TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL
NEW DELHI

DATED 5th OCTOBER, 2010

PETITION NO. 61 of 2008

Bharti Airtel Ltd. .... Petitioner

Vs.

Bharat Sanchar Nigam Ltd. .... Respondent

BEFORE :

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

For Petitioner	:	Mr. Navin Chawla, Advocate
For Respondent	:	Mr. Maninder Singh, Sr. Advocate Mr. Tejveer Singh Bhatia, Advocate

ORDER

S.B. Sinha

1. The petition involves interpretation of some judgments of this Tribunal as also the Supreme Court of India in Tata Teleservices Ltd. Vs. Bharat Sanchar Nigam Ltd. reported in 2008(10) SCC pg. 556 and Reliance Infocom Ltd. vs. Bharat Sanchar Nigam Ltd, 2008(10) SCC page 535.

2. The petitioner herein was granted a license in terms of the provisions of Section 4 of the Indian Telegraph Act, 1885 (1885 Act).

3. The petitioner in this petition has inter-alia questioned a bill issued by the respondent herein for the period 14.11.04 to 30.6.2005 inter-alia on the premise that it had been rendering WLL(M) services although it had been granted license for rendering the basic telecom services.

4. The license in question was granted for Madhya Pradesh circle. According to the petitioner since 1998 it has been using the same technology its subscriber base which was 32000 in 2001 has come down to 22000 in July, 2006.

5. According to the petitioner the respondent till 22.05.2006 had never made any complaint that the petitioner had been providing WLL services. It is, however, not in dispute that on or about 22.5.2006 the petitioner had issued a circular letter amongst others to Chief General Manager, Rajasthan, Punjab and Madhya Pradesh Telecom Circle, inter-alia stating :-

> *"Please refer to this office letters of even number dated 14.01.2005 on the above subject vide which it was intimated that M/s. Tata Teleservices Ltd. (TTL) & M/s. Reliance Infocom Ltd. (RIL) are offering Limited Mobile WLL(M) services under the fixed line numbering levels*

under brand name 'Walky' & 'Unlimited Cordless' respectively. All field units were asked to raise bills to M/s. TTL & M/s. RIL for Interconnect Usage Charges (IUC) including ADC as per Clause 6.4.9 of the Interconnect Agreements for all their calls of Limited Mobile Service through 'WALKY' & 'Unlimited Cordless' schemes for the period from 14.11.2004 onwards. It was also intimated to ensure that the traffic originated from numbering levels of 'WALKY' & 'Unlimited Cordless' between M/s. TTL/M/s. RIL and BSNL may be accepted only on trunk group meant for WLL(M) calls.

2. Similarly, the UASLs, M/s. Shyam Telelink Ltd. in Rajasthan telecom circle, M/s. HFCL Infotel Ltd. in Punjab telecom circle & M/s. Bharti Tele-Ventures Ltd. in Madhya Pradesh telecom circle are also providing WLL(M) services using fixed numbering levels. It is, therefore, requested to immediately raise bills to these UASLs for the period from 14.11.2004 onwards for recovery of IUC (including ADC), as prescribed at para 11(a) of IUC implementation circular no. 352-1/2006-Regln dated 28th February, 2006 and as per Clause 6.4.6 of the Interconnect Agreement for migration from Basic service to UASL, for all their calls of Limited Mobile Service through their wireless services handed-over to BSNL on the BSNL Trunk Groups meant for fixed line traffic, as already done in the case of M/s. TTL & M/s. RIL."

6. According to Mr. Chawla, the learned counsel for the petitioner, the respondent had never made an enquiry as to whether the equipments used by the petitioner are similar to that of Tata Teleservices Ltd. which consist of one telephone containing

antenna, the battery as also the other requisite equipment necessary for rendering such services.

The petitioner contended that it had never shifted to the new technology nor has it been using any instrument like Tata Teleservices Ltd. or the Reliance Infocom Ltd.

7. The petitioner furthermore asserted that it had been using 'rooftop antenna' in most of the cases, but where it is not feasible to do so having regard to the terrain or other difficulties, it has been using a portable antenna.

It has furthermore been contended that having regard to the size of the battery, the antenna as also the charger, it is impossible to take the said equipment being three in number for use thereof as a WLL(M) outside the premise of the subscriber.

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

i. For the purpose of considering as to whether the services rendered by a licensee is a fixed service or a WLL(M) service, the only criterion which is applicable is as to whether the service provider has a fixed rooftop antenna or not, as the bulk of the instruments or the number of instruments required to be carried in a vehicle for its

being used as a fixed telephone would not be a relevant criteria. For the said purpose, any condition laid down in the agreement by and between the service provider and the customer restraining the latter from using the said instrument outside the premise for which the said agreement has been entered into also not relevant.

ii. In view of the decisions of this Tribunal as also those of the Supreme Court in Tata Teleservices supra and Reliance Infocom supra as also Shyam Telelink, there cannot be any doubt or dispute whatsoever that the services rendered by the petitioner was WLL(M) and not fixed service.

9. It is not in dispute that the services rendered by the Tata Teleservices or Reliance Infocom were in effect and substance limited mobility services. That question is no longer res-integra as this Tribunal held so in Petition No. 45 of 2005 Tata Teleservices Ltd. & Others Vs. Bharat Sanchar Nigam Limited.

We would notice the said judgment of the Tribunal for the purpose of considering the issue a little later.

10. For the said purpose, we may also notice the arguments advanced in support of the petitioner therein, wherein it was stated :

"The (Fixed Wireless Phones) FWP phone service of the petitioners has been in existence since 1997 and has been deployed by various Basic Service Operators as part of the Fixed Wireless Services. The Basic License of 1997 mandates the licensees to deploy Wireless Services as the preferred technology in the last mile (also known as Local Loop). Originally the Wireless Terminals (FWTs) were large, bulky and heavy and had several accessories like separate antenna, separate battery, separate Network Interface Unit and a separate telephone instrument. Over a period of time technological developments have resulted in all these features getting combined into an Integrated Fixed Wireless Phone (FWP), also called Desk Top Phone."

"Telecom Engineering Centre of Department of Telecommunications (TEC) has also recognized the distinction between FWPs and WLL(M) phones. The Desk Top Phones used by the Petitioners are classified as Fixed Wireless Phones whereas the phones which make use of handsets used within the SDCA are termed as WLL(M) phones."

11. The other submissions raised on behalf of the petitioner were, in view of the directions issued by the TRAI and/or DoT as under:

"DoT had issued show cause notice to the Petitioners on 06/01/2005. Thereafter the Petitioner has complied with the requirement to impose conditions and restrictions on the subscribers' ability to transport/move/relocate or shift the Subscriber Terminal Equipment from the place of installation, breach of which attracts suspension/disconnection of the telephone facility, as

evident from the Customer Application Form itself. There has been no determination by the DoT in response to the reply dated 21/01/2005 submitted by the Petitioner to its Show Cause Notice dated 06.01.2005."

12. The Tribunal noticed on considering the definition of WLL(M) in Regulation 2(xxviii), to be limited mobility telephony service using wireless in local loop technology within a short distance charging area, to hold:

> *"TRAI and DoT had clearly clarified in March, 2005 that fixed line service has to be confined within the registered premises of the subscriber and any service which cannot be so restricted would not be a fixed service but would be treated as WLL(M) service. The petitioners have submitted to DOT and TRAI that their Walky service cannot be restricted to operate within the subscribers' premises only and it is very much capable of being used outside the subscriber's premises and within the SDCA."*

13. This Tribunal noticed that a circular dated 14th Jan, 2005 was issued by the respondent to M/s. Tata Teleservices as also a letter dated 19th Jan, 2005 to all private access providers and NLDOs and circular letter dated 9th March, 2003, to opine :

"We find in this regard that the petitioners have not disputed that the main beneficiary of ADC is BSNL and that if the Walky service is to be regarded as WLL(M), the relevant ADC charges would be payable to BSNL. It is, therefore, clear that BSNL could not have remained silent in a situation where a fixed line service was being widely publicised as having features of mobility and which prima facie therefore could not be regarded as a "Fixed Service" but had all the features of WLL(M) service. Also the interconnect agreement between BSNL and M/s. TTL entitles BSNL to take action including raise a demand for payment of requisite IUC charges for calls originated from a WLL(M) phone."

14. Before the Tribunal a question of unilateralism was raised. In the light of its decision in BSNL vs. TRAI reported in (2005)5 Comp LJ 292 (TDSAT) dated 27.4.2005 as also the Judgment of the Delhi High Court in MTNL & Ors. Vs. TRAI & Anr. Reported in (2000)DLT Pg. 17, this Tribunal held :-

"In the matter presently before us the situation is quite different. There is no attempt on the part of BSNL to change the Interconnection Usage Charges. The provocation to treat the fixed line "Walky" as WLL(M) had indeed being given by the petitioners themselves and whatever has happened subsequently is in consequence to the extensive publicity by which this service has been promoted, through the media and other marketing efforts, as having all the best features of mobile phones including the freedom of mobility. As mentioned already BSNL could not have remained a silent spectator and its interconnect agreement with M/s. TTL entitled it to raise the demand as

contained in the letter of 14/01/2005 and the subsequent letter of 19/01/2005 and 9/03/2005."

It furthermore observed :

"It has been argued before us in considerable detail that the basic license of 1997 mandated the licensees to deploy wireless as a preferred technology in the last mile (last mile in simple words means the link between a customer's premises and the Exchange). It was also explained to us how the equipment at the subscribers end was essentially very large, bulky and heavy in the case of fixed wireless terminal, with separate accessories like antenna, battery and what is called a network interface unit, apart from a separate telephone instrument."

In regard to the issue of regulatory rights it was held :

"The learned Solicitor General Shri Goolam E. Vahanvati appearing for BSNL on the other hand argued in considerable detail that the regulatory regime clearly and consistently has made a distinction between the basic services and WLL(M) service for the purpose of payment of Interconnection Usage Charges and ADC. The fixed wireless service is clearly a part of basic service. The WLL(M) service has been clearly defined under Regulation 2 (xxviii) which reads as under:-

'WLL(M) means limited mobility telephony service using wireless in local loop technology within a Short Distance Coverage Area.'

The regulatory regime does not make any reference to use of any particular subscriber end equipment and the Interconnection Usage Charges make reference to "service" only. Since the Walky service of the petitioners is capable of operating outside the subscribers premises and within the SDCA. It is squarely covered by the definition of WLL(M)."

It was observed:-

"It is noteworthy that on behalf of the petitioners it has also been clearly stated that the directions dated 4.3.2005 of TRAI and the general clarification dated 23.3.2005 issued by DoT(which we would deal with in the later part of this order) enjoining the fixed wireless telephones to be confined strictly within the subscribers premises were incapable of being technologically implemented. Further it was pointed out by the petitioners to TRAI in response to the said communication that in their "Walky" fixed line service it was technologically possible to limit mobility only to within the range of one or two base stations."

It was furthermore observed :-

"In the matter being considered before us in the instant petition, we are, however, left in no manner of doubt that the "Walky" service of the petitioners could not be regarded as anything else than WLL(M). M/s. TTL have admitted on more than one occasion that their Walky service is capable of operating outside the subscribers premises and can only be restricted to a "Restriction Zone" within the SDCA (Short Distance Charging Area – the area within which a WLL(M) is supposed to operate). In fact, in the compliance report

filed by M/s. TTL dated 31/03/2005 addressed to TRAI, it has been made abundantly clear that the "Walky" service is capable of being used outside the subscribers premises and within the SDCA. The following extracts of this report are relevant:

......"2. The Regulator would surely be aware of the inherent "soft handover" nature of CDMA technology due to which CDMA terminals (FW or mobile) utilize signals from various BTSs thereby leading to better utilization of radio network and proving to be extremely spectrally efficient. Therefore, the implementation of any restriction would require considerable changes to the network which need time, effort and considerable resources to complete something which DoT/TRAI requires to provide. Neverthless under constraints of time, some actions have been initiated which are detailed further in this letter"....

On the basis of the aforementioned findings it was held:

"We therefore find that the cases cited above do not have relevance to the matter to be decided by us because while deciding the nature of service rendered by the petitioners, we are not basing our conclusions solely on the advertisements issued by the petitioners, on the contrary we have taken into consideration the features provided in the instrument provided by the petitioners, in particular, its capability of being operated outside the subscriber's premises, admission of the petitioner as to its mobility and the incapacity of the petitioners as service providers to restrict the mobility of the "Walky" instrument to within the confines of the subscriber's premises, among other factors. We have taken note of the advertisements by the

petitioners in the above factual background. Hence we do not find ourselves in agreement with the arguments in this regard on behalf of the petitioners. Mere withdrawal of the advertisements would not provide the justification for the petitioners to continue a service which admittedly has features of limited mobility outside the subscriber's premises."

We have referred to the decision rendered by this Tribunal in extenso keeping in view of the fact that the Supreme Court of India while rendering its decision in an appeal preferred by Tata Teleservices Ltd. & Reliance Infocom Ltd. (supra) opined that the reasons assigned by it were in addition to those of this Tribunal. However, it is neither possible nor necessary to notice in extenso the various Authorities and other documents considered by the Apex Court in the aforementioned two decisions. We may notice the broad parameters thereof.

15. Noticing the difference between the wireless system and wireline services it was opined that mobility is of value and in case of services, wireless access is a cheap cable replacement without additional features.

While considering generic requirements, it was held that those which were as far as the May, 1996 in consonance with the technological concepts enumerated the reference book referred therein, to state -

"It shall be engineered to provide wireless communication to cover subscribers located upto 25 Kms. from the exchange."

It furthermore noticed the general requirements of limited mobility services from the said authority, which are

"2.20. Mobility functions – Optionally the system may support limited mobility within designated area. The mobile handsets shall conform to relevant standards for mobile application. The equipment supplier shall indicate the coverage area for mobility for the equipment offered."

"15.0. Antenna
The type of antenna and gain may be decided by the supplier for getting desired coverage and performance of the system. Detailed specifications (technical as well as mechanical) shall be furnished by equipment supplier. Fixtures for antenna mounting at BSs and RSs shall be included as part of antenna supply."

16. It noticed the submissions made on behalf of the appellants herein in the paragraph 23 of the judgment, while considering the submissions in regard to unilateralism, referred to the clarifications of TRAI dated 4.3.2005, the directions issued by DoT dated 23.3.3005 as also other directions issued by this Tribunal. It was opined :

"39. Analysing the directive dated 4-3-2005 issued by TRAI, the point which arises for determination is whether such directive is clarificatory whereas according to the

appellants it is amendatory. According to TRAI, it is clarificatory whereas according to the appellants it is amendatory. In this case, as stated above, we are concerned with the demand of ADC on the appellants for the period 14-11-2004 to 26-8-2005. According to the appellants, such a directive dated 4-3-2005 cannot operate retrospectively. This is the key issue which we need to decide. In this connection, it may be noted that the said directive was issued to all access providers. The said directive came to be issued as it was brought to the notice of TRAI that new terminals were being deployed by access providers which terminals do not have any fixed network access point physically located at the address of the subscriber. In the said Circular dated 4-3-2005, TRAI noted that fixed wireless services were required to be provided through fixed wireless terminals with the location of the network access point being fixed and with the end-user terminal being connected to it. That, it had been brought to the notice of TRAI that new terminals were being deployed by certain access providers which did not possess fixed network access point physically located in the premises of the subscriber (PSR). Therefore, by the said circular, TRAI directed the service providers to strictly ensure that the terminal used for fixed wireless services should comply with premises specification restriction i.e. to the premises of the subscriber. This stipulation in the directive, according to the appellants, constitutes a new requirement which has the effect of amending the terms and conditions of the UAS licence as well as the Telecommunication Interconnection Usage Charges Regulations, 2003. The said directive dated 4-3-2005 stood followed by letters from DoT dated 23-3-2005 and 26-8-2005."

It was furthermore held :

> *"41. Firstly, the UAS licence classifies wireless service into three categories, namely, full mobility, limited mobility and fixed wireless access. As stated above, in FWA there is no mobility of the user device. FWA replaces copper lines to the homes of the users by wireless links but without the benefit of mobility for the user devices. FWA is one type of service. Mobility is a service feature. In FWA system, the location of end-user terminal and the network access point to be connected to end-user are fixed."*

> *"43. We may state that broadly FWA is called WLL(F). As stated above, the UAS licence refers to three types of wireless services, namely, full mobility, limited mobility and FWA. As stated, in FWA, the location of the end-user (Walky) and the network access point (antenna connected to the end-user) are both fixed whereas in the case of mobile wireless access, the location of the end-user is mobile. WLL(M) is a hybrid between FWA and MWA. Wireless access may be considered from many perspectives. In this case, we are concerned with mobility capabilities of the terminal; fixed nomadic, mobile restricted mobility etc. As stated hereinabove, the main purpose of FWA [WLL(F)] is to provide network access to buildings through exterior antennas communicating with central radio base stations. In FWA users in a building are allowed to connect to the network with conventional in-built networks. FWA is a service. It is intended as a cheap cable replacement, without additional features. Wireless systems differe depending upon the amount of mobility that they allow for the users. FWA system is a derivative of*

cordless phones. In FWA there is no mobility of the user devices. This is where the concept/principle of PSR emerges. As stated above, there is a difference between mobility and portability. A terminal may be portable but every portable device is not mobile. Therefore, in our view, the concepts mentioned in Circular dated 4-3-2005 issued by TRAI exist in telecommunications right from 2001. The said circular merely clarifies and brings out the concept premises specific restriction.

44. To sum up, in WLL(F) the telephone is the access point if the antenna is in-built in the telephone. If the impugned service is operable throughout SDCA it is WLL(M). In WLL(F), location of end-user termination and the network access point to be connected to the end-user are fixed. If the impugned service cannot comply with PSR it is classifiable as WLL(M) for IUC, ADC, numbering plan, etc. Lastly, the only difference between fixed wireline and WLL(F) is that WLL(F) is a cheap cable replacement without additional features. WLL(F) is limited to specific premises of the subscriber or permanent location."

The Supreme Court of India dismissed the said appeal inter-alia on the aforementioned premises.

17. Submissions of Mr. Chawla, as noticed heretobefore, relate to bulk of the equipment, portability on the part of the customer and non-observance of the principle of natural justice on the part of the respondent. From a bare perusal of the reasons assigned by this Tribunal, as also the Supreme Court of India, it is evident :-

(i) What is relevant is the service;

(ii) The immediate reason for the respondent to issue the aforementioned circular was the provocation on the part of the appellants therein by way of advertisement. The argument that the equipments are very large, bulky or heavy in the case of wireless terminal with separate accessories antenna, battery and network interface unit was not relevant.

(iii) There exists a distinction between the mobility feature of a handset and the portability feature associated with the fixed wireless phone like the 'Walky' of the appellant therein.

(iv) The regulatory regime did not make any reference to use of any particular subscriber and equipment and the interconnection usage charges make reference to service only.

(v) It is necessary to consider as to whether the services offered by the service providers are capable of operating outside the premises. Telephones which are connected with wireless apparatus must be strictly confined to the subscriber's premises and incapable of being technologically to take the same out of subscriber's premises. Capability of being operated outside the subscriber's premises would be the relevant consideration

so far as the features provided in the instruments are concerned.

(vi) Mobility per se has a value.

It provided the instrument could operate within a distance of 25 Kms. from the fixed area. What is, thus, relevant is the service and not instrument.

(vii) The rule of unilateralism, however, is not applicable.

(viii) In FAA, there is no mobility of the user device. In FWA system the location of end-user terminal and the network to be connected to the end user are fixed.

(ix) The network access point (antenna connected with end user) as also the location of the end-user are both fixed whereas in the case of Mobile Wireless Access, the location of the end-user is mobile.

(x) WLL(M) is a hybrid between FWA and MWA.

(xi) In FWA there is no mobility of the user device.

(xii) A terminal may be portable but every portable device is not mobile.

18. Mr. Chawla would however, submit that the Supreme Court of India had been considering the fixed roof top antenna as only one of the features and the said judgment must be considered having regard to the factual matrix involved herein and in particular the fact in the case of 'Walky' offered by the Tata Teleservices Ltd., the heavy instruments by reason of advancement of technology could be accommodated in one

instrument and in the case of Reliance the entire device could be carried into a hand held set.

19. However, before adverting to the rival contentions of the parties, we may notice that the other concerned operators namely Shyam Telelink Ltd. and HFCL Infotech Ltd. who were also the recipients of the respondent's circular letter dated 19.1.2005 had approached this Tribunal in Petition No. 223 of 2006 and Petition No. 232 of 2006. The said petitions have been disposed of on 21.5.2010, inter-alia holding :

> *"Indisputably, the petitioner has not been using the number allotted to them for providing fixed services but the numbers allotted to them for mobile services."*
>
> *"In our opinion, the technology involved in the third category of phones as described in paragraph 4(iii) of the petition is not material. What is mentioned therein is that the said category of instruments has a roof top antenna. If they had, in view of the decision of the Supreme Court, it would be fixed phone and not a mobile one."*

20. This Tribunal, in that case, at the outset, noticed the number of the subscribers of different nature provided for by the parties to consider as to whether 10500 subscribers who have been given the alleged FWP services would come within the purview of WLL(M) services or not. Therein this Tribunal noticed the

controversy between the parties as to the technology involved consisted of a fixed roof top antenna or not.

Referring to the decision of the Supreme Court of India in Tata Teleservices (supra), it was held :

> *"In view of the aforementioned findings rendered by the Supreme Court of India, there is neither any doubt nor any dispute whatsoever that an instrument which had a roof top antenna and a separate battery would come within the purview of 'fixed phones' as contradistinguished from the 'mobile phones'."*

21. This Tribunal, for determining the said question noticed the pleadings of the parties so far as the FWT services of the petitioners therein were concerned, being :

> *"a) a Network Interface Unit (NIU), that is nailed to the wall.*
> *b) A patch Antenna that is fixed to the terrace or exterior or building.*
> *c) a Wire that connects the Patch Antenna to NIU.*
> *d) a Battery to provide electrical support to NIU.*
> *e) a wired connectivity to an ordinary push button Telephone Instrument from the NIU."*

> *"i) they are fixed devices which communicate with their BTS or each other from the same location.*
> *ii) They are connected to an external phone using RJ-11 cable. It is a fixed terminal (without Dialer) &*

another external phone is required to be connected to FWT in order to originate & terminate any call.

iii) *The Remote station is wall mounted and fixed.*

iv) *It has a wall set NIU, battery powered Adapter, Charger etc. besides wired connection to an exterior antenna as well as a wired connection to an instrument.*

v) *The location of the end-user termination and the network access point to be connected to end user is fixed.*

vi) *The antenna is not in built in the phone and is usually installed on the roof of the Subscriber's premises……*

xiv) *in case if a FWT is to moved out of the installed place it has to be physically dismantled and reinstalled at the new premises and all the configurations are done as per the zone in which it is reinstalled. It is similar to any fixed wireline telephone which when removed from one premises is to be reinstalled and reconfigured at the new place."*

22. In the instant case, it is true, that the petitioner had not been given the opportunity of hearing but the question of complying with the principle of natural justice in view of the decisions of the Supreme of Court of India, in our opinion, at this stage takes a backseat.

It is not a case where according to the Supreme Court of India where nature of the instrument is to be determined. In this case the requirement to have a roof top antenna is not in

question, what is in question is that due to certain difficulties they cannot be put and in any event these devices cannot be carried in a vehicle.

23. Decisions of this Tribunal as also those of the Supreme Court of India, which we have noticed heretobefore in extenso, leave no manner of doubt that for the purpose of ascertaining the FWP or FWA services, the roof top antenna has to be there. It was held by the Apex Court that the instruments in question should not be capable of being taken out of the premises of the subscriber. It is not the case of the petitioner that by no means it cannot be taken out. It is the case that in all probability they would not be taken out. The only contention thus, is that the customers would not be taking the bulk of the instrument.

The question as to whether the approval of the instrument being taken out had been given by the petitioner or not to its customers in their offer to render the service, is immaterial.

24. It is true that a decision is an authority for what it decides and not what can logically be deduced therefrom. Ratio of a decision is the reason assigned having regard to the factual matrix involved therein and not mere observation.

25. Indisputably the nature of services has been held to be of great significance by the Apex Court for determining the question of mobility. What constitutes a fixed service and what constitutes a mobile service has been considered by this Tribunal as also by the Apex Court having regard to a large number of factors including the opinion of the TRAI, the DoT as also the respondent herein. It referred to various authoritative publications for the purpose of holding that not only the nature of the service is material, the capability of the instrument being taken out of the premises is also of principal consideration.

26. The petitioner for reasons best known to it did not disclose as to how many instruments were connected with roof top antenna and how many of them were not.

Neither in the petition nor in its letter to the respondent, the petitioner has disclosed the same.

The petitioner in the petition states as under :

> *"It was further emphasized that petitioner's Fixed Wireless Service was based on the first generation IS95A CDMA platform and it had been retained in the same manner and form in which it was originally launched in 1998. The customer premises equipment, known as Fixed Wireless Terminal, consists of 3 piece bulky apparatus comprising a desktop phone, a Network Interface Unit and an external*

battery. In fact, in a lot of these phones the NIU are also fitted with an external Rooftop Antenna."

The respondent in its reply stated as under:

"It is denied that the petitioner is providing strictly Fixed Wireless Services(FWT). It is most respectfully submitted that the petitioner has not stated as to how many of the said phones are having external roof top antenna. It is most respectfully submitted that the most of the phones provided by the petitioner were capable of operating outside the customer's premises and therefore were WLL(M). All other contentions to the contrary are denied."

"..It is most respectfully submitted that simply by using IS95A CDMA will not make the services of the petitioner as FWT. It is most respectfully submitted that the petitioner has deliberately not stated as to how many of the phones have been supplied by the petitioner to its customers having external roof top antenna."

27. In its rejoinder the petitioner stated :

"It is most respectfully submitted that a lot, almost 100% of the phones, of the petitioner were fitted with external roof of antenna and therefore, in view of the above order, cannot be treated as WLL."

28. If the contention of the petitioner is correct that almost 100% of the phones have roof top antennas, there is no reason why the details thereof could not be furnished.

29. The submission of Mr. Chawla that the onus of the proof in this behalf is on respondent, cannot be accepted. In terms of the provisions contained in Section 106 of the Indian Evidence Act, it is the petitioner only who has the special knowledge about the nature of its instruments and/or its books of accounts.

30. The licensee, it is expected, would disclose the full facts as relying on or on the basis thereof, the respondent could raise the bills for ADC charges to which, indisputably, it is entitled to if the services rendered by the petitioner is a mobile service.

31. We, therefore, are of the opinion that the petitioner should disclose to the respondent as to how many of its connections have the facility of fixed roof top antenna and how many do not have. Such informations should be furnished within two weeks from date.

32. For the above mentioned purpose, if any occasion arises therefor, the petitioner would render all cooperation to the respondent to inspect its equipments as also its books of accounts. This petition is disposed of with the aforementioned

directions. However, in the facts and circumstances of the case, there shall be no order as to cost.

……………,J
(S.B. Sinha)
Chairperson

………………
(G.D. Gaiha)
Member

Pk/-