

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

**Dated 9<sup>th</sup> December, 2014**

**Petition No. 246 of 2013**

Vodafone Mobile Services Ltd., New Delhi & Anr. ... Petitioners

Vs.

Union of India & Anr ... Respondents

**Petition No. 198 of 2013**

(with M.A. No. 104 of 2013)

Bharti Airtel Ltd., New Delhi ... Petitioner

Vs.

Union of India ... Respondent

**Petition No. 199 of 2013**

(with M.A. No. 105 of 2013)

Bharti Airtel Ltd., New Delhi ... Petitioner

Vs.

Union of India ... Respondent

**BEFORE :**

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

For Petitioners : Mr. Meet Malhotra, Sr.Advocate  
 (in P.No.246 of 2013) Mr. Manjul Bajpai, Advocate  
 Mr. Shashwat Bajpai, Advocate  
 Mr. Ravi S.S.Chauhan, Advocate  
 Mr. Prateek Dahiya, Advocate  
 Ms. Pallak Singh, Advocate  
 Mr. Anant Ramdhyani, Advocate

For Petitioners : Mr. Gopal Jain, Sr.Advocate  
 (in P.Nos.198, 199 of Mr. Harsh Kaushik, Advocate  
 2013) Ms. Chinmayee Chandra, Advocate  
 Mr. Kshitiz Karjee, Advocate  
 Mr. Kartik Yadav, Advocate

For Respondent : Mr. Sunil Kumar, Sr.Advocate  
 Mr. Ritin Rai, Advocate  
 Mr. Abhay Prakash Sahay, Advocate  
 Mr. Siddhartha Jha, Advocate  
 Ms. Somya Rathore, Advocate

### **ORDER**

**By Aftab Alam, Chairperson** – Petitions nos.198 and 199 of 2013 are filed by M/s Bharti Airtel Ltd. (Airtel) and petition no.246 of 2013 by M/s Vodafone Mobile Services Ltd. (Vodafone). Both the petitioners challenge the imposition of penalty for introducing, for some time in the past, “Subscriber Local Dialing”, a service that the two petitioners called by different names, e.g., “Optimal Routing Service”, “Direct Connect Service”, Local Calling Service” etc.

In the case of Airtel (in petition no.198 of 2013), the impugned order is dated 9 July 2013. It is passed (in the name of the President of India) by the Director (AS-IV), Department of Telecommunications, Government of India. It relates to 11 service areas, namely, Delhi, Gujarat, Himachal Pradesh, Haryana, Maharashtra, UP(West), Kerela, Madhya Pradesh, Mumbai, Punjab and Chennai Metro service areas and gives to Airtel the Penalty of Rs.50 Crores (the maximum prescribed under the licence) in each of the eleven (11) circles. In petition no.199 of 2013, the impugned order of the same date relates to the service areas of Andhra Pradesh and Tamil Nadu; for each of the two service areas too Airtel is given the maximum penalty of Rs.50 crores each. Thus, under the two orders, Airtel is faced with the total penalty of Rs.650 crores.

In case of Vodafone, the impugned order is dated 6 August 2013 and it directs Vodafone to pay Rs.100 cores, being the sum of Rs.50 cores, the maximum penalty, for each of the two service areas, namely, Mumbai and Delhi.

The penalties are imposed on the ground that the services were introduced by the petitioners and those were continued in breach of their licence conditions.

### **THE FACTS:**

On 19 June 2002, Airtel wrote to the Telecom Regulatory Authority of India (TRAI) that it proposed to introduce in Delhi a value-added service i.e.,

“Subscriber Local Dialing” (SLD) services. The letter elaborated that “the SLD is a feature by which calls made to a Roaming Subscriber, who is visiting Delhi, are routed directly to his mobile instead of travelling via his home network, thereby generating substantial savings for subscribers. The letter claimed that the service would afford the subscriber savings in calling charges from 64% to 72% and in some cases from 57% to 88%. The TRAI responded by its letter of 25 June 2002 and asked Airtel to make a presentation before it that should cover, *inter alia*, the following issues:

- (i) Routing aspect and technical issues related thereto.
- (ii) xxxxxxxxxxx
- (iii) License conditions permitting introduction of such service.
- (iv) By-pass of NLDO traffic.
- (v) Scope of availability of the service to subscribers of other network including PSTN subscribers.
- (vi) xxxxxxxxxxx

Airtel made a detailed presentation as desired by the TRAI and in respect to the issues on which TRAI had sought clarification, it maintained as under:

“Re (i) The provision of SLD services was permitted under the license granted to the Petitioner as the same was a GSM service and would cover only calls which would terminate within the Petitioner’s network and the same service area.

Re (ii) xxxxxxxxxxxx

Re (iii) That the SLD service did not violate the numbering plan as the SLD service only required the addition of the code “#0” to be dialed thereby, allowing for a SLD call to be distinguished and identified vis-à-vis a normal roaming call. Further, that as the SLD service covered only those calls which were handled within the Petitioner’s network, the Petitioner was entitled to have its own numbering scheme;

Re (iv) That SLD services did not lead to a by-passing of NLDO traffic as SLD call was completely local and did not use any long distance connectivity/ service at all;

Re (v) That the SLD service was not discriminatory as the same was available to all the local subscribers of the Petitioner as well as those in-roamers of any other network or service area which logged/ latched onto the Petitioner’s network.”

Airtel did not receive any further queries or any formal reply from TRAI and in the absence of any negative response it seems to have assumed that TRAI had no objection to the introduction of the service. Airtel then introduced the service in all the 13 circles in question on 5 October 2002. It carried on the service till 11 January 2005 when it was stopped on account of “very low usage and thereby becoming unviable”.

At the time of launching the service Airtel had Cellular Mobile Telephone Service (CMTS) licences in all the thirteen (13) circles. Later on it migrated to the Unified Access Service (UAS) licence. It signed the UAS licences for different circles on different dates but all the UAS licences came into effect in all the circles retrospectively from the same date, 27 April 2004.

It is asserted by Airtel (as it was communicated to the DoT vide letter dated 29 April 2005 in response to the DoT's letter of 5 April 2005) and so far not controverted by the DoT that the total revenue earned from SLD service in all the 13 circles was Rs.8,60,000/- (rounded off).

M/s Hutchison Max Telecom Pvt. Ltd.(later taken over by Vodafone) held Cellular Mobile Telephone Service licences in the service areas of Mumbai and Delhi and at the material time operated as telecom service provider in the two areas/circles. On 4 July 2002, Hutch wrote to TRAI intimating that it proposed to introduce in Mumbai a value added service called "Optimal Routing", which essentially meant "routing a voice call by the shortest route from point to point". The letter elaborated that the essence of optimal routing was to "identify the location of the receiver and route the call from the caller to the receiver via the shortest route". The letter enclosed a detailed note in which apart from other things, it was stated that the service would provide the subscriber, savings in calling charges from 75% to 81%.

Hutch did not receive any reply to its letter from TRAI. Presumably, the TRAI had examined the matter thoroughly in the case of Airtel and did not find the need for any further investigation. Not getting any response from the TRAI, Hutch also seems to have believed that the TRAI did not have any objection to the introduction of the service. It launched the service in Delhi and Mumbai on 12 December 2002. Having started the service on 12 December 2002, Hutch duly informed TRAI vide letter dated 16 December 2002 that “it had introduced the value added service Direct Connect for in-bound roamers (national and International) from 12.12.2002” giving the requisite tariff details. The service that was launched on 12 December 2002 was brought to a close, after slightly over one year, on 31 December 2003 on account of “low usage and thereby being unviable”.

It is asserted on behalf of Vodafone, that all the revenue earned by it from the SLD service in the two circles amounted to Rs.65 lakhs.

### **SUBSCRIBER LOCAL DIALLING/OPTIMAL ROUTING OF CALLS:**

For making a call outside the Service area, it is well known that the called number has to be prefixed by “0” or “+91”. For example, if a person in Delhi (the caller) wishes to make a call to someone in Mumbai (the called party) he has to dial the ten (10) digit number of the called party, prefixed by “0” or “+91”. The Call goes to the Mobile Switching Centre (MSC) of the service provider, where on

the basis of the “0” and the initial digits of the subscriber’s number it is recognized as an outside call going to Mumbai. The MSC then instantly hands over the call to the National Long Distance (NLD) operator (BSNL or now, may be, a private service provider). The NLD operator carries the call to Mumbai and hands it back to the service provider. There, from the Visitor Location Register (VLR) the exact location of the called party is identified and the call is reached to him. But what happens if at the time the call is made the called party per chance happens to be in the same service area (in-roamer) from where the call originated? In the above example, if the called party happens to be in Delhi, then the service providers VLR will so indicate. And in that case, the call (through the NLDO) will come back to Delhi (the “back-haul”) where the service provider’s VLR will tell his exact location in Delhi to take the call to him. As a matter of fact, the back-haul is cited as one of the draw backs of GSM, an otherwise highly excellent technology.

The two petitioners used a technical innovation to do away with the back-haul

**Airtel:**

The Airtel subscribers, in order to avail of the SLD service were required to call the called party (whom he believed to be visiting his Service area) by prefixing his ten (10) digit number with “# 0”. For example if a Delhi caller wished to call

the called party from Mumbai, whom he believed to be in-roaming in Delhi, he would dial #0, followed by the subscriber's ten (10) digit number. The # would divert the call to an Interactive Voice System where, with the aid of the VLR, the location of the in-roamer called party would be ascertained and the call would go directly to him avoiding being sent to Mumbai and the back-haul. The caller would thus avoid payment at STD rates and would only be charged at the local rates. In case the called party was actually not in Delhi the IVR would tell the caller to make the call in the normal way and then the call would proceed in the normal way as described above.

**Vodafone:**

The service provided by Hutch was more elaborate and it was available to both Hutch and non-Hutch subscribers and in respect of both Hutch subscribers and non-Hutch subscribers (able to latch on to the Hutch net-work) and in respect of both national in-roamers and the in-roamers from abroad.

- i. A Hutch subscriber with post-paid and STD facilities was required to dial, instead of the called party's number, the number assigned to the IVR provided to the caller. On being prompted by the IVR, he was then required to dial the ten (10) digit number of the called party suffixed by \*. The IVR would then ascertain the called party's location from the

- VLR and direct the call to him, in case the called party was in the same service area. As Caller Line Identification (CLI), the called party would get on his mobile phone screen the caller's number followed by 11.
- ii. A pre-paid Hutch subscriber and a Hutch subscriber with no STD facility and a non-Hutch subscriber and a fixed-line subscriber too could use the service by following the procedure described above. In this case, however, the caller would reach the called party by means of twin calls and the Call Data Record (CDR) would also show two separate calls; the first call recorded in the CDR would be from the caller to the IVR and the second from the IVR to the called party. Consequently, the called party on his mobile phone screen would see, for the CLI, the number of the IVR and not that of the caller.

Needless to say that, like Airtel, Hutch service too avoided the back haul and thus the caller was charged at rates for local calls instead of the much higher STD or ISD rates.

**Further Facts:**

It is noted above that Airtel introduced the service in all the 13 circles in question on 5 October 2002 and Hutch launched the service in Delhi and Mumbai on 12 December 2002. On 20 June 2003, the DoT issued a communication to all

CMTS licensees stating that some of the CMTS operators were offering services (SLD by different names) not permitted under the licences granted to them. The communication emphasized that “such type of Service is violative of National Routing Plan, Numbering Plan and unauthorisedly bypasses NLD traffic”. The communication went on to observe that it was “desired that any operator doing so should stop the same forthwith, with immediate effect”.

Both Airtel and Hutch gave the same reply to the DoT’s communication vide their letters dated 27 June 2003. The operators denied that they violated any terms and conditions of the licence granted to them or the National Numbering Plan or the Routing Plan. They further pointed out that the services were commenced after duly notifying TRAI and the services were in accordance with the international practice. They also requested for an opportunity to explain their case in-person and to clarify how the services operated.

They however did not discontinue the service as required in the communication by the DoT.

Eighteen (18) months later, on 7 January 2005, the DoT issued another letter to both Airtel and Hutch asking for the dates of start of the services by them and the dates on which the services were stopped subsequent upon issue of instructions

vide the letter of 20 June 2006. The operators were not asked to provide the call data records in respect of the services in question.

Here, it may be recalled that Hutch had stopped the service on 31 December 2003, more than a year prior to the issuance of this letter and Airtel on 11.1.2005, i.e., immediately on receipt of the letter.

The two operators furnished the required information; Hutch by its letter dated 14 January 2005 and Airtel by letter dated 20 January 2005. Hutch in its reply stated that it had discontinued this service on its own “as there was very low usage and had also become unviable”.

The DoT then issued show cause notices to both Airtel and Hutch. The notices though issued on different dates were in similar terms. It may also be noted that in the show cause notices, there was no longer any reference to violation of the National Numbering Plan, National Routing Plan or any terms and conditions of the licences granted to them. The accusation against Hutch, in the show notice dated 22 February 2005, was that it continued with the service even after the instruction to stop it by letter dated 20 June 2003. The charge made in the show cause notice to Hutch was as under:

“2. ....As can be seen from the above that the service has been continued beyond 23.06.2003 when the above letter was received by your representative. This is in gross violation of the instructions of DOT.

3. In view of the above, M/s Hutchison Max Telecom Pvt. Ltd. is required to explain as to why necessary action for violation of terms & conditions of Licence Agreement should not be initiated against the company for the above stated lapse on its part.”

Hutch gave a detailed reply to the show cause notice denying all charges of any wrong doing.

### **The Hutch Case:**

In the case of Hutch, without going into any other details, we may come directly to the yet another show cause notice given to it by the DoT on 5 July 2005. The main accusation in the second show cause was the same as in the earlier one, i.e., Hutch had continued the service even after the order issued by the DoT on 20 June 2003 and had thus violated the terms and conditions of the licence agreement, especially, clauses 4.1 and 6.1 of amended licence. The relevant extract from the show cause is as under:

“And whereas, M/s Hutchison Essar Mobile Services Ltd. continued unpermitted local calling services **up to 31.12.2003** even after the orders were issued by DoT on 20.06.2003 to stop the said services immediately.

The company continued to provide Local calling Service even after the Licensor declared it as ‘not permitted’, thus the service provider has violated the terms & conditions of the license agreement especially clauses 4.1 & 6.1 of amendment to License Agreement vide No.842-47/2002-VAS dated 12<sup>th</sup> August 2002.”

Hutch once again gave a detailed reply denying the charges vide letter of 13 July 2005. *Eight years later*, the impugned order/demand notice for imposition of

financial penalty was passed against it, requiring Vodafone (the successor-in-interest) to pay Rs.100 crores at the rate of Rs.50 crores for each of the two circles.

The case of Hutch can be allowed on a short, technical point without going into any other details concerning the two cases. The service in question was launched by Hutch on 12 December 2002. According to its case, it stopped the service in both the circles on 31 December 2003 as for lack of usage, the service had become unviable. The date on which the service was stopped is accepted by the DoT as it is the same date that is mentioned in the show cause notice dated 5 July 2005 issued by the DoT.

It is undeniable that in the CMTS licence held by Hutch at that time (from December 2002 to December 2003), there was no provision for imposition of any penalty for violation of the terms of the licence or for any other reason. It is equally undeniable that the provision for imposition of penalty was incorporated in the licence by an amendment introduced on 25.11.2004. The amendment letter, in so far relevant for the present, is as under:

“Subject: Amendment to the CMTS Licence Agreement.

The undersigned is directed to convey the approval of the competent authority for amendment of the Licence Agreement for provision of Cellular Mobile Telephone Service to the extent as per details below.

**New clause to be inserted in CMTS license agreement  
[This clause to be inserted below clause 15.7 of old CMTS**

**Licence Agreement signed for 1<sup>st</sup>& 2<sup>nd</sup> Cellular Licensees and below clause 10.8 of 3<sup>rd</sup>& 4<sup>th</sup> CMTS Licence Agreement and would be appropriately numbered as 15.8 and 10.9 respectively]:**

*The Licensor may also impose a financial penalty not exceeding Rs.50 crores for violation of terms and conditions of license agreement. This penalty is exclusive of Liquidated Damages (LD) as prescribed in this License Agreement.*

2. Other terms and conditions of the Licence Agreement including amendments and instructions issued from time to time shall remain unchanged.”

It thus follows that for any alleged breach of the terms of the licence during the period December 2002 to December 2003 no financial penalty could be imposed, for the simple reason that at that time there was no such provision in the licence agreement. The authority in the DoT appears to be fully conscious of this aspect of the matter but has tried to overcome the difficulty in a rather curious way. In the impugned order, it is stated that the Hutch website in 2005 carried the advertisement for the SLD service and on that basis alone it is found and held that the service was in operation until 2005, i.e., after the amendment in the licence agreement. In the impugned order, it is stated as under:

“20. Whereas M/s Vodafone (formerly M/s Hutch) had intimated about withdrawal of SLD service by December 2003 while **it had continued to provide service at least up to March’05. This was clearly evident from the website of M/s Hutch at that time.** In providing these services, M/s Hutch had grossly violated various license conditions. Whereas from above facts it is evident that ‘the Company’ has tried to twist the facts relating to its SLD service with regard to date of withdrawal of service.”

The reference to Hutch website is apparently on the basis of a complaint dated 18 March 2005 made by a Member of Parliament (Rajya Sabha) enclosing the print out from the Hutch website. The complaint alleged that the service in question was causing huge loss of NLD revenue to Bharat Sanchar Nigam Limited (BSNL).

In our considered view, the finding that Hutch was operating the service in question until 2005, based solely on the advertisement carried on its website is completely untenable for more reasons than one. First, the show cause notice dated 5 July 2005 issued by the DoT was premised on the fact that the service was stopped on 31 December 2003. The DoT could not obviously alter this date to the detriment of Hutch, without giving it an opportunity to explain. Secondly, the information on the website is one of the most fragile pieces of evidence as this Tribunal learnt itself, to its deep embarrassment. Until about a month ago, the “Procedure for Filing Petition/Appeal Before TDSAT” as displayed on the Tribunal’s website incorporated, besides others, the provision for payment of *ad veloram* court fee on petitions. Thus, misled by the website, a petitioner actually filed a recovery petition paying a huge amount as *ad velorem* court fee only to learn later that the provision for payment of *ad velorem* court fee was held to be bad and invalid by the decision of the Tribunal as far back as on 7 October 2010<sup>1</sup>.

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<sup>1</sup> MA No.33 of 2010 in Petition No.12 of 2002 – Tata Teleservices Ltd., Maharashtra Vs, Union of India.

The petitioner accordingly filed a petition for refund of the court fee amount which was allowed by the order dated 31 October 2014<sup>2</sup> and then only the Procedure on the website was properly corrected. Thirdly, the advertisement on the website of Hutch had come in possession of DoT in March 2005 itself when the position was easily verifiable by placing a call through the service. If the service was operational at that time, the call would easily reach its destination. No such attempt was made to verify the correctness of the advertisement which could be easily done at that time. Hence, basing the finding on unverified advertisement on the website, ten years after the event, is wholly unreasonable and unjustified.

For the above reasons, it has to be held that Hutch stopped this service on 31 December 2003 and there being no provision for imposition of penalty at that time, the impugned imposition is illegal and unsustainable.

**The Airtel case:**

Airtel of course had continued the service till 11 January 2005, that is to say, till after the amendment in the CMTS licence. Hence, the above point is not available to it and its case has to be considered on merits.

It is seen above that in reply to the earlier show cause by the DoT, both Airtel and Hutch had *inter alia* stated that the services were launched by them only

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<sup>2</sup> MA No.289 of 2014 in Petition No.433(C) of 2013 – United Cable Services Vs. A.P. Hinduja & Ors.

after intimating the TRAI and submitting their respective tariffs for the service. It appears that on 17 February 2005, the DoT asked the TRAI whether the latter had given its sanction for the services and this prompted the TRAI also into action. On 9 March 2005, the TRAI issued a show cause notice to both Hutch and Airtel stating that they should have stopped the service when asked to do so by the DoT by its letter of 20 June 2003 and not doing so was in serious violation of the licence conditions. It asked the operators to explain why action should not be taken for violation of licence conditions, in particular, clause 16.1 of the CMTS. In its reply dated 23 March 2005, Airtel sought to explain in detail that there had been no violation of the terms of the licence and also requested for a personal hearing before the TRAI. The TRAI, in its report to the DoT, seems to have taken the view that the action of the operators in not stopping the service, when asked to do so by letter dated 20 June 2003, was in violation of the terms and conditions of the licence for which they were liable to punishment.

Thereafter, there were several notices to Airtel asking for information on a number of issues, namely, the circles in which Airtel was providing the SLD service, dates of commencement and discontinuation of the service, revenue earned from the service etc. Airtel furnished answers to all the queries including the revenue earned by it from the service in all the circles (that amounted to Rs.8.6 lakhs – see letter dated 29 April 2005 at page 541 of the paper-book). Finally, it

was served with show cause notices for each of the circles in which the service was launched. Here it needs to be noted that in the show cause to Airtel, like Hutch, there was no longer any reference to the National Numbering Plan or the National Routing Plan or any unauthorised bypass of the NLD. The accusation in the charge-sheet was simply that it did not stop the service when asked to do so by letter dated 20 June 2003. The relevant extract from the charge-sheet dated 5 July 2005 is as under:

“And whereas, M/s Bharti Cellular Ltd. continued unpermitted local calling services up to 11.01.2005 even after the orders were issued by DoT on 20.06.2003 to stop the said services immediately.

The company continued to provide SLD Service even after the Licensor declared it as ‘not permitted’, thus the service provider has violated the terms & conditions of the license agreement especially clauses 4.1 & 6.1 of amendment to License Agreement vide No.842-47/2002-VAS dated 12<sup>th</sup> August 2002/clauses 16.1 & 23.6 of UAS License Agreement.”

Airtel gave its reply to the show cause by its letter of 12 July 2005 denying the charges completely. Even after filing the reply to the show cause, there was some exchange of correspondence in which the DoT sought some further information and clarifications in regard to information given earlier. Every letter of the DoT was responded to by Airtel and it furnished all the information and clarifications asked for.

Finally, **seven years later** the impugned order was passed on 9 July 2013 imposing penalty of Rs.50 crore in each of the 13 circles aggregating to the amount of Rs.650 crores.

From the materials on record it would appear that it was not a proceeding confined between the licensor (the DoT) and the licensees (Airtel and Hutch) but there were also some collaterals going on side by side. Apparently, complaints were received in the DoT that by not letting the calls to go through the NLD the services were causing huge loss to the NLD operator, BSNL. The DoT examined the matter at different stages through committees constituted for the purpose. The first committee, consisting of senior and high level technical officers, was constituted even before the issuance of the show cause notice dated, 5 July 2005. The Committee submitted its report on 28 March 2005. It examined the technical aspect of the service in depth and agreed that the back-haul of the call was indeed a drawback of GSM system. It, however, pointed out that the GSM Standard provided for avoiding the back-haul but in practice it was difficult to operate on account of difficulties in raising charges against the caller. It expressed the view that the SLD service introduced by the petitioners did indeed avoid unnecessary usage of NLD network and thus saved on charges both to the caller and to the parties but it was in deviation of the GSM Standard and was in violation of the National Numbering Plan. It concluded that the tariff submitted by the operators

would be deemed to have been approved by the TRAI and to that extent the service had the sanction of the TRAI. It also stated that the service could not be said to cause any loss of revenue to BSNL.

Around the time the committee submitted its report (on 28 March 2005), a complaint was made by a Member of Parliament (Rajya Sabha) on 18 March 2005 alleging that the service was causing huge loss of revenue to BSNL and MTNL. The complaint was addressed to the Chairperson, National Advisory Committee with copies to the Principal Secretary to the Prime Minister and the CVC. It was stated in the complaint that although Hutch claimed to have stopped the service its website continued to have details of the service and a print-out of the advertisement taken from the website was also enclosed with the complaint.

Twice, questions were asked in that regard in the Parliament. On 30 July 2009, in answer to the un-starred question no.2899, the Minister of State in the Ministry of Communications & Information Technology made the following statement in the Rajya Sabha:

“(a) & (b) Yes, Sir. It is a fact that in 2003, some of the mobile telecom operators, viz., Spice Telecom, Bharti and Hutch had been found by passing NLD Networks while offering certain services like Subscriber Local Dialing (SLD), Direct Contact Service, Roamers Local Link etc. wherein in-roamers (as they were called) were permitted to be accessed by the local subscribers on a local call basis. However, BSNL has intimated that there was no loss caused to BSNL by these services.

(c) & (d) The cases of violation of License conditions including in the matter of providing local calling services (like SLD etc.) has been examined by a committee in Department of Telecom. The Committee has submitted its report. A decision on Report of the Committee has not yet been taken by the Government.”

Again, on 3 May 2010, in answer to the un-starred question no.6119, the Minister of State in the Ministry of Communications & Information Technology made the following statement in the Lok Sabha.

“(a) Yes, Madam. In 2003, some private mobile telecom companies including BhartiAirtel Limited were offering certain services like Subscriber Local Dialing (SLD), Direct Contact Service, Roamers Local Link etc. wherein in-roamers (as they were called) were permitted to be accessed by local subscribers on local call basis, while offering such services it has been found that these telecom companies had by-passed NLD Network. However, Bharat Sanchar Nigam Limited (BSNL) has intimated that there was no loss caused to BSNL by these services.

(b) The case of imposition of quantum of financial penalty against the service providers for violation of terms and condition of the license agreement by providing different type of services are under consideration.”

The complaint by the Member of Parliament, referred to above, a copy of which was sent to the PMO duly reached the DoT and seems to have led to the constitution of another committee (of officers, much lower in rank than the members of the previous committee) on 20 June 2011. The Committee deliberated behind closed doors and the operators had no opportunity to participate in its deliberations. It submitted its report on 25 May 2012. We have gone through the

report of the second Committee and it appears to us that the Committee was over-anxious to hold the operators guilty on all conceivable counts. The Committee's report simply piles-up breaches and violations of the terms and conditions of the licence. It holds the operators guilty of charges that were not even part of the different show cause notices issued by the DoT or, more importantly, on issues on which the previous Committee had held that there was no violation of any terms of the licence. The report of the second Committee has been apparently heavily relied upon for passing the impugned order/demand notice.

Mr. Sunil Kumar, Senior Advocate, appearing for the DoT strongly defended the impugned order/demand notice. He first submitted that the services launched by the two petitioners were in breach of the National Numbering Plan. In support of the submission, he referred to clause 1.6 of the National Numbering Plan (2003) which provides as under:

“Only the decimal character set 0-9 has been used for all number allocations. Letters and other non-decimal characters **shall not form part of the National (Significant) Number [N(S)N]**”.

N(S)N is defined as 10-digit for both the basic as well as cellular mobile services.

We fail to see any application of clause 1.6 of the Numbering Plan to the facts of the case. Clause 1.6 deals with number allocations for basic and cellular

mobile services. The services in question did not involve any **allocation** of numbers.

Mr. Sunil Kumar then referred to clause 2.1.5 of the Plan that fixes sub-level 0 as the national prefix. The clause relied upon by the counsel provides that only “0” can be used as the prefix “for cellular mobile to cellular mobile calls **outside** the service area from where the call is originated”. This clause too has no application to the facts of the case as the whole object and purpose of the service was to retain the call made by the caller within the service area where the called party was in-roaming and not to allow the call to go outside the service area from where it originated so as not to be brought back through back-haul.

Moreover, though the National Numbering Plan was mentioned in the communication dated 20 June 2003, it did not find mention in any of the show cause notices later issued to the two petitioners.

In any event, the charge of any breach of the National Numbering Plan does not hold water as the DoT itself later accepted the recommendation of the TRAI and allowed the use of characters other than the decimal numbers. On 23 May 2006, the DoT issued the following communication to all UAS licensees, CMTS licensees and basic service licensees:

**“Sub: Use of special characters such as \*, #, \$ etc. from subscriber terminal.**

After considering TRAI’s recommendations on the above mentioned subject, it has been decided by competent authority to permit use of special characters such as \*, #, \$ etc. from subscriber terminal within the network of Unified Access Service Licensee / Cellular Mobile Telephone Service Licensee / Basic Service Licensee for provisioning of intra-network value added services or accessing / provisioning of high speed data services with immediate effect.”

A few days later, on 1 June 2006, the TRAI issued the following Press

Release:

**TELECOM REGULATORY AUTHORITY OF INDIA  
PRESS RELEASE – NO.47 / 2006  
(1<sup>ST</sup> June 2006)**

Government Accepts TRAI’s Recommendation Pertaining to Use of Special Characters for Intra-Network Value Added Services.

The government has accepted TRAI’s recommendation regarding use of special characters \*, #, \$ etc. from subscribers terminal within the network of intra access service licensee/cellular mobile telephony service licensee/ basic service licensee for provisioning for intra network value added services or accessing/provisioning of high speed data service.

Earlier Authority had observed that access providers were allowing their subscribers to use these special characters in the provisioning of intra network value added service. After examining the issue alongwith the clarifications obtained from service providers, it was found that **such facility is desirable in the consumers’ interest** to access the high speed interest in the wireless networks. TRAI also observed that the existing National Numbering Plan (NNP) 2003 does not mention about the use of special characters for voice and data services. Therefore, TRAI recommended to the government that relevant clauses of NNP 2003 should be amended/clarified to accommodate **the intra network value added services by using special characters \*, #, \$ etc. within the service providers network.**

The government has accepted TRAI's recommendation with immediate effect.

(S.N. Gupta)  
Pr.Advisor(CN)''

In view of the aforesaid development and the acceptance of the TRAI recommendation by the DoT it will be wholly unjustified and wrong to penalise the petitioners for the use of the characters # and \* for making calls that were never allowed to go outside the service area of their origin.

Mr. Sunil Kumar then picked up all the restrictive clauses in the licences, regardless of whether or not those were mentioned in the show cause notices and cited them, one by one, as being violated by the services launched by the petitioners. He first cited clauses 4.1 and 6.1 that were introduced through an amendment made in the CMTS licence on 12 August 2002. It may be noted here that these were the only two provisions of which the breach was stated as the charge in the show cause notices given to the petitioners. Clause 6.1 mandates that the licensee shall adopt all means and facilities in every manner for the application of the Indian Telegraph Act 1885 and Indian Wireless Telegraphy Act 1933 and that the Service would be provided in accordance with the Indian Telegraph Rules as amended and modified from time to time. Clause 6.1 has evidently no relevance to the present controversy.

Mr. Sunil Kumar however, placed strong reliance on clause 4.1 that reads as under:

“The LICENSEE shall not engage on the strength of this LICENCE in the provision of any other Service other than the SERVICE as defined in this Licence Agreement.”

The Cellular Mobile Telephone Service is defined in clause 1(l) and Value-Added service in clause 1(w) of the CMTS Licence. Mr. Sunil Kumar was not able to show us that the services launched by the two petitioners were not covered by the definition of the Cellular Mobile Telephone Service. We are satisfied that the definition of the Cellular Mobile Telephone Service is sufficiently expansive to cover the services launched by the petitioners and there was no violation of clause 4.1 of the licence.

Mr. Sunil Kumar then referred to clause 24.10 of the CMTS Licence (equivalent to 23.6 of the UAS Licence) that makes it obligatory for the licensee to seek the approval of the licensor for providing additional facilities in case of any value addition/up-gradation that the technology might permit at a later date. He also referred to clause 12.4 of the CMTS licence that prohibits the licensee from **engaging in the business of** provision of Value Added Service based on the cellular mobile service without the specific permission of the licensor. We fail to see any application of the two clauses to the facts of the case. Besides, these two clauses were not part of the show cause notices to the petitioners.

Mr. Sunil Kumar lastly relied upon clause 16.1 of the CMTS licence and submitted that the petitioners clearly violated the provision by not stopping the services when asked to do so by the DoT. Clause 16.1 of the licence provides as under:

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

Mr. Sunil Kumar contended that violation of the provision was writ large on the facts of the case. He submitted that the DoT had issued clear directions to stop the service vide its letter of 20 June 2003. Nonetheless, the two petitioners continued to keep their respective services alive. Hutch stopped the service on 31 December 2003 and Airtel, much later, on 11 January 2005.

On behalf of the petitioners, however, it is submitted that there was really no violation of the provision if the matter is seen in light of all the surrounding facts. It is pointed out that though the DoT gave instructions for stoppage of the service by its letter 20 June 2003, the letter was replied to both by Hutch and Airtel by their letters dated 27 June 2003. The operators denied that they violated any terms and conditions of the licence granted to them or the National Number Plan or the Routing Plan or bypassed the NLD operator in any unauthorised manner. They further pointed out that the services were commenced after duly notifying the TRAI and the services were in accordance the international practice. They also

requested for an opportunity to explain their case in person and to clarify how the services operated. The petitioners did not receive any reply to their letters and the only response in regard to the services in question that was received from the DoT came eighteen months later on 7 January 2005. It is submitted, it was, therefore, not unreasonable for them to legitimately believe that their explanation was accepted by the DoT and the injunction against the services stood lifted. Learned Counsel for the petitioners further submitted that long before the second letter dated 7 January 2005 was issued by the DoT, Hutch had already stopped the service on 31 December 2003 and Airtel too stopped the service on 11 January 2005 immediately on receipt of that letter from the DoT.

The alleged of violation of clause 16.1 of the licence is perhaps the only charge against the petitioners that merits any serious consideration. On taking a pedantic and rigid view of the matter one may come to the conclusion that there was a certain degree of disobedience on the part of the operators in not stopping the services immediately on receipt of the letter dated 6 June 2003 and we might have considered remitting the case to the DoT for awarding some token penalty to Airtel. But we find there are good and strong reasons for not taking that course.

First, Airtel stopped the service in January 2005 and the last, in a series of show cause notices, given to it was dated 5 July 2005. But the impugned penalty order was finally passed in July 2013, that is to say, eight and a half years after the

stoppage of the service and eight years after the issuance of the show cause notice. The matter is thus plainly quite old and stale and calls for a quietus. The DoT could find that the service in question was violative of the terms and conditions of the licence after long years and through the reports of the committees constituted for the purpose. We have gone through the report of the second committee which is primarily relied upon for passing the penalty order and we find it to be quite unsatisfactory. The committee held that the operator was guilty of charges those were not even mentioned in the show cause notice and also in respect of which it was exonerated by the first committee consisting of more senior and higher officers. The committee seemed to be bent upon finding faults in the service by any means. Secondly, we are also not satisfied that the instruction to stop the service was for any valid reasons. It rather appears to us that on receiving unverified complaints that the services were causing loss of revenue to BSNL, the NLD operator, the instruction for stoppage of the service was a knee-jerk reaction intended to stop the service even while the correctness of the allegations could be investigated. It is now undeniable that no undue loss of revenue was caused to BSNL as stated by the Minister of State for Telecommunications in both Houses of the Parliament and as also found by the first committee. Thus the very basis of the instruction remains in grave doubt.

Thirdly, the most important reason for not remitting the matter to the DoT is that shortly after giving show cause to the operators, the DoT accepted the recommendation of the TRAI and permitted the use of characters like # and \* other than the decimal numbers.

We are thus fully satisfied that it is not a fit case for being remitted to the DoT

At this stage we also feel compelled to say a few words about the manner in which the penalties are imposed by the DoT at the maximum prescribed rate. Let us, for the sake of argument, assume that there was violation of clause 16.1 of the licence in that the petitioners did not stop the services despite being told to do so. Let us examine the facts of the case on that basis. The service was carried on by Hutch for slightly over a year (from 12 December 2002 to 31 December 2003) and by Airtel for three years and a few months (from 5 October 2002 to 11 January 2005). The impugned order was passed in July and August 2013, i.e., more than ten years (in case of Hutch) and eight and a half years (in case of Airtel) after the services were stopped. It is abundantly clear that the services did not cause any loss to BSNL, the NLD operator. It is also borne out from the records (the report of the first Committee) that it was beneficial for the users. The Press Release by the TRAI also makes it clear that the facility is desirable in the consumers' interest. It is also borne out from the records that Hutch earned the revenue of Rs.65 lakhs and

Airtel Rs.8.60 lakhs for the entire duration of their respective services. On these undeniable facts, the imposition of penalty of Rs.650 crores on Airtel and Rs.100 crores on Hutch defies all sense of proportionality. We are constrained to observe that the DoT must learn that imposition of penalty is not a means for generation of revenue and to meet the financial targets and we regret to say that such orders can only be passed by someone who, safe in anonymity, feels secure from any accountability.

In light of the above discussions, we are clearly of the view that both the petitions deserve to be allowed. We, accordingly, set aside the impugned orders of penalty/demand notices in all the three cases.

In the result all the petitions are allowed with costs quantified at Rs.25,000/- for each of the petitions.

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**(Aftab Alam)**  
**Chairperson**

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**(Kuldip Singh)**  
**Member**