

**TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL
NEW DELHI**

DATED 24th September, 2012

Petition No. 130 of 2012

Aircel Limited & Ors. Chennai
Vs.
Bharti Airtel Ltd, New Delhi

...Petitioner

...Respondent

BEFORE:

**HON'BLE MR. JUSTICE S.B.SINHA, CHAIRPERSON
HON'BLE MR. P.K. RASTOGI, MEMBER**

For Petitioners : Mr. Meet Malhotra, Sr. Advocate
Mr. Ravi S.S. Chauhan, Advocate
Mr. Prateek Dahiya, Advocate

For Respondent : Mr. Maninder Singh, Sr. Advocate
Mr. Gopal Jain, Advocate
Mr. Aman Avinav, Advocate

JUDGMENT

P.K.Rastogi, Member

This petition has been filed against the demand raised by the respondent on account of charging for SMS termination and also against the threat of withdrawal of interconnection of the SMS services of the petitioner's network by the respondent. The respondent vide its letter dated 30th November 2011, demanded an amount of Rs. 24,58,94,871/- on net basis effective from April 2011 to October 2011 towards IUC on SMS. The petitioner in its prayer has requested this Tribunal to:

- (a) declare the demand of Rs. 24,58,94,871/- raised upon the petitioners by the respondent (on account implementation/ imposition of SMS termination charge @ 10 paise per SMS) as arbitrary, illegal, wrong, unilateral and without any basis; and quash/set aside the same;
- (b) direct the respondent not to withdraw the interconnection for SMS service with the petitioner's networks for non payment of the unilaterally increased and imposed demand for SMS termination ;

2. In our interim order dated 23.03.2012, we had directed the respondent not to take further action for withdrawal of interconnection for SMS service, pending further adjudication before this Tribunal.

3. The petitioner has submitted that petitioner and the respondent in terms of existing IUC regulation entered into Interconnect Agreement for different telecom service areas for interconnecting its network for providing the telecommunication services to its customers. The parties also agreed in their Interconnect Agreement not to charge each other for termination of SMS on their network and followed a methodology, prevalent in the industry, i.e. "Bill & Keep". The various interconnect agreements executed at different point of time between the parties for different circles. The agreement was

executed as early as 1.8.2002 for Chennai Metro Area and on 1.5.2003 for rest of Tamil Nadu area. Rest of the circles were covered with inter connection agreement on 10.4.2006 and 16.08.2007. The contents of the interconnection agreements between the parties were somewhat similar, although executed at various points of time.

Initially, the interconnection charges between the service providers were based on the Telecommunication Interconnection (Charges and Revenue Sharing) Regulation 2001 (5 of 2001) dated 14th December 2001. Under the said regulation, the interconnection charges were to be cost based. For determining cost based interconnection charges, the main basis was to be incremental cost or additional cost directly attributable to the provisions of interconnection. The said regulation further forbore from specifying interconnection charges. However, the mutually agreed charges will be based on the principle enunciated in this regulation.

By a regulation dated 29.10.2003, known as the Telecommunication Interconnection Usage Charges Regulation 2003, TRAI forbore the IUC for SMS for the time being, which it may revisit in near future. The forbearance for IUC for SMS was continued by TRAI on 21.08.2006 also.

The policy of forbearance of IUC on SMS was continued by the TRAI even in its Telecommunication Interconnection Usage Charges 2009 (2 of 2009) notified on 09-03-2009. Under the said IUC regulation, IUC for SMS was kept under forbearance. However, if any charges was sought to be levied, the same shall be transparent, reciprocal and non-discriminatory.

4. The petitioner further submitted that inspite of the fact that the parties were not charging each other for termination of SMS on their respective network, the respondent unilaterally proposed to implement the SMS termination charge @ 10 paise per SMS and proposed to revise a clause in the existing interconnection agreements between the parties.

The respondent wrote emails dated 18.06.2009, 30.06.2009 and letters on 29.09.2009 to the same effect. Again, on 20.10.2009, the respondent wanted the termination charges to be made effective from 1.10.2009. The petitioner wrote to the respondent on 20.11.2009 and disagreed with the proposal on account of the fact that the proposal of charging SMS termination @ 10 paise per SMS was unilateral and lacked transparency. The petitioner further asked the respondent that the methodology used for arriving at termination cost of @ 10 paise per SMS. However, the respondent has not replied the same till date.

Again vide its letter dated 28.04.2010, the respondent tried to pressurize the petitioners to execute an addenda to the existing interconnect agreement for charging SMS termination @ 10 paisa per SMS. It also informed the petitioner that the respondent it had already entered into agreement for SMS termination charge @ 10 paisa per SMS with operators like BSNL and Vodafone.

5. Further, as some of the service providers raised the issue of IUC charges for SMS @ 10 p per SMS by the respondent before the TRAI, the Authority vide its letter dated 22.02.2011 directed the respondent to stop applying termination charges on SMS in a discriminatory manner.

6. According to the petitioner, the respondent vide its letter dated 15.03.2011 wrote to it to execute addenda agreement for charging of SMS termination @ 10 paise per SMS. This time the respondent suggested to implement the charging of SMS @ 10 paise per SMS effective from 01.04.2011, instead of its earlier proposal to make it effective from 01.10.2009.

The petitioner again wrote a letter to the respondent on 28.03.2011 requesting the respondent to inform its methodology used by the respondent to arrive at a termination cost of @ 10 paise per SMS. The petitioner also informed the respondent that the proposal of charging of 10 paise per SMS

was abnormally high and was without any basis and in effect amounting to circumventing the consultative review process for IUC undertaken by the TRAI. In fact, TRAI came up with a consultation paper on review of Interconnection Usage Charges.

7. The respondent, on the other hand, submitted that the failure of the petitioner to make payments towards SMS termination charge was in breach of IUC Regulation dated 9.3.2009. Though, the respondent made a uniform offer of 10 p to all operators, the petitioner failed to make payments towards SMS termination charges. The petitioner has used the respondent's network and it has caused harassment to its customers as they have been flooded with unsolicited SMSs. The respondent was entitled to payments towards SMS termination charges.

8. According to the respondent, the TRAI permitted forbearance for SMS termination charges under the IUC regulations. The regulations do not prescribe any particular rate for SMS termination as it is under forbearance. Operators can therefore, fix termination charges. The respondent offered a uniform rate of 10 p to all operators including the petitioner herein. Several operators (87% of them) have executed agreements with the respondent on this basis and billing is done accordingly.

There is no agreement for bill and keep method agreed between the parties in any of the interconnect agreements executed between the parties. In the regulation there is no stipulation for bill and keep. The regulation does not mandate that operators have to adopt bill and keep method as far as SMS termination is concerned.

The petitioner failed to execute the agreement though it is mandatory to execute agreement in order to avail any services.

The respondent denied the averment made by the petitioner that under the agreement parties had decided to follow the bill and keep method with respect to the SMS Termination charges. This was factually incorrect. The interconnect agreements between the parties, infact, do not deal with the issue of SMS termination charge.

9. In its further submission, the petitioner stated that 100% of the petitioner's interconnection agreements with other operators for SMS termination have been on bill and keep basis. In fact, in some of the agreements with the operators 'bill and keep' has specifically been mentioned while in other agreements nothing is specifically mentioned regarding SMS termination but the petitioner neither charged any amount any time nor any other operator has charged any amount from the petitioner.

10. The petitioner has the same arrangement with respondent since inception of the interconnection on its respective network. Over the years the petitioner has not charged for respondent for termination of respondent's SMS on its own network. Similarly, the respondent reciprocated in the similar manner.

11. The respondent did not raise any bill from 2002 till date for SMS termination. It is understood that the respondent being in dominant position persuaded new operators who were given licence in the year 2008 to existing 10 p per SMS on its termination on its network. However, the petitioner did not choose to exploit the situation and worked out interconnection agreement whereby the prevalent practice of bill and keep was continued.

12. The respondent without reasons or justification increased the SMS termination from existing Nil to 10 p per SMS without the consent and concurrence of the petitioner.

The respondent cannot seek novation of this long and existing charging arrangement on unilateral basis.

13. Although the cost of usage of the network in SMS termination which uses the signaling channel i.e. CCS 7 signalling of the network is virtually non-existent. In that case sudden increase of 10 p is arbitrary. Infact the respondent was charging intra circle carriage only 1 p per SMS in cases where the carriage was for termination SMS on network other than the respondent, for carriage of SMS originating on the petitioner's network, which were to terminate on the respondent's network, even that 1 p carriage charge was not taken. Quantum of increase although not payable yet is too steep and arbitrary.

14. Even TRAI in its Telecom Commercial Communications Customer Preference Regulations 2010 (as amended) proposed 5 p per SMS termination for commercial / promotional category of SMS traffic. This was also deliberately high charge meant in respect of SMS or the provisions of bulk SMS to commercial users at very low rates.

15. The dispute has arisen between the parties on the interpretation of the provision of the Interconnection Usage Charges Regulation 2003 as amended from time to time with respect to IUC for SMS.

16. The Telecommunication Interconnection (Charges and Revenue Sharing) Regulation 2001 issued on 14th December 2001, did not specifically

mention anything on SMS but provided the principle of interconnection charges. Clause 3 related to interconnection charges of above regulation provided that the interconnection charges shall be cost based calculated on the basis of additional cost attributable to the interconnection. It also provided that unless specifically provided, the interconnection charges will be forborne. We may read the relevant provisions :

"3. Interconnection Charges

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

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

(vi) Unless specifically so provided, the Authority has forborne with respect to interconnection charges....

(vii) Where the Authority has, for the time being, forborne from specifying interconnection charges, interconnection seekers and providers shall mutually decide on such charges.

(viii) Interconnection charges mutually agreed among interconnection seeker and provider shall be based on the principles enunciated in this Section.

(ix) Where mutual agreement for interconnection charges cannot be reached within 30 days of initiating such a process for charges with respect to which the Authority has forborne, the Authority may intervene to settle the matter suo motu or on the application of either party...."

17. The Telecommunication Interconnection Usage Charges Regulation 2003 issued on 29.10.2003 provided that the interconnection charges shall be continued to be governed by regulations 2001.

Although, the interconnection charges for the voice call was prescribed through this regulation, no charges were provided for SMS. The IUC for SMS continued on the basis of forbearance.

18. The TRAI had circulated consultation paper on 13th June 2006 on Interconnection Usage Charge (IUC in short) for SMS. After deliberation and consultation with all the stake holders, the Authority decided to continue the forbearance on IUC for SMS. We may see the relevant portion of press release made on 21.8.2006 :

*"Telecom Regulatory Authority of India
A-2/14, Safdarjung Enclave, New Delhi – 110 029*

No. 409-11/2006-FN

Dated the 21st August, 2006.

To

All Service Providers/ Stakeholders (Through Website)

Subject: TRAI's Consultation Paper No. 10/2006 dated 13th June 2006 on "Interconnection Usage Charges (IUC) for Short Message Service (SMS)" -Decision of the Authority

As per Interconnection Usage Charges (IUC) Regulation dated 29th October, 2003, Termination and Carriage charges for Short Message Service (SMS) has not been specified by the Telecom Regulatory Authority of India (TRAI). The Authority has forbore in respect of IUC for SMS. This forbearance on IUC for SMS was not withdrawn by the Authority in the revised IUC of 2005 and 2006.

2. TRAI had issued a Consultation Paper No. 10/2006 dated 13th June 2006 on the issue of "Interconnect Usage Charges for Short Message Service (SMS)".

Comments were received from various stakeholders on this and the issues raised were also deliberated upon in the Open House Discussion with the Stakeholders.

3. The Authority deliberated upon the various aspects of the subject matter including the international practices and has made the following decision:

(i) The forbearance on IUC for SMS should continue for the present.

*Yours faithfully,
(S.N. Gupta)
Pr. Advisor (FN"*

19. The Telecommunication Interconnection Usage Charges Regulations 2009 issued on 9.3.2009 slightly modified the earlier IUC regulation 2003 by way of inserting a separate schedule making specific provision for SMS where it was specifically mentioned that Interconnect Usage Charge (IUC) for Short Message Service (SMS) shall be under forbearance, provided that such charges shall be transparent, reciprocal and non-discriminatory.

20. It can be seen from the IUC regulation 2001, 2003, and 2009 that provision for determining for SMS has always been on the principle of forbearance. While regulation 2001 and 2003, did not specifically mention IUC for SMS, Regulation 2009 included the IUC for SMS in Schedule IV. We may reproduce the updated provision of the Interconnection Usage Charges (IUC) Regulation 2003 as amended in the year 2009:

"Section III

3. Interconnection Charges

Interconnection Charges shall continue to be governed by "The Telecommunication Interconnection (Charges and Revenue Sharing) Regulation, 2001(5 of 2001)" and The Telecommunication Interconnection (Port Charges) Regulation 2001 (6 of 2001), except to the extent modified by this Regulation.

Section IV

4. Interconnection Usage Charges (IUC)

The Interconnection Usage Charges are specified in Schedules hereto.

Schedule I –Termination Charges

Schedule II –Carriage Charges

Schedule III – Access Deficit Charge (ADC)

Schedule IV – Interconnect Usage Charge (IUC) for Short Message Service (SMS)

"Schedule IV

INTERCONNECT USAGE CHARGE (IUC) FOR SHORT MESSAGE SERVICE (SMS)

Interconnect Usage Charge (IUC) for Short Message Service (SMS).- Interconnect Usage Charge (IUC) for Short Message Service (SMS) shall be under forbearance:

Provided that such charges shall be transparent, reciprocal and non-discriminatory."

21. We would like to state facts in brief, which are undisputed. The petitioner and the respondent have interconnect agreements starting from 2002 for Chennai Metro Circle, from 2003 for Tamil Nadu Circle, from 2006 for Bihar, Assam, Orissa, Himachal Pradesh, West Bengal and J & K from 2007 Rajasthan, Haryana, Kerala, Kolkatta, Madhya Pradesh, Punjab, U.P. (East), U.P. (West), Andhra Pradesh, Delhi, Gujarat, Karnataka, Maharashtra and Mumbai circles. Neither bills have been raised nor payment was made for interconnection charges for SMS by any party at any time. However, after the issue of IUC Regulation 2009 on 9.3.2009, the respondent wrote to the petitioners on 18.06.2009, 30.06.2009, 209.2009 and 20.10.2009, where it requested the petitioner to implement the SMS termination charge @ 10 p per SMS. The petitioner vide its letter dated 20.11.2009 disagreed with the proposal but asked the respondent the basis on which the termination cost has been arrived at by the respondent. Again, the respondent wrote to the petitioner on 28.04.2010 that it had already entered into agreement for SMS termination @ 10 p per SMS with operators like

BSNL and Vodafone and requested that petitioner to execute the interconnect agreement.

22. The petitioner alongwith other service providers raised this issue with TRAI. The Authority after examining the interconnection agreements between Bharti (the Respondent herein) and some service providers observed that different charges are being applied to different service providers. Therefore, the Authority issued a direction under section 13 of TRAI Act to the respondent on 22.02.2011. The Authority found that the respondent had contravened the non-discriminatory provisions of the Regulations. We may read the relevant portion of TRAI direction:

*"TELECOM REGULATORY AUTHORITY OF INDIA
Mahanagar Doorsanchar Bhawan, Jawahar Lal Nehru Marg,
(Old Minto Road), New Delhi – 110002
Fax : 91-11-23213294*

No. 409-12/2008-I & FN(Part. II)

Dated the 22nd February,2011

DIRECTION

Subject : Direction under section 13, read with sub-clauses (ii), (iii) and (iv) of clause (b) of sub-section (1) of section 11 of the TRAI Act, 1997, to M/s Bharti Airtel Limited regarding application of Interconnection Usage Charges on Short Message Service(SMS)

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5. After examining the reply furnished by M/s Bharti Airtel Limited vide their letter number Ref : Airtel/FY 09-10/TRAI/211 dated 12.11.2009 and interconnection agreements filed by various service providers with the Authority, it is noticed that Bharti Airtel Limited has concluded agreements with some service providers specifying IUC for SMS while in respect of the rest, they are still in the process of entering into similar, which has resulted in a situation wherein the charge being actually applied is different for different service provides.

6. From the interconnection agreements filed with Authority by various service providers, it is seen that IUC for SMS has not been incorporated in all interconnect agreements of M/s Bharti Airtel Limited, entered into with other service providers and thus, M/s Bharti Airtel Limited has contravened the non-discriminatory provisions of the principal regulations. (underlining is ours)

7. In view of the above, the Authority, in exercise of the powers conferred by section 13, read with sub-clauses (ii), (iii) and (iv) of clause (b) of sub-section (1) of section 11 of the TRAI Act, 1997 and with a view to ensure compliance of the provisions of 'Schedule IV' of the Telecommunication Interconnection Usage Charges Regulation 2003 dated 29th October 2003 hereby directs M/s Bharti Airtel Limited, to stop applying discriminatory termination charges on SMS."

(Arvind Kumar)
Advisor (I&FN)

To,

Shri Sanjay Kapoor
President & CEO
M/s Bharti Airtel Limited
3rd Floor, Tower A
Unitech World, Cyber Park
Sector - 39, Gurgaon,- 122 001"

23. On the same day, i.e. 22.02.2011, the TRAI wrote a similar letter to all the service providers including the petitioner, where it was specifically mentioned that the termination charge that are sought to be levied by service providers do not seem to have been determined on the basis of cost and SMS termination charge has still not been incorporated in all the agreements of the service providers. Further, application of termination charge selectively in non-transparent and discriminatory manner contravenes the provisions of IUC regulations. Therefore, all the service providers were advised to ensure strict compliance of the provisions of schedule IV of the said regulation. We may reproduce the said direction:

"TELECOM REGULATORY AUTHORITY OF INDIA

*Mahanagar Doorsanchar Bhawan, Jawahar Lal Nehru Marg,
(Old Minto Road), New Delhi – 110002
Fax : 91-11-23213294*

No. 409-12/2008-I & FN(Pt. II) Dated the 22nd February, 2011

To

*Shri Ashok Sharma,
National Head – Regulatory
M/s Dishnet (Aircel Group of Companies)
5th Floor, DLF Cyber City
Building No. 10 A
Near Shankar Chowk
Gurgaon, Haryana – 124 002*

Subject : Interconnection Usage Charges on Short Message Service

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2. It was brought to the notice of the Authority by a number of service providers that discriminatory termination charge for SMS are

being levied by some service providers. The Authority sought comments from the concerned service providers and after examining the replies furnished by them and interconnection agreements filed by service providers with TRAI, the Authority noticed that some service providers are levying fixed SMS termination charges unilaterally on new operators and in a discriminatory manner.

3. It may be recalled that during the last consultation process undertaken by the Authority to review IUC charges, some service providers expressed concern on the growing trend of levying termination charge on SMS and pointed out that these charges are not cost based. The Authority noted that, by and large, the existing arrangement between the service providers, at the time, was 'Bill and Keep' and therefore, the Authority decided to continue with the policy of forbearance in the matter of IUC for SMS with the express stipulation that these should be transparent, reciprocal and non-discriminatory. It is, therefore, clear that the Authority has consciously kept IUC for SMS under forbearance with assumption that the practice of 'Bill and Keep' will continue in a fair, transparent and non-discriminatory manner. In this connection attention is invited to the relevant portion of the explanatory memorandum to the Telecommunication Interconnection Usage Charges (Tenth Amendment) Regulation, 2009 dated 9th March 2009, which reads as under :

5.2.8 Also in view of the fact that by and large the arrangement prevalent today are 'bill and keep' and mutually agreed reciprocal arrangements, the Authority believes that the service providers would continue with these arrangements in a fair, transparent and non-discriminatory manner.....”.

4. Considering that the SMS termination charges that are sought to be levied by some service providers do not seem to have been determined on the basis of cost and SMS termination charge has still not been incorporated in all the agreements of the service providers and thus application of termination charge selectively in non-transparent and discriminatory manner contravenes the provisions of the Telecommunication Interconnection Usage Charges Regulation, 2003(4 of 2003). All the service providers are, therefore, hereby advised to ensure strict compliance with the provisions of schedule IV of the said regulation.(underling is ours)

(Arvind Kumar)
Advisor (I&FN)”

24. The Petitioner lodged its protest to the proposal of the Respondent on or about 20.11.2009 in the following terms:-

"We are in receipt of your letters suggesting changes in our interconnection agreement to the extent as to provide for 10 paise termination charges for SMS. At the outset we would like to inform you that we do not subscribe to the proposed changes and totally disagree to this proposal which is unilateral and lacks transparency.

It is pertinent to mention here that even though the tariffs (barring roaming) are under forbearance but same is not true for IUC for termination and carriage charges since the entire IUC regime, as regulated by the TRAI is cost based. The basic reason why SMS termination has been left out by TRAI is quite obvious and is even reiterated by the regulator in its last IUC review i.e., the cost involved with handling of SMS in a network is insignificant and in the prevailing SMS regime the termination charges are not largely being practiced by the service provider. Also there are complexities involved in implementing and accounting for IUC for SMS. Hence under such circumstances, unilateral attempt to enforce an arbitrary amount for SMS termination charges is not at all acceptable.

In view of the above, we would like to know the following:

The methodology used to arrived at termination cost at 10 paise for SMSes. This is important because as we know, we live in the times of a cost based IUC regime, so the costing becomes very relevant."

The Respondent informed the Petitioner that it had already executed agreements fixing the termination charges @ 0.10 paise/SMS, with majority of the operators including BSNL and Vodafone.

25. The respondent contended that as mandated under the regulation it has introduced the interconnection charges of 10 p per SMS to all the service providers and it has already executed the agreement with 87% of the service providers and it kept the same termination charge for all the operators in a transparent reciprocal and non discriminatory manner. The petitioner has not yet signed the agreement. Forbearance as prescribed under the regulation does not mean bill and keep method. The regulation has not prescribed for interconnection usage charge on 'bill and keep' method rather it said that the parties should be on forbearance that means the parties are free to fix any rate as agreed between them. The respondent has fulfilled all its obligations by fixing its IUC on criteria as mandated by the regulation.

26. It is true that forbearance does not mean the bill and keep method alone. Forbearance has been defined in the IUC Regulation as :

"Forbearance" means that the Authority has not, for the time being, notified any charge for a particular telecommunication service and the service provider is free to fix any charge for such service. The Authority, however, has right to intervene at any stage after the introduction of the charge."

This means the parties are free to fix any rate of IUC for SMS among themselves. 'Bill and Keep' also can be one system of IUC for SMS if agreed between the parties. However, the proviso to schedule IV of IUC Regulation

2009, make it mandatory on the part of both the parties to see that IUC charges are transparent, mutual and non-discriminatory.

27. The Regulator has not and could not have intervened in the matter so long the IUC Regulations in the present form holds the field. An Explanatory Memorandum merely explains a Statute. It cannot and does not amend the law. It cannot by reason of an Explanatory Memorandum or otherwise or by a circular letter can ask the parties to do something which is not provided for in the Regulations. The 2009 Regulations provides for continuation of the forbearance clause subject, of course, to the conditions mentioned therein.

In terms of the said Regulations, bill and keep is only one of the methods. It does not prohibit the parties from entering into an agreement.

28. We have considered the meaning of 'transparent', 'reciprocal' and 'non-discriminatory' in the judgment dated 30.08.2012 in Petition No. 430 of 2011. We have held that the transparency does not mean that it has to be cost based. Similarly, the non-discrimination means the application of the same principle among the persons similarly situated and the word 'reciprocal' does not mean both the operators must agree but it means that the parties to the contractual should charge each other.

29. In the present case, the respondent has fixed the uniform charge of 10 paise per SMS for all the interconnection seeker and agree to pay the same rate to the service provider without any discrimination on the basis of traffic or volume. Therefore, the respondent fulfills all the conditions of reciprocity, transparency and non-discrimination.

30. The other issue raised by Mr. Malhotra, the learned senior counsel for the petitioner is that whatever rates of interconnection usage charges are fixed between the parties, it must be based on the principle mentioned in the section 3 of the Regulation 2001, which provide for determining the IUC based on additional or incremental cost directly attributable to the provisions of interconnection.

Mr. Meet Malhotra's arguments are based on clause 3 of "*The Telecommunication Interconnection (Charges and Revenue Sharing) Regulation, 2001*, where it is provided that :

"3. Interconnection Charges

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

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

(vi) Unless specifically so provided, the Authority has forbore with respect to interconnection charges....

(viii) Interconnection charges mutually agreed among interconnection seeker and provider shall be based on the principles enunciated in this Section."

The Regulator did not make any specific provision for regulating the SMS till the amendment of 2009. The interconnection charges for SMS remained on the principle of forbearance, therefore, the conditions provided in the Regulation 2001 as aforementioned prevailed.

Clause 3 of the IUC Regulation 2003 prescribes that the interconnection charges shall continue to be governed by Regulation 2001 to the extent modified by this Regulation. The principle of cost based interconnection charges could have been applicable as long as the regulator did not make any specific provision for IUC for SMS.

The Regulator amended the Regulation 2003 in 2009 by making a specific provision of SMS saying that the IUC for SMS shall be under forbearance and the only condition for fixing the charges will be that such charges are transparent, reciprocal and non-discriminatory.

Therefore, we are of the opinion that the IUC charges for SMS are not to be determined on the basis of cost.

31. It is no doubt true that a contract implies consensual agreement between the parties. A valid agreement would be a contract within the meaning of the provisions of the Indian Contract Act. If the parties don't agree to the terms of the agreement, no contract can be entered into.

32. Having regard to the phraseology used by the Regulator, it cannot be said that right of 'freedom to enter into contract or not to do so' can be taken away. It is not the law that a contract must be entered into on the terms as one of the party's wishes.

33. The perusal of interconnection agreement executed between the parties for different circles shows that no provision has been made for charging any amount for providing interconnection for SMS.

However, both parties are providing SMS services mutually. This arrangement of providing SMS on each other's network is going on since inception without raising of any bill or making payment by any party.

34. In the agreement dated 16th August 2007 between Bharti and Aircel for the circles of Andhra Pradesh, Delhi, Gujarat, Karnataka, Maharashtra and Mumbai, it was mentioned :

"20. TERMINATION

20.1 This agreement shall continue for the period indicated in this agreement unless either party ceases to hold a license under Section 4 of the Indian Telegraph Act, in which case this agreement shall immediately be terminated."

20.2 This agreement may also be terminated by a party in the event that the other party :

-----"

35. One of the agreement executed for Chennai Metro on 1.8.2002 had initial term for 24 months from the commencement of this agreement. However, it also provides for continuation of this agreement until and unless either party terminate this agreement by giving 90 days notice in advance to the other party. We may reproduce the relevant clauses of the agreement :

"Initial term means the term of 24 months from the commencement date".

"3. COMMENCEMENT AND TERM

3.1 This Agreement is deemed to take effect on the commencement date.

3.2 This agreement shall be for the initial term unless terminated earlier in accordance with clause 13.

3.3 On the expiration of the initial term, this agreement shall continue provided that either party may terminate this agreement

by giving notice in writing not less than 90 days in advance to the other party to take effect at any time after the expiry of the initial term."

"4. REVIEW

4.1. If

- a). *any authorized governmental agency makes any statement, direction or determination in relation to interconnectivity; or*
- b). *there is any other substantial change in the regulatory environment affecting telecommunications,*

then the Parties will negotiate in good faith to agree on amendments to this agreement or negotiate a similar agreement taking into consideration the effect of the new services, statement, direction or determination or substantial change."

"14. TERMINATION

14.1 -----

14.2 Either party may terminate this agreement by giving notice in writing if, as a result of any of the events referred to in clause 4, the parties are unable to reach agreement in accordance with that clause."

36. It is seen that no agreement has been executed between the parties for interconnection charges for SMS. The SMS services between the parties are based on unwritten understanding. If one party does not want to continue the arrangement, without charges, we cannot force that party to continue with the arrangement. Therefore, in the present case, it is for the respondent to terminate the existing arrangement, if it so wishes.

37. The respondent vide its impugned letter dated 11.1.2012 requested the petitioner to execute the agreement immediately otherwise the respondent may exercise its legal right and remedies available to it including withdrawal of interconnection for SMS services. We may read the relevant portion of the impugned letter :

"Thus, unless the Agreement is in place, we may be constrained to review the existing interconnection between our networks for SMS services as the said services does not form part of the services agreed in the prevailing interconnect agreement between us. This is without prejudice to our rights and claim termination charges on SMS effective Ist April 2011.

For the sake of continuity of smooth functioning of our interconnected networks for SMS services, we request you to take immediate action for effecting IUC on SMS and accordingly initiate necessary action including but not limited to execution of agreement to be effective from Ist April 2011 and issuance of bills and their settlement on or before 31st January 2012.

Kindly consider this as a last opportunity on the issue failing which we may exercise the legal rights and remedies available to us including but not limited to withdrawal of interconnection for SMS services. This communication may be treated as advance inimation cum notice for any future action contemplated by Airtel."

38. Therefore, in view of the circumstances and aforementioned reasons, we hereby vacate the interim order issued by us on 23.03.2012 wherein the Respondent was directed not to take any further action for withdrawal of interconnection for SMS services. The period during which our interim order was operative, the Respondent, however, would be entitled to adjustment of equities.

39. In a case of this nature the doctrine of restitution shall apply. The Petitioner cannot unjustly enrich itself in terms of the interim order passed by this Tribunal. Such restitution must be based on the materials placed on record. Therefore, we issue directions to restitute the respondent an amount it has suffered loss by way of damages. A direction is issued that the period during which the order of injunction remained operative, the Petitioner shall pay to the Respondent Interconnection Usage charges @ 10paise/SMS on net inflow of traffic.

40. This petition is disposed of in the aforementioned terms without any orders as to costs.

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

.....
(P. K. Rastogi)
Member

S.B. Sinha (Supplementary)

While agreeing with the operative part of the judgment authored by Mr.P.K. Rastogi, I intend to add a few words :-

The parties had entered into an interconnect agreement.

The contention of the Petitioner is that in terms thereof so far as SMS charges are concerned, the parties were maintaining a `Bill and Keep' method. The controversy between the parties started when the Respondent issued a letter requesting the Petitioner to pay a sum of 10 paise per SMS on a mutual and reciprocal basis.

The Petitioner requested the Respondent to assign the reasons therefor.

It furthermore intended to know the amount of cost to be incurred in providing the SMS services to the network of the Petitioner.

The contention of the Respondent was that the charges levied are cost based.

The Petitioner moved the TRAI.

A direction appears to have been issued to the Respondent forbidding it to charge on SMSs on a discriminatory basis.

An agreement was entered into by the parties hereto.

They were *ad idem* on the terms and conditions of the agreement.

When the Regulator exercises a power to regulate the price, the same which would inter alia mean effective control of the same.

Although, unlike 'essential commodities' the rate fixed by TRAI cannot be burdensome, but there cannot be any doubt or dispute that the known principles with regard to fixation of rates should be followed.

It is, therefore, incorrect to contend that for the purpose of entering into a contract, the parties must demonstrate not only the reasonableness thereof but also must follow the principle of 'work done' in determining the rate while entering into a commercial contract.

Freedom of contract of the parties must be respected. Any law restricting the right of the parties to enter into contract must receive strict interpretation. The TRAI in absence of a statutory power cannot determine

the commercial terms. Once it is found that the contract is not vitiated being opposed to public policy or otherwise contravenes the provisions of a statute, the terms contained in an agreement have to be enforced.

No court of law can ask the parties to deviate from the express terms of the contract, even if the same to some extent may be burdensome.

{See for example : Alopri Prashad & Sons Ltd vs. Union of India - AIR 1960 SC 588}

The TRAI itself by way of the impugned Regulations provided that apart for 'bill and keep' method there could also be other 'arrangements' between the parties.

In the aforementioned context the terms 'by and large' and 'other charges' used by it assume great significance.

If the 'bill and keep' method was an inviolable rule, nothing prevented the Regulator from saying so in explicit terms.

It, while framing the IUC Regulations since 2003, had all along prescribed 'forbearance'.

If the `interconnection seeker' and `interconnection giver' agree to a particular method of accounting between them, the same, in the absence of any prohibition imposed by the Regulator, they would be free to exercise their right to freedom of contract; any statute prohibiting the same must receive a strict construction.

The proviso appended Schedule IV must be given a purposive meaning. It does not prohibit from entering into a contract. It must be read in the light of the main provision. It is not and cannot operate independently or as a separate provision.

On the other hand, the `Proviso' itself speaks of charges to be levied subject of course to the conditions mentioned therein.

Even the `Proviso' does not say that the parties must resort to `Bill and Keep' method of accounting.

Each wording of a statute must be given effect to.

It is not a case whereby, by reason of insertion of the said proviso, the Regulator seeks to impose a complete prohibition on the parties from entering into a contract.

If the Petitioner intends to question the validity/ legality of the offer of the Respondent, it was for it to prove as to how the same is discriminatory and/ or otherwise not transparent.

It, in fact, recognizes the freedom of contract of the parties.

Having said so, it merely provides that the rates fixed thereunder should be reasonable, `transparent` and `non-discriminatory`.

The term `transparent` in the context of an agreement would not mean a `see through` transparency.

In *Balco Employee's Union vs. Union of India* reported in (2002) 2 SCC 333, it was stated :-

"67.... Transparency does not mean the conducting of the government business while sitting on the crossroads in public. Transparency would require that the manner in which decision is taken is made known. Persons who are to decide are not arbitrarily selected or appointed. Here we have the selection of the Global Advisor and the strategic partner through the process of issuance of global advertisement. It is the Global Advisor who selected the valuer who was already on the list of valuers maintained by the Government. Whatever material was received was examined by high power Committee known as the IMG and the ultimate decision was taken by the Cabinet Committee on Disinvestment. To say that there has been lack of transparency, under these circumstances, is uncharitable and without any basis."

Reasonableness of the terms of a contract cannot be equated with the term 'wholly unreasonable'.

Neither the provisions of the Indian Contract Act nor the Specific Relief Act, 1963 can be invoked for issuing an order of injunction from enforcing the terms of the contract unless it is hit by Section 23 of the Indian Contract Act.

Even in such a case in view of the *doctrine of ex turpi causa non oritur actio*, the contract shall be void.

A bare perusal of the Regulations would clearly go to show that either the parties would be governed by a Statute or by a contract. There cannot be any other mode.

Rates and charges fixed by the TRAI may not be the same unless discrimination amongst the operators is manifest.

In this case the Petitioner has two options.

If it agrees to the offer of the Respondent a valid contract would be entered into; if it does not, the contract will stand terminated.

The Respondent in law may be correct in contending that the terms and condition of a contract cannot be finalized without its consent.

The other side of the picture is that if no such consent is given, the contract itself shall come to an end; the choice being in the hands of the Petitioner.

It is not a case where the Respondent has sought for recovery of a huge amount by filing a petition in terms of Section 14 of the Act.

This Tribunal by reason of an order of interim order of injunction restrained the Respondent from enforcing its demands subject, of course, of adjustment of equities between the parties.

Applying the aforementioned principle, the standard for determining the amount of compensation by way of restitution would be that the Respondent shall be entitled to a reasonable amount. Such a reasonable amount as has been noticed by the learned Member should be priced at 10 paise per SMS, being the prevalent market rate.

The Respondent, however, if it intends to realize any amount alleged to be due from the Petitioner, may file an appropriate petition therefor.

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

/NC/