TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL

NEW DELHI

DATED 31st OCTOBER 2012

Appeal No. 20 of 2012

Bharat Sanchar Nigam Ltd. …Appellant

Vs.

Telecom Regulatory Authority of India …Respondent

Appeal No. 21 of 2012

Mahanagar Telephone Nigam Ltd. …Appellant

Vs.

Telecom Regulatory Authority of India & Ors. …Respondent

BEFORE:

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

For Appellant (Appeal 20)	:	Ms. Maneesha Dhir, Advocate Mr. K.P. S. Kohli, Advocate Mr. Abhishek Kumar, Advocate Ms. Debopama Roy, Advocate
For Appellant (Appeal 21)	:	Mr. Chandan Kumar, Advocate
For Respondent - TRAI	:	Mr.C.S.Vaidyanathan,Sr. Advocate Mr. Saket Singh, Advocate Mr. Kumar Ranjan Mishra, Advocate
For AUSPI	:	Mr. Ramji Srinivasan, Sr. Advocate Mr. Akshat Hansaria, Advocate

Mr. Kawaljit Singh Bhatia, Advocate
Mr. Vivek Paul Oriel, Advocate

For COAI : Mr. Maninder Singh, Sr. Advocate
Mr. Manjul Bajpai, Advocate
Mr. Gopal Jain, Advocate
Mr. Sarvajeet Kumar, Advocate

ORDER

The Appellants before us are public sector undertakings. They have filed these appeals purported to be aggrieved by and dissatisfied with the Regulation dated 18.9.2012 issued by the Respondent herein.

By reason of the said Regulations, port charges have been fixed.

2. These appeals for all intent and purport are in sequel to the decision of this Tribunal in Bharat Sanchar Nigam Ltd. Vs. TRAI being Appeal No. 2 of 2008 disposed of on 24.5.2010 and Appeal No. 4 of 2010 disposed of on 28.5.2010 (BSNL Vs. TRAI).

3. The Respondent had made Telecommunication (Interconnection Port Charges Regulation) from 1999. The port charges fixed by the Respondent in terms of the said Regulations were on a slab basis.

On or about 28.12.2001, the principal Regulation for port charges were issued in the following terms:-

No. of Ports	*'Port' Charges (in Rs.) per Annum*
1 to 16 PCMs	*N X 55000*
17 to 32 PCMs	*8,80,000 +(N-16) X 30,000*
33 to 64 PCMs	*13,600,000 +(N-32) X 20,000*
65 TO 128 PCMs	*20,00,000+(N-64) X 15,000*
129 TO 256 PCMs	*29,60,000+(N-128) X 14,000*

Notes:

(1) The above Rates are ceiling Rates and Service Providers are permitted alternative lower charges

(2) N refers to the number of 'ports' demanded by the Interconnection seeker within the capacity ranges under the column "No. of Ports".

Demands were raised by the BSNL purported to be in terms of its letter dated 02.11.2001.

The said demands were subject matter of a petition filed before this Tribunal.

4. By a judgment and order dated 27.4.2005 (Association of Basic Telecom Operators & Ors V.s BSNL) the demands made by the Respondent - BSNL in terms of its circular dated 2.11.2001 were set-aside by this Tribunal holding that port charges as determined in the circular letter dated 12.10.1999 of DOT were payable till coming into force the TRAI Port Regulations of 2001.

Civil appeals were preferred thereagainst before the Supreme Court of India which are pending.

5. It may be noticed that BSNL also preferred appeals marked as Appeal No. 5 of 2002.

The said appeal was dismissed.

The authority of the TRAI to determine IUC was, thus, upheld.

6. Indisputably, the Appellants herein have entered into various Interconnect Agreements whereby and whereunder, the following port charges were fixed:-

No. of Ports	*'Port' Charges (In Rs.) per Annum*
1 TO 16 PCMs	*N x 55000*
17 TO 32 PCMs	*8,80,000+(N-16) x 30,000*
33 TO 64 PCMs	*13,60,000+(N-32) x 20,000*
65 TO 128 PCMs	*20,00,000+(N-64) x 15,000*
129 TO 256 PCMs	*29,60,000+(N-128) x 14,000*

"N" above refers to the number of ports demanded by the Interconnection seeker within the capacity ranges under the column "No. of Ports".

7. The Respondent by a letter dated 17.8.2006 informed the Appellants herein that it had been examining the issues relating to fixation of the port charges as requested by the private operators, whereto by letters dated 14.9.2006 and 22.9.2006, the Appellants contended that the draft amendment Regulations issued on or about 12.1.2007 fixing 1.4.2007 as the date on which the same would come into force, the BSNL requested the Respondent to extend the date for submission of comments which was rejected and in stead and in place on 1.4.2007, the said Regulations were directed to come into force w.e.f 2.2.2007 prescribing the following revised charges:-

S No.	*No. of Ports*	*'Port' charges (in Rs. per annum)*
1	*1 to 16 PCMs*	***N * 39,00***
2	*17 to 32 PCMs*	***6,24,000 + (N-16) * 22,500***
3	*33 to 64 PCMs*	***9,84,000 + (N-32) * 14,500***
4	*65 to 128 PCMs*	***4,48,000 + (N-64) * 11,500***
5	*129 to 256 PCMs*	***21,84,000 + (N-128) * 10,500***

8. BSNL preferred an appeal thereagainst which was marked as Appeal No. 4 of 2007.

AUSPI also preferred an appeal which was marked as Appeal No. 2 of 2008.

While dismissing the appeal preferred by AUSPI, the one preferred by BSNL was allowed and the matter has been remanded to the TRAI. It was, however, directed that BSNL shall not be entitled to claim any amount in terms of the said judgment from any operator during the interregnum. Appeals thereagainst have been filed also by BSNL against the Respondent herein which have been marked as Civil Appeal No. 5253 of 2010 and Civil Appeal No. 2829 of 2010. Other private operators as also the Respondent herein filed an appeal thereagainst inter-alia questioning the jurisdiction of this Tribunal to interfere with Regulations framed by the Respondent. The said appeal was marked as Civil Appeal No. 6068 of 2010.

9. The Supreme court of India on interim prayers made by the Appellants before it inter-alia by an order dated 15.12.2010 directed as under:-

> *"Pending hearing and final disposal of these civil appeals; in respect of each additional port, the Operators/Service Providers, who are before us, will give Bank guarantee of a Nationalized bank on the difference between the rates applicable between 2001 and 2007 per Port. However, it is made clear that the Registry will not accept the Bank guarantee unless and until the Chief Executive Officer of the Operators/Service Providers shall give an undertaking in the form of an*

affidavit that in the event of BSNL succeeding in the matter, each of the applicants, who has given Bank Guarantee, would have to pay interest at the rate which may be fixed by the Court at the time of final hearing of the matters."

10. During pendency of these appeals before the Supreme Court of India, AUSPI made a request to the Respondents herein to determine the port charges afresh, pursuant whereto or in furtherance whereof a letter dated 18.8.2011 was issued stating inter-alia as under:-

"TRAI had issued the Telecommunication Interconnection (Port Charges) Regulation 2001 (6 of 2001) on 28.12.2001 which inter-alia prescribed slab wise port charges. To align the port charges with reduced costs of the network elements and costing methodologies used by TRAI, the principal regulations were reviewed and the amendment to the Port Charges Regulation was issued on 02.02.2007 wherein port charges payable to the interconnection provider were brought down by 23-29%. The amendment was effective w.e.f. 1st April 2007.

2. TRAI is currently re-examining the port charges. To provide fair opportunity to all stakeholders and to maintain transparency in reviewing the port charges, the Authority

considered it appropriate to collect relevant information from the service providers/associations. Towards this end, the service providers/associations are requested to furnish the following information;

(i) What interfaces/network elements/equipment shall be taken into consideration for determining port charges? Please explain with the detailed note, justification and diagram, clearly indicating cost recovery mechanism for each element involved.

(ii) Explain the approach/model/costing methodology to be adopted for determination of port charges. Give justification for adopting the proposed approach, model or methodology and also provide details of the assumptions used in the model, if any.

(iii) Provide list of interfaces/network elements/equipment required for expansion of switch/ exchange for provisioning of additional ports. Separate list should be provided for each category of switch used for Fixed Line Service/GSM Mobile Service/CDMA Mobile Service/NLD service/ILD service.

(iv) Provide costs and capacity of each interfaces/network elements/equipments listed as per (vi) above.

(v) Provide cost model in excel sheet to calculate port charges alongwith adjustments and justification for all assumptions used.

(vi) Whether port charges are specified by the regulator in other countries? If yes, what is the approach/methodology being followed by the regulator in determining these charges?

(vii) Any other relevant information related to subject alongwith all necessary details."

4. All the service providers/associations are requested to furnish the above inputs by 19th September, 2011, positively."

11. AUSPI by another letter dated 4.10.2011 asked the Respondent to review the port charges.

Appellants also furnished the requisite data.

12. The Respondent, thereafter, issued a consultation paper on review of the Telecommunication Interconnection (Port Charges) and invited comments of the stake-holders by its letter dated 9.5.012. The said comments were to be furnished by 8.6.2012 whereto the Appellants replied by its letter dated 8.6.2012. The private operators

also submitted their comments with which at present this Tribunal is not concerned.

13. Thereafter, the impugned Regulations were issued, the relevant part whereof reads as under:-

> ***"2B. Port charges on or after the 1st October, 2012****.*
>
> *(1) Every interconnection seeker shall, on or after the 1st day of October, 2012, make his demand, for every Point of Interconnection for the total number of Ports required by him on or after the said date to the interconnection provider.*
>
> *(2) Every interconnection seeker shall make demand under sub-regulation (1) on the basis of traffic projection (in Erlangs) on half yearly basis.*
>
> *(3) Every interconnection provider shall charge, on or after the 1st day of October, 2012, the Port charges in accordance with the Port charges specified in Schedule III to these regulations and raise the demand note or the invoice, as the case may be, for the Ports demanded on or after the said date by the interconnection seeker under sub-regulation (1) and (2).*
>
> *(4) The Port charges for every Port demanded, allotted and provided before the 1st day of October, 2012 shall be charged on or after the said date in accordance with the Port charges specified in Schedule III to these regulations and the interconnection provider shall raise the demand note or the invoice, as the case may be, for such Ports provided by him before the aforesaid date accordingly.*

(5) Nothing contained in the Schedule III to these regulations shall apply in case the interconnection provider and the interconnection seeker mutually agree to charge and pay charges lower than those specified in the Schedule III to these regulations."

14. The following Schedule 3 were also inserted in the draft Regulations in terms of paragraph 3 of the said letter. It reads as under:-

Item	***Port Charges***	
(1) Date of implementation	*1st October, 2012*	
(2) Coverage	*Charges for 'Ports' (other than the Port charges for internet, which are specified in Schedule VI of the Telecommunication Tariff order 1999)*	
3) Port Charges	*Port Charges (in Rs.) per port per annum for providing port in MSC*	*Port Charges (in Rs.) per port per annum for providing port in Tandem/ TAX Switch*
	4,000	*10,000*

The said draft Regulations has been made final by reason of the impugned Regulations.

With the said Regulations, the Respondent issued Explanatory Memorandum.

15. The Appellants in support of these appeals would contend:-

(i) The Respondent acted illegally and without jurisdiction in issuing the impugned Regulations in so far as it failed to take into consideration the fact that with regard to the port charges, it has no jurisdiction to interfere with the Interconnect Agreements entered into by and between the parties hereto, having regard to the fact that 2007 amendments has been set aside by this Tribunal in its aforementioned judgment dated 28.5.2010.

(ii) The Respondent could not have dispensed with the slab system which was being maintained in all the preceding Regulations.

So far as MTNL is concerned from a perusal of the Explanatory Memorandum, it would be evident that except the legal aspects of the matter, the Respondent did not consider the factual contentions raised by it.

(iii) The impugned Regulations could not have been given a retrospective effect and retroactive operation in so far as it seeks to interfere with the terms of a binding agreement.

(iv) The Respondent in passing the impugned Regulations failed and/or neglected to maintain the level of transparency expected

of it having regard to the provisions contained in Section 11 (4) of the Act.

(v) The Respondent having not granted a proper opportunity of hearing to the Appellants, the same must be held to be violative of the principles of natural justice.

(vi) The impugned Regulations, in any event, could have been given effect to only from the 1.4.2013 and not from 01.10.2012.

(vii) No rationale exists for fixing separate charges, i.e., one for mobile interconnection and another for the basic interconnection.

(viii) The Respondent before passing the impugned Regulations ought to have disclosed to the Appellants that it would not only be reviewing the Regulations but also would dispense with slab systems.

(ix) The impugned Regulations is barred under the principles of *res-judicata* as it is bound by the observations made by this Tribunal in its judgment dated 24.5.2010.

16. Mr. Vaidyanathan appearing on behalf of the Respondent would however, urge:-

(i) From a perusal of the impugned Regulations as also the events taking place prior thereto, namely, the proposal, the consultation paper and the responses made pursuant thereto or in furtherance thereof, it is evident that that the contention of the Appellants therein have been accepted.

(ii) The impugned Regulations having been issued pursuant to or in furtherance of the directions issued by the Tribunal, it is idle to contend that it had no jurisdiction with regard thereto and/or could not have reviewed the Regulations relating to port charges.

(iii) The jurisdiction of the TRAI emanates from the provisions contained in Section 11 (1) (b) of the TRAI Act and in that view of the matter, it would not be correct to say that the TRAI had no jurisdiction to fix the port charges.

(iv) The Respondent in passing the impugned Regulations has taken into consideration the fact that the ground realities obtaining in 2001 are absolutely different from the ground realities as obtaining now, in as much as whereas in 2001 the calls of the subscribers were routed through the network of the Appellants and, thus, basic infrastructure

provided by the Appellants herein were required but the same are not required at present.

(v) The Appellants either for giving interconnectivity to basic operators or to the mobile operators need not have any basic infrastructure and in that view of the matter the port charges have correctly been levied.

(vi) The Supreme Court of India having not granted any stay in the Appeal preferred by the Appellants herein and as having regard to the directions issued by this Tribunal in paragraph 65 of the judgment dated 24.5.2010, no interim order as has been prayed for need be passed.

(vii) The Appellants have no prima-facie case in their favour and even the balance of convenience lies against the grant of an order of injunction.

Mr. Maninder Singh, appearing on behalf of COAI and Mr. Ramji Srinivasan, senior counsel appearing on behalf of AUSPI supported the contention of Mr. Vaidyanathan.

17. The learned counsel, however, supplemented the said argument by contending that the Appellant has not been able to establish any prima-facie case in its favour.

It has been pointed out that in contrast to the 2007 Regulations not only CAPEX has been applied so far as the investments required to be made by the Petitioner is concerned, and the same has been calculated on the basis of the weightage average and moreover the Petitioners' contention that the same should be distributed over a period of 8 years has been accepted.

It was furthermore urged that from a perusal of the Explanatory Memorandum, it would appear that all the requisite contentions of the Petitioners have been taken into consideration by the Respondent while issuing the impugned Regulations.

18. The fact of the matter as noticed heretobefore having also been noticed in the aforementioned Appeal No. 4 of 2007, the same need not be repeated once over again.

19. We may, however, having regard to the rival submissions made by the learned counsel for the parties may take into consideration the relevant directions issued by the said judgment.

20. This Tribunal therein held :-

(a) There is no reason as to why the quantum of the costs of installation of equipments for ports should have been

changed by reducing the port charges by 23% to 20% without giving an opportunity of hearing to the BSNL.

(b) The contention of the Respondents therein that parallel cost of equipment had not remained the same between 2001 to 2007 and actual cost of reduction of about 20% in the port charges have taken place was not accepted.

(c) The Respondent did not maintain transparency while determining the port charges as it is required to maintain the same at a very high level.

(d) The Respondent was required to consider that even a slight alteration and modification may have a significant role to play so far as financial health of other operators is concerned.

(e) It was imperative on the part of the Respondent to clearly specify its proposal to the operators that methodology in determining the quantum of port would be changed.

(f) Keeping in view the fact that in the draft amendment the 2007 Regulations were to come into effect on and from 01.4.2007, there was no reason as to why an opportunity sought for by the Appellant was not granted and on the

other hand the date of enforceability was changed from 01.4.2007 to 02.02.2007.

(g) No consultation paper was issued which is the ordinary practice of the Respondent.

21. The TRAI itself in para 13 of the Explanatory Memorandum attached thereto contended it had taken into consideration the comments of the entities mentioned therein but the issue arising by and between the respective parties had not been spelt out clearly.

22. This Tribunal while opining that the issues raised before it by the parties require a fresh look by the TRAI itself, directed as under:-

> *"It is, however, stated that the BSNL shall not be entitled to claim any amount in terms of this judgment from any operator during the interregnum i.e., from the date of coming into force of the impugned regulation and this date."*

23. As indicated heretobefore the Supreme Court of India by its order dated 15.12.2010 while considering the prayer of stay made by the Appellant did not grant any order of stay.

24. It is in the aforementioned backdrop of events, we may notice that the Respondent by its letter dated 18.8.2011 with a view to

provide fair opportunity to all the stake holders and to maintain transparency in reviewing the port charges sought for certain relevant informations from the service providers/associations.

Appellants herein pursuant thereto or in furtherance thereof furnished the requisite informations, the relevant portions whereof are as under:-

> *"3. Generally the expansion of TAX for providing additional ports is being done as under:-*
>
> *a. In terms of 16/32/64/128/256 E1 ports for TDM TAX*
>
> *b. In terms of TMG of 4KC (158 E1 ports) in case of IP TAX. In addition to this, capacity enhancement in other control equipment is also required considering various technical dimensions.*
>
> *5. Cost model need to consider the ROI@16% and depreciation @12.5%, considering the IP TAX life span of 8 years. It should also consider overhead cost @10% and Annual Recurring Expenses @ 22% etc."*

It with the said letter inter-alia annexed:-

> *"ii (c) Calculation sheet indicating details of port charges is enclosed h/w vide Annexure 2A. The port*

charges are calculated based upon the weighted average per circuit (64Kbps) cost of TAX equipment which comes out to be Rs.1547.68.

ii (d) POIs are provided on E1 basis. The E1 port cost (CAPEX) as per weighted cost is Rs.46,430/- the detailed calculations are given at Annexure-2A.

iv. The weighted cost (CAPEX) for one E1 is Rs.46,430/-."

It had also given the equipments which are necessary for the purpose of expansion of IP TAX.

It furthermore annexed its own calculations by way of per circuit cost for all the tenders during 2001-2007; from a perusal whereof it appears that overall weightage per CCT cost for all the tenders comes to Rs.1547.68/- per CCT.

The average of the rates quoted in the said tenders range from Rs.2575/- to Rs.556/-.

It may also be placed on record that the costs to be recovered in respect of the said equipments were treated to be eight years as suggested by the Appellants instead of ten years as opined by the other operators.

25. A consultation paper on review of the Telecommunication Interconnection was thereafter issued.

The Appellant by its letter dated 8.6.2012 inter-alia stated:-

"2. The above consultation paper has been examined by BSNL and it has been found that cost of providing 1 port E1 has been calculated based on cost data, i.e., Rs.46,430/- per port given on the basis of latest IP TAXs provided vide letter No:1-16/2011-Regln./1243 dated 02.11.2011. In this regard it may kindly be noted that indicative cost of Rs.46,430/- provided by BSNL is not the actual cost being incurred by BSNL to provide one port E 1 connectivity to other Service Providers. Rs.46,430/- is only the incremental cost of upgrading the TAX (not the network) required to provide 1 E1 connectivity. Complete incremental cost will involve TAX expansion, additional media required between TAX and Local Switches, addition cost of upgrading local switches (due to increased traffic load), incremental cost in upgrading the supporting infrastructure such as power supply, AC etc. These have not been factored into. All relevant network elements need to be taken into account while arriving at the costs.

3. Therefore, the incremental cost of all network elements, i.e, TAX, Media, Transmission Systems, Local Switches and other supporting infrastructure need to be taken into account before arriving at fair cost of providing one E1 port to other service provider.

4. In addition to above, it may also be noted that cost of the upgrading TAX is very small in comparison to the cost involved in upgrading other network elements.

5. Also, the incremental costs incurred in providing one E1 port varies and depend on number of ports being provided, as, after certain limit, control part of switching equipments also need to be upgraded. Therefore incremental cost needs to be considered in different slabs as per following (as was done in Port Regulation 2001 and even 2007):

i) 1 to 16 PCM

ii) 17 to 32 PCM

iii) 33 to 64 PCM

iv) 65 to 128 PCM

v) 129 and onwards

7. The CAPEX already incurred for provisioning of additional switching and media capacity done to provide POI connectivity has not been recovered so far. Partial provision of IP TAX in BSNL network has not resulted into any CAPEX saving for BSNL as these IPTAX has replaced TDM TAXs who have not outlived their life and hence recovery of CAPEX done on TDM TAXs was not completed. The provisioning of IP TAXs was made due to some operational/AMC issues with TDM TAX vendors even before the expiry of life. Further, the number of

IPTAXs and capacity is very les in comparison to overall network. Therefore, in real terms, there was not reduction of incremental cost being incurred by the BSNL due to induction of IPTAXs.

8. It may please be kept in mind that Hon'ble TDSAT has already agreed with BSNLs contention that TRAI does not have jurisdiction to issue regulations to change the licence conditions and terms of interconnect agreement already entered between BSNL and other operators. By not taking into account the total expenditure incurred by BSNL, injustice will be done to BSNL. Presently the matter is pending in the Hon'ble Supreme Court of India."

26. Prima-facie, therefore, that the Respondent has maintained transparency.

So far as the question of jurisdiction of the TRAI is concerned, this Tribunal clearly stated that having regard to the provisions of Section 11 (I) (b) of the TRAI Act, it has the jurisdiction to regulate port charges.

It furthermore appears that the Respondent has applied CAPEX

27. I would, however, assume in favour of the Appellants herein that from the recommendations made by the Respondents, it would appear that the cost per E1 came to Rs.550/- X 30 , i.e, Rs.16,500/-. The said cost was to be distributed over a period of 8 years which would come to Rs.3,000/- per year.

28. TRAI in paragraph 15.9 of the Explanatory Memorandum stated as under:-

> *"15.9 For estimation of Port Charges, the calculations in the consultation paper have been made considering the following:*
>
> *(a) CAPEX per E1 port = Rs. 46,430*
> *(b) Useful life of the equipment = 10 years*
> *(c) Method of depreciation – Straight line method*
> *(d) Rate of Return (Pre-tax Weighted average cost of capital) =15%*
> *(e) Overhead on CAPEX recovery = 10%*
>
> *On the basis of above, the average annual cost (averaged over 10 years) per E1 port for TAX Exchange was estimated as Rs.9,321/-. Majority of the service providers, in their submissions, have taken useful life of the equipment to be 10 years. However, M/s BSNL, in their calculation for TAX Exchange, have assumed the useful life of equipment to be eight (8) years. Accordingly they have taken depreciation of 12.5% per annum for eight years using straight line method of depreciation. In the consultation paper, the Authority has also estimated port charges considering the useful life of the equipment, as submitted by BSNL i.e. eight years and accordingly the annual depreciation as 12.5% per annum. The average annual cost (averaged over eight years) per E1 port*

for TAX Exchange comes out be Rs. 10,693. Giving due weight to the comments of BSNL as well as other service providers, the Authority reconfirms its proposal as given in the consultation paper and decided to prescribe the revised Ceiling of Annual Port Charges for Tandem/ TAX Exchanges as Rs. 10,000 per port."

Only on the aforementioned basis, a proposal was made that the port charges be reviewed to Rs.10,000/- and Rs.4,000/- for basic operators and mobile operators respectively.

29. Coming to the question of balance of convenience between the parties hereto, when questioned, Mr. Vaidyanathan clearly stated that the Appellants would not have to refund any amount which has been deposited by the private operators in advance for the Financial Year 2012-2013.

It was, however, stated that in the event, the operators sought for and have been allocated and provided ports/additional ports only after 01.10.2012, the new rate shall come into effect.

30. This Tribunal, however, feel that the interest of justice would be sub-served if a direction is issued at this stage that no refund even need to be made to those seekers of port who had made advance payment in terms of the requisition.

31. Moreover, the concerned private operators through the interveners', COAI or the AUSPI, as the case may be, for the purpose of obtaining benefit of the Regulations must give an undertaking before the Appellants herein that they would be bound to pay the port charges, in the event, these appeals are allowed.

32. Before us both Ms. Dhir and also Mr. Chandan Kumar cited certain decisions. They are broadly under three heads, (i) one relating to jurisdiction; (ii) the retrospective effect of the REgulations and; (iii) res-judicata.

33. So far as the question of jurisdiction is concerned, Ms. Dhir would urge that in view of the decision of Delhi High Court in MTNL Vs. TRAI reported in AIR 2000 Delhi page 208, it was held that the TRAI had no authority to vary the terms and conditions of an Interconnect Agreement, stating:-

> *"48. For all the above reasons, it would have to be held that the Authority has no power to issue any regulation which in any manner converts the merely recommendatory or advisory function into a directory function. The directions and regulations which the Authority may issue and/or frame must necessary be within the framework of the said Act. The Authority has no power or function to change or vary rights of parties under contracts or licenses. It can only regulate within the terms and conditions of the license. As we are holding that Authority has no power to issue regulations of the*

nature that it has purported to do, the regulations will have to be set aside. Therefore, the Telecommunication Interconnection Charges and Revenue Sharing (first Amendment) Regulation, 1999 (3 of 99) issued on 17th September, 1999, stands quashed. Similarly Regulation 8 (of the Telecommunication Interconnection Charges and Revenue Sharing Regulation 1999) which gives to the Authority a overriding power over the terms and conditions of license would also stand quashed."

34. The Act was thereafter amended in the year 2000.

35. The Respondent thereafter issued an order on 09.10.2012 whereby and whereunder it suggested changes in the interconnection offer submitted by the BSNL.

36. The matter came up for consideration once again in BSNL Vs. TRAI reported in (2005) 5 Company Law Journal page 292 disposed of on 27.4.2005, wherein it was opined:-

"21. After examining the rival contentions we find substance in the submissions of BSNL. These are in line with the decisions of the Division Bench of the High Court in the case of Mahanagar Telephone Nigam Ltd. v. Telecom Regulatory Authority of India. Interpretation as put by TRAI and COAI would be contrary to this judgment. Words in the Act have to be given meaning unless of course the words are to be mere surplusage. It is nobody's case that the words "notwithstanding anything contained in the terms and conditions of the

license granted before the commencement of the Telecom Regulatory Authority of India (Amendment) Act, 2000" are mere surplusage and be ignored. The argument of TRAI and COAI that sub-clause (ii) of clause (a) of Section 11 which talks of terms and conditions of license would not include the terms and conditions relating to interconnectivity between service providers, does not stand to reason. Admittedly, Central Government, as licensor, is not bound by the recommendations of TRAI. When the Central Government puts the terms and conditions of interconnectivity in the license it is not for the TRAI to say that these conditions are of no use or suo motu vary or over ride them. There is nothing in the Act, after its amendment, which would take away the effect of the law, as laid down by the High Court in the case of MTNL. Principles laid down in that judgment are quite explicit. TRAI is now empowered to fix the terms and conditions of interconnectivity between the service providers to whom licenses have been issued prior to the amendment to the Act in 2000. The extent to which this power can be exercised is to bring harmony with the terms of interconnectivity of licenses issued after the amendment of 2000 so that it is in conformity with the TRAI Act and the principles laid down in the said judgment.

Statement of objects and reasons for the amendment do not take away the plain language of the enactment.

When terms and conditions of the license use the terminology like orders/ decisions/ determination/ regulation that would not mean that TRAI can adopt any of the methods to rewrite or vary the terms and conditions of the license and these would need to be

within the confines of the licensing framework and also be in conformity with the statute.

We cannot read in sub clauses (i) and (ii) of clause (a) of Section 11(1) that terms and conditions of the license would not include terms and conditions of interconnectivity between the service providers. TRAI would remain bound by the terms and conditions of interconnectivity of the service providers as given in the license issued after the amendment to the Act in 2000. It has power to change the terms and conditions of interconnectivity of the license issued prior to the amendment of 2000 to the extent that these are in conformity with the terms and conditions of interconnectivity contained in the license issued after the amendment of 2000. This to us appears to be the only harmonious construction to give effect to the provisions of sub-clause (ii) of clause (a) of Section 11 (1) and sub clause (ii) of clause (b) of Section 11(1) of the Act.

(Underlining is mine)

The said decisions, therefore, have no application to the fact of the present case. Moreover, even the BSNL sought for the same port charges from the operators by reason of the interconnect agreements as has been fixed by the TRAI.

37. It may be noticed that yet again in BSNL Vs. TRAI being Appeal No. 31 of 2003, this Tribunal by a judgment and order dated 3.5.2005 held:-

To get around the clear meaning of the aforesaid provision, BSNL seeks to interpret the aforesaid provision of "……. fix the terms and conditions of interconnectivity" as only applicable to licenses granted before 24th January 2000. However, the words "Notwithstanding……2000" simply mean "despite the licenses granted before 24th January 2000……fix the terms and conditions of interconnectivity…"

According to TRAI, the non obstante clause has been used to overcome the peculiar phraseology of licenses issued before 24-1-2000. The intention is clear. Notwithstanding the bar which may be read in the licenses granted before 24-1-2000, TRAI has the power to fix terms and conditions of interconnectivity. The non obstante clause clarifies and does not curtail the substantive power of TRAI to fix the terms and conditions of interconnectivity. This is not only to give words their natural meaning but the meaning so given fits in harmoniously with the scheme of the Act.

If Section 11(1)(b)(ii) is read in this light, no controversy survives. The Act, read as a whole, then reads cohesively, logically and with a harmony which ensures that the objectives of the Act are achieved."

38. Reliance has been placed by Mr. Chandan Kumar on Indian Express Newspaper Vs. Union of India, entered in (1985) 1 SCC 641, wherein the Supreme Court opined as under:-

"78. That subordinate legislation cannot be questioned on the ground of violation of principles of natural justice on which administrative action may be questioned has been held by this Court in Tulsipur Sugar Co. Ltd. v. Notified Area Committee, Tulsipur[20], Rameshchandra Kachardas Porwal v. State of Maharashtra[21] and in Bates v. Lord Hailsham of St. Marylebone[22]. A distinction must be made between delegation of a legislative function in the case of which the question of reasonableness cannot be enquired into and the investment by statute to exercise particular discretionary powers. In the latter case the question may be considered on all grounds on which administrative action may be questioned, such as, non-application of mind, taking irrelevant matters into consideration, failure to take relevant matters into consideration, etc, etc. On the facts and circumstances of a case, a subordinate legislation may be struck down as arbitrary or contrary to statute if it fails to take into account very vital facts which either expressly or by necessary implication are required to be taken into consideration by the statute or, say, the Constitution. This can only be done on the ground that it does not conform to the statutory or constitutional requirements or that it offends Article 14 or Article 19(1)(a) of the Constitution. It cannot, no doubt, be done merely on the ground that it is not reasonable or that it has not taken into account relevant circumstances which the Court considers relevant."

39. It was held that where a power has not been exercised in public interest, the judicial intervention may be permitted.

40. In the opinion of this Tribunal fixation of port charges fixed by the Respondents payable inter se by the operators cannot be said to be held to be wholly without jurisdiction. The port charges are fixed by the TRAI in exercise of its jurisdiction under Section 11 (1) (b); (ii) and (iii), in terms whereof it is for the TRAI to determine the terms and conditions of interconnectivity. Such a power has specifically been conferred upon the TRAI. It is, therefore, difficult to hold that the impugned Regulations are wholly without jurisdiction.

41. With regard to the question of retrospective effect, reliance has been placed upon Swami Vivekanand College of Education and others Vs. Union of India and others (2012) 1 SCC 642.

In that decision, the Apex Court upon considering various earlier decisions and dictionaries opined as under:-

> ***36.*** *Therefore, it is to be seen as to whether Regulation 8(5) takes away any right of the appellants or impairs any vested right acquired by the appellants under the existing law or has created any new obligation on their part."*

42. We are not concerned herein with such a situation as the rates fixed by the operators earlier has not been interfered with.

43. So far as the question of application of the principle of *res judicata* is concerned, Ms. Dhir has relied upon a large number of decisions, being, 2008 (150) DLT page 312 before T.S. Thakur and Veena Birbal, JJ, in Satish Nambiar Vs. Union of India; (2005) 7 SCC 190- Ishwar Dutt Vs. Land Acquisition Collector and Another; (2005) 10 SCC 51- Swamy Atmananda and Others Vs. Sri Ramakrishna Tapovanam and Others; (2011) 3 SCC 408 - M. Nagabhushana Vs. State of Karnataka and others; (1999) SCC 590 - Hope Plantations Ltd. Vs. Taluk Land Board, Peermade and another; (1998)Vol3 SCC 573 - K.K. Modi Vs. K.N. Modi and others.

44. There is no dispute with regard to proposition of law contained therein. Suffice it, however, to say that the principles of *res judicata* have no application in the instant case for the simple reason (i) that the matter is still pending before the Supreme Court of India and (ii) TRAI has acted in terms of the direction of this Tribunal. Moreover, a Statutory authority is entitled to exercise its power from time to time.

45. One of the questions which would undoubtedly arise for consideration is as to whether the Appellant has supplied sufficient data with regard to the slab system in the IUC.

Learned counsel for the Respondent would contend that no data with regard thereto were submitted by the Petitioners.

However, the matter in this regard has to be considered at an appropriate stage.

46. Another question which may arise for consideration is as to whether an opportunity of being heard was given to the Appellant in the light of the TDSAT's judgment as regards the slabs.

47. Keeping in view the aforementioned findings, the question of balance of convenience may be considered.

As indicated heretobefore Clause 2B of the impugned Regulations evidently would apply to the pending arrangements between the parties in the case where ports had already been allotted and advance payments has already been made.

48. Mr. Chandan Kumar would contend that in terms of the impugned Regulations operators would ask for refund.

Ms. Manisha Dhir would submit that infact the Appellants had been claiming port charges @ Rs.55,000/- per year despite the aforementioned 2007 Regulations. It is further stated at the bar that only in some cases such payments have in fact been made.

49. It is difficult to conceive the said contentions of the Appellants.

The Appellants have not obtained any order of stay so far as 2007 Regulations are concerned. How despite the aforementioned Regulations, the Appellants has been charging Rs.55,000/- per port, is difficult to comprehend.

50. This Tribunal having regard to the fact that the matter had been remitted to the Respondent herein by this Tribunal holding that 2007 Regulations have been made inter-alia on the ground of violation of natural justice, thought it necessary to make its observations in para 65 of the judgment.

The Appellants preferred an appeal against it but did not obtain any order of stay.

51. The interim order passed by the Supreme Court of India clearly goes to suggest that the same relates only to the additional ports and does not cover the ports which are already subject matter of the earlier agreements. Moreover, it has not been stated in the Memorandum of Appeal that the Appellant continued to charge the port charges @ Rs.55,000/- per port despite the 2007 Regulations and that all operators had been paying only in terms of the interconnection agreements.

It is also difficult to appreciate that if that was the factual position, why the same had not been brought to the notice of this

Tribunal in the earlier round of litigation and/or as to why the Petitioner filed an appeal against the judgment of this Tribunal.

52. It has been urged at the Bar that the entire financial health of the Appellants would be at jeopardy.

But keeping in view the fact that the Appellants did not obtain any order of stay in respect of 2007 Regulations either before this Tribunal or from the Supreme Court of India, the Appellant is not entitled to an order of stay of the operation of the impugned Regulations.

53. This Tribunal is, therefore, of the opinion that if it is directed that no coercive step should be taken against the Appellant by the Respondent in the event if they do not refund the amount received by it by way of advance port fee for the year 2012-2013 and in the case of those operators in whose favour the ports have already been allocated and the amount of advance received, the interest of justice shall be met. It is directly accordingly.

.....
(S.B. Sinha)
Chairperson

HKC/