

TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL  
NEW DELHI

Dated 30 March, 2016

Telecommunication Petition No.843 of 2012

M/s Aircel Limited

...Petitioners

Vs.

Vodafone India Ltd & Ors.

...Respondent

**BEFORE:**

**HON'BLE MR. JUSTICE AFTAB ALAM, CHAIRPERSON**

**HON'BLE DR. KULDIP SINGH, MEMBER**

**HON'BLE MR. BIPIN BIHARI SRIVASTAVA, MEMBER**

For Petitioner

: Mr.Meet Malhotra,Sr.Advocate  
Mr. Ravi S. S. Chauhan, Advocate  
Ms. Pallak Singh, Advocate

For Respondents

: Mr. Saket Singh, Advocate  
Ms.Sangeeta Singh,Advocate

## **Judgment**

### **Kuldip Singh:**

Whether the respondents are correct in levying a charge @ 0.10 paisa or any other amount as SMS<sup>1</sup> Termination Charges and for what period? Whether the imposition of SMS Termination Charges and demands raised by the respondent are unilateral, discriminatory, unreasonable, arbitrary and illegal? Whether the arrangement between the parties to the present petition, in so far as SMS Termination Charges are concerned has always been one of 'Bill & Keep' where nothing is payable by either party to the other for the said services? These are the main questions that arise in the present petition.

### **Brief Background**

Before we go into the facts of the case, we may describe the interconnection of telecom networks in brief.

It is well known that no telecom network can exist in isolation as the subscribers of one network would also want to communicate with the subscribers of other networks. For this reason, the networks are interconnected together. When a new network is set up, it may have very few subscribers. However, as the network grows the subscriber base also grows. The older

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<sup>1</sup> Short Message Service.

networks such as those belonging to the incumbent operators, usually have a subscriber base which is much larger than those of the new networks. The survival of the new operators, therefore, depends upon the interconnection of the new networks with the older networks. This is the reason that interconnection arrangements, all over the world, are regulated to a large extent by independent regulators. The interconnection is not only mandated by the regulations but the regulators also ensure that it is on non-discriminatory, fair and reasonable terms.

An important element of interconnect regulations is the interconnect Usage Charge (IUC) which is usually cost based. Let us take the example of a voice call that originates in network "A" and terminates in Network "B". While the operator of the Network "A" earns revenue from the subscribers in a "calling party pay" regime, resources of the network "B", in which the call is terminated, are also used for which the operator of the network "B" incurs a cost. The regulators, therefore, prescribe a charge to cover, fully or partially, the operational and capital costs (usually incremental) incurred by the operator of the network "B". For example, in the case of mobile networks such a charge is usually known as Mobile Termination Charge (MTC). Another example of an interconnect charge can be that of Port<sup>2</sup> charges.

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<sup>2</sup> Ports are used to provide physical interconnection between two networks.

A distinction may be made between the interconnection charge for an essential element of interconnect and a revenue share for a value added service<sup>3</sup>. It is possible that two networks together provide a value added service but the revenue for the service may be collected by the operator of one network. It may share this revenue with the operator of the other network. For example, a SMS that a subscriber may wish to send to participate in a TV contest. Such a SMS may be a premium SMS for which the subscriber may be required to pay a much higher rate than a normal SMS. The revenue from such a service may then be shared between the originating and terminating networks as well as the organizers of the contest. Another example can be that of a Toll Free Number such as 1-800-xxxxxxx. Subscribers making calls to such numbers do not pay any charges. On the other hand, the subscriber to whom the calls are made usually pays a premium charge. Though such calls also use interconnect between the networks, the regulators, following the doctrine of *laissez faire*, generally refrain from regulating such charges.

### **Facts of the case**

The petitioner, namely Aircel Ltd, Aircel Cellular Ltd. and Dishnet Wireless Ltd. are telecom service providers operating in all the telecom circles of India under the name “Aircel Group. The respondents are also telecom service providers operating under different names in various telecom circles

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<sup>3</sup> Value added services are services other than basic services that provide some additional value to the subscribers.

under the brand name “Vodafone”. Both the petitioner and the respondents have been granted licenses under section 4 of the Indian Telegraph Act, 1885, by the Department of Telecommunications, who is the Licensor.

The parties entered into interconnect agreements for different telecom circles the details of which are as under:

Sl. No.	Parties	Interconnection Agreement Date	Circles covered
1.	Vodafone Essar Spacetel Ltd. & DWL	22.12.2009	Madhya Pradesh
2.	Vodafone Essar Ltd.& its other group companies and Aircel Group and DWL	18.10.2007	Assam, NE, J&K, Orissa, Himachal Pradesh, Bihar, Haryaya, Kerala, Kolkata, UP(East), UP(West), Punjab, Delhi, Andhra Pradesh, Gujarat, Karnataka, Maharashtra, Rajasthan and Mumbai
3.	DWL & Hutchsion	07.03.2006	West Bengal

	Essar South Ltd.		
4.	BPL Mobile Cellular Ltd. and Aircel Ltd.	24.12.2002	Rest of Tamilnadu(ROTN)

Though there are different interconnect agreement for different circles executed at various points of time, the contents of these agreements are somewhat similar. Some relevant clauses of these interconnect agreements are as under :

## “2. Scope

2.1. This agreement sets out the framework for the conduct of the relationship between the parties as telecommunication providers whose networks are interconnected and to provide continuous telecommunication services covered under this agreement. This agreement establishes how the parties will provide, serve and invoice telecommunications services (covered in this agreement) to each other subject to the terms and conditions of the license(s) granted by the Government of India (Department of Telecommunications) and the Regulations / Orders/directives issued by TRAI.

2.10 The parties further acknowledge that the parties will mutually discuss to arrive at solutions to the issues arising out of any change in the terms and conditions of the license of either party at any point of time requiring changes in the interconnections arrangement in this agreement.

## 3. AMENDMENTS

3.1 Any amendments to this agreement shall be based on mutual agreements in writing and shall be registered with TRAI.

## 11. REVIEW

### 11. If

(a) any authorized governmental agency makes any statement, direction, regulation, order or determination in relation to interconnectivity ; or

(b) there is any other substantial change in the regulatory environment affecting telecommunications.

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

## 12. INTERCONNECTION CHARGES AND BILLING

12.1 The parties agree that all payments and rates for routing of calls. Access charges, interconnection charges, revenue sharing, rates for space, port charges and other related issues shall be in terms of schedule 1. The aforesaid charges may be amended from time to time in case of change arising out of mutual discussions, amendment by TRAI or by any judicial or statutory authority.

### 12.3

-----Provided, however for a period not exceeding seven (7) days for the date of receipt of the invoice, the Parties shall make a good faith attempt to reconcile their respective CDRs to resolve all differences on account of disputed accounts. If the Parties are still unable to resolve the differences within respect to the disputed amounts within the said period of seven (7) days, dispute shall be subject to dispute resolution mechanism, as more particularly detailed in clause 18 below. Further if any amount is payable/refundable upon reconciliation, the same shall be paid/refunded immediately along with applicable interest from the Due Date till date of actual payment.

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Admittedly, as far as the SMS termination charges are concerned, the interconnect agreements are silent. However, SMS were being terminated by both the parties on each other's network from the beginning and no termination charges were being collected by any party when on 25.08.2010, the respondent for the first time proposed a SMS termination charge of 10 paisa per SMS and accordingly proposed a supplementary clause to the existing interconnection agreement between the parties which is as under:

“...the parties agree to pay an SMS termination charge of 10 paise/SMS for all SMS originated from either party's network and terminated on the other party's network from 1st October 2010.”

The petitioner, disagreeing with the proposal, wrote to the respondent on 28.09.2010 as under, asking about the methodology used by it for arriving at the termination cost:

“...the methodology used for arriving at termination cost of @ 10 paise per SMS. This is important because, as you know, we live in the times of a cost based IUC regime, so the costing becomes very relevant...”

The respondent, however, went ahead and vide its letter dated 25.10.2012, asked the petitioner to pay Rs. 40 and odd crores for SMS termination charge. Vide letter dated 21.11.2012, the respondent further wrote to the petitioner to the effect that as the petitioner did not respond to its letter

dated 25.10.2012 nor made the payment on net basis, the SMS termination facility was being withdrawn. The petitioner then came to the Tribunal on 20.11.2012. On that day, the Tribunal passed the following interim order:

“9. The respondent does not want to continue the service of interconnection between the parties if the petitioner is not ready to pay @ 10 p per SMS. However, the petitioner wants to continue to use the SMS termination facility with the respondent but contends that it has right to continue on “bill and keep” basis.

In its judgment dated 24.09.2012, this Tribunal had already held that if one party does not want to continue the arrangement, without charges, no body can force that party to continue with the arrangement. Therefore, that party can terminate the existing arrangement, if it so wishes. The respondent wants interconnection charges for SMS termination @ 10 p per SMS. There is a need to examine whether the rate of termination charges demanded by the respondent are in accordance with the regulation, i.e. The Telecommunication Interconnection Usage Charges (2 of 2009) 2009 notified on 9.3.2009 and whether such charges are transparent, reciprocal and nondiscriminatory.

10. If the disconnection of the SMSs between the parties are allowed the subscribers of both the parties will suffer. Therefore, keeping in view the interest of both the parties, pending final hearing, it is directed that SMS services of the petitioner shall not be disconnected and wherever disconnection has taken place, the same will be restored immediately subject to the condition that petitioner will start paying 50% of the amount demanded by the respondent @ 10 paise per SMS on net inflow of traffic basis. This amount will be calculated and paid with effect from the date of filing of this petition.

11. This payment will be without prejudice to the rights and contentions of the parties and equities will be adjusted between the parties at the time of final hearing.”

During the pendency of the petition, the Telecom Regulatory Authority of India (TRAI) promulgated the Short Message Services (SMS) Termination Charges Regulations, 2013 (7 of 2013) which came into force with effect from 01.06.2013. Clause 3 of these regulations is as under :

**“3. Termination charges for Short Message Services (SMS):--**

Every Originating Access Provider shall pay to the Terminating Access Provider a termination charge of Re. 0.02 (paise two only) for each Short Message Service (SMS) terminated by it on the network of Terminating Access Provider;

Provided that termination charges for international incoming Short Message Service (SMS) shall be under forbearance.”

Keeping this in view, the tribunal modified its interim order dated 23.11.2013 as under:

“Since the statutory provision has been brought into effect from June 1, 2013, the interim orders passed in this case on 23.11.2013 needs to be modified and brought in accordance with the statutory provision. That is to say, from 1.6.2013 ‘termination of SMS charges’ shall be payable as provided in the statutory regulations.”

The respondent has filed a counter claim for a total amount of Rs. 47,88,66,220/- for SMS traffic on net basis for the period from 01.04.2011 to

31.05.2013. It has also claimed interest as per the interconnect agreement and service tax of Rs. 16,88,33,271/-

### **Regulatory Framework**

Before we note the submissions made by the parties, we may describe the regulatory framework for interconnection of telecommunications networks in India.

The TRAI notified the Telecommunication Interconnection (Charges and Revenue Sharing), Regulation, 2001 (5 of 2001) on 14.12.2001. Clause 3(vi) of this regulation states “Unless specifically so provided, the Authority has forborne with respect to interconnection charge.” Schedule I of this regulation provides for Interconnection Charge and Revenue Sharing. There was no mention of SMS termination charge in this Schedule.

On 29 October 2003, the TRAI notified “The Telecommunication Interconnection Usage Charges Regulation, 2003 (2 of 2003). This regulation superseded the earlier regulation dated 24 January 2003 (1 of 2003) and its amendments dated 27 March 2003(1<sup>st</sup> amendment) and 16 June 2003 (2<sup>nd</sup> amendment) . As per clause 3 of this regulation, interconnection charges shall continue to be governed by “The Telecommunication Interconnection (Charges and Revenue Sharing), Regulation, 2001 (5 of 2001)” except to the extent modified by this regulation. Clause 4 of this regulation provided for

Interconnection Usage Charges, and Schedules I to III specified the “Termination Charges”, “Carriage Charges” and “Access Deficit Charges”. Clause 4(i) of this regulation states “Unless specifically provided in the Schedules to this Regulation, the Authority forbears with respect to other Interconnection Usage Charges”. Again no termination charge was specified for SMS. In the Explanatory Memorandum to the regulation, TRAI Observed as under:

“68. No separate traffic/ cost data was available with TRAI to ascertain usage charges for resources utilized in transmission of short messaging service (SMS). The Authority is of the view that at present, the service providers should work out mutual arrangements for usage charges for exchange of SMS. The Authority has forbore in respect of IUC for SMS at present, and may re-visit this matter in the near future based on the exercise of collection of additional data in this regard.”

On 9<sup>th</sup> March, 2009, the TRAI issued “The Telecommunication Interconnection Usage Charges (Tenth Amendment) Regulations, 2009 (2 of 2009). Vide this regulation, “ Schedule IV – Interconnect Usage Charge (IUC) for Short Message Service (SMS)” was inserted in The Telecommunication Interconnection Usage Charges Regulation, 2003 (4 of 2003) [ also referred as the principal regulations]. As per this Schedule IV, IUC for SMS shall be under forbearance, provided that such charges shall be transparent, reciprocal and non-discriminatory.

On 1<sup>st</sup> December, 2010, the TRAI issued “The Telecom Commercial Communications Customer Preference Regulations, 2010 (6 of 2010). This regulation differentiated between “SMS” and “Transactional message”, “message” and “promotional message”, and a commercial communication, as under:

“2. Definitions

(i) “commercial communication” means any message, voice or SMS, made through telecommunications service, which is transmitted for the purpose of informing about, or soliciting or promoting any commercial transaction in relation to goods, investment or services;

(n) “message” shall have the meaning assigned to it in clause (3) of section 3 of the Indian Telegraph Act, 1885 (13 of 1885);

(t) “promotional message” means message containing promotional material or advertisement of a product or service;

(w) “SMS” means a message which is sent through short message service and includes a Multi Media message which is sent through Multi Media message service (MMS);

(ab) “Transactional message” means an SMS containing only—  
(i) information sent to its customer(s) by the Bank or financial institution or insurance company or credit card company or Access Provider pertaining to the account of that customer(s);  
(ii) information given by Airlines or Indian Railways or its authorised agencies to its passengers regarding travel schedules, ticket booking and reservation; (iii) information from a registered educational institution to parents or guardians of its students; (iv) any other message as may be specified by the Authority, from time to time as “Transactional message”;

This regulation also put some obligations on the originating access providers with regard to promotional and commercial communications including SMS.

As per seventh amendment to this regulation, notified on 25<sup>th</sup> October, 2011, a promotional SMS charge was defined as under:

“(ta) “promotional SMS charge” means the charge payable by an Originating Access Provider to the Terminating Access Provider for each promotional SMS sent by a registered telemarketer from the network of the Originating Access Provider to the network of the Terminating Access Provider.”

The promotional SMS charge was fixed as Rs. 0.05 (five paisa).

On 24<sup>th</sup> May 2013, eleventh amendment to this regulation was issued that defined a “transactional SMS charge” and fixed the same as Rs. 0.05 (five paisa) same as that for a promotional SMS charge. On the same date, “The Short Message Services (SMS) Termination Charges Regulations, 2013 (No. 7 of 2013)” was notified that for the first time provided a termination charge for SMS other than a promotional/transactional SMS. Clause 3 of this regulation reads as under:

“3. Termination charges for Short Message Services (SMS):-----

Every Originating Access Provider shall pay to the Terminating Access Provider a termination charge of Re. 0.02 (paise two only) for each Short Message Service (SMS) terminated by it on the network of Terminating Access Provider;

Provided that termination charges for international incoming Short Message Service (SMS) shall be under forbearance.”

## **Submissions**

Mr. Meet Malhotra, Ld. Senior Advocate, appearing for the petitioner, made the following submissions.

1. Interconnect Usage Charges were to be cost based from the beginning and that mandate was never changed. Though the IUC regulation 2009 mentioned SMS termination charge and prescribed forbearance for it, the same was always under forbearance even prior to that and this regulation continued the same.
2. In terms of the existing IUC regulation, arrangement between the parties has been on “bill and keep” basis for interconnection of SMS services as per which each party billed for SMS to its subscribers but did not charge each other for termination of the same.
3. The respondent’s unilateral proposal of charging SMS termination @ 10 p per SMS was arbitrary and illogical. Though the petitioner asked the respondent for the methodology used for arriving at termination cost of 10 paisa per SMS vide its letter dated 28.09.2010, the respondent never provided the same. This information was vital for ensuring fair, just, transparent and non-discriminatory interconnection for SMS.

Before we examine the rival submissions, we may note that the very same issues were raised before the Tribunal in another petition<sup>4</sup>. In an identical factual matrix, the Tribunal, after noting the definition of forbearance, found that the parties were free to fix any rate of IUC for SMS among themselves. Though “Bill and Keep” could be one system of IUC, the conditions imposed by the proviso to schedule IV of IUC regulation made it mandatory on the part of both the parties only to see that IUC charges are transparent, mutual and non-discriminatory.

The Tribunal further noted that the respondent service provider had fixed a uniform charge of 10 paise per SMS for all the interconnection seekers and agreed to pay the same rate to the service provider without any discrimination on the basis of traffic or volume. Therefore, the respondent fulfilled all the conditions of reciprocity, transparency and non-discrimination. Noting the submission made on behalf of the petitioner to the effect that interconnection usage charges must be based on cost in terms of the clause 3 of the regulation 2001, the Tribunal found that the principle of cost based interconnection charges could have been applicable as long as the regulator did not make any specific provision for IUC for SMS. In view of the specific provision of SMS

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<sup>4</sup> See *Aircel Limited & Ors. Chennai Vs. Bharti Airtel Ltd, New Delhi*. Petition No. 130 of 2012. Judgment delivered on 24<sup>th</sup> September, 2012.

charges in the 2009 regulation, the SMS charges need not be determined on the basis of cost. The relevant part is as under:

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

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

The Tribunal further observed that as no agreement had been executed between the parties for interconnection charges for SMS and the services between the parties were based on unwritten understanding, if one party did not want to continue the arrangement without charges, it could not be forced to do so and the respondent was free to disconnect the interconnection for SMS. Applying the doctrine of restitution, a direction was issued to the petitioner to pay the respondent IUC @ 10 paisa per SMS on net traffic for the period during which the respondent was restrained by the Tribunal from taking action<sup>5</sup>. An appeal against this judgment of the Tribunal is pending in the Apex Court but there is no interim order of stay.

Though the issues raised in the present petition are the same, Mr. Malhotra insisted that there was a difference in facts in view of an important

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<sup>5</sup> While agreeing with the operative part of the judgment authored by the Member, the Chairperson observed that if the respondent intends to realize any amount alleged to be due from the petitioner, it may file an appropriate petition for that.

development that took place subsequent to the judgment of the Tribunal and which may have a direct bearing on the findings arrived at by the Tribunal. He referred to the Short Message Services (SMS) Termination Charges Regulations, 2013 (No. 7 of 2013) that was notified on 24<sup>th</sup> May 2013 and that came into effect on 01.06.2013. This regulation fixes the SMS termination charge at Rs. 0.02 (two paisa) per SMS. As per Mr. Malhotra, the explanatory memorandum (EM) to this regulation makes it amply clear that the above charge is cost based. Some of the relevant paras of the E.M. are as under:

“19. In continuation to its consultation paper, the Authority vide its letter dated 13.12.2012, also asked all the service providers regarding the international practices with regard to SMS termination charge, network element used for providing SMS termination, cost data and costing methodology for estimating SMS termination charge. Many of the service providers have reiterated their stand of Bill and Keep for SMS termination charge as they have submitted in their comments on the consultation paper dated 27.04.2011. In support of their suggestion of Bill and Keep, they have also submitted international practices in this regard. These service providers have submitted that in case, TRAI decides to prescribe SMS termination charge, it should be strictly on the basis of cost and according to their submission it should be less than 1 paisa.

20. In response to the letter dated 13.12.2012, some of the service providers submitted network element wise cost bifurcation and cost estimation model for determination of SMS termination charge. According to their submissions the SMS termination charge ranges from 0.76 paisa per SMS to 10.4 Paise per SMS. These service providers were called for meeting in TRAI to explain the costing methodology used by them for estimating SMS termination charge. During the meeting they showed their cost model estimating SMS termination charge. Some of the service providers in their submission stated that Fully Allocated Cost (FAC) model should be adopted in India for determining SMS termination charge.

28. The information furnished by service providers in ASR is confidential. Therefore, name of the service providers and cost data submitted by them are not mentioned in the above table. From the above table, it may be seen that the SMS termination charge varies from 0.87 paisa to 2.87 paisa and the Industry average is 1.85 paisa per SMS. In this exercise, total CAPEX of wireless network submitted by the service providers has been suitably apportioned on the basis of percentage Contribution of SMS on wireless network resources of the operators but the operational cost has been taken as submitted by the service providers in their ASR. In case, the total OPEX of wireless network is also apportioned on the same basis as used for CAPEX allocation towards SMS, the SMS termination charge comes out to be 1.1 Paise.

29. In the above Table, the cost of termination charge of operator C comes 2.87 paisa per SMS. On examination, it was observed that operator C has allocated relatively very high cost towards 'cost other than network elements'. If this cost is normalized either with the similarly situated operator or with the industry average, SMS termination charge for this operator works out to be around 1.8 paisa per minute.

**30. Keeping in view all the above analysis the Authority decided that cost based SMS termination charge should be Re. 0.02 (Paise 2 only) per SMS.**

(emphasis supplied).

Para 1 of the above EM reads as under:

- 1. The framework of Interconnection Usage Charges (IUC) was established by TRAI through "The Telecommunication Interconnection Usage Charges (IUC) Regulation, 2003 (1 of 2003) dated the 24th January 2003.** This regulation was implemented from 1st May 2003. At that time the focus was on voice related charges and Short Message Services (SMS) termination charges were under forbearance.

(emphasis supplied).

As per the regulator, framework for interconnection was established through IUC regulation 2003. We may note some of the definitions as per this regulation, as under:

(vii) "Forbearance" means that the Authority has not, for the time being, notified any charge for a particular telecommunication service and the service provider is free to fix any charge for such service.

(viii) "Interconnection" means the commercial and technical arrangements under which service providers connect their equipment, networks and services to enable their customers to have access to the customers, services and networks of other service providers.

(ix) "Interconnection Charge" means the charge for interconnection levied by an interconnection provider on an interconnection seeker.

(x) "Interconnection Usage Charge (IUC)" means the charge payable by one service provider to one or more service providers for usage of the network elements for origination, transit and termination of the calls.

Clause 3 of this regulation provides as under:

### 3. Interconnection Charges

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

The regulation, 2001 differentiates between interconnection charges and revenue sharing for telecom services. Clause 1 (ii) of this regulation is as under:

(ii) The Regulation shall cover arrangements among service providers for interconnection charges and revenue sharing, for Telecommunication Services, including wireless in local loop with limited mobility [WLL(M)], throughout the territory of India, as also those originating in India and terminating outside India.

Mr Malhotra referred to Clause 3 of this regulation which is reproduced below.

### 3. Interconnection Charges

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

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

**(iii) No service provider shall discriminate between service providers in the matter of levying of charges for interconnection.**

Provided that a different charge may be levied if justified on the basis of a substantial difference in costs incurred for providing that particular interconnection.

**(iv) No service provider shall be charged for any interconnection facility it does not seek or require.**

Provided that if interconnection facility cannot be provided in the form that is sought or required by the interconnection seeker, the issue may be decided mutually between the seeker and provider of interconnection. In case such mutual agreement is not possible, the matter may be reported to the Authority for a decision. The interconnection provider shall inform the interconnection seeker within 30 days of the request for interconnection facilities whether the facilities can be provided in the form sought or required by the interconnection seeker.

(v) In the absence of a mutual agreement between the Interconnection provider(s) and the seeker(s), in respect of charges for the elements of the network used to provide interconnection, charges for the elements of the network used to provide Interconnection will be as specified by the Authority from time to time. **In the event mutual agreement is not arrived at in respect of the interconnection sought and / or**

**charges therefor, within 30 days from the date of such request , both the parties will approach TRAI with the details of their network element costs and traffic particulars for a determination in the matter. Pending such a determination the existing arrangement, if any, will continue.**

(v)(a) **The existing charging arrangements, if any, between the Interconnection seekers and Interconnection providers shall hold good until changed with the concurrence of the Authority, or on the basis of a regulatory determination.**

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

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

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

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

(emphasis supplied)

As per Mr. Malhotra, from the above, it is clear that interconnection charges are not only to be cost based but the costs to be taken into account are

incremental or additional costs incurred. Even where the authority has forborne, the charges are to be based on the principals enunciated in this.

Mr. Saket Singh, Ld. Counsel for the respondent submitted that clause 3(i) carves out an exception as per which the interconnection charges can be other than cost based and forbearance is a part of this exception. As per him, “forbearance” and “cost based” are two different concepts. He relied on judgment of this Tribunal in *Bharti Airtel Ltd. Vs. Tata Teleservices Ltd. & Anr*<sup>6</sup>.

We are unable to agree with these submissions. In our view, there is a need to differentiate between an interconnect charge for an element of interconnect used for an ordinary service vis-à-vis a share of revenue from a premium service. In the context of the present case this would be ordinary SMS generated by a subscriber vis-à-vis a commercial SMS (premium<sup>7</sup>, promotional or transactional) generated by a commercial person. In our view, the exception carved out in clause 3(i) is for revenue sharing in case of such commercial/premium services. This is also borne out from the fact that while the TRAI prescribes a 2 paisa charge per SMS for interconnect usage, it separately provides for an additional 5 paisa revenue share for promotional/transactional SMS. If meaning of forbearance in respect of an

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<sup>6</sup> Petition No. 430 of 2011 judgment delivered on 30<sup>th</sup> August 2012.

<sup>7</sup> We have given example of a premium SMS while giving background of interconnection such as those used in TV contests.

element of interconnect for an ordinary service was to be any charge, this will not only lead to a higher charge to the subscriber but the new service providers may find it difficult to compete with the incumbents defeating the very objectives of a regulated interconnect regime.

Further, what is the meaning of clause 3 (viii) “Interconnection charges mutually agreed among interconnection seeker and provider shall be based on the principles enunciated in this Section”? To our mind the main principals enunciated are that interconnect charge is to be cost based and how these costs are to be determined.

The observation of the Tribunal in the case of Bharti Airtel Ltd. Vs. Tata Teleservices Ltd. & Anr. in para 27 was made in the facts of that case where there was a valid contract between the parties. Even in the judgment of Tribunal in Aircel Ltd. Vs. Bharti Airtel (above), the Tribunal observed as under:

“Initially, the interconnection charges between the service providers were based on the Telecommunication Interconnection (Charges and Revenue Sharing) Regulation 2001 (5 of 2001) dated 14th December 2011. **Under the said regulation, the interconnection charges were to be cost based. For determining cost based interconnection charges, the main basis was to be incremental cost or additional cost directly attributable to the provisions of interconnection.** The said regulation further forbore from specifying interconnection charges. However, the mutually agreed charges will be based on the principle enunciated in this regulation.”

(Emphasis supplied)

The Tribunal in that case further observed as under:

“The Regulator did not make any specific provision for regulating the SMS till the amendment of 2009. The interconnection charges for SMS remained on the principle of forbearance, therefore, the conditions provided in the Regulation 2001 as aforementioned prevailed. Clause 3 of the IUC Regulation 2003 prescribes that the interconnection charges shall continue to be governed by Regulation 2001 to the extent modified by this Regulation. **The principle of cost based interconnection charges could have been applicable as long as the regulator did not make any specific provision for IUC for SMS.**

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

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

(emphasis supplied).

It is evident from the above that the Tribunal found that as long as the regulator did not make any specific provision for IUC for SMS, principal of cost based charge was applicable but with the amendment of regulation in 2009, a specific provision for IUC for SMS was made to keep it under forbearance and the only condition for fixing the charges was that such charges are transparent, reciprocal and non-discriminatory. As per the Tribunal, transparency does not mean that the charges have to be cost based. Further, non-discrimination means the application of the same principle among the persons similarly situated and

the word reciprocal does not mean both the operators must agree but it means that the parties to the contractual should charge each other the same. The observation of the Tribunal is as under:

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

From the explanatory memorandum (EM) to the 2009 regulation, it is evident that the decision to continue with forbearance for SMS termination charge was based on the premise that IUC is not being realized by the service providers from each other. The authority further noted that by and large the arrangements prevalent were “bill and keep” and mutually agreed reciprocal arrangements and it was hopeful that the service providers would continue with these arrangements in a fair, transparent and non-discriminatory manner. On the other hand, the authority found that the cost involved in handling SMS is insignificant as compared to handling voice and there were complexities involved in accounting for SMS.

The relevant part of the regulation and the EM are as under:

“5. After Schedule III to the principal regulations, the following Schedule shall be inserted, namely:- “Schedule IV INTERCONNECT USAGE CHARGE (IUC) FOR SHORT MESSAGE SERVICE (SMS) Interconnect Usage Charge (IUC) for Short Message Service (SMS).- Interconnect Usage Charge (IUC) for Short Message Service (SMS) shall be under forbearance:

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

“5.2.7. The cost involved with the handling of SMS in any of the service providers network is insignificant as compared to the cost for handling voice. In addition there are complexities involved in accounting for IUC for SMS. SMS is sent by the SS7 signalling channel and in order to bill and verify SMS termination internally, the mediation system needs to be able to generate SS7 CDRs for the billing system to count and rate the number of SMS messages. The terminating operators, in many cases, may have to rely on the originating operator to supply them with records of the SMS count of messages landing on their network. The billing system also needs to be scalable enough to process a large (and increasing) number of SMS arriving on the network. The prevailing trend in the industry is that IUC is not being realized by the service providers from each other.

5.2.8. The uptake of SMS by GSM customers has been a major success story for the mobile industry. Also in view of the fact that by and large the arrangement prevalent today are “bill and keep” and mutually agreed reciprocal arrangements, the Authority believes that the service providers would continue with these arrangements in a fair, transparent and non-discriminatory manner. The Authority has therefore decided to continue with the policy of forbearance in the matter of IUC on SMS, however, to keep watch on the market reporting requirements is being incorporated.”

We may also note here that the TRAI, vide its letter to the respondent dated 22<sup>nd</sup> February, 2011, noted that some service providers were levying fixed SMS termination charges unilaterally in a discriminatory manner and that charges levied were not cost based. It advised all the service providers including the respondent, to follow the schedule IV of the regulation strictly. The relevant part of the letter is as under:

“2. It was brought to the notice of the Authority by a number of service providers that discriminatory termination charge for SMS are 18 being levied by some service providers. The Authority sought comments from the concerned service providers and after examining the replies furnished by them and interconnection agreements filed by service providers with TRAI, the Authority noticed that some service providers are levying fixed SMS termination charges unilaterally on new operators and in a discriminatory manner.

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

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

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

Mr. Saket Singh, rightly argued that a letter/direction of TRAI cannot override the regulation.

Though the submissions made by Mr. Malhotra are not inconsequential, they are directly in teeth of the Tribunal’s judgment. While the intent of the regulator, as evident from the EM to the 2009 regulation and its letter above, does not appear to be for an IUC charge which could be anything, not necessarily based on cost, and in the realm of a pure commercial contract, the Tribunal, giving a strict interpretation of the regulation, found otherwise. As per it, if a service provider wanted a termination charge of 10 paisa per SMS, it was permitted to do so as long as it also paid the same charge on a reciprocal

basis and had the same arrangement with other service providers. The Tribunal of course did not have the benefit of 2013 regulation.

However, during the pendency of the present petition, the 2013 regulation was issued and we cannot ignore the fact that it prescribes a SMS termination charge which is indisputably cost based. It would be somewhat anomalous that IUC for SMS termination, which prior to 2009 regulation and as per 2013 regulation was cost based , should be anything other than cost based in the interregnum.

Be that as it may, since all the issues raised in the present petition were discussed and decided by the Tribunal in Aircel Ltd. Vs. Bharti Airtel, and an appeal against the same is pending in Apex Court, we do not find it appropriate to say anything further especially, as it may amount to per-empting the appeal pending in the Apex Court.

It was submitted by Mr. Malhotra that the present bench being a larger bench<sup>8</sup> can re-examine the issues. With regard to his submission, he relied on Central Board of Dawoodi Bohra Community and Anr. Vs. State of Maharashtra and Anr.<sup>9</sup> and Union of India and Anr. Vs. Paras Laminates (P) Ltd.<sup>10</sup> Our attention was also drawn to a decision of the Appellate Tribunal for Electricity at New Delhi in Maruti Suzuki India Ltd. Vs. Haryana Electricity

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<sup>8</sup> The bench in case of Aircel Ltd. Vs. Bharti Airtel comprised of Chairman and Member.

<sup>9</sup> (2005) 2 SCC 673

<sup>10</sup> (1990) 4 SCC 453

Regulatory Commission and Anr. [judgment dated 24<sup>th</sup> March, 2015]. It was submitted that under similar circumstances, the Tribunal did go ahead and decide the matter.

We do not wish to make any pronouncement on the issue of binding precedent also for the reason that the appeal from the earlier judgment of the Tribunal is pending before the Hon'ble Supreme Court.

We now come to the counter claim filed by the respondent -counter claimant. As per the counter claimant, the claim is filed in respect of net SMS terminated by the petitioner on the network of respondent between 1.4.2011 to 31.05.2013. The claim is for an amount of Rs. 47,88,66,220/- along with interest at the rate specified in the interconnect agreement for delayed payments. The claimant is also demanding service tax of Rs. 16,88,33,271/- . As per the counter claimant, the service tax is to be paid by the petitioner as per the understanding between the parties.

The above claim is based on a charge of 10 paisa per SMS that was offered by the counter claimant to the petitioner vide its letter dated 25.08.2010. The claimant has enclosed CDRs (Call Data Record) in support of its claim.

Mr Malhotra raised a preliminary objection regarding the maintainability of the counter claim citing Order 8 Rule 6 A of the CPC. It was submitted that

the same could be filed either before or, at the most, at the time of filing of the reply by the respondent. Admittedly, the respondent filed the counter claim on or around 31.03.2014 i.e. 11 months after filing the reply. It has also not provided any reasons for this delay. It was further submitted that when there is a statutory bar, the courts cannot exercise discretion. With regard to his submission, reliance was placed on Bollepanda P. Poonacha and Another Vs. K.M. Madapa<sup>11</sup>. We do not agree. In terms of the provision of Order 8 Rule 6-A, it is the cause of action that must accrue before the respondent has raised its defence. Relevant part of para 11 of the judgment cited is as under:

“The provision of Order 8 Rule-6A must be considered having regard to the aforementioned provisions. A right to file counter claim is an additional right. It may be filed in respect of any right or claim, the cause of action therefor, however, must accrue either before or after filing of the suit but before the defendant has raised his defence.-----“

The cause of action in this case accrued much before the respondent filed the counter claim.

As per the claimant, the offer of 10 paisa per SMS was made by the claimant to all operators including the petitioner. This offer was in the nature of a statutory offer as it complied with the obligation imposed upon it by the regulation dated 09.03.2009 (2009 regulation). As per it, while the operators

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<sup>11</sup> (2008) 13 SCC 179.

could determine any rate, this had to be transparent, non-discriminatory and reciprocal.

We do not agree that this offer was statutory in nature. While forbearance does not mean that all agreements had to be on the basis of “Bill and Keep”, no charge was specified by the regulator. To meet the requirement of non-discrimination, the claimant could as well have offered “Bill and Keep” to all and still it would be in compliance with the regulations. To our mind, an important part of non-discrimination is also that all the stake holders be similarly placed. We may note that in terms of the number of subscribers, the major operators were about four which included the counter claimant. It was stated that the SMS data between these operators was more or less balanced. If that be so, any rate for SMS termination would not have any material effect on these operators as on a net basis, they would be more or less equal. However, for a new comer the outgoing SMS may be much more than the incoming SMS resulting in a net outflow that would be impacted significantly by this charge for SMS termination.

Be that as it may, in view of the findings of the Tribunal in petition no. 130 of 2012, the prevailing market rate was 10 paisa per SMS.

On 22.02.2013, the petitioner, without prejudice to its rights and contentions, addressed a communication to the counter claimant requesting it to

send the bifurcation of SMS data for the purpose of reconciliation. The relevant part of this letter is as under:

“The details as of now should consist of the following & which may kindly be arranged at the earliest for Pan-India telecom Service areas between Vodafone and Aircel :

1. Count of SMS on a daily basis against all the months for which you have raised the unilateral demand.
2. Bifurcation of such SMS into Person to Person (P2P), A2P (transactional) and A2P (promotional SMS).

Upon the analysis of the above data, we would also be seeking specific day-wise CDR (for the period of demand raised by you) as effective reconciliation would be required as far as segregation/bifurcation & counts of SMS are concerned, and so far, this exercise has not been undertaken. Hence, request you to kindly arrange to send the above-said information for reconciliation at our end, at the earliest.”

On 06.03.2013, the counter claimant wrote to the petitioner informing it of certain revisions in the net SMS amounts for the months of August 2012 and September 2012 on account of inadvertent omissions of additional SMS counts that were not captured earlier.

On 18.03.2013, the petitioner again addressed a correspondence to the respondent asking for bifurcation of the SMS into A2P (application to person) and P2P (Person to person). As per it, this was necessary for reconciliation.

On 22.04.2013, the counter claimant replied the above letter stating that the bifurcation of SMS into A2P and P2P was not essential as all SMS were to

be charged at the rate of 10p and the charge of 5p per SMS introduced by the TRAI vide Telecom Commercial Communication Regulation dated 25.10.2011 was over and above the 10p SMS termination charge.

Let us examine this stand of the counter applicant. We may note that though the petitioner asked, the counter claimant did not explain the methodology for arriving at the 10p charge. Though transparency does not mean that the charge had to be cost based, the basis of arriving at the charge should have been explained. Be that as it may, this charge was definitely not cost based as the regulator determined that to be 2 paisa subsequently. In terms of the judgment of this Tribunal in petition no. 130 of 2012 also, this charge was the prevalent market rate which after the 2009 regulation was not required to be cost based. If this be so, then to our mind it had to be a composite charge to cover the cost as well as to have a revenue share from the A2P SMSs. It is nobody's case that the imbalance in traffic was due to P2P traffic. 5p charge for promotional SMS, which are A2P SMS, was also a share of revenue. To our mind, the counter claimant could not have shared revenue from the same SMS twice especially when the charge for promotional SMS was prescribed by a regulation as 5p.

We now come to the issue of interest and service tax claimed by the counter claimant. We see from the communication exchanged between the parties that a reconciliation of data did not take place as the bifurcation of the

SMS was not provided to the petitioner. We may note that even the counter claimant also corrected a part of its demand on account of an inadvertent error. In terms of the clause 12.3 of interconnect agreement between the parties, in case of a dispute the parties are required to reconcile their respective CDRs within 7 days of the receipt of the invoice. Though the petitioner asked for the SMS data many times, the same was not provided fully. Under the circumstances, we do not understand how the counter claimant can ask interest for delayed payments as the exact payments themselves were yet to be reconciled.

As regards service tax, though a plea is made by the claimant that in terms of the understanding between the parties, it was to be paid by the petitioner, no document to back this claim was shown to us. It is not the case that only the petitioner was receiving the SMS termination service. Both the parties were terminating SMS on each other's network though the quantum was different. We, therefore, do not accept this claim.

To summarize, we find that the issue of the SMS termination charge of 10p per SMS has already been settled by this Tribunal in petition no. 130 of 2012. The respondent can, therefore, charge this rate from the petitioner for the period from 01.04.2011 till 31.05.2013 before the same was regulated by law. However, since the charge for promotional SMS was fixed on 25<sup>th</sup> October, 2011 by the regulation, the respondent cannot charge 10p for such SMS over

and above that provided for in the regulation from the time that same came into effect.

Accordingly, in regard to the counter claim, we direct the respondent-counter claimant to provide the necessary details including bifurcation of SMS data to the petitioner. The petitioner is directed to complete the reconciliation of data within four weeks of the receipt of these details. Based on the reconciliation, the amount found payable shall be paid within a period of four weeks after adjusting the amount already paid in terms of the interim order of this Tribunal.

The petition is dismissed in above terms with no order as to costs.



*(Handwritten signature)*

**(Aftab Alam)**

**Chairperson**

*(Handwritten signature)*

**(Kuldip Singh)**

**Member**

*(Handwritten signature)*

**(B.B. Srivastava)**

**Member**