TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL

NEW DELHI

DATED 29th SEPTEMBER, 2010

Appeal No.6 of 2006

Bharat Sanchar Nigam Limited …Appellant

Vs

Telecom Regulatory Authority of India & Ors. …Respondents

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APPEAL No.5 OF 2007

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Bharat Sanchar Nigam Limited … Appellant

Vs.

Telecom Regulatory Authority of India & Ors. …Respondents

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APPEAL No.5 OF 2008
(With M.A. No. 114 of 2008)

Bharat Sanchar Nigam Limited … Appellant

Vs.

Telecom Regulatory Authority of India & Ors …Respondents

-

APPEAL No.4 OF 2006

(M.A.No.123 of 2006)

Cellular Operators Association of India & Ors. … Appellants

Vs.

Telecom Regulatory Authority of India …Respondent

Appeal No. 2 of 2009

(M.A.Nos.56 & 62 of 2009)

Bharat Sanchar Nigam Ltd. ... Appellant

Versus

Telecom Regulatory Authority of India & Ors. ... Respondents

-

Appeal No. 3 of 2009

M.A.No.63 OF 2009

Association of Unified Telecom Service Providers of India & Ors. ... Appellants

Versus

Telecom Regulatory Authority of India & Ors. ... Respondents

APPEAL No.4 OF 2009

(M.A.No.39 of 2009)

M/s Vodafone Essar Gujarat Ltd, & Ors. … Appellants

Vs.

Telecom Regulatory Authority of India & Ors. …Respondents

APPEAL No.5 OF 2009

(M.A.No.41 of 2009)

M/s Bharti Airtel Ltd. And Anr. … Appellants

Vs.

Telecom Regulatory Authority of India & Ors. …Respondents

APPEAL No.6 OF 2009

(M.A.No.43 of 2009)

Idea Cellular Ltd. & Anr. … Appellants

Versus

Telecom Regulatory Authority of India & Ors. …Respondents

Appeal No.7 of 2009

M.A. No. 46 of 2009

Aircel Limited & Ors. ... Appellants

Versus

Telecom Regulatory Authority of India & Ors. . .. Respondents

APPEAL No.8 OF 2009

ETISALAT DB Telecom (P) Ltd. … Appellant

Vs.

Telecom Regulatory Authority of India …Respondent

BEFORE:

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

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

For BSNL	:	Mr.Maninder Singh,Senior Advocate Mr.Nikhil Mehra,Advocates for Mrs.Prathiba M. Singh,Advocate
For COAI	:	Mr. Navin Chawla, Advocate
For AUSPI	:	Mr.Ramji Srinivasan,Senior Advocate Mr.Manali Singhal,Advocate Mr. Santosh Sachin, Advocate Mr.Kshatrasal Raj, Advocate
For Vodafone (in Appeal No.4 of 2009)	:	Mr.Harish Salve, Senior Advocate Mr. Navin Chawla, Advocate
For Vodafone in Appeal No.8 of 2009)	:	Mr. Navin Chawla, Advocate
For Bharti Airtel	:	Mr. Navin Chawla, Advocate
For Idea Cellular	:	Mr. Navin Chawla, Advocate

For Aircel	:	Mr. Sunil Jain,Advocate Mr.Akash Garg, Advocate
For ETISALAT DB	:	Mr. Mahesh Agarwal, Advocate Mr. Nikhil Rohatagi, Advocate
For TRAI	:	Mr.C.S.Vaidyanathan,Senior Advocate Mr.Saket Singh, Advocate

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JUDGMENT

1. Introduction

These appeals have been filed by the petitioners who are licensees of fixed and cellular mobile services granted to them by the Union of India in terms of Section 4 of the Indian Telegraph Act, 1885 (The 1885 Act) questioning the directions/regulations made by the Telecom Regulatory Authority of India (TRAI) commonly known as and hereinafter called and referred to as IUC Regulations, 2005 dated 06.01.2005.

2. License

Licenses under the Act are granted by Department of Telecommunications of the Government of India in exercise of the purported special privilege conferred upon it under Section 4 thereof, the relevant portion of which reads as under :

*“**4. Exclusive privilege in respect of telegraphs, and power to grant licenses.—** [(1)] Within [India], the Central Government shall have exclusive privilege of establishing, maintaining and working telegraphs:*

Provided that the Central Government may grant a license, on such conditions and in consideration of such payments as it thinks fit, to any person to establish, maintain or work a telegraph within any part of [India]:

3. Interconnection

Indisputably, one of the conditions of the licence mandates the licensee to grant interconnection, if and when any request therefor is made by another service provider.

However, admittedly the matter relating to laying down of the terms and conditions of interconnection agreement is within the exclusive domain of the TRAI.

TRAI was constituted under Section 3 of the Act. The functions of TRAI are contained in Section 11 thereof. It contains a non obstante clause.

Clause (a) of Section 11 provides for the matters in respect whereof, recommendations may be made by TRAI either suo moto or on a request made by the licensor.

Clause (b) of sub-section (1) of Section 11 thereof mandates on the part of TRAI to inter alia discharge of the following functions :

“(i) ensure compliance of terms and conditions of licence;

(ii) notwithstanding anything contained in the terms and conditions of the licence granted before the commencement of the Telecom Regulatory Authority of India (Amendment) Act, 2000, fix the terms and conditions of inter-connectivity

between the service providers;

(iv) regulate arrangement amongst service providers of sharing their revenue derived from providing telecommunication services;"

TRAI in terms of Section 36 of the Act is empowered to make regulations. Indisputably various charges payable both by the fixed service providers as also the cellular operators in respect of the interconnection agreements entered into by and between them are governed by the directions/regulations made/framed by TRAI.

4. <u>Pre IUC regime:</u>

4.1 Interconnection in a Multi Operator Scenario is the very heart of telegraph services. For the said purpose Interconnection Usage Charges (IUC) are payable by one operator to another for usage of networks of each other. Public Switched Telephone Network (PSTN) was not required to pay any charge to mobile operators for usage of network of later by the former prior to IUC regime i.e. before 01.05.2003.

4.2 For making calls by mobile operators to PSTN, PSTN charges were required to be collected by the mobile operators in addition to 'Airtime charges' from its customers. The PSTN charges were to be paid by the mobile operators to PSTN networks for usage of network of later by the former. Basic wireline network operators, thus, were only to receive charges for usage of their network from the mobile operators without making any reciprocal payment. For every incoming call on the mobile network, mobile operators used to recover usage charges of their network from their customers themselves on which calls were to be terminated. Usage charges for the network of other operators, however, were recovered by other mobile operators from their customers only. They were not receiving any interconnection charges from other operators for usage of networks, which was known as 'Airtime Charges'.

4.3 Department of Telecommunications had the monopoly of providing telephone services including the National Long Distance (NLD) and International Long Distance Services (ILD) which were taken over by Bharat Sanchar Nigam Limited (BSNL), as a result whereof the telecom sector opened for competition to all access services i.e. both basic as well as mobile services and NLD and ILD services.

4.4 Licenses both in respect of basic services as well as cellular mobile telephone services were granted from 1995 onwards. Telephone sector emerged as a multi-operator multi services sector from the monopoly sector. Necessity was, therefore, felt for putting in place cost based interconnection usage regime for the purpose of compensating the service providers for usage of their networks on 'work done' principle. With that CPP (Calling Party Pays) regime was put in place.

4.5 The calling party is to pay the Charges in contrast to earlier regime where even the person receiving calls was required to pay.

4.6 IUC, therefore, is paid by one operator to another out of the charges recovered from the calling party as tariff.

4.7 Beginning from 2001, TRAI started issuing/making directions/ regulations.

On or about 14.12.2001 TRAI framed regulations providing for levy of interconnection charges, commonly known as TRAI Regulation of 2001 (5 of 2001) which inter-alia provided for:

"3. Interconnection Charges shall be cost based -

(i) Interconnection charges shall be cost based, unless as may be specified otherwise.

(ii) For determining cost based interconnection charges, the main basis shall be "incremental or additional" costs directly attributable to the provision of interconnection by the interconnection provider."

In 2001 Regulation 5 of 2001 was made a 'cost based' one.

4.8 IUC Regulation 1 of 2003 came into force on and from 24.01.2003 whereby termination charges payable to the cellular mobile in metro area was prescribed at Rs. 0.30 p while for the circle, it was fixed at Rs. 0.40 p per minute. However, soon thereafter TRAI upon publication of a consultation paper and obtaining comments of the stakeholders thereon issued/made directions/regulations being 2 of 2003 which came into force w.e.f. 29.10.2003 in terms whereof termination charge was reduced to an uniform rate of 0.30 paise per minute for all types of calls namely, local, NLD and ILD as also basic, WLL and cellular network in both metro and circle areas.

4.9 In the year 2005 again Regulation 1 of 2005 was made which came into force on 06.01.2005 whereby the same amount of termination charges was maintained. TRAI notified the IUC Regulations 2006 on or about 23.02.2006. The 2009 IUC Regulations came into force w.e.f. 01.04.2009. The validity and/or correctness of the aforementioned 2006 and 2009 Regulations is in question before us in these appeals.

4.10 Apart from the termination charges, in this batch of appeals, we are concerned with the carriage charges or transit charges.

4.11 Grievances have also been made by one of the operators in not fixing SMS termination charges. Contentions have also been raised for not allowing the operators to enter into agreements in certain areas, particularly, for International Call Termination with the international operators.

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5. <u>Factual Backdrop</u>

Before adverting to the rival contentions of the parties, we may notice some basic facts.

5.1 On or about 24.1.2003, as noticed heretobefore, TRAI notified Telecommunication Interconnection User Charges (IUC) Regulation 2003 (Regulation 1 of 2003). The said charges were projected as cost based. It is however, stated that no indication was given in regard to the methodology which was adopted by it.

5.2 The Cellular Operators Association of India (COAI) made a representation thereagainst on or about 4.2.2003 stating that although TRAI professed that the termination charge would be fixed on the basis of costs, it was not implemented. According to it, the Mobile Termination Charge (hereinafter called as MTC) was said to be only about 1/10th of the total costs that were actually incurred by the Cellular Mobile Service Providers (CMSPs) for terminating a call on their network. According to COAI, TRAI had used incomplete data resulting in incorrect assessment of termination charges. On or about 19.02.2003, TRAI opined that interconnection user charges has been fixed strictly on the basis of costs relating to the network elements used in origination/carriage/termination of the call and the charges have been specified for each of the aforementioned legs so that the concerned operators recovered the costs involved.

5.3 TRAI released a consultation paper being No. 2003/1 on the IUC issues. On 6.6.2003 COAI submitted its comments/representations/suggestions on the issues raised in the consultation paper emphasizing the need for an effective 'cost based' termination charge. An open house discussion took place on 25.06.2003. Regulation 2 of 2003 was issued on 29.10.2003. IUC was said to have been fixed on the basis of the operational costs of the year 2000-01, increased by 20% per annum. A protest there-against was made by COAI on 20th November, 2003 which was rejected by an order dated 15.12.2003. A request was made to TRAI to reconsider its views by some of the operators on 26.12.2003.

5.4 TRAI started the process of having a relook at the IUC regime which included ADC also. Some of the appellants are said to have again pointed out the anomalies in fixation of the termination charges and made a representation under cover of COAI's letter dated 9.2.2004 suggesting a higher termination charge on incoming ILD calls.

5.5 The IUC 4th Amendment Regulation (1 of 2005) was made on 6th January, 2005 in terms whereof the same termination charge was maintained by TRAI and thus rejecting the plea of the appellants for permission to access providers to negotiate termination charges with ILDOs.

5.6 Another consultation paper was issued by TRAI on 17.03.2005. A representation was again made by COAI on 30th April, 2005 seeking a far more meaningful response thereto. The appellants are said to have pointed out that they had repeatedly been seeking industry data from TRAI and that it was unjust and unfair on its part to deny them access to the said informations and thereby they were put in a disadvantageous position by stipulating below cost termination charges. The representation made on 17.06.2005 and 9.6.2005 contained the following:

"a) The Appellants through COAI again made further submissions along with a presentation on the issues involved in the Consultation Paper whereunder it was pointed out that

- *The WTO Reference Paper and GATT framework emphasize on the importance of cost based interconnection charges. The relevant subsection of Interconnection to be ensured – includes:*
  "…….. that interconnection is to be provided in a timely fashion, on terms, conditions (including technical standards and specifications) and cost-oriented rates that are transparent, reasonable, having regard to economic feasibility, and sufficiently unbundled so that the supplier need not pay for network components or facilities that it does not require for the service to be provided; and ……"
- *It was also reiterated that the termination charges in India were significantly out of line with international practices."*

5.7 TRAI notified IUC Regulations of 2006 on 23.02.2006 whereagainst also COAI and some operators raised a protest.

5.8 These appeals were filed thereafter. During pendency of the said appeals TRAI issued IUC regulations on 21.03.2007 primarily dealing with access deficit charges wherewith we are not concerned herein. On or about 12.09.2008, TRAI sought the views of the appellants on various aspects of IUC, in view of the changes since the First IUC Regulations in 2003, in response whereto COAI submitted a white paper prepared by Spectrum Value Partners (SVP) highlighting various aspects of telecommunication dynamics of the Indian Mobile Industry which should be taken into consideration while reviewing the mobile termination charges.

A request was also made in its representation dated 23.10.2008 by COAI to set up an industry working group comprising of representatives across the operators to interact with the authority in developing a costing model for determination of MTC. Another white paper was submitted by COAI on 17.11.2008 containing the assumptions made by SVP on the Forward Looking Long Run Incremental Cost (FL-LRIC) model as also the rationale thereof. On or about 2.12.2008 COAI submitted a further report from SVP based on bottom up FL-LRIC model for a typical, hypothetical, efficient new operator by a representation made on 2.12.2008. According to the appellants TRAI while holding meetings for the purpose of deliberating on the contentions raised by COAI, did not disclose to it and other industry stakeholders the methodology it had adopted in past and the values it had put to various components in calculating the MTC which made the appellants somehow handicapped. However, a representation was made on 19.12.2008 asking TRAI to provide with informations as to how the termination charges are regulated in other jurisdictions during case studies in Malaysia, Pakistan and Brazil.

5.9 A formal consultation paper was however issued only on 31.12.2008 from the stakeholders. According to the appellants, they addressed a letter on or about 13.01.2009 pointing out that the consultation papers contained very little information regarding the following:

"(a) The assumptions adopted by the Authority;

(b) The methodology followed by the Authority;

(c) The cost elements used;

(d) Aspects pertaining to network design and calibration."

5.10 As would appear from its response dated 23.01.2009, TRAI used top down model and the data contained in the Accounting Separation Reports of various service providers outlining that the termination charge was based on the methodology that the relevant operational expenses are recovered from the airtime/call charges and Capital Expenditure from the rentals. It was pointed out that relevant OPEX from telephone services (excluding the components, like sales and marketing expenses etc.) have been taken into account.

5.11 COAI submitted its formal response to the consultation paper on or about 30th January, 2009. It also responded to the letter of TRAI by its letter dated 11.02.2009. Vodafone independently submitted its response to the consultation paper on or about 30th January, 2009. An open house discussion took place at Hyderabad on 26.02.2009. According to Vodafone the same was a departure from TRAI's normal practice and, thus, many operators were caught by surprise and sought further time to respond thereto which was acceded to by TRAI pursuant whereto Vodafone has submitted a representation on 2.3.2009.

5.12 COAI also submitted its response by its letter dated 3.3.2009. A further response was made by it on 4.3.2009. By a letter dated 3.3.2009 TRAI responded to COAI's letter dated 11.2.2009 largely disregarding the international practices relied upon by COAI in support of its submissions.

5.13 It also stated that the elements which were not included in the OPEX were sales and marketing cost, expenses for provisioning of bandwidth, customer acquisition cost, financial charges, loss or sale of assets etc. TRAI also refused to provide the stakeholders the data, stating that the sharing of the Accounting Separation Reports is not generally favourably received. COAI again asked for maintaining transparency in the working of the National Productivity Council (NPC) by a letter dated 6.3.2009. It reiterated the need to maintain transparency and the working of NPC suggesting models by which the data used by TRAI could be shared with it so as to enable it to make meaningful representation. The impugned regulations are made on 9.3.2009 whereagainst also the COAI made a representation.

6. <u>The Appeals</u>

These appeals were filed on different dates. BSNL filed the appeal on 30.03.2009.

No stay, however, was granted.

Before considering respective cases of the parties, we may notice the details of the appeals and the prayers made therein, which would generally show their respective grievances.

7. **Reliefs sought by the parties**

Although we would record the submissions made by each of the parties separately as also the respective grounds of challenge, we may notice the grievances raised by the appellants hereinafter appeal-wise.

8. **Appeal No. 2 of 2009**

The appellant (BSNL) has challenged Telecommunication Interconnection Usage Charges(Tenth Amendment) Regulations dated 09.03.2009 and has sought for the following reliefs –

(i) fixation of termination charge for fixed wireline services on actual cost basis taking into account latest data furnished by BSNL
(ii) permit mutual negotiation for fixing of termination charges on incoming ILD traffic and in case mutual negotiation fails then fix the same between rupees 3 to 4 per minute
(iii) permit BSNL to recover carriage charges on cost basis i.e. Rs. 1.43 per minute for carriage of traffic in rural, remote, hilly and inaccessible areas
(iv) no reduction in carriage charge of cellular calls from LDCC to SDCC from Rs. 0.20 to Rs. 0.15 per minute
(v) no reduction in carriage charge from Rs. 0.20 to Rs. 0.15 per minute
(vi) permit BSNL to pay no termination charge for calls originating from its fixed line.
(vii) Set aside and quash the regulations to that extent.

9. **Appeal No. 3 of 2009**

The appellants(AUSPI) have challenged Telecommunication Interconnection Usage Charges(Tenth Amendment) Regulations dated 09.03.2009 and have inter alia sought for the following reliefs–

(i) Setting aside of the IUC regulation dated 09.03.2009

(ii) Review of termination charge, transit charge and port charge

(iii) To adopt bill and keep in case this is not adopted then termination charge should be cost based and less than ten paise per minute

(iv) Exclude revenue earned from VAS as well as licence fee/spectrum charge from revenue requirement estimated for termination charge

(v) Take actual cost to calculate termination charge excluding buffers like rural telephony.

(vi) Review and remove transit charge for intra circle cellular calls from LDCC TAX to SDCC

10. <u>Appeal No. 4 of 2009</u>

The appellants(Vodafone) have challenged Telecommunication Interconnection Usage Charges(Tenth Amendment) Regulations dated 09.03.2009 and have inter alia sought for the following reliefs–

(i) Setting aside of the IUC regulation dated 09.03.2009 and fix mobile termination charge at 35 paise and in alternative remand the matter for fresh consideration by TRAI in transparent manner.

(ii) Determine MTC using FL-LRIC

(iii) Take into account recognized category of CAPEX, OPEX, common cost and cost of capital mark up listed under the heading International Practice in Cost Modeling is very well established.

(iv) TRAI not to offset the cost so calculated by applying an amount attributable to revenue earned from provision of telecom services including VAS in determining MTC.

The appellants have also filed affidavit of two experts in support of their case. The reply of TRAI to the said affidavits has been filed.

11. Appeal No. 5 of 2009

The appellants M/s. Bharati Airtel have challenged Telecommunication Interconnection Usage Charges(Tenth Amendment) Regulations dated 09.03.2009 and have interalia prayed for –

(i) Setting aside of the IUC regulation dated 09.03.2009 and fixation of mobile termination charge at 35 paise and in alternative remand the matter to TRAI for fresh consideration of the matter in open, fair and transparent manner taking into account the methodology which uses FL-LRIC take into account recognized categories of CAPEX, OPEX, common cost etc. and not offset the cost by applying amount attributable to revenue earned from VAS in determining MTC.

(ii) Increase in termination charge on international incoming calls.

(iii) Determination of transit charge/carriage charge from level II TAX to SDCC and Intra SDCA and TAX transit charge on basis of cost principles.

12. Appeal 6 of 2009

The appellants (Idea Cellular Ltd. & Ors.) have challenged Telecommunication Interconnection Usage Charges(Tenth Amendment) Regulations dated 09.03.2009 and have interalia sought for the following reliefs –

(i) Setting aside of the IUC regulation dated 09.03.2009 and fixation of mobile termination charge at 35 paise and in alternative remand the matter to TRAI for fresh consideration of the matter in open, fair and transparent manner taking into account the methodology which uses FL-LRIC take into account recognized categories of CAPEX, OPEX, common cost etc. and not offset the cost by applying amount attributable to revenue earned from VAS in determining MTC.

(ii) To increase termination charge on international incoming calls taking into account prevailing international practice.

(iii) Determination of transit charge/carriage charge from level II TAX to SDCC and Intra SDCA and TAX transit charge on basis of cost principles.

13. Appeal No. 7 of 2009

The appellants (Aircel Ltd. & Ors.) have challenged Telecommunication Interconnection Usage Charges(Tenth Amendment) Regulations dated 09.03.2009 and have interalia prayed for the following reliefs -

(i) Setting aside of the Interconnection Usage Charges(Tenth Amendment) Regulations dated 09.03.2009 and fixation of mobile termination charge on the basis of cost determined by using Forward Looking Long Range Increment Cost (FL-LRIC) Model.

(ii) In alternative, remand the matter to TRAI for re-consideration in transparent manner.

(iii) Direction to TRAI to determine MTC taking into account recognized categories of CAPEX, OPEX, common cost etc. and cost of capital mark up listed under the heading “International Practice in Cost Modeling” which is very well established.

(iv) TRAI not to offset the cost so calculated by applying an amount attributable to revenue earned from provision of telecom services including Value Added Services (VAS) in determining MTC.

14. Appeal No. 8 of 2009

The appellants (Etisalat D.B. Telecom (P) Ltd. have challenged Telecommunication Interconnection Usage Charges(Tenth Amendment) Regulations dated 09.03.2009 and have interalia sought for the following reliefs:-

(i) Setting aside of the Interconnection Usage Charges(Tenth Amendment) Regulations dated 09.03.2009

(ii) Direction to TRAI to introduce asymmetry in rate of termination charges based on whether an operator is a new entrant and yet to roll out its services or an existing operator.

(iii) Direction to TRAI to determine MTC at not more than Rs. 0.09 per minute and FTC at not more than Rs. 0.10 per minute.

(iv) Direction to TRAI to fix TAX transit charge at not more than Rs. 0.02 per minute.

(v) Direction to TRAI to reduce long distance carriage charge and fix it with a ceiling of Rs. 0.11 per minute.

(vi) Direction to TRAI to fix ‘nil’ charge for receipt of interconnect SMS traffic on the receiving telecom network.

15. Contention of the parties:

Although we may notice the submissions made by the parties separately, we may notice the case of the BSNL at some length.

16. The principal grievance raised by the BSNL relate to the process of accounting vis-à-vis the methodologies adopted therefor, which had been undertaken by TRAI.

16.1 Indisputably it was entitled to 30 paise for both fixed services as also cellular services in terms of IUC Regulations 2003.

16.2 It has a five fold grievances in relation to the impugned regulation i.e.:

1. Fixation of termination charges at a uniform rate of 0.20 paise per minute both for fixed and mobile networks for domestic calls and 0.40 per minute for fixed as well as mobile networks towards termination charge for incoming international long distance calls.
2. Fixation of a ceiling of 0.65 paise per minute towards carriage charges in respect of the calls in rural, remote, hilly and non-accessible areas.
3. Transit charges at the rate of 0.15 paise per minute for intercircle cellular calls from LDCC contacts to SDCC, whereas in term of the earlier regulations, it was entitled to transit charges at the rate of Rs. 0.20 per minute.
4. In respect of Termination of International Calls, it has not been given liberty to enter into any negotiation with the operators operating abroad and fixing, as noticed heretobefore, the ADC at the rate of Rs. 0.40 (forty paise) only.
5. Those operators who had a direct interconnectivity, although asked for entering into arrangements with BSNL for routing its call through it, the same has been denied.

16.3 Indisputably, BSNL as a part of the consultative process had written a few letters, one of them is dated 31.10.2008. By reason of the said letter, it is said to have furnished various information which were necessary for determination of the rates in terms of IUC charges.

16.4 A chart had also been given in paragraph 4.9 of the said letter which reads as under :-

S. No.	*Details*	*Wireline Networks*	*Mobile Networks*
1.	*Total Cost (including capital recovery, depreciation and OPEX) (A) (Crores of Rupees)*	*23261*	*7014*
2.	*Fixed recovery from services (Rental + Value Added Services) (B) (Crores of Rupees)*	*4561*	*1307*
3.	*Balance {C=(A-B)} (Crores of Rs.)*	*18700*	*5707*
4.	*Minutes of Usage (D) (In crores)*	*24141*	*28616*
5.	*Termination Charges (E = C/D) (Paise per minute)*	*77*	*20*

16.5 It has not been denied or disputed that the consultation paper on review of interconnection usage charges (IUC) was published by TRAI on or about 31st December, 2008.

16.6 BSNL thereafter sent a letter to the Secretary, TRAI on or about 30th January, 2009, the relevant paragraphs whereof may be noticed by us at some details :-

"3. The present IUC regime is highly in favour of cellular mobile operators and causing their undue enrichment at the cost of wireline operators and their customers. Further, the present IUC regime is also extending undue advantage to the tune of about Rs. 4000-5000 crores per annum to the international operators/carriers and causing huge losses to national exchequer and Indian service providers/consumers.

6. Further in response to the pre-consultation process carried out through the communication dated 12.09.2008, BSNL had provided the information sought by TRAI to the extent it had become feasible in the limited time period provided for submitting such information. Other telecom operators and their associations were also required to provide the same information to TRAI in response to the letter dated 12.09.2008. However, as is evident from the present consultation

paper, it seems BSNL only has provided the revenue and traffic information to TRAI and none of the other operators has submitted the costing, revenue and traffic details. In spite of this, an impression has been created in this consultation paper as if it is only the BSNL who has not provided the required information and rest of the operators have submitted all the information sought by TRAI, which is not correct and is contrary to the factual position. In case the other operators have submitted the entire data as sought by TRAI, it is requested that the TRAI may kindly publish the same for enabling BSNL and other stake holders to examine and comment thereupon with a view to ensure transparency.

7. It is also observed that the TRAI in this consultation paper has pointed out shortcomings in the information submitted by BSNL without seeking any clarification in this regard. In fact, these observations of TRAI are not correct. On the contrary, no comment has been offered by the TRAI on the information/ data, if any, submitted by other operators. Further, the data submitted by BSNL against the letter dated 12.09.2008 of TRAI as well as its accounting separation report have been discussed and published by TRAI throughout the present consultation paper, whereas no such discussion has been done with respect to accounting separation reports of any other operator. It is the humble request of BSNL that all the operators should be treated uniformly by the Authority while analyzing their data and sharing/disclosing of their financial and commercially sensitive information with a view to ensure transparency and level-playing field.

8. TRAI has relied on certain data provided in table 5.1 and 5.3 wherein the names of the operators have been withheld. Based upon this data, TRAI has provided/calculated the range of mobile termination charges varying from Rs. 0.09 to 0.22 per minute in para 5.3.1.11, fixed wireline termination charges varying from Rs. 0.19 to 0.28 per minute in para 5.3.2.4 and carriage charges varying from Rs. 0.16 to Rs. 0.72 per minute in para 5.5.2 of present consultation paper. However, TRAI has not provided/shared any calculation/data, methodology whatsoever used in arriving on these charges. In the absence of the names of the operators and methodology/calculation/approach adopted by TRAI , it is not possible for BSNL or any other stake holder to comment on these values. Prima facie these values are not consistent with the network costs. It would have been just and fair to transparently provide the operatorwise data/methodology/calculation/approach etc. in the consultation paper itself while seeking the comments of stakeholders. It

is requested that the same may kindly be made available to BSNL at the earliest before prescribing the IUC, so that BSNL can examine and provide its comments on the same.

9. In para 5.3.2 of consultation paper, it has been observed by TRAI that BSNL has made higher cost booking in fixed wireline networks and lower cost in wireless networks resulting into abnormal decline in EBIDTA of fixed lines from 65% in 2001-02 to 2% in 2007-08. In this regard, it is submitted that TRAI has made its calculations based on the information taken from two different sources i.e. accounting separation report for the year 2007-08 and financial report for the year 2001-02, which is not proper as the same are not comparable. Therefore, the conclusions drawn from this are not correct and cannot be relied upon.

10. For the sake of record, BSNL would like to point out some of the policies used in arriving at the EBIDTA margins in the respective years. For calculation of EBIDTA margins of the year 2001-02, other income of RS. 2681 crores has been included as the income from basic services despite the clear disclosure in the accounts that Rs. 2300 crores out of the total other income is on account of reimbursement of licence fee and spectrum charges as per the Cabinet decision which from any logic cannot be a part of EBIDTA calculation of this segment since it is not related to specific service i.e. wireline or wireless or to specific license i.e. either Basic service or CMTS. Therefore, taking this into consideration, the revised EBIDTA margin of 2001-02 will be 55% only and not 65% as published in the consultation paper.

11. Further, it has been alleged that the motivated booking has been done by BSNL in the fixed line to artificially show a low EBIDTA margin which is against the facts and perhaps the TRAI has failed to take note of the deviation in income which has taken place from 2001-02 to 2007-08 in various segments of business of BSNL. The income from telephone in 2001-02 was Rs. 22630 crores against the income of Rs. 12668 crores in 2007-08 and thus there is a decline of Rs. 9962 crores in income from telephone in the corresponding periods. This is mainly due to favourable regulatory regime towards mobile operators and non-provisioning of requisite amount of ADC to BSNL during the relevant period.

12. Similarly, the expenses have increased from Rs. 3848 crores in the year 2001-02 to Rs. 8808 crores due to implementation of IDA pay scales in place of CDA pay scales and time and again revision of DA rates and also due to

transfer of liability of leave encashment for the period during which the employees served in the DoT, to BSNL without any financial compensation by DoT. Therefore, the decline in EBIDTA on account of these two items alone amounts to Rs.14922 crores leading to drastic reduction in EBIDTA margin.

17. Authority is well aware that the approach being adopted by mobile operators for shifting of CAPEX recovery into OPEX is not possible in case of wireline networks being legacy networks and highly CAPEX centric. Authority is also aware that it is not feasible for the wireline operators to recover their entire CAPEX through rental/fixed monthly charges. It is further submitted that Authority itself has regulated the rural tariffs for wireline networks which permits recovery of only Rs.70 per month per subscriber against the cost based rentals of Rs. 542 per month per subscriber for most of the rural lines. It is pertinent to mention here that BSNL is able to recover only Rs. 50 per month per subscriber due to reasons of affordability. In urban areas also, due to very high CAPEX involved in the wireline segment and intensive competition in the access market, it is not at all feasible and justified to recover the CAPEX through fixed monthly charges / rentals only.

18. In such a scenario, identical treatment of the wireline and wireless networks for the recoveries of CAPEX and OPEX through fixed charges and IUC respectively is highly erroneous, discriminatory and contrary to the principles of level-playing field and cost based IUC regime. Similar anomalies shall arise within the wireless networks also which is evident from the wide range of termination charges varying from Rs. 0.09 to Rs. 0.22 per minute determined by TRAI as mentioned in the consultation paper.

31. There appears to be no need of reviewing the present ceiling of carriage charges on high traffic routes as NLD operators are already offering lower carriage charges than prescribed on such routes. However, there is a need for upwardly revising the carriage charges on the actual cost basis for hilly, remote and difficult terrains areas wherein in many cases calls are carried through costly satellite media. Alternatively, as sufficient competition is existing in the NLD segment, it is suggested that these charges may be forborne for all areas."

16.7 With the said letter also, BSNL furnished calculation of termination charges for mobile as also fixed line network; being:

Figures in Crores

Sl. No	***Item***		***Basic Fixed***	***CMTS***
1	*O&M Cost*		*10,782*	*2,574*
2	*Sales and Marketing cost*		*2,129*	*775*
3	*O&M cost excluding cost of sales and Marketing (1-2)*		*8,653*	*1,799*
4	*Depreciation*		*6,637*	*1,166*
5	*Cost (Opex+Depr) excluding marketing (3+4)*		*15,290*	*2,964*
6	*Total Capital Employed (Prof. G)*		*44,837*	*29,216*
7	*Total cost (Capex) @ 13.98%*	*13.98%*	*6,268*	*4,084*
8	*Total cost (Opex+Depr+Capex) (5+7)*		*21,558*	*7,049*
9	*Recovery through Fixed Charges (20% of Total cost)*	*20.00%*	*4,312*	*1,410*
10	*Cost to be recovered from usage and inter connection (8-9)*		*17,247*	*5,639*
11	*Annual MoUs (OG+IC)*		*19,746*	*29,841*
		Figure in Rs.		
12	*Termination cost per minute (10/11)*		*0.87*	*0.19*
13	*Add License fee @ 8.13%*	*8.13%*	*0.07*	*0.02*
14	*Add Spectrum charges @ 1.19%*	*1.19%*		*0.00*
15	*Termination cost per minute after adding License fee and spectrum charges*		*0.94*	*0.20*
16	*Add mark up 25%*	*25%*	*0.24*	*0.05*
17	*Termination cost per minute after adding 25% mark up*		*1.18*	*0.26*

As the recovery was to be made only on CAPEX for calculation of usage and interconnection, in terms whereof for basic fixed services 0.48 paise and for CMTS 0.07 paise was charged.

It has also given calculation of carriage charges from SDCC to LDCC and NLD network.

16.8 Mr. Maninder Singh, the learned senior counsel appearing on behalf of the BSNL would submit:

(a) Having regard to the fact that interconnect agreements are required to be entered into not only in terms of the conditions of license but also in terms of the regulations framed by TRAI itself, the concept of an ordinary contract namely the parties should be ad-idem in the matter of fixation of terms and conditions of contract would be wholly irrelevant, when a party is forced to enter into a contract, and as such the regulator is bound to make a provision in terms whereof the service providers must be able to recover its expenses.

(b) Telecommunication services being not an Essential Commodity, the principles of fixation of price by an administrator should not be taken to such an extent namely that the interconnect services should be provided even at a cost lower than what is incurred by a service provider. Determination of revenue sharing, thus, must be done on fair and equitable principles. Interconnect agreement being dependent upon cooperation of various operators, although one call is handled by one operator, the revenue generated therefrom is required to be distributed.

(c) Interconnection being mandatory in nature in terms of the conditions of license, TRAI which is an expert body was required to discharge its responsibility by devising mechanisms from time to time whereby and whereunder it was required to ensure that no one goes out of pocket. For the aforementioned purposes, the regulator is required to take into consideration the relevant factors germane for arriving at a decision and eschewing factors which are irrelevant therefor.

(d) With a view to achieve the said result, TRAI was required to apply its mind so as to ensure reasonable and equitable distribution.

(e) From a bare perusal of the entire Regulation vis-à-vis the materials brought on record, it would be evident that 'TRAI' had first arrived at a conclusion and then made attempts to find out reasons in support thereof, which is impermissible in law.

(f) Although, it is well known in the industry that the cost of wireline services is higher than the wireless services namely mobile services, TRAI had taken into consideration the figures which were available to it in the year 2003 for determination of IUC in 2008-09 which could not have been done.

(g) In the year 2003, average subscriber base of the petitioner was 950 minutes per subscriber per month per wireline, whereas in 2008-09 it came down to 511 minutes and in that view of the matter, the impugned Regulations are liable to be set aside.

(h) Although the requisite informations were furnished, the assertion of TRAI that it had not received the same, is factually incorrect. Although mobile termination charges for cellular calls for wireline operators, it would be 30 paise and for cellular operators it would be 23 paise, as a result whereof the cellular operators have incurred a profit of over Rs.6300 crores, over and above the costs incurred by it, the same having not been taken into consideration by TRAI, the impugned Regulations are liable to be set aside.

(i) Although BSNL suggested that IUC charges for Cellular Operators be fixed at 20 paise per minute and for fixed services 94 paise per minute, TRAI had not bestowed any consideration whatsoever towards the fixed services and accepted its suggestion for 20 paise for both fixed and cellular services which is wholly unjust.

(j) The process of working out after fixing the charges at the rate of 20 paise per minute, TRAI stuck to the figures of 950 minutes per subscriber not on the ground that BSNL still have so many subscribers which in fact had drastically been

reduced over the years but took the said figure as by way of handling capacity on its part without taking into consideration it had a higher capacity to handle.

(k) The relevant consideration for TRAI although ought to have been as to what was the actual figure and not that what BSNL can handle, the same having not been taken into consideration, the impugned Regulations to the said extent is wholly unsustainable.

(l) In the year 2003, the figure 950 was taken which was being the actual figure in relation to the users but in view of the subsequent events; methodology was required to be changed which having not been done, fixation of 20 paise per minute per call was wholly unwarranted.

(m) Although BSNL had been asking for mutually negotiated transit facility and not 20 paise per minute, the same has not only been denied but also it was reduced to 15 paise (cellular operators although have direct connectivity, which facilities were not available earlier but the same would not work for the fixed phones and thus, the BSNL was entitled to higher charges).

(n) In relation to termination of international charges, the well known data of the industry that the overseas operators charge about Rs. 3 to 5 per call per subscriber for termination of their calls abroad has totally been ignored. The plea of the BSNL for liberty to negotiate with the overseas operators had not only declined but the ADC has been fixed as 0.40 paise, which was not cost based and in fact imposes heavy financial burden on the subscribers.

(o) The regulatory regime does not apply to foreign operators as they make negotiations only the way they want and, thus the same should be both ways and in that view of the matter, the same should not have been rejected on the ground that the same would cause interference with the internal security or otherwise interalia in view of the fact that similar arguments had been rejected by this Tribunal in COAI Vs. TRAI being Appeal No. 7 of 2005 disposed of on 21.09.2005.

17. Mr. Harish Salve, the learned Senior Counsel appearing on behalf of 'Vodafone' submitted:-

(a) The fundamental error in the impugned decision is that it is not a cost based one. TRAI in its impugned decision could not have excluded CAPEX from the calculation of termination cost which was legitimate and reflects the real costs for mobile network.

(b) TRAI should have identified and applied the correct principles and methodologies for arriving at/setting an efficient MTC which would mean application of LRIC principals and would include capital costs, being in consonance with international best practices.

(c) From a bare perusal of the consultation paper issued by TRAI, it would appear that it had while determining port transaction charges included both CAPEX and OPEX and, thus, having recognized that CAPEX can form part of some charges, should not have excluded the same for calculation of MTC.

(d) TRAI by its failure to implement the basic principles of accounting as reflected in the following must be held to have committed basic flaws:

- *"The decision does not comply with the policy objectives of NTP 1999 and TRAI Act;*
- *The decisions fail to correctly implement accepted cost modeling principles;*
- *The decision seems to confuse the concepts of CAPEX and capital costs;*
- *The decision is not consistent with the principles adopted in other TRAI regulated charges;*
- *TRAI's novel methodology is not a cost-based methodology;*
- *TRAI's reasons for rejecting established and accepted cost methodologies are spurious and inconsistent."*

(e) By adopting the said approach, TRAI had defeated its own stated objective as would appear from the following :-

The Consultation process which was to have a cost-based regime.

The Explanatory Memorandum of the impugned IUC Regulation dated 9.03.2009, Therein :

- *TRAI recognized that an important objective of IUC is to make the widest range of telecommunications services available in the most economically efficient manner.*
- *This includes fostering efficient new entry and ensuring that charges are justified from an economic perspective. (see[21.],[2.2] and [2.3].)*
- *It also recognized that it meant a cost based approach to determining termination rates should be adopted (see [1.4], [5.3.2]).*
- *However, despite this the TRAI later disregarded its stated approach that termination rates should reflect the economically efficient cost of providing termination and instead decided that it is too difficult to align prices with costs because this means that interconnecting operators have to compensate the network owner for the cost of providing termination (see [5.3.2] and [5.3.9]).*

(f) The Methodology adopted by TRAI was with a predetermined mind and, thus, has vitiated its ultimate decision.

(g) TRAI failed to adopt an open, fair and transparent process and, thus, the impugned charges are liable to be interfered with.

(h) The impugned decision of TRAI disturbs the level playing field of the operators.

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18. **<u>Appeal No.4 of 2006</u>**

Mr.Gopal Jain, the learned counsel for the appellant urged:

(a) The instant case involves basic principles i.e. inclusion and recovery of capital costs from MTC wherefor exclusion of capital cost is impermissible being required to be done on work done method, which could not have been ignored by TRAI.

(b) Having regard to the accepted principle that a service provider on whose network the call is permitted, has to pay the cost for the termination thereof which had originated from another service provider, TRAI ought to have determined MTC on the

basis thereof.

(c) TRAI failed to maintain the level of transparency mandated under Section 11(4) of the Act which envisages a 'mirror level' transparency or 'See through' transparency.

(d) The fundamental errors committed by TRAI in the exercise of its determination of cost based charges inter alia, are:

(1) Exclusion of capital costs in calculation of termination charges while determining cost based termination charge;

(2) Fixation of below cost MTC whereby cross subsidy from one competitor to the other has been allowed indirectly.

(3) Extending another level subsidy free to competing and originating operator at the cost of terminating operator, which would have an adverse effect on investment and demand specially in building rural infrastructure.

(4) Unrecovered termination cost cannot be recovered from elsewhere.

(5) In making vital assumptions for arriving at the aforementioned inference in so far as:

(i) The existing operators virtually have no freedom due to competition in the retail market and/or market condition.

(ii) Even subsidy in a competitive market cannot be recovered through retail rates.

(6) IUC was to be cost based being the stated object of TRAI and only a lip service has been paid in this behalf.

(7) Forbearance in the other items for recovery of revenue is wholly misplaced as capital costs cannot be recovered from rental etc. and that too when 95% service are prepaid services.

(8) If TRAI's contention that it had adopted a cost based methodology by conscientiously leaving out the capital cost in taken to its logical conclusion; then it is possible to exclude OPEX as also capital cost by taking into consideration depreciation only which would lead to an inconsistency and fundamental flaw in the approach of TRAI.

(9) Having regard to the various protests made by the appellant since 2003, it is incorrect to contend that the existing operators had accepted not only the methodology adopted by TRAI but also the figures of costs to which it had arrived at.

(10) TRAI ignored expert materials which had been filed before it, namely, (i) report of OVUM; (ii) a report of SVP; and (iii) internationally accepted practice.

(11) TRAI having not disclosed the necessary data relied upon by it for determination of MTC to the stake-holders, the appellant could not engage itself in effective participation of IUC determination exercise although it had participated therein at every stage. Appellant was not made aware of the fact that TRAI had excluded capital costs while determining termination charge prior to the impugned decision taken/regulation powers.

(12) TRAI had assigned no reason for keeping the stakeholders including the appellant in the dark. Having regard to the protest made by the appellant from time to time, TRAI is wholly unjustified in stating that since it had not been changing the basis of MTC it was not required to provide the data and methodology.

19. Appeal Nos.5 and 6 of 2009

Mr.Navin Chawla, the learned counsel appearing on behalf of Bharati Airtel and Idea Cellular urged as under:

(a) TRAI has fixed termination charge for incoming long distance call at 40 paise without laying down any basis therefor.

(b) TRAI has wrongly fixed Trunk Automatic Exchange (TAX), Transit charge at less than Rs. 0.15 per minute as a ceiling without assigning any reason and adequate discussion, except in paragraph 5.11 of the impugned regulations, which is contrary to or inconsistent with para 6.7.2, wherein it has been admitted that the cost of transit should be less than the value prescribed therein as no carriage was involved in transiting the call as it was expected that BSNL would levy a reasonable charge below the ceiling specified therein to the service providers for transiting the call.

(c) It was, incumbent upon TRAI to determine transit charges without leaving the operators at the mercy of BSNL.

(d) BSNL's submissions that those charges should be left to mutual negotiation are not correct in view of the orders passed by this Tribunal dated 03.05.2005 in Appeal No.31 of 2003, wherein it has been held:

> *"BSNL charges Rs. 0.19 per minute from the Cellular subscribers for transmitting calls through its Level-I TAX. While this may be justified for providing terminations to these calls to the BSNL PSTN network or for providing connectivity to the*

networks of other operators, it is also being charged for accessing BSNL CellOne subscribers. The cellular operators have paid port charges to BSNL for the Level-I TAX connectivity. On the other hand BSNL Cellone is getting the benefits of connectivity to the other cellular operators without paying the PSTN transit charges and makes use of existing ports meant for such cellular operators for getting the PSTN transit connectivity for their traffic. On considerations of level playing field it appears that BSNL is not justified any longer in charging transit charges to the extent of 19 paise for accessing BSNL CellOne subscribers."

(e) TRAI committed a serious error in fixing transit carriage charge from Level-II Trunk Automatic Exchange ADCC at 15 paise irrespective of distance, although the actual cost therefor comes to about 4 paise.

(f) TRAI although had taken note of the submissions of the appellant that according to the present regulatory framework, handing over of intra circle traffic originating from mobile network and terminating in BSNL's fixed line network at Level-II TAX being mandatory and, thus, the charges being unavoidable, the particulars should have been strictly cost based, although it noticed in Paragraph 5.10 of Explanatory Memorandum that determination had been made without taking the actual costs involved therein into consideration.

(g) Having regard to the fact that in the regulations dated 29.10.2003, a distance based carriage charge was determined with the maximum rate of Rs.1.10 per minute which have substantially been reduced to a ceiling of Rs. 0.65 per minute irrespective of distance in the Regulations made on 23.02.2006, the actual charges in fact work out at Rs.0.04 per minute wherefor the requisite exercise of determination of actual costs and the capacity of the network should have been taken into account, in support of which both the associations as also the appellants had advanced contentions.

20. Mr. Mahesh Agarwal, the learned counsel appearing on behalf of the ETISALAT DB Telecom (P) Ltd., contended:

(a) Determination of MTC at 20 paise per minute is wholly unjustified as in the consultation paper issued on 31.12.2009 TRAI had found the cost of termination for the most efficient operator at only Rs. 0.09 per minute. The data submitted by the existing operators as also the analysis thereof would clearly demonstrate that the actual cost of termination is less than 10 paise per minute. TRAI in fact had arrived at the figure of MTC at 20 paise per minute and made a backward calculation to favour the existing operators wherefor it had taken into consideration the gross ARPU at Rs.280 which is of high level as would appear that even in the year 2009 the ARPU was Rs.164 for GSM and Rs.89 for CDMA operators.

(b) TRAI has committed a serious error in so far as it took EBIDTA margin of 20% despite the fact that from para 3.6.6 of the consultation paper issued by it, it would appear that the declaration made by two operators in that regard for the year 2007-08 was in the range of 40% to 42% and thus, there could not be any justification for reduction of 10% margin without offering any explanation therefor.

(c) The estimation of value added service was wrongly limited to 10% of the revenue whereas the same in fact would be around 15% thereof.

(d) In determining the OPEX, TRAI wrongly deducted the following charges:

(a) administrative and other miscellaneous costs of auditors; (b) personnel; (c) network and equipment costs; and (d) provisions for bad and doubtful debts etc.

(e) The accounting separation report of the established operators should have been taken into consideration which should be much higher than ARPU of new operators.

(f) Keeping in view the interest of the new operators vis-a-vis that of the consumers; TRAI has committed a grave error in treating them on equal footings and, thus, treated unequals as equals as by reason thereof no level playing field has been achieved so far as these two sets of operators is concerned. For the said purpose TRAI should have introduced as asymmetric termination charge as represented by the appellant which ought not to have been rejected without assigning any reason.

(g) Premium is granted to the new entrants world over in respect of the termination rates and at least in 17 countries, 7% to 51% premium is granted to the new entrants which on an average comes to approximately 26% over and above the incumbent players which having not been considered by TRAI, it must be held to have committed a grave error.

(h) The contention of the existing players as also TRAI that since 2003 new operators had entered into the market and had been able to grow without any asymmetry in their favour is wholly incorrect as from the said year only the existing operators, like Airtel, Vodafone, Idea, Reliance, Tata & Aircel have acquired additional licenses for expanding their footprint and attain a pan-India coverage. They cannot be treated on equal footing like Etisalat which is a completely a new entrant in the Indian Telecom Industry. The new entrants furthermore are required to incur a high cost as they are to use spectrum in 1800 MHz since it is more capital intensive than 900 MHz (wherefor at least 2 to 2.5 time more number of towers would be required to be erected) allocated to the old GSM operators which having not been considered by TRAI the impugned determination cannot be sustained.

(i) TRAI committed a serious error in so far as in respect of ARPU figures for March, 2002 a sum of Rs.1270 was considered towards post-paid and Rs.454 towards prepaid charges, in March, 2009 the value thereof have come down to Rs.543 for post paid and Rs.181 for prepaid in respect whereof no consideration has been bestowed.

(j) TRAI has ignored a large number of documents produced by the appellant in support of its contention such as common position paper published by European Regulators' Group (ERG) in 2008, stating –

> *"when there are difference in costs that are due to exogenous factors, outside the control of operators, asymmetric rates that reflect the cost differences may be justified, the duration wherefor depends upon the differences in frequencies endowments and technologies as also upon fully functional secondary spectrum market or until a regulatory action aligning all endowments of spectrum operators takes place."*

(k) It is wrong to contend that taking recourse to the asymmetry method would amount to subsidy but the same would merely ensure a level playing field for making the welfare objectives of the State by promoting competition.

(l) TRAI should have kept in mind the distinction between a tariff and determination of costs.

21. Mr. C.S. Vaidyanathan, the learned Senior Counsel appearing on behalf of the respondent, TRAI as also Mr. Saket Singh, on the other hand, submitted :-

(a) The impugned decision of the TRAI having been made in terms of its Regulation making power contained in Section 36 of the TRAI Act, 1997, these petitions are not maintainable.

(b) TRAI having been making IUC regulations from a long time and having been adopting OPEX and not the CAPEX, no error can be said to have been committed by it in following the well accepted principles for determining MTC and FTC etc. and if the methodology was to be changed, very strong grounds were required to be assigned therefor.

(c) While making a regulation, TRAI is not only required to keep in mind the interest of the operators but also that of the consumers.

(d) If the contentions raised by the Petitioners are accepted namely Capital Cost should be taken into consideration for the purpose of determining the mobile termination charges, the same would result in an anomaly which would be wholly undesirable.

(e) TRAI in making regulation in relation to fixation of Interconnect Usage Charges was bound to apply a uniform rate which having been done, no exception can be taken in regard thereto.

(f) TRAI in providing termination, carriage or transmitting of calls generated by subscribers of other interconnecting service providers involves costs for which the service providers need to be fairly compensated through appropriate components of

IUC to telecom services wherefor; it was necessary to ensure that the IUC regime would enable all service providers to gain access on reasonable terms and conditions to the interconnection facilities and services necessary to provide efficient service to their customers and in that view of the matter, it was equally necessary to look into several other important considerations like welfare of the customer, sustained growth of telecommunication and economic development of the country as also the impact on competition prices, equality, incentives and investments in fixed and mobile networks.

(g) The background of the IUC regime as also the components of a call, namely, origination, carriage of the transit and termination wherefor charges are required to be recovered from the subscribers as also the infrastructures required therefor, the costs were required to be determined from revenue streams and the tariff (which is under forbearance) and upon structuring the same accordingly.

(h) TRAI having not fixed tariff for mobile telecom services being under forbearance, the service providers can recover their costs from the following streams of revenue, namely, (a) Mobile origination charge (b) Mobile termination charge; (c) rental/fixed/administrative charges; (d) SMS and other value added services; and (e) data services (GPRS) etc. of which except mobile termination charge are under forbearance.

(i) The correct methodologies and principles were applied by TRAI in determining the cost of MTC which were as under:

(i) All components of costs must be recovered from some stream of revenue unless some cost is given up by the operators;

(ii) All costs cannot be recovered from MTC which is also one stream of revenue,

(iii) CAPEX should be recovered from other streams of revenue like rental, origination charge, administrative charges, VAS and other charges which are under forbearance. The OPEX must be recovered from MTC in

the case of mobile termination. In other words, operational costs which are relatable to the actual usage of the network of the other service provider for MTC, FTC etc. (airtime).

(j) TRAI in fixing MTC considered the fact that many revenue streams were available to the service providers for recovery of their costs which would include: –

(a) Cost of capital (reasonable rate of return on capital employed);

(b) Depreciation; both together are called recovery of the CAPEX (or sometime simply CAPEX)

(c) Operational cost (OPEX);

TRAI having issued its first Consultation Paper on "Concepts, Principles and Methodologies of Telecom Pricing" for determining of telecom tariffs and interconnection charges having been explained; as would appear from the execution summary, it would be evident that cost of local call had been determined on the basis of OPEX within the local area, the impact whereof had also been noticed during the IUC regime.

(k) The following factors would demonstrate that the present IUC regime had worked well:

i) The monthly additions of mobile subscribers are the highest in the world. There is addition of 19.10 million wireless subscribers in Dec 2009.

ii) The total number of connections in India is second highest in the world after China,

iii) In the period from 2003 to 2008 the telephone connections have gone up by 47% CAGR and are presently at 562.21 (December 2009) million which is more than what was projected for at the end of year 2010.

iv) The revenues have also grown between the years 2003 to 2008 at the rate of 25% CAGR.

v) Although the tariff is in forbearance, yet there has been a constant decline in the tariff charges making the services affordable for the large section of consumers,

vi) The service providers are making huge profits from their business which is evident from their Account Separation Reports, etc. It reads as under:

> *"If one looks at the performance of last 5 years (2003-08), since the inception of regulated IUC regime, telephone connections have gone up from 53.9 million in 2003 to about 374 million in November, 2008 with a CAGR of about 47%. The revenues have grown from about US$ 10 billion to US$ 31 bn at CAGR of 25%. The traffic has also grown manifold. It was seventh largest network in 2003 and now it is the second largest network globally."*

(l) TRAI in its decision making process had maintained high level of transparency. Having regard to the fact that various service providers had diverse commercial interests and furthermore a multi-stage consultation process having been undertaken whereby views were sought on the methodology to be used for calculating IUC as also the level of charges having been received, the same had been taken into consideration while preparing the consultation paper.

(m) A detailed consultation paper was issued on 31.12.2008 whereupon 23 stakeholders including the service providers, consumer groups and associations responded, which were uploaded on the website of TRAI whereafter an Open House discussions, sessions and meetings were held at Delhi and Hyderabad and, thus, meaningful discussions were held by the stakeholders.

(n) Having regard to the representations made at Hyderabad in the Open House discussion by TRAI for the purpose of clarifying the key issues raised by them at the Delhi Open House discussions wherein the stakeholders had been given ample opportunity to make their comments, which were again uploaded on its website for information of all concerned. The service providers in response to the consultation paper proposed a wide range of termination charge. The ultimate decision was arrived at upon detailed examination by TRAI keeping in view the diverse commercial interests which were not necessarily consistent with the objective of spreading growth, creating level playing field and consumer welfare.

(o) All daters provided for by the service providers could not be made public having regard to the requests made by them to maintain confidentiality in relation thereto.

(p) As during the Open House discussions in Hyderabad, Vodafone raised the issue of only negative list of components being presented, a complete list of cost item excluded or included in calculation was also provided in the Table 6.1 of the Explanatory Memorandum of the regulations. TRAI has, thus, exercised complete openness in collecting information, carrying out consultations with the stakeholders, discussions during meetings and presentations, revealing of calculation methods etc. In respect of Mobile Termination Charges it took into consideration the commonly suggested three methods, namely; (i) Forward looking long range incremental cost; (ii) Bill and keep; and (iii) Fully allocated cost, and recourse to OPEX was taken having regard to the fact that the said methodology had been put into practice since 2003 and its impact on the industry and consumers have been more positive than expected.

(q) LRIC and FLLRIC could not be resorted to as they provided for a bottom up approach wherein cost of services was computed using an optimized model of the network and service production technologies and in view of the fact that faulty planning process and assumptions would lead to incorrect design of the efficient network and consequent incorrect costing and cost allocations was possible giving incorrect result.

(r) The suggestions of Vodafone to use hybrid FLLRIC model involving based on both top down and bottom up processes and the reconciliation of results could not be resorted to as the said service provider had provided the details only of bottom up analysis without providing the top down results. It was found that the results predictably differ. The assumptions in the said model were so subjective that another set of stakeholders were carrying calculations based on the same model techniques but with the assumptions more applicable to them showing drastically different results. It was furthermore wholly irrelevant since actual cost had been taken into consideration to which no error has been pointed out.

(s) Fully allocated cost method as adopted by TRAI had the advantage of reliability as it had used accounting data submitted by service providers in the balance sheet, profit & loss accounts and accounting separation reports which were not only easy to audit but also stood the test of time. The detailed reasoning as to why CAPEX having been taken into consideration for calculating Mobile Termination Charge have been explained in details in para 5.3.20 to 5.3.25 in the Explanatory Memorandum at pages 179 and 181 of the compilation from a perusal whereof it would appear that several

relevant factors were ignored therein. Furthermore the service providers had not furnished the data of actual cost incurred by them which would indicate that charges fixed under the regulations were sufficient enough to recover the cost being incurred by them.

(t) In its exercise of service, profit and loss analysis for the GSM service providers by TRAI, it was found that on an average the service providers have 10 paise per minute surplus revenue which would clearly demonstrate that not only CAPEX recovery i.e. reasonable rate of return on capital employed as also depreciation had been recovered but also the operational costs involved therein. Abnormal profit if allowed to be earned by the GSM service providers by way of recovery of CAPEX from termination as also other charges was found to be necessary to be avoided.

The following table would show the level of profit which was being made by M/s Vodafone and M/s Bharati:***Service Profit and Loss Account***		***Vodafone***	***Bharti***
Required Revenue	*Rs. Per Month*	*395*	*301*
ARPU	*Rs. Per Month*	*428*	*376*
Profit	*Rs. Per Month*	*33*	*75*

The origination charge being equal to the termination charge, having regard to the fact that Vodafone is offering tariff at the rate of 50 paise per minute or one (1) paise per second for local and long distance calls which itself contradicts the estimation of mobile charges of 31 paise by its experts.

(u) The established service providers having not questioned the methodology adopted by TRAI since 2003 and BSNL having only questioned 2006 regulations, only on the ground of lack of transparency, no sufficient reason can be said to have been assigned for adopting a different approach.

(v) TRAI having shown the actual calculations as to how the quantum of mobile termination charges should be 20 paise per minute upon estimating the gross average revenue per user (ARPU) earning before interest tax depreciation and amortization (EBITDA) margin and minutes of usage (MOU), no exception can be taken thereto.

It is wrong to contend that TRAI had cross-subsidized new operators as the new entrants are also required to make a low capital investment in the event, 37 paise is fixed for MTC on the ground that expansion into rural areas are required to be made, the same would run counter to the basic objective of making tariff affordable in terms of National Telecom Policy. The following table would show the approximate net domestic termination charge receivable by M/s Bharti and M/s Vodafone:

Net Domestic Termination charge of M/s. Bharti and M/s. Vodafone

Service Provider	*Subscribers as on December 2009 (in millions)*	*Domestic MOU/subscriber/month (2008-09)*				*Total Revenue receivable as Termination Charge (In Rs. Crores)*	*Total revenue payable as Termi-nation Charge (In Rs. Crores)*	*Net domestic Termination Charge (In Rs. Crores)*
		Incoming		*Outgoing*				
		Off-net	*On-net*	*Offnet*	*On-net*			

Bharti	*118.86*	*154*	*106*	*144*	*106*	*4393*	*4108*	*285*
Vodafone	*91.40*	*127*	*110*	*102*	*110*	*2786*	*2237*	*548*

(w) Vodafone is clearly wrong in contending that so far as BSNL is concerned, cost of local loop can be taken as fixed cost which would clearly go to show that from the very beginning TRAI had used some costing principle both for fixed line and mobile telephony.

(x) TRAI while determining the mobile termination costs and other charges which pertain to the character of subordinate legislation having taken into consideration not only numerous materials produced by the parties but also the opinions of the experts i.e. Spectrum Value Partners, it would be wholly unjustified to examine outside experts at the post decisional stage.

(y) Even the affidavits of the experts run contrary to the present international trend, namely, reduction of very high mobile termination charge and paying the same at par with the fixed charges.

(z) The contention of ETISALAT that asymmetric termination charge should be in favour of new operators is wholly unacceptable as any kind of asymmetry would skew the traffic and would make a vicious circle for further higher termination charge as would appear from paras 5.6.2 to 5.6.4 of the Explanatory Memorandum .

(aa) M/s Etisalat has not understood the difference between the gross ARPU and the ARPU as published in Performance Monitoring Report (PMR) of the TRAI and in that view of the matter, its contention to that effect must be held to be wrong.

(bb) The bill and keep method of accounting which basically refers to a Mobile Termination Charge could not have been accepted as deliberated in the Explanatory Memorandum being paras 5.3.11 to 5.3.13 thereof at pages 175 and 176

of the compilation.

(cc) Table 6.2 (page 208 of the compilation) indicates the total expenditure of the wireless segment for the year 2007-2008 projecting on the basis of ratio (EBIDTA margin) for the coming years.

(dd) So far as fixed termination charge is concerned, BSNL cannot be permitted to change its stand and seek an asymmetric regime of termination charge by claiming FTC of 48 paise as a uniform rate was required to be prescribed, particularly, in view of the fact that it itself had not challenged the FTC of 30 paise in 2003 or in 2006 either on principle or method of computation or actual cost arrived at.

(ee) The contention of BSNL with regard to correctness of the denominator namely minutes of usage for arriving at per minute cost i.e. the assumption of 950 minutes of use per subscriber per month in respect of fixed network is incorrect and the same is only 511 minutes cannot be sustained as no actual data had been supplied in relation thereto as would appear from paragraphs 6.4.1 to 6.4.6 of the Explanatory Memorandum.

(ff) FTC having been computed at 23 paise per minute in 2006 which methodology again having not been challenged, the purported minutes of usage furnished by BSNL being 511 minutes per subscriber per month being not in accord with the figures furnished by other operators, the same has rightly been rejected.

(gg) BSNL having been using numerator and denominator for different periods and in its sample based minutes of usage i.e. 2414 crore per annum by its letter dated 31.10.2008, and 19746 crore minutes by its letter dated 30.01.2009, and that TRAI having before it the audited cost data for the year 2007-2008 had no other option but to reconcile the sample data furnished by BSNL with the datas furnished by the other mobile operators as the variation found therein was to the extent of about 70% minutes furnished by BSNL in the incoming minutes to BSNL fixed network from other cellular network.

(hh) The contention of BSNL that the cost of termination is 35 paise per minute is incorrect as tariff plans filed by various cellular operators would show that the call charges per minute are as low as 4 paise per minute.

(ii) So far as the international termination charge is concerned, BSNL's contention that the access providers have been paying for termination of their outgoing international calls in other countries at the rate of Rs.3 to Rs.5 and thus, TRAI should have allowed forbearance by allowing access providers to negotiate termination charges with the ILD operators for incoming international calls or a higher termination charge (as propounded by Bharti) could not be accepted having regard to the fact that no extra work is done for the international incoming calls by the access providers, as contended by the AUSPI, that the charges should be the same as domestic termination charge.

(jj) Comparison by BSNL and Bharti so far as the international outgoing and incoming calls are concerned being totally different, as a sum of Rs.3 and Rs.5 which is required to be expended by a subscriber by way of international carriage charge from India to other countries, has nothing to do with the 40 paise paid as termination charge to access providers and as TRAI was required to balance two important objectives, namely; (i)asymmetric charges between domestic and international termination would lead to arbitrage opportunity; and (ii) give rise to grey market; and this necessity was felt to protect the interest of the Indian operators to the extent that it does not lead to grey market.

(kk) The following Table would indicate the growth of number of ILD incoming minutes because of reduction of effective termination charge for international incoming calls:

International Termination Charge

Year	***ILD incoming Minutes(In Millions)***
1999-2000	*1,769*
2000-2001	*2,167*
2001-2002	*2,546*
2002-2003	*3,110*

2003-2004 (Effective TC = Rs 5.50)	*4,043*
2004-2005 (Effective TC = Rs 4.55)	*5,251*
2005-2006 (Effective TC = Rs 3.55)	*7,728*
2006-2007 (Effective TC = Re 1.90)	*10,757*
2007-2008 (Effective TC = Re 1.30)	*15,100*
2008-2009 (Effective TC = Re 0.80 till Sep 09 then 30 paise till March 09)	*21,418*

(ll) The request for option of forbearance could not have been accepted as the same would lead to uncertainty and unnecessary disputes in the market.

(mm) Higher termination charge would result in higher charges payable by the domestic subscribers in respect of the outgoing calls and particularly in relation to the countries where there exists reciprocity such as SAARC countries.

(nn) So far as the carriage charges having been kept at 65 paise is concerned, BSNL cannot be permitted to raise the said question and that too after a long time; its claim having become time barred.

(oo) The intra circle charge being only 15 paise and inter circle charges being 65 paise, it is only 1% of the total number of calls and other operators having not only been charging much less but also having regard to the fact that Etisalat had claimed that it cannot be more than 11 paise, no exception to the carriage charge can be taken.

(pp) Transit charge from Level-II TAX to Tandem has rightly been reduced to 15 paise from 20 paise as BSNL had not furnished datas for the year 2007-2008.

(qq) Submission of BSNL that TAX transit charge should not have been reduced to 15 paise from 25 paise and/or the same should have been put under forbearance could not have been accepted as according to the new operators the cost is less than 2 paise apart from being time barred.

(rr) No consultation paper having been issued in respect of SMS termination charge, the contention of Etisalat that SMS charges should have been fixed could not have been accepted.

22. We may at this stage place on record that the Mr. Vaidyanathan did not advance any argument on the question of jurisdiction of this Tribunal stating that he had made contrary submissions in the other matters and in view of the said stand, Mr. Saket Singh

addressed us on the said issue.

23. We have not recorded the submissions of Mr. Singh separately as we propose to examine his submissions as a preliminary issue.

Issues

24. The primary questions which would arise for our consideration in these appeals are:-

(i) Whether this Tribunal has jurisdiction to interfere with the impugned Regulations framed by the TRAI?

(ii) Whether TRAI has in framing the impugned Regulation complied with the statutory requirements?

(iii) Whether the methodologies adopted by TRAI in determining the charges are correct?

(iv) Whether TRAI ought to have taken into consideration CAPEX in determining the charges and not OPEX for the purpose of determining the actual cost incurred by the service providers?

(v) Whether the impugned charges are liable to be set aside and what relief, if any, the appellants are entitled to?

(vi) Whether the appellants COAI and Vodafone were entitled to adduce additional evidence?

(vii) Whether the TRAI has maintained the level of transparency?

We would, however, determine, as indicated herebefore, the question of jurisdiction as a priliminary issue.

25. Jurisdiction

25.1 A preliminary objection was raised by TRAI that the impugned regulations having been made in exercise of its regulation making power conferred on it under Section 36 of the Act, this Tribunal being a creature of a statute cannot go into the question of constitutionality thereof.

25.2 By reason of the 2000 Amendment Act, it was contended; there is a bifurcation, as the adjudicatory functions having taken place, this Tribunal in terms of section 14(1) (a) of the Act and this Tribunal can adjudicate only the disputes between the entities named in Sections 14 and 14A of the Act, which are specified therein.

25.3 However, so far as its appellate power envisaged under section 14 (1)(b) is concerned, the same being confined to 'direction', 'decision' and 'order' which terminologies specifically find mention in different provisions of the said Act, and the Parliament having expressly omitted the word 'Regulation' from the purview thereof, it must be held that this Tribunal has no jurisdiction to consider the constitutionality of the Regulation.

25.4 It is not a case where TRAI had made any tariff and, in fact IUC charges having nothing to do with tariff, the impugned subordinate legislation could not have been challenged before this Tribunal. Although in some of the decisions of this Tribunal, it has been held that the subject matter of the present dispute would come within the purview of the jurisdiction of this Tribunal but as the correctness of the said decisions are pending consideration before the Supreme Court of India and/or before the Division Bench of the Delhi High Court, no reliance should be placed thereupon.

Analysis of the relevant statutory provisions.

25.5 We may at the outset notice the scheme of the Act.

25.6 As the preamble would show, the Act was enacted to provide for the establishment of TRAI and this Tribunal with a view to *regulate* the telecommunication services, adjudicate disputes, dispose of appeals and to protect the interest of service providers and the consumers in the telecom sector to promote and ensure its orderly growth and for matters connected therewith or incidental thereto.

Section 2 is the interpretation section.

Section 2(1)(k) defines 'telecommunication service' to mean-:

"k) 'telecommunication service' means service of any description (including electronic mail, voice mail, data services, audio tex services, video text services, radio paging and cellular mobile telephone services) which is made available to users by means of any transmission or reception of signs, signals, writing, images and sounds or intelligence of any nature, by wire, radio, visual or other electro-magnetic mean but shall not include broadcasting services;"

[Provided that the Central Government may notify other service to be telecommunication service including broadcasting services.]

25.7 We may notice that by reason of the Amendment Act of 2000 clause (ea) was inserted in sub-section 1 of Section 2 thereof, which reads as under:-

"(ea) 'licensor' means the Central Government or the telegraph authority who grants a licence under section 4 of the Indian Telegraph Act, 1885"

25.8 Chapter II of the Act provides for establishment and incorporation of TRAI. Section 11 occurring in Chapter III of the Act provides for its powers and functions which contains a non obstante clause.

25.9 Clause (a) of sub section 1 of section 11 of the Act provides for the power of TRAI to make recommendations either suo-moto or on a request from the licensor on the matters specified therein. We are herein not concerned with the recommendatory jurisdiction of TRAI.

25.10 Clause (b) of sub-section 1 of Section 11 provides for the power of TRAI to discharge functions which are enumerated therein.

25.11 Sub-clauses (ii), (iii) and (iv) of clause (b) of Section 11 of the Act lay down the substantive power in TRAI to make interconnection regulations. Sub-clause (ii) of clause (b) of sub-section 1 of section 11 of the Act again provides for a non obstante clause.

25.12 By reason of the said provision, even the provisions of the Indian Telegraph Act, 1885 would stand superseded so far as the matter relating to laying down of the terms and conditions of interconnectivity between the service providers is concerned.

25.13 Sub clause (iv) of clause (b) of sub section 1 of section 11 empowers TRAI to regulate arrangements amongst the service providers for sharing their revenues derived by reason of providing telecommunication services.

25.14 Sub-clauses (vii), (viii) and (ix) of clause (b) of sub-section 1 of section 11 of the Act prescribe the matters in respect whereof regulations are required to be framed by TRAI.

25.15 Sub-section 2 of Section 11of the Act reads as under:-

> *"(2) Notwithstanding anything contained in the Indian Telegraph Act, 1885 (13 of 1885), the Authority may, from time to time, by order, notify in the Official Gazette the rates at which the telecommunication services within India and outside India shall be provided under this Act including the rates at which messages shall be transmitted to any country outside India:*
>
> *Provided that the Authority may notify different rates for different persons or class of persons for similar telecommunication services and where different rates are fixed as aforesaid the Authority shall record the reasons therefor."*

25.16 The said provisions refer to the tariff making power of TRAI and, thus, it may safely be inferred that IUC would not come within the purview thereof. (As noticed heretobefore, in view of TRAI's own contention, the sources of power of TRAI to determine IUC must be found out only in Section 11 (1) (b) (iv) of the Act.)

25.17 While exercising its power under the said provision, TRAI is required to maintain transparency as envisaged under Sub-section 4 of Section 11 thereof.

25.18 Section 12 empowers TRAI to call for information, conduct investigations etc. Sub-section 3 of Section 12 mandates that every service provider shall maintain such books of accounts or other documents as may be prescribed. Sub-section 4 of Section 12 of

the Act authorizes TRAI to issue such direction to the service providers, as it may consider necessary for their proper functioning.

25.19 Section 13 of the Act empowers the authority to issue direction from time to time to the service providers as it may consider necessary. The proviso appended thereto, however, states that no direction under sub-section 4 of section 12 shall be issued except on the matters specified in clause (b) of sub-section 1 of section 11.

25.20 Section 35 of the Act empowers the Central Government to frame rules; sub-section 1 whereof is general in nature in so far as it lays down that the rules may be framed by the Central Government for carrying out the purposes of the Act. Sub-section 2 enumerates the matters which are required to be prescribed by the Central Government.

25.21 Section 36 of the Act provides for the power to make regulations in the TRAI. Sub-section 1 of section 36 is identically worded as Sub-section 1 of Section 35 of the Act, namely; that the authority may interalia subject to the provisions of the Act (and also rules made thereunder in case of the former), make regulations to carry out the purposes of this Act. Sub-section 2 of section 36 which are illustrative in nature provides for the regulation making power in the matters specified therein. Similar is the provision contained in sub-section 2 of Section 35 of the Act.

25.22 We may notice that clause (c) of Sub-section 2 of Section 36 empowered TRAI to fix the salary and allowance and other conditions of service of its officers and other employees, which, by reason of the 2000 amendment was taken out of the purview thereof and was inserted in Section 35 of the Act.

25.23 It is not in dispute that a tariff made under Section 11 (2) of the Act would come within the purview of the decision making power of this Tribunal. We are specifically referring thereto as in our opinion, the rates and charges fixed for interconnectivity amongst the service providers would be a part of such fixation. In any event the power to frame tariff being a higher power, the jurisdiction to lay down charges for interconnect agreement would come within the purview thereof. However, no tariff has been framed by TRAI in terms of sub-section 2 of Section 11 of the Act.

25.24 Contention of Mr. Salve that the impugned Interconnection Usage Charges have been made by TRAI in exercise of its jurisdiction under sub-section (2) of Section 11 of the Act is not correct, but the same is merely a pointer to show that there is no reason as to why IUC being a component of tariff could not have been framed in terms of other provisions thereof or necessarily recourse therefor has to be taken to Section 36 of the Act. In other words for determining the IUC charges, Section 36 of the Act is not the source of the power vested in TRAI.

25.25 We are also not in a position to accept the submission of Mr. Saket Singh that making of a provision in regard to interconnection between two service providers would not come within the purview of 'telecommunication service'. The term 'telecommunication services' as defined in Section 2 (1) (k) of the Act means service of any description. It includes several such services as specified therein. Providing for interconnection services, it is conceded at the Bar, that interconnection is imperative in character. Such a condition having been made in the condition of license, TRAI was bound to give effect to and not act in derogation thereof. In absence of any interconnection between two service providers, it would not be possible for a customer of one telecom services to communicate with another customer of another operator. It contains the 'must provide clause' in terms of the conditions of license.

25.26 It is one thing to say that the rates or charges so fixed are meant for the service providers inter se but it is another thing to say that by reason thereof the end users of the telephone would not derive any benefit at all.

'Telecommunication Service' principally has three components:-

a) origination of call;

b) transfer of calls including interconnection; and

c) termination thereof.

25.27 Interconnection between two service providers is essentially a matter of the privity of contract between them. As a matter of fact both seeker and provider in the business of telecommunication are equally benefited thereby and, in that context, both can be

called as providers and as also seekers.

25.28 Telecommunication is a two way business and at no point of time it should be considered as if somebody is trying to benefit while other side is not able to get any benefit vis-à-vis his counterpart. The interconnection charges have got a direct impact on the rate fixed which will have a direct effect on what a subscriber will have to pay.

25.29 Interconnection, it will mere repetition to state, being imperative for effecting telecommunication services, the same, in our considered opinion, would come within the purview of Section 2(1)(k) of the Act. The definition of 'telecommunication service' is exhaustive in character. It has a wide application. All kinds of services for the purpose of transfer of a voice call from one customer to the other, in our considered opinion, would, thus, come within the purview thereof.

25.30 If that be so, we are furthermore of the opinion that TRAI will have jurisdiction to issue such general orders or directions, which may be found to be necessary and specified therein which in turn would include fixation of rate and/or charges in respect thereof. Moreover, Section 11 starts with a non obstante clause. Clause (b) of Sub-section 1 thereof shall prevail over other provisions of the Act.

25.31 The power of TRAI under Section 11(1)(b) of the Act is wide in nature. It has exclusive jurisdiction in relation thereto. The provisions contained in clause (b) of sub-section 1 of Section 11 are imperative in character. TRAI has no other option but to discharge its functions, Of course, if any necessity arises therefor in respect of the matters enumerated therein; interconnectivity between the service providers being one of them. In terms of Sub-clauses (ii), (iii) and (iv) of clause (b), TRAI has the requisite power not only to fix the terms and conditions of interconnectivity which itself would enable it to fix the rates and/or charges to be levied between two service providers, but also is entitled to regulate arrangements amongst them for sharing their revenue derived from providing telecommunication services which again would empower it to provide for the mode and manner thereof.

25.32 Mr. Saket Singh conceded that fixation of rates or charges within the meaning of the provisions of Section 11 of the Act would be 'law' within the meaning of Article 13 of the Constitution of India. It has also not been disputed that this Tribunal would have jurisdiction in all over the matters falling thereunder. It is furthermore not in controversy that TRAI in exercise of its jurisdiction under section 11 of the Act may also pass general orders. General orders may not be required to be published in the official

gazette but that would otherwise come within the purview of the term 'law' as it would bind all operators as also the Government of India. Once such general orders and directions are issued, TRAI must ensure their compliance, being one of their principal functions. Determination of price need not necessarily be in the nature of a subordinate legislation. It is, however, not necessary to pronounce on the said question finally.

25.33 In Kerala Samsthana Chethu Thozhilali Union v. State of Kerala - 2006(4) SCC 322, the Supreme Court of India held as under:

"37. Furthermore, the terms and conditions which can be imposed by the State for the purpose of parting with its right of exclusive privilege more or less have been exhaustively dealt with in the illustrations in sub-section (2) of Section 29 of the Act. There cannot be any doubt whatsoever that the general power to make rules is contained in sub-section (1) of Section 29. The provisions contained in sub-section (2) are illustrative in nature. <u>But, the factors enumerated in sub-section (2) of Section 29 are indicative of the heads under which the statutory framework should ordinarily be worked out."</u> (Underline is ours for emphasis)

25.34 In the aforementioned context, we may notice the provisions of Section 36 of the Act. We have noticed heretobefore that both the Central Government and TRAI in exercise of their respective jurisdictions under sub-section 1 of section 35 of the Act and sub-section 1 of section 36 thereof respectively are entitled to make rules/regulations for the purpose of carrying out the purpose of the Act. It is beyond any controversy that ordinarily sub-section 1 of section 35 and sub-section 1 of section 36 would confer on the authorities concerned a general power of making subordinate legislation. There cannot furthermore be any doubt or dispute that the matters specified in Sub-section 2 of Section 35 and Sub-section 2 of Section 36 are illustrative in nature. However, it is also well settled that the nature of the regulation making power must be determined having regard to scheme of the Act. Amendment in the Act made in the year 2000 is a pointer to the fact that the Central Government even intended to keep with itself financial aspects of the matter. For interpretation of the provisions relevant for our purpose, this principle of 'purposive construction' is required to be taken recourse to.

25.35 Statutory authorities have 3 different powers, so far as making of subordinate legislation is concerned namely (a) power to make rules, (b) power to make regulations and (c) power to issue directions. We have noticed heretobefore that sub-clauses (vii), (viii) and (ix) of clause (b) of Sub-section 1 of Section 11 empower TRAI to make Regulations in relation to the matters specified therein. The said functions are ministerial in character. Substantive power to issue general orders, vests in TRAI in terms of sub clauses (i) to (v) of clause (b) of sub-section 1 of section 11. Sub-section 2 of section 36 of the Act provides for regulations making power only in such matters which are not substantial in nature. It is in the context of the matters specified in sub-section 2 of Section 36, we are of the opinion that the provisions of sub-section 1 of Section 36 of the Act must be read in the context of Sub-section (2) thereof. ***Once it is held that the regulation making power under section 36 is not substantive in nature, the logical corollary thereof would be that an appeal shall lie against an order passed under section 11 (1) (b), providing for substantive power.***

25.36 We say so because we have noticed heretobefore that a broader power to make regulation which is more substantive in nature flows from Sections 11 and 13 of the Act in terms whereof TRAI was empowered to lay down uniform norms. It is a special power. It would exclude general power. The essential functions of TRAI are laid under Section 11(1) (b) of the Act. Sub-section 1 of section 36, therefore, must be read in the context thereof vis-à-vis other provisions of the Act.. Thus, in our opinion it is clause (b) of sub-section 1 of section 11 of the Act which provides for the generic power.

25.37 The submission of Mr.Saket Singh, that directions, orders or decisions are not synonymous to the word Regulation, could be accepted but for the reason it is well settled that each statute must be construed having regard to the scheme thereof. For the said purpose, even the “Preamble” of the statute is required to be taken into consideration.

25.38 In our opinion, the impugned IUC charges, in effect and substance have been made by TRAI in exercise of its jurisdiction under Section 11 (1)(b)(ii) read with sub-clause(vi) of the same Section 11(1)(b) of the Act. The impugned Regulation would survive

even if the provision of Section 36 is deleted therefrom. In other words Section 36 of the Act is not the source of laying down the interconnection charges.

25.39 The contention of Mr.Saket Singh that the Regulation should be dealt with all seriousness by the Authority is beyond any controversy, but we must observe all statutory functions particularly those for making of IUC Regulations also deserve serious consideration at the hands of TRAI.

25.40 Power to make subordinate legislation emanates from the statute.

25.41 Mr. Singh suggested that there is no clear cut demarcation or guiding factor laid down under the Act in this behalf and as such TRAI had adopted the approach of performing the said function by framing regulation. What is needed is exercise of the statutory function wherefor what is needed is the source of power and not the terminologies used in the provisions referred.

25.42 Practice adopted by a statutory authority in this behalf can never form the basis of exercising a power for making a subordinate legislation. It must be borne in mind that wherever such a question has been raised, this Tribunal has held that it had jurisdiction to hear appeals therefrom. The decisions rendered by the Tribunal on the said question are uniform.

25.43 If any such guidelines furthermore were required to be issued, it is for Parliament to do so, which has so far not taken any step in this behalf.

25.44 We are also not in a position to agree with the contention of Mr. Singh that impugned IUC charges would come within the purview of Regulation making power of TRAI only and not its power under Section 11(1) (b) of the Act.

25.45 For the purpose of determining the jurisdiction of this Tribunal, the history of the legislation plays an important role. The interpretation of the statutory provision by competent court of law would also assume significance. The law as declared by the highest Court of the country would also play a crucial role.

See Workmen Vs. Firestone Tyre & Rubber Co. of India (P) Ltd. - 1973 (1) SCC 813.

25.47 See also

(i) Dilip N. Shroff Vs. CIT – 2007(6) SCC 329

(ii) ICICI Bank Ltd. Vs. SIDCO Leathers Ltd. – 2006(10) SCC 452

(iii) Babua Ram Vs. State of U.P. - 1995 (2) SCC 689

25.48 It is also of some significance to notice that in Civil Appeal No.6743 of 2003, TRAI Vs. BPL Mobile, the former itself had raised a contention before the Supreme Court of India that in the context of Section 29 of the Act, a 'direction' would include 'regulation'. Section 29 providing for a penal provision required to be construed strictly. Despite the same having regard to the scheme of the Act as also for the purpose of ensuring enforceability of the regulations made by TRAI, it was held that directions issued within the purview of Section 13 of the Act would embrace within its fold 'the regulations'. To the same effect is the judgment of the Delhi High Court in WPC 2838 of 2005 (TRAI Vs. TDSAT) wherein it was held as under :-

"64. Examination of the provisions of Section 36 whereby the TRAI is empowered to make regulations shows that it is specifically mentioned therein that regulations would be made by notification in respect of the subjects set out therein. Section 36(2)(e) empowers the TRAI to make regulations in respect of the subject matter of Section 11(1)(b)(viii) and Section 11(1)(c) of the Act. In this view of the matter, I have no manner of doubt that the TRAI can validly make regulations in respect of only such subject matters which have been specifically specified under Section 36 of the enactment. It is necessary to bear in mind the spirit, intendment and purpose of the TRAI Act, 1997 and the functions which the authority is required to discharge. Both the Appellate Forum and the TRAI consist of experts who are required to go into technical questions which arise for consideration. The Appellate Authority is specifically empowered to hear and dispose of appeals against directions, decisions and orders of the TRAI.

69. I find force in the submissions on behalf of the respondents to the effect that the access deficit charges would be covered within the ambit of the expression "terms and conditions of inter-connectivity" between the service providers and hence any direction or decision in respect thereof has to be appealable to the appellate tribunal constituted under Section 14 of the statute. The TDSAT specifically is even otherwise empowered to hear and dispose of appeals from any directions, decision or order of the TRAI by virtue of the powers vested in it under Section 14(b) of the Act. The challenge made by the petitioner on this ground has therefore to be answered against it.

70. In the instant case there is no manner of doubt that the TRAI was fully competent to issue directions in respect of the access deficit charges for which it has been statutorily empowered. Therefore, I find force in the contentions on behalf of the respondents to the effect that merely because it has notified its decision as a regulations and may even have followed the same procedure to give effect to the same, it cannot have the effect of converting such directions into statutory regulations. I find that the real purpose of the TRAI was to give effect to a decision taken under Section 11 of the Act and, therefore, there is no prohibition to the maintainability of the appeal before the TDSAT."

26.49 It was furthermore observed:

"90. I have held that the Regulation I of 2005 was in the nature of a direction issued by the TRAI which has been statutorily enjoined to consider all relevant matters and make appropriate directions in respect of the matters set out in Section 11(1)(b) of the Telecom Regulatory Authority of India Act, 1997. The respondent has submitted that the Regulation 1 has been issued by TRAI in exercise of its executive fiat. The material, reasons and considerations which weighed with the authority in issuing the directions are necessarily to be found with the petitioner. There is no adversarial party on the other side before the TDSAT. The respondent has itself arrayed the TRAI as a party respondent to its appeal before the TDSAT. In these circumstances, there can possibly be none other than the authority whose direction has been challenged

which would be best equipped to defend the same. In these circumstances, it is not possible to hold that it was not proper for the petitioner to make a challenge to the orders passed by the TDSAT by way of the present writ petition or that this writ petition deserves to be rejected on the ground of judicial impropriety."

26.50 We have noticed heretobefore that before the Supreme Court of India TRAI itself raised a contention that the terms 'Regulations' and 'Directions' are interchangeable.

26.51 Section 11 of the Act seeks to achieve the purpose of interconnectivity. Such interconnectivity need not be and in fact not the result of a free volition of the parties thereto. It, in view of the conditions of licence, is a 'must provide' clause. For the said purpose conceedingly directions can be issued.

26.52 Section 11 of the Act itself provides as to what categories of functions are required to be performed by TRAI by resorting the regulation making power under Sub-section 1 of Section 36 of the Act besides those which are enumerated in sub-section 2 thereof.

26.53 The provision relating to a subordinate legislation required to be laid before the Parliament is a procedural one. It is directory in nature **(See AIR 1979 SC 1149 – M/s. Atlas Cycle Industries Ltd. and others vs. State of Haryana).** Moreover, in our considered opinion, IUC in effect and substance have been framed by TRAI in exercise of its power under Section 11 (1) (b) of the Act and not in terms of Section 36 thereof. It was, therefore, not necessary to be placed before the Parliament. It is not in the nature of subordinate legislation within the meaning of Section 36 of the Act.

26.54 If the substantive powers of issuing direction in terms of Section 11 of the Act can be exercised for the purpose ensuring connectivity by issuing general direction as has been conceded by Mr.Saket Singh, we fail to understand as to on what basis it can be said that such power must meet the requirements of the procedure required to be followed for the purpose of making a Regulation.

26.55 In our opinion, it is the other way round. No hearing is necessary either in law or on principle before a subordinate legislation is made of the nature provided for in Section 36 of the Act. For issuing general directions having regard to the specific provisions contained in Section 11(4) TRAI was required to give an opportunity to all the stake holders and give due consideration to their view point.

26. We, however, hasten to add that legally speaking it is possible to an affected party to question the validity of even a subordinate legislation on the failure of its maker to make effective consultation in appropriate cases. See Administrative Law by Wade and Forsyth , 8th Edition, Page 175 and 875.

27. It is only for the purpose of ensuring transparency as envisaged under Section 11(4) of the Act, that detailed consultation process is required to be undergone in law. In other words consultation processes which are taken recourse to is by way of and/or as a matter of practice and not the requirement of law. The process is required to be undertaken by TRAI only when it exercises its power under Section 11 of the Act and not under Section 36 thereof.

28. Our attention has been drawn by Mr. Saket Singh to paragraphs 51 and 52 of the judgment of the Delhi High Court in TRAI vs. TDSAT (supra) which reads as under :

> *"51. In view of the above discussion, I have no manner of doubt that it is not open for a litigant to approach a tribunal constituted under a statute to question vires of a statutory legislation which created the particular tribunal. However it is open for the litigant to test the constitutional validity of statutory provisions and rules before a tribunal created under Article 323-A and 323-B of the Constitution.*
>
> *52. In the light of the authoritative pronouncements of law by the Apex Court, therefore, it has to be held that the TDSAT in the instant case, which has derived its jurisdiction under the specific statutory provisions of the TRAI Act and has not been created under any constitutional provisions does not have the jurisdiction or the competence to decide on the constitutionality of a statutory provision under which it has been created. For the same reasoning, it would not have the*

competence to adjudicate on the vires of the subordinate legislation framed and effectuated in exercise of power conferred under the same statute."

29. It is true that this Tribunal has not been constituted in terms of Article 323 A or Article 323 B of the Constitution of India. It is also true that it being a creature of a statute, it would not ordinarily be entitled to declare a statute unconstitutional. Power of different bodies providing for a hierarchical system must however be construed differently from the bodies created by reason of different statutes. TRAI is a regulator. It, prior to coming into force of the 2000 Amending Act, exercised three different functions viz legislative, executive and adjudicatory. It has now no adjudicatory function.

30. The distinction between constitutionality and legality of a statute is well known. Furthermore, as a provision for filing an appeal is provided in terms of the statute itself, the Appellate Tribunal would be entitled to go into the merits of the direction in relation to determination of interconnect charges. The power of this Tribunal to interfere with the order, decision and direction issued by the TRAI being the appellate power is wider than the power of judicial review. We may notice that even the Delhi High Court in its decision dated 12.03.2005, had categorically held therein that the power by TRAI in that case had in fact been exercised under Section 11 of the Act and not under Section 36 thereof.

It may also be noticed that decision of the Supreme Court of India in West Bengal Electricity Regulatory Commission Vs. CESC Ltd. (2002) 8 SCC 715 has been distinguished in COAI Vs. UOI reported in 2003(3) SCC 186.

31. It is also pertinent to note that that part of the order of the Supreme Court in West Bengal Regulatory Commission's (supra) has been referred to a larger Bench by a two Judge Bench of the Supreme Court recently. The matter, we are informed at the Bar is pending decision before a Constitution Bench of the Supreme Court of India.

32. It is true that power to frame Regulation and Interconnect charges are different as has been contended by Mr. Saket Singh but in view of the terminology used in Section 11 of the Act, there cannot be any dispute that it is mandatory for TRAI to do so. For the

said purpose, in our opinion in law, it is not necessary to resort to the regulation making power.

33. In relation to tariff making power of the Electricity Commission, the Supreme Court of India had the occasion to consider the scope and ambit the High Court's power to entertain an appeal from the determination of tariff made by the Electricity Regulatory Commission.

34. The Supreme Court of India opined that Electricity Regulatory Commission being an expert body and the High Courts, having no such expertise, should not be held to be entitled to exercise its appellate power akin to section 96 of the Code of Civil Procedure and in that view of the matter observed that it must exercise a restrictive appellate power. A recommendation was made that the Parliament may consider constitution of an expert Appellate Tribunal. However, it was opined that in exercise of the said jurisdiction, a statute could not be declared ultra vires.

35. Determination of rates and charges is a difficult job. Although statutes provided for an appeal to the High Court, necessity was felt by both the Apex Court as also the Parliament to have an expert Appellate Tribunal to consider the correctness or otherwise of orders determining different rates and charges for different categories of services rendered by the service providers. If that be the scheme of the Act, it is difficult to agree with the submission of Mr.Saket Singh that this tribunal has no appellate jurisdiction over TRAI in such a matter.

36. There is another aspect of the matter which must also be taken note of. The preamble of the Act envisages regulatory functions both by TRAI as also this Tribunal. The word "AND" which has been used in the preamble of the Act clearly establishes that the function by TRAI and TDSAT are conjointly to regulate the telecom services and regulation and Regulation is not merely the function of TRAI only. The preamble does not stop there but further elaborates that besides regulating the telecommunication services, the jurisdiction of this Tribunal can be exercised in regard to adjudication of disputes, disposal of appeals and to protect the interest of the service providers and consumers of the telecom sector (as per provision of Section 14), as also to promote and ensure orderly growth of the telecom sector. The statute makers, therefore, have very specifically and carefully mentioned

in the preamble itself that the responsibility is conjoint in nature and not for the Regulator only in isolation. A two tier regulatory forums, therefore, have been provided for. TRAI, therefore, while exercising its power under Section 11 of the Act would be subject to the appellate jurisdiction of this tribunal.

37. Prior to the amendment of the TRAI Act in 2000, the power to make Regulation with the preface thereof used to be as under:

> *"In exercise of the powers conferred upon it under section 36 read with clauses (c) and (d) of subsection (1) of section 11 of the Telecom Regulatory Authority of India Act, 1997 to ensure effective interconnection between different service providers and to regulate arrangements amongst service providers of sharing their revenue derived from providing telecommunication services, the Telecom Regulatory Authority of India hereby makes the following Regulation."*

After the amendment of TRAI Act in the year 2000, the preface has changed as follows:-

> *"In exercise of the powers conferred upon it under section 36 read with clauses (ii), (iii) and (iv) of sub section (b) of Section 11(1) of the Telecom Regulatory Authority of India Act, 1997 as amended by TRAI(Amendment) Act, 2000 to fix the terms and conditions of interconnectivity between Service Providers, to ensure effective interconnection between different service providers and to regulate arrangements amongst service providers of sharing their revenue derived from providing telecommunication services, the Telecom Regulatory Authority of India hereby makes the following Regulation."*

38. The above preface to the Regulations establishes beyond doubt that Authority has derived its substantive power from Section 11 of the Act. Only because Section 36 thereof has been mentioned, the same would not mean that Section 11 had no role to play. The question can be considered from another angle. In the Regulation making power purported to be contained in Section 36 of the Act could be exercised for framing of tariff or determination of IUC charges, even if Section 11(4) had not been enacted by the Parliament. The answer to the said question must be rendered in the negative.

Section 11(1)(b) delineates the function of the TRAI. In its absence, the purposes for which it had been enacted would have remained vague. Section 11 of the Act is concluded in imperative terms. It lays down the main parameters of its purposes for

which it had been enacted.

Only certain sub-clauses of Clause (b) of sub-section (1) of Section 11 of the Act state in regard to the matter which would be done by taking recourse to Regulation making power apart from those which have been mentioned in sub-section (2) of Section 11 of the Act.

39. While considering the question of jurisdiction of a tribunal of this nature, we must keep in mind the well known principles of the interpretation of statute, namely, the statute must be read in its entirety and then chapter-by-chapter, section-by-section and clause-by-clause.

(See Reserve Bank of India Vs. Peerless General Insurance Company AIR 1987 Supreme Court 1023 followed in Associated Indem Mechanical (P) Ltd. Vs. West Bengal S.S.I.D.C. Ltd. and Ors.- AIR 2007 SC 788).

40. It is now also well settled that in view of bifurcation of the jurisdiction of TRAI vis-à-vis this Tribunal by reason of 2000 Amendment Act, the former has no adjudicatory role to perform.

41. There are precedents where this Tribunal has come across the question of validity of a Regulation. We may take notice of some of them.

"FIRST SET

a) BSNL Vs. TRAI, Appeal No. 11/2002, judgment dated 27/04/2005 (See paras 31-32 @ pages 34-40)
b) C.A. No. 3298/05 pending in Supreme Court against order of 27/4/2005. The matter has been referred to a larger bench in terms of Reference Order dated 6.2.07 or 5 issues which does not include the issue of jurisdiction.

SECOND SET

a) TDSAT judgment dated 31/1/05 in MTNL Vs. TRAI Appeal No. 3/2005 (pages 7 to 15)
b) TRAI filed a writ in Delhi H.C. The Ld. Single Judge passed a judgment on 23.12.2005.
c) TRAI has gone in Appeal being LPA 337/2006 which is pending.

THIRD SET

a) Domestic Lease Circuit Judgment. See M.A. in Appeal No. 3/2009.
Judgment of TDSAT in BSNL v. TRAI, Appeal No. 8/2007. This Tribunal held it has the jurisdiction to hear an appeal against Regulation.

b) TRAI preferred an Appeal in Hon'ble Supreme Court being Appeal C.A. 2435-2436/09.

c) The Hon'ble Supreme Court stayed the impugned judgment. See Pg. 1177."

42. It is, however, contended that this tribunal has a limited jurisdiction. It may or may not be so but it cannot be denuded of its power to exercise its power in relation to the matters which are subject matter of a decision by TRAI. The terms 'order, decision or direction' are of wide amplitude. An order/direction of this nature would fall within the purview of Section 11 of the Act. In fact Mr. Singh has not controverted this aspect of the matter.

43. We may moreover have to keep in mind the distinction between a power of judicial review and an appellate power.

44. Determination of rates or charges has a far reaching effect on the service providers. It may have a far reaching effect on the interest of the consumers. Different categories of service providers would have different nature of interests. Their interest inter se may clash. By reason of fixation of such rates and charges, the other service provider may suffer undue hardship. Had the jurisdiction of this Tribunal been limited or non existent, the very purpose of enacting an expert Appellate Tribunal would be lost.

45. If we are right in our finding that the Tribunal has the requisite jurisdiction to interfere with determination of rates and charges by Tribunal inter alia in view of the decisions of this Tribunal referred to heretobefore as well as that of the Delhi High Court, there cannot be any doubt or dispute that the nature of jurisdiction would be different.

46. It has been so held by the Supreme Court of India in Cellular Operators Association of India & Ors. Vs. Union of India & Ors. – 2003(3) SCC 186, wherein it has categorically been held that the appellate power is different from that of the power of judicial review.

47. We are not unmindful of the Act that the power of judicial review of legislation can be exercised by the Supreme Court only as has been held by the Supreme Court of India in Mumtaz Post Graduate Degree College Vs. Vice-Chancellor – 2009(2) SCC 630, there cannot be any doubt or dispute that the appellate jurisdiction is wider.

48. Undue hardship or even hardships may not be a ground for judicial review but Wednesbury unreasonableness is. [See Grand Kakatiya Sheraton Hotel & Towers Employees & Workers Union Vs. Srinivasa Resorts Ltd.,(2009) 5 SCC 342].

We here, however, are herein concerned with a different situation.

49. This Tribunal can not only go into the question of legality but also the principles and methodology. It can not only set aside or modify the order of the TRAI but also in a given case which may be of extraordinary nature undertake the entire exercise itself so as to enable it to substitute its own opinion/decision thereover.

50. Keeping in view the new economic policy of the Central Government adopted in the year 1991, of which the telecom sector is the biggest contributor, it must be held that all orders made by the regulator and all directions issued would have great impact on the economy of the country. Revenue earned by DoT alone largely contributed to the GDP of the country. The revenue earned by DoT & MIB is enormous. More than 1 lakh crores has been earned by the Government of India by 3G auction only. It is only with that end in view the Parliament must be held to have thought of providing for a forum which would exercise appellate jurisdiction in respect of all directions/orders of the TRAI. The new economic policy was formulated to attract more Foreign Direct Investment (FDI). FDI in the Telecom Sector probably are more than those made in other sectors.

51. One of the factors which must have been uppermost in the mind of the makers of the policy was that the area of dispute remains at the minimum level as also early resolution thereof by an impartial Tribunal with utmost expedition. FDI is made more and more if the investors become aware of not only the market conditions, but also the availability of forums including the regulatory regime which may be hierarchical in character. So far as the tax regime is concerned, both direct and indirect; even forum of 'Advance Rulings' have been provided for by the Parliament.

52. Section 11 of the Act vis-à-vis Section 36 thereof should be construed in the aforementioned backdrop.

53. Intention of the Parliament having regard to the economic policy as also the decision of the Supreme Court to create an appellate authority, a body capable of considering all aspects of the matter by a regulator assumes importance in this context.

54. Both TRAI and this Tribunal are expert bodies. The entire purpose of the legislation was to create an expert appellate forum. An appellate body, it is trite, can exercise all the powers of the original authority.

55. The regulatory regime thus, includes both the Regulator and the Appellate Tribunal.

56. Their functions and powers are contained in Section 11 and 12 of the Act respectively.

57. Tribunal having regard to the scheme of the Act would, thus, be entitled to perform all functions of the regulator and exercise similar powers. As an appellate authority, it can not only go into the decision making process by the regulatory authority but also the legality and/or correctness of an order, direction or determination made by the regulator.

58. We may also notice that this Tribunal in Appeal No.11 of 2002 disposed of on 27.04.2005, observed as under:-

> *"We would also like to mention that Division Bench of Delhi High Court in the Judgment (MTNL vs TRAI) -referred to above, while taking note of Section 36(1) of the Un-amended TRAI Act which gives a general power to TRAI by notification to make regulations consistent with the Act and the rules made there under to carry out the purposes of the Act also held that "this power is to be exercised consistent with the provisions of the said Act and the rules framed by the Govt. This power cannot be used to subvert the provisions of the said Act and to assume powers and functions not conferred by the said Act". The Division Bench has observed that among the non-recommendatory functions assigned to TRAI under Section 11(1) of the Act only sub clauses (l), (m) and (p), specifically provide for framing of regulations whilst the others do not. There is no change in the amended Act in regard to Section 36(1). Sub clauses (l), (m), and (p) of Section 11(1) of the Un-amended Act are analogous to sub sections (b) (vii) and (b)-(viii) and (c) of Section 11(1) of the amended Act. The observations of the Division Bench therefore are equally valid with reference to the Amended Act.*

"Section 11 (1)(b)(iii) (earlier Section 11(1)(c) of the unamended Act) and Section 11(1)(b)(iv) (Section (1)(d) of the unamended Act) provides that TRAI has to ensure compliance with the terms and conditions of the license and to regulate arrangement amongst service providers. Delhi High Court in the aforesaid Division Bench judgment said that these powers are to be exercised qua service providers. TRAI cannot frame regulations under these provisions as in that case functions could be enforced against or imposed on the Central Government. Under these provisions directions could be issued to only service providers and if regulations are framed then that would mean that functions of the TRAI could be enforced against or imposed on the Central Government as well which would lead to an absurd situation and would be clearly a method of trying to do indirectly what cannot be done directly."

It was, furthermore observed :

"Again in the face of the principle enunciated by the Delhi High Court that the same authority/body cannot have both legislative as well as adjudicatory functions and that the Act itself had to be amended establishing TDSAT to hear and dispose of appeal against any direction, decision or order of the TRAI under the Act, for TRAI to say that it has still the power to adjudicate upon a dispute has no meaning. In this context observation of the Delhi High Court that "further, sub-clauses (1)(m) and (p) specifically provide for framing of regulations whilst other do not" becomes relevant.

59. It has been submitted that an appeal thereagainst is pending before the Supreme Court of India but it is also accepted that no order of stay has been passed.

60. We may furthermore notice that although the matter has been referred to a larger bench, the questions which were referred to by the Division Bench upon considering the view points of the learned counsel appearing for the parties does not contain the question as to whether the validity of the regulation can be challenged before this Tribunal or not.

61. Our attention has been drawn to Petition No. 3 of 2009 which has been printed in Vol.VI of the TDSAT Journals page 1035 relating to direct connectivity regulations. Our attention has furthermore been drawn to the decision of this Tribunal dated 23.01.2009 in Appeals No. 8 and 9 of 2007, BSNL Vs. TRAI published in the same Vol. at page 1044 wherein it has been held as under :-

> *"5. Before we set out to address ourselves to the issues posed above, it is necessary to first settle the threshold challenge posed by the Respondent that this appeal is not maintainable before this Tribunal in as much as the impugned Regulations are in the nature of subordinate legislation, laid before the Parliament, and that it is only the Parliament which can modify or annul these Regulations. The Respondent has taken support of the judgement of the Hon'ble Supreme Court in* ***West Bengal Electricity Regulatory Commission v. CESC Ltd [AIR 2002 SC 3588]*** *as also in* ***L. Chander Kumar v. Union of India and others [JT 1997 (3) SC 589]****. We have noted that although the Respondent raised this issue in its pleadings, this was not pursued in the course of arguments as also evidenced by the written submissions. As such, it would not be inappropriate to dismiss this contention straightaway. Nevertheless, we will deal with this contention since it has been raised.*
>
> *13. We feel that this should set at rest all doubts regarding the maintainability of these appeals before this Tribunal. We accordingly reject the contention of the Respondent in this regard. We would also like to point out that once a principle has been unequivocally settled and continues to hold ground, it was not appropriate for the Respondent to continue to make the same submissions before this Tribunal."*

62. However in the appeals preferred by TRAI thereagainst, it is stated that specific grounds with regard to jurisdiction of this Tribunal have been taken and the matter is pending before the Supreme Court of India.

63. It is our considered view that labeling a direction concerning interconnectivity purported to have been issued under Section 36 read with Section 11 of the Act would not be decisive. The Courts must enquire into the source of the power of the concerned

statutory authority, as it is well settled that wrong mentioning of a provision would in such cases shall be inconsequential. *[See Securities & Exchange Board of India Vs. Ajay Agarwal - 2010(2) SCALE 680]*

64. Furthermore as concedingly all general orders or decisions made by TRAI in terms of Section 11 of the Act are appealable, the jurisdiction of the Tribunal cannot be curtailed by stating that the same has also been issued under Section 36 thereof. Section 36, in our opinion has wrongly been quoted in the impugned Regulation.

In any event the impugned Regulations being capable of being framed by TRAI as has been held heretobefore only in terms of Section 11(1) (b) of the Act and not Section 36 thereof. Section 36 of the Act, in our view is not the repository of the power of TRAI for determination of interconnection charges.

65. It is accepted at the Bar that Executive Orders of TRAI would be appealable.

66. Moreover, the legislative and executive powers cannot be exercised by TRAI interchangeably at its sweet will.

67. It cannot take contradictory and/or inconsistent stand. It cannot exercise both the legislative and executive functions simultaneously.

68. Moreover, in determining the issue of the present nature it must also be borne in mind that ordinarily the interpretation which upholds the right of an appeal should be accepted and not the one which denies such right.

69. We have noticed heretobefore that tariff framed in terms of a similar legislation namely W.B. Electricity Regulatory Commission Act was subject to appeal under Section 43 thereof. Observation in regard to limited jurisdiction of the High Court were made by the Supreme Court of India in West Bengal Electricity Regulatory Commission v. CESC Ltd. - 2002(8) SCC 715 and only in view of suggestion of the Apex Court tin, an Appellate Tribunal under the Electricity Act 2003 has been constituted.

70. Submissions made by Mr. Singh that the Parliament having not inserted the word 'regulation' in Section 14(b) of the Act, this Tribunal has no jurisdiction to hear an appeal, this, cannot be accepted. We reiterate that nomenclature of an order or direction is not decisive.

71. Apart from the decision of the Delhi High Court in TRAI (supra) it is for a superior court to find out the true scope and ambit as also the nature and character of determination made by a subordinate authority.

72. If on a proper analysis of the provisions of the Act and in the light of the determination made by TRAI, it is found that power has been exercised by it under Section 11 of the Act and not under Section 36 therein, indisputably an appeal thereagainst would be maintainable.

73. Apart from constitutionality, judicial review of legislation is permissible on a variety of grounds. *[See Bombay Dyeing and Mfg. Co. Ltd. Vs. Bombay Environmental Action Group and Ors. - (2006)3SCC434]*

74. Legality can also be a subject matter of consideration for judicial review of legislation.

75. Section 14A of the Act envisages exercise of appellate jurisdiction by the Tribunal at the instance of persons other than the licensor, licensee, service providers and group of consumers i.e. at the instance of Central Government, State Government, Local Authority or a person aggrieved.

76. The Central Government has also statutory functions to prefer in terms of Chapter V of the Act. It can also issue directions under Section 25 thereof.

77. No appeal before this Tribunal, therefore, would be maintainable at the instance of the Central Government in relation to its functions thereunder.

78. An appeal shall lie only when it acts as a licensee or a service provider. Such functions can be performed only by the Department of Telecommunication.

79. The word 'Central Government' for the purpose of other provisions of the Act need not necessarily be the DoT.

80. The question as to why, therefore, the scope of appeal before this Tribunal has been extended must be considered.

81. It is stated at the Bar that Central Government, State Government, may have some roles to play under Section 5 of the Indian Telegraph Act, 1885, but functions of a Local Authority thereunder can only in exceptional situations be a subject matter of determination by TRAI.

82. If that be so, they or any other person may become aggrieved only by reason of an order of TRAI and not otherwise.

83. In view of the decision of this Tribunal that TRAI has no adjudicatory role to play in the changed scenario viz. after the 2000 Amendment Act has come into force, these entities mentioned in Section 14A of the Act can be aggrieved only by a general order or a so called regulation framed by TRAI as the same may affect their rights under the common law or other functions emanating from other statutes or the license.

84. It is, therefore, difficult to conceive that a third party, who may not have anything to do with enforcement of a regulation or not otherwise would be entitled to file a complaint before TRAI would be entitled to maintain an appeal, but those entities who have a major role to play in effecting 'telecommunication services' would not be able to do so.

85. The English Courts, it may incidentally be noticed, are developing that law in this behalf, that a law cannot be declared unenforceable inter alia by taking recourse to the doctrine of 'modified ultra vires', incompatibility etc.

86. While making interconnection usage charges, we may reiterate only jurisdiction order under Section 11 of the Act was required to be exercised . The impugned Regulations are not in the nature of subordinate legislation in terms of Administrative law..

They cannot be framed in terms of the regulation making power as contained in Section 36 of the Act only.

87. For the foregoing reasons, we have no hesitation in holding that the Preliminary Objection raised by TRAI has no force.

It must be rejected accordingly.

Expert Evidence

88. The appellant Vodafone filed an application for examining same experts before us. Their affidavits have also been filed. They are Dr. Parsan and Mr. Jerry A. Hausman. The said application for examination of the experts was opposed not only by AUSPI but also by TRAI.

89. The contentions raised by them inter-alia are :-

- This Tribunal cannot treat these appeals as original petitions.
- No material has been placed before this Tribunal as to why the said experts were not examined before TRAI.
- So called international best practices on the basis of which the said experts have expressed their opinions are not relevant in the Indian context.

90. The jurisdiction of this Tribunal stricto sensu is not governed by the provisions of the Code of Civil Procedure (Code). In terms of the Section 16 of the Act, this Tribunal can lay down its own procedure. Furthermore while determining the legality and/or validity of the charges fixed by TRAI, this Tribunal is not adjudicating on a dispute between two parties as such. For the purpose of arriving at a just conclusion as to what should be the amount which would compensate the service operators adequately, a large number of factors, including the expert evidence must be taken into consideration. In fact before TRAI itself evidence of some experts as also the reports of some Commissions have been placed, which we have noticed heretobefore. Adduction of

opinion evidence of the experts within the meaning of the provisions of Section 45 of the Indian Evidence Act, therefore, cannot be said to be alien to a proceeding necessary for determination of the charges either before TRAI or before us.

91. One of the questions which has been raised is whether in a situation of this nature, the provisions of Order XLI Rule 27 of the Civil Procedure Code would be applicable. It reads as under :-

"Order XLI Rule 27 of Code of Civil Procedure

R. Production of additional evidence in Appellate Court. *– (1) The parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the Appellate Court. But if-*

(a) the Court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted, or

a[*(aa)*] *the party seeking to produce additional evidence, establishes that notwithstanding the exercise of due diligence, such evidence was not within his knowledge or could not, after the exercise of due diligence, be produced by him at the time when the decree appealed against was passed, or]*

(b) the Appellate Court requires any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any other substantial cause,

the Appellate Court may allow such evidence or document to be produced, or witness to be examined.

(2) Wherever additional evidence is allowed to be produced by an Appellate Court, the Court shall record the reason for its admission. "

Section 45 of Evidence Act.

*"45. **Opinions of experts. -** When the Court has to form an opinion upon a point of foreign law or of science or art, or as identity of handwriting [or finger impressions], the opinions upon that point, of persons specially skilled in such foreign law, science or art, [or in questions as to identity of handwriting] [or finger impressions] are relevant facts.*

Such persons are called experts".

92. Requirements of a Court of Law to take on records additional evidence so as to enable it to pronounce judgment is, thus, itself a ground therefor. It is, therefore, one thing to say that this Tribunal has no jurisdiction to take additional evidence in the appellate proceedings but it is another thing to say that it may take the same on record either on the principles analogous to Order XLI Rule 27 of the Code of Civil Procedure or otherwise having regard to its requirements in terms of Section 16(2)(f) of the Act.

93. It is difficult to agree with the contention of Mr. Vaidyanathan and Mr. Ramji Srinivasan that the international best practices for determination of MTC are not at all relevant. They may be ultimately not applicable but they are not wholly irrelevant. Even ETISASALAT DD has relied thereupon.

94. It is not and cannot be the contention of a party that the international best practices should be the sole criteria for determining the charges, but in our considered opinion there cannot be any doubt or dispute that the same may be considered to be one of the criteria. It would bear repetition to state that upon consideration of all the materials, it is possible for TRAI, as also this Tribunal, not to rely thereupon and/or to arrive at a conclusion that the principles on which this international best practices have been drawn up are not applicable in the Indian telecom scenario.

We have been taken through the affidavits of the said experts and in particular that of Dr. Parson. Dr. Parson is fully competent to opine as to what principles should be followed in determining mobile termination charges.

We, by our order dated 17.12.2009 directed as under :

> *"We, however, on the merit of the application, are of the opinion that in the interest of justice and in particular having regard to the fact that this Tribunal can fix its own procedure and furthermore having regard to the provisions contained in Section 2(C) 14A (7) of the Act, the interest of justice would be sub-served if the reports filed with the rejoinder at pages 1454 and 1554 of the paper book be kept on record.*

The appellants are given liberty to file.

95. The appellants are given liberty to file affidavits of the aforementioned experts by way of affidavits. However, the relevance thereof and/or matters connected thereto as well as other contentions of the parties shall be considered at the time of final hearing.

96. The said experts were present on a few dates before us so that, if necessary, any of the parties can cross examine them.

97. Having regard to the material already available on record and the fact that the said experts can be examined by TRAI itself at a later stage, we although reject the contention of Mr. Vaidyanathan and Mr. Ramji Srinivasan that this Tribunal has no jurisdiction to entertain additional evidence, we direct that in the event of any necessity arises therefor, it would be open to COAI/Vodafone to examine them before TRAI.

98. **<u>CONSULTATIVE PROCESS AND TRANSPARENCY :</u>**

1) The consultative process adopted by the TRAI finds mention in paragraph 4 of the Explanatory Memorandum issued by it. It, therein, noticed the contention of various stakeholders. It took into consideration the methodologies to be adopted for determination of charges as presented by the stakeholders before it. It also allowed a presentation by the 'Spectrum Value Partners' as also one made by AUSPI, wherein they had expressed their reservations about the model proposed by COAI and/or continuation of the existing model.

Indisputably a detailed consultation paper was issued on 31.12.2008. By reason thereof, the stakeholders were asked to express their views in all inter-related issues as contained in paragraph 4.54 of the Explanatory Memorandum. An open house discussion took place at Delhi wherein an opportunity had been given to CEOs' and other Senior functionaries of the operators to present their view point(s) on any of the issues which they might have considered to be important.

2) A second round of open house discussion took place at Hyderabad on 26.2.2009. A presentation was made by TRAI said to be for the purpose of clarifying the key issues addressed by them. A copy of the said presentation is said to have been uploaded on 'TRAI website'.

3) It, however, in the open house discussion at Hyderabad raised eight new issues for consultation. The stakeholders are stated to have been caught by surprise by reason thereof. A representation was made in relation thereto on 2/3/2009. The COAI also responded to the observations made by TRAI during the open house discussions in terms of its letter dated 4.3.2009. Response to the COAI's letter dated 11.2.09 was made by TRAI on 3.3.2009. The COAI again protested thereto by its letter dated 6.3.2009, reiterating the need to maintain transparency in the working of MTC and suggested the mode in which the data used by the TRAI could be shared by it so as to enable it to make meaningful representation.

4) It is, however, admitted that the new Regulations were made on 9.3.2009. It is, therefore, difficult for us to conceive as to how TRAI, within such a short period could apply its mind to various representations made by the operators or addressed itself to the issue of transparency raised by the Association as also the stakeholders.

5) COAI and Vodafone, on the other hand, contended that presentation made by TRAI at Hyderabad was the one wherein some discussions had taken place. COAI and Vodafone objected to the manner in which the purported consultation took place interalia in the following lines

"c) It is clear from the facts set out in paragraphs (c) to (ii) in "Section D Facts" above that the TRAI did not follow the principles of transparency in accordance with Section 11(4) of the TRAI Act. In particular :

i) *Issues for consultation were floated only on 26.2.2009 in the 2nd Open House at Hyderabad, Representations/response to the same were made by the Appellants on 02.03.2009 and 06.03.2009. However, within 3 days thereof the TRAI passed the impugned decision. This shows complete non application of mind. The representations made by the Appellants were not examined or considered and no opportunity of any further hearing was given to the Appellants.*

ii) *The TRAI refused to disclose to the Appellants and other participants in the telecom industry the exact nature of the methodology used for estimating the cost of supplying termination or the specific inputs used in methodology and how those inputs were calculated. As a consequence the accuracy of the proposed MTC cannot be analysed by the Appellants or any other industry participants.*

iii) *The TRAI stated in its Reasons that a number of factors had gone into determining the IUC Charges in the Impugned Regulations. At {4.1} of the Reasons the TRAI stated :*

"Passive infrastructure sharing has brought about a change in the CAPEX/OPEX structure of the service providers. Issue of fresh licenses and allocation of spectrum to new companies would see infusion of capital in the sector based on their perception of viability of operators. Competition is bringing in compulsion of handling traffic more efficiently. More and more service providers are embracing Internet Protocol (IP) networks in a bid to reduce their network CAPEX and OPEX and perhaps prepare for migration to NGN. The Government incumbents have launched 3G services. Auction of relevant spectrum and subsequent deployment of 3G service by other service prodders (sp) is round the corner. It had, therefore, become necessary to consider how these changes would affect IUC."

(iv) *While the above statement suggests that the factors identified above were relevant to the TRAI's decision to determining the MTC, there is no discussion in the remainder of the reasons as to how these factors have been evaluated or taken into consideration by the TRAI in determining the MTC. For example, despite identifying passive infrastructure sharing as a relevant factor in calculating the MTC, on the face of the reasons the TRAI has made no attempt to assess the structural shifts contained in the data sets it used to calculate the MTC. As a consequence, the TRAI's analysis is cursory and an inadequate basis upon which to determine the MTC.*

v) *The cost based approach used by the TRAI to set charges in fulfillment of its statutory function under the TRAI Act should be :*

i) ***Accurate*** *so that the results can be used to support decisions based on the right level of prices;*

ii) ***Transparent*** *so that the methodologies followed for the attribution of costs and preparation of the results can be verified;*

iii) ***Credible*** *so that the telecommunications industry and the market accepts the methodologies and the results of the cost based approach; and*

iv) ***Consistent*** *with established economic principles and regulatory best practices around the world."*

6) According to COAI, TRAI did not disclose the necessary data relied upon by it for determination of MTC to the stakeholders by reason of which it was deprived of taking an effective part in the determination making process, despite the fact that its participation therein was extensive at all stages. According to COAI it was also not aware of the fact that TRAI has excluded capital costs while determining termination charge prior to the impugned decision taken.

7) The level of transparency, required in terms of subsection (iv) of Section 11 should be high. Necessity to give an opportunity of hearing so that the rule of transparency as laid down in sub section (4) of section 11 is imperative Indisputably, TRAI had resorted to not only to issuance of the consultation paper but also allowed the parties to make their own presentations. Apparently the grant of opportunity to all the stakeholders to express their views and to hold two public hearings, wherein every material available with it was placed on the website, including the comments made by all the stakeholders, satisfies the norm laid

down in subsection (4) of Section-11 of the Act, is the question. It is one thing to say that consultation paper was issued or two public meetings were held, but it is another thing to say that thereby the requirements of law to be fully transparent are satisfied.

8) The COAI as also Vodafone contended that it had no idea at all that TRAI was going to determine the charges only on OPEX and not on CAPEX. Such a methodology, in our opinion, which was going to be adopted by TRAI should have been disclosed so as to enable the parties to offer their respective comments thereupon. In other words, what was necessary for TRAI was to let the stakeholders aware as to which methodology was to be adopted so that comments thereupon could be made.

9) TRAI even while maintaining the confidentiality clause, could have placed before the stakeholders certain data which were necessary for effective determination of the issues.

10) It is on the aforementioned premise, although we do not agree with Mr. Gopal Jain that the process of transparency would mean 'see through' or 'mirror image' transparency, the contention of the Association/Vodafone, in our opinion, should have received adequate attention of TRAI. There cannot be any doubt that it was for TRAI to arrive at its own findings upon taking into consideration the relevant materials brought on record but it is not necessary to elaborately deliberate thereupon. What is imperative is to maintain fairness in the entire process.

99. To say the least we would expect that TRAI in future would start a consultative process well in time and formulate the issues seeking response of the stakeholders. Public hearings may be conducted on some major issues on a day to day basis so that the parties may not only make their own presentations but also, if necessary, examine expert witness and bring in sufficient materials on record. But undoubtedly sufficient notice therefor should be given to all the stakeholders.

100. It, for the aforementioned purpose, may indicate the core issues so that the investors would know about all the factors to be taken into consideration in advance before making any new or further investments and that the charges are likely to remain

same for a sufficiently long period and atleast for if not more, three years. There cannot be any doubt or dispute that a well documented policy decision of the nature of IUC is necessary for growth of the Telecom Sector as also long term investment both by the Indian as also foreign players.

101. General Principles

1) The controversies between the parties inter-se are in effect and substance triangular in nature. Whereas in certain respects Vodafone and BSNL proceeded on the same footing; AUSPI as well as ETISALAT took the opposite stand and ; in certain other respects BSNL was opposed by all the private operators.

2) Undoubtedly, therefor task before TRAI was a delicate one. There cannot, furthermore, be any doubt that this delicate task was entrusted to TRAI having regard to its expertise. It enjoys the status of an independent regulator. It has all the Human Resources therefor as well as its infrastructure.

3) It was therefore, bound to apply the correct principles. It is obligated to act within the four corners of the statute. It was required to keep in mind the provisions of the National Telecom Policy. It was required to apply the correct methodologies. The principles and the methodologies which were required to be applied by TRAI are, thus, jurisdictional questions so far as the same relate to determination of Interconnect Usage Charges. (See Anisminic Ltd. Vs. Foreign Compensation Commission 1969(1) All E R 208)

4) TRAI in determining the charges for interconnection amongst the service providers could not have, thus, taken into consideration irrelevant factors not germane for performing its statutory functions nor could it eschew relevant factors. it was required to put unto itself the right question. Framing a wrong question, it is trite, would lead to a wrong answer. It could not have misdirected itself in law.

5) Its jurisdiction being limited to determine the charges on cost based and work done principle, could not have granted any subsidy far less artificial cross-subsidy. It is beyond any doubt or dispute that it was entitled to take into consideration the question in

regard to the plight of new entrants but it could not have been given a complete go by to sound economic principles. It could not have ignored the long term interest of the consumers. It was its duty to adopt such principle which would be conducive for investment in future and in particular in rural and hilly areas.

6) Mr. Vaidyanathan, contended that no operator having raised the question of methodologies adopted by TRAI beginning from 2003 onwards, should be permitted to do at this stage particularly in view of the fact that 2006 charges had been challenged only on the purported ground of lack of transparency.

7) It is difficult to accept the said submission for more than one reason.

Firstly, because we have noticed heretobefore that COAI as also some of the private operators had been filing representations in respect of the said methodologies. It is also beyond any doubt or dispute that a person may become aggrieved by and dissatisfied with the legality and / or validity of a statutory order with the change of time. It is possible for an operator to make its business plan in a particular manner so that it may be able to arrange its own affairs; however, having regard to the changed situation it may not be possible for it to actually continue to do the same.

8) We may notice that in Government of West Bengal Vs. Tarun Kumar Ray, 2004 (1) SCC 347, the Supreme Court of India in response to a submission that the Govt. of West Bengal having not questioned the correctness of an order passed by the High Court in similar situation could not maintain an appeal at a later stage, opined as under :

> *"28. In the aforementioned situation, the Division Bench of the Calcutta High Court manifestly erred in refusing to consider the contentions of the appellant on their own merit, particularly, when the question as regard difference in the grant of scale of pay on the ground of different educational qualification stands concluded by a judgment of this Court in Debdas Kumar (supra). If the judgment of Debdas Kumar (supra) is to be followed & finding of fact was required to be arrived at that they are similarly situated to the case of Debdas Kumar (supra) which in turn would mean that they are also holders of diploma in engineering. They admittedly being not, the contention of the appellants could not be rejected. <u>Non-filing of an</u>*

appeal, in any event, would not be a ground for refusing to consider a matter on its own merits. (See State of Maharashtra v. Digambar MANU/SC/0740/1995 : AIR1995SC1991)"

(Emphasis Added)

9) Furthermore, only because the operators in the past have been able to make some profit by itself may not be a ground to deny the disputants/appellants their valuable right to appeal, on the premise that at an earlier point of time they did not do so. There is no law which mandates that for the purpose of maintaining an appeal, the appellants not produce compelling evidences that the charges fixed by TRAI were going to affect their future nor were they, in absence of any statutory requirements, are obligated to establish that they have suffered net losses by reason of lowering of charges. Operators take licenses and make huge investments to earn profit. In the world of business, profit is not a dirty word. All the stakeholder have different and diverse business interests.

10) We are also unable to agree with the submission of Mr. Vaidyanathan, that interest of new comers would be the principal ground to adopt a methodology for determination of inter-operator charges. Policy decisions, in our opinion, in this behalf should be clear and explicit.

11) It is also difficult for us to imagine as to what prompted the Cellular Operators to lower down their call charges. We have to go by the materials brought on record by the parties and not base our decision on surmises and conjectures. Subsequent event may be relevant, but cannot be the sole basis for determination of the contentions between the parties.

102. Analysis

The grounds of attack so far as determination of the impugned charges fixed by TRAI are concerned, are almost common, being :

1) 70% of the figures adopted by TRAI are presumptive in nature and not on actual figures.

2) The termination charges of 20 paise per month was a pre-determined figure and the reasonings adopted by TRAI were only to arrive at the said figure for which controversies of various nature have been resorted to.

3) The entire exercise by TRAI was an act of fraud on its power.

4) The parameters required to determine the inter operational costs had wrongly been applied as Capital Expenditure should not be directed to be realized by the operators from their own subscribers.

5) Even the operational costs ought to have been determined only on the basis of actual costs and not on hypothetical ones or on the basis of revenue earned. Even if OPEX was to be considered for determining the costs, the same could have included the relevant factors.

6) The profit earned on the basis of charges by the operators being a subsequent event should not be taken into consideration for determination of the present issues.

103. Even otherwise before us Vodafone had filed financial indicators showing reverse decline it has allegedly suffered for the first time in five years in Quarters 1 and 2 of the year 2009-2010 despite increase in the subscriber base to show that whereas in quarter ending September 2008 it was having a cash flow of 791 million pounds, it came down to 765 million pounds in the quarter ending October 2009.

In the aforementioned context, let us also notice:

Revenue Analysis Quarters

Revenue :

India	Q1 09/10 £m	Q2 09/10 £m	Q3 09/10 £m
	755	704	767

EBITDA Margin

H1 07/08 £m	H2 07/08 £m	HI 08/09 £m	H2 08/09 £m	H1 09/10 £m
34.0%	32.0%	28.4%	25.3%	24.0%
389	641	592	759	529

India – Adjusted operating profit

H1 07/08 £m	H2 07/08 £m	HI 08/09 £m	H2 08/09 £m	H1 09/10 £m
(18)	53	7	(37)	(43)

Regional Results - India

Capitalised fixed addition assets.

H1 07/08 £m	H2 07/08 £m	HI 08/09 £m	H2 08/09 £m	H1 09/10 £m
389	641	592	759	529

Operating Free Cash Flow :

H1 07/08 £m	H2 07/08 £m	HI 08/09 £m	H2 08/09 £m	H1 09/10 £m
20	(200)	(219)	(384)	(31)

The correctness of figures supplied to us by M/s Vodafone may not be of much relevance here, but we have noticed the same only with a view to show that the revenue earned by one of the biggest operators may not be as projected by the others.

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We would request TRAI to consider the desirability of obtaining figures compiled by Auditors from the private operators in future so that it may be able to arrive at a correct decision.

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Constituents of Call :

A call has three components:

(a) Origination

(b) Carriage and transit

(c) Termination giving rise to corresponding charges

-

104. Charges

TRAI while issuing the impugned Regulations dated 9.3.2009, laid down the following changes :-

1) Asymmetric/uniform termination charges of 20 paise/minute for all domestic calls in both wireline and wireless network to a uniform ceiling of 65 p/minute on carriage charges in both high traffic urban areas as also low traffic rural, remote, hilly areas.

2) A uniform termination charge of 40 p/minute for terminating incoming international calls on both wireline and wireless networks.

3) A reduction from 20 p/minute to 15 p/minute in carriage charge for intra-circle cellular calls from LDCC TAX to SDCC

4) A reduction in transit charges also from the ceiling of 20 p/minute to 15 P/minute; and

5) SMS termination charge, however, has been left to forbearance.

105. FTC

1) Indisputably TRAI in determining ‘fixed termination charges’ had followed the principles adopted by it in 2003.

The principal question which would arise for our consideration is as to whether it was justified in doing so. In determining the FTC in the year 2003, indisputably TRAI took into consideration the data furnished by BSNL itself in terms whereof the no. of minutes per subscriber per month in land line was 950 minute. BSNL even then, had furnished data only for one month by way of a sample. It however, appears that in its 2009 Regulations, TRAI had taken into consideration the same figure, although according to BSNL the number of minutes per subscriber per month in landline has come down to 511 minutes per subscriber per month.

2) One of the questions is to whether a capital cost should be allowed to be recovered by operator from its own subscribers and whether thereby the work done principle is said to have been followed or not, is another.

3) It is, not in dispute that the percentage of fixed line telephones has come down drastically. Whereas in the year 2003, according to BSNL, the average subscriber base of wireline phone was 950 minutes, in 2008-09, it admittedly has come down to 511 minutes.

4) It is in the aforementioned context, in our opinion, TRAI was required to fix FTC. We may notice that the cost of termination in wireline network would obviously be much higher than in wireless network. Even otherwise the usage of wireline has drastically declined.

5) Principally two factors appear to have worked in the mind of TRAI. One the purported data submitted by private operators which prompted it to conclude that the BSNL data was unreliable and the other being that BSNL had only given one month's sample data which could not have been accepted.

6) It, however, does not appear that as to on the basis of which material relied upon by the private cellular operators, it came to the conclusion that the data furnished by BSNL were not reliable. We have been taken through the proformas enclosed by TRAI as also the performance monitoring report.

Neither of said documents provides for any information to be supplied with regard to disclosure of the actual costs of termination in wireline network.

The proforma as contained in Annexure-F1 was required to be filled up by the private operators circlewise.

Annex- F1

Submission of Fixed Wireline traffic data (Minutes of Usage) to TRAI

Name of the service provider:

For the month of:

Date of submission:

Month----------------2006								
Average Subscribers (Fixed Wireline) in the month	All Local Calls		All Intra- Circle Calls		All Inter- Circle Calls		All ILD Calls	
	Outgoing Minutes per subscriber in the month	Incoming Minutes per subscriber in the month	Outgoing Minutes per subscriber in the month	Incoming Minutes per subscriber in the month	Outgoing Minutes per subscriber in the month	Incoming Minutes per subscriber in the month	Outgoing Minutes per subscriber in the month	Incoming Minutes per subscriber in the month

Similarly by Annexure-M1 the following information was sought from agencies in respect of each, circlewise

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Annex- M1

Submission of Mobile traffic data (Minutes of Usage) to TRAI

Name of the Service provider:

For the month of:

Date of Submission:

Month--------------------2006						
Average Subscribers	All Intra Circle Calls		All Inter-Circle Calls		All ILD Calls	
	Outgoing Minutes per	Incoming Minutes per	Outgoing Minutes per	Incoming Minutes per	Outgoing Minutes per	Incoming Minutes per

	(Mobile) in the month	subscriber in the month	subscriber in the month	subscriber in the month	subscriber in the month	subscriber in the month	subscriber in the month

106. We may notice that the performance monitoring report also does not provide for the minutes of usages terminated by the cellular operators on the fixed lines of any particular operator.

BSNL in its rejoinder categorically contended that they have furnished all the requisite data in the Quarterly Report and the Account Separation Report. TRAI, however, denies or disputes the same. The MoU report suggests that according to BSNL 1823 crore minutes was available. We may notice that TRAI had made projections in respect of the traffic data as well as in case of private cellular operators in its consultation paper dated 31.12.2008. They are in the following terms :-

"6.3.2: The Authority relied on the Proforma B of the Accounting Separation Regulation, 2004 as the source of reliable data of the industry. Treatment of each cost head/item of the Performa is given in Table 6.1 Constituents of each head of cost are already part of the ASR Regulation and have not been described here. All sub-heads of any head of cost that has been included are also automatically included. As has been explained in Section 5.5 in the present exercise the total VAS revenue has not been deducted from the total OPEX. The proportion of VAS revenue to the total revenue has been used to take the appropriate percentage of total relevant OPEX as the deductible. As the VAS revenue is about 10% of the total revenue therefore only 10% of the OPEX has been deducted to account for VAS."

TABLE 6.1:SUMMARY OF PROFORMA B (PROFIT & LOSS STATEMNT-SERVICE) OF ACCOUNTING SEPARATION REPORT	
Particulars	***Remark***
Gross Revenue	*Used for estimating Gross ARPU of the industry*
Cost items	***Treatment***
Pass Through(Interconnection Charges)	*Not included*
Licence Free and spectrum charge	*Included proportionately for termination charge*

Employee Cost	*Included*
Administration Cost	*Included*
Sales & Marketing	*Not included*
Maintenance Cost	*Included*
Network Operating Cost	*Included*
Depreciation and amortization	*Not included*
Finance Charges	*Not included*
Other Costs[excluding loss of sale of fixed assets(net)]	*Included*

"6.3.5 Estimation of the Mobile Termination Charge

Examination and analysis of the P&L accounts of the service providers for the financial year 2007-08 was carried out by the Authority. It was noted that the Average Gross Revenue per user (ARPU- Gross) has shown a declining trend for the period 2007-08 as compared to previous year whereas, the EBITDA margin of the industry has increased from about 35% to about 36% in the same period."

"6.3.6 When growth in the number of subscribers over the period was examined it was noted that in the month of January 2009 alone the industry added more than 15 million subscribers while the average per month in the year 2008 was about 9 million. Therefore projection of subscriber would not yield correct result. Therefore, to arrive at the relevant OPEX per subscriber for future years for estimation of the MTC, the Authority projected the EBITDA margin and ARPU of the industry. The Authority noted that the industry is maintaining consistent EBITDA margin and, in fact, two leading listed telecommunications service providers have declared their EBITDA margin for the year 2007-08 in the range of 40% to 42%. However, the Authority is conscious of the fact that much of future expansion would be in rural areas which would cause pressure on the EBITDA margins of the service providers. To factor this in the Authority considered that it would be more appropriate to take 32% EBITDA margin for the industry for estimating the MTC for the coming year. The Authority expects that gross ARPU would be around about Rs.280 for the financial year 2009-10 based on the trend of the last few years.

Based on the ASR data for the year 2007-08 and previous years it was estimated that the percentage of relevant OPEX that should be considered for MTC should be 43%. These estimations have been made based on financial and non-financial information available in the Account Separation Report. The Authority examined the circle-wise pattern of MOU on different mobile networks and noted that the average Minutes of Usage per subscriber per month (MOU) have increased from 440 to 450 in the same period. However, it is further observed that during the first three quarters of financial year 2008-09 MOU has shown a declining trend. On the basis of above mentioned parameters and ratios, it was estimated that relevant Opex per subscriber per month would be Rs 82. This was further adjusted as already explained above to take care of VAS revenue. The relevant OPEX adjusted for VAS comes to Rs 74 per subscriber per month. This adjusted relevant OPEX per subscriber was dividend by estimated MOU to obtain the MTC which comes to Rs 0.20 per minute. Details of calculations are given below in Table 6.3."

TABLE 6.3: ESTIMATION OF MOBILE TERMINATION CHARGE (MTC)		
Particulars	*Unit*	*Amount*
Gross Average Revenue Per User (ARPU-Gross) per month	***Rs***	*280*
EBITDA Margin	*%*	*32%*
Total Operating expenditure- (Except Depreciation and Finance Charge)	*Rs*	*190*
Percentage Of Relevant Opex to Total Opex	*%*	*43%*
Relevant Opex	***Rs***	***82***
Less: Allocation of Relevant Opex (10%) for VAS	*Rs*	*8*
Relevant Opex (adjusted for VAS)	***Rs***	***74***
Minutes of Use per subscriber per month	*Minute*	*425*
MTC without License & Spectrum fee	*Rs per Minute*	*0.17*
License & Spectrum fee	*%*	*12%*
MTC with License & Spectrum fee	*Rs per Minute*	*0.20*

107. If actual financial data of BSNL was available with TRAI, it was not necessary for it to proceed on certain presumptions. It has been pointed out before us that in fact in the 2003 Regulation also so far as MTC and FTC is concerned, the rates were determined on the basis of the one month's sample data furnished by BSNL. It might have a reason why traffic data of BSNL was not reliable but it could have called upon it to furnish other and better particulars thereof.

108. There is another aspect on the matter which we also must take note of. In the process of determination of various charges in terms Section 11 of the Act, TRAI indisputably can take recourse to and in our opinion, should issue appropriate direction(s) as provided for in Section 12 of the Act, asking the operators to furnish such data or disclose such documents which according to it would be necessary. Such directions can be issued even without breaching the confidentiality clause. It is in the aforementioned context we, are of the opinion that the recovery of CAPEX by an operator only through rentals from its own subscribers may not be justified. Opex only model may not take care of a wireline operator as not only its network should be made accessible to the subscribers of all operators on minute to minute basis, rentals in wireline network would be far below the actual cost. TRAI ought to have noticed and in fact could call for materials from the wireline operators to ascertain as to whether in the light of the prescribed tariffs by it so far as the rural and far-flung areas are concerned, the rentals is far below the actual costs or not.

109. It is in the aforementioned situation we may notice that the TRAI appears to have followed different methodologies for calculation of FTC and MTC. Coming now to the MoU aspect of the matter, it is evident, that at different stages, in place of the ground realities that wireline network is about 36 million vis-à-vis 600 million wireless phones, that is about 6%, the share of wireline network was around twice that of wireless network in 2003. The MoU, therefore, must be different. No reason has been assigned as to why even the 500 MoU figure furnished by BSNL, although found unacceptable, some figure in between the same and the 950 could not have been arrived at.

110. There cannot be any doubt or dispute that wireline network is highly capital sensitive. While calculating the termination charges TRAI appears to have assumed that same as also origination charges should be equal as same network elements are used for

both the purposes.

Recovery of CAPEX, thus was not permitted by TRAI through either termination or origination charge and in that view of the matter even origination charges levied were not sufficient to recover the capital costs or a part thereof. We also fail to see any logic that the fixed line operators should recover the last mile cost through rental only. It is, in our opinion, having regard to the percentage of the wireline phones and the dwindling aspect of the matter, the same was not a relevant factor, particularly in view of the fact that fixation of rental for the said purpose was not prohibited at any point of time.

111. The traffic sensitive incremental CAPEX, would also vary from operator to operator. If a network is designed for 50 Milli erlang traffic per user, it may not be sensitive to incremental traffic at all because normal average traffic per user would be of the order of 20 to 25 Milli erlang whereas the network is designed for 20 Milli erlang, its sensitivity would be greater for incremental traffic.

112. In the light of the aforementioned findings, the fixation of symmetric termination charges by the TRAI, both for wireline and wireless operators, in our opinion, may not be held to be justified.

We say so for various reasons; some of which are:-

(i) Firstly because two unequals have been treated equally. As they stand on different footings, the fixed line operators could not have been compared with wireless network operator.

(ii) By reason thereof the 'cost based and work done principle' stood disregarded.

(iii) It ought to have considered actual use of network in both the cases.

(iv) It wrongly applied the sold units or actually handled minutes usage in case of wireless network and saleable units or handling capacity in case of wireline networks.

(v) Furthermore, as indicated heretobefore, TRAI has no jurisdiction to establish a cross subsidy between competitors. A cross subsidy in a wholesale market vis-à-vis a retail market would otherwise be difficult to recover having regard to the ground realities and market forces.

(vi) There does not exist any logic of alternating network to subsidize the call originating network.

We, therefore, are of the opinion that fixation of 20 Paise for termination charge for FTC should be considered afresh on the basis of materials on record.

113. MTC

The Principles

1) TRAI has proceeded on the basis that in determining MTC, the correct principle is to apply is cost based and work done.

2) Whereas TRAI is said to have taken OPEX into consideration and exclude capital costs, according to AUSPI and ETISALAT, the same should have been based on the revenues earned by the mobile operators.

3) BSNL, COAI and Vodafone, on the other hand, would contend that the principles which should have been applied by TRAI in calculating MTC were :

a) Cost-based rate;

b) Avoiding cross-subsidies;

c) Encouraging investment;

d) Paying for resources used to provide termination;

e) Include traffic sensitive costs in traffic sensitive rates and allocate non-traffic sensitive costs to be recovered via non-traffic sensitive rates;

f) Inclusion of capital costs for number portability;

g) Gradual move to FL-LRIC;

h) Reference to U.S. economists, a finance textbook, international trends, “well established” and “well recognized” principles.

i) The establishment of a mobile calling-party pays regime.

4) According to AUSPI and ETISALAT, TRAI had committed an error in so far as :

(a) It should have calculated termination charges on the basis of inflated revenue based of ARPU trend which was 205 and not 280 of the capital cost which are not relevant as per cost causation termination principle.

(b) It should have taken into account the entire revenue earned from the Value Added Service and not a part of it.

(c) It should not have taken into account the question of licence fee/spectrum fee realized from the operators so as to reduce the cost.

(d) It should have adopted ‘Bill and Keep’ method of accounting which is consistent with cost causation principle.

(e) TRAI should have been provided uniform cost.

5) Different methodologies have been advocated before us. Whereas Vodafone and COAI state that it should be LRIC or the Hybrid principle thereof; TRAI had adopted bottom up approach.

AUSPI and ETISALAT advocated ’Bill and Keep’ method which was rejected by TRAI.

Para 5.3.11 to 5.3.13 of the Explanatory Memorandum read that :

"5.3.11 Bill and Keep was another method suggested. In this method the service providers do not pay any termination charges to each other. This method has the advantage of the service providers not transferring costs of their network to interconnecting service providers and also of low regulatory costs. This method does not work if the traffic flows are imbalanced or the service providers are at different stages of network deployment. It may not properly compensate the service providers and may not encourage development of efficient networks.

5.3.12 The supporter of bill and keep claimed that zero MTC under bill and keep regime is one of the most pro consumer and pro competitive. According to them the zero MTC regime will remove all controversy caused by data ambiguity, reduce the risk of subjectivity and would be future proof IUC regime. These service providers also said that payment of termination charge unnecessarily blocks funds with the service providers which could be used for expansion of the network. These service providers also argued that this higher MTC is responsible for massive difference between off net and on net tariffs and also increasing consumer confusion.

5.3.13 The bill and keep proposal of the service providers was analyzed and it was noted that this could mean return to situation prevalent before the present IUC regime was established i.e receiving party used to pay for incoming calls. One of the fundamental principles of prescribing IUC regime was work done principle. It was also noted that tariff before the IUC regime were very high tariff. The service providers may again resort to charging their own subscribers for receipt of calls or increase fixed charges of providing the services. As the service providers do not have to pay for termination of calls into other service provider networks they may offer plans with free calls which could load other service providers' networks. Bill and keep regime may also reduce call completion rate as the terminating network will not have any incentive to complete the call. Bill and keep scheme would not necessarily lead to the lower tariff as is evident from the tariff offered by the service provider in case of SMS etc."

6) AUSPI had also asked for asymmetrical charges contending that whereas the termination charges should be low, origination charges should be high so far as new entrants are concerned.

It is in the aforementioned backdrop, we would consider each of the charges separately.

114. <u>Quantum Issue</u>

1) BSNL contended that the MTC should be fixed at 20 p. It has been accepted by TRAI .

AUSPI and ETISALAT suggested less than 10 p. On the other hand, COAI and Vodafone suggested 35 paise per minute.

2) According to COAI and Vodafone, the errors committed by the TRAI are as under :

i) The TRAI has excluded Capital Costs in calculation of termination charge while determining cost based termination charge.

ii) TRAI has fixed a below-cost MTC which gives a cross subsidy to competitors [though it is not a competent authority to permit subsidy between operators].

iii) Unlawful subsidy is extended to competing originating operators at the cost of the terminating operators.

iv) The TRAI proceeded in a predetermined manner and excluded capital costs. The entire process was therefore flawed and was an arbitrary exercise. The TRAI had decided to reduce MTC without proper consideration of the material/methodologies and without application of mind.

v) The TRAI has proceeded on the basis that capital costs can be recovered from retail rates, which, in a competitive market, is impossible.

3) AUSPI, on the other hand, contended :

(a) The actual cost for the effective operation is Rs. 0.09 per minute.

(b) Actual data submitted as also existing data would also demonstrate that the cost of termination would be less than 10 paise.

(c) Fixed 20 paise MTC produces the return for more than 122% to an operator although the allowable return fixed by the TRAI is only 14%., Even in case of IUC revenue, TRAI has allowed 13.93% as would be seen from para 41 of the Explanatory Memorandum of IUC Regulation dated 29.01.2003, which reads as under :

"41. The Authority then addressed the weighted average cost of capital (WACC) used for BSNL, based on the recent data provided for 2002-2003. The WACC for BSNL has increased slightly from 13.78% in 2001-2002 to 13.93% in 2002-2003, because of a reduction in the debt of BSNL. As mentioned above, while this estimate has been used for the IUC exercise, a WACC of 12.21% has been used for calculating the access deficit of BSNL that needs to be funded."

(e) The figures mentioned at para 6.3.6 for determining the termination charge of Rs. 0.20 are erroneous. It reads as under :

"6.3.6 When growth in the number of subscribers over the period was examined it was noted that in the month of January 2009 alone the industry added more than 15 million subscribers while the average per month in the year 2008 was about 9 million. Therefore projection of subscriber would not yield correct result. Therefore, to arrive at the relevant OPEX per subscriber for future years for estimation of the MTC, the Authority projected the EBITDA margin and ARPU of the industry. The Authority noted that the industry is maintaining consistent EBITDA margin and, in fact, two leading listed telecommunications service providers have declared their EBITDA margin for the year 2007-08 in the range of 40% to 42%. However, the Authority is conscious of the fact that much of future expansion would be in rural areas which would cause pressure on the EBITDA margins of the service providers. To factor this in the Authority considered that it would be more appropriate to take 32% EBITDA margin for the industry for estimating the MTC for the coming years. The Authority

expects that gross ARPU would be around about Rs 280 for the financial year 2009-10 based on the trend of the last few years. Based on the ASR data for the year 2007-08 and previous years it was estimated that the percentage of relevant OPEX that should be considered for MTC should be 43%. These estimations have been made based on financial and non-financial information available in the Account Separation Report. The Authority examined the circle-wise pattern of MOU on different mobile networks and noted that the average Minutes of Usage per subscriber per month (MOU) have increased from 440 to 450 in the same period. However, it is further observed that during the first three quarters of financial year 2008-09 MOU has shown a declining trend. On the basis of above mentioned parameters and ratios, it was estimated that relevant Opex per subscriber per month would be Rs 82. This was further adjusted as already explained above to take care of VAS revenue. The relevant OPEX adjusted for VAS comes to Rs 74 per subscriber per month. This adjusted relevant OPEX per subscriber was divided by estimated MOU to obtain the MTC which comes to Rs 0.20 per minute."

(f) TRAI did backward calculation after deciding the said MTC to favour the existing operators.

(g) EBIDTA margin of 32% having been incorrectly taken into consideration as two service providers declared their own EBIDTA margins for 2007-2008 in the range of 40-42% which should have been given reduction of 10%.

(h) In order to determine relevant OPEX on the total one, TRAI not only should have deducted sales and marketing costs but could not deduct. expenditure of the operators on the other heads of expenditure which having no connection with termination charges were wholly irrelevant, such as :

i. Administration and other misc. cost of auditors;
ii. Personnel
iii. Network and equipment costs
iv. Provisions for bad and doubtful debts etc.

(i) Accounting separation report of established operators should not have been related to ARPU as OPEX of new operator is much lower.

3) We would first consider the cost components in regard to which the parties are at variance :

According to Vodafone, the following would constitute CAPEX:

(a) cost of capital being a reasonable rate of return of capital employed;

(b) depreciation

The appellant would contend that the respondent's inference that the operators are able to recover their CAPEX from the revenue streams already available to them which is reflected in the Accounting Separation Report of both the companies showing the surplus profit of Rs. 33 and Rs. 75 per subscriber per month respectively after recovering all the costs i.e. OPEX + Depreciation+ Pre-tax ….. /ROCE at a rate if 15%. The appellant would further contend that the same figures are available at page 2490 of the Appeal No. 4 of 2009 which is consisting M/s. Vodafone as appellant no. 4. The above submission on behalf of the appellant is in consonance with the audited accounts of the two major operators who are demanding higher mobile termination charges in these appeals.

Indisputedly, methodology adopted by TRAI was the OPEX. It appears from the consultation paper issued by the TRAI as also its determination of the charges in 1999, 2002 and 2003. On the other hand, Mr. Mahesh Agawam states that allocation of capital cost and expenditure cost should be considered .

The Authority issued a Consultation Paper dated 23.09.2002 and this paper discussed the underlined cost and the cost apportioning method to various products and services. However, the allocation of capital cost was also carried out in this process and the same is shown as follows :

Scenario –I

Cape from Access loop to SDCC - from monthly rental

(22.77% ARE)

OPEX from Access loop to SDCC - X% from local call charge

- 1-X% from long distance Call charges.

Cape (22.77% ARE) & OPEX SDCC onwards - from long distance call charges.

Scenario –II

Cape from Access loop to SDCC (22.77% ARE) - X % from monthly rental

- 1-X% from long distance Call charges.

OPEX from Access loop to SDCC - X% from local call charge

- 1-X% from long distance Call charges.

Cape (22.77% ARE) & OPEX SDCC onwards - from long distance call charges.

This cost allocation methodology adopted by the Authority remained the formula for the allocation of cost for different cost elements to different revenue streams. The appellant would contend that the same methodology of allocation of cost to different revenue streams was further clarified in the explanatory memorandum to the IUC Regulation dated 24.1.2003.

TRAI however, contends that Capital Expenditure incurred by cellular operators could be recovered from monthly rental charges, process fees and other administrative charges.

In its Explanatory Memorandum of IUC Regulation TRAI stated :

"Calculation of Interconnection Usage Charges

7. As on date, the incumbent BSNL is the Main Significant Operator that provides Basic and NLD services covering about 38 million subscribers through a Basic Service Network of more than 35000 local exchanges located at various urban and rural sites spread out in 2647 SDCAs and Long Distance Network with TAX switches in 21 Level I and 301 Level II LDCAs. It has Intra-SDCA, Intra-LDCA, Intra-Circle and Inter-Circle digital transmission Network, mainly on the Optical Fiber media, which is used for interconnection between various switches as per a Network Hierarchy.

8. In the absence of actual cost data, the Authority had initially estimated IUCs using a bottom up approach i.e. partly based on a Proxy Model. These estimates were presented in its Consultation Paper (2002/3) for comments.

Subsequently the Authority was provided with the network element and other costs by BSNL in the course of the consultations and subsequent discussions. When compared with the expenditures by the BSNL, these figures were found to be too high. Correspondence with BSNL to clarify the matter was not conclusive. Meanwhile the BSNL published its balance sheet for the year 2001-2002, which provided the Authority with an alternative source of data based on which IUC calculation was

feasible. Accordingly for its IUC estimates, the Authority has used the data available in the Annual Report 2001-02 of BSNL together with certain other information provided to it by BSNL, in their interactions with the Authority.

9. For the IUC exercise the Authority has taken the CAPEX, Depreciation and OPEX as derived from the audited BSNL figures for the Financial Year 2001-2002 (please see Table 1). The components include data on Depreciation charges during the year, Net Block, Capital Works in Progress, Current Assets, Current Liability, Employees Remuneration and administrative expenses. Information on the number of DELs at the end of the period is also provided. CAPEX + Depreciation costs and OPEX costs have been converted to cost per line against these heads by dividing the costs with the DELs as on 31.3.2002. The derived values have been also adjusted for costs attributable to telephone service with the assumption that only 95% of total revenues are derived from these services.

10. The overall CAPEX and OPEX have to be allocated to different parts of the network. This has been done by allocating these costs to the various network elements in the same ratio as has been done by the BSNL in its RIO Schedule cost data submitted to the Authority. Thus, based on BSNL inputs, the aggregate amount of CAPEX + OPEX has been allocated to network elements based on Mean Capital Employed for each un-bundled Network Element as shown in Table 2.

11. The data on minutes of use attributable to various Network Elements is as per the submission of BSNL to the Authority and pertains to April 2002. The data provided by BSNL shows the share of long distance calls (Inter-SDCC long distance minutes) to be 16.28 % of the total minutes. Since April 2002, the usage pattern for these calls is estimated to have changed substantially following the substantial price decline in the tariffs for long distance calls.

Moreover, long distance tariffs are declining even further, and this too will affect the usage of these calls, leading to an increase in their share in overall minutes. In view of these developments, and based on the extent of tariff decrease and elasticity of demand ranging between 0.3 to 0.5, the Authority has taken the share of these calls to be 22 % of the total minutes (Table 3). This is also borne out by the fact that the decline in BSNL revenue has been lower than the extent to which it should have declined in the light of the long distance tariff reduction had the share of such traffic remained at 16.28% of the total, as was the case earlier.

Further, the data on revenues, metered call units and DELs from BSNL covering A&N, Haryana, J&K, Karnataka, Punjab, Tamilnadu, Uttranchal and Calcutta for 3 months ending September 2002 suggest that Inter-SDCC long distance

contribution could be around 22%. Data from other Circles is still not available. Thus, for the IUC calculations, the Authority has considered Inter-SDCC long-distance minutes of usage as 22% of the total minutes.

12. On the above basis, Table 4 provides Cost per Minute for various unbundled Network elements. The costs do not include the amounts paid for revenue share License Fee and Spectrum Charge, because these cost items depend on the revenues earned, which in turn are not certain in view of the ongoing changes in competition driven market prices. However, to account for revenue share License Fee and Spectrum Charge, the cost based estimates have been enhanced by 12% for basic service and 15% for national long distance service."

As per 2003 Regulations, the IUC components, carriage and termination should form the basis thereof. A clarification was issued by TRAI regarding OPEX cost appearing in its explanatory memorandum:

" (c) Cost of capital and Operating Costs for the IUC exercise

*35. The distribution of CAPEX is based on the shares in CAPEX of the thirteen different network elements that were provided by BSNL in the context of the Reference Interconnection Offer (RIO) exercise, and were used in the previous calculation of IUC. The OPEX was also distributed across these elements in the same ratios as CAPEX. For the IUC exercise, the cost based monthly rental was determined on the basis of cost of capital employed and depreciation for the year (CAPEX) from end-user up to (but not including) the SDCC (i.e. network elements 1, 2, 3, 6 and 7 in **Table 5**). The cost based rental is calculated after making the adjustments for the compensation given by the Government to BSNL.*

Table 5
Apportionment of CAPEX + Depreciation and OPEX to different network elements based on BSNL Annual Account 2002 - 03

	Network Element	***Annual Depreciation + Cost of Capital***	***Annual Opex***
		in Rs Crore	***in Rs Crore***
1	*Access Loop*	*7243*	*4859*
2	*Local Exchange*	*3429*	*1808*
3	*SDCC Tandem*	*214*	*113*

4	*Intra-LDCA (Level II TAX)*	*219*	*111*
5	*Inter-LDCC Intra Circle + Inter Circle (Level I)*	*219*	*111*
6	*LE-SDCC Transmission Systems*	*549*	*290*
7	*LE-SDCC Transmission Systems Length (Avg 10km)*	*1024*	*687*
8	*SDCC-LDCC Tax Transmission*	*116*	*59*
9	*SDCC-LDCC Tax Transmission Length (Avg 40 km)*	*538*	*342*
10	*Inter-Tax Transmission System (Intra-Circle)*	*54*	*27*
11	*Inter-Tax Transmission Length (Intra-Circle) (SDH Rings)*	*229*	*146*
12	*Inter-Tax Transmission SDH16 System (Inter-Circle)*	*57*	*29*
13	*Inter-Tax Transmission Length (Inter-Circle) (SDH Rings)*	*456*	*290*
	Total	*14348*	*8870*

36. The Authority also examined the principle, as it had done previously, whether the cost based monthly rental should be based on the allocation of costs attributable to non-traffic sensitive part of the network. This is more in line with the pricing principles under which the cost of local calls should be linked to incremental or traffic sensitive costs. The Authority considered this matter again with the revised cost data and the applicable routing principles. Even now, if the monthly rentals are calculated based only on non-traffic sensitive portion of the network, the cost of local call becomes higher than the amount sustainable under the prevailing tariff regime. Thus, such a cost attribution would imply an increase in local call charge, which the Authority did not favour imposing. Thus, the Authority decided to continue with its previous methodology of cost allocation for determination of monthly rentals and call charges. The Authority did, nonetheless, feel that by the time the next review of the IUC regime is conducted, the situation may have changed to make such a cost allocation more acceptable.

*37. The cost of a local call was determined on the basis of operational costs (OPEX) within the local call area. For this purpose, the operational costs covering the same elements as for cost based rentals, were divided by the total minutes of use that were relevant for each of the corresponding network elements (please see **Table 6**). To derive the relevant minutes of use, the Authority used the routing factors that were determined on the basis of discussions with BSNL as well as experts (Please see **Figure I** for the routing schemes). The process allocates this joint cost among the various types of calls (local/ long distance and intra-network/ inter-network) on the basis of minutes of use.*

Table 6

Network element wise Minutes of Use (MOU)

	Network Element (N.E.)	***MoU per sub. per year***
1	*Access Loop*	*11405*
2	*Local Exchange*	*11011*
3	*SDCC Tandem*	*7116*
4	*Intra-LDCA (Level II TAX)*	*3043*
5	*Inter-LDCC Intra Circle + Inter Circle (Level I)*	*939*
6	*LE-SDCC Transmission Systems (Local Exchange)*	*10618*
7	*LE-SDCC Transmission Systems Length (Avg 10km)*	*10618*
8	*SDCC-LDCC Tax Transmission*	*3457*
9	*SDCC-LDCC Tax Transmission Length (Avg 40 km)*	*3457*
10	*Inter-Tax Transmission System (Intra-Circle)*	*1447*
11	*Inter-Tax Transmission Length (Intra-Circle) (SDH Rings)*	*1447*
12	*Inter-Tax Transmission SDH16 System (Inter-Circle)*	*421*
13	*Inter-Tax Transmission Length (Inter-Circle) (SDH Rings)*	*421”*

5) As no consensus on methodology was arrived at, it rejected the Bill and Keep method as also FL-LRIC and / or Hybrid method stating :

a. FLRIC methodology is not based on any accounting procedure and as such difficult to audit.

b. The roaming in the Hybrid FL-LRIC method taking the cost of hypothetical new entrant being subjective and different realization may arise in the case of different operators.

Since actual cost has been taken, FL-LRIC is wholly irrelevant.

Bill and Keep method cannot be complied as transaction between two operators in particular the established operators vis-a-vis new operators would not be the same. Next, on the other hand, a fully allocated cost method is devoid of reliability.

We may in this connection notice TRAI's treatment on CAPEX:

"Treatment of CAPEX

5.3.20 Some of the service providers have argued that allocation of relevant OPEX only for termination charge and not taking CAPEX into account is not the right way of calculating the termination charge. They further argued that for the capital-intensive industry there is a need to take the CAPEX also into consideration for calculating the termination charge. Some even linked it to highways where toll charges take CAPEX into account. This only goes to demonstrate that the point being missed is that the telecommunications infrastructure is different from all other infrastructures because of network externalities. The value of the telecommunications network increases for its subscribers as more and more subscribers join the network. When networks grow, networks interconnect with each other; the perceived value increases for all the subscribers. Another fact that one has to remember is that termination charge is not the only stream of revenue from which all CAPEX and OPEX need to be recovered. There are other streams like fixed charges, origination charge, revenue from value added services and so on.

5.3.21 The Authority analyzed this matter in two ways (a) whether service providers are able to recover all of their costs of providing the services by the scheme of taking only relevant Opex into consideration for termination (b) How will the effect of taking Capex in calculating the termination charge would affect the present regime.

5.3.22 The service profit and loss analysis has been done for the major service providers on the basis of the data furnished by them in their account separation reports and it is found that in some cases surplus revenue, over and above the reasonable profits(15% WACC), for some of the service providers is as much as 16 paise per minute which clearly indicates that service providers are able to generate sufficient revenue and cash flow in their mobile service operations. The GSM mobile industry has surplus revenue of 10 paise per minute and wireless industry on the whole has surplus of 5 paise per minute. This surplus indicates that the service providers not only are able to recover CAPEX, OPEX and reasonable profits from their operations but they are also having surplus over and above that. Thus rationalization of termination charge based on current factors should not cause them concern.

5.3.23 Considering the CAPEX or even proportion of it for calculating the termination charge would unnecessarily transfer the burden of business decisions taken by the service provider to the interconnecting service providers. Decisions like planning horizon, network dimensioning, technology induction of a service provider should not affect the interconnecting service provider who should be required to pay the bare minimum cost. Taking CAPEX in calculating the termination charge would mean that the interconnecting service provider would not have any choice of innovative tariff plan or rentals. Service providers are free to recover their CAPEX from the rental and the origination charge that is under forbearance. The argument that now there are more than 90% subscribers on the prepaid segment and therefore, there is no rental revenue to recover CAPEX from is also weak. The tariff is under forbearance and it is the service provider who has to see the viability of the plans he launches. While launching these plans the service providers were well aware of the IUC regime and the fact that only relevant OPEX is to be recovered from the termination charge. In fact, when one of the service providers launched the lifetime plan it presented to the Authority proof of viability and sustainability of the tariff plans for their business. There is also a case of a service provider offering Re 0.10 per minute for all incoming calls showing that the operators were able to recover cost.

5.3.24 In the fully allocated methodology all the costs of the service providers should be recovered through one component or other. If CAPEX is also allowed to be recovered through the termination charge then termination charge would widely vary among the service providers since some of the service providers might have invested more in the capital

expenditure keeping in view their future forecast and their business plan. This cost would be transferred to the interconnecting operator.

5.3.25 With regard to relevant network elements and cost, the Authority recalled that in the previous IUC exercises the cost of local call was determined on the basis of operational cost (OPEX) within the local area. The Authority analyzed the principle of allocating relevant OPEX to local call in today's context. The Authority found that now the service providers are offering innovative tariff plans in such a way that it is very difficult to estimate the revenue generated from the rental and the call charges. Since now service providers are offering tariff s in such a way that some of the tariff plans have higher rentals but lower call charges while others have lower rental but higher local charges. This has been possible because of the policy of forbearance in rental and origination charges. Since it is difficult to distinguish the revenue generated from these two streams separately now it has become more relevant to go with the same principle as has been adopted in previous IUC Regulations."

6) According to TRAI, the contention of the Vodafone and COAI on the one hand, and AUSPI and ETISALAT, on the other, with regard to methodologies should be rejected and it took a decision to stick to the old methodology.

7) We may, however, notice that it is not the case of COAI or Vodafone that the entire element of CAPEX would require to be taken into consideration. What was needed according to them was to take into consideration is only the traffic sensitive costs.

8) There cannot be any doubt or dispute that having regard to many methodologies placed before TRAI, it had to take a decision on one or the other methodology. The question, however, would remain as to whether despite adoption of one or the other methodology, TRAI had acted properly in calculating the traffic sensitive costs a cost based MTC.

9) Before TRAI some experts' opinion had been produced.

Before us also, as noticed heretobefore affidavits of two experts being Dr. Steven Gene Parson & Mr. Jerry A. Hausman.

10) COAI had submitted an expert report of Spectrum Value Partner. The report of European Commission has also been placed before us.

11) European Commission is now advocating a so-called PURE LRIC methodology. While in LRIC methodology, many common costs are not allocated to the rates.

European Commission on termination charges stated :

"(1) European Commission on Termination Charges:

European Commission and ERG has done a lot of work on termination charges and still in the process of review for a long-term regime to be introduced before the migration to NGN takes place. Aiming to spur competition among operators and lower phone charges for European consumers, the European Commission started a public consultation on the future regulation of "voice call termination rates" in the EU based on a draft Commission Recommendation on termination rates. EU observed that Voice call termination rates are the wholesale tariffs charged by the operator of a customer receiving a phone call to the operator of the caller's network. Such charges are are determined by the intervention of national telecoms regulators, included in everyone's phone bill, and therefore eventually paid by the consumer. EU observed that the decisions of the national telecoms regulators result in very divergent rates across the EU. Mobile termination rates range from €0.02/min (in Cyprus) to over €0.18/min (in Bulgaria) and are 9 times higher than fixed line termination rates (on average €0.0057/min for local call termination). This distorts competition between operators from different countries and between fixed line and mobile phone operators.

The Commission, after assessing over 770 regulatory proposals by national regulators over the past 5 years, observed that price regulation of termination markets across Europe lacks consistency. It said that gaps between fixed and mobile termination rates and between mobile termination rates imposed by national regulators cannot be altogether justified by differences in the underlying costs, networks or national characteristics.

At present, fixed operators and their customers are indirectly subsidising mobile operators by paying higher termination rates for calls made from fixed lines to mobiles. This cross-subsidisation is estimated at €10 billion in Germany for 1998-2006 (WIK Consult) and €19 billion in the UK, Germany and France for 1998-2002 (CERNA-Warwick-WIK)."

Keeping in view the entirety of the situation, we are of the opinion that TRAI should consider the matter once again upon taking into consideration all aspects of the matter including the views of the Experts.

12) The Australian Competition and Consumer Commission and Convent of Inter Carriar, USA as well as FL-LRIC proposal for unified regime have been placed before us by Mr. Vaidyanathan.

These papers discuss various methodologies. We as at present advised cannot and should not consider as to whether any of the recommendations should weigh with the TRAI. It is necessary to take into consideration some of the recommendations for arriving at a joint conclusion. Acceptance of one or the other methodologies should be supported by reasons. We would, however, like to make some general comments on the subject.

Apart from the cost based charges and work done charges, charges for incoming and outgoing calls at the end of the Cellular Mobile Service Providers known as Airtime charge, it is difficult to accept that it should be realized by them only from their own customers.

They are required to collect "PSTN Charges" in addition to Airtime charge from its customers and pay this PSTN charge as a Termination Facility Usage Charge to the fixed/PSTN network. Once the calling party regime principle, has come into being in contrast to earlier regime, where even a party receiving a call was required to pay a part of a airtime charge, various components of IUC namely, Origination charge, carriage charge and termination charge must be held to be the established principle of cost based determination therefor.

IUC are obtained by dividing the network cost data by network traffic wherefor it is imperative to take into consideration for the relevant purpose, context and time period so as to enable a rational result to be yielded.

An established service provider, in common parlance, have two categories of customers. One retail customers and two wholesale customers. Retail customers are those who are direct customer of service provider meaning thereby with whom there exists a privity of contract.

Wholesale customers, however, would be those who take the services not only of the service provider with whom it has a contractual relationship but with another who is providing interconnect services to another service provider. When the customers of the wholesale market take the benefit of the services not only provided by the service provider with whom he has a privity of contract but also from another with whom he has none, it is difficult to concieve, that charges would be fixed only on the basis of retail markets.

It is not in controversy that the service providers are required to be compensated for the resources used by other service providers. It is, therefore, difficult to perceive the submissions made by Mr. Srinivasan and Mr. Aggarwal that those who provide services to the customers to other service provider also are deriving benefit thereunder.

We may notice that the TRAI itself in para 5.3.2 has opined :

"Economists and regulators agree that the approach adopted should be adapted to local conditions and should be based on cost so that the service providers are compensated for their resources used by the other service providers. However, it is difficult to strictly align prices with the costs. Interconnection usage charges imply setting charges to compensate explicitly one operator for the costs imposed on him by the other operator's use of his network to originate or terminate a call. The operator paying the interconnection usage charge "owns" the call and takes the risk of disputed and unpaid charges."

We may furthermore notice that TRAI in its consultative process undergone by it noticed that most of the service providers and consumer associations had argued in favour of the cost based pricing methodology:

"*5.4.2 Most of the service providers and consumer association have argued in the favour of cost based pricing methodology. These service providers argued that cost based pricing methodology accurately reflects the underlying cost for providing interconnection services and is more transparent. However, one or two service providers have also argued for the cost oriented approach. The Authority is of the opinion that suitable methodology be applied based on the charges under consideration and prevalent situation."*

The cost of network is numerator and traffic in minute flowing on the network is denominator.   The traffic would include :

(a) Traffic originated and terminated within the network.

(b) Outgoing traffic to other network.

(c) Incoming traffic from other network.

There again cannot be any doubt or dispute that for the purpose of arriving at a reasonable termination charge at a particular point of time the cost and traffic data of MOU should be for the same period and that too should be the most recent one. TRAI itself has recorded the same in para 6.3.1 of the consultation paper.

However, a question remains as to whether TRAI was justified in taking into consideration only OPEX for the purpose of determining charges of termination by observing that the CAPEX / OPEX should be realized by service provider from their own customers and partial OPEX from other operators.

It must not be forgotten that every operator must keep its network maintained for use by its own subscribers as well as by subscribers of another operators on equal basis. If that be so, we fail to see any reason as to why the traffic sensitive cost contained in CAPEX should be kept out of consideration. In any event the effect thereof should have been in our opinion taken into consideration by TRAI. Sticking to old methodology by itself may not be a virtue.

TRAI in the regulation, in our considered view, failed to take a very significant aspect of the matter into consideration, namely, those who are making investments for infrastructure and those who are hiring them out.

Those who have adopted hiring method, in the context of CAPEX viz-a-viz OPEX will be spending more towards operational cost viz-a-viz Capital costs. Those operators who followed CAPEX model, thus, will be deprived of a part of investment made by them. Although, another operator adopted a hiring model and who did not make any investment would get the benefit thereof. In other words, the OPEX of the operators following the hiring model would also include the CAPEX.

If annualized capital cost is also taken into consideration alongwith OPEX for calculating the network usage charges payable by the subscribers of all the operators irrespective of the fact as to whom they belong to, could lead to the determination of fair amount of compensation irrespective of any model taken by any operator.

Traffic is under forbearance. An operator upon taking into consideration a large number of factors were offering various plans having either a fixed monthly charges or variable calls and / or the mixture of the two. In the present Indian Telecom scenario which offers the lowest termination charge and highest growth in the world is to a large extent driven by the market forces.

Although we agree that it might not have been possible for TRAI to lay down different charges for different operators, it could not have given a complete go by to the cost based principle or work done principle.

Furthermore, each of the operator, be it an established one or a new entrant; be it servicing metropolitan cities or the rural areas or semi urban areas, must be able to compete with the other.

TRAI was therefore required to consider that all the operators must offer the call charges to its customers which would be sustainable in the long run. ARPU, moreover, may not depend on tariffs alone but implementation of business model and deals from the operations also have a role to play.

It is not in controversy that cost would include CAPEX/OPEX and depreciation. There exists also, of course, a difference between the operators running a wire link network vis-a-vis wireless network or both.

It is in the aforementioned context, probably, the experts had opined that cost based approaches for computing IUC must include the cost irrespective of whether their capital cost or operating cost failing which a cross-subsidy with negative consequence on competition and indifferent regime has come into being.

While saying so, we are not oblivious of the fact that it might not have been possible for TRAI on the basis of existing data to come to a definite conclusion as to what would be the actual traffic sensitive cost from the materials placed before us by private operators including the established operators.

But once it was, on principle, possible to arrive at a conclusion that CAPEX in its entirety may not be disregarded and at least receive serious consideration of the heads of TRAI, the details thereof and / or other relevant particulars could have been directed to be supplied to it by the operators.

We are furthermore of the opinion that aggregation of cost, whether Capital cost or operating cost being based on different accounting principles, different techniques and standards for various purposes including taxing purpose may have to be applied to give effect to cost causation principle and so far as determination of IUC including termination charges are concerned.

TRAI, could not be at variance with its own objectives. For the said purpose a sound economic principle could not have also been turned the blind eye nor international based practice could have been totally ignored.

It was also required to bear in mind that the operators are required to make more investments. A charge should not be based on some premise which would not be investment friendly. Even otherwise, the experience of the TRAI itself is that the established operators are not very much willing to spread their network in rural and far flung areas. If that be so, it was necessary to have a more detailed and elaborate discussions. The TRAI as an expert body should have a vision, what can happen in future keeping in view the experience of other countries may be borne in mind.

A case based on sound reasonings and rationality was, therefore, required to be made for arriving at a correct methodology. The principles/theories play an important role. They should be clearly spelt out and applied.

115. <u>CARRIAGE CHARGE</u>

1) A ceiling of 65 Paise/Minute has been fixed towards carriage charges both in respect of the high traffic urban areas as also the low traffic rural, remote and hilly areas.

2) We may furthermore notice that in the 2003 Regulations, different charges were prescribed towards carriage charges, beginning from 20 Paise to 1.20 Paise. An amendment was carried out in the year 2006 where again a ceiling of 65 Paise was prescribed. We may, however, place on record that BSNL being aggrieved by and dissatisfied therewith preferred appeals before us which are marked as Appeal No. 1 and Appeal No. 8 of 2006. We have allowed the said appeals by a judgment and order dated 21.5.2010. The matter, we are informed, is pending before the Supreme Court of India.

3) One of the questions which was raised before us that no change having been carried out in respect of carriage charges, these appeals are not maintainable.

Ceiling of 65 Paise/Minute towards carriage charge is mainly being contested by BSNL. According to it, the 2003 regime should have been maintained keeping in view the fact that it had expanded its network not only in the metropolitan areas, but also in the rural and hilly areas where the traffic is not only low but also involves investment of a huge capital. The stand taken by AUSPI, Etisalat, on the other hand, is that even the ceiling of 65 paise is very high.

4) The principal question which arises for our consideration is as to whether the same carriage charges fixed for urban and rural areas is justified? Indisputably the ceiling fixed for both urban and rural areas by TRAI, in our opinion, may not be entirely correct. Suffice it to say that any below cost carriage charge in rural areas may discourage investment in telecom networks therein. Furthermore the traffic in the rural and far-flung areas is low. The return on capital model, according to BSNL, would be much higher for the aforementioned areas, approximately being 29% for national long distance operators operating in high traffic urban areas compared to approximately less than 10% in the rural/hilly areas which is the average would be round about 15% and the ratio of the urban-rural traffic would be about 80:20.

5) If TRAI had accepted the principle that the carriage charges payable by one operator to the other shall be on actual rather than forbearance, the same should have been followed in 2009 Regulations also.

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116. <u>INTRA-CIRCLE CELLULAR TRAFFIC</u>

1) In the 2006 Regulations, the carriage charges fixed by TRAI for cellular calls for LDCC TAX to SDCC was 20 Paise. ETISALAT contends that it should be less than 2 Paise. It has been reduced to 15 Paise/minute. There cannot be any doubt or dispute that it should be in consonance with the ceiling prescribed for carriage charges at Rs. 0.65 /minute.

We in this behalf may notice the submissions of TRAI –

<u>“Para 32 & 33</u>

That, it is denied that the answering respondent has not shared relevant data transparently. All the relevant data for calculating the mobile termination and fixed termination charge are available at Table 6.2, 6.3 and 6.4 of the Explanatory Memorandum to the regulations. For estimating transit / carriage charge from Level II TAX to SDCCC cost data supplied by the appellant and estimated minutes for year 2007-2008 were used. Since the appellant has mentioned that the data are strictly confidential! Therefore, the answering respondent refrained from publishing these data. However, the methodology to arrive at these charges has been clearly mentioned in the Explanatory Memorandum to the regulations.

As clearly mentioned that carriage charge was not re-estimated and the respondent retained the same value as was specified in the IUC Regulation dated 23.02.2006. As mentioned above, the calculation sheet for carrying out the calculation of fifteen (15) paise was not provided as the data of appellant which was used were marked by it as strictly confidential.”

2) As would appear from the said submissions that TRAI contends that no data in regard to minutes of usage had been supplied by BSNL for the year 2007-08. It is, therefore, difficult to conceive as to on what basis actual cost incurred or actual MoU handled by the BSNL could be arrived at.

3) Yet again the contention of Bharti Airtel, AUSPI and ETISALAT is that it should have been fixed on the basis of the most efficient operator.

4) What would be the effect thereof, has not been considered but TRAI itself accepts that the same is an untenable proposition. Keeping in view the ‘work-done’ principle, it was necessary for TRAI to consider as to whether a separate clause of carriage charges of cellular traffic and other traffic should be fixed.

5) The carriage charges, should also be fixed, on the basis of ‘work-done’ principle, which according to TRAI itself should be applied.

6) It is of some significance to notice that this Tribunal in Petition No. 95 of 2005, Tata Teleservices Vs. BSNL by its judgment dated 14.11.2006 held as under:-

"8.2 We hold in these circumstances that since BSNL has not actually done the work of carriage from the near end LDCC to the far end LDCC as a result of a conscious decision taken by it as already stated in its letters of 30-4-2003 and 13-9-04 and this kind of handover was also clearly stated to be a past practice, the notional carriage charge is not payable to BSNL.

8.3 In this background we have seen the terms contained in the letter dated 26-8-2005 of the Petitioner addressed to the BSNL offering terms for a full and final settlement of all pending demands. In these terms the Petitioner has indicated willingness to discharge its liability towards payment of termination charges and Access Deficit Charges to BSNL based on the distance from the originating end SDCC to the terminating end SDCC which is in accordance with what BSNL has claimed. In regard to the liability towards payment of carriage charges it is envisaged that these would be applicable only for the carriage done from the LDCC TAX where the call was actually handed over to the BSNL and the SDCC of the SDCA when the call was terminated.

We are of the view that in the light of our analysis the terms offered by the Petitioner to the BSNL provide a sound basis for a settlement and should be accepted by BSNL towards full and final settlement of the issue."

7) We, therefore, do not see sufficient ground and without assigning any cogent reasons as to why the same was reduced to 15 Paise.

8) We, therefore, are of the opinion that the matter relating to carriage charges should receive a fresh considerations at the hands of the TRAI in the light of the observations made heretobefore as also in our aforementioned order dated 21.05.2010 in the aforementioned Appeal No. 1 of 2006 and 8 of 2006.

117. <u>TRANSIT CHARGE</u>

1) TRAI has reduced the transit charges also from 20 Paise to 15 Paise. Before, however, we consider the rival contentions of the parties in relation thereto, it would be useful to take into consideration the historical background.

2) The Telecom Policy 1994 postulated that every mobile/cellular service provider required to route their entire cellular traffic through the PSTN network of the DoT. The said benefit was thereafter to be received by BSNL, the successor of DoT. DoT/BSNL were required to augment their infrastructure for carriage of calls of other cellular operators besides its own, irrespective of the fact as to whether they may not be terminated at its network.

3) By reason of the 1999 National Telecom Policy, however, direct connectivity between service providers was made permissible. TRAI also recommended changes in the license conditions. The same was the subject matter of an Appeal before this Tribunal marked as Appeal No. 31 of 2003.

4) The direction of TRAI has been held to be without jurisdiction by this Tribunal in its judgment dated 3.5.2005, stating :

"Following the conclusions mentioned above we are of the view that the letter/direction of TRAI dated 22nd July 2003 mandating direct interconnectivity has resulted in modification in the license conditions, of licenses issued after the amendment of 2000 in the TRAI Act, and as such this was not in accordance with the provisions of the Act."

"We further hold that the language 'licensee shall comply with any order, direction, determination or regulation issued by TRAI under TRAI Act, 99….." used in the licenses, on which great stress has been laid by the learned counsel for TRAI, is to be harmoniously interpreted to mean that such orders, directions, determinations or regulations need to be in accordance, and not in conflict, with the license conditions.

8. BSNL has raised many other grounds for challenging the impugned letter/directive of TRAI. These relate to lack of transparency and violation of natural justice and absence of process of consultation. It is mentioned that imposition of direct connectivity would lead to wastage of resources through the setting up of new transmission networks and also through some of the existing infrastructure being rendered surplus. Also that there was no techno-economic justification given to make direct interconnection mandatory, there was no satisfactory reasoning given as to how this approach was to be matched with the Interconnect Gateway concept mooted in the RIO Regulations of TRAI dated 12-7-2002. During arguments it was pointed that this was in conflict with the idea of the Interconnect Gateway Switch mooted in the TRAI

Consultation Paper issued on 13-4-2004. All these have been contested by TRAI. We would not like to get into the details in this regard here as we would touch upon these issues briefly while dealing with Petition 20 of 2004. These are, however, relevant to indicate that as and when TRAI considers it fit to recommend to the licensor that direct connectivity between the service providers needs to be mandated in the license, all these aspects would need to be adequately addressed in a transparent manner."

"9. In the above background we allow the prayer of BSNL and quash and set aside the impugned letter/ directive dated 22-7-2003 of TRAI."

5) It is not disputed that the private operators had not been able to achieve direct connectivity for its cellular networks all over the country and the BSNL's Telephone network was being utilised by the other cellular operators of the cellular network.

6) The stipulation, imposed by this Tribunal was only till the time direct connectivity for cellular network of BSNL network was achieved with the other cellular service providers.

7) At the relevant time Transit charge of 19 Paise was being paid in terms of the IUC Regulations as was prevalent then. However, that part of the judgment of this Tribunal is pending consideration before the Supreme Court of India. It is not disputed that direct connectivity between two cellular operators stands achieved.

It is only for their own interest some of the cellular operators are receiving the benefit of the PSTN network of BSNL for transit of their cellular traffic. It is a matter of contract.

BSNL, therefore, may not be held to be under any legal obligation after achieving the interconnection through direct connectivity with the other cellular service providers to provide an alternate facility for transit of cellular traffic. If direct connectivity has been achieved, TRAI need not have fixed any charges in respect thereof. This aspect of the matter has not

been received due and serious consideration by TRAI. We, therefore, are of the opinion that the matter requires reconsideration at the hands of TRAI.

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118. SMS TERMINATION CHARGE

1) ETISALAT only raised the contention that TRAI should have exercised its jurisdiction for fixing a charge in respect thereof. It, however, appears that while leaving the matter to forbearance it was expected the service providers to levy a reasonable charge, having regard to the fact that no consultation on cost based SMS Termination Charge had been undertaken.

2) We, therefore, are of the opinion, that in the interest of the customers vis-à-vis some of the service providers, the TRAI may consider this aspect of the matter also.

119. Termination Charge for incoming International calls.

According to BSNL, TRAI should have restrained itself from laying down any fixed charge and ought to have resorted to forbearance in this area, so as to enable the operator to enter into negotiations with the foreign operators.

ETISALAT and AUSPI, on the other hand, took the extreme stand that the technologies involved in transmitting NLD and ILD calls being the same, no extra cost is incurred for receiving the calls from abroad by any service provider. It however, we may notice, is not in controversy that the foreign operators on average charge Rs. 3.60 to Rs. 7.20 per minute from the Indian operator for

providing termination of calls in foreign country. It may be of some relevance to notice that in paras 58 and 59 of the Regulation dated 23.02.2006 it was stated: :

"h) Mobile Termination Charge and Fixed line Termination Charge

58. Due to increased volume of traffic, it is likely that the termination charges especially for mobile services may come down. The Authority has also estimated and found that mobile termination charges as well as fixed termination charges could be lower than the present specified level of Rs.0.3 per minute. In spite of this, the Authority did not reduce the mobile termination charges and fixed termination charges mainly on account of the following reasons:-

i. With the increased growth of subscribers, the addition in capacity of the network also has to match both in terms of the radio equipment capacity and also switching and transmission equipment capacity. If these additions in capacity do not match with the growth of subscribers then the quality of service deteriorates which is also a major concern of the Regulator. Regulator expects that along with the growth the service providers adds to the capacity of networks so that there is no deterioration in the quality of service which is being experienced now for various parameters which has been laid down by TRAI in its QoS Regulation dated 8th July, 2005.

ii. Mobile termination charges in India are not only equal to fixed termination charges but they are even lower than one US cent per minute, which is not only lowest in the world but also it is 12 to 24 times lower than mobile termination charges in other countries of the world. ***(Indicated in the table below)*** *This also should be noted that in all countries, the mobile equipments are supplied by the same set of vendors.*

iii. As mentioned earlier, the mobile coverage in terms of population in India is only about 35% of the population which is lowest in the world and mobile operators have to increase their penetration into rural areas and therefore, large investments are to be made to cover even the 77% (world average) of the country's population. As networks penetrate into interiors and there is evidence that this is happening.

iv. The exponential growth in mobile subscribers has been possible because of various innovative and competitive tariff schemes which may have a higher component of incoming calls. If mobile termination charges are decreased then the viability and sustainability of these tariff plans may not be possible and this may retard the growth of mobile subscribers in the country. It should be noted that the main concern of the Authority here is not to ensure the viability of a tariff plan because that is the main responsibility of service provider in an unregulated tariff regime but the Authority has a responsibility to achieve a higher growth and tele-density in the country, and therefore, it is a matter of concern.

Table - 11: Termination Rates per minute for mobile service in different countries (June, 2004)

Name of the country	***Termination rates per minute***	
	Fixed (US$)	***Mobile (US$)***
Australia	*0.016*	*0.152*
Brazil	*0.020*	*0.080*
China	*0.010*	*0.025*
Switzerland	*0.017*	*0.163*
Japan	*0.022*	*0.130*
India	*0.007*	*0.007*

59. Further, the World Bank (InfoDev Division) in its Report on Regulating Competition, Interconnection and Prices dated December 23, 2005 has mentioned as follows:-

*"**c. Mobile Termination Charges, Mobile Penetration and Universal Service Goals** - Developing countries with low penetration levels are experiencing a growing tension between encouraging further penetration of mobile services with above-cost mobile termination charges and the downward pressures of mobile termination rates coming from market and regulatory forces. This is especially valid in low penetrated markets in which there could be theoretical and practical justifications of having mobile termination charges above cost in order to cross subsidized access to the service (basically the handset) and mobile-to-mobile and mobile-to-fixed calls……….*

…………………..However, in most of developing countries where landline penetration is far less ubiquitous, mobile telephone development is enabling countries to achieve universal service goals to segments of populations where landline or other telecommunication services have not ever penetrated before. High-income segments of population within developing countries are easily penetrated in the first stages of mobile telephony. The great challenge of the mobile industry is to continue penetrating low-income segments of the population and it is there where the source of industry growth will be coming from in most of developing countries. Any regulatory intervention to reduce mobile termination charges should weight the effects of reducing interconnection revenues that are used to cross-subsidized handset prices (i.e. access to the network to poorer segments of population) and outbound mobile prices, against the purported benefits that a reduction of charges would produce."

Keeping all these facts in view, the Authority decided not to review the termination charges and keep them same for both mobile as well as fixed termination charges. The Authority expects that mobile service providers would increase their penetration into rural and remote areas and the Authority would continue to monitor their progress in this regard."

It is also not in dispute that termination charges in other countries vary from 12-24 times to the termination charges fixed by the TRAI. Admittedly, the TRAI has no control whatsoever in regard to termination charge realized by the foreign operators.

At the outset, we may notice that on our query as to on what basis the termination charges for incoming International Calls were fixed at Rs. 0.40 paise, Mr. Vaidyanathan submitted that it consists of two components, namely, domestic termination charge and origination charge being 20 paise each.

We fail to see any justifiable reason therefor, if that was the only reason which was taken by TRAI to be a fair reasonable return.

TRAI also, it may be noticed that in its explanatory memorandum stated that higher termination charge could have been fixed as the same would lead to arbitrage and grey market operations.

Mr. Vaidyanathan would submit that experience in other sectors would show that when the import duty had been reduced, the profiting in the concerned goods had come down.

There is a basic fallacy in the aforementioned argument. Custom Duty or Excise Duty of Direct Taxes are payable to the Government of India. It may revise it or issue modified tariff in its wisdom. It may deal with certain matters, having regard not only to its revenue/ economy of the country but also various other factors meaning thereby the total expenditure it is required to incur for curbing menaces operating in the field.

Trade or business, on the other hand, is guaranteed under Article 19 (1) (g) of the Constitution of India. Clause 6 of Article 19 enables the Parliament or the State Legislatures to enact a law which may reasonably restrict the exercise of such fundamental right. Any regulation interfering with a fundamental right of a citizen of India, therefore, must be a reasonable one. It must be necessary for security of the country etc. Arbitrage or grey market operators is certainly one of the criteria which may considered to be a necessary for restricting such fundamental rights, but that by itself cannot be a ground to deprive the operators for their legal dues. Furthermore, would it come within the purview of TRAI Act is the question.

We have already held heretobefore that TRAI while exercising its jurisdiction under Sec 11(1) (b) of the Act exercises power of statutory authority. It is, therefore, required to act within the four corners of the statute. Arbitrage or grey market operations are exclusively within the domain of the Central Government. For the said purpose, the Central Government has taken various steps. It had issued various circulars. It even has imposed a fine of Rs. 50 crores on one of the operators as it was found to be indulging in such activities.

We have said so, we may hasten to add, not because of acts of omission and commission on the part of an operator has been established, as the matter is pending before the Apex Court but only to show that wherever necessary, the Government of India had been taking the requisite steps to curb the menace of grey market. In that view of the matter, it would be safe to conclude that those factors were not relevant and in any event contrary to the legal position. TRAI could not have, in our opinion, considered the said issue for the purpose of fixation of incoming international calls.

It is also of some significance to notice that this aspect of the matter has been taken into consideration by this Tribunal in its judgment dated 21.09.2005 passed in Appeal No. 7 of 2005 (COAI & Ors Vs TRAI & ors) in the following terms:

> *"(d) We find that the introduction of ADC on the Roamer's calls has been introduced to avoid misuse of POI by the cellular operators if they hand over incoming international as well as incoming Inter-circle calls as local calls to BSNL. It is also clear from the last but one paragraph of TRAI's letter dated 11.3.2005, to avoid such misuse of POI, TRAI has directed that all calls of national roaming subscribers should be treated as National Long Distance calls and all calls of international roaming subscribers should be treated as incoming International Long Distance calls. As such for all calls made by National roamers while in a different Service Area, ADC charge for national calls i.e. Re. 0.30 per minute will be applicable. For International Roamers while making any call while in India, an ADC of Rs. 3.25 per minute should be applicable, until any further change in the regime by the Authority. We do not question the powers of TRAI to change the classification of calls or to introduce ADC on the changed classification. But the reason to introduce ADC on roamers to stop the likely misuse is questionable. Two points merit consideration:-*
>
> *• We are changing the basic definition of circles i.e. Inter & Intra or in*
> *Other words for the roamers this boundary is demolished.*
> *• Secondly, even when roamer makes Intra-circle calls he is made to pay ADC which is anti-consumer.*
>
> *To prevent the likely misuse of calls there are other means available which can be considered for enforcement. We find from TRAI's submission during the argument and also in one of the letters that CDR can resolve the issue.*

There may be an answer if the CDR can be passed on by the private operators to BSNL and the correct charges can be levied on various types of calls based on that CDR.

We found from the arguments of Respondent No. 2 that there was an apprehension on their part that the private operators could pass on the calls on their POIs as local calls whereas these calls in effect are NLD/ILD calls. It is for this reason that they approached TRAI for creation of separate trunk groups. Though introduction of separate trunk groups would have facilitated the BSNL to differentiate between a roamer's call from that of a local subscriber call, the TRAI while rejecting their demand stated that since Call Data Record billing system was soon to be in place, no useful purpose would be served in creation of separate trunk groups which also is a time consuming process. It was also mentioned to us by the Learned Counsel for Respondent No. 1 that the Authority will soon be going afresh into the whole issue of ADC and this order was of an interim nature. We also find from the language that TRAI is quite explicit in stating that this applicability of ADC was until any further change in the regime by the Authority. Three days' notice, though considered too short, for the stakeholders to give comments also reflects on the TRAI that they were expecting comments/views and, therefore, there was not a certainty of applicability of the ADC under question. In any case, this is not the final order which is contemplated by TRAI to come out with after consultation process.

As we see the crux of the problem lies in differentiating and identifying these calls as Intra-circle of Inter-circle by the BSNL. They contend that STD / ISD calls were continuously on the decline thereby eating into their revenue and they apprehend that reason for this was that some of the NLD/ILD calls are being passed on by the private operators as local / Intra-circle calls. We, however, notice that the NLD / ILD calls are to be handled by the NLD / ILD licensees. Presently, there are only two private operators viz. Bharti (Airtel) and Reliance.

The order of TRAI, however, makes it compulsory for calls made by roaming subscribers of all cellular operators to be treated as NLD calls even if they do not pertain to the cellular operators who do not have NLD/ILD licence. This in true sense is not justified. Secondly, in our view, to stop a misuse of licence condition by a licensee we cannot use the instrument of ADC. ADC is meant for a particular purpose – a noble objective. The amount being collected as ADC from a roaming subscriber will be over and above the amount earlier worked out by TRAI to be given to BSNL. Imposition of ADC for stopping the likely misuse does not seem to be in order."

Mr. Vaidyanathan would contend that as the inflow of International traffic to India has increased because of fixation of 40 paise per minute as international termination charge.

This may not be entirely correct. This may be a surmise. No study has been conducted. No data have been collected. The international traffic might have also been increased because of the increased subscriber base in the country.

It has been brought to our notice that the average incoming international minute per subscriber in fact had gone down. Be that as it may, the same may not be by itself a ground, as to why, having regard to the fact that tariff is under forbearance, an Indian ILD operator would not have freedom to negotiate with the foreign operators on reciprocal basis, particularly, in view of the fact that even the Indian customers would be benefited thereby.

Even otherwise namely for maintaining the level playing field between two different types of the operators, It would necessary for TRAI to consider this aspect of the matter. We would request the TRAI to consider the matter afresh.

Conclusion:

For the aforementioned reasons, we direct the TRAI to consider the matter afresh. We would, however, request it to consider the desirability of informing all the stakeholders in advance, if it is otherwise not inconvenient, that the charges determined by it shall remain valid for more than one year and preferably three years so that the stakeholders or the operators may arrange their business accordingly and submit their representation keeping in view that aspect of the matter. We would also request the TRAI to consider the desirability of granting sufficient time to party to respond, if any occasion arises therefor, sufficient time preferably not less than two weeks. We render our appreciation to the efforts made by TRAI and request it to consider desirability of completing the consultation process in a time bound manner and determine the charges so that the IUC charges could be made effective/implemented by 1.1.2011. We, therefore, remand the case to TRAI with the direction that TRAI will complete the consultation process in a time bound manner so that new IUC charges could be made effective/implemented by 1st January, 2011. These appeals are disposed of with aforementioned observations and directions.

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/rkc