TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL

NEW DELHI

DATED : April 19, 2012

Petition No.324 of 2010

Reliance Communications Ltd. … Petitioner

Vs.

Bharat Sanchar Nigam Ltd. … Respondent

Petition No.86 of 2011

Reliance Communications Ltd., U.P.West … Petitioner

Vs.

Bharat Sanchar Nigam Ltd., Mumbai … Respondent

Petition No.87 of 2011

Reliance Communications Ltd., Orissa … Petitioner

Vs.

Bharat Sanchar Nigam Ltd. … Respondent

Petition No.92 of 2011

Reliance Communications Ltd., Mumbai … Petitioner

Vs.

Bharat Sanchar Nigam Ltd., New Delhi … Respondent

Petition No.96 of 2011

Reliance Communications Ltd., Mumbai … Petitioner

Vs.

Bharat Sanchar Nigam Ltd., New Delhi … Respondent

Petition No.141 of 2011

M/s Reliance Communications Ltd., Navi Mumbai … Petitioner

Vs.

Bharat Sanchar Nigam Ltd., New Delhi … Respondent

Petition No.156 of 2011

M/s Reliance Communications Ltd., West Bengal … Petitioner

Vs.

Bharat Sanchar Nigam Ltd., New Delhi … Respondent

Petition No.157 of 2011

M/s Reliance Communications Ltd., Maharashtra … Petitioner

Vs.

Bharat Sanchar Nigam Ltd., New Delhi … Respondent

Petition No.158 of 2011

M/s Reliance Communications Ltd., Haryana … Petitioner

Vs.

Bharat Sanchar Nigam Ltd., New Delhi … Respondent

Petition No.159 of 2011

M/s Reliance Communications Ltd., Karnataka … Petitioner

Vs.

Bharat Sanchar Nigam Ltd., New Delhi … Respondent

Petition No.160 of 2011

M/s Reliance Communications Ltd., M.P. … Petitioner

Vs.

Bharat Sanchar Nigam Ltd., New Delhi … Respondent

Petition No.161 of 2011

M/s Reliance Communications Ltd., A.P. … Petitioner

Vs.

Bharat Sanchar Nigam Ltd., New Delhi … Respondent

Petition No.162 of 2011

M/s Reliance Communications Ltd., Kerala … Petitioner

Vs.

Bharat Sanchar Nigam Ltd., New Delhi … Respondent

Petition No.163 of 2011

M/s Reliance Communications Ltd., Delhi … Petitioner

Vs.

Bharat Sanchar Nigam Ltd., New Delhi … Respondent

Petition No.164 of 2011

M/s Reliance Communications Ltd., Chennai … Petitioner

Vs.

Bharat Sanchar Nigam Ltd., New Delhi … Respondent

Petition No.165 of 2011

M/s Reliance Communications Ltd., Jharkhand … Petitioner

Vs.

Bharat Sanchar Nigam Ltd., New Delhi … Respondent

Petition No.166 of 2011

M/s Reliance Communications Ltd., Tamilnadu … Petitioner

Vs.

Bharat Sanchar Nigam Ltd., New Delhi … Respondent

Petition No.167 of 2011

M/s Reliance Communications Ltd., Chhatisgarh … Petitioner

Vs.

Bharat Sanchar Nigam Ltd., New Delhi … Respondent

Petition No.168 of 2011

M/s Reliance Communications Ltd., Bihar … Petitioner

Vs.

Bharat Sanchar Nigam Ltd., New Delhi … Respondent

Petition No.169 of 2011

M/s Reliance Communications Ltd., Punjab … Petitioner

Vs.

Bharat Sanchar Nigam Ltd., New Delhi … Respondent

BEFORE:

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

HON'BLE MR. P.K. RASTOGI, MEMBER

For Petitioner : Mr.Ramji Srinivasan,Senior Advocate
Ms.Manali Singhal, Advocate
Mr. Santosh Sachin, Advocate
Mr.Sharath Sampath,Advocate
Mr.Manikya Khanna, Advocate
Ms.Shikha Sarin, Advocate
Ms.Swati Sinha, Advocate

For Respondent : Mr.Vikas Singh,Senior Advocate
Ms.Maneesha Dhir, Advocate
Mr.K.P.S.Kohli, Advocate
Ms.Amrita Narayan, Advocate

J U D G M E N T

Background Facts

Petitioner, a UAS Licensee on and from 13.11.2004, has filed this petition inter-alia questioning the legality and/or validity of some bills raised by the Respondent, as being illegal, unjust and unfair as also for a direction that Clause 7.5 of the Addenda VI appended to the Interconnect Agreement be declared ultra-vires, illegal, unconstitutional and invalid.

2. Petitioner has also prayed for a declaration that the Respondent-BSNL cannot use any of the provisions of the Interconnect Agreement for the purpose of enforcing demands of ADC, being illegal and invalid.

3. The parties in Petition No.324 of 2010, have placed a large number of documents which will be treated as the lead case.

In the said petition, demands dated 20.12.2006, 21.05.2008, 20.08.2008, 11.06.2010, 30.06.2010 and 07.09.2010 are in question.

4. We may for the purpose of appreciating the contention of the parties notice one of the said bills being dated 20.12.2006.

It was raised for the period 14.11.2004 to 28.02.2006 for a sum of Rs.9,87,25,798/-.

A bill towards interest on the amount said to be outstanding was also raised on or about 20.08.2008 for the period 01.07.2005 to February 2006, claiming a sum of Rs.4,83,26,538/-.

Similar bills were raised during the intervening periods.

5. Before, however, proceeding with the matter further, it may be placed on record that bills for three different periods i.e. (a) 01.02.2004 and 13.11.2004 (hereinafter referred to as P-1), (b) 14.11.2004 and 26.08.2005 (hereinafter referred to as P-2); and (c) 27.08.2005 to 28.02.2006 (herein after referred to as P-3) are involved in these petitions.

6. During the aforementioned periods, the Telecom Regulatory Authority of India (TRAI) in exercise of its power conferred upon it under Section 11 (1) (b) of the Telecom Regulatory Authority of India Act, 1997 (the Act), inter alia, made three Interconnect Usage Charge Regulations i.e. (a) on 29.10.2003 for the period 01.02.2004 and 31.01.2005; (b) on 06.01.2005 for the period 01.02.2005 and 28.08.2006; and (c) on 23.02.2006 for the period 01.03.2006 and 31.03.2007.

7. We may notice the factual matrix involved in these matters in respect of the Gujarat Circle.

Petitioner entered into an agreement with DoT on or about 18.03.1997 in respect thereof.

Basic Interconnect Agreement was signed between DoT and the Petitioner for the said Circle on 18.03.2007.

8. Licences were issued to the Petitioner under Section 4 of the Indian Telegraph Act, 1885 to establish, install, maintain and operate the Basic Telephone Service in several service areas of the country on or about 20.07.2001.

9. Another Basic Interconnect Agreement was signed between the parties hereto on or about 21.05.2002.

Petitioner migrated from Basic Service Licence to Unified Access Service Licence with effect from 14.11.2003.

10. On or about 28.01.2004, a circular letter was issued purported to be for implementation of the IUC Regulations dated 29.10.2003, paragraph 11 whereof reads as under :-

> "11. The CLI based barring facility shall be activated at the PoIs wherever technically feasible to ensure that the traffic handed over to BSNL is in the appropriate trunk groups only. Wherever it is technically not feasible to activate CLI based barring, periodic monitoring of the incoming trunk

groups shall be done by BSNL to ensure this objective. The calls received without CLI by BSNL from various operators shall be charged at the highest slab i.e. as for ISD Calls. In case such calls are received by BSNL on a trunk group not meant for such calls then all the traffic received on such trunk group for that month/billing cycle shall be charged at the rates applicable for IUC of incoming ISD Calls."

11. On and from 04.03.2005, the TRAI issued a direction to all the service providers to strictly ensure that terminal use of fixed wireless service should be confined to the premises of the subscribers. DoT also issued a direction to that effect on or about 23.03.2005. Similar notices were also issued to Tata Teleservices (P) Ltd.

12. The legality/validity of the said notices was challenged before this Tribunal by Tata Teleservices Pvt. Ltd. The said petition was marked as Petition No.45 of 2005. By reason of a judgment and order dated 09.09.2005, the said petition was dismissed and the demand notice issued by the Respondent herein was, thus, upheld.

13. We may also place on record that on or about 26.08.2005, the DoT also issued a circular classifying the Petitioner's unlimited cordless service as WLL(M) phones.

Petitioner also filed a similar petition before this Tribunal, which was marked as Petition No. 108 of 2005, inter-alia being aggrieved by and dissatisfied with the demand for a sum of Rs.27,52,717/- said to have been

made pursuant to or in furtherance of purported re-classification of services, which was also dismissed by an order dated 17.01.2006.

14. Appeals were preferred against the said judgments both by Tata and the Petitioner before the Supreme Court of India, which were marked as Civil Appeal No. 5850 of 2005 and Civil Appeal No. 936 of 2006 respectively.

Before the Supreme Court of India, the Respondent herein filed a chart showing the amount due from the Petitioner for the period November, 2004 and February, 2006.

It reads as under :-

S.N.	*Circle*	*Period*	*Amount Pending (In Rs.)*
1.	*Andhra Pradesh*	*Nov'04 to Feb'06*	*29,69,30,834/-*
2.	*Bihar*	*Nov'04 to Feb'06*	*99,54,869/-*
3.	*Chattisgarh*	*Nov'04 to Feb'06*	*1,03,85,730/-*
4.	*Chennai*	*Nov'04 to Feb'06*	*3,59,35,335/-*
5.	*ETR*	*Nov'04 to Feb'06*	*3,71,61,084/-*
6.	*Gujarat*	*Nov'04 to Feb'06*	*20,17,32,597/-*
7.	*Haryana*	*Nov'04 to Feb'06*	*18,93,04,563/-*
8.	*Himachal Pradesh*	*Nov'04 to Feb'06*	*4,23,17,605/-*
9.	*Jharkhand*	*Nov'04 to Feb'06*	*1,22,93,298/-*
10.	*Karnataka*	*Nov'04 to Aug'05 & Feb'06*	*16,68,55,340/-*
11.	*Kerala*	*Nov'04 to Feb'06*	*32,92,00,286/-*
12.	*Kolkata*	*Nov'04 to Feb'06*	*22,26,67,926/-*
13.	*Madhya Pradesh*	*Nov'04 to Feb'06*	*7,63,19,349/-*
14.	*Maharashtra*	*Nov'04 to Feb'06*	*22,20,12,280/-*
15.	*NTR*	*Nov'04 to Feb'06 (except Jan'06 & June, July, Aug for*	*17,97,50,150/-*

		Mumbai Optr)	
16.	*Orissa*	*Novb'04 to July'05 & Feb'06*	*2,33,11,590/-*
17.	*Punjab*	*Nov'04 to Feb'06*	*20,75,73,824/-*
18.	*Rajasthan*	*Nov'04 to Feb'06*	*13,86,58,677/-*
19.	*STR*	*Nov'04 to Feb'06*	*118,37,21,068/-*
20.	*Tamilnadu*	*Nov'04 to Feb'06*	*32,93,87,126/-*
21.	*Uttar Pradesh (E)*	*Nov'04 to Nov'05 & Feb'06*	*8,12,94,464/-*
22.	*Uttar Pradesh (W)*	*Nov'04 to Feb'06*	*15,32,77,490/-*
23.	*Uttaranchal*	*Dec'04 to Nov'05 & Feb'06*	*2,02,88,817/-*
24.	*West Bengal*	*Nov'04 to Feb'06*	*6,18,12,781/-*
25.	*WTR*	*Nov'04 to Feb'06*	*11,75,54,000/-*
	Total		***434,97,01,082/-***

15. By reason of two judgments passed on or about 30.4.2008 entitled Tata Teleservices Limited vs. Bharat Sanchar Limited since reported in (2008) 10 SCC 556 and Reliance Infocom Limited vs. Bharat Sanchar Nigam Limited reported in 2008(10) SCC 535, the Supreme Court of India while upholding the demands of the Respondent for the period 14.11.2004 to 26.08.2005 directed that the question with regard to quantification of claims and counter claims be adjudicated in accordance with law at appropriate stage by the competent authority.

16. Immediately thereafter, disconnection notices were issued on 03.05.2008. The process of disconnection of the POIs of the Petitioner started at 5.00 P.M. on the same date.

Petitioner with a view to avoid such disconnections made payments of Rs.225 crores.

17. Respondent, however, disconnected more than 400 POIs of the Petitioner. For getting the same restored, said to be under duress, the Petitioner paid a further sum of Rs.287 crores to the Respondent and, thus, is said to have made about 75% of the total demands of Rs.327 crores.

18. A petition was filed by the Petitioner questioning the said disconnection of POIs on 26.05.2008 before this Tribunal, which was marked as Petition No. 109 of 2008.

The said petition was disposed of by an order dated 15.04.2010, inter-alia, holding:

(a) The effect of dismissal of Petition 108 of 2005 by TDSAT and its Appeal (CA 936 of 2006) will be that the demands of BSNL were upheld.

(b) Legality or validity of Clauses 6.4.6 having not been questioned in Petition 108 of 2005, the principle of constructive res judicata would be applicable

(c) Petitioner could have raised their bills on BSNL on the basis of their own CDRs.

(d) It was not open to the Petitioner to question the validity of the bills and quantum thereof in these proceedings so far as the same related to the same period.

(e) Respondent BSNL may not be correct to contend that no challenge whatsoever can be raised in respect of the demand pertaining to the period 26.8.2005 and 28.2.2006; the judgment of the Hon'ble Supreme Court of

India dated 30.4.2008 being confined to the period 14.11.2004 and 26.8.2005 and its demand was found to be valid in law for that period only.

The Respondent should raise a revised demand of ADC for the period other than the one upheld by the Supreme Court.

19. On or about 14.01.2005, the Respondent is said to have detected that the Petitioner while extending its WLL(M) services, was in fact rendering unlimited cordless service and not a fixed one as was being treated by the parties hereto.

It was stated as under:

"2. Fixed wireless services are being given by M/s RIL using LG Make CDMA Instrument Model No.LSI-110, but this instrument can be used as WLL-M throughout the SDCA. This has also been verified by obtaining one telephone number of fixed numbering Level-39 with the above mentioned LG instrument and found that this instrument works within the whole SDCA of Jaipur like a WLL-M connection.

3. Since IUC applicable for limited mobile services are different from fixed line wireless services, there appears to be an attempt by M/s RIL to evade the IUC charges including ADC payable to BSNL for limited mobile services by providing limited mobile services in the disguise of fixed services.

4. The BSNL calls upon M/s RIL to immediately pay the entire amount of Interconnect Usage Charges including ADC as per Clause 6.4.9 of the Interconnect Agreement for all its calls of Limited Mobile Services through its Unlimited Cordless Scheme handed-over to BSNL on the BSNL Trunk Groups meant for fixed line traffic, for the period of last two months, i.e. from 14.11.2004 to 13.1.2005. Thus, the difference of the IUC charges including the ADC in this

regard should be paid by M/s RIL immediately on receipt of this communication. Also, the ADC paid by BSNL to M/s RIL for the calls originated by limited mobile and cellular/fully mobile subscribers of BSNL and terminated on the numbering levels of Unlimited Cordless service should be refunded to BSNL. Further, the traffic information of the inter circle STD calls originated from/receipt in the numbering levels of unlimited cordless service and terminated in/originated from the network of other limited mobile and fully mobile service providers and the incoming and outgoing ILD calls to/from the numbering levels of unlimited cordless service are to be given to the respective BSNL circle offices for billing of ADC payable to BSNL for such calls. Your are also called upon to immediately stop the operation of above mentioned unlimited cordless service using numbering levels of fixed services, without paying the IUC charges including ADC which is applicable for limited mobile service as the same is contrary to the license conditions, IUC Regulations and to the agreed terms and conditions of the interconnection agreement.

5. It is intimated the details of the amount to be paid by M/s RIL to BSNL in the terms mentioned above, should also be furnished enabling the BSNL to confirm and verify the correctness thereof in terms of the Interconnection Agreement including its clause 6.4.9."

20. Alleging evasion of requisite ADC charges payable to it, the Respondent by a circular letter dated 10.5.2010 called upon the Petitioner to pay the amount specified therein for the period 14.11.2004 and 14.01.2005 along with interest accruing thereupon, stating inter-alia as under :-

"6. Broadly, as enumerated under, there are three types of traffic for which bills of IUC including ADC are to be raised by BSNL upon Tata and Reliance in respect of their WLL(M) services. The rates of IUC including ADC to be applied also stand intimated vide this office letter No.208-20/2003-Regln dated 28th January 2004 and letter No.352-1/2005-Regln dated 29th January 2005 issued for implementation of IUC Regulations during the relevant period.

(a) Calls originated from WLL(M) services of Tata and Reliance which were handed over by these operators to BSNL on the trunk groups/ports meant for fixed line services:

(i) As per provisions of Interconnect Agreement executed with Tata and Reliance, hand over of WLL(M) service originated calls to BSNL at the ports/trunk groups meant for fixed line services falls within the category of wrongly routed calls. Accordingly, Clause 6.4.9/6.4.6 of interconnect agreement becomes applicable for raising the bills of IUC including ADC by BSNL upon them.

(ii) Instructions have been issued by this office from time to time for raising the bills of IUC including ADC upon Tata and Reliance for this traffic for the period from 14.11.2004 to 28.02.2006. Lastly, such detailed instructions were issued by this office, vide letter No.332-2/2006-Regln dated 26.05.2008 after pronouncement of the judgment by Hon'ble Supreme Court of India for ensuring that no traffic scenarios of such traffic remained unbilled/unrealized from Tata and Reliance.

(iii) As a last opportunity, all call scenarios, for which IUC including ADC is to be recovered from Tata and Reliance, are enclosed as Annexure-I. All the field units are requested to kindly verify that bills are raised upon these operators for all of these call scenarios and in case inadvertently bills have not been raised for any of the call scenarios the bills may immediately be raised upon Tata and Reliance as per provisions of Interconnect Agreement along with applicable interest.

(b) Calls terminated by BSNL on the WLL(M) services of Tata and Reliance treating these services as fixed line services due to use of fixed line numbering scheme for WLL(M) services by them:

(iv) Due to use of fixed line numbering scheme for their WLL(M) services by Tata and Reliance, BSNL, had paid ADC to these operators for its call terminated on the WLL(M) services of these operators, which was not payable as per the provisions of the prevalent IUC Regulations of TRAI. Tata and Reliance are obliged to refund this ADC illegally collected by them from BSNL during the period 01.02.2004 to 28.02.2006.

(v) Instructions in this behalf have also been issued form this office many times for raising the bills of refund upon Tata and Reliance from 14.11.2004 to 28.02.2006. Lastly, such detailed instructions were contained in this office letter NO.332-2/2006-Regln dated 26.05.2008.

(vi) Further, bills for refund of ADC may also immediately be raised for the period 01.02.2004 to 13.11.2004 upon Tata and Reliance as per instructions issued from this office from time to time, for all call scenarios.

(vii) As a last opportunity, all call scenarios, for which IUC including ADC is to be recovered from Tata and Reliance, are enclosed as Annexure-II. All the field units are requested to kindly verify that bills are raised upon these operators for all of these call scenarios and in case inadvertently bills have not been raised for any of the call scenario, the bills may immediately be raised upon Tata and Reliance along with the applicable interest.

(c) Calls originated from/terminated on the WLL(M) services of Tata and Reliance and terminated on/originated from the private operators. This also includes traffic within the own network of Tata and Reliance.

(viii) As per provisions of the prevalent IUC Regulations of TRAI, ADC was payable to BSNL even for the calls terminated on the WLL(M) services of Tata and Reliance by private operators including incoming ILD calls. Further, ADC was also payable to BSNL for the calls originated form WLL(M) services of Tata and Reliance and handed over to private operators including outgoing international calls to ILD operators.

(ix) ADC bills for this traffic were to be raised by BSNL based on the declaration of inter-se private operators traffic by all the private operators to BSNL.

(x) As Tata and Reliance were using fixed line numbering scheme for their WLL(M) services, correct declaration of traffic could not be made by the private operators including Tata and Reliance. Accordingly, due to fault of Tata and Reliance, BSNL could not recover the requisite ADC from the private operators for the period from 01.02.2004 to 28.02.2006.

(xi) For raising the bills for his component also instructions have been issued by BSNL from time to time. As this traffic does not pass through the network of BSNL, therefore, all the details including CDRs for raising the bills upon Tata and Reliance for requisite ADC are to be provided by private operators.

(xii) Detailed instructions for supplying the details including CDRs have been separately issued from this office to all the Access Providers, NLDOs and ILDOs including Tata and Reliance with a copy to BSNL field units for necessary actions at their end. Copy of these instructions is enclosed as Annexure-III for ready reference.

(xiii) It is to be ensured that details and CDRs are provided by each and every Access Provider, NLDO & ILDO to BSNL within the specified time of 2 weeks. Further, data and CDRs submitted by Tata & Reliance may be cross checked with the data and CDRs submitted by other service providers.

(xiv) Based on these details, bills of ADC alongwith applicable interest are to be immediately raised on Tata and Reliance for the period 01.02.2004 to 28.02.2006."

(Underlining is ours for emphasis)

21. The field units of the Respondent were thereby directed :-

"(i) The break-up of the arrear bills along with applicable interest for the component 6(a) may be provided to Tata and Reliance for the period from 14.11.2004 to 26.08.2005 and 27.08.2005 to 28.02.2006.

(ii) From the demands raised for the above-components 6(a), 6(b) & 6(c), the amounts already paid by Tata and Reliance may be adjusted. In respect of component 6(a), demands for the period 14.11.2004 to 26.08.2005 are to be enforced first and thereafter only the demands for rest of the period i.e. 27.08.2005 to 28.02.2006 are to be enforced. However, there is no such restriction for the components 6(b) and 6(c).

(iii) After adjusting the amounts already paid by Tata and Reliance, the balance demands may be intimated to these

operators and thereafter immediate necessary actions for recovery of the balance demands may be initiated as per the provisions of Interconnect Agreements.

(iv) It is pertinent to mention here that Tata has paid an amount of Rs.20 crores on 13.10.05, Rs.100 crores on 31.08.06, Rs.125 crores on 05.05.08 & Rs.34.35 crores on 11.06.08 and the same have been apportioned by Corporate Account Cell of BSNL corporate office to the concerned field units. Similarly, Reliance has paid an amount of Rs.40 crores on 03.03.2006 & Rs.287 crores on 05.05.2008 and the same have been apportioned by Corporate Account Cell of BSNL corporate office to the concerned field units."

22. It may be placed on record that Cellular Operators Association of India (COAI) also filed a petition claiming IUC charges from the Respondent herein as also Tata and the Petitioner, wherein by an order dated 18.03.2010 reconciliation of accounts inter-se between the parties hereto by exchange of CDRs were directed.

23. Against the aforementioned judgment dated 18.03.2010, the Petitioner preferred an appeal before the Supreme Court of India, which has been marked as Civil Appeal No. 4878 of 2010.

The said appeal is pending adjudication by the Supreme Court.

24. Indisputably, pursuant to the said order dated 15.4.2010, various circles of the Respondent started raising fresh demands.

These petitions have been filed challenging the same.

25. We would also like to place on record that in a case involving interpretation of Clause 6.4.6 of the Interconnect Agreement, the Supreme Court of India disagreed with the opinion of this Tribunal that the same constitutes 'penalty', holding that it is a 'genuine pre-estimated damages'.

The said decision has since been reported in Bharat Sanchar Nigam Ltd. vs. Reliance Communications Ltd. 2011(1) SCC 394.

26. During pendency of these petitions, demands were raised and various interim orders were passed from time to time.

Various petitions were filed before this Tribunal questioning the demands made by other circles of the Respondent.

In one of the orders being dated 10.03.2011 passed in Petition No.141 of 2011, payment of the entire principal amount irrespective of the fact as to whether the same is barred by limitation or not was directed to be made, stating:

> "Admit.
>
> Mrs. Prathiba M. Singh accepts notice on behalf of the respondent. Reply may be filed within two weeks. Rejoinder thereto, if any, may be filed within two weeks thereafter. Put up the matter on 15.4.2011 for framing of issues.
>
> As agreed to by Mr. Meet Malhotra, the learned Senior Counsel appearing on behalf of the petitioner shall be confined to Kolkata Circle.
>
> So far as other Circles are concerned, the petitioner

may file short petitions stating the fact involved in each case as it is stated that the question which arises for consideration in all these matters would be the same.

Two principal issues which arise in these matters are:-

(i) Whether any ADC prior to 2004 is payable; and

(ii) Whether the petitioner is liable to pay interest at the rate stipulated in the respective agreements.

Keeping in view the orders passed by this Tribunal in M.A.No.66 of 2011 arising out of Petition No.86 of 2011 and M.A.No.67 of 2011 arising out of Petition No.96 of 2011, it is directed that by way of interim measure the petitioner shall pay the entire amount towards the principal irrespective of the fact that as to whether the same, as per its contention, is barred under the law limitation or not.

The petitioner shall deposit the amount of interest as per direction of this Tribunal in its order dated 1.3.2011 in the aforementioned M.As.

The adjustment in regard to typographical error said to have committed by BSNL shall be considered later.

In the event the petitioner deposits the amount as directed within two weeks from date and subject to the condition that the petitioner files appropriate petitions within ten days in relation to the Circles other than the Kolkata Circle, the impugned demands may not be given effect to by way of disconnection of Point of Interconnections**.**

This order shall be without prejudice to the rights and contentions of the parties and shall be subject to any other or further orders which may be passed by the Tribunal.**”**

27. Pursuant to above order, the Petitioner filed separate Petitions in respect of other circles, the details whereof are as under:

Petition	**Demand**		**Total Demand**	**@ pg**
	Principal	**Interest**		
141/11 (Calcutta Tel) (Kolkata Level 1 TAX)	5,52,71,568 5,92,61,658	13,22,94,868 3,28,38,260	18,75,66,436 5,92,61,658	131 135
156/11 (W.Bengal)			7,28,25,016	171
157/11 (Maharashtra)			64,11,51,282	186
158/11 (Haryana)			18,70,15,872	180
159/11 Karnataka	4.90 crs	12.69 crs	17.59 crs	197
160/ 11 (MP)			7,05,83,452	108
161/11 (Andhra P.)			12,96,40,907	188
162/11 (Kerala)			70,16,80,901	166
163/11 (Delhi & NCR)			100,37,26,762	142 143
164/11 (Chennai)	4,89,50,912	5,66,95,289	10,56,46,201	184
165/11 (Jharkhand)	59,21,529	1,17,62,539	1,76,84,068	123
166/11 (Tamil Nadu)	39,96,31,935	28,83,22,923	68,79,54,858	179
167/11 (Chhatishgarh)			98,25,101	85

168/11 (Bihar)	98,43,039	2,20,93,124	3,19,36,163 3,24,96,163 (Inc Reconn Chgs)	136
169/ 11 (Punjab & NTR)	332490646	38,20,04,323	55,15,14,992	199

28. It has been brought on record that a demand for a sum of Rs.7 crores for the period February 2004 and October 2004 as also interest on the said amount, subject to verification, was not pressed by the Respondent in respect of the Punjab circle and a claim for a sum of Rs.65 crores for the Delhi circle has been withdrawn.

The parties hereto have not adduced any oral evidence.

29. Pursuant to the leave granted by this Tribunal by an order dated 04.08.2011, the Respondent, however, filed additional affidavit in Petition No.141 of 2011, to which response has been filed by the Petitioner.

30. It may also be placed on record that Addenda VI to the Interconnect Agreement was inserted in respect of the Gujarat Circle on or about 28.02.2006 with retrospective effect from 14.11.2003.

31. We may furthermore notice some of the relevant clauses of the said Addenda, as interpretation of Clause 6.4.6 whereof arises for consideration herein.

"FIXED WLL SERVICE means fixed services using terminals strictly confined to the premises of the subscriber where telephone connection is registered, it shall be the UASL's responsibility to ensure that the subscriber terminal is operated in accordance with terms of the License for fixed line services including above restrictions. Separate level within allocated SDCA based link numbering scheme is to be used for wireline and fixed wireless services. Wherever such restrictions cannot be imposed it shall be treated as WLL(M) feature for al purposes which inter-alia includes Numbering Plan, Interconnection Usage Charges, Interconnection arrangement etc."

"11. It is further agreed that any kind of breach of any of the terms of this agreement by the UASL shall entitle BSNL to levy damages on the UASL. Quantum of damages assessed and levied by BSNL shall be final and not challengeable by the UASL."

32. Chapter VI of the said Addenda provides for interconnection charges. Clause 6.4.2 reads as under :-

"6.4.2 Interconnect Usage Charges (IUC) payable by UASL to BSNL shall be as per details enclosed in Scheduled I. Similarly, IUC shall be payable by BSNL to UASL as per Schedule I. This Schedule I may be amended as per applicable TRAI's Regulation or as mutually agreed from time to time. Interconnect Usage Charges shall not be linked with any tariff plan provided by BSNL to its own subscribers or any other categories of service providers."

Clause 6.4.6 reads as under :-

6.4.6 WRONGLY ROUTED CALLS

(a) Unauthorised calls i.e. calls other than specified for that trunk group if detected, for which the applicable IUC is higher than the IUC applicable for calls prescribed in that trunk group, then BSNL shall charge the UASL the highest applicable IUC, as applicable for such unauthorised calls, for all the calls recorded on this trunk group from the date

of provisioning of that POI or for the preceding two months whichever is less.

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

(c) When CDR based billing is introduced in BSNL's network some of the trunk groups shall be merged. In such cases also, in case unauthorised or Incoming International Call, without CLI call, call with tampered CLI is handed over to BSNL at the merged trunk group, then BSNL shall charge the UASL the highest applicable IUC, as prescribed in clauses 6.4.6(a) above for unauthorised calls & 6.4.6(b) above for incoming International call, without CLI call, call with tampered CLI, for all calls recorded on this merged trunk group from the date of provisioning of that POI or for the preceding two months whichever is less.

(d) In addition, BSNL shall also have the right for taking other legal actions including disconnection of POIs or temporary suspension of the interconnection arrangements under misuse.

33. Clause 6.4.7 provides for furnishing of informations including outgoing STD and ISD traffic from a limited mobile access network handed over to each of private NLDO/ILDO separately and incoming STD and ISD traffic terminated to its network and originated from private NLDO/ILDO's

network separately. It was, furthermore, provided :-

> "6.4.7…….
>
> Similarly, information of intra circle traffic from its limited mobile/fully mobile/cellular access network to each of fixed network (including its won) separately and intra circle traffic to its fixed access network from each of limited mobile/fully mobile/cellular network (including its own) separately is also to be given each access provider wise by UASL to BNSL."

34. Clause 6.5.2 provides for billing. It is, however, accepted that at the relevant point of time CDR based billing system for POIs was not available at the BSNL's network.

35. Mr. Ramji Srinivasan, learned senior counsel appearing on behalf of the Petitioner, in support of these petitions would urge :-

(i) So far as the claim of the Respondent in respect of P-1 period is concerned, the same having never been the subject matter of any petition and no claim having been raised in respect thereof, the same must be held to be barred by limitation having been issued in May and June 2010 and in that view of the matter, the question of paying any interest on the said sum does not arise.

(ii) In the facts and circumstances of the case and in particular, having regard to the fact that the Respondent had raised bills for P-1 period in 2010, no interest could be calculated from 2004 onwards being contrary to Clause 7.2.1 of the Agreement. In any

event, no compound interest is payable in terms of Clause 7.5 of the Agreement.

(iii) Respondent having the opportunity to raise claims on the Petitioner during the pendency of the earlier litigations and it having chosen to limit it's claim only in respect of P-3 period, the claim for the other period is barred under the principles of 'Constructive Res-Judicata' and/or Order II Rule 2 of the Code of Civil Procedure;

(iv) Even before the Supreme Court of India, the Respondent only filed an affidavit stating that their total demand is about Rs.434 crores for the period 14.11.2004 to 28.02.2006 and despite the fact that the Petitioner had supplied all the requisite data way back in 2006, it having limited its claim by raising a bill on or about 11.02.2011 only for P-3 period, it is estopped and precluded from raising any other or further claim.

(v) Respondent itself having issued a circular letter dated 14.01.2005 contending that the circle offices should not pay ADC on such calls of those phones and having contended that it would treat the Petitioner's Unlimited Cordless Service as WLL(M) and not a fixed one, it would not be correct to contend that it's rights with regard thereto crystalised only after the

judgment of the Supreme Court of India delivered on 30.04.2008.

(vi) So far as the decision of this Tribunal in COAI Vs. RIL being Petition No. 140 of 2005 is concerned, even COAI had claimed refund of ADC only from 14.11.2004 which, thus, covered only P-2 and P-3 period against the Petitioner and the Respondent respectively.

(vii) Even the Respondent in Petition Nos. 163 of 2011 and 169 of 2011 confirmed that it had not been seeking any ADC for the P-1 period.

(viii) The IUC charges being only in respect of origination, carriage and termination of calls, the claim of refund of ADC is beyond the scope of interconnect agreement.

(ix) Respondent having regard to the provisions contained in the interconnect agreement, should not have claimed any interest for any period prior to the date of the judgment of the Supreme Court of India, wherein only a scheme of ADC for P-2 period had been upheld. In any event, no valid bill having been raised by the Respondent, the question of invoking the provisions for payment of interest under the Interconnect Agreement does not arise.

(x) A claim in terms of Clause 6.4.6 of the Interconnect Agreement, in view of the decision of the Supreme Court of India in the case of BSNL (Supra) being in the nature of pre-estimated damages, the Respondent is not entitled to any other or further amount by way of interest i.e. damages.

(xi) The claims of the Respondent for the P-3 period, whether for ADC or pre-estimated damages or interest, are not valid in law, keeping in view the fact that the question is pending consideration before the Supreme Court of India in Civil Appeal No. 4877 of 2011.

(xii) So far as claim of the Respondent for ADC is concerned, no details in regard to the P-3 period having been provided for, it must be held to have failed to establish that the same has correctly been computed or that correct rate has been applied or correct CDRs or MoUs have been used in calculating the amount under the bills.

(xiii) Having regard to the fact that this Tribunal in its judgment dated 15.4.2010 had directed the Respondent to raise bills for the P-3 period separately, and it having raised only a consolidated bill, the Petitioner became disabled to verify the correctness thereof.

(xiv) Petitioner was entitled to supply of CDRs by the Respondent having asked therefor in asmuch as its claim, if any, could be supported by a detailed Call Data Record for establishing genuineness/veracity of the demand. Despite receipt of the Petitioner's letters dated 28.7.2010 and 22.7.2010 requesting the Respondent to supply the CDRs and the same having not been complied with, it would not be possible for it to verify the same from its CDRs keeping in view the provisions of the Interconnect Agreement.

(xv) Clause 6.4.6 of the Interconnect Agreement having been inserted by way of Addenda VI on or about 28.02.2006 having regard to the exception contained therein as regards payment of IUC/ADC charges, interconnection arrangements and associated billing arrangement, it must be held that the bills which have been raised by the Respondent, could not have been reopened and/or supplemented.

(xvi) Even assuming that any bill could be raised in terms of Clause 6.4.6 of the said Addenda, it having not been specified as to which sub-clause thereof would be applicable in the instant case, no amount is payable,

(xvii) ADC not being a part of IUC, no bill for payment of ADC could be raised in terms of the provisions of the Interconnect Agreement having regard to the fact that in view of decision of this Tribunal as also the Supreme Court of India, it is now trite that the Respondent does not have any legal right to obtain ADC.

(xviii) In any event, payment of ADC having been allowed by the TRAI only by way of a subsidy, the Respondent is not entitled to any amount by way of unjust enrichment or otherwise in excess of the amount to which it became entitled to thereunder.

(xix) In view of the decision of the Supreme Court of India as regard quantification of amount payable to the Respondent, it having already realised more than Rs.5,335 crores as noticed by this Tribunal in its Judgment dated 21.9.2005 in Appeal No.7 of 2005 titled COAI & Ors. Vs. TRAI & Ors., it was incumbent on it to prove that by reason of non-payment of ADC by the Petitioner, it has suffered any loss.

(xx) Clause 7.5 of the agreement providing for interest must be struck down as the same is not reciprocal and contrary to the basic concept of the level playing field between two parties of the contract.

(xxi) The provision for payment of interest as contained in Clause 7.5 being unfair, unreasonable and against the principles of equity, must be held to be violative of Article 14, 19(i)(g) and 21 of the Constitution of India as also contrary to the public policy and, thus, violative of Section 23 of the Indian Contract Act. In any event, the Respondent cannot claim any interest contrary to Clause 7.5 of the Addenda read with Clause 7.2.1 of the Basic Interconnect Agreement without raising a bill and providing for a due and effective date of payment.

(xxii) Petitioner having paid excess amount in terms of the interim order passed by this Tribunal, it is entitled to obtain refunds thereof.

(xxiii) Respondent ought to have filed petitions before this Tribunal for recovery of money sought to be due from the Petitioner and not take recourse to the disconnection of POIs in terms of the Interconnect Agreement or otherwise.

36. Mr. Vikas Singh, learned senior counsel appearing on behalf of the Respondent, on the other hand, urged:

(a) Petitioner, having not raised any pleadings so far as the nature of ADC being a subsidy having a cap (upper limit) of 5000 and odd crores, is concerned, cannot be permitted to urge the same.

(b) In any view of the matter ADC having been provided in the Regulations framed by the TRAI for the benefit of BSNL, the validity of the Regulations itself should have been challenged by the Petitioner and it having not done so should not be permitted to raise any question with regard thereto before this Tribunal and that too without any pleadings in that behalf whatsoever.

(c) The question as to whether the ADC was payable to BSNL on the premise that the services rendered by the Petitioner herein was WLL(M) service and not a fixed service, the Respondent could not and/or did not raise any bill on the Petitioner as the matter was pending before this Tribunal and the Supreme Court of India, wherein an order of stay was passed.

(d) As far as the P-1 period is concerned, the private operators are also liable for calls made inter se amongst themselves for which ADC was payable to BSNL.

(e) The private operators including the Petitioner having not supplied the details which ought to have been done in terms of the interconnect agreement, the refund of the amount paid to Petitioner by way of IUC charges could not be claimed.

(f) The Supreme Court of India having held that ADC is a part of IUC, the Petitioner cannot be heard to say that no ADC was payable.

(g) Addenda VI to the inter connect agreement having been given a retrospective effect on and from 14.11.2003, all the relevant provisions contained therein, which could not be placed before this Tribunal in the earlier round of litigation as the same did not come into force by the time the matter was heard and the judgment was pronounced, but to which attention of the Supreme court of India could have been but was not drawn, should be taken into consideration which would include the definition of `fixed WLL service' and Chapter VI and Chapter VII thereof, dealing with the issues regarding `raising of bills, supply of informations, penal charges, the terms of payment, `right of disconnection and interest payable on delayed payment'.

(h) Clause 7.2.1 of the license agreement as contained in Addenda VI having provided for raising of bills on mutual basis, the claim of the Respondent cannot be held to be barred under the law of limitation.

(i) Clause 7.5 of the Interconnect Agreement will clearly go to show that interest would be payable both in respect of a bill:

1. which has been raised, and

2. the bill which could not be raised on the due date due to non supply of information by the operator

(j) From a perusal of the Regulations dated 29.10.2003, it would be evident from the definition of terms including `user charges' that ADC in terms of Clause 4 of the IUC Regulations was one of the components of IUC.

Schedule-I appended t the Regulations providing origination charges having been confined to 00.30 paise i.e. at an uniform rate and the carriage charges having been fixed on the basis of distance and thus uniform where the distance is not in question; the only variable component for NLD and ILD being ADC and, thus, the rate payable for ILD being Rs.4.25 would be the highest rate which would be applicable for the purpose of invocation of Clause 6.4.6 of the agreement for a period of two months.

(k) Respondent became entitled to refund of the amount as it had made payments treating the services rendered by the Petitioner to be a fixed service, although in terms of the Regulations it was to make payments when calls originated from a fixed service and terminated at WLL(M) and to receive payments when a call originated from WLL(M) was terminated at a fixed service.

Moreover, for intra circle calls from Cellular to WLL(M), the Respondent would be entitled to the IUC charges.

(l) From a perusal of the judgment of this Tribunal as also of the Supreme Court of India, it would be evident that the circular letters issued by the Respondent herein being 14.1.2003, 19.1.2003 and 9.3.2005 having been

upheld, each component contemplated thereby must be held to have become payable in consequence thereto or as a result thereof.

(m) This Tribunal as also the Supreme Court of India having rejected the contentions of the Petitioner that the said circular letters issued by the Respondent either on the ground of unilateralism and/or alteration of services, the Respondent is entitled to the amounts found to be payable relying on or on the basis thereof.

(n) From a perusal of the circular letters dated 14.1.2003, 19.1.2003 and 28.1.2004, it would be evident that the Respondent had sought for informations from the Petitioner as regards the details of the calls made by the operators inter se and in absence of the details thereof neither any bill could be raised nor the law of limitation will have any effect with regard thereto.

(o) This Tribunal and the Supreme Court of India having clearly held that the main beneficiary of ADC being the Respondent and the payability thereof being governed by the services capable of being rendered between SDCA and not solely on the basis of the advertisement issued, it is wholly inconceivable that it having clearly been held that the advertisement was the trigger point and withdrawal of the advertisement did not result in withdrawal of the nature of service and thus, ADC and IUC shall be payable

for all the three periods subject of course to the fact that the demand under Clause 6.4.6 would be restricted only from 14.11.2004 to 13.1.2005.

(p) During pendency of the proceedings before this Tribunal as also before the Supreme Court of India, subject to certain conditions, orders granting stay of disconnection notices having been issued, it was not possible for the Respondent to raise bills.

(q) The Supreme Court of India having arrived at a finding in para 26 of its judgment, clearly found that the WLL(M) would be a service feature and, thus no exception can be taken thereto.

(r) By reason of the judgment of the Supreme Court of India, the circular letters issued by the Respondent having been upheld and it having been found that the service features provided by the Petitioner were not capable of being confined to a premise as far as the mobility aspect is concerned and furthermore the decision of the TRAI dated 4.3.2005 being a clarificatory one and not an amendatory one, the same must be held to be retrospective in nature.

(s) Petitioner having not raised any contention that no refund was permissible or inter circle charges were not payable, in view of the decision of this Tribunal dated 18.3.2010 in the case of Cellular Operators Association of India & Ors. vs. Tata Teleservices Ltd. & Ors., Petition No.74 of 2005 and Cellular Operators Association of India & Ors. vs. Reliance

Infocomm Limited & Ors., it would not be correct to say that the judgments rendered therein as also the Supreme Court of India covered any period, particularly, having regard to the fact that it has been found therein that the law was not clear.

Moreover, ADC being payable in terms of the IUC Regulations and the Respondent having been paying the same from 1.2.2003, the Petitioner has not made out any case for grant of any relief as has been prayed for in this petition or otherwise.

(t) Even in Petition No.109 of 2008 (Reliance vs. BSNL), this Tribunal having considered the nature of demands made by the Respondent and it having been held that the principles of Constructive Res Judicata as also the principles of Order II Rule 2 of the Code of Civil Procedure would be applicable, the Petitioner cannot now be permitted to raise the same questions once over again.

(u) This Tribunal having granted liberty to the Respondent to raise bills for the P-3 period, the contention of the Petitioner that no such liberty had been granted which would clearly demonstrate the hollowness of its claim.

(v) Before the Supreme Court of India, no specific period being in issue and only the validity of the circulars and the demands raised by the Respondent being in issue and the same having been upheld, the question of the

Supreme Court's adjudicating on any issue as regards different periods did not and could not arise.

(w) From the pleadings of the Petitioner, it would appear that more or less the petition are confined to the claim of interest by the Respondent.

Keeping in view the fact that in terms of the interconnect agreement entered into by and between the parties, the accounts maintained by them was mutual, the provisions of Article 1 of the Schedule appended to the Limitation Act, 1963 would be attracted in the instant case.

(x) So far as the prayer of the Petitioner relating to validity of the interest clause as contained in Clause 7.5 is concerned, this Tribunal may read down the same to provide for a level playing field to the private operators also.

However, this Tribunal has no jurisdiction to re-write the agreement as it is not a Court of record but has only a limited jurisdiction.

(y) Clause 6.4.6 of the interconnect agreement as inserted by the Addenda, the Respondent has not claimed any ADC or IUC for the period of two months but is entitled to claim refund from the very beginning as payability thereof was in question before this Tribunal as also the Supreme Court of India.

(z) The Petitioner having not questioned the correctness of any particular bill, the prayers made by the Petitioner in that behalf must be held to be completely vague as no case has been made out for setting aside a bill, either on the basis of any sound reasoning or otherwise. Moreover, the Petitioner having not made out any case as to why the Respondent's claim for inter circle IUC charges would not be payable, interest of justice would be subserved if a direction is issued to reconcile the accounts between the parties as has been done by this Tribunal in Petition No. 109 of 2008 Reliance Communications Ltd. vs. Bharat Sanchar Nigam Limited by an order dated 15.4.2010.

The Demand

37. We may at the outset notice that three different periods of claim as indicated heretobefore as P-1 (1.2.2004 to 13.11.2004), P-2 (14.11.2004 to 26.8.2005) and P-3 for the period (27.8.2005 to 28.2.2006) comprised of three types of claims.

The claim involved in the P-1 period is ADC. The claim involved in P-2 period involves invocation of Clause 6.4.6 i.e. for IUC.

The claim for the P-3 period is normal IUC plus ADC.

38. The bills for P-1 period was raised in May –June, 2010. The claim involved in the P-2 period was, however, raised in January, 2005. So far as the claim for P-3 period is concerned, before the Supreme Court of India,

the Respondent filed an affidavit demanding a sum of Rs.434.00 crores for the period 14.11.2004 to 28.2.2006 i.e. for both the P-2 and P-3 periods. The said demand also the subject matter of Petition No.109 of 2008.

39. It has been brought to the notice of this Tribunal that despite the fact that BSNL by a circular dated 10.5.2010 directed its Field Units to raise bills for the P-1 period but the same were raised in the following manner in respect of circulars mentioned therein:

Circle	Bill Dated	Period	Amount	Pgs
Rajasthan Petition 96/11	19.6.10	P1	464044	40
	19.6.10	P1	257998	41
	21.7.10	P1	1083855	43
	6.7.10	P1	342462	44
	6.7.10	P1	190530	45
	6.7.10	P1	14491	46
	9.12.10	P1	421909	47
	9.12.10	P1	266642	48
	10.1.11	P1	17813	50
Maharashtra Petition 157/11	19.1.11	P1 (Consolidated bill for P1, P2, P3)	339112842	186 of Pet. 141/11

Karnataka Pet 159/11	2.8.10	P1	1208257 149884 384952 153508	190 of Pet. 141/11
Delhi & NCR Pet 163/11	18.2.11	P1	659845895 (W/d claim)	142 of Pet. 141/11
Punjab Pet 169/11	15.2.11	P1	22,87,20848 (W/d part of claim)	199-201 & 204 of Pet. 141/11

40. In this behalf the bill dated 10.1.2011 for the Rajasthan Circle may be noticed which is as under:

Bill Dated 10-1-011 M/s Reliance (Infocomm) Communication Ltd. E-161 E-170 Road No.12, V.K.I. area Jaipur Last date of payment 30-1-011 From: Feb 04 To: Jan-05 PAGE-1 PAGE-1 Final supplementary bills to recover IUC including ADC from M/s Reliance in r/o WLL(M) Services as per L.No.TR-IUC-Unlimited Cordless/RCL/98 dated 22-5-010 Bill regarding calls terminated by BSNL on the WLL(M) Service of reliance treating these services as Fixed Line Service due to use of Fixed Line (6B) The following Bills were raised for total Rs.23,361/= as under B.No. B/Date B/Amt POI 64681173 20-2-07 5488= AJ TAX 64681180 20-2-07 1296= EWSD AJ 64681204 20-2-07 8769= Bear 64681196 20-2-07 7808= MJK	Total amount payable Amount payable	17813

_____ 23361=For Nov-04 TO Jan-05 Now	by the last date	17813

IUC Regulations

41. The TRAI in exercise of its jurisdiction under 11(1)(b) of the Act made the first IUC Regulations on or about 24.1.2003, with effect from 29.10.2003. It was valid for the period 1.2.2004 to 31.1.2005.

The Interconnect Usage Charges (IUC) had a limited life, meaning thereby it ceased to have effect, if forbearance was prescribed or another IUC Regulation was made.

42. For the purpose of appreciating the submissions made by learned counsel for the parties, we may at the outset notice some of the relevant provisions of the IUC Regulations.

43. ADC is defined in Clause 2(ii) of the Regulations to mean Access Deficit Charges.

The terms `Interconnection' and `Interconnection Usage Charges' have been defined in Clause 2(viii) and 2(x), to mean as under:

> "2(viii) "Interconnection" means the commercial and technical arrangements under which service providers connect their equipment, networks and services to enable

their customers to have access to the customers, services and networks of other service providers."

"2(x) "Interconnection Usage Charge (IUC)" means the charge payable by one service provider to one or more service providers for usage of the network elements for origination, transit or termination of the calls."

44. Indisputably, in terms of Clause 4 occurring in Section IV of the said Regulations, the Interconnection Usage Charges were specified in the Schedules. It reads as under:

"4. Interconnection Usage Charges (IUC)

The Interconnection Usage Charges are specified in Schedules hereto.

Schedule I – Termination Charges

Schedule II – Carriage Charges

Schedule III – Access Deficit Charge (ADC)"

Schedule I comprises of three categories of charges.

`Termination charges' were prescribed at the rate 0.30 paise per minute.

`Forbearance' was provided for origination charges and Carriage charges have been specified in Schedule II.

Access deficit charges have been specified in the Schedule III.

45. Access Deficit Charges applicable for the specified category of calls had been mentioned in Table III. It was payable to basic service

operators on a per minute basis by the Basic/Cellular Operators, National Long Distance Operators and International Long Distance Service Providers.

We may notice Table III of the said Regulation:

TABLE III

Access Deficit Charge application for various types of calls

Access Deficit charge	Local	Intra circle calls		Inter circle calls			ILD
(in rupees per min)	Local	0-50 kms	>50 kms	0-50 kms	50-200 kms	>200 kms	ILD
Fixed-Fixed	0.00	0.00	0.30	0.30	0.50	0.80	4.25
Fixed-WLL(M)	0.30	0.30	0.30	0.30	0.50	0.80	
Fixed-Cellular	0.30	0.30	0.30	0.30	0.50	0.80	
WLL(M)-Fixed	0.30	0.30	0.30	0.30	0.50	0.80	4.25
WLL(M)-WLL(M)	0.00	0.00	0.00	0.30	0.50	0.80	
WLL(M)-Cellular	0.00	0.00	0.00	0.30	0.50	0.80	
Cellular-Fixed	0.30	0.30	0.30	0.30	0.50	0.80	4.25
Cellular-WLL(M)	0.00	0.00	0.00	0.30	0.50	0.80	
Cellular- Cellular	0.00	0.00	0.00	0.30	0.50	0.80	

It is not in dispute that for the period 2003 and 2008 ADC was payable by other operators to BSNL.

46. The Explanatory Memorandum of the TRAI appended to the said Regulations inter alia contains some salient features of the regime.

Table I reads as under:

TABLE 1

Illustrative IUC Plus ADC Charges as Applicable Under The IUC Regulation Of January 2003

(INTRA CIRCLE)								
	>500 kms		**200-500kms**		**50-200kms**		**0-50kms**	
	Uniform ADC	**Non uniform ADC**	**Uniform ADC**	**Non uniform ADC**	**Uniform ADC**	**Non uniform ADC**	**Uniform ADC**	**Non uniform ADC**
F-F	5.10	4.60	4.75	4.25	2.45	2.45	0.70	0.70
F-W	3.60	3.35	3.25	3.00	1.95	1.95	0.95	0.95
F-C	1.20	1.20	1.20	1.20	1.20	1.20	1.20	1.20
W-F	3.50	3.25	3.15	2.90	1.85	1.85	0.85	0.85
W-W	2.00	2.00	1.65	1.65	1.35	1.35	1.10	1.10
W-C	1.00	1.00	1.00	1.00	1.00	1.00	1.00	1.00
C-F	1.20	1.20	1.20	1.20	1.20	1.20	1.20	1.20
C-W	1.00	1.00	1.00	1.00	1.00	1.00	1.00	1.00
C-C	0.80	0.80	0.80	0.80	0.80	0.80	0.80	0.80

47. The question is as to whether having regard to the various judgments of this Tribunal as also the Supreme Court of India, ADC being not a part of IUC and, thus, no demand in relation thereto is reasonable and/or whether by reason thereof the Respondent can unjustly enrich itself?

48. We may notice that the Petitioner in paragraph 8.5 of the petition has quoted an order dated 30.4.008 passed by the Supreme Court of India in Appeal No.5850 and 5871 of 2005, which is in the following terms:

> "……It is important to note that ADC does not arise out of any legal right. It arises out of TRAI's consideration of smoothening the transition process during competition, i.e. providing support during transition period when costs of access is not fully recoverable from the revenues from access line monthly rental under the existing tariff regime due to competition in the market. In other words, ADC is a depleting regime for ADC purpose……."

49. In Tata Teleservices Ltd. (supra) and Reliance Infocomm Limited (supra) similar observations of this Tribunal made in Petition No.119 of 2008 and 118 of 2008 being dated 15.4.2010 were noticed by the Apex Court.

This Tribunal in Petition No.166 of 2010 opined as under:

> "ADC and IUC charges are, however, separate and distinct, the former being not part of the later……"

50. It is also stated that the TRAI also in its Regulation No.2 of 2008 dated 27.3.2008 stated that different principles were used for calculation of IUC and ADC in the following terms:

> "9. Therefore the principle followed by The Authority was that the every cost of all the elements of the network required for completion of a call has been accounted for in IUC and any deficit arising out of rentals and to make calls affordable as accounted for in ADC. Thus the purpose of ADC was different from IUC.

10. In this regard it may also be noted that in per minute based ADC regime, in most of the scenarios the ADC was to be paid to BSNL, even when no IUC is required to be payable to BSNL as it is not involved in the completion of the call. As an example, mobile to mobile inter circle calls, wherein the traffic originated in the mobile network of an operator in one circle, carried by an NLDO (Other than BSNL) and terminated on the network of the same operator in another circle, the ADC was to be paid to BSNL, irrespective of the fact that it is not involved in the call and no IUC is required to be paid to it. Similarly in the percentage of AGR based ADC regime all the NLDOs and ILDOs are paying ADC to BSNL, even some of them are not carrying voice traffic and not having interconnection with BSNL. In view of all above, the Authority found no merit in the argument that ADC is an integral part of IUC."

Similarly, in Appeal No.6 of 2006, this Tribunal in its judgment dated 2.2.2009 held as under:

"51. We have considered the contentions of both the counsels. We find that the arguments of the learned counsel for Respondent are well founded. In fact, this issue has been set at rest by the Authority itself, which issued the Regulations. Paragraphs 8 to 10 of the Explanatory Memorandum to the IUC Regulations, 2008 leave no doubt whatsoever that while the Interconnection Usage Charges Regulation has been used by TRAI to bring in ADC, ADC is not an integral part of interconnection. Clause 2(x) of the IUC Regulations, 2008 reads as follows: '*Interconnection Usage Charges (IUC) means the charge payable by one service provider to one or more service providers for usage of the network elements for origination, transit and termination of the calls'*. Besides, in the **Reliance Infocomm case**, *cited supra*, the Hon'ble Supreme Court dealt with IUC and ADC as distinct elements. It observed that ADC is essentially to compensate for the difference between the costs and local calls revenue. The Apex Court also observed that categorization of services for levying a charge by way of IUC/ADC is a matter of policy and revenue recognition, which is the part of the regulatory regime. We therefore

> hold that while the IUC Regulation may have been used by TRAI to bring in ADC, ADC is not an integral part of interconnection and that IUC and ADC are distinct elements. We hold that the Authority had rightly concluded that the purpose of ADC was different from IUC and that ADC is not an integral part of IUC. It follows therefrom that demand for ADC will have to be on its own merits and not based on alleged violations of IUC."

51. The concept of ADC and IUC having been defined differently and the rates thereof having been specified in different Schedules they may have to be dealt with differently. It may also be true that TRAI in its Explanatory Memorandum dated 24.1.2003 devoted a few paragraphs as to why those two different charges had been levied.

We are, however, not concerned therewith.

52. Having regard to the decision of the Supreme Court of India in the cases of Tata Teleservices (supra) and Reliance (Supra), if a call originated from WLL(M) and terminated in a fixed phone or vice-versa, ADC @ 0.30 paise becomes payable apart from intercircle calls and ILD charges, whereas for making calls from WLL(M) to WLL(M) no ADC is payable.

53. Similarly, if a call originated from a fixed telephone and terminated in a Cellular one and vice-versa, ADC at the rate of 0.30 paise became payable.

54. The Supreme Court of India in the case of Tata Teleservices (supra) noticed that the charges claimed by the Respondent herein were towards ADC.

Paragraphs 12 and 13 of the said judgment read as under:

> **Meaning of Interconnection Usage Charges ("IUC")/ADC:**
>
> 12. On 29.10.2003, TRAI notified IUC. ADC is a part of IUC. ADC is a percentage of the revenue. The framework of IUC regime was established by TRAI through its Regulation dated 24.1.2003 which was subsequently reviewed on 29.10.2003 and 6.1.2005. IUC has to be determined based on minutes of usage for various network elements and the cost of these elements.
>
> 13. ADC, on the other hand, is based on the consideration of cost based rent, local call charges, low rental in rural areas, free calls etc. to make the basic telecom services affordable to the common man, to promote universal service and universal access as required by NTP, 1999. **It is important to note that ADC does not arise out of any legal right. It arises out of TRAI's consideration of smoothening the transition process** during competition, i.e., providing support during transition period when costs of access is not fully recoverable from the revenues from access line monthly rental under the existing tariff regime due to competition in the market. In other words, ADC is a depleting regime for ADC purpose. **Calls to/from WLL(F) is similar to calls to/from fixed lines. It is important to note that fixed wireless services**, provided by fixed service providers, **and unified access service** licences **are classified as Fixed Services**. However, **fixed wireless services for all purposes tantamounts to full cellular services and can be offered seamlessly throughout the SDCA** which created a non level playing field for cellular operators vis-a-vis the fixed wireless service providers, which has led to the present dispute, which is primarily concerned with the "range of mobility" of Fixed Wireless

> Terminals provided by appellants herein and Reliance Infocomm and not with the size of the instrument "Walky" provided by appellants (Handset provided by Reliance Infocomm) or the technology used therein, viz, wireless or wireline, in the context of levy of ADC.

55. It was held that walky services if treated to be WLL(M) service for the purposes including numbering plain, interconnection user charges, ADC etc. as clarified by the DoT in its Circular letter dated 23.3.2005 would be payable. It was held that `levy of ADC would depend upon the service which is rendered to the user by the access provider.'

It was opined:

> "49. Before concluding, one aspect needs to be mentioned. It is alleged by the appellants and also by Reliance Infocomm Ltd. in the conjoint appeal which we will separately deal with in the subsequent judgment that BSNL have also not disclosed their numbering levels for their fixed wireless service and for their WLL(M) services which they have been providing during the relevant period in the name of "Tarang", which according to the appellants, would now constitute WLL(M) service. According to the appellants, BSNL has also been providing fixed wireless phone services which has limited mobility. This is a matter of quantification. That stage has not yet arrived. However, Mr. Gopal Subramanium, learned senior counsel appearing on behalf of BSNL, has fairly stated that BSNL would abide by the parameters laid down in our judgment and whatever adjustments required to be made in that regard in the context of claims and counter claims, the same shall be worked out in near future. Be that as it may, we express no opinion on the point of quantification which question did not arise even before TDSAT in this case. Suffice it to state that the services of the appellants vide the instrument Walky falls in the category of WLL(M) service and, accordingly, the appellants would be liable to

pay ADC in that regard during the relevant period 14.11.2004 to 26.8.2005."

56. Similar observations were made in the case of Reliance Infocomm (supra) at paragraph 39 of the judgment in the following terms:

> "39……..The test to be applied to distinguish WLL(F) from WLL(M) is that if the impugned service cannot be restricted to the place of the subscriber then such service has to be classified as WLL(M) for the purposes of ADC. In the present case, the impugned service cannot be technically confined to the premises of the subscriber. The impugned service cannot comply with PSR. Therefore, it has to be classified as WLL(M) service for ADC purposes."

It was also held:

> 42. The important thing to be noted in this case is we are basically concerned with the levy of ADC charge on a given call. The identity of the call and the caller is checked not by the base station but by the MSC. The Numbering plan is also in MSC and not in the BTS. In this case, we are not concerned with the communication linkage between MSC and BTS. In this case, we are essentially concerned with the existing service in MSC on the basis of which a charge could be levied depending on the type of the originating call. If a Walky call is to be classified as FWA service then the integrity of the Numbering plan would stand infringed. The Numbering plan is co-related to the Database in the MSC. It is for this reason that we have examined the differences in the services, namely, cellular, cordless, FWA etc. It is for this reason that we have analysed the types of devices, namely, fixed device, nomadic device, low mobility, high mobility etc.

57. We may also notice that while considering the matter relating to payability of ADC, it was observed that both in terms of technology as also

policy framework, the classification of wireless services into three categories in the matter of payability of ADC was well known to the service provider.

A bare perusal of the relevant provisions of the Regulations as indicated heretobefore would clearly go to show that IUC and Access Deficit Charges had been mentioned in different schedules.

58. Be that as it may, in our opinion, it is incorrect to contend that the right of the Respondent to receive ADC although may not be a legal one as a concept but it is difficult to ignore that the same emanates from the IUC Regulations.

59. It must be borne in mind that the TRAI assigned no reason as to why ADC would be payable to the Respondent. But the same would not mean that right of the Respondent to receive ADC from other operators can be totally ignored.

60 Such a case, in our view, could not have been made out as the basis thereof has been upheld in both the first and second round of the litigation.

61. In the first round of litigation, the validity of the bills have been upheld; in the second round, the Petitioner was given to liberty to question the correctness of the bills and not the right of the Respondent to claim ADC. The respective rights and obligations of the parties having been determined, to our mind, the basic question cannot be permitted to be reopened again.

62. It is well settled what cannot be done directly, cannot be permitted to be done indirectly.

63. It may not be a legal right to charge ADC while claiming IUC. ADC is payable, albeit separately, by the Respondent both under the interconnect agreement as also under the Regulations.

64. IUC Regulations remained valid for different periods. So long the said Regulations remained operative, it is difficult to conceive as to how a cap thereupon was possible to be put.

65. It is not the case of the Petitioner that the IUC Regulations although stricto sensu may not be a Regulation made in terms of Section 36 of the Act and come within the purview of a `Direction' issued by the TRAI in exercise of its power under Section 11(1)(b) thereof, has no force of law.

66. This Tribunal time and again has held that the Regulations made by the TRAI in exercise of its jurisdiction under Section 11(1)(b) of the Act would be law within the meaning of Article 13 of the Constitution of India.

Unjust Enrichment Issue

67. From para 47 of the judgment dated 12.5.2009 passed by the Tribunal in Appeal No.6 of 2006 as also from the judgment dated 15.4.2010 passed in Petition No.166 of 2006 Reliance vs. BSNL, it would appear that

the question with regard to interpretation of 6.4.6 had not been pleaded in those proceedings.

68. In any event on a bare perusal of Clause 6.4.6 of the Interconnect Agreement it would appear that the same deals with the calls which terminates at the BSNL's Trunk Group and, thus, has nothing to do with the intercircle calls.

69. No pleading in this behalf having been raised, the contentions raised by Mr. Srinivasan cannot be entertained.

70. If a contention like the present one was to be raised, it was obligatory on the part of the Petitioner to raise requisite pleadings with regard thereto in its petition.

71. In case of this nature, the importance of pleadings cannot be minimized. (See paragraphs 67-70 of Maria Margarida Sequeria Fernades and Others vs. Erasmo Jack DE Sequeria (Dead) Through L.Rs. 2012(3) SCALE 550). It was held that apart from pleadings the court must insist on documentary proof in support of the pleadings.

72 Submissions of Mr. Srinivasan, that the Respondent, having realized a huge amount that is more than Rs.5000 crores and odd from different private operators including Tata Teleservices, cannot enrich itself unjustly, would have required consideration, if requisite pleadings were raised in that behalf and evidence to the effect was brought on record.

No evidence whatsoever in that behalf has been adduced.

In absence of any pleading or proof, we are afraid, such a question cannot be determined.

73. Strong reliance has been placed by Mr. Srinivasan on Kumari Shrilekha Vidyarthi & Ors. vs. State of UP & Ors. (1991) 1 SCC 212 wherein it was held that the concept of fairness, justness and reasonableness would apply also in contractual matters, where the State is a party.

74. In that case the Apex Court was considering the doctrine of "Spoils System" being the practice of giving public offices to adherants of a political party on assumption of power which was held to be ultra vires Article 14 of the Constitution of India.

75. The observations made in paragraphs 24, 27, 33, 35 and 36 of the said judgment to which our attention has been drawn by Mr. Srinivasan refer to a situation where the relationship between the parties is although governed by contract, but where the action on the part of the `State' was found to be arbitrary.

76. Action of a `State' no doubt should be fair as recently opined in NOIDA Entrepreneurs Association vs. Noida & Ors., 2011(6) SCC 508 (59) but when a statute confers a special benefit, it must be held to be reasonable unless declared otherwise.

77. The law (in this case the IUC Regulations) issued from time to time by the TRAI cannot be held to have conferred an unjust benefit on the Respondent. If that was so, it was obligatory on the part of the Petitioner to question the validity thereof at the appropriate stage. It should have furnished the requisite data therefor.

78. For the said purpose whether a judicial review would have been maintainable or an original petition would have been maintainable against the TRAI is a different question.

79. But what needs to be emphasised is that in absence of such a challenge and that too in absence of the TRAI being a party in these proceedings, no credence can be given thereto.

80. Reliance has also been placed by Mr. Srinivasan in LIC of India & Anr. vs. Consumer Education & Research Centre & Ors. reported in (1995) 5 SCC 482, wherein upon taking into consideration the relative bargaining power of the contracting parties thereto, the Apex Court held that if a contract or a clause contained therein is found to be unreasonable or unfair or irrational, the same cannot be acted upon.

81. For the aforementioned reasons the decision of the Apex Court in LIC (supra) also has no application to the fact of the present case.

82. A large number of judgments of the Apex Court have also been cited by Mr. Srinivasan to contend that equity principles should be applied to

hold that a party to a lis cannot unjustly enrich itself viz. State of Maharashtra & Ors. vs. Swanstone Multiplex Cinema Pvt. Ltd. 2009 (8) SCC 235, Canbank Financial Services. Ltd. vs. Custodian & Ors 2004 (8) SCC 355, K.T. Venkatagiri & Ors. vs. State of Karnataka & Ors. 2003(9) SCC 1, Indian Banks' Association, Bombay and Ors. v. Devkala Consultancy Service and Ors. (2004) 11 SCC 1 and Mumbai Agricultural Produce Market Committee & Anr. vs. Hindustan Lever Limited & Ors. (2008) 5 SCC 575.

83. There can be no quarrel with the said legal proposition, but in our considered view, such a case has to be made out.

84. We may also notice a recent decision of the Supreme Court of India in Indian Council for Enviro-Legal Action vs. Union of India, (2011) 8 SCC 161. That case involved degradation of ecology vis-à-vis the benefit earned by a violater of a series of orders passed by the Supreme Court of India. It was stated:

> "162. We may add that restitution and unjust enrichment, along with an overlap, have to be viewed with reference to the two stages i.e. pre-suit and post-suit. In the former case, it becomes a substantive law (or common law) right that the court will consider; but in the latter case, when the parties are before the court and any act/omission, or simply passage of time, results in deprivation of one, or unjust enrichment of the other, the jurisdiction of the court to levelise and do justice is independent and must be readily wielded, otherwise it will be allowing the court's own process, along with time delay, to do injustice."

85. Thus, in a case invoking pre-suit right, the claim has to be established keeping in view the provisions of substantive law.

In State of Maharashtra & Ors. (Supra) the Apex Court, following several other decisions, opined as under:

> "36. It may be true that here at we are not concerned with refund of tax but then for enforcement of legal principles, this Court may direct a party to divest itself of the money or benefits, which in justice, equity and good conscience belongs to someone else. It must be directed to restitute that part of the benefit to which it was not entitled to."

86. We may however, add that the application of said principle would arise if a finding of fact is arrived at that a party had obtained undue advantage and thus cannot be permitted to retain the same.

For the said purpose the principles of restitution may be applied.

Recently in State of Gujarat vs. Essar Oil Ltd. reported in 2012(3) SCC 522, the Apex Court opined:

> "61. The concept of restitution is virtually a common law principle and it is a remedy against unjust enrichment or unjust benefit. The core of the concept lies in the conscience of the court which prevents a party from retaining money or some benefit derived from another which it has received by way of an erroneous decree of court. Such remedy in English Law is generally different from a remedy in contract or in tort and falls within a third category of common law remedy which is called quasi-contract or restitution.
>
> 62. If we analyse the concept of restitution one thing emerges clearly that the obligation to restitute lies on the person or the authority that has received unjust enrichment or unjust benefit (see *Halsbury's Laws of England*, 4th Edn., Vol. 9, p. 434).

> 63. If we look at *Restatement of the Law of Restitution* by American Law Institute (1937 American Law Institute Publishers, St Paul) we get that a person is enriched if he has received a benefit and similarly a person is unjustly enriched if the retention of the benefit would be unjust. Now the question is what constitutes a benefit. A person confers benefit upon another if he gives to the other possession of or some other interest in money, land, chattels, or performs services beneficial to or at the request of the other, satisfies a debt or a duty of the other or in a way adds to the other's security or advantage. He confers a benefit not only where he adds to the property of another but also where he saves the other from expense or loss. Thus the word "benefit" therefore denotes any form of advantage (p. 12 of the *Restatement of the Law of Restitution* by American Law Institute).
>
> 64. Ordinarily in cases of restitution if there is a benefit to one, there is a corresponding loss to other and in such cases, the benefiting party is also under a duty to give to the losing party, the amount by which he has been enriched.
>
> 65. We find that a person who has conferred a benefit upon another in compliance with a judgment or whose property has been taken thereunder, is entitled to restitution if the judgment is reversed or set aside, unless restitution would be inequitable (p. 302 of the *Restatement of the Law of Restitution* by American Law Institute).
>
> 66. Equity demands that if one party has not been unjustly enriched, no order of recovery can be made against that party. Other situation would be when a party acquires benefits lawfully, which are not conferred by the party claiming restitution, court cannot order restitution."

87. In Mumbai Agriculture Produce Market (supra) while considering the question of `fee', applying the principles of quid-pro-quo it was held as under:

> "14. The quantum of recovery, however, need not be based on mathematical exactitude as such cost is levied having regard to the liability of all the licensees or a section of them. It would, however, require some calculation."

88. We, therefore, in absence of any pleading or proof are not in a position to accede to the submissions of Mr. Srinivasan that the final object of prescribing ADC was by way of an ad-hoc arrangement and the Regulations were merely supervening in nature.

89. On the question of unjust enrichment Mr. Srinivasan has also relied upon the decision of the Supreme Court in Sahakari Khand Udyog Mandal Ltd. vs. Commissioner of Central Excise & Customs reported in (2005) 3 SCC pages, wherein it has been held as under:

> "31. Stated simply, 'Unjust enrichment' means retention of a benefit by a person that is unjust or inequitable. 'Unjust enrichment' occurs when a person retains money or benefits which in justice, equity and good conscience, belong to someone else.
>
> 32. The doctrine of 'unjust enrichment', therefore, is that no person can be allowed to enrich inequitably at the expense of another. A right of recovery under the doctrine of 'unjust enrichment' arises where retention of a benefit is considered contrary to justice or against equity.
>
> 33. The juristic basis of the obligation is not founded upon any contract or tort but upon a third category of law, namely, quasi-contract or the *doctrine of restitution*.
>
> ……..
>
> 45. From the above discussion, it is clear that the doctrine of 'unjust enrichment' is based on equity and has been accepted and applied in several cases. In our opinion,

therefore, irrespective of applicability of Section 11B of the Act, the doctrine can be invoked to deny the benefit to which a person is not otherwise entitled. Section 11B of the Act or similar provision merely gives legislative recognition to this doctrine. That, however, does not mean that in absence of statutory provision, a person can claim or retain undue benefit. Before claiming a relief of refund, it is necessary for the Petitioner/appellant to show that he has paid the amount for which relief is sought, he has not passed on the burden on consumers and if such relief is not granted, he would suffer loss."

90. Whatever be the nature of the said impost, unless the TRAI itself had restricted its applicability, it is difficult for this Tribunal to arrive at the conclusion that the Respondent could not recover any amount beyond a certain point having regard to the fact that the same was payable as it had expended a huge sum in laying cables in rural areas which the other operators did not.

91. We, therefore, have no hesitation to reject the said contention of the Petitioner.

Interconnect Usage Charges whether includes ADC.

92. Clause 6.4.1 and Clause 6.4.2 which are relevant, read as under:-

"6.4.1 Interconnect Usage Charges (IUC) shall be payable by UASL to BSNL for the calls originating in UASL network and handed over to BSNL network. Likewise Interconnect Usage Charges shall be payable by BSNL to UASL for the calls handed over by BSNL network and terminating in UASL network. Interconnect Usage Charges include termination

charge, carriage charge transit charge and access deficit charge (ADC) as applicable.

6.4.2 Interconnect Usage Charges (IUC) payable by UASL to BSNL shall be as per details enclosed in Schedule I. Similarly, IUC shall be payable by BSNL to UASL as per Schedule I. This Schedule I may be amended as per applicable TRAI's Regulation or as mutually agreed from time to time. Interconnect Usage Charges shall not be linked with any tariff plan provided by BSNL to its own subscribers or any other categories of service providers."
[Emphasis supplied]

93. ADC is not only, thus, payable under the Regulations, but also in terms of the said agreement in terms whereof IUC would include ADC as applicable.

Both by reason of a statute as also the agreement, therefore, ADC was payable to the Respondent herein.

94. Chapter VI provides for interconnection charges. A definition of 'interconnection charges' and 'Access Deficit Charges' in terms of the Regulations may be different, but as indicated heretobefore Clause 6.4 clearly provides therefor.

Disconnection of POI

95. The right of the parties to disconnect the Points of Interconnection in the event of non-payment of dues is not in dispute. The contention of the Petitioner however, is that the Respondent can disconnect POIs only for realization of IUC and not for ADC.

96. However, as by reason of an expansive definition, IUC would include ADC, we fail to see any reason as to why disconnection of a POI would not be permissible for non-payment of ADC also.

Constructive Res Judicata and Order II Rule 2 of the Code of Civil Procedure-Issue.

97. The contention of the Petitioner is that the defence of the Respondent is barred under the principles of constructive res judicata as also Order II Rule 2 of the CPC is stated to be rejected.

98. Respondent has drawn our attention to a letter dated 25.1.2004 wherein the Corporate office directed the circle offices to raise bills for the P-1 period i.e.1.3.2004 to 31.11.2004. But only because the Respondent in the earlier round of litigation raised the claim only for the P-2 and P-3 period, the same would not mean that it would not be permitted to do so for the P-1 period in the present proceeding, even if it was otherwise entitled thereto.

99. What was in issue therein was the right of the Respondent to raise the said claim. If the Respondent had paid a huge amount to the Petitioner by way of IUC charges which has subsequently been held to be not payable, it is difficult to hold that the claim with regard thereto would be barred under the principles of Constructive Res Judicata and/or Order II Rule 2 of the Code.

100. Moreover, there is nothing on record to show that the Respondent at any point of time has given a go bye to its claim. Even according to the Petitioner the claim for each of the three periods is to be considered separately. We thus, fail to see any reason as to why the claim of refund of ADC would be barred under the said principles.

101. We may notice the decisions on which reliance has been placed by Mr. Srinivasan.

102. In Hope Plantations Ltd. v. Taluk Land Board, (1999) 5 SCC 590, at page 611 the Apex Court stated the law thus:

> "31. Law on res judicata and estoppel is well understood in India and there are ample authoritative pronouncements by various courts on these subjects. As noted above, the plea of res judicata, though technical, is based on public policy in order to put an end to litigation. It is, however, different if an issue which had been decided in an earlier litigation again arises for determination between the same parties in a suit based on a fresh cause of action or where there is continuous cause of action. The parties then may not be bound by the determination made earlier if in the meanwhile, law has changed or has been interpreted differently by a higher forum. But that situation does not exist here. Principles of constructive res judicata apply with full force. It is the subsequent stage of the same proceedings. If we refer to Order XLVII of the Code (Explanation to Rule 1) review is not permissible on the ground
>
> "that the decision on a question of law on which the judgment of the Court is based has been reversed or modified by the subsequent decision of a superior court in any other case, shall not be a ground for the review of such judgment"."

103. In Ramadhar Shrivas v. Bhagwandas, (2005) 13 SCC 1, at page 9 it is stated as under:

> "21. In our opinion, the learned counsel for the appellant is also right in submitting that the rule of constructive res judicata applies to the present case. The expression "matter in issue" under Section 11 of the Code of Civil Procedure, 1908 connotes the matter directly and substantially in issue actually or constructively. A matter is actually in issue when it is in issue directly and substantially and a competent court decides it on merits. A matter is constructively in issue when it "might and ought" to have been made a ground of defence or attack in the former suit. Explanation IV to Section 11 of the Code by a deeming provision lays down that any matter which "might and ought" to have been made a ground of defence or attack in the former suit, but which has not been made a ground of defence or attack, shall be deemed to have been a matter directly and substantially in issue in such suit.
>
> 22. The principle underlying Explanation IV is that where the parties have had an opportunity of controverting a matter, that should be taken to be the same thing as if the matter had been actually controverted and decided. The object of Explanation IV is to compel the plaintiff or the defendant to take all the grounds of attack or defence in one and the same suit."

104. In Dadu Dayalu Mahasabha, Jaipur (Trust) v. Mahant Ram Niwas, (2008) 11 SCC 753 it was opined:

> "25. Explanation IV of Section 11 of the Code extends the principle of res judicata stating that the reliefs which could have been or ought to have been prayed for even if it was not prayed for would operate as res judicata. Section 12 thereof bars filing of such suit at the instance of a person who is found to be otherwise bound by the decision in the earlier round of litigation and in a case where the principle of res judicata shall apply.
>
> 26. We, however, are not unmindful of the principles of estoppel, waiver and res judicata are procedural in nature

> and, thus, the same will have no application in a case where judgment has been rendered wholly without jurisdiction or issues involve only pure questions of law. Even in such cases, the principle of issue estoppel will have no role to play.
>
> 27. However, once it is held that the issues which arise in the subsequent suit were directly and substantial in issue in the earlier suit, indisputably Section 11 of the Code would apply.
>
> 28. Similarly the provisions of Order 2 Rule 2 bars the jurisdiction of the court in entertaining a second suit where the plaintiff could have but failed to claim the entire relief in the first one. We need not go into the legal philosophy underlying the said principle as we are concerned with the applicability thereof."

105. None of the aforementioned decisions assist the Petitioner in as much as the claim of the Respondent towards refund of IUC Charges were not and need not have been put up as a defence to the contentions of Petitioners in the earlier case.

106. A separate claim of the Respondent an original petition is not a defence. Even according to the Petitioner the bills raised by the Respondent in the earlier round of litigation were not in issue.

107. The said claim is independent of the claims raised for the P2 and P3 period. Principles of Constructive Res Judicata, therefore, has no application in the present proceeding.

For the self serve reasons, Order II Rule 2 of the CPC has also no application.

Limitation Issue

108. The period in question is 1.3.2004 to 30.11.2004.

Bills for the said period have been raised in 2010 and 2011.

We may notice the different dates of the bills so far as the claim for the said period is concerned.

It has been noticed heretobefore that the Respondent by a letter dated 14.1.2005 not only stopped payment of ADC on calls made from or to the WLL(M) phones, but also by reason thereof, the circle offices were instructed to treat the Petitioner's unlimited cordless service as WLL(M).

109. Mr. Vikas Singh, however, would contend that in a situation of this nature Article I of the Schedule appended to the Limitation Act, 1963 shall apply.

Article 1 of the Limitation Act reads as under:-

"Description of suit	Period of limitation	Time from which period begins to run
(1) For the balance due on a mutual, and current account, there have been reciprocal demands between the parties.	Three years.	The close of the year in which the last item admitted or proved is entered in the account; such year to be computed as in the account."

110. A bare perusal of the said provision would clearly go to show that for attracting the same, the accounts maintained by the parties not

only must be mutual but also open and current. All the three ingredients must be fulfilled so as to attract the provision of Article I of the Limitation Act, 1963.

111. This Tribunal in a judgment in Idea Cellular Ltd. vs. Mahanagar Telephone Nigam Ltd. Petition No. 33 of 2009 disposed of on 26.7.2010 relying inter alia on Era Constructions (India) Ltd v. D.K. Sharma reported in 2008(1) Arb. L.R. 205(Delhi) clearly held:

> "24. To create an open, mutual and current account, there must be an intention. Such intention must be deducible from the course of dealings, to have mutual dealings, create the reciprocal obligations which are independent of each other, with the intention that these transactions are to continue and are not so closed until the parties decide to close their accounts. In this case parties were not maintaining any common account. The petitioner has claimed a money decree for non-payment of the roaming charges for particular month(s). The dues of the month(s) in question were not to be carried forward to the next month as interest was to be paid on the invoiced amount of the creditor minus the invoiced amount of the debtor and, thus, the transaction must be held to have come to a close on the happening of the said event. This Petition is not based on account but on invoice.
>
> 25. In any event, the agreement was terminated in April, 2005. Once it was terminated, the account between the parties would not be current. Thereafter, there would be no transaction. There would be no expectation of any transaction."

It was also, inter alia, noticed:

> "27. A division Bench comprising of Braumont, C.J. and Rangnekar, J., in Karsondas v. Surajbhan [AIR 1933

Bombay 450] considered a case where a suit has been filed by a principal against an agent for accounts and for money that may be found due. Holding that Article 85 will have no application, the learned Judges held as under:-

"In determining whether the suit falls within Art. 85, the first question to be decided is whether there was at any time a mutual, open and current account between the parties, and if so, when it was closed. As I have already said I think that at any rate down to April 1997 there was a mutual, open and current account between the parties, but, there being no general agency agreement, it would only remain an open and current account with the consent of both the parties. Whether that consent was withdrawn or not at any particular time is a question of fact. In my opinion the fact that all dealings between the parties ceased from April, 1992, coupled with the fact that in the following July the defendants sent in an account showing the amount due and made an unconditional offer to pay that amount, shows that it was the intention of the defendants to close the account, and I hold as a matter fact that the account was closed at any rate from 28.7.1922.

Now whether an account is mutual, open and current so as to attract the application of Art. 85 is a pure question of fact and must depend upon the nature of the dealings between the parties, nature of the entries and other relevant circumstances. In order that an account should be mutual there must be dealings between the parties and such dealings must be capable of giving rise to independent obligations on each side of the account at any given period or stage. One test commonly applied is the possibility of shifting balances sometimes in favour of one party and sometimes in favour of the other. But as observed in several reported decisions that the test is not decisive or conclusive of the matter. The real test is whether the dealings between the parties are of such a nature that the balance might so shift. An account current means a running account, that is an account which is continued and not stopped or closed. If the account is running, that is to say if it is unclosed, then it is open and current. It is open either because the balance remains to be drawn or struck, or because it is to be carried forward

because of some contemplated future dealings between the parties. If the account is not closed by settlement or otherwise, it is open. Of course mere cessation of the dealings between the parties does not mean that the account is closed. The real question in each case would be what is the intention of the parties, and that must be inferred from the surrounding circumstances.

Suppose there is a mutual, open and current account between the parties and the dealings close in July and the plaintiffs draw a balance against the defendants and then demand the sum from them intimating that no further dealings will take place between them, I am unable to see how it can be said that after July the account still remained a mutual, open and current account and continued to bear that character right up to the end of the year. There is nothing in law which prevents a party from saying to the other, "I am closing your account today. This is what is due to you. I shall have nothing to do with you in future."

It is difficult to see how it can be contended after this that the account still remained open and current."

It was furthermore observed—

"It must follow therefore that if the account in question was closed prior to the suit, the suit cannot be said to be for the balance of an open and current account. In order to bring the case under Art. 85, it is in my opinion necessary for the plaintiff to show that he is suing for the balance due on a mutual and open account. If at the time the suit was brought the account was closed, then I think the article would not apply. In other words, the account must be open down to the suit."

This decision applies to the fact of the present case in all fours.

Respondent has not filed a suit for accounts.

112. If from 14.1.2005 it had stopped making any payment of ADC, it is difficult to hold that the account of the parties continued to be mutual, open and current.

Whether ADC was payable or not for the said period was itself in dispute.

Moreover, the Respondent has not raised any pleading in this behalf.

Any benefit claimed in terms of Article I of the Scheduled appended to the Limitation Act was required to be supported by pleadings.

113. An issue was required to be framed. The parties were required to produce their books of account to show that how and in what manner the same were being maintained.

Article 1 of the Schedule appended to the Limitation Act, 1963, therefore, in our opinion has no application in the instant case.

114. Clause 7.2.1 reads as under:

> "7.2.1 Bills for IUC will be issued on monthly basis by the designated unit of BSNL to the UASL and such bills shall be payable within 15 days from the date of issue. The UASL for the IUC, if any, due to it, may also issue similar bills."

Bills were, thus, required to be raised on a monthly basis.

115. Questions of interest as provided for in 7.13, 7.14, 7.2.1, 7.3.2, 7.5, 7.32, 7.5 are required to be considered in the context in which they have been made.

Bills have been raised by the Respondent during the period 19.6.2010 and 18.2.2011.

116. In Tata Communications Ltd. vs. BSNL & Anr. Petition No. 186 of 2010 disposed of on 27.1.2011, this Tribunal has opined that the period of limitation would be three years, despite a judgment of a learned single judge of the Andhra Pradesh High Court holding that the period of limitation so far as BSNL is concerned would be 30 years. .

117. At no point of time, any order of injunction or prohibition on the part of the BSNL to raise bills towards refund of ADC was passed by any competent court of law. Respondent was, thus, entitled to raise the bills. Keeping in view the aforementioned position by reason of the circular letter dated 14.1.2005 it itself called upon the circle offices to raise bills.

118. If the circle offices of the Respondent did not carry out the said instructions, the period of limitation would not be saved.

119. The question of limitation having regard to the provisions Section 3 of the Limitation Act, 1963, being a jurisdictional question, even a court of law is not entitled to extend the period of limitation, subject of course to exclusion of the periods specified in Sections 4 to 14 thereof.

Reliance has been placed by Mr. Srinivasan on P.K. Ramchandran vs. State of Kerala & Anr. (1997) 7 SCC 556 wherein it has been held:

> "6. Law of limitation may harshly effect a particular party but it has to be applied with all its rigour when the statute so prescribes and the Courts have no power to extend the period of limitation on equitable grounds. The discretion exercised by the High Court was, thus, neither proper nor judicious. The order condoning the delay cannot be sustained. This appeal, therefore, succeeds and the impugned order is set aside. Consequently, the application for condonation of delay filed in the High Court would stand rejected and the Miscellaneous First Appeal shall stand dismissed as barred by time. No. costs."

[See also I.T.C. Ltd. v. George Joseph Fernandes , (1989) 2 SCC 1 and

DDA v. Ram Prakash , (2011) 4 SCC 180.]

120. In Petition No.211 of 2010 Reliance vs. BSNL disposed of

21.1.2011, this Tribunal opined:

> "This Tribunal inter alia exercises original jurisdiction. It cannot even otherwise, having regard to the provisions contained in Section 3 of the Limitation Act, extend the period of limitation.
>
> Section 3, as is well known is imperative in character. The Limitation Act is a statute of repose. A right accrues in favour of another person if an action is not brought within the period prescribed under the law of limitation. Proper explanation therefore, is required to be given if a valuable right of another is sought to be defeated (See Ashish Kumar Hazra Vs. Ruby Park Cooperative Housing Society, AIR 1997 SC 2724).

It was observed:

> "Even no case in regard to exclusion of time has been made out.
>
> In Sudhir Kumar Pandey v. Bank of India and Ors. reported in AIR 1991 Pat 267 it was held that:

"As to what are those subsequent dates have not been disclosed and the plaint is blissfully vague on this point. As noticed above, Rule 6 of Order VII clearly goes to show that the grounds of exemption from the law of limitation, if the suit is instituted after the expiration of the period prescribed by the law should be stated in the plaint. In the present case no such ground appears to have been stated in the plaint."

In Ramaswamy Chetti v. Anaiya Padayachi and Ors. reported in AIR 1936 Mad 545, it was held:

4. …. Where the suit is instituted after the expiration of the period prescribed by the law of limitation, the plaint shall show the ground upon which exemption from such law is claimed.

We may also refer to "Law of Limitation & Prescription" by R.N.Chodhry at page 475 where the learned author opines as follows:

"No lack of bona fides. – Section 14 of the Limitation Act provides for exclusion of time of proceeding bona fide in a court without jurisdiction. The provisions in the section lay down, inter alia, that in computing the period of limitation for any suit the time during which the plaintiff has been prosecuting with due diligence another civil proceeding, whether in a court of first instance or of appeal or revision, against the defendant shall be excluded, where the proceeding relates to the same matter in issue and is prosecuted in good faith in a court which, from defect of jurisdiction or other cause of a like nature, is unable to entertain it."

We are not oblivious of the fact that the Limitation Act although takes away the remedy of a person to bring an action before a Court of Law, the claim itself does not come to an end. We cannot, however, ignore the same. No person can be granted any relief, if he is not entitled thereto in law. If a statute bars a remedy, a court of law cannot provide the same to a suitor.

Interim stay granted in the earlier round of litigation would not, in our opinion, save the period of limitation. For the said purpose, even Section 14 of the Limitation Act, 1963 will have no application."

121. In Tata Communication Ltd. vs. BSNL, Petition No.423 of 2010 disposed of on 16.11.2011 it was held:

> "22. The bills are to be settled on a monthly basis but if such a situation is there, how the bills related to period as old as July 2005 can be raised with a delay of more than 5 years by the respondent. These are covered by limitation period of 3 years. This Tribunal in Petition No. 186 of 2010 between the same parties has held on 27.01.2011 :
>
> "36. However, when the petitioner questioned the impugned letter threatening withdrawal of inter connection services, evidently the question has to be considered keeping in view the provisions of Section 28 of the Indian Contract Act and not for the purpose of lodging a claim.
>
> Mr. Bhatia, however, would contend that the agreement being of inter connection and both the parties having been raising bills on each other, the provisions of Article 1 of the Schedule appended to the Limitation Act, 1963 shall apply
>
> 37. The aforementioned contention of Mr.Bhatia, in our opinion, is wholly without any basis.
>
> 38. BSNL has not filed any suit for accounts. Indisputably, it was to raise the bill either within a period of six months or file a suit for recovery of interconnection charges within a period of three years. It cannot raise a bill after the period of limitation is over, seeking to enforce its contractual right to disconnect the POIs. The bill has been raised for the months of April and May, 2004.
>
> 39. The said bill has been raised only during the pendency of these proceedings. The respondent, as was accepted in this case, had been raising bills on a wrong premise.
>
> 40. If it was maintaining the records electronically, the billing advice should have been contained all the informations relating to the digital number plan of the receiver of services. The respondent could not have, in any

> event, invoked a penal clause without any rhyme or reason.
>
> 41. The instance given by Mr.Hazarika, namely, Malleswaran POI at Bangalore should have been an eye opener for the respondent.
>
> 42. The provisions of the agreement clearly state the bills raised by the parties hereto be settled within a period of one month. It is, therefore, not a case where the account between the parties is not only mutual but also open and current."

122. There is nothing on record to show that any change in the situation took place. It may be true that the question as to whether the services by the Respondent was in the nature of mobile services had been crystallized by reason of the judgment of the Supreme Court of India on or about 30.4.2008 but the same has nothing to do with the question of limitation as the Respondent at all material times was aware that it was entitled to refund of IUC Charges from the Petitioner. We, therefore, are of the opinion that the claim of the respondent for the P-1 period is barred under the law of limitation.

Validity of Clause 7.5

123. Clause 7.5 of the Interconnect Agreement provides for payment of interest.

It reads as under :-

"7.5 (i) In the event of delayed payment by the UASL, interest will be charged on the due amount at the following rates:

	Period of Delay	Interest Rate (per annum)
a.	For delay upto 15 days	3.5% above the PLR
b.	For delays beyond 15 days but upto 30 days	6.% above the PLR

(e.g. In case of delay of 18 days in making the payment to BSNL, for the period of first 15 days interest shall be charged @ 3.5% above the PLR and for balance 3 days interest shall be charged @ 6.5% above the PLR.)

* Note: The above mentioned interest rate shall be applicable for the entire period of delay. No claim shall be entertained for lower rate of interest for the part period of the delay.

(ii) The interest charges referred above will also be applicable in case the bill is disputed by UASL but subsequently the billing is found to be in order by the appropriate authority i.e. the dispute raised was not correct. Delay in this case shall be calculated from due date to date of actual payment to BSNL by UASL of the outstanding amount. Interest rate to be charged to UASL for this delay period shall be calculated on the outstanding amount received beyond due date and shall be @ 6.5% above the PLR upto 30 days and @ 24% beyond 30 days from due date.

(iii) In case of disputed and delayed bills, where it is found that billing dispute raised is correct then interest shall be charged to UASL at the specified interest rate for the entire period of delay from the due date of bill on the undisputed portion only of the outstanding amount. This specified interest rate being @ 3.5% above the PLR upto 15 days @ 6.5% above the PLR beyond 15 days but upto 30 days and @ 24% beyond 30 days from due date. However, no

interest shall be applicable on the disputed portion of the outstanding amount till the dispute is settled.

In case UASL fails to pay the amended/balance disputed portion of the bill as settled within the new due date prescribed after settlement of billing dispute interest will be applicable on such amended/balance disputed portion of the bill amount from the specified new date of payment to the actual date of payment at rates as applicable in case of delay in payment of a fresh bill as detailed above."

124. Mr. Vikas Singh very fairly stated that the said provision may be read down so as to provide for a level playing field.

Parties to an agreement would otherwise be entitled to a level playing field having regard to the decision of the Supreme Court of India in Reliance Vs. Maharashtra State Electricity Board reported in (2007) 8 SCC 1, wherein the law has been laid down in the following terms :-

"36. We find merit in this civil appeal. Standards applied by courts in judicial review must be justified by constitutional principles which govern the proper exercise of public power in a democracy. Article 14 of the Constitution embodies the principle of "non-discrimination". However, it is not a free-standing provision. It has to be read in conjunction with rights conferred by other articles like Article 21 of the Constitution. The said Article 21 refers to "right to life". It includes "opportunity". In our view, as held in the latest judgment of the Constitution Bench of nine Judges in I.R. Coelho v. State of T.N., Articles 21/14 are the heart of the chapter on fundamental rights. They cover various aspects of life. "Level playing field" is an important concept while construing Article 19(1)(g) of the Constitution. It is this doctrine which is invoked by REL/HDEC in the present case. When Article 19(1)(g) confers fundamental right to carry on business to a company, it is entitled to invoke the

> said doctrine of "level playing field". We may clarify that this doctrine is, however, subject to public interest. In the world of globalisation, competition is an important factor to be kept in mind. The doctrine of "level playing field" is an important doctrine which is embodied in Article 19(1)(g) of the Constitution. This is because the said doctrine provides space within which equally placed competitors are allowed to bid so as to subserve the larger public interest. "Globalisation", in essence, is liberalisation of trade. Today India has dismantled licence raj. The economic reforms introduced after 1992 have brought in the concept of "globalisation". Decisions or acts which result in unequal and discriminatory treatment, would violate the doctrine of "level playing field" embodied in Article 19(1)(g). Time has come, therefore, to say that Article 14 which refers to the principle of "equality" should not be read as a stand alone item but it should be read in conjunction with Article 21 which embodies several aspects of life. There is one more aspect which needs to be mentioned in the matter of implementation of the aforestated doctrine of "level playing field". According to Lord Goldsmith, commitment to the "rule of law" is the heart of parliamentary democracy. One of the important elements of the "rule of law" is legal certainty. Article 14 applies to government policies and if the policy or act of the Government, even in contractual matters, fails to satisfy the test of "reasonableness", then such an act or decision would be unconstitutional."

125. Mr. Vikas Singh, however, would contend that this Tribunal cannot re-write the contract. It is ordinarily so.

But, in our opinion, the submissions of Mr. Vikas Singh are self-contradictory.

126. The rules of interpretation of a document would embrace within its fold the reasonableness thereof.

In Persimmon Homes (South Coast) Ltd. v. Hall Aggregates (South Coast) Ltd. and Cemex UK Properties [2008] EWHC 2379 (TCC) it was held:-

> "THE PROPER CONSTRUCTION OF THE SALE AGREEMENT
>
> The Relevant Principles of Construction
>
> 46. There appeared to be little between the parties as to the principles of construction of commercial contracts relevant to this dispute. In my judgment, those which are most applicable to the present dispute are the following:
>
> a) The proper construction of a contractual clause must not consider that clause in isolation, but must consider the clause in the context of the contract as a whole: see for example, The Apostolis (No 2) [2000] 2 Lloyds Rep 337 at 348;
>
> b) An express term in a contract excludes the possibility of implying any term dealing with the same subject-matter as the express term: see Miller v Emcer Products Limited [1956] Ch 304;
>
> c) Where a particular construction may produce an unfair result, the court will often require clear words to support the construction in question: see BCCI v Ali and Stocznia Gdanska v Latvian Shipping Co [1998] 1 WLR 574, HL.

127. By applying the rule of reading down as suggested by Mr. Vikas Singh himself, the provision of the contract is held to be applicable to both the parties.

We do not see any reason as to why the principle of level playing field may not be applied keeping in view the submissions made by learned counsel himself, which would otherwise be in consonance with the decision of the Supreme Court of India as indicated heretobefore.

128. We may notice that Kim Lewison in his Interpretation of Contract (5th Edition 2012) in paragraphs 7.18 opined that where a construction does not produce an unfair result, the Court will often require clear words to support the construction in question.

129. It may also be placed on record that this Tribunal in Cellular Operators Association of India vs. BSNL & Ors. Petition No. 48 of 2004, disposed of on 11.11.2005 has granted the same rate of interest to the operator as was claimed by BSNL therein, stating :-

> "52(c) Reciprocity in Interest – The petitioners have pointed out that large amounts of bills are not paid in time by the respondents and when paid after considerable delay there is no payment of interest whereas an interest of 24% per annum compounded quarterly is charged from them on their dues. We direct that this should be on reciprocal basis. Both parties are directed to enter into agreement regarding the rate of interest which will be applicable for both the parties on reciprocal basis. "

130. However, that decision, we must place on record, has not been universally followed.

We, therefore, accept the submissions of Mr. Vikas Singh and opine that the rate of interest provided in Clause 7.5 would be applicable in the case of both the parties.

Interpretation of Clause 7.2.1 Issue

131. What would be the effect of Clause 7.2.1 may now be considered. Chapter VII of the interconnect agreement as inserted by the Addenda VI which came into force with effect from 28.2.2006 in respect of the circle of Gujarat reads as under:

> "7.2.1 Bills for IUC will be issued on monthly basis by the designated unit of BSNL to the UASL and such bills shall be payable within 15 days from the date of issue. The UASL for the IUC, if any, due to it, may also issue similar bills."

The provision of interest should not be read as a stand alone clause but should be read with the other Clauses in the Chapter dealing with billing.

The bills were to be raised on a monthly basis.

Clause 7.2.1 provided for raising of such bills by either party. The demands raised by one party on the other would depend upon the number of calls which have passed through each other's exchanges.

132. The bills were required to be issued in respect of the dues and claims receivable by each of the parties.

IUC charges as specified by the TRAI indisputably was payable depending upon the calculation of the number of minutes of traffic exchanged between the parties in the previous months.

133. The amounts specified in such bills were required to be paid within fifteen days from the date of raising thereof or on or before the `due date' or `pay by date' specified in each one of the them.

Any payment made beyond the specified date would be subject to payment of interest as specified in Clause 7.5.

134. The same would not, however, mean that even if successive bills are raised, the amount of interest would be calculated only on the basis of the date specified in the last bill. For the said purpose the dates specified in each of the bills must be taken into consideration and the first of such dates shall be the date from which the interest shall be payable.

135. Agreement between the parties subject to applicability of a statute including the rate of interest is the decisive factor. The parties may not only specify the rate of interest but also the nature thereof i.e. whether the same would be simple or compound.

136. Payability of interest would, thus, depend upon the terms of the contract or a law. If there does not exist any provision in the agreement for payment of compound interest, the same would not be payable. A provision for payment of such compound interest in respect of a bill shall be calculated only after such a clause in that behalf is brought into the contract.

137. Interest, at the rate provided for in the interconnect agreement would thus, be payable, provided the amount has become due and payable. For that purpose only bills are required to be raised.

The payability would, however, depend upon the terms of the contract. If a cause of action arises in terms whereof some amount becomes due to the other party to a contract, the same would be payable.

138. We may notice that in Marine Trade SA vs. Pioneer Freight Futures Company Ltd. 2010 1 Loyd's Rep. 631, it was held:

> "22. I have no doubt that Mr. Baker's construction of the provision in Section 2(c) is the correct one. As a matter of ordinary language, "payable" clearly means now due and owing, for immediate payment and not only payable if and when some suspensive condition for which Mr. Tselentis contends is satisfied. Quite apart from the ordinary meaning of language, when the agreement is considered as a whole, the word "payable' in Section 2(c) clearly means that there is a current enforceable obligation to pay. This is clear form the fact that, having talked about "amounts which would otherwise be payable", the provision goes on to talk about "each party's obligation to make payment" being automatically satisfied and discharged" by payment of the balance after netting. However, where Pioneer is affected by an Event of Default, as a consequence of Section 2(a)(iii) Marine Trade has no obligation to make payment to Pioneer at all.
>
> 58. Applying recognized principles of contractual construction, where a contractual obligation (and corresponding contractual right in favour of the other party) has accrued, it would require clear words in the contract to remove that obligation and corresponding right at some later stage. There are no such clear words in these agreements. Pioneer relied upon the words "is continuing" in Section 2(a)(iii)(1) in support of the

argument that Marine Trade had to continue to comply with the condition precedent after February 2009 for the obligation to pay to continue. However, in my judgment, the words "has occurred and is continuing" are focusing on whether there is an Event of Default at the time that the obligation to pay accrued, i.e. on 6 February 2009. Once the obligation accrued on 6 February 2009 because there was no Event of Default at that date, Pioneer remained under an obligation to discharge that debt, irrespective of whether Marine Trade became affected at a alter date by an Event of Default, at least unless and until Pioneer served a Section 6 Notice and designated Early Termination."

Interpretation of Clause 6.4.6

139. Clause 6.4.6 was inserted in the Interconnection Agreement on or about February, 2006 with retrospective effect from 14.11.2003.

One of the questions, which arises for consideration, is as to whether the said provision could be given a retrospective effect.

Paragraph 1 of the Addenda VI to the Interconnect Agreement read as under :-

"1. Each party i.e. BSNL as well as the UASL, does hereby agree to the terms & conditions as described herein which shall append as Addenda to the original agreement and the combined agreement, hereinafter called "AGREEMENT" will become effective from 14th November 2003 except the applicable Interconnection Usage Charges (IUC) including ADC, Interconnection arrangements and associated billing arrangements as prescribed by BSNL Corporate Office, during this intervening period till date of signing of this Addenda."

140. The parties clearly agreed that the same should be given effect to on and from 14.11.2003 i.e. with a retrospective effect. Some exceptions, however, were provided therein. The exception contained in the said paragraph refers to the quantum of IUC including ADC during the intervening period i.e. till the date of signing of the addenda.

141. It, however, does not postulate that Clause 6.4.6 cannot be given a retrospective effect in so far as it provides for a pre-estimated reasonable amount of damages, which has been suffered by the Respondent by acts of omissions and commissions on the part of the operator to avoid payment of IUC including ADC.

142. Petitioner, as noticed heretobefore, had filed petitions before this Tribunal on at least two occasions. It, neither in those proceedings nor in the present proceeding, has questioned the validity of the said clause. It did not say that the said provision must be given a prospective effect.

143. In Petition No. 109 of 2008, this Tribunal has clearly held that so far as the claim of the Petitioner is concerned, so far as interpretation of Clause 6.4.6 is concerned, the same was barred under the principles of Res-Judicata and/or Order II Rule 2 of the Code of Civil Procedure.

144. Petitioner had been granted liberty on various occasions to question the validity of the said provision, but it has failed and/or neglected

to do so. It may be noticed that it has, in this proceeding questioned the validity of Clause 7.5.

145. The parties entered into the Interconnect Agreement with effect from 14.11.2003. The subsequent events show that a consensus was arrived at that the Addenda will have a retrospective effect.

We do not see any reason as to why the same is not permissible in law.

146. Question of the validity and/or applicability of Clause 6.4.6 has been raised only for the P-2 period. We have noticed heretobefore that in Petition No. 109 of 2008, so far as the claim relating to P-2 period is concerned, the same was upheld in the judgment dated 15.4.2010.

147. In view of the aforementioned categorical finding, we are of the considered opinion that Clause 6.4.6 of the Interconnect Agreement in these proceedings cannot be held to be invalid in law.

Re-application of Clause 6.4.6

148. It is true that interconnection arrangements and Associated Billing Arrangements as contained in Chapter VI of the interconnect agreement provide for the mode and manner in which the bills in terms of Clause 6.4.6 will have to be raised.

149. Submission of Mr. Srinivasan that the bills having not been raised against the specific subclauses of Clause 6.4.6 of the interconnect

agreement, the same are not payable. We fail to persuade ourselves to agree to the aforementioned submissions.

150. Even in the case where a statutory authority passes an order in terms of the provisions of statute, the source of the power is not required to be disclosed. Validity of an order would depend on the power of the authority in this behalf and not on mentioning of the source thereof.

151. So far as enforcement of the terms of a contract is concerned, we are not in a position to hold that therefor specific subclause contained in a clause was required to be referred to, failing which the amount claimed shall not be payable at all.

The said contention of Mr. Srinivasan is rejected.

Claim for P-2 period (14.11.2004 to 26.8.2005)

152. The bills raised by the respondent were subject matter of the judgment of this Tribunal as also the Supreme Court of India. We see no reason as to how a different view can now be taken.

Claim of the P-3 period

153. Respondent herein raised the claim for P-3 period i.e. for the period 27.8.2005 and 28.2.2006. Pending adjudication of the appeal preferred by the Petitioner before the Supreme Court of India. Neither the

principal amount nor the interest accrued thereon according to Mr. Srinivasan is payable.

154. The Hon'ble Supreme Court of India has not passed any order of stay. It is one thing to say that the claim of the Respondent is not legally justified, but it is another thing to say that the same would not be payable at all. There cannot, however, be any doubt or dispute that any order passed in this petition is subject to any order passed by Supreme Court of India in this behalf.

155. The main grievance of the Petitioner, however, appears to be that the Respondent has not complied with the directions issued by this Tribunal in its judgment dated 15.4.2010 passed in Petition No.109 of 2010. It is said to have raised consolidated bills.

156. According to the petitioner, it had been protesting against raising of such bills particularly with regard to the payability thereof. By way of example it is contended that the Respondent has withdrawn a bill for a sum of Rs.65.00 crores issued in respect of the Delhi circle and has also withdrawn a part of the bill in respect of the Punjab circle for a sum of Rs.7.00 crores.

157. The same in our opinion, however, would not mean that the amount has not become payable. We are, however, of the opinion that in

regard to the exact amount payable in terms of the aforementioned bill, the parties may reconcile their accounts so as to arrive at a correct finding.

158. Moreover the Supreme Court in its 2008 judgment held that the quantification of the amount due from each of the parties hereto against the other must be determined by this Tribunal.

Refund Issue

159 Mr. Srinivasan would contend that the amount paid by the Respondent pursuant to or in furtherance of the interim orders passed by this Tribunal, it is entitled to a huge refund. We fail to appreciate this contention. It will depend on reconciliation of accounts between the parties required to be carried out in terms of the order of the Tribunal.

Such a plea ought to have been established. No account has been filed. No calculation sheet has been produced before us.

160. We, therefore, are not in a position to accede to the said contention.

Incidental to the aforementioned question we may also consider a submission made by Mr. Srinivasan that the Respondent herein ought to

have filed a separate petition. A party to a contract may have several remedies, one of them being a harsher one.

161. If, however, one of the two remedies resorted to by a party to the contract does not offend the provisions of the Constitution of India or Section 23 of the Indian Contract Act or in any other manner held to be wholly unreasonable, the same can be applied.

162. It is difficult to conceive as to how for each and every claim the Respondent in stead and in place of taking recourse to its power of disconnection of POI, must be asked to file petition to recover the amount.

Summary of findings

(1) The disconnection notice issued by the Respondent in respect of P-1 period cannot be upheld as its claim for recovery of ADC was barred under the law of limitation.

(2) So far as the claim of the Respondent in respect of P-2 period is concerned, the same being covered by earlier judgment of this Tribunal and the Supreme Court of India, no relief in regard thereto can be granted in favour of the petitioner.

However, the parties should reconcile their accounts with regard to P-3 period.

(3) Article I contained in Schedule appended to the Limitation Act, 1963 is not applicable in the instant case.

(4) Clause 6.4.6 of the interconnect agreement, having regard to the prayers made by the Petitioner cannot be declared ultra vires.

(5) Keeping in view the contention raised by the learned counsel for the Respondent that with a view to achieve `level playing field' Clause 7.5 of the agreement should be read down and so read, both the parties would be entitled to the same rate of interest subject to just exceptions, and in that view of the matter Clause 7.5 of the interconnect agreement need not be struck down.

163. This petition is allowed in part and to the extent mentioned hereinbefore.

164. But in the facts and circumstances of this case, the parties shall pay and bear their own costs.

(S.B. Sinha)
Chairperson

(P.K. Rastogi)
Member

April 19, 2012
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