TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL
NEW DELHI

DATED 13th May, 2009

Appeal No. 7 of 2007

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Bharat Sanchar Nigam Limited ……….. Petitioner

Versus

Telecom Regulatory Authority of India ……….. Respondent

BEFORE :

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

For Petitioner : Mr. Maninder Singh,
Mr. Yoginder Handoo,
Mr. Kunal Sood, Advocates

For Respondent : Mr. Saket Singh, Advocate.

O R D E R

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1. The present appeal has been filed by the Appellant impugning the direction of Telecom Regulatory Authority of India (hereinafter referred as TRAI/Authority), purported to have been issued under Section 13 of TRAI Act, 1997. Appellant is a Public Sector Undertaking licensed to operate all types of telecom services in the country excepting Delhi and Mumbai.

2. The impugned direction under Section 13 of the TRAI Act, 1997 has been issued on 29th Aug, 2007 requiring the appellant to furnish to TRAI, the number of subscribers adversely affected and excess amount charged from the subscribers by reduction of the pulse rate in landline calls originating from its network and terminating in the network of Airtel from 180 seconds to 45 seconds in early October, 2005. This change in pulse rate has neither been intimated to its subscribers nor was any publicity given.

3. The Authority has alleged that it had forwarded a news item vide its letter dated 9th Jan,

2006 followed by three reminders asking appellant specifically to clarify whether the provisions of the Principal Tariff Order as amended by Telecommunication Tariff (Thirty First Amendment) Order, 2004 (to be termed as TTO, 2004 in all future references)had been complied with, while introducing the above changes in tariff and whether tariff was implemented without informing the subscribers.

4. The appellant, issued a tariff order on 1st September 2004 specifying the pulse rate to be adopted for calls originating from fixed line to Wireless Local Loop (limited mobility) (to be termed as WLL(M) in all future references) for inter circle calls and intra-circle calls for different distances, as slab rates, to be effective from 10th September 2004. This tariff order has been circulated to all its units besides placing it on its web site. Subsequent to this order on 22-8-2005, appellant has issued a circular including M/s Reliance, M/s TTL, M/s HFCL and M/s Shyam also in the category of WWL (M) service providers, while introducing 45 second pulse for all intra-circle calls as applicable to Unified Access Service Provider (to be termed as UASP in all future references) and 30 second pulse for all inter circle calls. On 26-9-2005 appellant had issued another circular which included M/s Airtel (Touchtel) to be also placed in the same category as the operators mentioned in the earlier circular dated 22-8-2005. The appellant has contended that, changes in tariff have been made after a period of six months and all these tariffs are available on BSNL web site.The above explanation has been given by the appellant to the respondent in response to its letter dated 2nd Feb, 2006 and thereby admitted to have changed the tariffs vide Circulars No. 3-37/2004-R&C dated 1.9.04, No. 3-15/2005-R&C dated 22.8.2005 and No. 3-15/2005-R&C dated 26.9.2005.

5. The counsel for the respondent has pleaded to clarify the intention behind the 31st amendment to the TTO, 2004, by stating that this amendment has carved out a class of consumers who have not completed six months time in that particular tariff plan, which was opted by them, for availing the service of the appellant. The protection given by the amendment that, all subscribers who are within six months of subscribing to a particular package of a service provider, have to be treated as a separate class of consumers, whose subscription plans cannot be changed for six months. Further interpretation given b y the

counsel of the respondent is that, the rates may be decreased but the rates of none of the items of a given plan, can be increased without giving six months notice to the consumer. Another protection, that has been envisaged in the TTO,2004 (31st amendment) is a direction to all cellular mobile service providers and Unified Access Service Providers, is that the customer should be informed in writing, within a week of activation of service, the complete details of his tariff plan. In addition, as and when, there are any changes in respect of any item/ tariff in the chosen package, the operator shall intimate, in writing, such changes to those subscribers whose tariff packages undergo a change.

6. The appellant's reply of 18th April, 2006 was examined by the Authority. The Authority observed that as per the 31st Amendment of the TTO, any given tariff plan should be available to the subscribers for a period of at least six months from the date of enrolment. The service provider during the currency of six months would also not be permitted to raise any tariff. According to the respondent, the appellant has not properly interpreted the 31st Amendment of the TTO. The increase in tariff after a period of six months or more than six months as intimated by the appellant is not the crux of the tariff order, rather the main contention of this order, is to protect a class of subscribers, for a period of six months after opting any particular tariff plan. The respondent's view is that, in a dynamic situation, several subscribers might have joined the plan just before the proposed charges, and might not have completed six months in the existing tariff plan. For such subscribers also, the existing tariff must be ensured for six months. The subscribers, who are falling within the period of six months and who have adopted a certain tariff plan, must traverse through that plan uninterrupted for a period of six months, before any change is effected which is to the detriment of their interest. The main purpose of asking for information as per the impugned direction, was to find out, as to how many such subscribers, who have opted for 180 seconds pulse in the last six months, have to perforce adopt a 45 seconds pulse as per the changed circumstances by a sudden change effected by the appellant without any notice or prior intimation.

7. The issues which arise for determination in this particular appeal are as follows:

(i) Whether the classification of the services as per the directions of the licensor resulting into the change of the applicable pulse rate is in contravention of the TTO?

(ii) Whether there is a provision in the TTO to accommodate such changes which are to be implemented in classifying the service according to its characteristics which results into a change of tariff?

(iii) Whether the implications of the Interconnect Usage Charges Regulation dated 29th October, 2003 which envisages the payment of Access Deficit Charge (to be termed as ADC in all future references) after classification of the service as in WLL(M) category is possible to be met with without realizing the same by changing the pulse rate as per the classification of the service?

(iv) Whether the directions issued by the respondent are legitimate in the facts and circumstances of this particular case.

8. The counsel for respondent has contended that the appellant responded to their letter dated 1st June, 2006 after four reminders, on 4th Dec, 2006. The salient points of the response of the appellant vide their letter dated 4th Dec, 2006 are as follows :

(i) The appellant issued circular no. 3-37/2004-R&C dated 1.9.04 for specifying the pulse rate for the calls originating from BSNL fixed line service to fixed line, fully mobile and limited mobile subscriber of BSNL as well as private operators. These terms were as follows :

(a) Pulse rate applicable 'for local calls' for BSNL fixed line to fixed line service of any operator – 180 seconds.

(b) Pulse rate applicable 'for limited mobile service' of private operators for local calls – 45 seconds.

(ii) The objective of this circular was to achieve uniformity in raising the bills.

(iii) The appellant has also drawn the attention of all operators about the directions issued by respondent that terminal used for fixed wireless service should be strictly confined to the premises of the subscriber where telephone connection is registered. All service providers should also ensure that there is no misleading advertisement in the electronic and print media and the media should be made to publicise the service as a mobile or limited mobile service. The responsibility of these actions was thrust upon the licensee and violation was actionable as per the relevant clause of the license agreement.

(iv) The appellant has further drawn the attention of the respondent about the clarification issued by the licensor i.e. Deptt. Of Telecommunications, Govt. of India on 23rd March, 2005 addressed to all Unified Access Service Providers, it shall be treated as WLL(M) – Wireless in Local Loop (Mobile) Service for all purposes. The classification inter-alia, effected three important aspects i.e. Numbering plan, Interconnection Usage Charges and Interconnection arrangement.

9. The counsel for appellant has contended that in view of the clarification of 23rd March, 2005 from the Department of Telecommunication (The Licensor), it became obligatory for Unified Access Service Providers to take necessary action in treating such services not as fixed line service but as limited mobile service. The necessary action by appellant has, therefore, been taken as per the instructions of the licensor in respect of Interconnection arrangement. The demand of ADC by treating this service as WLL(M) service has also been raised as Interconnection Usage Charges vide Regulation, issued on 29th October, 2003 regulating the payment of interconnection usage charges, for telecommunication services, covering basic service that includes WLL(M) services, cellular mobile services and long distance services (STD/ISD) throughout the territory of India. The Schedule-III of this Regulation mandates the payment of Access Deficit Charge for fixed to WLL(M), WLL(M) to fixed, WLL(M) to WLL(M), WLL(M) to cellular and cellular to WLL(M). After 10.3.2006 the IUC regime (Interconnection Usage Charges) changed altogether. The methodology of collection of ADC from per

minute basis to a simple 1.5% of the Adjusted Gross Revenue (AGR) of the operator has been implemented.

The contention of the appellant is that, it classified the service as WLL(M), which was capable of operating outside the premises of the subscriber. The consequential effect of such classification has led to the application of 45 seconds pulse vis-à-vis 180 seconds pulse. The appellant has further contended that, in no way it amounts to change in tariff and, therefore, stipulation in the 31st Amendment of the TTO, is not applicable. The appellant has categorically claimed that change in the classification of service as per the direction of licensor, having a consequential effect of change in the pulse rate, does not amount to change in tariff plan.

10. The counsel for the respondent pleaded that in spite of protracted correspondence with the petitioner, specific queries were not answered in regard to the compliance of the TTO and, therefore, it was left with no option but to issue the impugned direction of 29.08.2007 to seek information. The counsel for respondent also stated that impugned direction, lists the complete background of the case, the provisions of the TTO and rejects the contentions of the appellant expressed in various communications and mandates the appellant to furnish the required information. The counsel for the respondent also pleaded that the Authority, in order to be transparent and fair, depends heavily on the information provided by the service providers. He further pleaded that the impugned direction does not impose any liability but only seeks information for the sake of taking a decision in future.

11. The counsel for appellant reiterated that there was no change in the tariff and it was only a change of classification, which was necessary, as the walky phones were not WLL(Fixed) but WLL(Mobile) and this was clarified by TRAI on 4th March, 2005 and the DOT on 23rd March, 2005 and 26th August, 2005. The appellant's counsel vehemently argued that the stand taken by the appellant was accepted by this Tribunal on 9.9.2005 and by Hon'ble Supreme Court in the Walky Cases.

12. The main submission made by the counsel for respondent is that this Tribunal and the

Hon'ble Supreme Court of India have decided that walky phones are WLL(M) and the clarifications issued by the respondent and the Department of Telecommunication (Licensor) were clarificatory of the license and regulatory provisions. It was further pleaded that the judgments held the clarifications to be clarificatory in nature and the services to be WLL(M). It was also pleaded by the counsel for respondent that there was no issue of change in tariff with respect to the decision on the classification, however, if there is any increase, then in what manner the same should be applied is the main issue. The counsel for respondent argued that increase in tariff cannot be made ignoring the regulatory principles, governing the increase in tariff, especially the 31st Amendment to the TTO, notwithstanding the fact that such increase is a consequence of a judgment. The following case law were cited by the learned counsel for respondent in support of its contention:

(a) **Bombay Dyeing & Mfg. Co. Ltd. (3) v. Bombay Environmental Action Group,(2006) 3 SCC 434, at page 536 para 312.** A judgment, it is well settled, cannot be read as statute. Construction of a judgment, it is well settled, should be made in the light of the factual matrix involved therein. Any observation made in a judgment, it is trite, should not be read in isolation and out of context.

(b) Mehboob Dawood Shaikh v. State of Maharashtra,(2004) 2 SCC 362, at page 369 para 12. A decision is available as a precedent only if it decides a question of law.

(c) Union of India v. Major Bahadur Singh,(2006) 1 SCC 368, at page 373 para 9-11. The observations of the Court are neither to be read as Euclid's Theorems nor as the provisions of the statute and that too taken out of their context. Judges interpret statutes they do not interpret judgments. They interpret words of statute; their words are not to be interpreted as statute. Circumstantial flexibility, one additional or different fact may make a world of difference between conclusion in two cases.

13. The learned counsel for respondent argued that the content of the clarification issued by

the respondent on 23rd March, 2005 only stipulates that Walky shall be treated as a limited mobile service; it does not, by itself, authorize the service provider, including the appellant, to raise tariff ignoring the provisions of the TTO. The counsel also stated that increase in tariff may be valid but has to be effected well within the confines of the regulatory principles governing increase in tariff and the judgment or clarification automatically do not override the TTO. The learned counsel for respondent has extended the argument by saying that if the contention of the appellant is accepted, it would make the 31st Amendment to the TTO redundant, ineffective and otiose. It would amount to reading in an exception against the object and purpose of the provision. It was pleaded by the learned counsel for respondent that this is a situation where the tariff was not an issue before this Tribunal and Hon'ble Supreme Court and is not under challenge in any forum. Finally, the learned counsel for respondent concluded by saying that judgments may have the effect of justifying the increase in tariff, but the same is not an authority for ignoring the regulatory principles governing the actual implementation of the increase in tariff.

14. The learned counsel of respondent has also brought to our notice the following cases supporting its contention that the object of the TTO is beneficial as it protects a class of consumers from any kind of increase in tariff for first six months. The provision is mandatory and an absolute bar with no exceptions. The words being clear and unambiguous and being a tariff order the same need to be given a literal meaning.

(a) **Nathi Devi v. Radha Devi Gupta,(2005) 2 SCC 271, at page 277 para 13-18**; courts are not concerned with the policy involved or that the results are injurious or otherwise, which may follow for giving effect to the language used. If the words used are capable of one construction only, then it would not be open to the courts to adopt any other hypothetical construction on the ground that such construction is more consistent with the alleged object and policy of the act.

(b) **Nasiruddin v. Sita Ram Agarwal, 9 SCC page 589 para 37**; the court's jurisdiction to interpret a statute can be invoked when the same is ambiguous. It is well known that in a given case the court can iron out the fabric but it cannot

change the texture of the fabric. It cannot enlarge the scope of legislation or intention when the language of the provision is clean and unambiguous.

(c) **Easland Combines v. CCE(2003) 3 SCC 410 at page 421 para 18**. It is well settled law that merely because a law causes hardship, it cannot be interpreted in a manner so as to defeat its object.

15. **(i)** The first issue is related to the classification of service in the category of WLL(M). In our opinion the directive/communication dated 4th March, 2005 issued by TRAI only re-emphasizes the position mentioned in the IUC Regulation dated 29th Oct, 2003, namely that a fixed wireless terminal, if not confined to the premises of subscriber, will invite mobility within Short Distance Charging Area(SDCA), which in turn would attract ADC charges on such services. The definition of the WLL(M) is provided for, in the IUC Regulation of 29th Oct, 2003 in clause 2 (xxviii) which classifies the limited mobility telephone service to operate within a short distance charging area by using the wireless technology in the local loop. The implication, thereafter, is to change the pulse rate of the calls and to put them in the appropriate category. This category is already specified by the appellant vide their circular no. 3-37/2004-R&C dated 1st Sept, 2004. The contention of the counsel for appellant is that this is not a case of increase in tariff but only of change of pulse rate which was mandatory. The contention of the counsel for respondent is that the classification of subscriber as per the TTO is well within the powers of the respondent under Section 11(2) of the TRAI Act. It was argued that the classification has also been created to protect the interest of subscriber in a multi operator scenario in which the subscriber has to choose the most beneficial tariff plan, before taking services from any operator and to remain unaffected for a period of atleast six months. The change in category of a service, having consequential liability like ADC etc., should protect the subscriber as well as the operator. In the present circumstances we find that the categorization of service from WWL(F) to WWL(M) is on an immediate basis without envisaging any protection to a particular class of subscriber as per TTO who have not

completed their tenure of six months period in their adopted tariff plan. We are, therefore, of the view that the action taken by the appellant is appropriate.

(ii) We have gone through the provisions of the TTO alongwith the explanatory memorandum. The objective of the 31st Amendment is to achieve transparency in publishing and implementing the tariff and in billing the subscribers, which is necessary to be ensured because of the multiplicity of the plans in a multi-operator scenario. The respondent has also not tried to regulate the number of tariff packages offered by the Access Provider, in view of the dynamic situation in the market on account of intense competition. The purpose for which, this amendment in the TTO has been issued, is laudable and, is in the interest of the subscriber, however, the instructions of the licensor and the categorisation of service by the respondent in the instant case, have not kept in view a particular class of subscribers to be immune to any change of tariff. This aspect, if mentioned while issuing the change in classification of service by the licensor would have given the necessary protection to the subscriber and thereby maintaining the provisions of the TTO. In the present circumstances, we think that there was no other option with the appellant except the action taken by it.

(iii) It is a fact that the Interconnect Usage Charges Regulation dated 29th Oct, 2003 envisages the payment of ADC after classification of the service in WLL(M) category. The methodology of collection of ADC has also changed from per minute basis to a simple 1.5% of Adjusted Gross Revenue (AGR) of the operator in March 2006. In any case the call charges have, therefore, to accommodate the ADC payment until and unless, the operator decides to absorb it as a business preposition. The decision about fixing tariff normally takes care of all such charges which are payable as per the prevailing regulations and, therefore, as soon as this service is classified as mobile service, the charging of ADC as a component of tariff is a normal practice adopted by all the operators. It is a fact that liability of each operator for its subscriber for payment of IUC/ADC is inevitable until and unless there is a specific provision made for the subscribers who become immune to change in tariff because of the TTO.

(iv) The directions issued by the respondent in the present circumstances are in conflict with its own instructions of classifying the service in WLL(M) category without making any exception to the class of subscriber created in the TTO for providing protection against change in tariff plan before the expiry of six months and, therefore, in the instant case the direction issued by respondent is not tenable.

We uphold that the classification of service as WLL(M) (Wireless Local Loop Limited Mobile Service) according to the direction of licensor resulting into the application of pulse rate is as per the prevailing orders of the licensor as well as of the respondent. As per the TTO the respondent has created a class of subscribers, who have not completed the six months duration in a particular tariff plan. This classification is well within the powers of the respondent under section 11(2) of the TRAI Act. The intention of making such classification is to protect the interest of the subscriber in a multi-operator scenario, offering several options, which requires a concerted effort on the part of the subscriber to choose the most beneficial plan, before taking services under a particular tariff plan. The subscriber does not expect to be hurt atleast for a period of six months after adopting a particular tariff plan. This implies that, the subscriber belonging to this class should be protected from change in tariff on account of the instructions of the respondent as well as the licensor, and, therefore, while issuing the orders for effecting a change in the category of service, having consequential liability like ADC etc., there should be a specific mention that, as per the TTO, the class of subscriber which is within the period of six months time, after adopting a particular tariff plan, is insulated from these changes. In the present circumstances, however, we find that the instructions of the licensor and the respondent are to implement its decision immediately. There is no specific reference to exempt a class of subscribers who have not completed the period of 6 months.

We find that the Appellant has not changed tariff *per se* but has only changed the pulse rate as per the classification already in vogue. This exercise has been carried out by the appellant as per the direction of the licensor. The instructions of the Respondent which, inter-alia required the licensee of the fixed wireless service provider to strictly confine to the

premises of the subscriber has not been followed and the Appellant has attracted the classification of being a limited mobile service operator as per the judgment of TDSAT as well as the Respondent. Had it not done so, the Appellant would have attracted the charge that it was not levying the proper tariff and thereby depriving the Government of license fee/taxes on Adjusted Gross Revenue (AGR) as well as defaulting on ADC payments. We, therefore, hold that this is a peculiar case where the Appellant was obliged to change over to the new pulse rate. It could not have, in the circumstances, done otherwise, than what it did. The only thing that can be said is that it could have informed the same to the Authority while carrying out the change of pulse rate. But, it would not have been possible for the Appellant to wait for 6 months even in respect of a restricted number of subscribers, not to change the pulse rate. It would have only resulted in avoidable confusion. We, therefore, direct that no further action is necessary in pursuance of the Respondent's Direction dated 29.8.2007.

The question remains whether the Direction itself was valid. In a normal circumstance, such a Direction would be valid, since, as maintained by the counsel for Respondent, the Tariff Order is the only protection for the consumer. But, this is an extraordinary situation. We, therefore, feel that, in this case, further action is not called for. We also direct that when such a situation arises, where a service operator is legally bound to effect a change, it shall do so by simultaneously informing the Authority.

The appeal is disposed of accordingly with no costs. M.A. also stands disposed of.

……………………J
(Arun Kumar)
Chairperson

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(J.S. Sarma)
Member

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(G.D. Gaiha)
Member