TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL
NEW DELHI

Dated 15th April, 2010

Petition No.2 of 2008

M/s. Reliance Communications Ltd. …. Petitioner

Vs.

Bharat Sanchar Nigam Ltd. …. Respondent

BEFORE:

HON'BLE MR. JUSTICE S.B. SINHA, CHAIRPERSON
HON'BLE MR. G.D. GAIHA, MEMBER

For Petitioner : Mr. Ramji Srinivasan, Sr. Advocate
Mr.Akhil Sibal, Adcoate
Mr.Manali Singhal, Advocate
Mr.Santosh Sachin, Advocate
Mr.Kshatrashal Raj, Advocate

For Respondent : Mr. Maninder Singh, Sr. Advocate
Mrs.Pratibha M. Singh, Advocate
Mr.Yoginder Handoo, Advocate
Mr.Tejveer Singh Bhatia, Advocate
Mr.Arjun Nararajan, Advocate
Ms.Nitya Thakur, Advocate

ORDER

Introduction

1. This petition raises an interesting question relating to interpretation of a provision of the interconnect agreement, viz., Clause 6.4.6 providing for levy of charges for non-CLI, invalid CLI etc.

Facts

2. The parties herein are holders of licenses granted to them by the Department of Telecommunication, Ministry of Telecommunication of the Government of India in terms of Section 4 of the Indian Telegraph Act, 1885 (hereinafter referred to as 'the 1885 Act'). They indisputably entered into an interconnect agreement on or about 25th Jan, 2002 pursuant whereto and in furtherance whereof the petitioner became entitled to route its STD and ISD calls to its subscribers through the exchanges of the Respondent. The terms and conditions of supply, including the mode and manner in which the bills are to be raised by the Respondent on the petitioner, are governed by the said agreement.

We would refer to the relevant terms and conditions of the said interconnect agreement, a little later.

3. The Kerala Unit of the respondent on the premise that the petitioner has tampered with the CLI (Call Line Indicator) and forwarded its calls through non-CLI, invalid CLI, incomplete CLI and wrong routed trunk group etc. raised demand notices, said to be as a measure of penalty, on or about 30.11.2007, 21.12.2007 and 29.12.2007 for a sum of Rs. 96.53 crores. It, however, stands admitted that the said bills were revised by the respondent's Kerala Unit from Rs.96.53 crores to Rs. 90.37 crores.

The Demand

4. The respondent raised bills upon the petitioner impugned in this petition for a sum of Rs. 90.37 crores after some adjustments in terms of a letter dated 21.12.2007, which reads as under:

"As per the letter No. NS/21-35/Penalty bills/2007/Vol.1 dtd 30-11-2007, this office has requested M/s RCL to pay the penalty bills issued for tampepred CLI calls, wrong routed calls, non-CLI, invalid CLI calls etc. in different IUC regime period for Rs. 96.33 crores. SSA wise, POI wise details of penalty bills pending for payment are furnished in Annexure-A. I am directed to request you to pay the amount on or before 31.12.2007 and in case the payment is not received before 31.12.2007, this office will be constrained to take appropriate action as per the Interconnect Agreement."

With the said letter, consolidated statements were annexed therewith showing the details of – (1) SSA; (2) IUC Regimes; (3) PoI's; (4) Tampered CLI; (5) Wrong routings; (6) Invalid CLI; (7) Non-CLI and (8) Incomplete CLI – in respect of various Circles mentioned therein.

5. The petitioner, however, contended that the details submitted by the respondent not only were wholly insufficient but also did not include bill-wise invoice amounts as also the outstanding amounts against each bill for each Secondary Switching Area (SSA), details of the CDRs, on which the alleged decision has been taken to treat those calls as cases of non-CLI/invalid CLI/tampered CLI/wrong routing of the calls etc. According to the petitioner; although the respondent's Kerala unit purported to have furnished the details therein, but in fact only the bill date, bill number and the amount has been mentioned, stating that it was the case of wrong routing, tampered CLI, tampered call diversion of ISD through BSO circuits'/violation etc. separately. However, in respect of Trichur SSA, the respondent mentioned the reason for levy of penalty collectively as wrong routing,

tampered CLI, non-CLI, invalid CLI, incomplete CLI without specifying the purported violation in each and every bill separately.

6. The petitioner filed an application under Section 9 of the Arbitration and Conciliation Act, 1996 before the Delhi High Court praying for issuance of an order of Injunction, directing the respondent to continue to provide to it the interconnect facilities at all points of interconnection in terms of the agreements.

The same, however, was dismissed as being non-maintainable by the High Court, opining as under:

"11. In order to be entitled to discretionary relief, RIL should not be seen to have approached this Court with unclean hands. It must also establish that it has a prima facie case i.e., that the manner in which it has conducted its business is in consonance with the Interconnect Agreement, the salient provisions of which have been reproduced above. A reading of the Agreement prima facie leads to the conclusion that RIL has surreptitiously breached the covenants and obligations contained in the Interconnect Agreement with the purpose of withholding monies which appear to be due to BSNL. For telephone calls emanating from the United State of America or outside India from third party subscribers distinct from RIL itself, the so-called Home Country Direct Service cannot be employed. It is difficult to conceive such an activity as a 'Direct Service'. It is also not in dispute that by changing the CLI and thereby disguising and attempting to change an international call to a domestic one, the liability of RIL towards BSNL has been drastically reduced. Assuming that RIL was within its contractual rights to use the Home Country Direct Service even for telephonic traffic of third parties, there would scarcely have been any need for RIL to change the caller identification unless it had itself understood its business activity to be contrary to the Interconnect Agreement. There is a vast difference between the liability of Rs. 5.00 or 4.40 per minute and 0.30 corresponding to local call charges which RIL has been paying to BSNL.

12. At this stage, the existence of a prima facie case is wholly absent. Moreover, prima facie it is evident that the manner in which RIL has conducted its business activities is in dishonest breach of the Interconnect Agreement. Such a party is not entitled to any discretionary relief. So far as the balance of convenience is concerned, it is the common case that both parties are financially solvent having mutual dealing running into crores of rupees every month. Therefore in the event of the Arbitration Award being rendered in favour of RIL, there ought to be no difficulty in making the recoveries / adjustments. Moreover, although the word 'penalty' has been used in the correspondence, BSNL has only demanded amounts envisaged in the Agreement itself."

7. Questioning the correctness of the said demand the petitioner has filed this petition on or about 02.01.2008 claiming inter alia the following reliefs:-

(a) Direct the respondents to restore the disconnected POIs in Kerala circle.

(b) grant ad-interim stay of the notices of disconnection dated 30.11.07, 21.12.07 and 29.12.07 issued by the Respondent's Kerala circle;

(c) direct the respondent's Kerala unit to provide all call details (CDRs) for the alleged wrong routing of calls, call with non-CLI / invalid CLI, or tampered CLI calls.

(d) Direct the respondents to not to act on the alleged penalty bills till the details are provided and analysed and the alleged wrong routing cases are established.

Pleadings

8. The petitioner in this petition inter-alia contended:-

(i) in absence of the call data records it would not be possible for it to establish as to whether the bills raised by the respondent are payable at all or whether there was any wrong routing as alleged.

(ii) With a view to enable the petitioner to verify the purported violation(s), it was necessary for the respondent to specify actual violation before imposing any penalty.

(iii) The respondent has also not provided any detail of the method applied for raising such bills nor any finding has been arrived at that such calls are ILD calls as alleged in some of the correspondences between the respondent's Kerala unit and the petitioner.

(iv) The respondent and the DoT themselves having issued several circular letters from a perusal whereof it would appear that it was acknowledged that clandestine/illegal telecommunication centres / telephone exchanges are being run by unscrupulous persons and the possibility of the said calls being the handi-work of the said units cannot be ruled out, the impugned demands are wholly unsustainable.

9. The respondent, however, in its reply averred:

(a) The petitioner is guilty of suppression of various material facts;

(b) The respondent by a letter dated 15.12.2006 have furnished all the details which has not been disclosed by the petitioner in the petition, it is not entitled to.

(c) The bills in question are not penalty bills but only reflected same charges which are envisaged in the Interconnect agreement itself.

(d) The parties hereto were obliged to transmit the authentic CLI which has an important bearing in effective interconnection between two service providers as also security implications as the same is required to identify the location, time and other aspects thereof for tracing the call on the basis whereof all inter-operated charges would be leviable.

(e) The petitioner being guilty of tampering of CLIs, the respondent is entitled to levy charges for all calls recorded in the POI on the basis of IUC applicable for interconnect ISD calls. The detailed reply furnished by the Kerala unit of the respondent with annexures annexed to its letter dated 21.12.2007 discloses sufficient and necessary POI-wise details for the purpose of upholding the amount demanded from the petitioner.

Proceedings

10. Admittedly the respondents disconnected the POIs of the petitioner on or about 4.01.2008.

11. By an order dated 4.1.2008 the said POIs were directed to be restored on payment of 65% of the demand which is under challenge in this petition; pursuant whereto or in furtherance whereof restoration of connection was directed.

12. The representatives of the parties also held meetings during pendency of this petition to which we would refer to at an appropriate stage.

13. After exchange of the pleadings including the rejoinder to the reply filed by the petitioner and sur-rejoinder thereto by the respondent, the petitioner filed a Miscellaneous Application for quashing inter-alia a disconnection notice dated 2.2.2009 for alleged non-payment of outstanding amount of Rs. 9,17,27,716/- in respect of the bill dated 21.03.2005 for illegally routing of calls. The parties have exchanged pleadings in relation thereto also.

Submissions

14. Mr. Ramji Srinivasan, learned senior counsel appearing on behalf of the petitioner urged:-

(i) The respondent could not have taken an unilateral decision in raising bills for tampering with CLI or for delivering calls with non-CLI, invalid CLI, incomplete CLI or alleged wrong routing of calls without furnishing the basis therefor and / or without providing the details thereof.

(ii) Admitted misuse of telecom facility by unscrupulous subscribers cannot be termed as a tampering of CLI by the petitioner even in a case where the calls were terminated in the right trunk.

(iii) The directions/guidelines issued by DoT and the respondent to deal with various issues of Interconnection are binding on it and it was obligatory on its part to comply therewith before issuance of the bills which are penal in nature.

(iv) No penalty could have been imposed by the respondent in absence of any provision in the interconnect agreement.

(v) A notice for disconnection of POI, could not have been issued under the UASL Interconnect Agreement for alleged violation of NLD Interconnect agreement.

15. Mr. Maninder Singh, learned senior counsel appearing on behalf of the respondent, on the other hand, contended:-

(a) The parties being bound by their own pleadings, this Tribunal may not permit the petitioner to raise the bogey of non-supply of call data records (CDRs) having regard to the fact that all the relevant and requisite details have been supplied by the respondent for the purpose of invocation of clause 6.4.6 of the agreement.

(b) This matter is a sequel to the earlier round of litigation before this Tribunal viz. the HCD matter, wherein the petitioner had been found guilty of commission of fraud in the matter of depriving the respondent from realizing its lawful dues.

(c) The terms and conditions of the licenses granted to the parties by the Government of India as well as, the conditions of the interconnect agreements and interconnect regulations framed by TRAI including the charges having been fixed the same would govern the regime.

(d) The respondent herein having complied with the conditions of the agreement, the petitioner cannot be heard to say that it was not bound to pay the contractual amount in terms of clause 6.4.6 of the agreement, in view of the fact that violation of the license as well as the interconnect agreement, for all intent and purport, stands admitted.

(e) The purported explanations offered and/or the first information reports by the petitioner, having been lodged after a long delay, the same cannot be used as a shield by the petitioner for depriving the respondent from its lawful demand.

(f) The petitioner having not raised the question of validity of clause 6.4.6 of the agreement and there being no dispute with regard to the details of the calls, the number and nature thereof and other relevant data, it is too late in the day to contend that the petitioner is not bound to comply with its contractual obligations in terms of clause 6.4.6 of the interconnect agreement.

(g) Having regard to the admitted position that the circulars of the DoT as also those issued by the respondent being related to non-CLI calls or invalid CLI calls etc, the defence of the petitioner that some unscrupulous persons were responsible therefor, cannot absolve itself of its liabilities.

(h) The trunk groups having been specified and furthermore all the PoIs having been given specific numbers, any delivery of call which does not pertain to that trunk group or at the specified number, must be held to be cases of wrong routing and tampering of CLI.

(i) The circular letters upon which reliance has been placed by the petitioner are wholly inapplicable in the instant case.

(j) The petitioner having not shown its bonafide and / or taken action on its part to comply with the conditions therefor, it is not entitled to any relief, as has been prayed for in the petition or otherwise.

(k) In the meetings held between the parties, the petitioner having disputed only two categories of bills, namely, 11 bills totaling Rs.33,67,064 shown in Annexure '1-A' pertaining to wrong routing of calls and 5 bills shown in Annexure '1-B' totaling Rs. 1.42 crores on the ground that the same was time-barred, no other or further contention can be permitted to be raised herein.

(l) This petition should be dismissed as sufficient explanation has been furnished that there had been no overlapping of bills and the same was not barred under the law of limitation.

Issues

16. The core questions which arise for consideration of this Tribunal are:

(i) Whether the bills in question are penal in nature; and

(ii) Whether the respondent acted illegally and without jurisdiction in issuing the impugned bills and the notices without following the procedures laid down by DoT/BSNL in the circular letters dated 24.6.03 and 13.6.05 respectively.

Agreement

17. Before, however, adverting to the rival contentions of the parties, as noticed hereinbefore, we may notice the salient features of the agreement.

18. The petitioner was granted a license for providing Unified Access Services after migration on or about 20.7.2001 which was renewed in the year 2004 with effect from 14.11.2003.

Before us, a copy of the agreement in respect of Karnataka Circle has been produced stating that the agreement for the Kerala Circle is not available and that the provisions contained in both the agreements are similar. An addenda was appended to

the original agreement and the combined agreement was to be called 'the Agreement'.

The relevant provisions of the Interconnect Agreements are as under:

Clause 2.1.13.1:

"Incoming international calls, inter circle STD calls from fixed networks and inter circle STD calls from WLL(M) and cellular networks shall be handed over to BSNL at its SDCC tandem exchange by RIL on separate ports for the purpose of traffic measurement and revenue sharing. The traffic on each port or group of ports will be limited to the type mentioned above."

Clause 2.1.13.2:

"In case it is detected that incoming international calls or intercircle STD calls from cellular network and WLL(M) subscribers are handed over to BSNL on any port other than the earmarked ports, BSNL shall be entitled to bill RIL for the termination charge applicable to the highest slab for all calls recorded on that port for the preceding two months or the date of provisioning of that POI whichever is later."

The provision with regard to the billing is contained in para 6 thereof.

Clause 6.4.6 of the agreement reads as under:-

"The CLI based barring facility shall be activated at the PoIs wherever technically feasible to ensure that the traffic handed over to BSNL is in the appropriate trunk groups only. Wherever it is technically not feasible to activate CLI based barring, periodic monitoring of the incoming trunk group shall be done by BSNL to ensure this objective. The calls received by BSNL without CLI or modified / tampered CLI from UASL shall be charged at the highest slab i.e. as for ISD calls. In case such calls are received by BSNL on any trunk group, then all the calls recorded on this trunk group shall be charged at the rates applicable for IUC of incoming ISD Calls from the date of provisioning of that PoI or for the preceding two months, whichever is less…"

Clause 6.5 provides for billing. Paragraph 6.5.1 reads as under:

"IUC shall be billed based on bulk billing of traffic recorded at the point of interconnection."

The Regulations

19. It is beyond any doubt or dispute that the Telecom Regulatory Authority of India (the Authority) in exercise of its power conferred upon it under clause (b) of Sub-Section 1 of Section 11 of the TRAI Act made regulations/issued directions pursuant whereto, the respondent became entitled to 30 paise for every local call and Rs. 4.25 for International Long Distance calls by way of interconnect charges. The interconnect charges including the access deficit charges are payable only to the respondent in terms of the Interconnect Usage Charges Regulations, 2003 for termination of all calls in the network of BSNL and other service providers.

20. The IUC Regulations, 2003 provide detailed provisions with regard to the termination charges, access deficit charges etc.

Para 3.2 of Schedule 3 provides for collection and distribution of ADC, the substance of the relevant portions whereof reads as under:

3.2 **Collection and distribution of ADC**

The amount given above is to be collected/ paid as follows:

- For all intra-circle calls from cellular mobile/ WLL(M) to fixed line, the terminating service provider to be paid the access deficit amount

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- For all intra-circle calls from fixed to cellular mobile/ WLL(M), the originating service provider to retain the access deficit amount

- For intra-circle calls from fixed line to fixed line, the originating service provider to retain the access deficit amount (local calls and calls within "0 to 50 kms." do not have any access deficit charge). No access deficit charge is payable to the terminating fixed network.

- For all inter-circle (including ILD) calls from fixed line, the originating service provider to keep the access deficit amount. No access deficit charge is payable to the terminating fixed network.

- For all ILD calls to fixed line, the terminating service provider to be paid the access deficit amount by the ILDO (directly or through NLDO, wherever applicable) together with the termination charge

- For all inter-circle calls from cellular mobile/ WLL(M) to fixed line, the access deficit charge and termination amount is to be collected by the NLDO from the originating service provider and the access deficit charges together with the termination charge should be paid to the terminating service provider.

- For all inter-circle calls from cellular mobile and WLL (M) to cellular mobile/WLL(M), the access deficit amount is to be collected by the NLDO from the originating service provider and the access deficit charges should be paid to BSNL.

- For all ILD outgoing and incoming calls from/to cellular mobile and WLL (M), the access deficit amount is to be collected by the ILDO and the access deficit charges be paid to BSNL.

Mechanism

21. For different types of calls, namely, local calls, subscriber trunk dialing and international calls, different boxes are maintained. Calls are required to be received in the concerned box having regard to the nature thereof. Indisputably, millions of

calls pass through the said boxes. It is also not in dispute that if international calls are handed over at the point of local call, a huge amount payable to the respondent would be affected. It is furthermore not in dispute that if such wrongly routed calls or tampering in PoI is permitted, the same may affect the security of the country.

22. It is also not in dispute that the Department of Telecommunications of the Government of India framed National Routing Plan and all the service providers are required to strictly adhere thereto. It is, furthermore, not in dispute that the default clause is a contractual one and not governed by any statute. All interconnect agreements, however, to the extent mentioned therein are governed by the IUC Regulations.

23. We may also notice the meaning of 'invalid / incomplete CLI / non-CLI / wrong routing of calls / tampering of CLI' with a view to understand the basis for raising the impugned bills which are as under:-

(i) **CLI** is said to be **invalid/incomplete** when the telephone number of the calling party is having different number digits than those which are reflected to the called party when the call is made.

(ii) A **non CLI call** is a call in which CLI of the calling party does not appear to the called party at all.

(iii) **CLI** is said to be **tampered** when the number of the calling party is deliberately altered/modified/concealed from the called party through some mechanism during transmission of the call.

(iv) A **call** is said to be **wrongly routed** when the call is delivered in a Trunk Group other than the designated Trunk Group to which the call was supposed to be delivered.

The Circulars

24. DoT issued a circular dated 24.6.2003 which inter alia deals with operation of clandestine / illegal telecommunication centres / telephone exchanges, the relevant portions whereof are as under:

"(i) Utmost vigilance should be exercised in providing bulk telephone connections at a single user as well as for a single location. Provision of 10 or more connections may be taken as bulk connections for this purpose. Special verification of bonafide should be carried out for providing such bulk connections. Information about bulk connections will be forwarded to Sr. DDGs (Vig.), DOT as well as all Secirity Agencies on monthly basis.

(ii) The call detail records for outgoing calls made by the customers should be analysed for the subscribers making large number of calls day and night and to the various telephone numbers. Normally such numbers do not receive incoming calls. This can be done by running special program for this purpose. The service provider should devise appropriate fraud management and prevention programme and fix threshold levels of average per day usage in minutes of the telephone connection; all telephone connections crossing the threshold of usage should be checked for bonafide use. A record of check must be maintained which may be verified by Licensor any time. The list/details of suspected subscribers should be informed to the Sr. DDG(Vig.), DOT, West Block-I, Wing-2, R.K. Puram, New Delhi-66, immediately.

(iii) Active Support must be extended by the service providers to the vigilance units of DoT, for detection of such clandestine/illegal telecommunications facilities. For this purpose, names of the Nodal Officers & alternate Nodal Officers in respect of each licensed service area as communicated to the Intelligence Agencies for monitoring of telecommunications, should also be forwarded to Sr. DDG(Vig.). The Vigilance Unit of DoT will contact the Nodal Officer/alternate Nodal Officer, and till the time such nomination is received or in case of non-availability of such officer, the DoT vigilance units will contact the Chief Executive Officer of the licensee, for such support / coordination."

The respondent in its Circular dated 13.6.05 stated as under:-

"Various reasons for handover of such non-CLI or invalid/incomplete CLI calls have been reported. These reasons may be due to calls originating from mobile without SIM card, transient faults in the switch, software version / signalling problem, non-recognition of CLI by exchanges, lack of capability to analyse all digits by some exchanges, operator

assisted trunk call booking, non-CLI calls originated by BSNL network and meant for private operators' network which is in turn forwarded back to BSNL network due to activation of call forwarding feature by private operators' subscribers, roaming call forwarded cases wherein non- CLI or invalid/incomplete CLI calls meant for cellular subscribers roaming in other services areas / networks were routed via BSNL TAXs etc. In all such cases, where it is sufficiently established by concerned BSNL field units that the reasons for handover of non- CLI, invalid/incomplete CLI calls to BSNL network was not of deliberate misuse or routing/tampering of CLI of incoming ISD calls at PoI, and where the private operators give an undertaking that call forwarding to BSNL network has been barred from their network, in all such cases which have come to notice as well as cases which come to notice henceforth shall be settled as prescribed."

It was furthermore stated ---

"All the ILD operators should transit the CLI as received from the foreign callers. In case of CLI is not received from the distant end (foreign party) then the ILD operator in the country should introduce his assigned two digit carrier identification code followed by the country code from where the call is received. In no case, the call should be offered to BSO/CMTS without any CLI. This is to identify the origin of call and ILD operator handling the call."

The circular letter of the respondent dated 13.6.05 relates to non-CLI, invalid / non-CLI calls by the private access operators.

25. It was in the context of the said subject-matter, deliberate misuse or routing or tampering of CLI of incoming ISD Calls at PoI and where the private operators give an undertaking that call forwarding to BSNL network has been barred from their network. It was directed that when such cases come to the notice of the addressees as well as cases which had already come to the notice thereof, should be settled in the manner as prescribed thereunder, namely, when the non-CLI calls received at PoI are less than 0.5 % of the total number of calls received at that PoI, then in such cases the access provider shall be charged for

double the number of such non-CLI calls handed over at the highest slab of IUC applicable, i.e., interconnecting STD calls as detailed thereunder for each of the three IUC regimes.

26. The circular letter dated 25.10.2004, provided for continuation of unauthorized deviation in routing of ILD Calls. However, as per the said letter, the petitioner is said to have stopped tampering of CLI with effect from 16.09.2004.

27. However, by a letter dated 30.4.2006, the petitioner brought it to the notice of the Chairman-cum-Managing Director of the respondent that the cases be settled in line with the various circulars issued by the Headquarters of the respondent.

Two FIRs were also lodged by the petitioner on 13.12.2004 and 12.5.2005 purported to be in terms of the circulars of the DOT.

Subsequent Events

28. We may, at this juncture, also notice certain subsequent events, namely, the meetings, which are said to have taken place pursuant to the Orders of this Tribunal passed from time to time.

29. The first of such meetings was held on 26.8.2008, the relevant portion of the minutes whereof as communicated to the respondent, reads as under:

"As instructed by the Corporate office vide File No. 331-2/2008- Regin/842 dated 19.8.08, a meeting was held with the representatives of M/s Reliance to sort out the issues regarding the verification/correctness of bills as directed by Hon'ble TDSAT. Details of the penalty bills issued to M/s RCL totalling to Rs. 90.37 crores was handed over to the representatives of M/s RCL. Out of this, M/s RCL contested -

a. penalty bills amounting to Rs. 33.67 lakhs pertaining to HCD calls which according to them has been paid at the Corporate Office by them.

b. penalty bills amounting to Rs. 1.42 crores are time barred AB arrear group bills.

30. The second meeting took place on 17.9.2008, the minutes of the meeting whereof are said to be as under:

"It was clarified from BSNL side that 11 bills totalling to Rs. 33,67,064/- shown in Annexure 1-A pertain to wrong routing calls totalling to Rs. 33,67,064/- issued by Alleppy, Calicut and Trivandrum SSAs which have not yet been paid by m/s RCL.

M/s RCL, disputed 5 bills shown in Annexure 1 B totalling to 1.42 crores stating that these are time barred AB arrear group bills and the dispute is pending with Hon. TDSAT.

It was clarified from BSNL side that details of 5 bills shown in Annexure 1 B totalling to Rs. 1,41,66,750/- are supplementary bills issued by Trivandrum SSA on account of rate revision. The contention of M/s RCL that these bills are time barred AB arrear bills cannot be agreed to in view of the Para 7.3.1.(iv) of interconnect agreement which inter alia stated that "if the bill issuing authority subsequently finds that some charges have been omitted ..... additional billing becomes necessary due to tariffs/rates changes notified subsequently with retrospective effect by the appropriate authority.

In view of the above, it was reiterated by BSNL that M/s RCL is liable to pay the amount of Rs. 90.37 crores referred to in the disconnection notice dated 30.11.07, after adjusting the 65% of the total amount which has already been paid by M/s RCL."

31. The petitioner disputed the correctness of recording of the said minutes of meeting in terms of a letter dated 24.10.2008, the relevant portions whereof read as under:

"4. It is also pertinent to note that **there was no denial from BSNL to the record of discussions sent by RCOM on 18.9.09.** From these records of the discussion, it is clear that RCOM made specific requests for CDRs from BSNL with regard to the bills raised by BSNL for the alleged non-CLI, invalid CLI / incomplete CLI cases, RCOM **also made specific request of CDRs to determine the issue of wrong routing cases alleged by BSNL.** However, as recorded in the RCOM letter dated 18.9.08, BSNL side did not agree to provide CDRs or any other documentary evidence as the matter was stated to be subjudice and that the CDRs or any other documentary evidence will be produced by BSNL before the Court of Law, if necessary. It may not be out of place to mention here that the Hon'ble TDSAT, during the course of arguments specifically directed BSNL to supply the CDRs to the Petitioners.

5. As regards the issue of duplicate billing (reference point 3 of the RCOM letter dt. 18.9.08) and the demand of BSNL Kerala Circle for payment of the alleged amounts for the HCD service, allegedly not paid by RCOm, **we submit that the stand of BSNL Kerala Circle is at variance with the BSNL HQ.** The BSNL HQ vide its letter dated 7.6.05 indicated that the total amount calculated upto the period 31.5.05 is Rs. 319.04 crs. for the entire country out of which Rs. 188.73 crs has been paid and also that the balance amount of Rs. 130.31 crs should be paid immediately. In this letter the demand from Kerala Circle was shown as Rs. 15.66 crs. Further a reminder was received from the BSNL HQ in which it was again indicated that the pending amount for the entire country is Rs. 130.31 crs. This amount was paid by RCOM centrally to the BSNL HQ on 21.9.05. It is to further indicate that subsequently that BSNL HQ issued a letter dated 21.9.05 by which it intimated that the entire amount demanded by BSNL has been paid by RCOM and no further notice for disconnection of POIs is to be issued. **Therefore, BSNL statement that the disconnection notice issued by Kerala Circle in November 2007 contained bills pertaining to HCD period also, is again in violation of the direction from the BSNL HQ as well as violation of the Interconnect Agreement.** A copy of the said letter dated 21.9.05 from BSNL HQ is attached herewith.

6. BSNL had further indicated that the application of the BSNL HQ circular dated 13.6.05 for non-CLI, invalid CLI / incomplete CLI etc can be applied only in cases where the conditions stipulated in the said circular are applicable. We submit that this is one of the major issues in the present petition being Petition No. 2 of 2008 pending in TDSAT. Therefore, BSNL has to apply not only the circular dated 13.6.05 issued by BSNL HQ but also the circular dated 24.6.03

issued by the DoT and also BSNL HQ circular dated 25.10.04. **BSNL is requested to consider the issues as reflected above and reconcile the issue of payability of the penalty demanded by BSNL.**

7. We further submit that in the purported minutes of the meeting held on 17.9.08 received by RCOM on 14.10.08, reference is also made to the meeting held on 26.8.08. From the minutes of the meeting held on 26.8.08 it has been inferred that the dispute by RCOM relates to only Rs. 1.75 crs and the balance penalty bills amounting to Rs. 88.62 crs have been accepted by RCOM. **This however is not the correct position of the case. It is clear from the wording of the minutes dated 26.8.08 that what is being referred is the totals of numbers which in any case is not the issue under discussion.** The main issue under discussion is that the said bills totalling about Rs. 96.53 crs, as conveyed in the BSNL Kerala letter dated 30.11.07 and repeated vide letter dated 21.12.07 and later on revised to Rs. 90.37 crs vide letter dated 21.12.07 are arbitrary, illegal and not payable by RCOM."

32. It is also relevant to notice that in paras 12 and 13 of its sur-rejoinder, the respondent raised a contention that the petitioner did not raise any dispute in regard to number of calls, the nature of calls, challan number and quantum of bills except those mentioned therein. The petitioner in its response to the said sur-rejoinder stated as under:

"20.9. That the contents of para 12 & 13 are not correct and hence denied. In response to this para, the Petitoner is relying upon the contents of letter dated 24.10.08, already annexed as Annexure P-55. The petitioner further respectfully submits that the Respondent BSNL has herein, wrongly referred to the issue of HCD service as allegedly, "**a cloak invented by the petitioner to unlawfully deprive the Respondent of its dues.....**" {emphasis added}. The Petitioner respectfully submits that this contention of the Respondent is completely baseless and misleading. The issue of HCD is entirely different and is subjudice before the Hon'ble Supreme Court and before this Hon'ble Tribunal as Petition No. 142 of 2007."

33. Thus, only legality of demand had been put in issue and not the other details. We may furthermore notice that a chart has been supplied to us by the learned counsel for the respondent, from a perusal whereof, it would appear that the trunk group

allotted to the petitioner was termed as 'AA'. It, however, appears that although code 477 was allotted for Alleppy SSA, the numbers involved are 04843042000, 04843041085 and 04843041100.

Similar other examples are given, where the calls instead of local box, given a particular number, was used for transmitting international calls.

34. The validity of clause 6.4.6 is not in question. It is, thus, not necessary for us to go thereinto. The said provision, however, is akin to an agreement between the parties to claim damages. The respondent has introduced the said clause by way of an addendum in the original agreement so as to enable it to recover its dues besides Access Deficit Charges (ADC). Indisputably, in terms of the Regulations framed by the Authority as also agreement entered into by and between the parties herein, it is the respondent alone who is entitled to ADC. Admittedly, the Authority has prescribed charges in terms of IUC Regulations framed by it from time to time. ADC payable to the respondent is also prescribed. Whereas for local calls, the respondent is entitled to receive about 30 paise per call, for international calls, it is entitled to receive about Rs. 4.25. The petitioner herein allegedly while implementing the Home Country Direct Service (HCDS) had been passing on the international calls as local calls. The Government of India owing to the aforementioned acts of omission and commission on the part of the petitioner, imposed a penalty of Rs. 50 crores upon the petitioner. Questioning the legality and/or validity thereof, the petitioner filed a petition before this Tribunal which was marked as Petition No. 3 of 2005. By reason of a judgment and order dated 4.3.2005, this Tribunal upon taking into consideration the contentions raised by the parties thereto in great details, held as under:

> "Validity of the penalty clause cannot be questioned. Public interest requires such a clause to be put in place in the license. Such a penalty clause is required in the license to see that licensee performs its obligations as per terms and conditions of the license entered into with the licensor, the Central Government, which the Central Government does in

exercise of its statutory powers for public good. The words in proviso of Section 4(1) of the Telegraph Act "Central Government may grant a license, on such conditions and in consideration of such payments as it thinks fit" have to be given proper meaning. "Conditions" and "consideration of such payment" and "as it thinks fit" have been appropriately used. Of course, no one can say that "conditions" could be arbitrary or unreasonable. License is not a contract in its ordinary sense but rather a privilege granted to the licensee on certain conditions for establishing, maintaining and working telecommunications in the country. There are conditions in the license which the licensee is obliged to observe in the interest of security of the country. We do not find clause 10.2(ii) in the license to be any arbitrary or unreasonable. Having examined the whole aspect of the matter we do not find that the impugned order of the Central Government imposing full amount of penalty in any way excessive. It could not be faulted with.

Mr. Salve learned counsel for the petitioner said that there is interconnection agreement between the petitioner and BSNL/MTNL, and that the dispute thereunder would fall within the jurisdiction of TDSAT, and DoT cannot take it upon itself to decide that dispute. He stated on that account again the impugned order is without jurisdiction. DoT is not concerned with the losses, if any, occasioned to BSNL/MTNL on the ground that BSNL/MTNL have been deprived of the legitimate ADC or otherwise. It is quite correct to say that the award of damages assessed by reference to financial loss, if any, either to BSNL or MTNL is not within the purview of DoT and in fact, DoT rightly made its stand clear in its communication dated 15.10.2004 to the petitioner. It could be that damages, if any, suffered by BSNL/MTNL might be measured by the benefits gained by the petitioner from the breach of the terms of the license or agreement between them.

According to DoT, breaches committed by the petitioner were of extreme vital nature. Mr. Vahanvati said that action of the petitioner put the security of the nation in grave danger. He was referring to Caller Line Identification (CLI) numbers. He said the modus operandi adopted by the petitioner was a criminal act. It was a ruse to conceal true nature of the calls. Petitioner generated fake numbers which did not belong to any subscriber, misguided the recipients of the calls and misled the security agencies. Petitioner gave no explanation whatsoever why it at all resorted to generating dummy or bogus subscriber numbers though it started giving correct CLI numbers from 16.9.2004 but only when DoT asked for its explanation. It is not one or two dummy numbers. Rather these run into hundreds and thousands. The method Reliance Infocomm Ltd., the petitioner, employed to camouflage an international call was certainly unprincipled and if we may say so unscrupulous. This was in total breach of the license conditions. Petitioner stated that all records were being maintained and there was no stoppage for the licensor or any of the security agencies to call for the records any do see from that where the call originally emanated. That may be so, but when the security agencies want to monitor a call immediately/simultaneously that will be the crucial time to take action and not to wait for the records to be called by which time, it may be too late. With the specter of terrorism and other dangers looming all over even a second's delay could be disastrous."

This petition, according to the respondent, is a sequel thereto.

It may or may not be but as at present advised, we need not enter into the said question.

35. The respondent, for realisation of the damages by way of loss in the ADC charges, has made the impugned demands.

36. In a case of this nature, the fact that clause 6.4.6 would apply, is not in dispute. The application of the said provision, however, must be determined having regard to the allegations made by the respondent in its demands as also the subsequent correspondences.

37. Mr. Singh has contended that the circular dated 13.6.05 is not applicable. We are unable to agree with the aforementioned contention. A bare perusal of the said circular would clearly demonstrate that the same had been issued having regard to the fact that various cases had come to the notice of the respondent and which would come to its notice thenceforth, so far as the reasons for handing over of non-CLI / invalid / incomplete CLI are concerned.

38. It may, however, be true that the case of a deliberate fraud on the part of a party to a contract, or if the same has come to the notice of the respondent, may stand on different footings. Although Mr. Srinivasan has taken us through almost the entirety of the pleadings as also the relevant correspondences, which passed between the parties, it may not be necessary for us to consider the same at great details. The petitioner, for all intent and purport, has accepted that international calls have been handed over to the respondent as local calls. The petitioner, however, had contended that it was by reason of activities of unscrupulous subscribers who misuse the facility and indulge in illegal routing of international calls with which it had nothing to

do. It has furthermore been contended that the unscrupulous subscribers indulging in illegal routing of traffic use the facility of the service providers including that of the respondents. It, however, appears that examples of tampered CLI, wrong routing, invalid CLI, non-CLI and incomplete CLI has been furnished PoI-wise. Indisputably, tampering of CLI was prohibited by DoT in terms of its circular letter dated 24.6.03. Various directives were issued in terms thereof.

39. The respondent has placed before us a large number of documents covering over 280 pages along with the sur-rejoinder affidavit, wherewith, a letter dated 11.10.04 was annexed, to show continuous violations on the part of the petitioner in handing over international calls as local calls to it. The said letter reads as under:

> "Wrong routing and replacing ISD CLI with CLI from within India was observed on FA and FD circuit groups at Calicut POI by M/s Reliance Infocomm Ltd. Violation bills for the months of March at August, 2004 have been charged to M/s RIL to be paid before 13.10.2004.
>
> It is now observed that calls are being received at local circuit group AA with incoming CLI as 0484 3041085 and 0484 3042000. When the above two numbers (i.e. 04843041085 and 04843042000) are called, we are always getting busy tone. However, when we contacted the called numbers in Calicut SSA, the called numbers confirmed that they have received calls from Indonesia, Newzealand, Rome, Riyad, Oman, Canada, USA, Dubai, Australia, Italy etc. The calls are coming from these two telephone numbers, i.e., 04843041085 and 04843042000, continuously and even now calls are being received i.e. observed upto 8.10.2004.
>
> Earlier in reply to our violation bill for FD group, M/s RIL has stated that these violations may be the work of a grey operator. In view of the above, we may take up with the Sr. DDG(Vig.) in DOT Cell as BSNL is losing a lot of revenue because of such wrong routing and it is a serious national security issue. Details of sample CDRs which were checked with customers are enclosed for both FD group and AA group for kind information."

40. Furthermore, pursuant to the orders of this Tribunal from time to time, the parties have met for reconciliation of their accounts. In the first meeting, the minutes whereof were said to have been recorded on 26.8.08, only two issues were said to have been raised, namely, payment of penalty bills amounting to Rs. 33.67 lakhs pertaining to HCD calls which according to the petitioner has been paid at the corporate office by them and penalty bills amounting to Rs. 1.42 crores. The said meeting was held pursuant to an observation made by this Tribunal in its order dated 8.8.2008. The records of the respondent were shown to the representative of the petitioner. It is stated that no dispute was raised in relation thereto. Only two disputes have been raised by the petitioner which we have noticed hereinbefore. When the meetings were directed to be held to let the parties try to sort out the issues regarding verification/correctness of the bills, the correctness of the bills, therefore, are not only in question set also the validity thereof. It is, therefore, not a case where the principles of natural justice have been complied with.

The authorised representatives of the parties met on two occasions. No dispute is said to have been raised with regard to the details of the calls, number of calls, the nature of the calls etc. No minutes of meetings, however, have been signed by the petitioner.

Correctness of the minutes of the second meeting is in serious dispute.

It also is not the case of the respondent that in the said meetings the respondent had supplied the copies of its CDRs.

41. It is true that a court of law would be entitled to take subsequent events into consideration for the purpose of granting, moulding/denying the petitioner the reliefs sought for in the petition. Reference in this connection may be made to Order 7 Rule 7 of the Civil Procedure Code which reads as under:-

> "7. **Relief to be specifically stated** - Every plaint shall state specifically the relief which the plaintiff claims either simply or in the alternative, and it shall not be necessary to ask for general or other relief which may always be

given as the Court may think just to the same extent as it had been asked for. And the same rule shall apply to any relief claimed by the defendant in his written statement."

(See P. Venkat Savala Vs. Motor and General Traders [(1975)1 SCC 770] and Shiv Kumar Sharma Vs. Santosh Kumari – AIR 2008 SC 171).

42. The matter, however, might have been different if the correctness of the bills were not in question, in which event only the legal pleas raised by the petitioner would fall for consideration. We would although deal with the said legal pleas, but for the reasons stated herein, we cannot ignore the facts of the matter only on the basis thereof.

43. Moreover, it cannot, in absence of any other material, be said that the bills inter alia being pertaining to HCD, and as the same is pending before the Supreme Court of India, this Tribunal will be bound by its earlier decision in Petition No 3 of 2005, without any other or further consideration.

44. It, however, stands admitted that the respondent has not supplied the copies of the CDRs to the petitioner. It is true that some materials had been shown, to which reference had been made hereinbefore, that the petitioner had been handing over international calls as local calls to the respondents but the same by itself would not mean that the requirements to hand over the CDRs are not required to be complied with.

45. The respondent is a State, within the meaning of the Article 12 of the Constitution of India, and, thus, unless strong reason exists therefor, it should not refuse to supply any relevant documents (which would include the CDRs), to the petitioner; particularly when it was ready and willing to hand over such CDRs to this Tribunal. No privilege can be claimed in respect of the said CDRs.

Requirements to supply such CDRs are contained in various clauses of the agreement. The respondent contends that clause 6.4.6 merely provides for a strict civil liability and not a penalty. We cannot agree to the said contention. The said clause being penal in nature, it is required to be construed strictly. All preconditions laid down therefor must also be fulfilled. In a case of this nature where a huge liability has been fastened on the petitioner, the principles of natural justice are required to be complied with. Applicability of the principles thereof cannot be doubted. It is, therefore, not enough that in order to attract the said provision, as was submitted by Mr.Singh the respondent is merely required to show:-

(i) There are specified trunk groups;

(ii) Respondent detects calls, other than specified for that trunk group;

(iii) Respondent has applied the highest applicable IUC for all the calls recorded on the said trunk group.

46. It is, however, not in dispute that trunk groups have been specified in terms of the agreement itself. There cannot, furthermore, be any doubt or dispute that the petitioner had full knowledge thereof. It is furthermore not in dispute that the applicable charges for local calls, STD and international calls have been specified by the Authority itself. We are not oblivious of the fact that the petitioner in its letter accepted that details were handed over to it by BSNL and it had also annexed therewith, its tabulated analysis. We, furthermore, are not oblivious of the fact that the petitioner, except for lodging two FIRs after a long

time, did not take any significant step even to comply with the circular letter dated 24.06.2003 issued by the DoT. Indisputably, the petitioner is also duty-bound to comply with the said directive with a view to show that all such directives have been complied with, so as to explain the measures taken by it for plugging the loopholes so that neither national security is breached nor illegal international calls are passed on as local calls.

It will, thus, also be open to the DoT, if it is so advised, to seek compliance of its circular. We say so as it has been shown before us that a telephone illegal use whereof was intimated to it on 10.03.2004, has not been disconnected till 08.11.2004, i.e. for a period of about 8 months without causing any check either before the grant of connection or during the operation of the connection in terms of the said circular. It, furthermore, is evident that the respondent by a circular dated 25.10.2004 has emphasized that despite the claim of the petitioner that it had stopped tampering of CLI pointed out that international calls have been delivered on local PoIs. We also place on record that the FIRs were lodged only after the show cause notice had been issued by the DoT, and demand had been raised by the respondent herein as also the petitioner was threatened with disconnection.

Limitation

47. The petitioner appears to have raised the question of limitation in the meetings held with the representative of the respondent. No such contention appears to have been raised in the petition itself. Furthermore, reference to the limitation of six months in terms of the agreement relate to a mistake in the submission of bill and nowhere to allegations of tampering with the

CLI etc. In any event, the period of limitation for recovery of an amount or submission of a bill cannot be curtailed having regard to the provisions of Section 28 of the Indian Contract Act. As has been held by the Supreme Court of India in National Insurance Company Vs. Sujir Ganesh Nayal – 1997(4) SCC 366, curtailment of the period of limitation provided by law is not permissible and is hit by Section 28 of the Indian Contract Act. (See also P.No.146 of 2005 : Bharti Televentures Ltd. Vs. BSNL, New Delhi disposed of on 18.12.2009 by this Tribunal).

Conclusion

48. We, therefore, are of the opinion that interest of justice would be subserved if the respondent is directed to hand over the relevant CDRs to the petitioner so as to enable it to offer explanations thereabout, if any, and also a direction upon the petitioner to furnish such information of informations and/or document or documents as may be asked for by the respondent. This, however, would be subject to any findings arrived at herein.

49. This petition is disposed of with the aforementioned directions. In the facts and circumstances of the case, there shall be no orders as to costs.

……..... J
(S.B. Sinha)
Chairperson

..……..... (G. D. Gaiha)

Member