

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

**DATED 28<sup>TH</sup> MAY, 2010**

**APPEAL NO. 4 OF 2007**

Bharat Sanchar Nigam Ltd. ... Appellant

Vs.

Telecom Regulatory Authority of India ... Respondent

**JUDGMENT**

**S.B. Sinha**

The appellant, which is a Public Sector Undertaking, being aggrieved by and dissatisfied with the Regulations framed by TRAI dated 02.02.2007 purported to fix thereby Port charges has filed this petition. The factual matrix involved in this case is not in much dispute. The Telecom Regulatory Authority of India (TRAI) in exercise of its jurisdiction under Section 11 (1) (b) (ii), (iii) and (iv) of the Telecom Regulatory Authority of India Act, 1997 (The Act) framed Regulations interalia in relation to the Port charges in the year 1999.

2. For the said purpose, it floated a Consultation Paper on or about 09.9.1998, the relevant portions whereof are as under :

**“Interconnection**

Proposed that Inter-Exchange Junction Charges be the same as the proposed leased line charges.

The following port charges are proposed.

Demand for Number of PCMs	Existing Charges (Rs. per port)	DOT Port (Rs. per port)	Proposed Port Charges (Rs. per port)
2 PCM	2,16,200		36,940
4 PCM	1,08,100		36,940
8 PCM	54,100		36,940
16 PCM	30,600		20,470
32 PCM	20,400		12,840
64 PCM	15,400		9,030
128 PCM	12,900		7,120
256 PCM	Not Applicable		6,170

For basic services, revenue sharing proposed for revenues from long distance and international calls. Under present interconnection conditions, when Rs.0.50 per pulse is to be paid for carrying long distance calls, it is proposed that revenue from such calls be shared between the new entrant and DOT in the ratio of 60 to 40. Similarly, whenever at present Rs.0.70 per pulse is to be paid for carrying international calls, revenue from international calls is proposed to be shared in a 45:55 ratio between the new entrant and DOT respectively.

For local calls, the proposal is to continue the present system of “bill and keep”.

3. The said Regulations came into force on or about 28.5.1999 prescribing the Port charges in the following terms :

“SCHEDULE III INTERCONNECTION CHARGE AND REVENUE SHARING

ITEM	PORT CHARGES
(1) Date of Implementation	01 May, 1999
(2) Coverage	Charges for ports provided by service providers (other than the port charges for internet which are specified in Schedule VI of the Telecommunication Tariff Act, 1998).
(3) Port Charges	Number of PCMs Annual Charges (Ceiling of Rs. per port) Up to 8/37,000 Above 8 and/16,000 Up to 32 Above 32/9,000”

4. Indisputably, the appellant and other private operators were granted licence by the Department of Telecommunications in terms whereof the licensees were obligated to enter into Interconnect Agreements if and when a request in that regard was made by the other telephone operators. On or about 06.12.2001 the appellant entered into the Interconnect Agreements, a sample copy whereof is contained in Annexure A-9 to the Memorandum of Appeal wherein the Port charges were sought to be levied in the following terms :-

Sl. No.	Demand for No. of PCMs from the BSO as accepted by BSNL in an exchange on each occasion	Annual interconnect port charge per PCM termination (excluding the cost of infrastructure viz. Land, Building, air-conditioning etc.) (In Rupees)
1.	Up to 8 PCM	1,40,000/-
2.	Above 8 and up to 16 PCM	61,000/-
3.	Above 16 PCM	48,000/-

- (ii) A fixed amount, irrespective of the number of terminations, in each exchange for the Circle/Service Area of Rs.81,000/- (Rupees Eighty One Thousand only) per PCM per termination per annum. Minimum usage charges as mentioned in (i) above shall be payable under this arrangement also.

After expiry of the said period of three years, BSNL shall be free continue or revise these charges.

Provided always that for a 64 Kbps Analogue port, the said charges shall be Rs.7,500/- (Rupees Seven Thousand and Five Hundred Only) per annum per port.”

5. It is evident that Port charges prescribed by TRAI by the 2007 Regulations by the private operators to the appellant – BSNL differ from those prescribed by 1999 Regulations.

6. It is also not in controversy that the TRAI on 28.12.2001 in purported exercise of its power conferred upon it under Section 36 read with clause (ii), (iii) and (iv) of clause (b) of Sub-Section 1 of Section 11 of the Act as amended in the year 2000 framed Regulations to ensure effective interconnection between different service providers and to regulate arrangement amongst service providers of sharing from revenue delivered from private telecommunication services. The Port charges were specified in terms of the said Regulations in the Schedule appended thereto, which reads as under :

ITEM	'PORT' CHARGES	
(1) Date of Implementation	28.12.2001	
(2) Coverage	Charges for 'Ports' provided by service providers (other than the Port Charges for Internet, which are specified in Schedule VI of the Telecommunication, Tariff order 1999).	
(3) 'Port' Charges covering all switches	No. of 'Ports'	'Port' Charges in Rs.
	1 to 16 PCMs	N+55,000

	17 to 32 PCMs	$8,80,000 + (N-16)+30,000$
	33 to 64 PCMs	$13,60,000 + (N-32)+20,000$
	65 to 128 PCMs	$20,00,000 + (N-64)+15,000$
	129 to 256 PCMs	$29,60,000 + (N-128)+14,000$

7. It is again not in controversy that the appellant herein did not question the 2001 Regulations in respect of levy of Port charges before this Tribunal or in any other Forum. The appellant-BSNL contends that it entered into the Interconnect Agreement with the private operators in respect whereof it has annexed a copy of the agreement entered into between itself and M/s. Reliance Infocom Ltd. whereby and whereunder the Port charges had been fixed as under :-

"Sl. No.	Demand for No. of PCMs from the BSO as accepted by BSNL in an exchange on each occasion	Annual interconnect port charge per PCM termination (excluding the cost of infrastructure viz. Land, Building, air-conditioning etc.) (In Rupees)
1.	1 to 16 PCMs	$N+55,000$
2.	17 to 32 PCMs	$8,80,000 + (N-16)+30,000$
3.	33 to 64 PCMs	$13,60,000+(N-32)+20,000$
4.	65 to 128 PCMs	$20,00,000+(N-64)+15,000$
5.	129 to 256 PCMs	$29,60,000 + (N-128)+14,000$

Note: 'N' above refers to the number of 'ports' demanded by the Interconnection Seeker within the capacity ranges under the column 'No. of Ports'."

8. TRAI, however, took recourse to the exercise for the purpose of revisiting Port charges. It is not in dispute before us that the said exercise was undertaken at the instance of Cellular Operators Association of India, the AUSPI and other private operators who contended that the amount of Port charges should be reviewed. For the aforementioned purpose, TRAI issued a letter to the appellant-BSNL herein on or about 17.8.2006 seeking informations as specified therein and also asked it to attend a meeting on 29.8.2006 at 1500 hrs. The appellant also received a letter from the TRAI dated 18.8.2006 relating to review of the Port charges for interconnection between service providers, the details whereof are as under :-

“The Authority is in the process of reviewing the Port Charges for Interconnection between Service Providers. In this connection, a detail of current cost on acquiring various components for establishing a new port in various exchanges for interconnection is required. A sample list of network elements for OCB 283 Exchange is enclosed. For all other exchanges used for Interconnection, element wise cost details in the similar format may be provided. Further the percentage of the different types of exchanges used for interconnection in your network may be indicated.”

9. Indisputably, the sample list of ‘Network Element’ in OCB 283 Exchange was also annexed. The appellant by its letter dated 14.9.2006 furnished the requisite informations sought for by TRAI, the details whereof are contained in Annexure A-14 to the petition. It is also stated that the appellant again furnished further details to the TRAI in terms of its letter dated 22.9.2006, stating :

“In continuation of this office letter of even number dated 14<sup>th</sup> September, 2006 on the above subject. Kindly find enclosed report on details of equipment with cost for various types of exchanges which are used for providing PCMs interconnectivity to private operators. Kindly note that cost of installation, establishment and annual recurring expenditure is not included in the cost calculation, which will be intimated whenever asked for.

From the analysis of details, it is clear that present rental for ports are very less. Hence, port charge revision, if done, may be revised upward from the present charges.”

10. It is not in controversy that the TRAI by its letter dated 12.01.2007 published draft Port Charges Regulations inviting written comments through E.mail or Fax. It provided that the Regulation shall come into force on the 1<sup>st</sup> day of April, 2007. The appellant by a letter dated 19.01.2007 asked for some time to submit its comments on or before 05.02.2007, stating :

“In this connection it is submitted that BSNL is studying this draft regulation on port charges in detail, along with the port charges proposed by the TRAI from 1<sup>st</sup> April 2007. Since this study involve consultation from the BSNL field units also, therefore it is requested to kindly extend the date for submission of comments on port charges to 05.05.2007 to enable the BSNL to submit its comments on and before 05.02.2007.”

11. The TRAI, however, by its letter dated 22.01.2007 declined to accede to the said request of the appellant. The appellant thereafter by a letter dated 22.01.2007 again asked for 15 days' time interalia contending therein and raising the question of jurisdiction of the TRAI to issue the said Regulations having referred to in the judgment of this Tribunal dated 27.4.2005 passed in Appeal No. 11/2002 and judgment dated 3.5.2005 passed in Appeal No.31/2003.

12. In support of the said contention, the appellant stated :

“The Hon'ble TDSAT has also laid down that after the licences with the stipulated terms and conditions granted by the licensor-DoT and the interconnection agreements having been entered into between the parties, it would not be permissible for the TRAI to entertain any dispute with regard to charges/levies etc. which are to be paid by the private operators to the BSNL either under the licence or under the accepted terms and conditions of the interconnection agreements. The TRAI cannot entertain so-called representations/grievances

from the private operators and thereafter embark upon adjudicatory process; the jurisdiction in relation thereto is exclusively vested in the Hon'ble TDSAT. It has also been laid down by the Hon'ble TDSAT that in any such process, in any case, there cannot be any variation/supervision of the terms and conditions of any existing interconnection agreements between the private operators and the BSNL.

The above-mentioned communication of the Authority under subject has been received Regulation Division of the BSNL Headquarters on 16<sup>th</sup> January, 2007, after it had been put on the internet by the Authority. As you are aware, the final hearing of the appeals filed by the TRAI in the above-mentioned matters (stated at serial No.1 & 2 above) is before the Hon'ble Supreme Court and can be taken up for hearing on any day. Almost all the officials of the Regulation cell of the BSNL are fully engaged/involved in the preparation for those appeals for defending the rights and interests of the BSNL. They continue to remain involved and engaged in that exercise when those appeals can be taken up for hearing on any day.

Therefore, while reiterating that the BSNL is fully entitled to recover the port charges, strictly in accordance with the terms and conditions of the interconnection agreements existing between the private operators and the BSNL and the TRAI having no jurisdiction in this regard, yet the further response on behalf of the BSNL to your above-mentioned communication dated 12<sup>th</sup> January 2007, for the reasons explained above, requires a little more time by the BSNL. It is, therefore, requested that under these circumstances the time for the BSNL, to send its response may kindly be extended by a further period of 15 days.”

13. Thereafter the TRAI had issued the said Regulations which came into force on or about 02.02.2007. Only AUSPI has preferred an appeal against the said Regulations in Appeal No.2 of 2008 interalia contending that the appellant was not to incur any charges in granting benefit to the private operators of its port and as such the TRAI should have levied no Port charges.

14. The said Appeal has been dismissed. We may, however, notice that AUSPI, for reasons best known to it, did not implead the appellants herein or any other private operators in the said appeal.

15. Mr. Maninder Singh, the learned Senior Counsel appearing on behalf of the appellant-BSNL has principally raised three contentions in support of this appeal. Drawing our attention to paragraphs 7 and 9 of the petition it was submitted that keeping in view the judgments of this Tribunal which have been referred to by us hereinbefore, TRAI must be held to have no jurisdiction to change the conditions of licence and the terms of the Interconnect Agreements. We may notice that this Tribunal in its judgment passed in Appeal No.31 of 2003 interalia held :-

“We, therefore, direct the following on the prayer made in Petition No.20 of 2004 :

Prayer (a) : In view of our conclusion that TRAI does not have the authority to override the license conditions for making direct connectivity mandatory, either by direction under Section 13 or by regulation under Section 36 of the Act, we are unable to accede to the prayer of the petitioners that we direct BSNL to seek direct connectivity.

Prayer (b)\_(c) & (d) : On considerations of level playing field, we direct that BSNL should stop charging 0.19 paise from cellular operators by way of transit charges for accessing BSNL CellOne subscribers, wherever the MSCs of both BSNL CellOne and Private CMSOs are connected to the same BSNL switch. We are of the view that our direction will take effect from the date of this judgment and we authorize TRAI to make this part of the regulatory regime. In the totality of circumstances there is no necessity to consider refund of transit charges collected by BSNL so far, for transit of calls of private CMSOs to BSNL CellOne through Level-1 TAX.

Prayer (e) & (f) : This involves reopening the arrangements that were operated as per the regulatory regime during the said period. Therefore, we do not grant this prayer.

Prayers (g) to (i) : for interim/ad-interim/ex-parte order (s), fall through as this is a final order.”

16. The consultation process undertaken by TRAI in this case was not by way of floating of a Consultation Paper. It mainly circulated a Paper on 13.4.2004 in respect of the Gateway Switch. According to the appellant, it in response to the aforementioned Consultation Paper, reiterated its stand on the benefit of Gateway Switch, which reads under :-

“With reference to the international experience and ITU Case study referred to in Clause 11 at page 20-21 of the consultation paper, Clause 12.3 therein at page 22 clearly demonstrates that in the Indian scenario when conventional approach is compared with that of interconnect gateway switch concept, instead of having 51557 POIs, only 405 POIs would be required in all 2648 SDCAs including 322 LDCAs.”

17. According to the learned counsel, the same however was resisted by the private operators which appear to have been accepted by TRAI without assigning any reason whatsoever.

18. Our attention in this behalf was drawn to paragraphs 13 and 14 of the Petition which reads as under :-

“13. It is respectfully submitted that there cannot be any dispute in relation to the necessity, benefits and advantages towards implementation of the concept and mechanism of interconnect gateway switch.

14. It is further submitted that the first Consultation Paper was taken out by the TRAI in the year 2002. The efficacy and the necessity for the interconnect gateway switch had also come up for consideration before this Hon’ble Tribunal in the year 2004-05 and it had been noticed and submitted on behalf of the BSNL that there was no explanation for the delay of more than 2-1/2 years in the finalisation and the implementation of the mechanism of the interconnect gateway switch and specially when except for the COAI and BPL all other telecom operators including BSNL, had submitted their response to the TRAI favouring the implementation of this mechanism.”

19. It has furthermore been contended that this Tribunal by its judgment dated 3.5.2005 in Appeal No. 31 of 203 interalia opined as under :-

“TRAI has still not come out with a recommendation and will take time and, therefore, we feel that till such time the matter is comprehensively dealt with by TRAI and final decision is taken thereon by the licensor, direct connectivity should remain permissible.....”

20. According to the appellant, the Gateway Interconnect Switch has eliminated all disadvantages which the appellant might have suffered which according to it is around Rs.100 crores per annum. The appellant, however, has urged the following on the merit of the matter.

1. There was absolutely no reason as to why TRAI should not have granted a fortnight's time to the appellant, as had been prayed for, for making its response to the Draft Regulations as it was of the opinion that many conditions raised by it had not been taken into consideration therein.
2. TRAI while making the said Regulations, did not take into consideration the concept of total expenditure incurred for installation of Port by the appellant.
3. Although TRAI in its previous Regulations had considered all the factors regarding capital expenditure, overhead charges, as well as the annual recurring expenditure, there was absolutely no reason as to why in the impugned Regulations, apart from taking into consideration the recurring expenditure on Port charges, a complete go bye was given to the other relevant factors.
4. The cost of equipments, having been found to be relevant for 10 years as only 10% depreciation having been granted, there was absolutely no reason why the methodology adopted in the costs of the equipments originally installed could not be taken into consideration after a period of six years.

21. Sub-regulation 4 of Regulation 2 would clearly show that the same is wholly ambiguous and arbitrary and there is absolutely no reason as to on what basis the heads have been made applicable for levy of the Interconnect charges.

22. Two examples were given before us in this behalf by Mr. Maninder Singh, the learned counsel, namely; as to what would happen if one service provider asks for 250 Ports but keeping in view the ability of the appellant, only 10 Ports can be provided, and what will be the charges therefor namely whether the slab would be of the highest or the lowest; and in a converse case, where the private operator applies for 250 Ports but at the time of taking the same, takes only 5 Ports.

23. The TRAI failed to maintain transparency, it was submitted, in as much as in the Table I which has taken into consideration 7 heads namely 1. Port Terminals to CCS; 2. 7 signals; 3. Processors; 4. Switching Matrix; 5. Mechanical; 6. Cable, Connector; and 7. Software as well as Batteries and Power Plant & Miscellaneous wherein in total 44 elements were taken into consideration, but from the sample list of net-worth elements annexed by TRAI with its letter dated 03.2.2008, it would appear that the format contains 76 elements. In the next letter namely the letter dated 14.9.2006, slightly different elements had been taken into consideration. It was urged that there was absolutely no reason for TRAI not to disclose the total amount which has been taken into consideration in as much as BSNL did not ask for any figure given by any particular operator but only the total amount involved which was necessary to respond to TRAI's concern for 3 things namely (i) cost sheet; (ii) the basis of 14% being a reasonable rate of return and the basis of overhead at the rate of 10% of Capex as has been pointed out to TRAI by the appellant in terms of its letter dated 15.2.2007.

24. Even in its letter to AUSPI, the TRAI did not furnish any details and in its letter dated 23.02.2007, stated interalia as under :-

“Kindly refer to your letter No.16-15/2006-R&C dated 15<sup>th</sup> February 2007 wherein you have asked detailed cost of network equipment, detailed cost sheet and justification regarding rate of return @ 14% and the basis of overhead @ 10% applied in Regulation 2007.

2. The list of network equipment taken into account, detailed costing methodology, justification for reasonable rate of return i.e. 14%, overhead etc. is already provided in the Explanatory Memorandum of the Regulation.”

25. So far as the judgment relied upon by TRAI is concerned, being dated 27.4.2005 AUSPI Vs. BSNL in Petition No. 9 of 2001 wherein observations were made by this Tribunal having regard to the clause contained in para 6.3.1 of the agreement which reads as under :-

“Notwithstanding anything contained hereinabove, the directions or decisions on the subject by the Telecom Regulatory Authority of India shall be binding on either party and such decision or direction shall be implemented in good faith by both the parties.

Provided always that for a 64 Kbps Analogue port, the said charges shall be Rs.3,200/- (Rupees three thousand and two hundred only) per annum per port.

It is, therefore clear that the interconnect agreement itself empowers the TRAI to issue direction/decisions that shall be binding on either party and such decision or direction shall be implemented in good faith by both the parties. We therefore are very clear that in the May'99 regulations when TRAI determined the port charges, it was well within the power conferred on it under the interconnect agreement. That this determination would be binding on the related parties does not get determined by Clause 8 of the May'99 regulations but the provisions of the interconnection agreement itself. The subsequent sequence of events shows that these rates were brought into effect from 1.5.1999 through the DoT letter dated 25.10.99. The determination of port charges by TRAI under these circumstances was therefore totally in accordance with the conditions of the license and the powers conferred on TRAI by the interconnect agreement whose compliance constitutes one of the conditions of the license.”

26. It was not very relevant in view of the fact that such a clause does not appear in any other Interconnect Agreement entered into by and between the BSNL and private service providers. Our attention in this behalf has been drawn to a sample copy of the agreement at page 571 of the Paper Book. Our attention has further been drawn to the fact that the said judgment has been stayed by the Supreme Court of India in Civil Appeal No.4965-4966 of 2007 – BSNL vs. TRAI by an order dated 12.11.2007.

27. Mr. Meet Malhotra, the learned counsel appearing on behalf of TRAI, on the other hand, would contend that keeping in view the decision of this Tribunal in Appeal No. 14 of 2006 dated 24.8.2007 as also a recent decision of the Supreme Court of India in PTC India Ltd. Vs. CERC reported in 2010 (3) SCALE 55 by a Constitution Bench, it is evident that this Tribunal has no jurisdiction to consider the validity or otherwise of the regulations made by the Regulator. Mr. Malhotra would further submit that the Explanatory Memorandum appended to the Regulations dated 02.02.2007 and in particular paragraphs 3,4,5 as also paragraphs 8,9 and 10 it would clearly show that the specifications made therein would be attracted as the TRAI having regard to the figures, which have been made available to it by the operators for the purpose of calculation of the incremental costs incurred by BSNL to make available additional Ports, have arrived at the incremental costs upon making changes in the method.

28. The TRAI had clearly disclosed the methodology adopted by it for the purpose of calculating as to what would be the costs. The BSNL, however, did not respond thereto and resorted to only legal grounds.

29. From the Explanatory Memorandum it would appear that TRAI has dealt with all the major issues raised by the parties before it and furthermore had taken into consideration indisputably all probable situations including the 13

projections in the criteria for AUSPI for Ports. The regulations in this case does not override the conditions of licence, keeping in view the fact that it had merely fixed the rate therefor.

30. So far as the contention of BSNL regarding Gateway Switch is concerned, it was a party to the Expert Committee appointed by TRAI and the Members thereof having differed in their opinion, the said factor had not been taken into consideration.

31. Mr. Ramji Srinivasan, the learned Senior Counsel appearing for AUSPI, urged that additional cost required to be incurred would come to about 25% to 29% of the initial cost. While determining the Port charges, TRAI had taken into consideration all relevant factors which should be upheld by this Tribunal having regard to the concept of Level Playing Field as also in view of the fact that by reason thereof competition would be encouraged. So far as Gateway Switch factor is concerned, according to the learned counsel, nothing survives as by reason of the impugned Regulations only an amendment of 2001 Regulations had come into force with effect from 22.3.2002 in terms whereof the rates have been decreased.

32. The appellant, BSNL having accepted 2001 Regulations, Mr. Srinivasan urged, cannot now be permitted to take a different stand. In this connection our attention has been drawn to paragraph 10 of the Reply filed by AUSPI which is to the following effect :-

“The Appellant is not an incumbent operator in the cellular mobile service segment and as per the existing interconnection arrangements had to interconnect with other private operators. However using the market power in the wireline segment, it interconnected its cellular operation – CellOne with other cellular operators without having to pay for any port charges. “CellOne” utilized the connectivity of BSNL PSTN with the other

cellular operators for getting connected to their networks and thereby the related cellular subscribers. BSNL used its dominance not only to connect its CellOne operations but also charged Rs.0.19 per minute from the cellular subscribers by way of transit charges for accessing BSNL CellOne subscribers unless this Hon'ble Tribunal decided the case against BSNL and directed to stop charging 0.19 paise for transiting calls to its CellOne network. The private cellular operators have paid port charges to BSNL for the Level-1 TAX connectivity but BSNL CellOne is additionally getting the benefits of connectivity to the other cellular operators without having to paying for the port charges.”

33. It was furthermore contended that this Tribunal in Petition No. 9 of 2001 and Petition No. 12 of 2001 having held that the determination of Port charges by the TRAI was in accordance with the conditions of the licence and the power conferred upon it and by reason of the Interconnect Agreement; the relevant portions whereof are as under :

“19. It is, therefore clear that the interconnection agreement itself empowers the TRAI to issue direction/decisions that shall be binding on either party and as such decisions/directions shall be implemented in good faith by both the parties. We therefore are very clear that in May'99 Regulations when TRAI determined the port charges, it was well within the power conferred on it under the interconnect agreement. That this determination would be binding on the related parties does not get determined by Clause 8 of the May'99 regulations but the provisions of the interconnection agreement itself. The subsequent sequence of events shows that these rates were brought into effect from 1.5.1999 through the DoT letter dated 25.10.99. The determination of port charges by TRAI under these circumstances was therefore totally in accordance with the conditions of the license and the powers conferred on TRAI by the interconnect agreement whose compliance constitutes one of the conditions of the license.”

34. Our attention in this behalf has also been drawn to clauses 20.12, 27.2 and 27.3 of the UASL licence, which read as under :-

“20.12 The Licensee shall separately pay the access charges for carriage of calls originating in its network but carried and terminated in the Other Service Providers’ networks. The Licensee shall also separately pay charges for network resources obtained by the Licensee from other licensed service providers. This will be governed by the determination of TRAI if any.

27.2 The charges for accessing other network for inter-network calls shall be based on mutual agreements between the service providers conforming to the order/regulation/guidelines issued by the TRAI from time to time.

27.3 The network resources including the cost of upgrading/ modifying interconnecting networks to meet the service requirements of the Licensee will be mutually negotiated keeping in view the orders and regulations issued by the TRAI from time to time.”

35. In view of the fact that the aforementioned clauses are subject to regulations framed by the TRAI are upgraded/modified the Interconnect Regulator’s net worth, it would not be correct on the part of the BSNL to contend that the TRAI had no jurisdiction in regard thereto. Our attention has also been drawn to the affidavit of BSNL in the Petition No. 3 of 2002 wherein it was stated as under :-

“Without prejudice to the foregoing, it is respectfully submitted that in any case, as far as future payments of port charges are concerned, the said payment would be governed by the fresh regulation of TRAI but port charges namely, the telecommunication interconnection (port charges) Regulations 2001 (6 of 2001) dated 28.12.2001. The said regulation is final and has to be adhered to by all service providers.”

36. Mr. C.S. Vaidyanathan, learned Senior Counsel appearing on behalf of the respondent, would contend that para 8 of the Explanatory Memorandum would show what type of consultations had taken place and it would appear that the only change in the methodology is in respect of annual recurring expenditure in terms whereof the rate of 22% had been

applied to the capital cost which worked out comprising of 12% of cost of capital plus depreciation at 10% keeping in view the fact that the equipments should be of various types, which is beneficial to the appellant and thus, there was absolutely no reason as to why BSNL did not furnish the requisite information either before the Draft Regulations was furnished or thereafter.

37. It was submitted that COAI had made a joint presentation with AUSPI wherein it had been contended that no Port charges should be payable at all.

38. In view of the aforementioned rival contentions of the parties, the following questions, in our opinion, arise for consideration :-

- (i) Whether TRAI had the requisite jurisdiction to frame the impugned Regulations?
- (ii) Whether by reason of the impugned Regulations, terms and conditions of Internet Agreement had been interfered with?
- (iii) Whether the TRAI was otherwise justified to alter the Port charges?

39. Keeping in view of the fact that the question of jurisdiction of TRAI to make Regulation interalia having regard to the conditions of licence as also the provisions of the Interconnect agreement, in our opinion, cannot be decided by us as the matter is pending decision by the Supreme Court of India. Before we enter into the merit of the matter, keeping in view of the fact that this Tribunal in a large number of cases has opined that Regulations made by TRAI are interalia in the nature of directions which admittedly are issued by it in exercise of its jurisdiction under Section 11 (b) (ii), (iii) and (iv), this appeal would also come within the provision of jurisdiction of this Tribunal. We would, however, like to place on record that it was not correct on the part of the Mr. Malhotra to refer to the decision of the Constitution Bench of the Supreme

Court of India in PTC (Supra) in as much as at the instance of TRAI itself, the Constitution Bench did not advert to the question of jurisdiction of this Tribunal vis-à-vis Regulations framed by TRAI.

40. TRAI indisputably can make, modify or alter the Port charges in exercise of its power under Section 11 (1) (b) of the Act. While undertaking such exercise, indisputably, TRAI is required to maintain a high level of transparency. In the instant case, TRAI had not undertaken the exercise suo motu. It took recourse thereto at the instance of the AUSPI, COAI and other licensees. It may not be denied or disputed that apart from appellant-BSNL and MTNL, Port charges are ordinarily not paid by and between other private operators, although they may be major players in the field or the established operators. It has been contended before us that so far as the established operators are concerned, they do not levy any Port charges against any other private operator in as much as the cost borne by them are almost equal.

41. We may, however, place on record the statement of Mr. Maninder Singh that after licences had been granted to several new entrants, the established private operators have also been charging Port charges from the new operators.

41. Be that as it may, there is no doubt or dispute that the appellant herein is also a BSO licensee. It incurs huge expenditure in installing equipments from time to time keeping in view its obligations under the licence to provide Port to the other service providers and in particular the Rural and Hilly areas. Whether in doing so, the appellant incurs additional expenditure and would be entitled to the total cost incurred for the purpose of establishing Ports was the issue before the TRAI before it amended 2001 Regulations. It is a matter of great regret that whereas the contentions had been raised in the case of AUSPI that the TRAI has not changed the methodology in computing port charges, it has been contended before us in this Appeal that in fact methodologies in certain respects had been changed.

43. COAI in its written submissions placed before us a comparative chart, the relevant portions whereof are as under :-

S. No.	Item	28.12.2001 Regulation	02.02.2007 Regulation
1.	TRAI considered only directly attributable incremental cost (DAIC)	Yes- Page 46 para 5	Yes - Page 52 Para 19
2.	DAIC considered for : a. Port terminals b. All other relevant elements such as CCS 7 signalling equipment, processors and switching matrix etc.	Yes – Page 46 Para 5	Yes – Page 52 Para 19; Also see Page 61
3.	DAIC of all other relevant elements such as CCS 7 signalling equipment, processors and switching matrix etc., computed as overhead	Yes – Page 46 Para 5	Yes – Page 52 Para 19
4.	Overhead at the rate of 10% representing freight, storage and installation have been added to total DAIC	Yes – Page 46 Para 5	Yes – Page 48 Para 11
5.	For arriving at annual recurring expenditure *ARE) a rate of 22% had been applied to the capital cost so worked out comprising of 12% cost of capital + depreciation at 10% (10 year life)	Yes – Page 46 Para 5	ARE method not adopted – Provides depreciation at 10% on straight line method Also provides – reasonable return at 14% per annum on capital has been considered – Making it 24% - Page 48 para 11; Also page 53 para 21;
6.	Cost of downstream augmentation of Network resources being recovered from usage charges (now IUC) of	Yes – Page 532 para 6; Also Page 47 para 6; Page 641 at 643	Yes – Page 56 Para 27

	network elements involved in call carriage		
7.	Cost of Network management, operations and maintenance center, fault management system have been excluded as not being directly attributable to interconnection ports.	Yes – Page 532 para 3	Yes – no page available

44. Thus, in fact the methodology had undergone some change is not in dispute. The parties, however, have raised an issue as to whether the item No.5 of the said comparative chart was beneficial to BSNL. We may place on record that Mr. Maninder Singh contended that one item of expenditures which had not been taken into consideration by TRAI while changing methodology which was said to be beneficial to BSNL by reason of the provision in the Port Regulations. Mr. Maninder Singh has placed before us a comparison of AUSPI methodologies assuming cost of capital of Rs.1,000/- including the depreciation etc. In both the cases which reads as under :-

Comparison of Costing Methodologies (Assuming Cost of Capital of Rs. 1000 including depreciation etc. in both cases)			
Sl. No.	Year	Recovery as per Regulations – 2001 (At 22% Flat)	Recovery as per Regulations – 2007 (10% straight line depreciation and 14% on the CAPEX after deducting depreciation)
1	1 <sup>st</sup>	220	240
2	2 <sup>nd</sup>	220	226
3	3 <sup>rd</sup>	220	212
4	4 <sup>th</sup>	220	198
5	5 <sup>th</sup>	220	184
6	6 <sup>th</sup>	220	170
7	7 <sup>th</sup>	220	156
8	8 <sup>th</sup>	220	142
9	9 <sup>th</sup>	220	128

10	10 <sup>th</sup>	220	114
<b>Recovery in 10 years</b>		<b>2200</b>	<b>1770</b>

45. The correctness of the said chart may or may not be open to question. But it is difficult to consider that BSNL would prefer appeal against the impugned Regulations despite the fact that the same had in overall benefited it. Furthermore, we do not find any reason as to why the cost of equipments for Ports should have been changed in relation to the methodology by reducing the Port charges from 23% to 20% which according to the BSNL, is Rs.100 crores per annum without giving an opportunity of hearing to it. We may notice that COAI jointly with AUSPI have made a presentation before the TRAI, wherein it was stated that BSNL had recovered cost of Port charges in 7 years against 10 years envisaged in 2001 Regulations and in that view of the matter no further payment should be payable for such Ports. We are not required to go into the said question as indisputedly the said submissions had not been accepted by TRAI itself in the following terms :

**“Issue 6 : Recovery of CAPEX for existing Ports and sunset clause :**

- (a) Cost of POI working for more than three years has been recovered by the interconnection providers and, therefore, there is no rational for continuation of payments for the same.
- (b) Cost of 7 years old Ports have already been recovered as per TRAI’s own calculations and as such no further payments should be applicable for at least such Ports and, therefore, sunset clause should apply to these Ports immediately.
- (c) There should be sunset clause for payment of Port charges.

24. The Authority has also considered the view of the stakeholders regarding recovery of the cost for the existing ports and is of the view that interconnection provider generally is required to replace the existing equipment necessary for continuance of interconnection from time to time and, therefore, proposition made by

the service providers, that cost of the existing ports is completely recovered within 7 years and no further payment should be applicable with sunset clause for Port charges, is not sustainable in present scenario.”

46. Furthermore, having regard to the fact that COAI or any other private operators being not in appeal against the aforementioned findings of TRAI, it is not necessary for us to go into the aforementioned factual aspects, although we are not sure as to whether the contentions of the COAI and other private operator, if any, have been communicated to BSNL or not.

47. For the self same reasons, we are also not in a position to accept the contentions of the respondents that parallel cost of equipments had not remained the same between 2001 to 2007 and according to COAI, there was actual cost of reduction of about 20% in the Port charges.

48. We may, however, notice paragraph 17 of the Explanatory Memorandum appended to the Regulations, which is to the following effect.

“The Authority has made all the calculations on the basis of the substantial data provided by the interconnection seekers and interconnection providers. The Authority has also found some gaps and even inconsistencies in data in certain cases provided by interconnection seeker/provider. The Authority has made reasonable checks with due diligence while taking the network elements and costs furnished by some of the stakeholders thereof for expansion of exchange/switch. The Table-I in this Explanatory Memorandum provides details of network elements considered for determining the Port charges. It was also noted that while furnishing the costs details of network elements, some of the stakeholders marked it ‘Confidential’. Therefore the cost has not been indicated against the network elements listed in Table-1.”

49. It is true that confidentiality was required to be maintained by TRAI but the question, however, which arises for our consideration is as to whether the TRAI was justified in not providing BSNL the basic datas (without naming the operator or the Association who had supplied the same) to BSNL so as to enable it to meet their conditions. In this view of the matter, Table 1 contained net-worth elements required for expansion of Switch/Exchange. It does not however, appear that for the aforementioned purpose, the transparency, as is mandatorily required in terms of Sub-Section 4 of Section 11, was maintained keeping in view the said submission.

50. We are of the opinion that TRAI is required to maintain a high level of transparency, the reason being that vastness of the Telecom sector is such that even the slight change by way of reduction of some charges, as noticed heretobefore, play a significant role so far as financial health of other operators is concerned.

51. We, in a case of this nature, although do not intend to lay down the law that TRAI would be bound for all time to come to adhere to one or the other methodologies adopted by it in the earlier Regulation (s); but in our considered opinion there cannot be any doubt or dispute that the intended change in the methodology has in fact led to a dispute amongst the parties, who would be gravely affected thereby. The methodology must be altered to the detriment of BSNL and/or MTNL, who according to TRAI itself, are the only BSO operators and who are the service providers vis-a-vis other private operators who are service seekers and after considering their view points elaborately. The fact that in the Regulations which preceded the impugned Regulations, TRAI itself having proceeded on the premise that the service seekers must reimburse the service providers, it was imperative on the part of the TRAI to clearly specify its proposal to change the methodology.

52. We therefore see much force in the contention of Mr. Maninder Singh that the TRAI in a matter of this nature, acted in undue haste. The chronological events, which had been noticed by us heretobefore, clearly point out that despite the fact that the Draft Regulations had been circulated to the parties only on 12.01.2007 wherein it was clearly stipulated that

it shall come into force from only from 1.4.2007, it defies any logic as to why request made by BSNL for grant of sometime to respondent thereto was rejected. No reason has been assigned in support as to why the date of enforceability was changed from 1.4.2007 to 2.2.2007.

53. Having regard to the fact that in the connected matter, we have noticed that even AUSPI had filed its objections to the said Draft Regulations inter alia contending that TRAI had not considered its submissions to the effect that the methodology for computing the Port charges should be altered not only keeping in view the actual incremental cost but also the usage thereof and in that view of the matter, the submissions of the BSNL to raise a contention as to what had happened to the points of view rejected by it and accepted the point of view of others was without any basis.

54. We must also notice that in this case no Consultation Paper was issued which is the practice ordinarily adopted by TRAI. We may, however, hasten to add that we do not mean again to lay down a law that in each and every case issuance of Consultation Paper is imperative in character but there cannot be any doubt that what a major change is sought to be effected to the detriment of one player in the field and at the instance of the others, the basic issues should fall for discussions.

55. Explanatory Memorandum appended to the Regulations would clearly show that TRAI proceeded on the basis that there existed an anomaly in that the charges with regard to the interconnection to place more than the actual demand of ports and thus the same is needed to be re-evaluated, had not been addressed.

56. From paragraph 5 of the Explanatory Memorandum, it would appear that while referring to the 2001 Regulations, the TRAI had considered that associated costs have been computed as overrate in the various Ports slabs but however for

all intent and purport it affects the annual recurring expenditure and why a rate of 22% thereof have been applied to capital cost so worked out had not been specified.

57. We may notice that the TRAI, however, in para 11 stated :-

“The Authority has not adopted annual recurring expenditure (R) method for present review of Port charges.”

58. In para 8 of the Explanatory Memorandum, TRAI refers to Consultations not only with the appellant but also with COAI and AUSPI and purported to have discussed in a series of meetings with them for the said purpose, for which as noticed heretofore, no consultation paper was circulated. Keeping in view the fact that although most of the network elements and details of analysis were asked for, it did not become the subject matter of consideration for effecting change in the Regulations. TRAI while in para 13 of the Explanatory Memorandum stated that it had taken into consideration the comments of the entities mentioned therein but the issue arising by and between the respective parties had not been spelt out clearly.

59. We have noticed heretofore that in para 17, while dealing with the Port charges, the informations asked for by BSNL were withheld on the ground of delay as also the confidentiality clause.

60. Issue No.6 related to recovery of Capex for existing Ports and some of the said clauses, which as has been noticed heretofore, has been rejected by TRAI. Keeping in view the aforementioned discussions, we are of the opinion that TRAI has failed to act, while determining the Port charges, in a complete transparent manner.

61. We furthermore are at a loss to understand as to why the matter relating to Gateway Switch was not found to be necessary for consideration by TRAI. It has not been denied or disputed that the same was a relevant consideration and if the said suggestion has been given effect to, it would prove to be beneficial to BSNL.

62. The submissions made on behalf of TRAI that there was no concurrence amongst the Members of the Expert Committee, in our opinion, by itself could not have been a ground not to address the said issue. The Regulator as an expert body must play its own role in the matter of determination of charges. Only because the Members of the Expert Body had not been able to arrive at a consensus, the same in our considered opinion would not mean that an important aspect of the matter would not form essential part of the consultation process. If the Members of the Expert Committee could not arrive at a consensus, the same might be considered afresh by TRAI although in a given case the TRAI might have done so. The role of a Regulator being distinct in nature, the said issue, in our opinion, deserved its utmost consideration.

63. For the reasons aforementioned, we are of the opinion that the issues raised before us by the parties require a fresh look by the TRAI itself.

64. We, however, would commend that TRAI should in the cases like the present one, if found practicable, should clearly indicate the period for which the charges fixed by it should remain operative so that the parties can take suitable measures to meet their financial objectives.

65. These appeals are allowed with the aforementioned observations and directions. In the facts and circumstances of this case, however, there shall be no order as to costs.

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

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

.....  
**(P.K. Rastogi)**  
**Member**