

TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL

NEW DELHI

Dated 12th October, 2012

Petition No.429/2012
With MA No.310/2012

Internet Service Providers Association ... Petitioners
of India & Ors.

Vs.

Union of India & Anr. ... Respondents

BEFORE:

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

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

For Petitioner : Mr.C.S. Vaidyanathan, Sr. Advocate.
Mr.Navin Chawla, Advocate.
Mr.Nasir Husain, Advocate.

For Respondent : Ms.Maneesha Dhir, Advocate.
Mr.K.P.S. Kohli, Advocate.
Mr.Abhishek Kumar, Advocate.
Mr.Tarveen Singh Nanda, Advocate.

J U D G M E N T

S.B. Sinha

The First Petitioner is an Association of the holders of license of internet service providers.

The Second Petitioner holds a pure internet service license since 10.12.1999.

The Petitioners No.3 to 6 and 13 to 15 have obtained licenses for providing internet services with telephony wherefor license agreements were entered into with the Respondent.

Petitioners No. 7 to 11 have been granted licenses for internet services with internet telephony w.e.f. 19.11.2007.

They are aggrieved by and dissatisfied with an order of the Respondent dated 29.6.2012 prescribing AGR for Internet services and Internet Telephony.

We have noticed heretobefore that there are three different categories of licenses. So far as first category of license is concerned, the same was granted in terms of the policy decision adopted by the Union of India in 1998; pursuant whereto or in furtherance whereof no license fee was charged till 2003. However, thereafter nominal fee of Rupee 1 was to be charged.

We may notice Schedule B of the said license:-

“ Schedule ‘B’

1.1 QUANTUM OF LICENCE FEE AND SCHEDULE OF PAYMENTS

(i)The licence fee is payable by the licensee in consideration for grant of this licence, for the complete duration for which this licence is granted. This has no relation to the actual start/provision of service by the licensee or any mutual obligations between the licensee and any other service provider/DOT/MTNL/VSNL/Departments of the Central or State Government/local or statutory bodies.

(ii)The Telecom Authority has decided to waive the Licence Fee for a period upto 31.10.2003. For those ISPs also who obtain licences prior to 01.11.2003, a nominal licence fee of One Rupee per annum will become payable from 01.11.2003.”

The second category of license had been granted inter alia on 8.4.2002.

The quantum of license fee and schedule of payments payable thereunder is as under :-

“1.1. QUANTUM OF LICENSE FEE AND SCHEDULE OF PAYMENTS

(ii) The Telecom Authority has decided to waive the Licence Fee for a period upto 31.10.2003 and a nominal license fee of One rupee per annum will become payable from 01.11.2003; however, the Telecom authority reserves the right to review and impose license fee including Universal Service Obligations (USO) levy anytime during the validity of the license, which decision with its terms and conditions, shall be binding on the licensee.”

An option was granted to the said licensees as regards amendment of license wherefor a letter dated 3.3.2006 was issued by the Central Government.

The relevant portions thereof read as under :-

“....Clause 1.1 of Schedule B and Clause 13.5 of Schedule C Part II of licence have been modified as under

Sl.No.	Existing Clause	Amended Clause
(i)	Clause 1.1: Quantum of license fee and Schedule of payment:	Clause 1.1: Quantum of license fee and Schedule of payment:

	<p>(i) The licence fee is payable by the licensee in consideration for grant of this licence, for the complete duration for which this licence is granted. This has no relation to the actual start/provision of service by the licensee or any mutual obligations between the licensee and any other service provider/BSNL/MTNL/VSNL/Departments of the Central or State Government/local or statutory bodies.</p> <p>(ii) The Telecom Authority has decided to waive the Licence Fee for a period upto 31.10.2003 and a nominal licence fee of One Rupee per annum will become payable from 01.11.2003; however, the Telecom Authority reserves the right to review an impose license fee including Universal Service Obligation (USO) levy anytime during the validity of the license, which decision with its terms and conditions, shall be binding on</p>	<p>(i) The licence fee is payable by the licensee in consideration for grant of this licence, for the complete duration for which this licence is granted. This has no relation to the actual start/provision of service by the licensee or any mutual obligations between the licensee and any other service provider /BSNL/MTNL/VSNL/Departments of the Central or State Government/local or statutory bodies.</p> <p>(ii) The Telecom Authority has decided to waive the licence fee for a period upto 31.10.2003 and a nominal licence fee of One Rupee per annum will become payable from 01.11.2003 upto 31.12.2005.</p>
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	the licensee.	
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The Association of Unified Telecom Service Providers of India had filed a Petition before this Tribunal which was marked as Petition No.7 of 2003 inter alia questioning the definition of "Adjusted Gross Revenue" (AGR).

In its judgment and order dated 7.7.2006 this Tribunal opined that the definition of AGR should have been kept confined to the licensed activities.

The Tribunal, however, requested the Telecom Regulatory Authority of India (TRAI) to consider the question as to whether some of the heads of income should come within the purview of the said definition, stating:-

"37. In view of the fact we have come to the conclusion that there has not been an effective consultation with the TRAI which is mandatory under the TRAI Act, we think we should not further delve into the exercise of finding out which component of the AGR, as defined by the Government in the conditions of licence, deserves to be retained and which component which the petitioners contend is not derived from the licensed revenue of the licensee should be excluded at this stage. We think it more appropriate that the matter should be remanded to the TRAI which is the 3rd Respondent herein, before whom the Government should produce the material relied by it while rejecting TRAI's recommendation so that TRAI can consider the same and send its conclusions to this Tribunal and thereafter, this

Tribunal will have the benefit of a comprehensive recommendation of the TRAI after considering the materials relied upon by the Government. While forming its conclusions the TRAI shall hear the Government as well as the licensees and consider the materials that may be placed before it by either side. In this process it is not necessary for the TRAI to hold fresh consultative proceedings unless it thinks necessary. During this proceeding before the TRAI the petitioners shall place before it their contentions in regard to the various components of AGR which they have challenged before this Tribunal and the TRAI after hearing the Government on this issue also, send its recommendations to this Tribunal preferably within three months of the receipt of this order.

38. Further, while considering the issue now remitted to the TRAI, the TRAI will bear in mind our finding in regard to the inclusion in gross revenue of the licensee revenue derived from non-licensed activities. Apart from that finding, any observations made by us in regard to any particular head of revenue will not be taken by the TRAI as a conclusive opinion. The Authority is free to make its recommendations after independent appraisal of the material that is placed before or obtained by it.”

What should be the components of AGR was recommended by TRAI.

In para no.3.17.3.3 the TRAI opined that :-

“3.17.3.3. The Authority observed that many service providers are now integrated operators and provide all telecom services. Since licence fee on number of services is charged at different rates, it is possible for the service providers to book revenues in such a manner that licence fee liabilities are minimized. The

Authority noted that recently DOT has brought a few services at par for payment of licence fee. The Authority therefore observed perhaps a uniform rate licence fee regime could obviate the recourse of diverting revenue from one service and booking it to another where incidence of licence fee is lower.”

The Respondent, however, sought for recommendations on internet services from TRAI, stating :-

“3. Therefore, the Government is contemplating to review the policy of Internet Services with a need to address the issues of a large number of ISP licenses, grey market operations, level playing fields vis-à-vis other telecom service providers for an effective, regulated and controlled ISP License.

4. TRAI is requested to furnish their recommendation in terms of Clause 11(1)(a) of the TRAI Act, 1997 as amended by TRAI Amendment Act, 2000 on the issue of ISP License (without Internet Telephone) as well as ISP License with Internet Telephony.”

The TRAI pursuant to and/or in furtherance of the said request of the Respondent dated 17.11.2006 made inter alia the following recommendations:-

“4.5.1 The present regime envisaged different license for provisions of different services like UASL, CMTS, BSO and ISP. The regime also clearly defines services permitted under different licenses. However the technological advancement has blurred the boundaries between various services provided under different licenses. Now Internet is permitted under CMTS and

UASL license, BSOs are permitted to provide Broadband and ISPs are permitted to provide Internet telephony services within limited scope of license. Financial regulatory levies under different licensing regime for providing similar services are different, which results in non-level playing field.”

It was recommended that there should be only one ISP license to provide all the services defined under ISP license including internet telephony.

It was furthermore recommended that the present provision of separate ITSP license should be done away with.

The Respondent, however, did not accept the said recommendations in their entirety.

It issued guidelines for general information on or about 24.8.2007, the relevant portion whereof reads as under :-

“9. The one time entry fee of Rs.20 lakhs for Category A Internet Service Licence & Rs.10 lakhs for Category B Internet Service Licence is to be paid before signing of the licence agreement.

10. An annual licence fee @ 6% of Adjusted Gross Revenue (AGR) subject to minimum of Rs.50,000/- (Rupees fifty thousand only) and Rs.10,000/- (Rupees Ten Thousand Only) shall be charged from category A & B service areas respectively per annum per licenced service area. The revenues accrued from pure Internet

services will be excluded from the definition of AGR for the purpose of computing licence fee.”

A petition was filed before this Tribunal by Petitioner No.1 and others including Petitioners No.2, 6, 8 and 12 questioning the legality/ validity of the aforementioned amendment of 2006, which was marked as Petition No. 119 of 2007.

By a judgment and order dated 30.8.2007 this Tribunal rejected the contention raised therein that the licensor had no jurisdiction to enhance the license fee from Rupee 1 to 6% of the AGR inter alia on the premise that payment of license fee being contractual in nature and having regard to the conditions of license, the UOI was entitled to review the same.

This Tribunal furthermore rejected the contention of the Petitioners therein that before making such amendment, it was obligatory on the part of the Respondent to obtain the recommendations of the TRAI in that behalf, opining that the Second Proviso appended to Section 11 (1) of the TRAI Act would not be attracted in a case involving amendment to the license.

We may, however, place on record that the TRAI itself now holds different views in relation thereto.

Pursuant thereto or in furtherance of the recommendations made by the TRAI, fresh licenses were granted to some of the Petitioners herein, as noticed heretobefore on or about 19.11.2007.

The Respondent furthermore constituted a Committee under the Chairmanship of the Joint Secretary (T) for the purpose of fixing the quantum of flat rate of the license fee.

The said Committee submitted its report on or about 31.8.2009 recommending an uniform flat rate at 8% of AGR.

The TRAI also released a consultation paper in regard to all spectrum management and review of the terms and conditions of the license relating to uniform rate of license fee wherein, inter alia, the following questions were raised :-

“42. What are the advantages and disadvantages of a Uniform license fee?

43. Whether there should be a uniform License Fee across all telecom licenses and service areas including services covered under registrations?

44. If introduced, what should be the rate of uniform License Fee?"

In Chapter 4 of the said consultation paper the summary of issues thereof involved therein were stated as under :-

".. All stakeholders are requested to give their comments along with relevant international experience technical data and established case law on the following issues. Stakeholders are free to raise any other issue that they feel is germane to the issues under discussion or any issue relating to spectrum policy and management and give their comments thereon. They are however requested to list such issues under the head -'other issues.'"

The Respondent again sought for recommendations of the TRAI on or about 2.12.2009, in respect of removing arbitrage from the prevailing license fee structure across various services providers with the due consideration of revenue receipts of the Government and growth of telecom services in India.

The TRAI made recommendations on Spectrum Management and Licensing Framework, inter alia, stating :-

"10. Internet Service Providers (ISP) hold a licence but pay a licence fee of only Re.1, except in those offering Internet telephony. It is noteworthy that the unified access services licence holders (Telecom companies) account for the major share of revenues from the Internet service provision. The Authority's

recommendation is to charge licence fee from the infrastructure service providers as well as the Internet service providers in a graded manner beginning *with* 4% in the year 2010-11, to reach 6% in the year 2012-13. Currently, access service providers (Telecom companies) are charged a license fee of 10% in the Metros and category 'A' areas, 8% in category 'B' areas and 6% in category 'C' areas. The Authority recommends that this license fee be brought down progressively from; the existing rates to a uniform rate of 6% by the year 2013-14."

Some of the relevant paras of such recommendations may also be noted :-

"2.88 The Authority through its various recommendations and communication exchanged with DoT, has noted that arbitrage opportunities exist on account of differential licence fee across various licences and service areas and pointed to the need to have a uniform licence fee across various services/licences. (Emphasis added). In its recommendations on Unified Licensing given on 13th January 2005, the Authority favored a progressive move towards uniform licence fee. In the recommendations on components of AGR dated 13th September 2006, the Authority discussed the need for a uniform rate of licence fee to address the issue of arbitrage and observed that a uniform rate licence fee regime could obviate the recourse of diverting revenue from one service to another where incidence of licence fee is lower. With most operators holding multiple licences, there is scope for creative accounting and booking of revenues in a manner to reduce the incidence of licence fee. TRAI raised this concern with the DoT vide its letters dated 21st November 2008 and 20th January, 2009.

(Underlining is ours)

2.90 The Authority has noticed that there is scope for creative accounting of the revenues under different licenses to take advantage of the differential license

fee. The following types of arbitrage opportunities are available because of differential/nil license fee across various telecom licenses -Within the access services, among different categories of service areas, between the access providers and long distance services, between the access providers and ISP, and between the access providers and IP-I.

2.94 Similarly, scope of service of a UAS licensee includes internet/broadband services. The revenue of the internet services provided by the UAS licensee should be within the UASL domain and attract UASL license fee, particularly when such services could have been provided by using UASL resources. However, invariably such UAS licensee also holds an ISP license and revenue from such internet services is shown under that license. Difference in license fee payments between UAS and ISP licenses is tremendous on account of differential license fee as well as different definitions of AGR.

2.95 The Authority, therefore, recommends that there should be uniform licence fee across all telecom licenses and service areas."

So far as the internet service providers are concerned, it was recommended:-

"2.104 To start with, Internet Service providers licence was opened for private sector from November, '98 and carried with it no Entry Fee and a licence fee of Re.1 per annum. Restricted internet telephony service was permitted to the ISPs from 1st April, 2002. The licence fee was waived upto 31.10.2003 and a nominal licence fee of Re. 1 became payable from 1.11.2003 to 31.12.2005. With effect from 01.01.2006, the licence fee became 6% of AGR in addition to Re 11 per annum in respect of ISPs with Internet telephony. As per the new guidelines for grant of licence for operating Internet Services issued

by DOT in August 2007, all ISPs were permitted to provide Internet telephony and separate category of Internet Telephony Service Providers (ITSPs) has been done away with. Licence fee of 6% of AGR was imposed on all ISPs except on the revenue earned from provisioning of pure Internet access services.

2.105 Despite a token licence fee for ISP, the number of internet subscribers has grown from 5.14 million in September 2004 to only 15.24 million by the end of December 2009. Of this, the number of broadband subscribers is 7.83 million. These numbers are way below the target of 40 million and 20 million by the end of 2008 for internet and broadband subscribers respectively. Further, out of the existing 165 active ISPs (as against 375 registered), 95.9% subscribers are covered by the top 10 ISPs, with the two PSUs (BSNL & MTNL) having more than 70% of the market share. The annual Revenues from ISPs is estimated to be about Rs 7000-8000 Crore. Of this the revenue from the Internet service providers with Internet telephony amounts to about Rs. 1200 crore. This amount would be far higher since the deductions allowed from Gross revenue for arriving at the AGR are over 90% of gross revenue.

2.106 The Authority in its recommendations on "Review of Internet services" sent to DOT on 10th May, 2007 observed that there was a need to stop revenue leakage and prescribe uniform formula for imposing licence fee and recommended a uniform annual licence fee equivalent to 6% of AGR on all ISPs including revenues earned from provision of Internet Access, Value Added Services and Broadband in ISP domain. It also recommended a single Internet service provider licence. In the letter dated 31st March, 2009 to the DoT as a follow-up to the recommendations dated 18th August, 2008 on "Issues relating to Internet Telephony", the Authority once again underlined the possibilities of arbitrage and pointed out that most of the UAS licensees, who can provide internet and broadband including triple play services under UASL, also take separate ISP licence and provide these services (Internet and broadband

services) under ISP licence, thereby avoiding the incidence of licence fee.

2.107 The above position has not changed and the Authority feels that the recommendations given earlier should be given consideration. Some stakeholders have represented that levying licence fee on Internet service providers providing pure Internet access would come in the way of the spread of Internet and broadband in the Country and jeopardise the growth of telecom sector. The Authority has duly considered this matter. The growth of Internet so far has been low and falls far short of the targets. There is no demonstrable correlation between the absence of licence fee and growth of Internet spread. On the other hand, the lack of licence fee enables scope for arbitrage as brought out by the Authority in the past.

2.108 At the same time, the Authority is keen that the spread of internet should be much faster than has been so far. In August 2007, pursuant to the recommendations of this Authority, DoT had done away with the Category 'C' license in ISP with the result that today, there is no licence at the sub-State level. The Authority is of the opinion that multiple operators should be allowed including at the local level with low entry fee. Accordingly, the Authority would like to reintroduce the 'C' Category licence with a District wide jurisdiction. This would enable small operators including; the cable operators to offer Internet service along with other services. This licence would however not apply to the Metros where, the ISP would be required to acquire a 'B' category licence.

2.109 Since the intention is to enable small operators to acquire ISP licence, the Authority proposes that those operators* who have a turnover of less than Rs.1 crore, need not be charged any licence fee.

2.110 The Authority recommends the introduction of the 'C' Category licence with a District-wide jurisdiction to enable small operators including the cable operators to offer Internet service along with other services.

2.128 One of the perspectives on the proposal to levy licence fee could be that the smaller players such as the Internet service providers are being charged licence fee and correspondingly the larger telecom operators are being given the advantage of reduced licence fee. The concern could be whether the spread of Internet in India would be adversely affected by this proposal. Firstly, the total revenue arising from the licence fee on the Internet service providers is a very small percentage of the total licence fee being collected. What is being proposed in this measure is the removal of a possible arbitrage that has been detailed above. Besides, there has been no evidence to indicate that the lack of licensing fee so far on the Internet providers has contributed to the growth of Internet in the country; As brought out above, the spread of Internet in this country is abysmally low and a large number of ISPs are not even active and those who are, have very low turnover. The major share of revenue is from the UAS licence holders. The rationale for charging a uniform licence fee has been earlier. Yet another concern could be that the four-year timeframe suggested would mean that the possibility of arbitrage would continue. In a way, this is partly true except that the degree of arbitrage reduces every year and to start with, would be lower than at present. After careful examination, the Authority is of the opinion that a uniform licence fee across all services and geographic areas would go a long way in the long-term development of the telecom services in the country. The Authority would however like the Government to examine the issues of double taxation, if any.

2.129 The Authority accordingly recommends that the licence fee for all the services viz. Basic/CMTS/UAS Licences in all the telecom service areas, NLD, ILD, ISP, ISP with IT GMPCS and IP-I licences, PMRTS, Commercial VSAT, leftover IP-II licensees till their migration to NLD licence be finalized and IPLC, in all the service areas, will progressively be brought to a uniform 6% of AGR over a four-year period, as shown in the table 2.12 below.

2.130 The Authority recommends that Infrastructure providers IP-I and the ISPs be levied a uniform licence fee which would be scaled upto 6% progressively over a three-year period, as shown in the table below. The Authority would however like the Government to examine the issues of double taxation, if any.”

It is not in dispute that a round table conference was held by the Minister of C & IT on or about 8.3.2011 with the telecom service providers purported to be before finalization of the decision on the amendment of the license fee structure. Some holders of the ISP license appear to have participated therein.

On or about 15.2.2012 a uniform license fee regime was introduced from the financial year 2012-13, wherefor a Press Release was issued on or about 15.2.2012 inter alia, directing :-

“There will be uniform license fee across all telecom licenses and service areas which will progressively be made equal to 8% of the Adjusted Gross Revenue (AGR) in two yearly steps starting from 2012-2013.”

Thereafter the impugned order was issued on 29.6.2012.

Before advertng to the respective contentions of the parties with regard to the question as to whether the Respondent has any

power in terms of the license to review the quantum of license fee, we may notice the relevant clauses of three different sets of licenses.

So far as the license dated 10.12.1999 is concerned, the relevant provisions are as under :-

“12.(ii) The LICENSOR reserves the right to modify at any time the terms and conditions of the licence covered under Schedule “A”, “B”, “C” and “D” annexed hereto, if, in the opinion of the LICENSOR, it is necessary or expedient to do so in the interest of the general public or for the proper conduct of telegraphs or on security consideration, provided further that the licensor reserves right to review the terms of this agreement based on the policy of further liberalization whenever articulated in the context of New Telecom Policy.

12.(iii) Notwithstanding anything contained anywhere else in the Licence Agreement, the LICENSOR’s decision shall be final on all matters relating to this Agreement and application of terms and conditions herein.”

In so far as the agreement between the Petitioners no.3 to 15 are concerned whereby and whereunder pari materia provisions were laid down therein being Clauses 12 (ii) and 12 (iii) of 1999 Agreement.

The quantum of license fee and schedule of payment as contained in Schedule B thereof provides for as under :-

(ii) The Telecom Authority has decided to waive the Licence Fee for a period upto 31.10.2003 and a nominal license fee of One rupee per annum will become payable from 01.11.2003; however, the Telecom authority reserves the right to review and impose license fee including Universal Service Obligations(USO) levy anytime during the validity of the license, which decision with its terms and conditions, shall be binding on the licensee.”

So far as the third category of the license, which were granted on or about 19.11.2007, are concerned, we may notice that Clause 7 thereof more or less contain pari materia provisions contained in clauses 12 (ii) and 12 (iii) of the earlier license.

We may, however, notice the following conditions also :-

“5.1 The LICENSOR reserves the right to modify at any time the terms and conditions of the LICENCE, if in the opinion of the LICENSOR it is necessary or expedient to do so in public interest or in the interest of the security of the state for the proper conduct of the Telegraphs. The decision of the LICENSOR shall be final and binding in this regard.

15.1 The Licensee shall be bound by the terms and conditions of this License Agreement as well as by such orders/directions/regulations of TRAI as per the provisions of the TRAI Act, 1997 as amended from time to time and instructions as are issued by the Licensor/TRAI.

17.2 License Fees: An annual licence fee @ 6% of Adjusted Gross Revenue (AGR) as defined in condition 18, subject to minimum of Rs.50,000/- (Rupees Fifty Thousand Only) and Rs.10,000/- (Rupees Ten Thousand Only) shall be payable for category 'A' & 'B' service areas respectively per annum per licenced service area."

18. DEFINITION OF 'ADJUSTED GROSS REVENUE':

18.1 Gross Revenue: The Gross Revenue shall be inclusive of revenue from Internet access service, revenue from internet contents, revenue from Internet Telephony service, revenue from activation charges, revenue from sale, lease or renting of bandwidth, links, R&G cases, Turnkey projects etc., revenue from IPTV service, late fees, sale proceeds of terminal equipments, revenue on account of interest, dividend, value added services, supplementary services, interconnection charges, roaming charges, revenue from permissible sharing of infrastructure and any other miscellaneous revenue, without any set-off for related item of expense etc.

18.2 For the purpose of arriving at the "Adjusted Gross Revenue (AGR)" the following shall be excluded from the Gross Revenue to arrive at the AGR:

(i) Charges from pure Internet service, activation charges from pure internet subscribers. Pure Internet Services shall mean any method / device / technology to provide access to Internet unless explicitly prohibited and all content available including web-hosting, web-colocation which is available on internet without access restriction.

(ii) Service tax on provision of service and Sales Tax actually paid to the Government if gross revenue had included as component of Sales Tax and Service Tax.

(iii) Roaming revenue actually passed on to other eligible/entitled telecom service provider.”

We have noticed heretobefore the relevant and existing clauses of the amendment carried out by the Respondent in the year 2006.

We may also place on record that this Tribunal upon obtaining the recommendations of the TRAI as regards the issue as to whether different heads of income would fall within the purview of the definition of AGR, by and large accepted the said opinion of the TRAI by a judgment and order dated 30.8.2007 passed in Petition No.7 of 2003.

The correctness of the said judgment was questioned before the Supreme Court of India by the Respondent herein.

By reason of a judgment and order passed in the case of Union of India and Anr. vs. Association of Unified Telecom Service Providers of India and Ors. reported in (2011) 10 SCC 543, it was inter alia held:-

“39. The proviso to sub-section (1) of Section 4 of the Telegraph Act, however, enables the Central Government to part with this exclusive privilege in favour of any other person by granting a license in his favour on such conditions and in consideration of such payments as it thinks fit. As the Central Government owns the exclusive privilege of carrying on telecommunication activities and as the Central Government alone has the right to part with this privilege in favour of any person by granting a license in his favour on such conditions and in consideration of such terms as it thinks fit, a license granted under proviso to sub-section (1) of Section 4 of the Telegraph Act is in the nature of a contract between the Central Government and the licensee.

40. A Constitution Bench of this Court in *State of Punjab v. Devans Modern Breweries Ltd. & Ors.* (supra), relying on *Har Shankar's case* and *Panna Lal v. State of Rajasthan* [(1975) 2 SCC 633], has held in para 121 at page 106 that issuance of liquor license constitutes a contract between the parties. Thus, once a license is issued under proviso to sub-section (1) of Section 4 of the Telegraph Act, the license becomes a contract between the licensor and the licensee. Consequently, the terms and conditions of the license including the definition of Adjusted Gross Revenue in the license agreement are part of a contract between the licensor and the licensee. We have to, however, consider whether the enactment of the TRAI Act in 1997 has in any way affected the exclusive privilege of the Central Government in respect of the telecommunication activities and altered the contractual nature of the license granted to the licensee under the proviso to sub-section (1) of Section 4 of the Telegraph Act.

47. A dispute between a licensor and a licensee referred to in Section 14 (a) (i) of the TRAI Act, therefore, is a dispute after a person has been granted a license by the Central Government or the Telegraph Authority under sub- section (1) of Section 4 of the Telegraph Act and has become a licensee and not a dispute before a person becomes a licensee under the proviso to sub-section (1) of Section 4 of the Telegraph Act. In other words, the Tribunal can adjudicate the dispute between a licensor and a licensee only after a person had entered into a license agreement and become a licensee and the word "any" in Section 14(a) of the TRAI Act cannot widen the jurisdiction of the Tribunal to decide a dispute between a licensor and a person who had not become a licensee. The result is that the Tribunal has no jurisdiction to decide upon the validity of the terms and conditions incorporated in the license of a service provider, but it will have jurisdiction to decide "any" dispute between the licensor and the licensee on the interpretation of the terms and conditions of the license.

55 On the other hand, we find from the long line of decisions in *Har Shankar vs. Excise & Taxation Commissioner (supra)*, *Government of A.P. vs. M/s Anabeshahi Wine & Distilleries Pvt. Ltd (supra)*, *Excise Commissioner vs. Issac Peter Ors. (supra)*, *State of Orissa. vs. Narain Prasad*, *State of M.P. vs. KCT Drinks Ltd*, *State of Punjab. vs. Devans Modern Breweries Ltd. , Shyam Telelink Limited vs. Union of India (supra)* and in *Bharti Cellular Limited vs. Union of India (supra)*, that this Court has consistently taken a view that once a licensee has accepted the terms and conditions of a license, he cannot question the validity of the terms and conditions of the license before the Court. We, therefore, hold that the TRAI and the Tribunal had no jurisdiction to decide on the validity of the definition of Adjusted Gross Revenue in the license agreement and to exclude certain items of

revenue which were included in the definition of Adjusted Gross Revenue in the license agreement between the licensor and the licensee.”

Mr.C.S. Vadiyanathan, learned Senior Advocate and Mr.Navin Chawla, Advocate appearing on behalf of the Petitioners would contend :-

- (i) The conditions of license being a contract between the parties could not have been unilaterally amended by the Respondent.
- (ii) In any event the Respondent in terms of the provisions of the license could not have fundamentally changed the conditions laid down therein with regard to the levy of license fee.
- (iii) The Respondent did not act in fair and reasonable manner in so far as it purported to change the definition of `Gross Revenue' without following the mandatory pre-conditions laid down in the Act.
- (iv) From the documents brought on record by the parties hereto, it would be evident that for the

acts of omissions and commission on the part of the holders of UAS license, who also hold ISP-1 and ISP Telephony license, the Petitioners have been discriminated against, in so far as they have been directed to pay the license fee at an enhanced amount of Adjusted Gross Revenue (AGR); whereas the quantum of license fee by way of AGR payable by the UASL licensee has been brought down.

- (v) The Respondent has placed reliance on its decision purported to be in public interest to stop arbitrage and bring a parity in the rate of license fee and/or revenue neutrality without taking into consideration the fact that unreasonable conditions have been imposed upon the Petitioners by reason thereof.

- (vi) The Committee constituted by the Union of India, the recommendations of which had also been referred to the TRAI, having not held any

consultations with the Petitioners, the same cannot be relied upon.

- (vii) Even from the consultation paper issued by the TRAI on or about 16.10.2009, it would appear that the same pertain to the telecom services and not the ISP services.
- (viii) Had the consultation paper contained any issue with regard to the rendition of ISP services, the Petitioners could have participated therein.
- (ix) The Respondent wrongly relied upon a purported response made by the Reliance Communication who did not represent the cause of the Petitioner.
- (x) The TRAI did not focus any issue on the licence fee payable by the Petitioners and particularly the fact that if telecom licensees were said to be violating the law, the Petitioners could not have

been brought within the purview of the increase in the amount of AGR.

- (xi) From the alleged minutes of meeting dated 8.3.2011 with the Hon'ble Minister of C & IT, it would appear, that the same was provisional in nature and until a final recommendation were made by the TRAI as would appear from para 2 of the impugned order and in that view of the matter, it could not have been given effect to.
- (xii) The TRAI made a purported recommendation without holding any consultation and thus the procedure laid down in sub-section 4 of Section 11 of the Act must be held to have not been complied with. If something was to be excluded, obtaining of the recommendations of the TRAI was evidently imperative in nature and even the UOI thought so.
- (xiii) The purported Round Table Conference, in any event, must be held to be an idle formality as

even prior thereto a policy decision had been taken on 15.2.2012 by way of a press release with regard to payment of uniform license fee by categories of license holders.

Ms.Maneesha Dhir and Mr.Kohli, learned counsel appearing for the Respondent, on the other hand, urged :-

- (i) The issue with regard to the power of the licensor to review the license fee being the subject matter of Petition No.119 of 2006 decided on 30.8.2007, the correctness of which having not been questioned and in terms whereof most of the Petitioners have been paying the license fee, the same has attained finality and, thus, the Petitioners are estopped and precluded from questioning the power of the Respondent to review the license fee or the definition of AGR.
- (ii) From a bare comparison of the definition of AGR as inserted by reason of the Memorandum dated

19.11.2007 vis-à-vis the one contained in the amendment to the terms and conditions of license agreement dated 3.3.2006, it would be evident that only some items have been directed to be excluded.

(iii) The Respondent took a policy decision upon obtaining the view points of all concerned including the TRAI that definition of AGR was required to be laid down in view of the fact that similar type of services with regard to internet service provided for to their subscribers both by the holders of all type of licenses, being the UASL, UASL with ISP and ISP Internet with Internet Telephony and/or those held by the Petitioners, there is absolutely no reason why uniform AGR would not be paid by all concerned.

(iv) From a perusal of the Respondent's letter dated 17.11.2006 issued to the TRAI, it would appear that policy decision taken by the Respondent not to levy any license fee and/or charging any

nominal license fee, did not bring about any fruit and in that view of the matter parity in the quantum of license fee was required to be brought about.

- (v) The TRAI having made recommendations in the years 2007 and 2009, it would not be correct to contend that the recommendations of the TRAI had not been obtained in the matter.
- (vi) In any event the second proviso appended to Section 11 (1) of the TRAI Act would not be attracted in the case of amendment of license in view of the decision of this Tribunal in Petition No.119 of 2006.
- (vii) Having regard to the decision of the Supreme Court of India in the case of Union of India vs. Association of Unified Telecom Service Providers of India and Ors. reported in (2011) 10 SCC 543, there cannot be any doubt or dispute that when AGR had been defined even before the grant of

licenses in the year 2007, the Petitioners no.7 to 11, having obtained the benefit thereunder cannot be permitted to question the validity thereof.

There, as indicated hereinbefore, exist four different categories of licenses; (a) pure ISP license, (b) ISP with telephony granted before 24.8.2007, (c) license granted after 24.8.2007, and (d) UAS licenses together with or without separate ISP and ISP telephony service.

We may notice that it is difficult to comprehensively define 'internet' as these are different concepts therefor in different parts of the world.

In short, internet is a network of computer networks. It now reaches worldwide depending on the whims of the local government.

One can pretty well get unto the internet and roam it unchecked.

ISP

'Internet telephony' and 'Internet working', however, are defined in Newton's Telecom dictionary in the following terms:-

"Internet Service Provider ISP. A vendor who provides access for customers (companies and private individuals) to the Internet and the World Wide Web. The ISP also typically provides a core group of internet utilities and services like E- mail, News Group Readers and sometimes weather reports and local restaurant reviews. The user typically reaches his ISP by either dialing-up with their own computer, modem and phone line, or over a dedicated line installed by a telephone company. An ISP is also called a TSP, for Telecommunications Service Provider, and a ITSP, for Internet Telephony Service Provider.

Internet Telephony In the very beginning. Internet telephony simply meant the technology and the techniques to let you make voice phone calls — local, long distance and international — over the Internet using your PC. To make these calls, both people on the phone need appropriate hardware and software. The hardware is typically a sound card or voice modem in a PC. There are almost as many ways of making phone calls on the Internet as there are software packages. The key is to figure a way that your PC can dial and reach someone else's distant PC

— which must be turned on, plugged in and connected to some place that my PC can find you at. In short, making voice phone calls was the first definition of internet telephony. But then people started thinking of other things internet telephony could become. For example, internet telephony could let you talk to someone while the two of you worked on making perfect a document that was on both your screens. If the Internet could send email, people started thinking of sending fax, voice, video and imaging mail / messages. And maybe, as you cruise the Internet and find a product you'd like to buy, you might see a button that says "I'd like to know more. Have an operator call me." So you click the button, and 15 seconds later your phone rings. The operator is calling, wanting to know how he can help? In short, the definition of Internet telephony is broadening day by day to include all forms of media (voice, video, image), all forms of messaging and all variations of speed from real-time to time-delayed. See GOLD, PACKET SWITCHING and, for the best explanation, TAPI 3.0.

Internet working:-

Internetworking Communication between two networks or two types of networks or end equipment. This may or may not involve a difference in signaling or protocol elements supported. And, in the narrower

sense — to join local area networks together. This way users can get access to other files, databases and applications. Bridges and routers are the devices which typically accomplish the task of joining LANs Internetworking may be done with cables — joining LANs together in the same building, for example. Or it may be done with telecommunications circuits — joining LANs together across the globe.

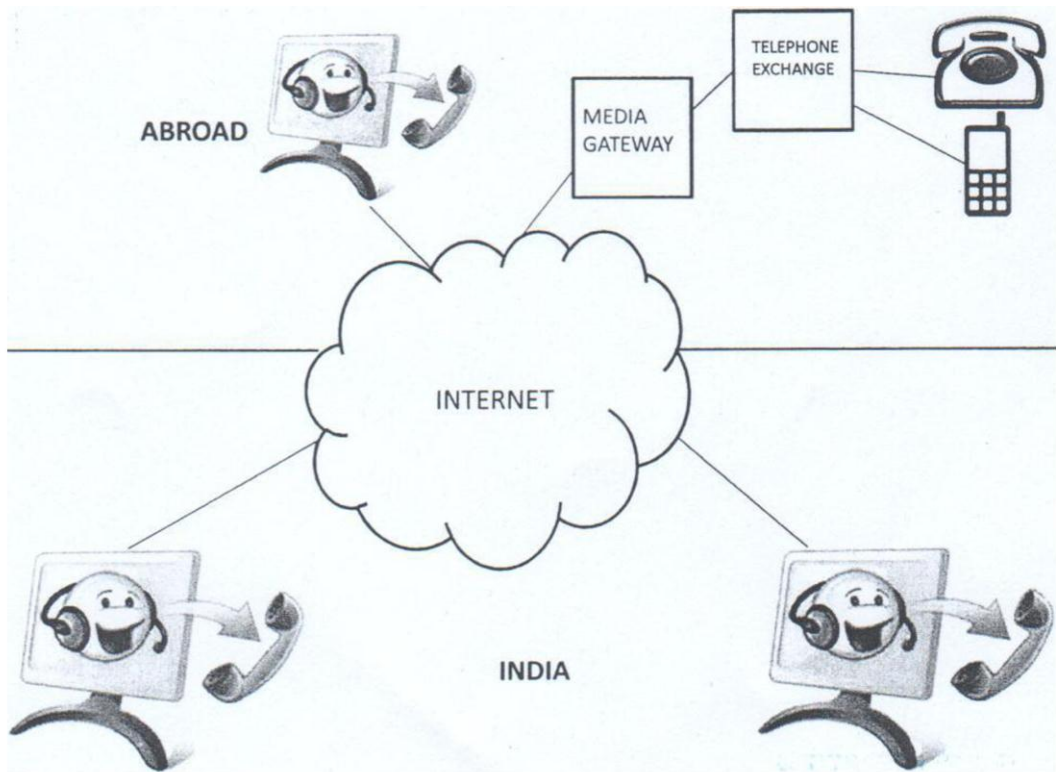
We may also notice that the term `internet' has been defined in the license as under :-

“16 Internet : Internet is a global information system that :

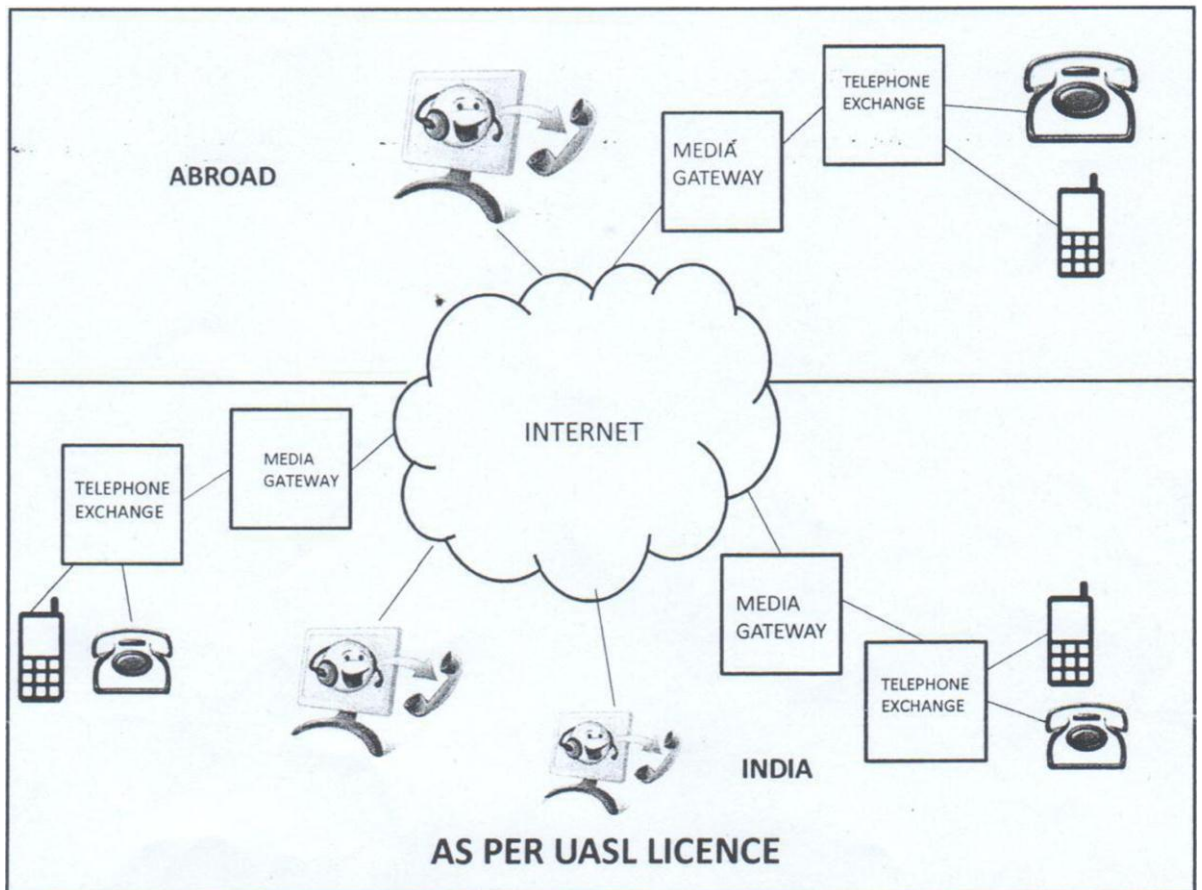
* is logically linked together by a globally unique address, based on Internet Protocol (IP) or its subsequent enhancements/upgradations;

* is able to support communications using the Transmission Control Protocol/Internet Protocol (TCP/IP) suite or its subsequent enhancements/upgradations, and all other IP compatible protocols; and..”

The distinction between an `internet telephony' and the methodology adopted by the UASL licensee, may be pictorially stated as under:-



AS PER ISP LICENCE



AS PER UASL LICENCE

Pure Internet services, however, cannot be rendered internationally unless there exists special provision in the License as regards thereto.

As indicated heretobefore, prior to 24.8.2007 there were two different categories of licenses.

However, w.e.f. 24.8.2007 ISPs were permitted to obtain the License regarding internet telephony as defined in the ISP agreement, which reads as under :-

“Following services can be provided within the scope of Licence for Internet Service :

(i) Internet Access: Internet access means use of any device/technology/methodology to provide access to internet including IPTV and all content available without access restriction on Internet including web hosting, webcolocation but it does not include service provider’s configured Closed User Group Services (VPN). The content for IPTV shall be regulated as per law in force from time to time. Permission to provide IPTV services shall be granted on application by licensee provided the licensee has networth of Rs. 100 crore or more.

(ii) Internet Telephony: Internet Telephony mean a service to process and carry voice signals offered through Public Internet by the use of Personal Computers (PC) or IP based Customer Premises Equipment (CPE) connecting the following :

a) PC to PC; within or outside India

b) PC / a device / Adapter conforming to standard of any international agencies like- ITU or IETF etc. in India to PSTN/PLMN abroad.

c) Any device / Adapter conforming to standards of International agencies like ITU, IETF etc. connected to ISP node with static IP address to similar device / Adapter; within or outside India.

Explanation : Internet Telephony is a different service in its scope, nature and kind from real time voice service as offered by other licensed operators like Basic Service Operators (BSO), Cellular Mobile Service Operators (CMSO), Unified Access Service Operators (UASO)

(iii) The Internet Telephony described in condition (ii) above, is only permitted.

(iv) Addressing scheme for Internet Telephony shall only conform to IP addressing Scheme of Internet Assigned Numbers Authority (IANA) exclusive of National Numbering Scheme / plan applicable to subscribers of Basic / Cellular Telephone service. Translation of E.164 number / private number to IP address allotted to any device and vice versa, by the licensee to show compliance with IANA numbering scheme is not permitted.

(v) The Licensee is not permitted to have PSTN/PLMN connectivity. Voice communication to and from a telephone connected to PSTN/PLMN and following E.164 numbering is prohibited in India.

(vi) Unified Messaging Services (UMS) without any additional PBX within the scope of (i) to (ii) above can be provided.

(vii) The Licensee shall ensure that Bulk Encryption is not deployed by ISPs. Further, Individuals/ Groups/ Organizations are permitted to use encryption up to 40 bit key length in the symmetric key algorithms or its equivalent in other algorithms without obtaining permission from the Licensor. However, if encryption equipments higher than this limit are to be deployed, individuals/groups/organizations shall obtain prior written permission of the Licensor and deposit the decryption key, split into two parts, with the Licensor.

(viii) Internet Service to any VSAT subscriber (who could be served by a shared hub commercial service provider or captive private VSAT network) can be provided, if the VSAT is located within the service area of the ISP. For this purpose, a direct interconnection of VSAT or VSAT-hub through leased line obtained from an authorized provider to the ISP's node/server shall be permitted only for the flow of Internet traffic. The ISP shall provide to the Licensor a monthly statement of VSAT subscribers served with their

locations and details of leased line interconnection with the VSAT hub. The VSAT hub, however, need not be located in the service area of the ISP

(ix) Licensee may install operate and commission International Internet Gateway using satellite or submarine cable as medium after obtaining security clearance/approval from Licensor.

(x) Licensee with International internet gateway is allowed to sell internet bandwidth to other licensed internet service providers."

We may also notice that the provisions of UAS license do not impose any restriction on the use of internet telephony service as would appear from its definition contained in Clause 28 (B) thereof.

It reads as under:-

"28(B) "Internet Telephony means "transfer of message (s) including voice signals (s) through public internet."

We have noticed the aforementioned fact only to consider the effect of the impugned notification vis-à-vis the practice prevalent prior thereto.

Before, however, we resort to interpretative process and consider the background facts, the impugned circular being dated 29.6.2012 may be noticed:-

"...In pursuance of the right of Licensor to modify at any time the terms and conditions of the License

Agreement for provision of Internet Services, in public interest or for the proper conduct of the service, the Licensor hereby intimates that:

A uniform licence fee rate of 8% of "Adjusted Gross Revenue (AGR)" shall be adopted for all ISP and ISP-IT licences, in two steps starting from 01.07.2012 as follows:

Category of licence	Details	Annual Licence Fee rate as % of ; AGR	
		For the period from 01.07.2012 to 31.03.2013	For year 2013-14 and onwards
ISP	Licence for provisioning of Internet services issued under 1998 guidelines (without Internet Telephony)	4%	8%
ISP-IT	Licence for provisioning of Internet services (Including Internet Telephony) issued under 2002 guidelines, Licence for provisioning of Internet services issued under 24.08.2007	7%	8%

Revenue for the purpose of licence fee for ISP Category shall provisionally include all types of revenue from Internet services, allowing only those deductions available for pass through charges and taxes/levies as in the case of access services, without any set-off for expenses. Revenues from Internet services will also be included in the definition of applicable AGR provisionally for ISP-IT category till government takes a final decision after obtaining TRAI recommendations in this regard."

In the aforementioned backdrop of events, the question which arises for consideration is as to whether the licensor in terms of the conditions of the license agreement could modify the terms and conditions of the license agreement?

The power of the licensor in this regard must emanate from the conditions of the license which we have noticed heretobefore.

It may, however, be placed on record that when in the year 2006, the definition of AGR was introduced the Petitioners herein questioned the said order.

The objection of the Petitioners with regard to the amendment of the license as also the power of the licensor was negated by this Tribunal, stating:-

"...So far as point regarding the decision being a unilateral decision of the Government is concerned, attention is invited to the relevant Clause 1.1(ii) of Schedule B of the license which has been quoted herein before. Under this clause the Telecom Authority has reserved the right to review the license fee and the same is ordained to be binding on the licensee. This is a contractual obligation under the license. The license is an admitted document accepted by both parties. The petitioners have not shown anything which may suggest that they objected to this condition forming part of the license. Therefore, the decision of the respondent to

amend the term relating to license fee cannot be challenged on this ground.”

The validity of the said order was also questioned on the premise that prior thereto the recommendation of the TRAI was mandatory.

This Tribunal opined :-

“... We are unable to agree with this submission. Amendment of a term of license cannot be said to be a case of grant of a new license. The power to amend the relevant terms of license is contained in the original license and the respondent in exercise of that power has amended the term relating to license fee. This cannot be said to be a case of grant of a new license. Therefore, this argument made on behalf of the petitioner is untenable. When we hold that this is not a case of grant of a new license, the requirement of recommendation of TRAI also goes because as per the proviso this requirement comes into picture only in case of grant of a new license. Therefore, we find no merit in the argument on behalf of the petitioners that the amendment of the term of license regarding license fee is illegal and is liable to be quashed. Prayer (a) is, therefore, rejected.”

It is not in dispute that the said order of this Tribunal has attained finality. The parties hereto, therefore, are bound thereby.

Moreover, indisputably those who are affected by the order incorporating the definition of AGR have been paying the license fee on AGR basis.

The impugned order was preceded by two recommendations of TRAI one made on or about 13.9.2006 and the other on or about 11.5.2010.

The Respondent, however while not accepting the recommendations of the TRAI dated 13.9.2006, provisionally appears to have accepted some of the recommendations dated 11.5.2010.

It was also preceded by a round table conference which was held on 8.3.2011 (wrongly stated in the reply as 8.3.2012). It is, therefore, evident that the contention of the Petitioners that the Respondent having issued a press release the same was an idle formality, is not correct.

In the said round table conference a few internet service providers were also present, although, it is the case of the Petitioners that neither the Petitioner no.1 nor any of its members were invited therefor.

The said contention of the Petitioner may not detain us in view of the fact that holding of a round table conference was not a

mandatory requirement and therefore, one way or the other, the same would not give rise to the impugned order being rendered invalid.

We would assume that certain recommendations had been made by the TRAI. We would furthermore assume that in terms of the second proviso appended to Section 11 (1) of the TRAI Act, it was not mandatory for the Respondent to obtain the recommendations of TRAI.

But in this case not only the recommendations of the TRAI were explicitly sought for by the respondent, as noticed heretobefore, even the report of the Committee constituted on 5.5.2009 were sent to the TRAI in term of its letter dated 31.8.2009 for its consideration.

It is, therefore, difficult to comprehend that before the licensees could be amended, the same was in the facts and

circumstances of the case was not required to be preceded by the recommendation of the TRAI.

Both the parties hereto have strongly relied upon the decision of the Supreme Court of India in Union of India vs. Association of Unified Telecom Service Providers and Ors. reported in (2011) 10 SCC 543.

Whereas Mr.Vadiyanathan relied upon the said decision for the proposition that the agreement between the parties is a contract; Ms.Dhir relied thereupon for the proposition that the Petitioners cannot question the provisions of an agreement having accepted benefit arising thereunder.

The Apex Court in AUSPI (supra) did not say that even subsequent amendments cannot be the subject matter of challenge by the licensee before this Tribunal. It said so in the context of original License.

However, in this case the petitioners have challenged the validity of a subsequent amendment whereby and whereunder a higher amount of license fee has been levied.

We may also place on record that the question as to whether an unilateral enhancement in absence of any power also came up for consideration before the Supreme Court of India in the case of DDA vs. Joint Action Committee, Allottee of SFS Flats and Ors. (2008) 2 SCC 672, wherein it was held :-

“70 Strong reliance has been placed upon the residuary power conferred upon the Authority to determine the cost of construction. When the same is done having regard to the relevant factors on the basis of which brochure as well as the notice inviting tender was issued, the superior courts may not interfere; but the same must be done in terms of the original contract and not dehors the same. The authority, even while exercising its residuary power, is required to act within the four corners of the contract. While doing so, the terms of the contract cannot be altered to include any other factors which were

contemplated thereunder. While computing the extra cost, no additional factor, thus, can be taken into consideration. If such a power is conceded in the authority, the same would give rise to exercise of arbitrary power. It is not contemplated in law. When construing a provision delegates a power on an authority under a statute, the constitutional provisions must be kept in mind.

71. At the time of calculation of the amount which would be the subject matter of demand of 5th and final instalment, the jurisdiction of DDA is to keep itself confined only to the factors on the basis whereof, the brochure has been issued and offer was made. No additional factor, thus, could be taken into consideration at the time of issuing notice other than the ones on the basis whereof offer was made by the registrants. Imposition of equalization charge also falls within the said purview.”

In these cases, we may proceed on the basis that in view of the fact that the decision rendered in Petition No.119 of 2006 by this Tribunal has attained finality between the parties.

However, we intend to consider the legality of the impugned order from a different angle.

To a query made by us as to the true import of paragraph 2 of the impugned order dated 29.6.2012 as to why the same was issued provisionally and a final decision was to be taken after obtaining the recommendations of the TRAI, Ms. Dhir submitted that ultimately the Central Government will have to take a decision upon obtaining the recommendations of the TRAI.

Paragraph 2 of the impugned order makes an interesting reading.

If the contention of the Respondent that the TRAI has made final recommendations which had been accepted, there is no

question of accepting the same provisionally. By reason of the impugned order the concept of AGR has been changed only provisionally.

The 1997 Act does not provide therefor.

If a situation like the present one is covered by the recommendations of the TRAI, in view of the provisions contained in the 1997 Act, the said recommendations were to be accepted or not accepted.

Sub-Section 5 of Section 11 of the 1997 Act to which reference has been made by the Apex Court in AUSPI (supra) the recommendations of the TRAI are not binding on the Central Government.

The Central Government, therefore, will have to arrive at its own decision.

We have noticed heretofore that the Central Government has also not accepted the recommendations of the internal committee constituted on 5.5.2009.

If the Central Government furthermore was to act on the basis of the decision taken in the round table conference, it was not necessary for it to obtain further recommendations of the TRAI.

The round table conference could not have been equated with the consultative process of the TRAI which is a statutory authority. If Central Government itself thought that in respect of any matter a final decision was required to be taken after obtaining recommendations of the TRAI, the necessary implication thereof would be that the recommendations of the TRAI or the discussions in the round table conference and/or recommendations of the committee have not been accepted.

If, moreover, before amending the terms and conditions of the contract relating to payment of license fee is to be taken, the same was required to be finally taken and not provisionally and that too subject to the recommendations of TRAI.

Presumably the Central Government was required to consider all aspects of the matter including the question as to whether the petitioners with regard to the 'pure internet service' vis-à-vis the services rendered by the UAS licensees have a level playing field. If they do not, appropriate measures may have to be taken in that behalf but the Petitioners could not have been asked provisionally to pay on the basis of the AGR, wherefor the final decision was to be taken at a later stage.

Keeping in view our aforementioned findings, we are of the opinion, that it is not necessary to advert to the question of Promissory Estoppel and/or Legitimate Expectation raised by the learned counsel for the parties, as contended by Mr. Vaidyanathan.

We, therefore, are of the opinion that paragraph 2 of the impugned order cannot be sustained.

It is set aside accordingly. No order as to costs.

(S.B. Sinha)
Chairperson

(P.K. Rastogi)
Member

October 12, 2012`ns'/rkc