

TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL

NEW DELHI

Dated : October 23, 2012

Petition No.720(C) of 2012

Asergis Telecom Services Pvt. Ltd. ...Petitioner

Vs.

Bharti Airtel Ltd. & Anr. ...Respondent

BEFORE:

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

For Petitioner : **Mr.D.K. Singh & Ms. Kirti Yadav,**
Advocates

For Respondent No.1 : **Mr.Gopal Jain & Mr. Kunal Kaul,**
Advocates

For Respondent No.2 : **Mr. Dayan Krishnan, Ms. Vibha Dhawan
& Mr. Sadapurana Mukherjee, Advocates**

Reasons for Order dated 19.10.2012

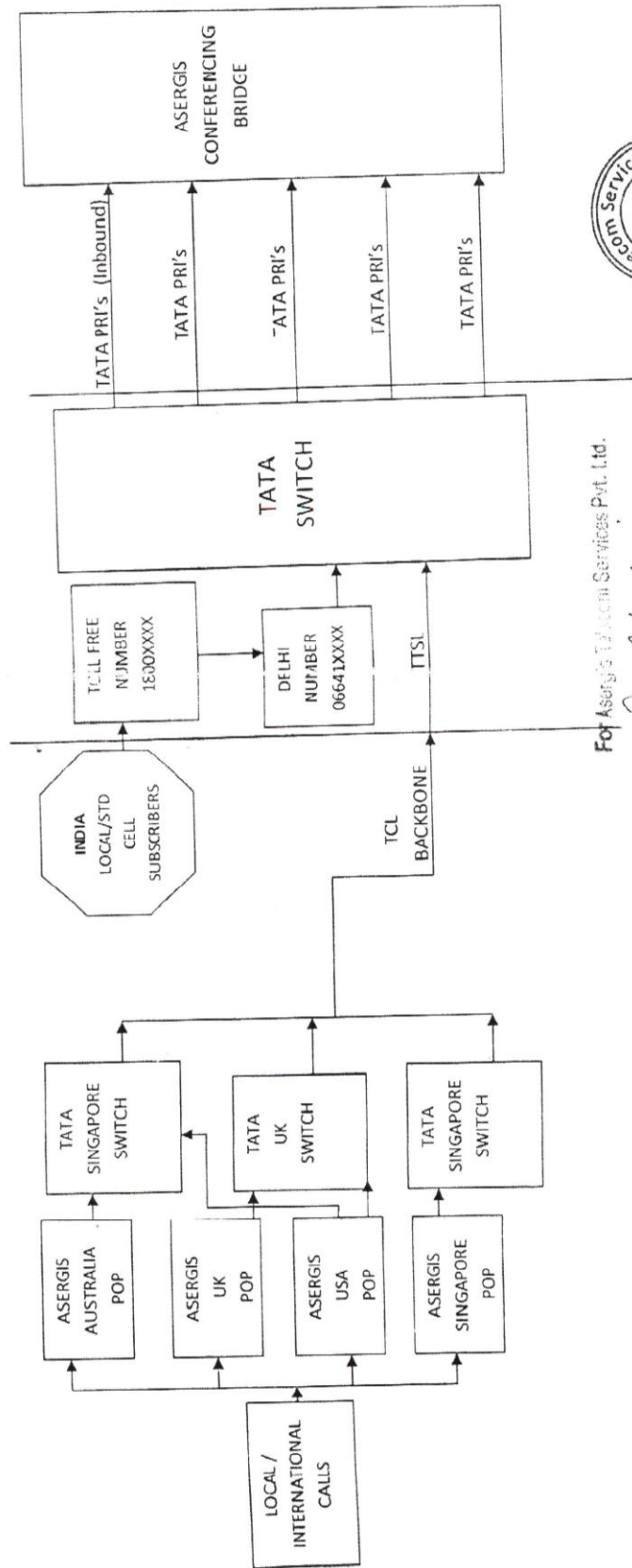
1. By reason of an order dated 19.10.2012 the first respondent was directed to lift the block caused by it on the access to the toll free numbers of the Respondent No.2 taken by the Petitioner on lease for Intelligent Network services.

The reasons for the said order are being now assigned.

2. The Petitioner was granted a license in terms of the proviso appended to Section 4 of the Indian Telegraph Act, 1965, on or about 27.11.2006. Pursuant to or in furtherance of the said License Agreement for provisioning of Voice Mail/Audiotex services dated 11.4.2012, the Petitioner entered into an agreement with the second Respondent which is an access provider.
3. The calls originated from the network of the said respondent and also terminated therein as would appear from the following diagram:

NETWORK DIAGRAM – AUDIO CONFERENCING SERVICE

TATA – DATA CENTRE (NEW DELHI)



For AserGIS Telecom Services Pvt. Ltd.



G. Abade Director

- TFN Forwarded to our Bridge at Delhi
- International Customers landing at TATA switch then afterwards will hit Bridge
- TCL – TATA Communications Limited

4. Inter alia on the premise that the Petitioner had been transmitting international calls although its area of operation was within the territories of India, the First Respondent herein blocked one port of the Respondent No.2 as a result whereof the Petitioner became unable to provide services to its customers in terms of the provisions of the license.

5. In the aforementioned premise the Petitioner has filed this petition praying inter alia for the following reliefs:

A. Hold and declare that the unilateral withdrawal of access to the toll free numbers of the respondent No. 2 taken by the petitioner on lease for providing Intelligent Network Services (Audio conferencing) to its IN customers is illegal and in breach of the UASL issued to the respondent No. 1, TRAI IN Regulations;

B. Permanently restrain the respondent No. 1 from withdrawing access to the inter connection between the respondent No.1 and respondent No. 2 on the ground that Intelligent Network free phone services under 1800 numbering plan is being terminated outside India by the petitioner;

6. Before we consider the controversy arising between the parties herein, we may notice the Regulations governing the field known as Intelligent Network Services in Multi Operator and Multi Network Scenario Regulations, 2006 (hereinafter called and referred for the sake of brevity as the said Regulations).

7. We may at the outset notice certain provisions of the Interpretation Clause contained in Clause 2 of the said Regulations.

"2. Definitions.--In these regulations, unless the context otherwise requires,-

.....

(b) "Access Providers" includes the Basic Operator, Cellular Mobile Service Provider and Unified Access Service Provider;

(c)" Authority' means the Telecom Regulatory Authority of India established under sub-section (1) of section 3 of the Act;

(d) "Basic Operator" means a service provider who has been granted a licence under section 4 of the Indian Telegraph Act, 1885 (13 of 1885) and who provides basic telephone service in accordance with the terms and conditions of the licence;

(e) "Cellular Mobile Telephone Service Provider" means a Cellular Mobile Telephone Service provider who has been granted a licence under section 4 of the Indian Telegraph Act, 1885 (13 of 1885) and who provides Cellular Mobile Telephone Service in a specified service area in accordance with the terms and conditions of the licence;

(f) "Eligible Service Provider" means service provider who has been granted a licence under section 4 of the Indian Telegraph Act, 1885 (13 of 1885) and who is eligible to provide the service in accordance with terms and conditions of licence;

.....

(h) "Intelligent Network" means a network architecture for the operation and provision of new services which is characterized by –

(A) extensive use of information processing techniques;

(B) efficient use of network resources;

- (C) modularisation and reusability of network functions;
 - (D) integrated service creations and implementation by means of the modularised reusable network functions;
 - (E) flexible allocation of network functions to physical entities;
 - (F) portability of network functions among physical entities; standardized communication between network functions via service independent interfaces;
 - (G) service subscriber control of some subscriber-specific service attributes;
 - (H) service user control of some user-specific service attributes; standardized management of service logic;
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(j) "National Numbering Plan" means the National Numbering Plan 2003, or, any such plan, made subsequently by the Government of India, Ministry of Communications and Information Technology, Department of Telecommunication;

.....

3. Provision for interconnection to all Eligible Service Providers. ---All Basic Operators, Cellular Mobile Service Providers and Unified Access Service Providers shall provide interconnection to all the Eligible Service Providers for the purpose of giving an option to subscribers of all Access Providers to exercise option for using the Intelligent Network Services of other Eligible Service Providers.

4. Prohibition to deny to subscribers access to Intelligent Network. ---
 No Basic Operator, Cellular Mobile Service Provider and Unified Access Service Provider shall directly or indirectly deny its consumers accessing Intelligent Network Services of his

choice which are available in multi-operator multinetwork scenario.

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10. Intelligent Network Services under commercial and technical arrangements or agreement.-- (1) All Eligible Service Providers shall provide the Intelligent Network Services in accordance with the terms and conditions of the licence granted to them under section 4 of the Indian Telegraph Act, 1885 (13 of 1885):

(2) Without prejudice to the conditions of the licence granted to the Basic Operator, Cellular Mobile Service Provider and Unified Access Service Provider and other telecom service provider under section 4 of the Indian Telegraph Act, 1885 (13 of 1885), such Basic Operators, Cellular Mobile Service Provider and Unified Access Service Provider and other telecom service provider may use resources of any other telecom service provider for Intelligent Network Services under commercial and technical arrangements or agreements entered among themselves as per mutually agreed terms and conditions.

(3) Every arrangement or agreement entered under sub-regulation (2) shall specify architecture for implementation of Intelligent Network Services.

(4) Every arrangement or agreement under sub-regulation (2) shall be entered into within ninety days from the date of commencement of these regulation for providing Intelligent Network Services to subscriber of other telecom service providers:

Provided that in a case any Basic Operator or Cellular Mobile Service Provider or Unified Access Service Provider fails to

enter into arrangements or agreement under sub-regulation (2), the Authority may, on an application made by the concerned service provider and having regard to the interest of the service providers and consumers of the telecom sector, extend the said period of three months to six months.

(5) All Eligible Service Providers providing Intelligent Network Services shall furnish call data records of all the calls handled by him as and when required by the Central Government or any authority specified by it or the Authority.

(6) Every arrangement or agreement entered under sub-regulation (2) shall be submitted to the Authority for registration within fifteen days from the date of entering into such agreement.

(7) The arrangements or agreement entered under sub-regulation (2) shall come into force within thirty days from the date of entering into such arrangements or agreements.

(8) In case any Basic Operator, Cellular mobile service provider or Unified Access Service Provider fails to enter into agreements or arrangements within the stipulated time, they shall intimate within fifteen days of such failure to the Authority with complete details thereof and after examining such failure and details furnished by the service providers, the Authority shall specify the interconnection arrangement.

(9) All the provisions of these regulations shall apply to the commercial and technical arrangements or agreement entered into under which licensed Access Service Providers shall connect their equipment, networks and services to enable their

customers to have access to the Intelligent Network of other Service Providers.

8. It may, however, be noticed that the said Regulations were amended by the Telecom Regulatory Authority of India (the TRAI) on or about 18.9.2012 whereby and whereunder Clause 3 was amended.

The agreement, however, was entered into by and between the Petitioner on or about 11.4.2012.

9. The Petitioner in terms of the said agreement has taken lease of the number 1800 from the Second Respondent for providing the Intelligent Network Services. The Petitioner, inter alia, provides audio conferencing facility by using free phone services of the Second Respondent to its customers who are interested therein.

10. The toll free number in terms of the NNP shall have 1800+yyy+ in number structure and the number shall be of 8 to 13 digits.

11. The Respondent, however, has blocked, as indicated heretobefore, access to calls of its subscriber to the toll free numbers of the Petitioner which it had taken on lease from Tata Teleservices with effect from 11.9.2012 on the premise that it had been providing international calls also.

12. The Petitioner and the Respondent No.2 had taken up the said matter with the First Respondent.

The Respondent No.2 has filed an additional affidavit wherein it has, inter alia, contended that the apprehension of the Respondent No.1 that domestic toll free numbers are being converted to international toll free number is not correct, stating:

"10. I say that the aforesaid allegations are without any basis and deserve to be ignored. No instance whatsoever has been given by the Respondent No.1 in support of the allegation. The allegation is based on surmises and conjectures. I say that the Respondent No.2 does not hold' an ILD licence to provide any sort of international toll free services to any customer/ subscriber. Secondary TTSL is not in the business of providing International toll free services to any customer/subscriber.

11. I say that 1800 series is for proving the national dialing and not for making international calls. I say that the Respondent No.2 is not using the said series to make any international calls or divert any calls to any international destination which it known is in violation of its licences."

13. So far as the allegation made by the Respondent No.1 that the Respondent No.2 has violated the provisions of the interconnect agreement entered into by and between them, it was stated by the Respondent No.2:

"13. I say that aforesaid allegation is with wrong intentions and is denied. On the contrary, it is the Respondent No.1, which is in violation of IN Agreement in as much as it has denied customer the access to IN services of its violation of Regulation 4 of the IN Regulations, which provide as under:

"4. Prohibition to deny to subscribers access to Intelligent

Network - No Basic Operator, Cellular Mobile Service Provider and Access Service Provider shall directly or indirectly deny its customers accessing Intelligent Network Services of his choice which are available in multi operator multi-network scenario."

14. I say that while quoting clause 5.10 of the Interconnection Agreement, Respondent No.1 has alleged the interconnection is limited only to the traffic originated and terminated in their respective networks and none of the party can utilize the interconnection for the transit service for any third party. It is submitted that Respondent No.1 has misconstrued the clause 5.10 of the Interconnection Agreement as will be clear from the said Clause 5.10, quoted herein below:

"Interconnectivity between the Parties will be utilized for calls originating from and terminating in the respective networks only. The Parties agree that traffic shall not be transited via network of any other service provider, for termination into each other's network at such places, except in case of network failure in network of either Party or if there is congestion in the network The Parties will mutually agree and finalize the terms of my such transit traffic to be routed through the network of any other party, whenever required, including the execution of a tripartite agreement among the three parties."

15. I say that the calls originating and terminating are within the networks of each other only and are not being diverted anywhere outside India, the entire process of conferencing being provided by the Petitioner is within India only. All the calls originating from any IN customer of Petitioner for availing the facility of conferencing through the Petitioner are being bridged in India only. There is no question of any transit call of any third party being routed through Respondent No. 1's network. I say that it is Respondent No. 1's subscriber only, who is using his network for reaching TTSL bridge for doing the conferencing.

16. I also say that the Respondent No. 1 is well

aware that the Answering Respondent does not hold an ILD licence and is not involved in any such activity of diverting toll free calls any calls to international destinations still with malafide intentions it wrote the letter dated 07.03.2012 to the Answering Respondent by mixing the functions of an NLDO & an ILDO, to which an oral reply was communicated to Respondent No. 1 and explained that the Answering Respondent does not hold an ILD Licence and is not involved in any such activity.

14. The Respondent No.1 has, however, filed a rejoinder to the said reply.

The Petitioner as also the Respondent No.2 has brought on record a large number of documents to demonstrate that apprehension of the Petitioner that the Petitioner is providing international services is incorrect.

15. It is not in dispute that the Petitioner as also the Respondent No.2 are bound to provide the services within the service areas even as a licensee. The Respondent No.2 is bound by the said condition of license.

16. The First Respondent, however, would contend that the Respondent No.2 has not provided an undertaking as is required and furthermore having regard to the fact that there is no relationship between the first Respondent and Petitioner, it is not entitled to an order of injunction in mandatory form or otherwise. It was furthermore contended that the Petitioner, in the event, intends to

carry out its operation, it should enter into a separate agreement with the First Respondent.

17. It now appears from the additional affidavit filed by Respondent No.2 that requisite undertaking had been filed, although according to it, it was not necessary.

18. The interconnect agreement inter se between the Respondents herein was entered into on or about 16.4.2003. A supplementary agreement was entered into on or about 28.2.2007. The agreement between the Petitioner and the Respondent No.2 was entered into in April, 2012.

19. From an e-mail dated 12.9.2012 it would appear that the Respondent No.2 issued an e-mail when it seeks to complain that the Petitioner's customers are not getting the intelligent services, whereupon an e-mail was sent stating in its e-mail dated 12.9.2012:

"Please check one of our toll free number 18004191219 is not connected via Touchtel numbers. Please get the same check and do the needful ASAP.
Please provide test calls from 01204X, 01294X and 0114X after closure."

In the e-mail dated 13.9.2012, it was requested:

"As discussed TTSL Toll Free number 1800-419-1219 mapped to Domestic number (01166414334) only, Pls help us to get this level opened at Airtel MSCs at the earliest."

20. The Petitioner also issued a certificate on or about 20.9.2012 which is in the following terms:

“the traffic for the free phone number involved is not being terminated directly or indirectly outside India and that there is no call forwarding of the traffic outside India and/or no call patching is happening at any point including at network/customer end”

21. For the purpose of passing an interim order, it is not necessary for me to enter into the factual matrix in great details.

Suffice it to say that there are materials on record on the basis whereof this Tribunal is satisfied that the Petitioner has not been indulging/dealing with international calls through its network and all the calls were originating and terminating in the Respondent No.2's network.

22. The only facility granted by the Petitioner was to provide for the conferencing facility so far as its customers are concerned.

The agreement entered into by and between the Petitioner and Respondent No.2 is not only governed by the agreement but also by the Regulations.

23. In terms of the Clauses 3 and 4 of the Regulations, the Petitioner could enter into with an agreement with the Respondent No.2 and, thus, it is difficult to accept that the Petitioner was also bound to enter into a separate agreement with Respondent No.1.

24. In this case the amended Regulation will have no effect.

Having regard to the provisions of the Regulations as noticed heretofore as also the guidelines issued by the DoT and in particular Clause 3 and 4 which read as under:

“3. The service area for the licence shall be Short Distance Charging Area (SDCA) on the basis of local dialing. From outside the SDCA, the service will be allowed to be accessed on STD call basis. The service provider would install his equipment within the SDCA for which licence is obtained.

4. For Unified Messaging Service, transport of Voice Mail Messages to other locations and subsequent retrieval by the subscriber must be on a non-real time basis. To ensure this LICENSEE shall ensure that there is no dialing out for delivery of the message to the recipient.”

25. There cannot be any doubt that the action on the part of the Respondent No.1 is improper. This Tribunal, thus, is of the opinion that the Petitioner has made out a strong prima facie case.

So far as the submission of Mr.Gopal Jain that the Petitioner, having no relationship with the First Respondent is not entitled to an order of injunction in mandatory form is concerned, the same cannot be accepted for more than one reason.

26. Firstly because the Petitioner is entitled to operate in terms of the license issued by the DoT and the Regulations made by the TRAI.

The Respondent inter se admittedly has entered into an interconnect agreement. If in terms of the Regulations the Petitioner

could take interconnection facilities from the Respondent No.2 to provide one of the services to which it was entitled to, the Respondent No.1 either on fact or in law could not have blocked one of its ports on either a mere apprehension or the flimsy pretext particularly when sufficient evidence had been provided by both the Petitioner and Respondent No.2, that it had not taken recourse to any such activity.

27. Had the First Respondent any grievances thereabout, it was accepted that it could have approached the TRAI. Why it did not do so is a question which has to be answered.

28. As a service provider the First Respondent cannot deny that the services were to be provided to the customers of the Petitioner to which it is bound to do both under the interconnect agreement as also the Regulations.

29. The validity of the Regulations framed by the TRAI being not in question, prima facie it has to be given effect to.

30. In that view of the matter the Petitioner has established a strong prima facie case in its favour. The factor of balance of convenience as also the irreparable injury are in favour of the Petitioner and against the First Respondent, in view of the fact that if it is established in future and/or in this proceeding that the Petitioner as also the Respondent No.2 have violated the provisions of the

Regulations and/or the conditions of license, they can be directed to be proceeded against either by the DoT or otherwise by TRAI and/or compensated on monetary terms.

These are the reasons in support of this Tribunal's order dated 19.10.2012.

(S.B. Sinha)
Chairperson

October 23, 2012
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