

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

Dated 20th August, 2014

Petition No. 403 of 2013
(With M.A. No. 312 of 2013)

Tata Communications Ltd.	... Petitioner
Vs.	
Bharat Sanchar Nigam Ltd. & Ors.	... Respondents

Petition No. 20 of 2013
(M.A. No. 30 of 2013)

Vodafone Cellular Limited	...Petitioner
Vs.	
Bharat Sanchar Nigam Ltd.	...Respondent

Petition No.577 of 2012

M/s Bharti Airtel Limited & Anr.	...Petitioners
Versus	
Bharat Sanchar Nigam Ltd.	...Respondent

Petition No.578 of 2012

Vodafone South Ltd.	...Petitioner
Versus	
Bharat Sanchar Nigam Ltd.	...Respondent

Petition No.579 of 2012

Vodafone Digilink Ltd.	...Petitioner
Versus	
Bharat Sanchar Nigam Ltd.	...Respondent

Petition No.583 of 2012

Idea Cellular Ltd.	...Petitioner
Versus	
Bharat Sanchar Nigam Ltd.	...Respondent

Petition No.584 of 2012

M/s Bharti Airtel Ltd & Anr. ...Petitioners
Versus
Bharat Sanchar Nigam Ltd. ...Respondent

Petition No.586 of 2012

Tata Teleservices LimitedPetitioner
Versus
Bharat Sanchar Nigam Ltd. ...Respondent

Petition No. 612 of 2012

Reliance Communications Ltd. ...Petitioner
Vs.
Bharat Sanchar Nigam Ltd. ...Respondent

Petition No.620 of 2012

Reliance Communications Ltd. ...Petitioner
Vs.
Bharat Sanchar Nigam Ltd. ...Respondent

Petition No.655 of 2012

Reliance Communications Ltd. ...Petitioner
Vs.
Bharat Sanchar Nigam Ltd. ...Respondent

Petition No.660 of 2012

Aircel Limited Ltd. & Ors. ...Petitioners
Vs.
Bharat Sanchar Nigam Ltd. ...Respondent

Petition No.666 of 2012

Reliance Communications Ltd. ...Petitioner
Vs.
Bharat Sanchar Nigam Ltd. ...Respondent

Petition No. 817 of 2012

M/s Videocon Telecommunication Ltd. (U.P.) ...Petitioner
Vs.
Bharat Sanchar Nigam Ltd. ...Respondent

Petition No. 818 of 2012

M/s Videocon Telecommunication Ltd. (M.P.) ...Petitioner
Vs.
Bharat Sanchar Nigam Ltd. ...Respondent

Petition No. 819 of 2012

M/s Videocon Telecommunication Ltd. (Mumbai) ...Petitioner
Vs.
Bharat Sanchar Nigam Ltd. ...Respondent

Petition No. 932 of 2012

Tata Teleservices (Maharashtra) Limited ...Petitioner
Vs.
Bharat Sanchar Nigam Limited ...Respondent

Petition No.944 of 2012

Vodafone Cellular Limited ...Petitioner
Vs.
Bharat Sanchar Nigam Limited ...Respondent

Petition No. 978 of 2012

Bharati Airtel Ltd. ...Petitioner
Vs.
Bharat Sanchar Nigam Ltd. ...Respondent

Petition No.322 of 2013

Idea Cellular Ltd. ...Petitioner
Vs
Bharat Sanchar Nigam Ltd. ...Respondent

Petition No.323 of 2013

Bharti Airtel Ltd. ...Petitioner
Vs
Bharat Sanchar Nigam Ltd. ...Respondent

Petition No.324 of 2013

Vodafone India Ltd. ...Petitioner
Vs
Bharat Sanchar Nigam Ltd. ...Respondent

Petition No. 283 of 2013

Reliance Communications Ltd. ...Petitioner
Vs.
Bharat Sanchar Nigam Ltd. ...Respondent

BEFORE:

HON'BLE MR. JUSTICE AFTAB ALAM, CHAIRPERSON
HON'BLE MR. KULDIP SINGH, MEMBER

For Petitioner(in P.No. 403/2013) : Mr. U. Hazarika, Sr.Advocate
Ms.Neha T. Phookan,Advocate

For Petitioner (in P.Nos. 20/13, 577/12,578/12, 579/12, 583/12, 584/12, 612/12, 944 & 978 of 2012) : Mr.Navin Chawla,Advocate
Mr. Ninad Dogra. Advocate

For Petitioner (in P.No.586/12 & 932 of 2012) : Mr.Mansoor Ali Shoket,Advocate
Mr. Nitin Kala, Advocate
Mr.Kunal Singh,Advocate

For Petitioner (in P.Nos.620/12 655/12 and 666/12, 283/13) : Ms.Manali Singhal,Advocate
Mr. Santosh Sachin, Advocate

For Petitioner (in P. No.: 660/2012) : Mr. Ravi S.S.Chauhan, Advocate

For Petitioner (In Petition Nos.: 817, 818, 819 of 2012) : Mr.Kirtiman Singh, Advocate
Mr. Waize Ali Noor, Advocate

For Respondent : Mr. K.P.S. Kohli, Advocate
Mr.Neha Singh, Advocate for
Ms.Maneesha Dhir,Advocate

JUDGMENT

Kuldip Singh: The petitioners herein have been granted licenses under section 4 of the Indian Telegraph Act, 1885, for providing telecom services such as Universal Access service/Cellular Mobile Telephone Service/National Long Distance Service, etc. They entered into Interconnection Agreements with the respondent, which is a Public Sector Undertaking, for interconnection of their telecom networks with that of the respondent. The dispute in the present petitions pertains to the charges for infrastructure facilities being provided by the respondent to the petitioners, which were increased vide circular of the respondent dated 12.06.2012. As the questions of law and facts in all these petitions are similar, they are being disposed of by this common judgment.

2. Before we go into the facts of the case, let us explain the need for and how the interconnection of the networks takes place.

The need for interconnection arises because no telecom network can work as a stand-alone network for the reason that subscribers of the operator of such a network would also like to communicate with the subscribers of the other operators having different networks. As an example of a typical voice call, let us take the case of a long distance call that originates in one service area and gets terminated in another service area

within the country. The network of the originating access provider¹, where the calls originate, hands over the call to the national long distance operator [NLDO] who carries the same to the distant service area and hands over to the access provider of that area for termination on the called subscriber. Though in some cases all the services may be provided by the same operator, many times the calls originate in the network of one operator and terminate in that of another. It is for this purpose that the networks are required to be interconnected with each other. Even for a local call terminating in the same service area, the originating and the terminating access providers may be different.

Whenever a new operator wishes to start operations, it is necessary for such an operator to interconnect with various other networks of the incumbent operators that are already in existence. The incumbents, however, may not feel the need to interconnect with the new comer. It is for this reason that interconnection, as well as the terms on which the same is to be provided, is regulated by the telecom regulators all over the world. The various operators designate some of their switches/exchanges as points of interconnect [POI] from which the interconnection facility is provided by a physical connection on the ports available in such points of interconnect. Sometimes the new comer, called the interconnection seeker in common parlance, may ask for certain other facilities/resources from the incumbent

¹ The access provider can be a Basic Service Operator who provides fixed telephones, a Cellular Mobile Operator providing wireless mobile phones, or a Universal Access Provider who can provide all types of access. The type of access is how the subscriber gets connected to the Central Office of the operator [also called exchange/switch/mobile switching centre, etc.].

operators, which may not be mandated by the Regulations, on mutually agreeable terms.

With the above brief background, we may now proceed to examine the facts of the present cases.

3. The facts below are based on Petition No. 577 of 2012 but are similar in other petitions.

As per the Clause 6.3.3 of the Interconnect Agreement between the parties, it is not mandatory for the respondent to provide any infrastructure to the petitioners which they are themselves supposed to arrange. The clause reads as under:-

“6.3.3 Other charges

It shall not be mandatory for BSNL to provide any infrastructure to BSO which BSO himself is supposed to arrange. In case the BSO is not able to bring his interconnecting transmission link upto the BSNL’s designated exchange for the POI, BSNL may subject to availability and payment of the prescribed charges by BSO, provide inter exchange junctions on PCMs from the exchange upto which the BSO has brought its transmission link to the location of POI. These charges shall be same as prescribed by TRAI for leased lines from time to time or on R& G & conditions as the case may be.

For any other infrastructure like space in BSNL's building, provision of power supply, air conditioning, mounting of antenna on towers or building tops if feasible, the charges and other terms & conditions for the same shall be as prescribed by BSNL from time to time separately. (Emphasis is ours)

Further as per Clause 2.1.9 of the Interconnect Agreement, such facilities may be provided subject to availability and feasibility. Rental for use of the same, shall be determined by the provider of such facility. The clause reads as under:-

“Clause 2.1.9”

*“Irrespective of who owns a transmission system of the link interconnecting one party's exchange to the exchange of the other party, each party **subject to availability and feasibility may provide accommodation for the terminals of such equipment of the other party located in its premises. Each party may permit mounting of antennae for interconnect link owned by the other party on its transmission towers subject to feasibility. Rental for use of such space and mounting shall be determined by the provider of such facility.** Arrangements for installation, operation and maintenance of such equipment will be arrived at by mutual agreement.”*(Emphasis our)

The respondent vide its circular dated 30.05.2006, fixed charges for sharing of infrastructure facilities. This circular is not under challenge, however, as it has important bearing in the case, the relevant part of same is reproduced below:-

“Dated: 30th May, 2006

Circular

1. *In view of various references received in this office on the subject, the competent authority has reviewed the infrastructure sharing charges prescribed vide Circular No.116-14/96-PHC(pt) dated 19th February, 2001 and decided to revise the charges as given below:-*

As the rates of electricity and capital expenditure of BSNL in developing these facilities is varying as per the size of the city, the rates for one transmission bay in these categories of cities will be as under:

Categories of City	Charges
<i>A cities</i>	<i>Rs.2,00,000 per bay per annum</i>
<i>B cities</i>	<i>Rs.1,80,000 per bay per annum</i>
<i>C cities</i>	<i>Rs.1,50,000 per bay per annum</i>
<i>Unclassified cities</i>	<i>Rs.1,20,000 per bay per annum</i>

Tower Charges: Charges per antenna will be as under:

S.No.	Tower Height	All Cities
1.	Up to 30 meters	Rs.1,20,000 per annum
2.	31-60 meters	Rs.2,50,000 per annum
3.	More than 60 meters	Rs.4,00,000 per annum

The above charges will be multiplied by no. of antennas in case multiple antennas are installed by Licensed Telecom Service Providers.

4. Applicability of above charges –

*a) These revised rates will be applicable w.e.f. 1st April, 2006 with a provision of 10% annual increase every year, i.e.,01.04.2007 onwards. Billing cycle shall be from 01.04. to 31.03 of every year. Hence, billing cycle for **all existing links may be shifted to the new** arrangement.*

b) All these charges will be leviable in advance every year.

c) In case of change of classification of cities, higher classification will be applicable at the time of yearly renewal only. The charges will be applicable financial year wise;

d) No cash refunds shall be made and any excess payments received by BSNL, due to difference in charges based on old and new formula, shall be adjusted in future bills of party concerned.”

As can be seen from the circular, the charges prescribed were based on classification of cities which in turn was based on the circular issued by

the Government of India in the year 2004, for the purpose of house rent allowance. However, though as per the Government circular, the cities were classified into six categories, the respondent, BSNL had only four classifications as the cities classified by the Government as 'A' and 'A1' were clubbed together and classified as 'A' and similarly 'B' and 'B-1' were classified as 'B'.

The Government vide its notification dated 29.08.2008 re-classified the cities w.e.f. 01.09.2008 as follows:-

“2 Based on the recommendations of the Sixth Central Pay Commission, the earlier classification of cities has been revised viz, A-1 to “X”; A, B-1 & B-2 to “Y” and C & Unclassified to "Z". In determining the revised classification, the population of Urban Agglomerate area of the city has been taken into consideration. Accordingly, the rates of House Rent Allowance shall be as under:-

<i>Classification of Cities/Towns</i>	<i>Rate of House Rent Allowance as a percentage of (Basic pay + NPA where applicable)</i>
X	30%
Y	20%
Z	10%

On 12.06.2012, the respondent issued the impugned circular revising the infrastructure charges w.e.f. 01.04.2009. The relevant part of the impugned circular is reproduced below:-

*In view of re-classification of cities and revision of rates of house rent vide Govt, of India, Department of Expenditure letter No. 2(B)/2008-E-II (B) dated 29.08.2008, the existing rental charges **for Infrastructure Sharing by the other licensed service** providers fixed vide **BSNL HQ No.. 103-1/2006**- Comml. Dated 30.05.2006 has been reviewed by Competent Authority and it has been decided to revise the charges w.e.f.01.04.2009, as details given below:*

1. Charges for building space.

*(Rates for one transmission bay including space for **one box OF** transmission and DDF as required)*

S.No	Classification of Cities/Towns	Charges W.e.f 01.04.2009
1	X	Rs.61,606 per annum per bay
2.	Y	Rs.47,916 per annum per bay
3.	Z	Rs.26,620 per annum per bay

4. Mr. Navin Chawla, learned counsel appearing on behalf of the petitioners² submitted that the impugned circular not only carried re-categorization of cities but also carried out a revision of rates. No unilateral change of rates by way of internal circular, without any justification for the same and negotiations with the petitioners, is permissible in law. With regard to his submission he relied on BSNL and Anr. Vs. BPL Mobile Cellular Ltd. & Ors ³ paras 43 and 44 which are as under:

“43. In view of the aforementioned law laid down by this Court, there cannot be any doubt whatsoever that the circular letters cannot ipso facto be given effect to unless they become part of the contract. We will assume that some of the respondents knew thereabout. We will assume that in one of the meetings, they referred to the said circulars. But, that would not mean that they are bound thereby. Apart from the fact that a finding of fact has been arrived at by TDSAT that the said circular letters were not within the knowledge of the respondents herein, even assuming that they were so, they would not prevail over the public documents which are the brochures, commercial information and the tariffs.

44. If the parties were ad idem as regards terms of the contract, any change in the tariff could not have been made unilaterally. Any novation in the contract was required to be done on the same terms as are required for entering into a valid and concluded contract. Such an exercise having not been resorted to, we are of the opinion that no interference with the impugned judgment is called for.”

² P. Nos. 20/13, 577/12, 578/12, 579/12, 583/12, 584/12, 612/12, 944 & 978 of 2012

³ (2008) 13 SCC 597

He further submitted that this was an internal circular which was not marked to other operators and the petitioner only got a demand letter referring to this circular.

Mr. Chawla further submitted that even if such a power to revise the rate is vested with the respondent, it cannot be exercised retrospectively. With regard to his submission, he relied on the judgment of the Tribunal in *Bharti Airtel Limited Vs. BSNL* ⁴.

Mr. U. Hazarika, learned senior counsel, appearing on behalf of M/s Tata Communications Ltd. in Petition No. 403 of 2012, adopted the submissions made by Mr. Chawla. He, however, stated that the petitioner in this case has made payments of the supplementary invoices raised as per details given in para 55 of the pleadings (Page 33-34 of the paper book). All such demands have been paid by the petitioner under protest and without prejudice to its rights.

Mr. Mansoor Ali Shoket, learned counsel appearing for Tata Teleservices Ltd. in Petition No. 586 of 2012 and 932/2012 and Mr. Ravi S.S. Chauhan, learned counsel appearing on behalf of M/s Aircel Ltd in Petition No. 660 of 2012 also adopted the submissions already made.

5. Ms. Dhir, learned counsel appearing for the respondent, referred to para 10, Clause 6.3.3 and Clause 2.1.9 of the Interconnect Agreement and

⁴ Petition No. 108 of 2008

submitted that it was not mandatory for BSNL to provide these infrastructure facilities and any such facilities were provided at rates which were to be as determined by BSNL. She further stated that the BSNL letter dated 30.05.2006 provided that in case of change of classification of cities, higher classification will be applicable at the time of yearly renewal and drew our attention to letter dated 01.03.2012⁵ as per which the revised rates have been charged in annual bill for the period from 01.04.2012 to 31.03.2013 and supplementary bill issued from the period 01.04.2009 to 31.03.2012.

It is the contention of the respondent that, in terms of the circular dated 30.05.2006, there can be no dispute with regard to the linking of infrastructure charges with classification of cities as prescribed by the Government of India. Further, the respondent can revise the classification of cities in case the same is revised by the Government of India. Accordingly, the respondent has revised the infrastructure charges as per the terms and conditions as enumerated in circular dated 30.05.2006 and in terms of Interconnect Agreement. In terms of Government of India letter dated 29.08.2008, fresh classification of cities was effective from 29.08.2008 and in terms of Clause 4 (C) of the respondent's circular dated 30.05.2006, the re-classification of cities for the purpose of determining infrastructure charges was made effective from 01.04.2009 by circular dated 12.06.2012. The respondent has given the reasoning for the revised charges in para 21 (page 392 -395 of Petition No. 577 of 2012).

⁵ page 282 of Petition No. 577 of 2012

Ms Dhir relied on Build India Construction System Vs. Union of India⁶ and submitted that a contract may give one of the parties the power to unilaterally vary the obligations and if such power can be spelled out from the terms of the contract and is held to be lawful then a unilateral variation of obligation by one party shall be binding on the other party.

We find that as per the interconnect agreement between the parties, rental for use of such space and mounting shall be determined by the provider of such facility [clause 2.1.9] and the charges and other terms and conditions of the same shall be as prescribed by BSNL[Respondent] from time to time separately [clause 6.3.3] . We also note that as per the circular dated 30.5.2006, which is not in dispute, that in case of a change in the classification of the cities, higher classification will be applicable, though at the time of yearly renewal. In the case of Bharat Sanchar Nigam Limited Vs. BPL Mobile Cellular [supra], the facts were different as in that case equipment was provided on rent and guarantee basis the period of which was 10 years. As per a booklet circulated by DoT, rent and guarantee charges were to be on capital cost basis and it was only after the expiry of the guarantee period when the charges would be on capital cost or flat rate whichever was higher. However, on or about 7-5-1999, DoT informed the local office that the charges which should be billed against the respondents should be either on capital cost basis or flat rate basis, whichever was higher. It was on the said premise, the bills were raised on flat rate basis. Such demands were raised only in the state of Kerala and nowhere else. In

⁶ (2002) 5 SCC 433

another case in the same matter, the dispute pertained to the premature surrender of certain circuits/lines leased taken from the appellant for which a minimum period of three years was contended by the appellant which according to the respondent was not known to them.

We, therefore, find that the respondent –BSNL was well within its rights to revise the rates and the classification of cities and it was up to the petitioners to continue using the resources of the respondent at the revised rates or take the same from someone else. We may note here that the respondent is not the sole provider of infrastructure facilities in question here such as the building space, etc., and the petitioners could have obtained these from any one.

We now come to the question of whether the rates prescribed by the Respondent vide the impugned circular dated 12.06.2012 could have been applied retrospectively with effect from 01.04.2009.

In case of Bharti Airtel Ltd Vs. BSNL [supra], this Tribunal had observed that in law a circular letter providing for any fiscal liability cannot be given retrospective effect. Ms. Dhir argued that as the earlier circular dated 30.05.2006 itself provided that in case of change of classification of cities, higher classification will be applicable at the time of yearly renewal, and since the reclassification of the cities was done by the Government

w.e.f. 01.09.2008, the respondent had revised the charges w.e.f. 01.04.2009 i.e. the next financial year. She argued that there is no retrospective application of charges. We are not convinced with these arguments. We note that while the notification of the Government for the reclassification of the cities was issued on 29.08.2008, the Respondent revised the rates as late as 12.06.2012. Had they done so in 2008 itself, the petitioners could have decided whether they want to avail the facilities at that rates or not. We also note that it is not merely a reclassification of cities but the rates have also been revised especially for cities newly classified as "X".

In view of the aforesaid circumstances, while upholding the right of the respondent-BSNL to revise the rates of the infrastructure facilities in question, we direct that the revised rates as per the circular dated 12.06.2012 of the Respondent shall be applicable with effect from 01.04.2013 which is the next financial year. Up to 31.03.2013, the infrastructure facilities provided by the respondent to the petitioners shall be charged at the rates and as per classification of cities as prescribed in the circular dated 30.05.2006. The excess rates, wherever realised from the petitioners, shall be refunded back to the petitioners along with interest at the rate as is prescribed in the interconnect agreements for delayed payments from the date of realisation of these amounts and till the time of filing of the petitions along with pendente lite and future interest @9% till the payment is made. The refunds shall be made within a period of four weeks. If any amount is found payable by the petitioners in terms of this

order, the same shall also be paid along with interest, as payable in case of refunds, and shall be paid within four weeks.

All the above petitions are disposed of in above terms with no order as to costs.

.....
(Aftab Alam)
Chairperson

.....
(Kuldip Singh)
Member

/HKC/08.08.2014