

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

DATED 15th January, 2010

PETITION No.119 OF 2008

HFCL Infotel Ltd., Punjab

... Petitioner

Versus

Bharat Sanchar Nigam Limited

... Respondent

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BEFORE:

HON'BLE MR. JUSTICE S.B.SINHA, CHAIRPERSON

HON'BLE MR. G.D. GAIHA, MEMBER

For Petitioner : Mr. Ramji Srinivasan, Senior Advocate
Mr.Ankit Shah,Advocate

For Respondent : Mr. Maninder Singh, Senior
Advocate with Mrs. Prathiba M.
Singh, Mr.Yoginder Handoo,
Mr.Tejveer Singh Bhatia,
Mr.Arjun Natarajan,

Ms.Nitya Thakur, Advocates

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JUDGMENT

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S.B. Sinha

The petitioner is a basic service provider; the license having been granted by the Union of India in terms of the provision of Indian Telegraph Act, 1885. The respondent herein is also a licensee. The petitioner is engaged in providing Wireless in Local Loop (WLL) and Wired Telecommunication Services in the state of Punjab, popularly known as Punjab Service Area. For completion of a call outside the Union Territory of Chandigarh and Panchkula, Haryana, the petitioner is necessarily required to interconnect its services with that of the respondent, it having the largest subscriber base in the country. Respondent is also required to take the services of the network of the petitioner for monitoring its calls.

As the respondent did not have the facilities to raising of the bills on Call Data Record (CDR) basis, it had been charging the petitioner only on the basis of Metered Call Unit (MCU) basis.

We are in this case concerned with the period 2003-2004. Indisputably, in relation to the said interconnect agreement, the parties were required to perform their mutual obligations on reciprocal basis. It is not in dispute that only

sometimes in the year 2005, the respondent acquired the capability of raising bills on CDR basis. It is furthermore not in dispute that the petitioner also shifted the platforms for the purpose of raising bills on the respondent on CDR basis. It is, moreover, beyond any controversy that there had been complete accord and satisfaction of discharge of the contractual obligation between the parties so far as payment of bills is concerned on MCU basis.

On or about 29.12.2007, the respondent raised a demand for a sum of Rs. 39,60,321/- towards alleged excess payment made by it against the bills raised by the petitioner during May 2003 to July 2004, stating:

“As per latest directions received on the issue from BSNL higher authorities matter is to be settled on the basis of CDRs available with BSNL.

Accordingly, month wise / POI wise details of amount paid in excess to M/s HITL as per BSNL CDRs of the corresponding period are attached as Annexure – II for all M/s HITL basic POIs except OCB-34 POI claims for the period May 2003 to March 2004 and ADC refund claims for the period May 2003 to January 2004. These claims are still under the process of verification and refund claims for these will be raised subsequently.

As per annexure II attached Rs. 3960321/- (Rs. Thirty Nine Lacs Sixty thousand three hundred and Twenty one only) have been paid in excess by BSNL against M/s HITL IUC claims paid without verification and are due to be refunded to BSNL by M/s HITL.”

Along with the said letter, the details of the bills raised by the petitioner and paid by BSNL area-wise, the number of bills and the nature of the exchanges were furnished.

In response to the said demand the petitioner by its letter dated 02.01.2008 requested the respondent to provide relevant CDRs with day-wise summary for matching the data with its record to enable it to arrive at a final conclusion. The respondent by its letter dated 14.01.2008 replied thereto in the following terms:

“In reference to your office letter no. cited above on the above cited subject your attention is again invited to this office letter of even no. dated 29.12.2007 vide which M/s HITL was asked to make payments of IUC refund claims raised by BSNL Chandigarh within 15 days period or take up the matter at circle level in case of any issue. It was further intimated in this regard that refund claims as referred above have been raised as per instructions received from BSNL higher authorities.

So with regard to your office letter cited above it is again intimated that as the above cited refund claims has been raised as per guidelines received from BSNL Punjab Circle office, so your are again requested to either make payment of Rs. 3960321/- (Rs. Thirty Nine Lacs Sixty thousand three hundred and Twenty one only) to AO(Cash), O/O GMTD, Telephone Exchange Building, Sector 34, Chandigarh within seven days of receipt of this letter or take up the matter directly at circle level in case of any issue or for any requirement on the matter.”

The petitioner was constrained to make requests to the respondent for providing CDRs to it by its letter dated 23.01.2008, whereto the respondent vide its letter dated 10.03.2008 responded as under :

“Regarding your demand of CDRs and day wise summary, the same is not required to be supplied by this office because the bills raised by you were itself wrong i.e. MCU based bills instead of MOU based. As per BSNL (HQ) (IUC) instructions issued vide No. 208-15/2003- Regn dated 23.04.2003 point 14”Termination charges to terminating access provider shall be paid by BSNL for successful calls on cumulative actual minutes of usages of

the network for the cumulative conversion time and not on call by call basis.” Regarding prevailing IUC instructions, these were already addressed to all operators and all billing activities were based on it.

Also as per BSNL-HQ instructions vide letter No. 208-15/2003- Regn dated 24.04.2003, para 5 “the bills raised by private operators shall be agreed to, subject to post facto reconciliation done by BSNL. Till such reconciliation is done, the bills raised by private operators shall be treated as provisional and shall be subject to final settlement.” & for reconciliation no time frame has been specified in the prevailing interconnect agreement.

Therefore, an amount of Rs.39,60,321/- excess paid by Chandigarh SSA is recoverable from you. It is pertinent to mention that Chandigarh SSA has already given you ample time for making payments but still the dues have not been paid. Due to non-payment of outstanding dues from your side this office is forced to issue this disconnection notice. In case payment is not made within 30 days from the issue of this disconnection notice all your POIs in Punjab Circle will be disconnected without any further correspondence in this regard and further action will be taken as per interconnect agreement and BSNL HQ guidelines issued from time to time.”

In response thereto the petitioner by its letter dated 4.4.2008, stated:

“In this regard we would like to mention here that we have already requested to Area Manager (North) o/o The General Manager, Telecom, Chandigarh SSA for supplying CDRs alongwith summary report of concerned disputed POI for matching the number of calls, MOUs, rate and amount with our own records vide our letter no. HITL/P/BSNL-IUC Bills / 2007-08/375 dated 2.01.2008 and letter no. Area Manager (North) o/o GMT, Chandigarh SSA, your office has issued us disconnection notice with the direction that in case payment is not made with 30 days

from the issue of this disconnection notice, our all POIs in Punjab Circle will be disconnected without any further correspondence in this regard and further action will be taken as per Interconnect Agreement.

On analyzing IUC bills previously passed by BSNL Chandigarh and now passed as per their CDRs, there is vast variation in the amount as intimated by BSNL Chandigarh. In some areas the variation is as high as 31.61 % i.e. Chandigarh Tax in the month of May 2004. Therefore, we would request to your goodself to kindly withdraw disconnection notice and grant us further time so that we may be able to exercise spade work for analyzing actual amount excess paid by BSNL Chandigarh. At the same time we would request to kindly issue suitable instructions to BSNL Chandigarh to supply us CDRs, Summary report indicating number of calls, MOU, Rate and amount in respect of following POIs at the earliest.”

A request was again made by the petitioner to make the CDRs available to it and to grant one month's extension to enable it to reconcile the accounts by its letter dated 08.04.2008. The respondent while acceding to the petitioner's request for grant of extension for a month, refused to agree to its request for reconciliation of the accounts or provide any proof in support of its claim.

A meeting thereafter took place by and between the representatives of the parties. By a letter dated 05.05.2008, the petitioner requested to defer the disconnection notice, stating:

“In light of the above, and as per our disconnections with your goodself, we request you to kindly advise the office of the CGM, Punjab Circle, Chandigarh “Not to disconnect the POIs” till the reconciliation of the accounts on reciprocal basis is done to arrive at a resolution in the matter.”

By another letter dated 07.05.2008, the petitioner requested the respondent as under :

“In continuation to the letter HITL/BSNL-IUC BILLS/2008/002, dated 5th May 2008, we had requested to provide the CDR data for the relevant period because as per the current systems available with HITL, we are unable to retrieve the old CDRs beyond the period of three years and as we are not retaining the old CDRs beyond the three years. HITL is having two switches in Punjab, one in Chandigarh and second in Jalandhar from where all the calls are routed. Your good self is once again requested to advise the office of CGM, Punjab Circle, Chandigarh, “Not to disconnect the POIs” and provide the CDR data for the relevant period for our internal analysis”

As the respondent continued to threaten disconnection of its interconnect services, the petitioner under protest and without prejudice to its rights and claims, paid the said amount of Rs. 3960321/- by a cheque dated 07.05.2008.

In the aforementioned factual backdrop, the petitioner has filed this petition praying inter alia for the following reliefs

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“(a) set aside the letters dated 29.12.2007, 14.01.2008, 10.03.2008 and 08.04.2008 issued by the respondents in respect of the demand of Rs. 3960321/- against the petitioners and direct the respondent to refund the said amount of Rs. 3960321/- alongwith interest at the same rate that is being charged by BSNL from the petitioner i.e. SBI PLR + 2% on quarterly rests;

(b) permanently restrain the respondents from raising unilateral demands and coerce the petitioners to pay the said demands of the respondents on the threat of disconnection of points of interconnection (POIs) etc. ;

(c) in the alternative that it is found that the amounts are payable by the petitioner to the respondent on the basis of the letter dated 29.12.2007 then this Hon’ble Tribunal may direct total reconciliation and settlement of respective accounts between the petitioner and the respondent on the same reciprocal basis to ensure level playing field, and in a time bound manner and with interest on delayed payments @ 12% per annum”

The respondent in its reply to the petition while accepting that at the relevant time it did not have the requisite capacity of raising bills on CDR platform in all the circles in the Country contended that it was the private operators who were insisting on raising the bills the CDR basis wherefor 'TRAI' was requested to come out with a scheme / guidelines for determining the proportion / shares of the services providers in generating the said amount required therefor. It was on the aforementioned premise innovative mechanism of Metered Calling System (MCS) was introduced. It is further stated that after a meeting held by and between the respondent and the private operators including the petitioner, a circular was issued on or about 24.04.2003 implementing the IUC regulations issued by TRAI, which came into force on 01.05.2003.

Reference has also been made to a petition before this Tribunal filed by Cellular Operators Association of India marked as Petition No. 48/2004 against the respondent as also a decision for setting aside the said circular dated 24.04.2003 and decision taken thereupon on 11.11.2005.

According to the respondent, this Tribunal despite specific prayers made in that behalf, did not grant a direction for refund of any amount.

It was urged that whereas the TRAI granted exemption to the respondent from the purview of IUC Regulations, no such exemption having been granted in favour of the petitioner, it was bound to comply therewith and as it was discovered later on that the respondent has paid an excess amount to the tune of Rs.39,60,321/-, it was entitled to recover the same.

Mr.Ramji Srinivasan, learned senior counsel appearing for the petitioner in support of this petition, would urge:-

- (i) The respondent either in the matter of raising of bills or receiving the same was bound to maintain the level playing field and in that view of the matter the impugned action on the part of the respondent in forcing the petitioner to part with the amount of Rs.39,60,321/- must be held to be illegal and wholly without jurisdiction.
- (ii) 'TRAI' as also this Tribunal having emphasized the requirements to maintain level playing field by all the players in the field, the respondent could not have retained a greater benefit for itself in comparison to that of a small operators like the petitioner.
- (iii) The respondent having accepted the bills from the petitioner and made payments thereof without any demur whatsoever, the action on its part in issuing a fresh bill and that too after a period of three years is liable to be set aside being vitiated in law.
- (iv) The respondent could not have taken advantage of its own wrong and in any event could not have issued a supplementary bill after a period of three years as the same became barred by limitation.

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

- (i) IUC Regulations being in force and only the respondent having obtained exemption from TRAI, the petitioner was bound to raise bills on CDR platform and it having not done so was obligated to reimburse the respondent to the extent of payments made in excess of the lawful dues.

- (ii) Such overpayment having been detected by the respondent only when it earned the capability of raising the CDR platform, no exception thereto can be taken.

Before adverting to the rival contentions of the parties, as noticed hereinbefore, we may notice the admitted fact.

The respondent being the successor in interest of the Department of Telecommunications of Union of India has about 99% of the market in basic telecom sector. The petitioner obtained a licence on or about 30.09.1997 and entered into an Interconnect Agreement with the respondent in respect of the Punjab Service Area only on 07.11.1997. Indisputably, TRAI issued IUC Regulations on or about 24.01.2003 which came into force on and from 01.05.2003.

By reason of the provisions of the said Regulations, basic service operators as also the cellular operators were required to raise bills on CDR platform. The respondent in various telephone exchanges did not have the said facilities. It had also no facility to raise bills on CDR platforms. By a letter dated 24.04.2003 the respondent informed the basic service operators as regards non-availability of infrastructures to implement the IUC charge pulses.

The relevant paragraphs of the said communication read as under:

“(3) Due to non-availability of CDR based billing platform, IUC charges applicable for the calls handed-over to BSNL at the PoI (Point of Interconnect) have been converted into different pulse rates as per Annexure II. The pulse rates have been calculated at a per MCU (Metered Call Unit) rate of Rs.0.10 for all calls except outgoing

ISD calls which shall be measured at a Rate of Rs.1.20 per MCU. The bills for IUC shall be raised by BSNL to the interconnecting operator based on the bulk billing on the incoming trunk groups.

5. Further in case of calls handed over by BSNL to the private operators for termination in their network, the bills for the IUC payable by BSNL shall have to be raised by private operator himself. Private Basic Service operators shall arrange the CDRs based on the various distance slabs whereas private Cellular Mobile operators shall arrange the CDRs based on type of originating network i.e. Basic (Fixed/WLL(M)) and Cellular Mobile. The bills raised by the private operators shall be supported by complete list of CDRs arranged in the required manner along with their summary reports. This bill shall be agreed to, subject to post facto reconciliation by BSNL. Till such reconciliation is done, the bills raised by private operator shall be treated as provisional and shall be subject to final settlement. Similarly, refund of ADC on account of long distance calls, terminated on WLL(M) network, shall be given normally within 45 days wherever feasible based on complete list of CDRs of WLL(M) terminating calls along with their summary reports handed over to BSNL by access providers at the originating end.

6. The BSNL field units shall try to get these CDRs, for calls handed over to private operator, post processed wherever feasible for re-conciliation of the bill raised by the private operator. Already, some BSNL field units are having capabilities of CDR based offline processing. In case this off-line processing of the CDRs is not feasible at present, then these CDRs shall be arranged to be read subsequently and bills raised by the private operator reconciled by BSNL. For this purpose the BSNL field units need to preserve the Call Data Records (CDR) till the process of reconciliation is over and at least for a further period of one year.”

Respondent furthermore issued a letter regarding implementation of the said regulation in BSNL network on or about 28.04.2003. The said regulations, however, were amended on 20.10.2003.

TRAI by a circular letter dated 15.12.2003 directed as under:

“10. Billing issues between BSNL and other operators:

A number of operators have represented that in the absence of CDR based billing system in the BSNL network, BSNL is making payment of them at the rate of Rs.0.10 per MCU for local, intra-circle and inter-circle calls and Rs.1.20 for international calls. It has been suggested that if MCU is fixed at 1 paise it will be equal to a call duration of one second for all calls attracting IUC of 0.60 paise per minute. At the same time BSNL is charging them on the basis of CDRs in bulk seconds. In this way they are making excess payment to BSNL because of difference in the pulse rate.

It may be recalled that in a TRAI meeting with all operators in Hotel Samrat in April 2003, BSNL had informed that they would be implementing CDR based billing over a period of next 6 months. The period is already over. BSNL as such should implement CDR based billing over a period of next 3 month or so. Till the same is not implemented, alternate arrangements must be on reciprocal basis.” (Emphasis Supplied).

It is, however, not in dispute that the respondent in terms of a letter dated 28.03.2003 addressed to the Secretary, TRAI expressed various technical limitations which according to it came on its network for implementing the IUC regulations which are as under:-

- (a) Absence of CDR based billing platform.
- (b) Non-availability of bulk billing in minutes of duration in the outgoing trunk group in all technologies.
- (c) Non-availability of bulk billing in minutes of duration in the incoming trunk group in all technologies.

It assigned reasons for not being able to implement the provisions of the said regulations having regard to the pulse rate fixed in terms of the IUC regulations. Note 2 appended to paragraph (d) (ILDs & BSNL) reads as under:

“Note 2: In case of CCS7 both way trunk groups, the outgoing traffic from BSNL to private operator can also be handed over to private operator on the same trunk group in which incoming traffic is received. In such cases also the CDRs for outgoing trunk group/duration count for the outgoing traffic can be monitored independently of the incoming traffic on the both way trunk group. This may be done for efficient use of the available trunk junctions.”

The difference between two different pulse rates i.e. on CDR system and MCU system was stated as under:

“9. For IUC the pulse rates have been calculated to get the required revenue share at per MCU rate of Rs.0.10 for IUC for all calls except outgoing ISD calls which shall be measured at a Rate of Rs.1.20 per MCU as at present. The details of the pulses defined are as follows. It may be seen that the pulse durations have been defined to the nearest technically feasible value. The various IUC charges applicable for the calls handed-over to BSNL at the PoI have been converted into different pulse rates. In order to reduce the error of quantization in conversion of IUC on per minute basis to per MCU basis, an attempt has been made to make the pulse width as small as possible by making the per MCU charge Rs.0.10 instead of the normal per MCU charge of Rs.1.20. However, in case of outgoing ISD calls handed-over by operators to BSNL per MCU rate of Rs.1.20 have been retained as pulse rate is already quite small and is also being used at present as such in the BSNL’s network. The bills for such calls shall be raised by BSNL to the private operator based on the bulk billing on the incoming trunk groups as detailed above.”

It was pointed out that in respect of a very large number of trunk routes the IUC regulations would not be implementable. It was submitted:

“11. It is further submitted that in case of POIs in switches, which does not support above IUC arrangements, the POIs need to be shifted at the switches, which support the IUC arrangements proposed. Like in case of E10B switches, CDR cannot be formed on outgoing trunk groups so it is required to shift POI. This shifting of the POI is to be done at the cost of the private operator itself. Similarly, POIs at FETEX and NEAX switches also need to be shifted for technical reasons i.e. non-generation of CDRs for all calls.

13. In view of above, it is submitted that the proposed arrangement for charging uniform IUC for long distance calls originating by subscribers of private access providers and terminating into the networks of Basic Services (fixed or WLL(M)) and the pulse rates as given in Para 8 & 9 above, may kindly be agreed to as this is the only way to implement IUC regulation in BSNL's network in the present circumstances. These proposed arrangements will also require implementation of IUC charge pulses at each of Level I Tax, Level II TAX and also at each SDCC Tandem Switches. It is therefore requested that a minimum period of 60 days, from the date of approval, may be accorded for proper creation of data, testing and verifying the proposed arrangements in various switches of BSNL. The proposed arrangements for implementation of the Telecommunication Interconnection Usage (IUC) Regulation, 2003 (1 of 2003 is submitted for kind information and perusal of the Authority.”

The respondent in the said letter did not point out that it had wanted an exemption from the IUC regime for itself; it merely pointed out that alternative arrangement which is possible to bring about in the pulse rate based on CDR system as per the IUC regulations and MCU. Our attention, however, has been drawn to the minutes of meeting dated 09.04.2009 held by the respondent with the private operators including the petitioner herein to contend that difficulties faced by BSNL was explained therein. However, evidently at that point of time there arose no occasion for the private operators to

discuss about the effect of the application for grant of exemption faced by the respondent and possible acceptance thereof by TRAI. TRAI, however, by a letter dated 23rd April, 2003 addressed to one Mr.K.S. Guliani of the respondent stated as under:

“Please refer to your letter No.F.208-15/2003-Regn. Dated 28th March 2003 on the above mentioned subject and the clarification given on 21st April, 2003.

The Interconnection Usage charge proposals submitted by you vide the above letters has been approved by the Authority for implementation. This is without prejudice to the cases pending in TDSAT on the IUC issues.

You are requested to make wide publicity on the above IUC charges and inform all service providers.”

What was, therefore, approved was the proposal for implementation of IUC Regulations. TRAI did not say nor could it say that IUC Regulations would not apply on reciprocal basis. It did not supercede its earlier circular letter dated 15.12.2003.

TRAI regulations are required to be taken into consideration on the touchstone of Article 14 of the Constitution of India.

The respondent however, on 24.04.2003 without making any reference to the letter of the TRAI, stated:

“5. Further in case of calls handed over by BSNL to the private operators for termination in their network, the bills for the IUC payable by BSNL shall have to be raised by private operator himself. Private Basic Service operators shall arrange the CDRs based on the various distance slabs whereas private Cellular Mobile operators shall arrange the CDRs based on type of originating network i.e. Basic (Fixed/ WLL(M)) and

Cellular Mobile. The bills raised by the private operators shall be supported by complete list of CDRs arranged in the required manner along with their summary reports. This bill shall be agreed to, subject to post facto reconciliation by BSNL. Till such reconciliation is done, the bills raised by private operator shall be treated as provisional and shall be subject to final settlement. Similarly, refund of ADC on account of long distance calls, terminated on WLL(M) network, shall be given normally within 45 days wherever feasible based on complete list of CDRs of WLL(M) terminating calls along with their summary reports handed over to BSNL by access providers at the originating end.”

It is also not in dispute that the respondent communicated to the BSOs the matter relating to implementation of the IUC charges Regulation 2003 in its network stating, inter alia:-

“14. Termination charge to terminating access provider shall be paid by BSNL for successful calls on cumulative actual minutes of usage of the network for the cumulative conversation time and not on call-by-call basis.”

Reference therein was made to the purported approval of TRAI to the respondent’s aforementioned letter.

We have, however, noticed hereinbefore that TRAI in its letter dated 15th December, 2003 opined that until the billing issues between the BSNL and other operators was sorted out, alternative arrangement should be made on a reciprocal basis. Indisputably, the parties hereto raised their respective bills on each other on MCU basis. The same had been acted upon by each of the parties. The respondent, however, contends that as in terms of the circular dated 24th April 2003, the private operators were to submit bills supported by complete list of CDRs arranged in the required manner along

with their summary reports, the same would be according to subject to post-facto reconciliation by BSNL and till such reconciliation is done, the bills would be treated to be provisional.

Indisputably, the parties had raised bills on each other on MCU basis from May 2003 till July 2004. Only on or about 29.12.2007 a supplementary bill was raised in respect of the aforementioned period. It, however, appears that the respondent has acquired the capability of raising bill on CDR platform sometime in November, 2005.

Submission of Mr.Maninder Singh, learned senior counsel that exemption has been granted only to BSNL is not fully correct. The exemption granted to the respondent is required to be construed keeping in view the letter of the TRAI dated 15.12.2003. The basic telecom operators being similarly situated, 'level playing field' amongst themselves must be considered to be imperative in character. It must be considered on the touchstone of Article 14 of the Constitution of India. TRAI Act and the regulations framed by TRAI not only provide for 'level playing field', competition amongst the private players is also encouraged. The respondent, however, having almost a monopoly as a basic telecom service provider throughout the country, a licensee providing for the basic services in a town would have no other alternative but to depend upon the respondent and, thus, succumb to all its dictates. Similarly, the respondent was also required to avail the facilities available with the petitioner. Payments were to be made by each other on the bills raised by them. It is inconceivable in law that by not taking recourse to the CDR regime the respondent would receive certain benefits in as much as the pulse rate would be reckoned on a 'minute' basis and not on an actual time basis, namely, on second basis. A party to a contract, it is well settled, cannot take benefit of its own wrong. [See Raja Ram Pal Vs. Hon'ble Speaker, Lok Sabha & Ors. - 2007(3) SCC 184].

The contention of the respondent that such benefits would be only one way, in our considered opinion, would not only be wholly unjustified but would also be hit by the doctrine of the 'level playing field' as also equality clause contained in Article 14 of the Constitution of India.

Furthermore, bills could not have been raised only because of the headquarter of the respondent asked the Punjab Circle to do it. It was required to be done on a legal basis and not de' hors the same.

It also does not appear to be correct as was contended by the respondent in its letter dated 29.12.2003 that bills were paid without verification. Bill indeed must have been verified, but admittedly the basis for charging the same was altered. On the supposed premise of accepting the bills provisionally, the very basis thereof could not have been changed. No notice in that behalf was given to the petitioner. Reconciliation of accounts was required to be done on the same terms and not on a different premise.

Moreover the attitude on the part of the respondent that CDRs need not be shown or bills could be raised at any point of time also cannot be appreciated. The respondent as a 'State' should have maintained transparency. It was bound to act reasonably and within a reasonable time.

Reliance has been placed by Mr.Singh on the decision of this Tribunal in a Review Application No.3 of 2005 in Petition 48 of 2004 – COAI & Ors Vs. BSNL. We may for the sake of completeness refer to certain observations made by this Tribunal therein:

“The actions of Respondent Nos. 1 & 2 being challenged are also alleged to be in breach of the principle of reciprocity. These actions of the Respondents No. 1 & 2 in this petition are summarized, as under:-

(a) Billing on per MCU basis in violation of TRAI's IUC Regulation dated 24.01.2003 and 29.10.2003; and also applying Non-Reciprocity in the billing methodology, i.e., BSNL and MTNL are billing Member Operators on call-by-call basis while they pay to them on aggregate total seconds expressed in terms of minutes basis.

(b) Imposition of distance based carriage charge (Re. 0.65 for 50 – 200 Kms; Re. 0.90 for 200 – 500 Kms and Rs. 1.10 for over 500 Kms instead of a uniform Re. 0.20) with effect from 01.02.2004 for Intra Circle Intra LDCA Calls from Cellular Network to PSTN handed over to BSNL at Level II TAX.

(c) Not refunding the excess amount of ADC collected by BSNL on WLL(M) calls.

(d) Non-payment/delayed payment of dues of Petitioners by Respondent No.1.

(e) Charging interest on delayed payments of IUC bills by Member Operators and non-payment of any interest on reciprocal basis for long delays in payment of bills by BSNL / MTNL to Member Operators.

(f) Seeking irrelevant and unnecessary information and in absence thereof delaying payments by withholding the bills of the Petitioners.

7. Senior Counsel for the Petitioners, Mr. C.S. Vaidyanathan, while arguing the case stated that the call Originating Operator is required to pay termination charges to the Terminating Operator. Each Terminating Operator raises its respective bill on the Originating Operator. He said that all billing arrangements between private operators and Respondents No. 1 and 2 have to be reciprocal. He stated that Respondents No. 1 & 2 were not following the same terms and principles for charging the petitioners as they are doing while paying to the petitioners. While Respondents No. 1 & 2 are charging the Petitioners on Metered Call Unit (MCU) i.e.

call by call basis for calls from them to Respondents, the Respondents pay on cumulative actual basis i.e. aggregate basis and not call by call basis for calls made by the Respondents No. 1 & 2 to the Petitioners. This results in Respondents No. 1 & 2 charging an excess amount of 6 to 10% from the Petitioners. He brought to the notice of the Tribunal, Section 4 of The Telecommunication Interconnection Usage Charges Regulation, 2003 (2 of 2003) {IUC Regulation (2 of 2003) in short} dated 29th October 2003 wherein under the heading 'Reconciliation and Settlement of ADC' it is mandated that the payment would be based on Bulk Basis. An extract of the same is reproduced below:-

“3.3 Reconciliation and Settlement of ADC

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

The Tribunal took notice of the correspondences passed between the respondent and TRAI vis-à-vis implementation/non-implementation of the IUC regime holding that an imbalance resulting from BSNL charges on MCU basis and the private operators charging on CDR basis. It was opined:

“44. We find from the records that TRAI has been insisting upon BSNL to implement CDR based billing to obviate this differential in charges being made by the Petitioners and the Respondent Nos. 1 & 2. It is also clear that TRAI vide its letters dated 15th February 2003 and 20th January 2004 respectively has taken note of the difficulties pointed out by BSNL but has also mandated that till CDR system is implemented by Respondent No. 1, it should implement reciprocal arrangement in billing. This has been accepted by

Respondent No. 1 as is evident from their reply at paragraph (A) of Para-wise reply to the Petition. We do find that Respondent No. 1 has been assuring that it would put the CDR system in place but the indicated time limit have been exceeded since long. At present they do not have a CDR system at a number of exchanges and therefore they have continued with the Metered Call Unit (MCU) billing method. In our view Respondent No. 1 being in fact a stronger player in the field should have come out with the CDR based billing system long back. Had they done so this dispute would not arisen and both the petitioners and respondents would have been on a level playing field as regards billing. We also see no reason why for nonavailability of a facility Respondent should have carried on with its own systems of billing for receipt and payment without caring for the need to establish reciprocity in this regard. We are of the view that since the CDR of the Petitioner is acceptable to the respondent for accepting the payments due to it, the same should be acceptable for raising bills also. In the alternative, the pulse rate could also have been adjusted for the purpose of the payments to be made by BSNL to the Member Operators and reciprocal non-discriminatory billing arrangement implemented on that basis till such time as CDR systems was installed.

45. We find that the dispute before us does not relate to access charges per se but in regard to the method of billing of these charges. Although stipulation in this regard has been made in the IUC Regulations, it was pointed out by BSNL to TRAI that it could provide interconnection only on the basis of bulk billing by making use of MCUs till the CDR system comes into place. We find it difficult to agree with the contention of the petitioners that TRAI did not have the authority to intervene in these circumstances to ensure implementation of interconnection without amending the Regulation. When it was pointed out to TRAI by BSNL that they did not have the technological capabilities to implement the CDR based billing system and needed time to implement the same and that it would involve a capital expenditure of around Rs. 400 crore, TRAI gave time to BSNL to install the CDR system and till such time also directed that billing of access charges be done on reciprocal basis. This meant that if BSNL was charging the private cellular operators on MCU basis, the same method should be made applicable by BSNL for making payments to the private cellular operators for the access charges.”

Holding that respondent should have hastened implementation of the CDR based platforms, it was directed as under:

47. We accordingly direct that the necessary arrangements be worked out by Respondent No. 1 (BSNL) and Respondent No. 2 (MTNL) and Member Operators of COAI and Respondent No. 3 (TRAI) should monitor the implementation of the same, so that level playing field in this respect gets established within the time frame which we are indicating below. We direct the Respondents No. 1 & 2 to implement the CDR system in all the remaining Level-II TAX within a period of 90 days from the date of this order. Further, until then there should be reciprocity in the billing in as much as that wherever CDR based billing by BSNL and MTNL for charging the private cellular operators is not possible and MCU based charging needs to be resorted to, then this system should be adopted for the purpose of making payments as well by BSNL and MTNL to the private cellular operators. We direct TRAI to lay down the arrangements in this regard within a period of 15 days from the date of this order. Keeping the totality of circumstances we do not consider it appropriate to order any refunds to be made in this regard by BSNL/MTNL to the Member Operators of the Petitioner Prayers (a) to (d) and (l), (m), (n) stand disposed of accordingly.

A review application was filed thereagainst which has been dismissed by an order dated 03.05.2006.

Respondent, therefore, was held to be a stronger player in the field. It was found to be liable to maintain a 'level playing field' regime in relation to the private operators.

The Supreme Court of India also held so, in COAI & Ors. Vs. – 2003(3) SCC 186 stating:

“We accordingly set aside the same and remit the matter to the Tribunal for reconsideration with special emphasis on the question of level playing field, on the basis of materials already on record, after hearing the counsel for the parties concerned.”

In LIC of India Vs. Consumer Education and Research Centre and Others [1995(5)SCC482] it was observed :

“In the sphere of contractual relations the State, its instrumentality, public authorities or those whose act bear insignia of public element, action to public duty or obligation are enjoined to act in a manner i.e., fair, just and equitable, after taking objectively all the relevant options into consideration and in a manner that is reasonable, relevant and germane to effectuate the purpose for public good and in a general public interest and it must not take any irrelevant or irrational factors into consideration or appear arbitrary in its decision. Duty to act fairly is part of fair procedure envisaged under Articles 14 and 21. Every activity of the public authority or those under public duty or obligation must be informed by reason and guided by the public interest.”

Yet again in Reliance Energy Ltd. Vs. Maharashtra State Road Development Corporation Ltd. - 2007(8) SCC 1, the Supreme Court of India held as under:

“36.Article 21/14 is the heart of the chapter on fundamental rights. It covers various aspects of life. "Level playing field" is an important concept while construing Article 19(1)(g) of the Constitution. It is this doctrine which is invoked by REL/HDEC in the present case. When Article 19(1)(g) confers fundamental right to carry on business to a company, it is entitled to invoke the said doctrine of "level playing field". We may clarify that this doctrine is, however, subject to public interest. In the world of globalization, competition is an important factor to be kept in mind. The doctrine of "level playing field" is an important doctrine which is embodied in Article 19(1)(g) of the Constitution. This is because the said doctrine provides space within which equally-placed competitors are allowed to bid so as to subserve the larger public interest. "Globalization", in essence, is liberalization of trade. Today India has dismantled licence-raj. The economic reforms introduced after 1992 have brought in the concept of "globalization". Decisions or acts which results in unequal and discriminatory treatment, would violate the doctrine of "level playing field" embodied in Article 19(1)(g). Time has come, therefore, to say that Article 14 which refers to the principle of "equality" should not be read as a stand-alone item but it should be read in conjunction with Article 21 which embodies several aspects of life. There is one more aspect which needs to be mentioned in the

matter of implementation of the aforesaid doctrine of "level playing field". According to Lord Goldsmith - commitment to "rule of law" is the heart of parliamentary democracy. One of the important elements of the "rule of law" is legal certainty. Article 14 applies to government policies and if the policy or act of the government, even in contractual matters, fails to satisfy the test of "reasonableness", then such an act or decision would be unconstitutional.” (Emphasis Supplied).

The respondent, assuming that it is right in its contention that the petitioner was bound to raise bills on CDR platform, but the same should have pointed that out the same from the very inception. The bills received by it on MCU basis could not have been treated to be provisional in nature only because according to it, the private operators were bound to raise the bills on CDR platform. Having accepted such bills sub silentio and allowing the private operators to raise bills on that basis, which evidently had been done keeping in view the directions of TRAI, the respondent, in our opinion, could not have after a long time turned round and contend that the basis of the raising of the bills was wrong. The action on the part of the respondent is hit by doctrine of ‘Estoppel by Conduct’ and in any event it must be held to have waived its right as it sought to raise the impugned bill only in terms of its contractual right.

If the petitioner had violated IUC Regulations, the respondent should have brought the same to the notice of TRAI. It could have also initiated action before this Tribunal against the petitioner. The least it could do was to raise the contention that TRAI had granted an exemption in its favour and not in favour of the private operators. The fact that by raising a bill on MCU basis respondent has derived certain benefits stands demonstrated from the judgment of this Tribunal. It being a ‘State’ within the meaning of Article 12 of the Constitution of India could not have deprived the

private operators from the same benefit, it intend to earn for itself. It could not have taken undue advantage of its not being able to change itself with the changing times. It was expected of a 'State' that while making an endeavour to reconcile the accounts, amount due and payable to each party would be reckoned. It could not have been a one sided affair.

It is neither just nor fair that the respondent would insist that it could receive a large amount from the petitioner without disclosing as to how much the petitioner would have received from it, if the bills were raised on CDR platform.

We may place on record that the petitioner contends that if it were to raise bills on CDR basis, a huge sum (about Rs.80 lakhs) would have become payable by the respondent.

The petitioner could have even approached TRAI before the Regulations were framed while consultative process was on. In any event if the private operators had derived certain advantage over it, the respondent could have taken up the matter with TRAI. It by its conduct allowed the petitioner and other private operators to proceed on the basis that they would also be entitled to raise bills on MCU basis. If the respondent was to take such a stand, it ought to have supplied it the CDRs supplied to the petitioner, and ought to allow the petitioner to find out the details about both outgoing and incoming calls, the bills raised by the petitioner therefor could have been verified by the petitioner from the CDRs itself. It is now not in controversy that bills could not have been raised both on CDR system and MCU system.

Mr.Singh will draw our attention to the so called understanding of the Tribunal's judgment by the petitioner and would contend that only after 11.11.2005 the reciprocity was to be maintained.

Interpretation of the judgment rendered by a court of law must be done on reading in its entirety. It cannot be read as a statute. Understanding of a judgment passed by a court of law by a party would be wholly immaterial if on its plain reading the ratio can be deciphered. The question of reciprocity in any event after 11.11.2005 did not arise as all the players in the field acquired CDR system for raising bills on CDR platforms.

Furthermore even if the respondent was to point out the defect in the mode of raising a bill, it should have done so within the period of limitation as provided under Article 137 of the Limitation Act. The term “payable” as is well known means legally recoverable. [See Commnr. Central Excise and Customs, Mumbai and Ors. Vs. I.T.C. Ltd. and Ors. - 2007(1) SCC 62].

It may be true that the matter relating to raising of bill is controlled by a statute. A statute as is well known must be read reasonably. A subordinate legislation made by a rule making authority must also conform to the level playing field. In a situation of this nature having regard to Article 14 of the Constitution of India the benefit of an exemption granted by an authority must be received by all the players in the field.

We, therefore, are of the opinion that this petition must succeed. It is directed accordingly. The petitioner is entitled to obtain refund of the principal amount with interest @ 18% per annum from the date of receipt of the sum of Rs.39,69,62/- from 07.05.2008 till realization. The respondent must also pay and bear the costs of this petition. Counsel's fee assessed at Rs.1 lakh.

....., **J**
(S.B.Sinha)
Chairperson

.....
(G. D. Gaiha)
Member