TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL
NEW DELHI

Dated: 8th July, 2015

Petition No.179 of 2011

M/s Reliance Communications Ltd., Navi Mumbai ...Petitioner
Vs.
Bharat Sanchar Nigam Ltd., New Delhi .Respondent

BEFORE:

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

For Petitioner : Mr.Navin Chawla,Advocate
Mr. Santosh Sachin, Advocate for
Ms. Manali Singhal, Advocate

For Respondent : Ms.Maneesha Dhir, Advocate
Mr. K.P.S.Kohli, Advocate
Mr.Prashant Jain, Advocate

JUDGMENT

Kuldip Singh: The dispute in the present petition is with regard to certain bills raised by the respondent on the petitioner allegedly for routing calls with tampered CLI[1], non-CLI, invalid CLI, incomplete CLI, wrong routed calls etc. The petitioner is challenging the demand notices dated 30.11.2007, 21.12.2007, 29.12.2007, 10.02.2011 and disconnection notice(s) dated 14.2.2011 &

[1] Calling Line Identification

24.2.2011, issued by Kerala Unit of the respondent-BSNL.

The Petitioner had been granted a license by the Department of Telecommunications under Section 4 the Indian Telegraph Act, 1885, as a Basic Service Operator (BSO) for provision of basic telephone services. Subsequently, the petitioner was permitted to migrate to a Unified Service License (UASL) in November 2003. The respondent is a wholly owned Government of India Enterprise and is providing telecommunications services in whole of India except Delhi and Mumbai.

The petitioner and the respondent entered into an Interconnect Agreement for Basic Telephone Services for Kerala Circle on 25.01.2002. Subsequently, when the petitioner migrated to the UASL, an addenda to the Interconnect Agreement was signed between the parties on 21.09.2005.

Clause 6.4.6 of the Interconnect Agreement and the addenda is relevant to the present dispute. The clause reads as under:

"Clause 6.4.6 WRONGLY ROUTED CALLS

(a) Unauthorized calls i.e. calls other than specified for that trunk group if detected, for which the applicable IUC (including ADC) is higher than IUC(including ADC) applicable for calls prescribed in that trunk group, then BSNL shall charge the UASL the highest applicable IUC (including ADC), as applicable for such unauthorized calls, for all the calls recorded on this trunk group from the date of provisioning of

(b) The CLI based barring facility shall be activated at the PoIs wherever technically feasible to ensure that the traffic handed over to BSNL is in the appropriate trunk groups only. Wherever it is technically not feasible to activate CLI based

barring, periodic monitoring of the incoming trunk group shall be done by BSNL to ensure this objective. The calls received by BSNL without CLI or modified / tampered CLI from UASL shall be charged at the highest slab i.e. as for ISD calls. In case such calls are received by BSNL on any trunk group, then all the calls recorded on this trunk group shall be charged at the rates applicable for IUC of incoming ISD Calls from the date of provisioning of that PoI or for the preceding two months, whichever is less.

(c) When CDR based billing is introduced in BSNL's network some of the trunk groups shall be merged. In such cases also, in case unauthorised or Incoming International Call, without CLI call, call with tampered CLI is handed over to BSNL at the merged trunk group, then BSNL shall charge the UASL the highest applicable IUC, as prescribed in clauses 6.4.6(a) above for unauthorised calls & 6.4.6(b) above for incoming International call, without CLI call, call with tampered CLI, for all calls recorded on this merged trunk group from the date of provisioning of that POI or for the preceding two months whichever is less.

(d) In addition, BSNL shall also have the right for taking other legal actions including disconnection of POIs or temporary suspension of the interconnection arrangements under misuse."

On or about 30.11.2007, 21.12.2007 and 29.12.2007, the Kerala Unit of the respondent, on the premise that the petitioner has tampered with the CLI (Calling Line Identification) and forwarded its calls through non-CLI, invalid CLI, incomplete CLI and wrong routed trunk group etc., raised demand notices on the petitioner for a sum of Rs. 96.53 crores which was subsequently revised to

Rs. 90.37 crores. These demand notices were challenged by the petitioner before the Tribunal vide Petition No. 2 of 2008. The Tribunal vide interim order dated 4.01.2008

stayed the operation of these notices directing the petitioner to deposit 65% of the total demand. The petition was disposed of by the Tribunal by judgment dated 15.4.2010 directing the respondent to handover the relevant CDRs (Call Data Record) to the petitioner so as to enable it to offer explanation about the same.

The respondent filed an appeal against the above judgment of the Tribunal before the Hon'ble Supreme Court being Appeal No. 4882-4883 of 2010. This appeal was disposed of vide order dated 29.09.2010 recording the statement of the learned Solicitor General appearing for BSNL that it would be providing CDRs to Reliance Communications Ltd. (the petitioner herein) within 4 weeks of the date of the order to quantify IUC charges payable as per agreement. However, the question of interpretation of clause 6.4.6 was kept open. Subsequently, the apex court, in Bharat Sanchar Nigam Ltd. (appellant) Vs. Reliance Communication Ltd. (respondent), C.A. No. 6706 of 2010, has held that clause 6.4.6 is not a penal clause but represents a pre-estimate of reasonable compensation. It was clarified in the judgment that it was restricted only to the interpretation of Clause 6.4.6 of the interconnect agreement read with the addenda.

On 10.02.2011, the respondent asked the petitioner to pay Rs. 87,79,04,983/- towards interest, and by bill dated 14.2.2011 the respondent asked the petitioner to pay the principal amount[2] of Rs. 31,63,21,053/- along with interest of Rs. 87,79,04,983/-. On 24.02.2011, the respondent issued a disconnection notice stating as under:

> "Please refer to the letter cited at reference above vide which it was requested to pay the outstanding dues in respect of tampering of CLI of

[2] Being 35% of the total bill of Rs. 90,37,74,434/-

ILD calls by M/s Reliance by 24.02.2011 as per the details given below :

i	outstanding principal amount 35% of the total bills for Rs. 90,37,74,434/-	Rs. 31,63,21,053/-
ii	Interest towards delay in payment of the bills for Rs. 90,37,74,434/-	Rs. 83,79,04,983/-
	Total	Rs. 119,42,26,036/-

This office has not received the outstanding dues as detailed above till date.

Hence, it is again requested to make payment of all the aforesaid dues of Rs. 119,42,26,036/- (Rupees one hundred and nineteen crore forty two lakhs twenty six thousand and thirty six only) immediately failing which, actions as envisaged as per the following clauses of the Interconnect Agreement shall be taken."

It is the contention of the petitioner that though the respondent did not supply the complete and readable CDRs as it was required to do, the petitioner has analysed the incomplete CDRs to the extent possible and found that there was no tampering of the CLI by it. As per the petitioner, since there is no tampering of CLI, the demand of ADC and interest thereon is not payable by it. The petitioner accordingly addressed a letter dated 14.03.2011 to the respondent. The pleadings of the petitioner in this regard are as under:

"28.It is submitted that the Respondent herein has raised the bill for the alleged tampered CLI, non-CLI, invalid CLI and wrong routed calls. It is essential to elaborate the concepts of tampered CLI, non- CLI, invalid/incomplete CLI and wrong routing of calls etc. It is submitted that:

(i) CLI is said to be tampered when the number of the calling party is deliberately altered/modified/concealed from the called party through some mechanism during transmission of the call.

(ii) CLI is said to be invalid/incomplete when the number of the calling party having different number digits than those which are reflected to the called party when the call is made.

(iii) A non CLI call is a call in which number of the calling party does not appear to the called party at all.

(iv) A call is said to be wrongly routed when the call is delivered in a Trunk Group of POI other than the designated Trunk Group to which the call was supposed to be directed.

29. It is submitted that from the CDRs provided by the Respondent BSNL it is absolutely clear that there is no tampering of CLI, invalid / incomplete CLI, no CLI call and wrong routing call. The demand of the BSNL is baseless and has been made without any substance and supporting evidence."

It was further pleaded that the demands raised by the respondent's Kerala unit are in violation of the directions issued by the licensor DOT vide its letter dated 24 .06.2003 on the subject of operations of clandestine/ illegal Telecom Centre / Telephone Exchange, as also the directions issued by the respondent's headquarter vide letter dated 13.06.2005 prescribing the procedure for dealing with the handover of non CLI / invalid CLI / incomplete CLI by the access providers.

The respondent on the other hand contended that the Tribunal came to a conclusion that clause 6.4.6 was a penal clause and, therefore, the CDRs should be provided to the petitioner to enable it to offer explanation thereof. As per it, the order of the Hon'ble Supreme Court in C. A. No. 4882-83 of 2010 was to merely provide CDRs within 4 weeks subject to interpretation of clause 6.4.6 which was not yet given. As per the respondent, any challenge to these notices is barred by the principals of *res judicata* as enumerated in Section 11 of CPC and the provisions of Order 2 Rule 2. Ms. Dhir, Ld. Counsel for the respondent, submitted that admittedly

international calls were handed over to it as local calls. Further there was no dispute about the quantum of billing and the total minutes of calls were to be charged at the highest rate applicable for international calls as per clause 6.4.6. For the time period for which the bills were raised, the respondent did not have the capability of CDR based billing and the billing was done on MCU (Metered Call Units) basis.

Ms Dhir submitted that the Tribunal in its judgment dated 15.4.2010 has already held that the petitioner for all intent and purposes had handed over international calls with domestic CLI and cannot re-adjudicate the same once again. As per the respondent, CDRs are to be reconciled only for the purpose of quantification and the submission of the petitioner that there was no tampering of CLI is totally ill founded and no statement to this effect has been made in the letter of the petitioner dated 14.3.2011.

For a resolution of the dispute, the questions required to be answered are:

(i) Whether as submitted by the respondent, the petitioner had admitted to tampering with CLI and handing over of international calls at the local POI and is now re-agitating the same?

(ii) If not, whether the petitioner had actually tempered with the CLI and/or handed over international calls at the local POI and the provisions of clause 6.4.6 are attracted?

In regard to the first question, though Ms. Dhir argued that the CDRs were

submitted only for the purpose of quantification. We also note that it is also the case of the respondent that during the period in question, it did not have the capability of CDR based billing and the billing was done on the basis of MCUs. Further, the same MCUs recorded at the POIs were to be charged at the slab meant for ILD calls. If that were so, where was the need for any quantification and what was the purpose of giving CDRs? We may also note that as per the reply of the respondent, there was no dispute about the quantum of billing and it had to supply the CDRs only to substantiate that the calls handed over by the petitioner to the respondent had tampered CLI. The relevant portion of the reply is as under:

> "2. It is submitted that, therefore, any challenge to these notices is barred by the principles of Section 11 of CPC and the provisions of Order 2 Rule 2. It is respectfully submitted that as observed by this Tribunal, the international calls were admittedly handed over to BSNL as local calls. Further, it is also the admitted position that there was no dispute about the quantum of billing. **However, BSNL had to only supply CDRs to substantiate that calls handed over by the petitioner to the respondent had tampered CLI.** " (emphasis supplied).

With reference to the submission of Ms. Dhir that the Tribunal has already held that the petitioner for all intent and purposes had handed over international calls with domestic CLI, the Tribunal also noted the contention of the petitioner that the same was by reason of activities of unscrupulous subscribers. Para 38 of the judgment[3] reads as under:

> "38. .....The petitioner, for all intent and purport, has

[3] M/s. Reliance Communications Ltd. Vs. Bharat Sanchar Nigam Ltd. Petition No. 2 of 2008 delivered on April,15, 2010. ....

accepted that international calls have been handed over to the respondent as local calls. The petitioner, however, had contended that it was by reason of activities of unscrupulous subscribers who misuse the facility and indulge in illegal routing of international calls with which it had nothing to do. It has furthermore been contended that the unscrupulous subscribers indulging in illegal routing of traffic use the facility of the service providers including that of the respondents . "

From the above, it cannot be said that the petitioner had admitted to tampering with CLI and handing over of international calls at the local POI and is now re-agitating the same. The answer to the first question must therefore, be answered in favor of the petitioner .

We now come to the question of whether the petitioner had actually tempered with the CLI and/or handed over international calls at the local POI and, is therefore, liable to pay for all the calls at the highest rate in terms of clause 6.4.6. The Tribunal in Reliance Communications Vs. Bharat Sanchar Nigam Ltd. and Reliance Communications Vs. Mahanagar Telephone Nigam Ltd [4] has laid the conditions precedent for attraction of clause 6.4.6 as under:

"103. Clause 6.4.6 indisputably would be attracted only when the conditions precedents therefor are found to be attracted and not otherwise; wherefor it was obligatory on the part of the Respondent to prove that

(i) the calls have been terminated at a wrong trunk group;
(ii) the calls were unauthorized and/or improper; and
(iii) such calls did not terminate without any CLI in the network of the Respondents herein due to any technological default or otherwise, and/or the calls were masked ones"

[4] Petition Nos. 142 and 143 of 2007 date of judgment October 17, 2012.

Calicut unit of the respondent observed that on AA circuit group of the petitioner, lots of calls were coming from certain numbers such as 04843042000, 04843041085, etc. When these numbers were called by the respondent, only a

busy tone was heard. When the respondent contacted the called numbers, who were the respondent's subscribers, it came to know that they were actually receiving calls from outside India from countries such as New Zealand, USA, Canada, Australia, Germany, Italy etc. The respondent accordingly addressed a letter dated October 14, 2004 to the petitioner as under:

> "It is observed that there are lot of calls on AA circuit group of M/s Reliance Infocomm Limited with their POIs at Calicut, Badagara and Kalpetta from May 2004, where the calling numbers are indicated like 04843042000, 04843041085 etc. The calling numbers when called, only busy tone was heard and these numbers are continuously busy pumping calls to BSNL POI. The number of calls with such CLI on AA group were minimal during the months of May, June, July and August, 2004. However, it is observed that from 16th September 2004, the date as agreed by you from which the alleged HCD calls of M/s Reliance Infocomm Ltd. are being routed in the ILD trunks of POI, there are a lot of calls everyday on the circuit group AA with CLI 04843042000, 04843041085 etc. The called numbers of which observations were made are all regular subscribers of BSNL who have confirmed tht the calls were from outside India like New Zealand, USA, Canada, Australia, Germany, Rome, Italy, etc. and definitely not from the numbers shown in the CLI as 04843042000, 04843041085 etc. This is clear violation of the terms and conditions of the license and is also a gross violation of the terms and conditions of the Interconnect Agreement of BSNL with M/s Reliance Infocomm Ltd. There is no provision in the Interconnect Agreement for terminating ISD calls by M/s Reliance Infocomm Ltd. in their BSO at Calicut, Badagara, and Kalpetta.
>
> In accordance with clause 2.1.9.2. of Basic Service Interconnect Agreement, one week notice from today is hereby issued for disconnection

of the Basic Service POIs at Calicut, Badagara, and Kalpetta. In view of the violation of the agreement described in the above said para. This is without prejudice to further action tht BSNL may take in this regard.

You are requested to ensure that wrong routing of calls is not done in the future of these POIs."

This letter was replied by the respondent on October 15, 2004 as under :

"Vide our letter of even No. dated 13th October 2004 it was intimated that all our HCD service calls used the series :

0223039xxxx
0333039xxxx
0443039xxxx

The issue is already in discussion with the licensor and BSNL H/Qrs and we are awaiting decision. Now, again you have alleged that you are receiving ILD calls on trunk group AA. If such calls are genuinely ILD calls we suspect that it is the handy work of some grey operator using our RIM numbers.

It may kindly be intimated whether your letter can be taken as an evidence for taking up the matter with the law enforcing authority and if so respective CDR may please be supplied to us."

As per the respondent, if these were genuinely ILD calls, the same was the handy work of some grey market operators who were using the respondent's numbers. It was further stated that the HCD (Home Country Direct) service operated by the respondent had a different series of numbers. The respondent also asked the petitioner to supply it with evidence in this regard.

Subsequently, a joint inspection by a team that included the representative of both the parties was carried out on 13.2.2004. The inspection report is available at page 856

of the paper book. As per this report, international calls were being illegally received through broadband link provided by M/s Reliance Infocom. These calls were then automatically being transited using a CISCO make router AS-5300 and suitable converters through telephone lines also provided by Reliance Infocom. Though the calls were received from other countries, these were reflected in the call data records (CDRs) as local and STD calls. Further, it was verified from some of the called numbers available in the CDRs of the number 04843041100, that they were receiving international calls. An FIR was lodged by the petitioner on 12-05-2005 against the subscribers of the petitioner subscribing to the numbers 04843042000 and 04843041085.

The Interconnect Usage Charges Regulations, 2003 provide detailed provisions with regard to the termination charges, access deficit charges (ADC) etc. Para 3.2 of Schedule 3 provides for collection and distribution of ADC. The ADC payable to the respondent was different for inter-circle calls, intracircle calls and ILD calls . It was the highest for ILD calls and since in this case, the calls were not routed as ILD calls on a trunk group meant for ILD calls, they were charged at a lower rate applicable for the trunk group on which they were wrongly routed.

Here we briefly explain the scheme of interconnection between various networks. Since the subscribers of different service providers having different networks may have a need to communicate with each other, it is necessary to connect the various networks together. The networks are connected together using some gateway switches called the points of interconnect (POI). Calls that originate in one network and terminate in another

network have to pass through the POI where these networks are interconnected. There are different type of calls that may land at a POI. Calls that originate and terminate in the same city are called local calls. The country is divided into telecom circles that generally (there are exceptions) coincide with the state boundaries. The calls originating in one city and terminating in another city within the country are called National Long Distance (NLD) or Subscriber Trunk Dialling (STD) calls. These are further classified as intra-circle calls or inter-circle calls depending upon whether the cities are within the same circle or belong to different circles. Since the tariff for a call is normally collected by the service provider in whose network the call originates, it pays what is known as the interconnect usage charges to the networks through which the calls transits and finally terminates.

Since the cost of providing fixed line networks used to be cross subsidized by NLD and ILD calls, after the opening of these segments to competition, the regulator provided for an access deficit charge (ADC) which was to be paid to the fixed line operators for the calls terminating on these lines. Further, since the ADC was different for different type of calls, they were terminated on different Trunk Groups (TGs) on which different charges were applicable. This was especially required in the case of the respondent since it was mostly doing billing based on the metered call units (MCUs). In this billing, the call duration in number of minutes is multiplied by the rate per minute applicable for the particular TG on which it lands. The CDR based billing is much more evolved as in that case the CLI is checked to identify the type of call and the rate is

applied accordingly.

It is possible for an operator to avoid paying the higher ADC applicable for the ILD calls by (i) routing the call on a TG which is not meant for ILD calls and

(ii) by masking and tampering with the CLI.

It is the case of the petitioner that unlike the Home Country Direct (HCD) service where the petitioner was terminating ILD calls using a series of local numbers thus avoiding the higher ADC, in the present case, it was being done by some of its subscribers without its knowledge. It is its further contention that a number of illegal exchanges were being operated by some unscrupulous elements, a fact which was recognized by both the licensor-DOT and the respondent, and that it was as much a victim of this as the respondent. The petitioner relied on a circular issued by the respondent-BSNL on October 25, 2004 which reads as under:

"Sub: Continuation of Unauthorized diversion in routing of ILD calls.

It has been brought to the notice of this office that although M/s Reliance Infocomm Ltd. (RIL) has claimed that tampering of CLI has been stopped w.e.f. 16th September 2004 but it has been found that international calls have been delivered on local POI of M/s RIL, at trunk group meant for intra circle terminating traffic, at various SDCC tandem exchanges, with CLI of M/s RIL network of other SDCAs which is different from 'STD Code + 3039 xxxx'. This information may be received either from customers or from BSNL staff also.

2. These may be instances of either tampering of CLI by the concerned service provider i.e.M/s RIL or due to the illegal telephone exchanges of grey market. Other private service providers may also be transiting and handing over such calls to BSNL at their POIs. In such cases, the CLI reported by the subscriber on receipt of International calls should be analysed, by the concerned SSA of BSNL, by dialing the CLI number and ascertaining whether these numbers exist in the network of M/s RIL or these numbers do not exist.

3. In case these numbers do exist then the concerned SSA of BSNL should immediately bring this information to the notice of that SSA of BSNL, where such numbers of M/s RIL are supposed to be located based on the CLI received, which shall then ask M/s RIL to arrange details of the subscribers and physical location where these telephone have been installed whose CLI has been received in incoming ISD calls. On receipt of these details of the subscribers and physical locations, a BSNL official along with a representative of M/s RIL shall verify the same and subsequently the local security agencies may be involved to stop such illegal grey market operations as per instructions issued by the O&M Cell of BSNL CO vide letter No.254-1/2003-O&M/93 dated 21 July, 2003 regarding operation of clandestine/illegal telecom centres/telephone exchanges/ILD grey market.

4. In case M/s RIL do not convey any or proper address of the customer whose CLI was sent then same should be communicated back to the concerned SSA of BSNL where such

> incoming ISD calls with domestic CLI was received, with a copy to circle office of this SSA of BSNL. In case the concerned SSA of BSNL, where such incoming ISD calls were received, finds that the telephone number of which CLI has been received do not exist or receives an intimation that M/s RIL has not conveyed any or proper address of the customer whose CLI was sent, then it shall issue a notice for disconnection under misuse of the POI in addition to raising bill, for arrears of ADC, for all the calls recorded on this trunk group from the date of provisioning of that POI or for the preceding two months whichever is less, at a rate applicable for incoming International calls, to the concerned telecom service provider who has handed over such calls to BSNL.
>
> 5. Such instances of issue of disconnection notice and raising of the bills, for arrears of ADC, as detailed above should be consolidated at BSNL Circle office level and then communicated to this office."

Mr. Chawla, Ld. Counsel for the petitioner submitted that in terms of this circular, if the numbers were in existence and details of the same were provided, the respondent could not have charged the calls at the highest rate by applying clause 6.4.6. He further submitted that the joint inspection confirmed the existence of an

illegal exchange and an FIR was launched in this regard. He argued that the petitioner cannot be held responsible for the wrongful actions of its subscribers.

We are unable to agree with the submissions of Mr. Chawla for a number of reasons. We may note here that though the respondent intimated the petitioner that its numbers 04843042000 and 04843041085 were being used to terminate international calls on 14.10.2004, these numbers were disconnected as late as 10.12.2004 and 12.01.2005, that is with a delay of about two to three months. No doubt, the petitioner replied to the letter of the respondent promptly on 15.10.2004 asking it whether it could be treated as evidence. The petitioner further asked CDRs from the respondent in support of the allegation. However, it could have as well checked its own CDRs. Had it done so, it would have known that different numbers were being called from the same two numbers. Further, all that it had to do was to call some of the numbers to confirm that these numbers were being used to terminate international calls. Even a simple call to the two numbers would have immediately shown that termination of calls on these were not possible and these were being used to only originate calls. We fail to understand why the petitioner did not do so.

We must also note that the petitioner was well aware of the modus operandi of such exchanges as it also was earlier providing similar service namely HCD. The circular of DOT referred by the petitioner also required that utmost vigilance should be exercised in providing bulk telephone connections to a single user as well as at a

single location. The relevant portions of the circular are as under:

> "Utmost vigilance should be exercised in providing bulk telephone connections at a single user as well as for a single location. Provision of 10 or more connections may be taken as bulk connections for this purpose. Special verification of bonafide should be carried out for providing such bulk connections. Information about bulk connections will be forwarded to Sr. DDGs (Vig.), DOT as well as all Secirity Agencies on monthly basis.
> The call detail records for outgoing calls made by the customers should be analysed for the subscribers making large number of calls day and night and to the various telephone numbers. Normally such numbers do not receive incoming calls. This can be done by running special program for this purpose. The service provider should devise appropriate fraud management and prevention programme and fix threshold levels of average per day usage in minutes of the telephone connection; all telephone connections crossing the threshold of usage should be checked for bonafide use. A record of check must be maintained which may be verified by Licensor any time. The list/details of suspected subscribers should be informed to the Sr. DDG(Vig.), DOT, West Block-I, Wing-2, R.K. Puram, New Delhi-66, immediately." (emphasis supplied).

Had the petitioner been vigilant, it would have immediately come to know about the purpose of these numbers. We may recall that these were ISDN PRI numbers. [5] An ISDN-PRI can carry 30 voice and two data channels which may also be used to carry voice. It is well known that ISDN-PRIs are frequently used for connecting private branch exchanges to the public network. The petitioner could not be oblivious to this. In view of the DoT circular and especially when its own HCD service was under a scanner, it should have been doubly cautious. On the contrary even when the respondent reported the misuse of these numbers, the petitioner did not do all that it should have done and took two to three months to disconnect these

[5] Integrated Services Digital Network- Primary Rate Interface.

numbers.

This Tribunal in its judgment in petition no. 2 of2008 (supra) had observed as under:

> "It is, however, not in dispute that trunk groups have been specified in terms of the agreement itself. There cannot, furthermore, be any doubt or dispute that the petitioner had full knowledge thereof. It is furthermore not in dispute that the applicable charges for local calls, STD and international calls have been specified by the Authority itself. We are not oblivious of the fact that the petitioner in its letter accepted that details were handed over to it by BSNL and it had also annexed therewith, its tabulated analysis. We, furthermore, are not oblivious of the fact that the petitioner, except for lodging two FIRs after a long time, did not take any significant step even to comply with the circular letter dated 24.06.2003 issued by the DoT. Indisputably, the petitioner is also duty-bound to comply with the said directive with a view to show that all such directives have been complied with, so as to explain the measures taken by it for plugging the loopholes so that neither national security is breached nor illegal international calls are passed on as local calls." (emphasis supplied)

Though that petition was disposed of by this Tribunal observing that interest of justice would be sub-served if the respondent is directed to hand over the relevant CDRs to the petitioner so as to enable it to offer explanations thereabout, if any, at that time the Tribunal did not have the benefit of the Hon'ble Supreme Court's judgment declaring the clause 6.4.6 as not penal but a preestimate of reasonable compensation. In view of the interpretation of the Hon'ble Supreme Court, no mens rea on the part of the petitioner is required to be established and, in our view, lack of due diligence on its part that caused a loss to the respondent is sufficient for the invocation of this clause. We find that in the facts and circumstances of this case, it cannot be said that the

petitioner carried out due diligence and was not negligent. We find that the respondent is, therefore, well within its rights to invoke the clause 6.4.6.

We now come to the question of interest. On 10.2.2011, the respondent has raised a bill of Rs. 87,79,04,983/- towards interest against the bills raised over the period from 29.9.2004 to 4.10.2005. The interest has been charged on 100% of the unpaid amount till 4.1.2008 and thereafter, on 35% of unpaid amount till 10.2.2011, since 65% of the principal amount was paid as per the interim order of this Tribunal dated 4.1.2008 in petition no. 2 of2008. The petitioner challenges the validity of clause 7.5 of the interconnect agreement under which the interest has been charged, on the ground that it is unreasonable, one sided and violates Article 14 of the Constitution. We are not inclined to go into the validity of the clause as this Tribunal has already held that it has to applied on a reciprocal basis and permitted to be so applied even when fresh agreements incorporating the same on a reciprocal basis were not executed. An appeal in the matter is pending before the Hon'ble Supreme Court.

We, however, note that in the present case, though the bills were raised in 2004-05, the petitioner had raised disputes and asked for CDRs. After some exchange of correspondence between the parties, the original demand of Rs. 96.53 crores was revised by the respondent on 29.12.2007 to Rs. 90,37,74,435/On 2.1.2008 the petitioner came to the Tribunal by filing petition no. 2 of 2008 and on 4.1.2008, the Tribunal stayed the operation of the impugned demand notices asking the petitioner to pay 65% of the total demand. Since then the matter has been under litigation. Under

the circumstances, we find that the interest of justice will be sub-served if the payment of interest was limited to the period from 29.12.2007 , date when the revised demand was raised, to 2.1.2008 , date when the petitioner came to the Tribunal for the first time. We direct accordingly.

In view of the foregoing, we direct that the petitioner shall pay Rs. 31,63,21,053/- to the respondent being the balance 35% of Rs. 90,37,74,435/within four weeks of the date of this order. The respondent shall rework the interest as directed above and raise a fresh bill for the same which shall than be paid by the petitioner within four weeks.

Parties to bear their own costs.

(Aftab Alam)
Chairperson

(Kuldip Singh)
Member

/NC/