding anything contained in the terms and conditions of the license granted before the commencement of the Telecom Regulatory Authority of India (Amendment) Act, 2000,* (the Authority shall) *fix the terms and conditions of interconnectivity between service providers;"*. According to the Counsel for Appellants, the presence of the non-obstante clause in this sub-section is a clear indication that the power to fix the terms and conditions is only in respect of the licences issued prior to the year 2000, while the counsel for Respondent contends that this power is available both in respect of licenses issued prior to or after 2000. He has cited the judgement of this Tribunal in Appeal no. 31 of 2003 as well as in Appeal no.s11 of 2002 and 12 of 2002. The subject matter of the Appeal no.s 11 of 2002 and 12 of 2002 was in respect of Reference Interconnection Order Regulations and the differences of opinion arising therefrom between the Appellants therein (BSNL and MTNL) and TRAI. In the judgement issued on 27.4.2005, this Tribunal had, basing itself on the judgement of a Division Bench of the Delhi High Court in civil writ petition no. 6543 of 1999 and CW no. 6483 of 1999 in MTNL v. TRAI **(AIR 2000 Delhi 208)** decided as follows: "TRAI would remain bound by the terms and conditions of interconnectivity of the service providers as given in the licence issued after the amendment to the Act in 2000. It has power to change the terms and conditions of interconnectivity of the licence issued prior to the amendment of 2000 to the extent that these are in conformity with the terms and conditions of interconnectivity contained in the licence issued after the amendment of 2000. This to us appears to be the only harmonious construction to give effect to the provisions of sub-clause (i) of clause (a) of section 11 (1) and sub-clause (ii) of clause (b) of Section 11 (1) of the Act." This was reiterated in the judgement of this Tribunal dated 3.5.2005 in Appeal no. 31 of 2003 (BSNL v. TRAI) and this Tribunal had also held that TRAI had no Authority to modify the licence conditions for the licences issued after the amendment of 2000. The learned counsel for Respondent pointed out to us that the judgement of the Delhi High Court in January 2000, cited *supra*, which was the basis of these two judgements of the Tribunal was replaced by a later judgement of the Division Bench of the Delhi High Court in **STAR INDIA Pvt. Ltd. v. TRAI [146 (2008) DLT 455],** where it was held that TRAI was empowered to fix the terms of interconnection. The learned counsel for Respondent also cited the judgement dated 24.8.2007 of this Tribunal in Appeal no. 14 of 2006 that TRAI enjoys a statutory mandate to regulate arrangements among service providers for sharing their revenue from private telecommunication services and that this power overrides private arrangements or agreements between parties. The learned counsel for Respondent also brought to our notice that the SLP filed by STAR INDIA against the judgement of the Delhi High Court in civil writ petition no. 24105 of 2005 was dismissed while another SLP filed by SET DISCOVERY is still pending before the Supreme Court. It is worth noting that the prayer in the civil writ petition no. 24105 of 2005 was for quashing tariff orders and also the Telecommunication (Broadcasting and Cable Services) Interconnection Regulations 2004 issued by TRAI. Likewise, the issue for consideration in Appeal no. 14 of 2006 in TDSAT related to the question whether TRAI had the power to regulate the arrangements between two parties in respect of sharing of revenue arising from interconnection. In this context, it would be appropriate to quote the observation of the Delhi High Court, in civil writ petition no. 24105 of 2005 which is as follows: "9. Courts should not place reliance on decisions without discussing as to how the factual situation fits in with the fact situation of the decision on which reliance is placed. There is always peril in treating words of a speech or judgement as though they are words in a legislative enactment, and it is to be remembered that judicial utterances are made in the setting of the facts of a particular case said Lord

Morris in Herrington v. British Railways Board (1972) 2 WLR 537. Circumstantial flexibility, one additional or different fact may make a world of difference between conclusions in two cases." As brought out above, the subject matter in these cases pertain to interconnection. As held by us in para 31 above, provision of domestic leased circuit does not constitute interconnection. As such, we would not like to go into the applicability of any of the cases cited above to the case presently before us. We also hold that TRAI does not have any power to override or amend/modify/add to the licence conditions and that the Domestic Leased Circuit Regulations, 2007 are violative of the provisions of the Telecom Regulatory Authority of India Act 1997.

51. The fourth contention of the Appellants in matters relating to jurisdiction is that the TRAI Act 1997 makes no provision for the Authority to issue the DLC Regulations and that the Authority can only make recommendations to the licensor i.e., the Central Government which alone is competent to modify the licence conditions in case it is in agreement with the recommendations of the Authority. We have examined this issue. Along with the reply to their Appeal affidavit, the Respondent had filed a copy of the Telecommunication Tariff (Thirty Sixth Amendment) Order, 2005 (3 of 2005) dated 21.4.2005, wherein it is stated that the then existing Schedule IV of the Telecommunication Tariff Order 1999 along with its Annexures shall be substituted by another Schedule and Annexures. The explanatory memorandum to this Tariff Order states that significant developments have taken place since the Tariff Order 1999 was notified and that although the number of players has increased, competition is restricted to the areas where the new entrants have built their networks. It quotes a study conducted in September 2004 by the Office of Telecommunications Authority, Hong Kong which stated that "competition in LLC markets is generally slower because it is affected by the pace at which new entrants build up their networks." It also cites a 2005 study by Gartner, which has already been quoted in para 16 above, that there is measured competition in key routes as a result of which prices had decreased but that prices are still high compared with competitive markets including China. The explanatory memorandum states that in view of the above, the Authority considers it appropriate to continue with tariff Regulation under such time that competition becomes adequate and effective. It then goes on to examine the issues relating to tariff Regulation and methodology which are not relevant for the present case.

52. In section 5 of the explanatory memorandum to the Telecom Tariff Order 2005, relating to further examination of outstanding issues measures to promote competition and promoting growth of rural networks are examined. The following extracts are relevant.

"5.6 Measures to Promote Competition

5.6.1 The long-term goals of the Authority to establish effective competition in the sector such that regulation of tariffs is not required. Until such a market scenario prevails, cost-based tariff pricing is required. As stated in the consultation paper, the DLC market has witnessed an increase in the number of players but competition is still not effective in the majority of cases. This is mainly on account of the fact that new entrants have not matched the incumbent in rolling out networks both in terms of quantum and in terms of reach. Further, new entrants perceive a significant risk in building out new high-capacity networks since the capacity is bought over time and capital recovery is dependent on how quickly utilisation levels can be increased. Thus the choice of service providers to the consumers is limited. This coupled with the absence of interconnect regulations for leased lines results in end-users to rely solely on what is offered by the operators nearest to his premises. The Authority

intends to release consultation papers on measures that could be taken so that competition in this space is further promoted. These measures include:

- interconnect of operators for provisioning of multi-operator leased circuits
- introduction of reselling of bandwidth
- introduction of wholesale and retail pricing.

5.7 Promoting Growth of Rural Networks

5.7.1 The Authority recognises that without focus on rural areas, sizeable growth in the telecom sector would not be possible. ...

5.7.2 Universal Service Objectives (USO) have been sought to be achieved through a combination of initiatives that include Government funding, Access Deficit charges, roll-out obligation, tariff policy, direct USO subsidy, etc. The Authority has also come across initiatives of the State Governments seeking to provide broadband connectivity for rural development as part of their e-Governance plans..... A number of other private initiatives by corporations and other voluntary agencies all aiming to take ICT (Information Communication Technology) services to rural areas have also been noticed. All these point to the need for making available the services of leased circuit in areas beyond the commercially attractive zones of availability.

5.7.3 In this context, it is relevant to quote the statement of the Authority in the consultation paper on "Growth in the Telecom Services in Rural India" dated 27.10.2004:

"*We are in a fortunate situation where the optic fibre structure has already been extended to the extent that on an average optic fibre termination is available in 4-5 locations each block. This implies that we can reach within 15 to 20 km of most villages with large bandwidth through lighting up of dark fibres which would, in turn, imply that the total investment needed for achieving this objective could be one-fourth to one-fifth of that needed in case we had to lay the entire optic fibre backhaul infrastructure.....*"

5.7.4 The Authority examined whether an incentive mechanism could be built in the pricing policy for the DLC, so that DLC with rural links could get the benefit of an inbuilt subsidy. Analysis of the extent of competition in non-rural areas indicates that a cross-subsidy mechanism in the pricing policy would not be appropriate. Therefore, an alternative mechanism needs to be involved in the matter of providing affordable bandwidth services to areas that are considered uneconomical by service providers and that mechanism has to be outside the tariff policy regime. USO is said to arise from requirements imposed as a result of inter alia regulation for providing telecommunication services as may be specified in geographical areas/locations that can only be met under cost conditions that follow outside normal commercial standards. Taking all these factors into account, the Authority would consider making recommendations to government on the issues of providing direct support from USO fun to bandwidth providers in rural/remote areas. Needless to say, the extent of such support would depend upon the price at which bandwidth services are to be made available to consumers in such areas as against the ceiling tariff specified in this Order. These and other related issues for operationalising the scheme would form part of recommendations of the Authority to the Government. **(emphasis supplied)**

53. What transpires from a reading of the above is that the development of the DLC market has been generally slower to pick up compared to other segments; that it has been so because of lack of investment by the

new entrants to build their networks beyond the 'trunk segment' (Metros and major cities); that while prices have decreased in the trunk segment, including to an extent where heavy discounts are offered, prices are still high compared with other competitive markets; that in view of this, the Authority considers it appropriate to continue with Tariff Regulation until such time as competition becomes adequate and effective; that competition cannot become effective unless new entrants roll-out their networks into rural areas; that the Authority intends to release consultation papers in this regard; and, most importantly, that the Authority would consider making appropriate recommendations to the Government. In other words, it is clear that the Authority recognises that its role, beyond fixation of tariffs which exercise it is authorised to perform by virtue of section 11 (2) of the TRAI act, is to make its recommendations to the Government. In fact, even the consultation paper issued on 17.11.2006 states in para 3.4 that "the Authority considers it appropriate to continue with tariff Regulations in the DLC market until such time the competition becomes adequate and effective." While the consultation paper no doubt speaks of the possibility of mandating the service providers to provide leased circuits, nowhere is it stated that the proposal is to issue Regulations in this regard. Section 11 (4) of the TRAI Act stipulates that the Authority shall ensure transparency while exercising its powers in discharging its functions. In keeping with the stipulation, it is expected of the Authority to specify in every consultation paper how it proposes to deal with a matter i.e., whether it proposes to issue a Regulation or whether it proposes to send necessary recommendations to the Government. This would enable the stakeholders to respond appropriately. Unfortunately in this case, the Authority had not done so.

54. Be that as it may, there is a clear recognition by the Authority of its responsibility to send necessary recommendations to the Government if it wants to propose measures beyond tariff fixation, when it issued the TTO 2005. It is clear that it is for the licensor to stipulate the licence conditions. As per the TRAI Act, only in case of interconnection is there a provision in Section 11 (1) (b) (ii) empowering the Authority to fix the terms and conditions of interconnectivity between service providers. It is a moot point here whether this provision relates to licences issued prior to the year 2000 or after the year 2000. Section 11 (1) (a) (ii) states that the functions of the Authority shall be to make recommendations, suo motu or on a request from the licensor, on the terms and conditions of license to a service provider. The provisions of the TRAI Act are absolutely explicit and there is no scope for confusion in this regard. It is thus clear that instead of making recommendations to the Government, the Authority had wilfully proceeded to that issue the Regulations even though the provisions of the Act are clear and even though it itself recognised, at the time of issuing the TTO 2005, that it needs to send necessary recommendations to the Government. This can only be, therefore, construed as a case of usurpation of powers by the Authority. We accordingly uphold the contention of the Appellants that the Authority had acted incorrectly in issuing the impugned Regulations instead of sending recommendations to the Government. Consequently, the impugned Regulations are void, *ab initio*.

55. The Counsel for Respondent argued that Section 11(1) (b) (vi) states that the Authority shall "lay down and ensure the time period for providing local and long-distance circuits of telecommunication between different service providers;". According to him, this sub-section clearly enables the Authority to issue the Regulation

because local and long-distance circuits include Domestic Leased Circuits and Local Lead, and that the power to deal with DLC can specifically be traced to the sub-section. He also pointed out that the in a rejoinder filed before this Tribunal in appeal no. 9 of 2005 has categorically stated that powers under the subsection can be exercised by the Authority only with reference to lease lines. He referred in this connection to para 19 (d) of the said rejoinder where the 1st appellant had stated as follows:

Para 19(d) *"The TRAI was clearly conscious and aware of the fact that lease lines for local and long distance circuits for telecommunication are only transmission links and are not parts of switches to work as Ports for interconnection. They are totally different. In this view of the matter the provisions of section 11 (1) (b) (vi) of the Act, which only apply to lease lines for local and long distance circuits for telecommunication are not the ports as points of interconnection, were never pressed into service during the proceedings of appeal no. 11 of 2002. The provisions of section 11 (1) (b) (vi) of the Act has no applicability whatsoever in relation to the ports for interconnection."*

56. Replying to the contention of the learned counsel for the Respondent about the rejoinder in Appeal no. 9 of 2005, the learned counsel for Appellants relied on the judgement of the Hon'ble Supreme Court in **P. Nallammal and Another v. State [(1999) 6 SCC 559]** wherein the court observed as follows:

"7.... The volte-face of the Union of India cannot be frowned at, for, it is open to the State or Union of India or even a private party to retrace or even resile from a concession once made in the court on a legal proposition. Firstly, because the party concerned on a reconsideration of the proposition could comprehend a different construction as more appropriate. Secondly, the construction of statutory provision cannot rest entirely on the stand adopted by any party in the lis. Thirdly, the parties must be left free to aid the court in reaching the correct construction to be placed on a statutory provision. They cannot be nailed to a position on the legal interpretation which they adopted at a particular point of time because saner thoughts can throw more light on the same subject at a later stage."

57. Irrespective of what the first appellant has stated in his rejoinder filed in a different case, it needs to be examined whether the provisions of Section 11 (1) (b) (vi) empower TRAI to issue the impugned Regulations. As indicated above, the Counsel for Respondent argued that the local and long-distance circuits include leased circuits. But what is being overlooked is that this sub-section speaks of local and long-distance circuits of telecommunication between different service providers. As indicated in Para 47 above, we had held that a leased line cannot be sought by a service provider from another service provider for the purpose of even giving the CUG network to a subscriber. So the question of leased circuits being covered under this sub-section does not arise. To try and impart a meaning to the sub-section when it is not intended would be incorrect.

58. During the course of arguments, the Counsel for Respondent sought to establish that powers to issue the impugned Regulations exist under the TRAI Act. His argument is that the TRAI Act has been amended in the year 2000 precisely to strengthen, among other things, the Authority and it is in this context that a clear distinction is made between the recommendatory and regulatory functions of TRAI. According to him, the recommendations regarding the terms and conditions of the licence would be made largely in a pre-licence stage and once the recommendations are accepted, it is open to TRAI to regulate a particular activity if the said activity falls within clause (b) of sub-section (1) of section 11 of the TRAI Act. We have carefully considered this argument. Firstly there is nothing in the TRAI Act which states that the recommendations regarding terms

and conditions of the licence would only be in the pre-licence stage. If this argument is accepted, it means that TRAI can bring in any additional conditions after the licence is issued. Such a position would be untenable. It is entirely the prerogative of the licensor i.e., the Central Government to stipulate and modify the terms and conditions of the licence. Except in so far as explicitly provided in Section 11 (1) (b) (i) of the TRAI Act, it is the duty of the Authority to ensure compliance of the terms and conditions of the licence. None of the functions as stipulated in Section 11 (1) (b) of the Act which the Authority is duty-bound to discharge speak of modification of or addition to the terms and conditions of the licence. Even in a case where the Central Government accepts the recommendations of the Authority, it is essential that the terms and conditions of the licence are suitably modified or added to only by the Licensor. As indicated above, only in respect of section 11 (1) (b) (ii) is there some scope for fixing the terms of interconnectivity. But the instant case is not one of interconnection. Secondly it is also not a case where the conditions of the licence had been modified. The letter dated 15.7.2003 from the Department of Telecommunications is only by way of a clarification; that too to state that the customers of CUG network can approach the Telecom operators directly. That by itself does not empower the Authority to issue the impugned Regulations. Even assuming for a minute that it did, the Regulations fly squarely in the face of the circular dated 15.7.2003 when actually the Authority is tasked to ensure compliance of the terms and conditions of the licence. To impart a meaning from the letter dated 15.7.2003 for assuming the power to issue the impugned Regulations is not, therefore, tenable.

59. The Counsel for Respondent also argued that it would be totally misconceived to state, as contended by the Counsel for Appellants, that all measures to facilitate competition and promote efficiency and operationalise telecommunication services so as to facilitate growth in such services should be only by way of recommendation and that there cannot be any Regulation. There is a certain force in this argument even though it does not apply to the instant case. And, this cannot be generalised. We are clear in our mind that it is the responsibility of the Authority to make recommendations regarding those measures that are not expressly contained in the terms and conditions of a licence and also so long as they are not specifically covered under the provisions of section 11 (1) (b) of the Act. If, on the other hand, they are covered by these provisions, either of the licence or of the sub-section, then it is open to the Authority to take such measures as are necessary. In our opinion there is no conflict between subsection 11 (1) (a) and subsection 11 (1) (b) of the Act as contended by the Counsel for Respondent. The learned counsel states that if the licensor acts on some recommendations and rejects the others and if TRAI frames a Regulation and brings into effect those recommendations that are rejected, there may be some conflict and may have to be tested. This, with due respect, is an illogical suggestion. We are sure that the Authority does not contemplate a situation where it would bring through a Regulation some of the suggestions which are rejected by the licensor. For, if it did, it would be a vile abuse of the power to regulate and may put at risk even the power that is otherwise required to promote the orderly growth of the telecom sector. Every creature of statute must recognise that it functions within the framework of that statute and cannot allocate to itself the ultimate wisdom.

60. In the light of the above, we hold that the impugned Regulations have been issued by the Authority without jurisdiction.

61. Before leaving this issue, we must address ourselves to an argument of the learned Counsel for Appellants that while the Regulations mandating the provision of a leased circuit is incorrect, it is open to a service provider to seek from another service provider the provision of a leased circuit to cater to the needs of the former's subscriber. What is being advocated is that compulsion by way of Regulation is bad and that it should be left to respective parties to enter into commercial arrangements. This argument overlooks the fact that resale of bandwidth is prohibited by the licence and as such, there cannot be any arrangements inter se between two service providers. What is permitted is what is envisaged by the letter dated 15.7.2003 which enables a customer to request different service providers in which case the arrangement of Telecom resources from various service providers may be resolved by their entering into mutually agreed commercial agreements. Only to this extent is a mutually agreed commercial agreement permissible.

62. Having disposed of the issue relating to jurisdiction, we now come to the merits of the case. The learned counsel for Appellants argued that the impugned Regulations are arbitrary. The consultation paper issued on 17.11.2006 recognises that DLC services market in India lacks effective competition except in the 'trunk segment' connecting metros and major cities. A reading of this paper gives the impression that the problem is arising from the reluctance of the incumbents to part with the local lead, which is capital intensive, when the need of the economy is to expedite the spread of leased circuits so as to subserve the needs of various sectors. But as brought out in Paras 52 and 53 above, the explanatory memorandum to the Telecom Tariff Order 2005 recognises that the problem is arising mainly from the reluctance of the new entrants to enter into rural areas. In this context, the impugned Regulations provide that any service provider who has an obligation to its subscriber, and who does not have adequate domestic leased circuits or resources for to provide the same may make a request to any others service provider for providing Domestic Leased Circuits or Local Lead of the Domestic Leased Circuit. Under this scenario, it is open to any service provider to first enter into an obligation with a subscriber and then demand of another service provider to provide the resource. The entering of of obligation by service provider cannot be a justification to force the other service provider to act in a time bound manner without reference to its own priorities. The Regulations do not make any provision that the service provider cannot enter into an obligation unless it has at least a major part of the requirement. All that the service provider has to do is given in clause 4 (2) of the Regulations and these are the details of the locations and the number of circuits as well as the period for which these are required. In clause 4 (2) (e) of the impugned Regulations, 'other relevant details' are indicated, without indicating what these 'other relevant details' are. Nowhere in the Regulations is there any provision to state that the requesting service provider should have the major part of the requirement before entering into any obligation with a subscriber. As an extreme case, it is open to a service provider, so long as it is licensed to operate in the area, to enter into an agreement with its subscriber even though it has no network. The impugned Regulations do not also insist that the requesting service provider should have at least fulfilled its rollout obligations as per the licence conditions before it enters into an

obligation with a subscriber and before it seeks the leased circuits from the other service provider. On the other hand, the obligation of the service provider to such a request has been made in the Regulation 5. The requested service provider has to, within 30 days of receipt of such request, send a confirmation of its ability to provide the Domestic Leased Circuit or Local Lead of Domestic Leased Circuit as the case may be. Demand note, giving details of payment schedule, likely date of provisioning of the circuits would need to accompany the confirmation. Clause 5 (2) of the impugned Regulations allows the requested service provider to intimate its inability to accede to the request only on grounds of non-availability of capacity or technical non-feasibility. In that case, the service provider has to give an option to the requesting service provider under Clause 8 of the Regulations, to acquire the circuits on "Rent and Guarantee Terms" or "Special Construction basis" or "Contribution basis". Only, in this case, the terms can be mutually agreed between them whereas, in the case of provision under Clause 5, the tariff indicated in the Telecom Tariff order 2005 will operate. A service provider has to, willy nilly, provide the Leased Circuits or the Local Lead one way or the other, failing which it is under the scrutiny of the Authority. All that the requesting service provider has to do is to make a request and the rest of the burden is on the service provider to whom the request has been made. The counsel for Respondent was at pains to point out that these Regulations are not directed at the incumbents, the appellants in these two cases, and that they apply to all the service providers. Irrespective of whoever is the service provider to whom a request has been made, it is clear that the burden of providing the Leased Circuit or Local Lead is on that service provider. Incidentally, neither the Regulations nor the Explanatory memorandum define or explain the import of the terms "Rent and Guarantee Terms", "Special Construction basis" or "Contribution basis". The way the Regulations have been fashioned is akin to a person 'A' promising another person 'X' that he would reach within 15 minutes, which he can only by way of a car that he does not possess. He then hails another person 'B', who is driving by, and demands that he be transported to the place of person 'X'. In the event 'B' has space, 'A' has to be accommodated and he would pay a predetermined price. In the event 'B' does not have place in the car or is travelling in another direction, then he has to offer to 'A' to hail a taxi for him, for which the payment terms and mode are to be negotiated between 'A' and 'B'. This, to our mind and to say the least, is untenable. The impugned Regulations do not address themselves to the license conditions, the obligations of the requesting service provider before it approaches another service provider and the burden that is cast on the requested service provider to provide the resources even in the event of non-availability or lack of technical feasibility. It may be that the Authority was guided by a genuine concern for accelerating the availability of DLC resources to various sectors of the economy. But as laid down by the Hon'ble Supreme Court in **IITT College of engineering v. State of H.P. and others [[2003) 7 Supreme Court cases 73]**, "However laudable the objective behind the steps ..., it cannot be justified under law." The impugned Regulations are arbitrary in that they are not properly founded on facts and they also fail the test of logic. The weak foundation on facts is reflected in the contradiction between the consultation paper, which appears to point the responsibility towards incumbents and the explanatory memorandum to the Telecom Tariff Order 2005 where the reluctance of new entrants to go into rural areas has been held to be the principal factor. The lack of adequate logic is reflected in the absence of the Regulations addressing themselves to the responsibilities of the requesting service provider before it makes a request and the undue responsibility cast on the requested service provider to somehow or the other provide the resources, even if it has to set up the same.

63. Lastly, the counsel for Appellants has, during the course of arguments, contended that Regulation 12 of the impugned Regulations implies that the Authority would adjudicate the disputes between service providers, a task which is not within the purview of the Authority but which is solely within the jurisdiction of TDSAT by virtue of the TRAI Act, 1997. The learned counsel for Respondent stated that this Regulation provides for inspection, auditing of records maintained by the DLC provider and that the Authority may undertake this exercise if it considers it expedient to do so and to ensure compliance of the provisions of the Regulations. He contended that such an intervention by the Authority does not amount to adjudication of any disputes between service providers by the Authority. Clause 12 of the Regulations provides for Inspection and Auditing. Clause 12 (4) states that "the Authority may, by order or direction, from time to time, intervene, for the purpose of protecting the interests of the subscribers or specified service providers or for monitoring and ensuring provision of Domestic Leased Circuits or Local Lead of Domestic Leased Circuit, as the case may be, under these Regulations so as to promote and ensure orderly growth of the Telecom sector." Without specifically so stating, this sub-clause does give the impression that in the event of any dispute between requesting service provider and the requested service provider, the former can approach the Authority who may then issue an Order. While under the Act, every Order or Direction of TRAI is appealable to TDSAT, there is no provision in the Act for the Authority to intervene in disputes between two parties. Disputes settlement is solely within the jurisdiction of TDSAT. Even the other sub-clauses of clause 12 do give the impression that the requested service provider has to not only provide the resource, as indicated above, but also has to maintain several records and be also constantly answerable for the Authority or the persons who may be appointed for inspection by the Authority. It will also have to bear the cost of inspection. As pointed out above by us, it appears to be a disproportionate burden, not under the purview of the licence, on the service provider to whom a request has been made and such a service provider does appear to bear the cross for no fault, all because some service provider who does not have the circuit or resources for to provide the circuit enters into an obligation with a customer and then makes a request. It can lead to a situation where a service provider establishes an infrastructure at some expense for its own future requirements and this is demanded by another service provider who has only to make a request under these Regulations. It is a patently unacceptable situation to put it most mildly. And we have no hesitation in holding that these Regulations are absolutely arbitrary and irrational.

64. In conclusion, we hold that the impugned Regulations are without jurisdiction and also arbitrary and irrational and void, *ab initio*. We accordingly set aside the Domestic Leased Circuits Regulations 2007 (10 of 2007). We have however taken note of the macro situation and the concern that the different sectors of the economy need to be provided with leased circuits. It is open to the Department of Telecommunications, as licensor, to consider the entire matter, if necessary seeking the opinion of TRAI and take a considered decision on the measures required, including, if needed, the modification of the license conditions to appropriately provide for making available Domestic Leased Circuits or Local Lead of Domestic Leased Circuit. It is equally open to the Authority to, if so desired, send *suo motu*, recommendations to the licensor on this issue. Needless to say, either *suo motu* or on request from the licensor, the Authority will follow the due procedure and in keeping with the provisions of section 11 (4) of the TRAI Act, 1997.

65. We would however like to clarify and direct that our setting aside of the DLC Regulations, 2007 shall not adversely affect, in any way, the arrangements already entered into between different service providers in pursuance of the said Regulations. We are so directing keeping in view the interest of the large number of consumers who may, directly or indirectly, be affected if these arrangements are suddenly disturbed.

66. We would like to place on record our appreciation of the efforts made by the learned counsels Mr. Maninder Singh as well as Mr. Saket Singh who have painstakingly taken us through the various dimensions of the issues involved.

67. The Appeals are accordingly disposed of. No costs.

.....J
(ARUN KUMAR)
Chairperson

.....
(J.S. SARMA)
Member

.....
(G.D. GAIHA)
Member