

TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL
NEW DELHI

Dated 30 March, 2016

Telecommunication Petition No.943 of 2012

Aircel Limited & Ors. ...Petitioners
Vs.
Idea Cellular 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
Mr. Manjeet Chawla, Advocate
Mr. Swetank Shantanu, Advocate

For Respondents : Mr. Gopal Jain , Sr. Advocate
Ms.Stephanie V Sonavane ,Advocate
Ms. Chimnayee Chandra , Advocate

ORDER

Kuldip Singh:

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? Whether the demands of the respondents are correct and whether they are entitled to levy a charge @ 0.10 paise or any other amount as SMS Termination Charges and for what period? These are the main questions that arise in the present petition.

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 under the brand name "IDEA". 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:

S. No.	Parties	Interconnection Agreement Date	Circles covered
1.	Spice Communication Ltd. & DWL and Aircel Ltd.	20.02.2009	Punjab & Karnataka
2.	Idea Cellular Ltd. Aircel Ltd. and DWL	03.11.2008	Harayana, Kerala, M.P., U.P(East), U.P.(West), Delhi, Andhra Pradesh, Gujarat, Maharashtra, Rajasthan & Mumbai
3.	Idea Cellular Ltd. Aircel Ltd. and DWL & Aircel Cellular Ltd.	07.10.2008 and 07.02.2008	Assam, N.E., J & K, Orissa, West Bengal, Kolkata, Tamilnadu, Chennai and Bihar

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.

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.

Schedule 2

2(ii) SMS Termination Charges

No Termination Charge for SMS originated from either Party's network and terminated on other Party's network shall be payable.

(Emphasis supplied)

The interconnect agreements and terms of the interconnect agreement including those with regard to the SMS termination charges, are not in dispute. Clause 3.1 of the Interconnection Agreement between the parties reads as under:

“3.1 This agreement shall be valid and effective as long as the Licences granted to both the Parties are valid, unless terminated in accordance with the provisions of clause 20 of this Agreement. Provided however, this agreement shall be terminated, if, either party ceases to hold a Licence under Section 4 of the Indian Telegraph Act. **Any amendments to this Agreement shall be based on mutual agreements in writing and shall be registered with TRAI**”.

(emphasis supplied)

Therefore, any amendment to the agreement has to be on mutual agreement in writing.

On 27th September, 2010, the respondent wrote a letter to the petitioner wherein it was mentioned that in order to curb the unsolicited SMS related cases, it has signed IC agreement on SMS termination charges with most of the operators. It proposed to sign SMS termination IC agreement with the petitioner on similar rates and proposed a supplementary clause in the existing interconnect agreements 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 November 2010.”

The relevant part of the letter is as under:

“As per TRAI’s Interconnection Usage Charges (IUC) Regulation dated 28th October 2003, TRAI’s directions dated 21st August 2006 and tenth amendment of IUC regulations dated 9th March 2009, IUC charges for SMS shall be under forbearance.

In view of the above & in order to curb the unsolicited SMS related cases, Idea has already signed I-C agreements on SMS termination charges with most of the operators like Vodafone, BSNL, Airtel, Uninor, Etisalat, Videocon etc.

We now propose to sign SMS termination I-C agreements with AIRCEL at similar rates and terms and & conditions, as done with other operators mentioned above.

Accordingly, please find enclosed herewith the draft I-C agreement on SMS termination charges. Please let us know when can we finalise & sign the agreement.”

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

“...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...”

Thereafter, the respondent did not take any further action for a period of almost two years. However, vide letters dated 09.11.2011 and 28.11.2012, it raised a demand of Rs. 1,30,19,671/- for the period July 2012 to October 2012. The respondent asked the petitioner to pay the same amount by 6th December, 2012 and further, to execute an agreement for SMS termination @10 paisa per SMS in terms of the decision of TDSAT in Petition No. 430/2011 and 130/2012. The Petitioner was threatened that if it failed to pay the said amount, and execute an agreement for SMS termination services, the SMS services will be terminated w.e.f 7th December, 2012. By another letter dated 03.12.2012, another demand of Rs. 1,16,01,956/- was raised for the same period.

The petitioner, of course, refuted the demand and after some correspondence with the respondents, filed the present petition.

On 19th December, 2012, the Tribunal, observing that the parties had a written agreement that did not prescribe any termination charges for SMS, and also that an agreement had been signed as late as 20th February, 2009, restrained the respondent from disconnecting the interconnection.

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, vide order dated 27th August, 2013, modified its interim order dated 18.12.2012 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.”

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(1st amendment) and 16 June 2003 (2nd 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 forborne 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 9th 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 1st 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 25th 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 24th 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

The case of the petitioner is that the demand raised by the respondent by charging SMS termination @ 10 paise per SMS, without an agreement to that effect, is arbitrary, unilateral, wrong and illegal.

Mr Gopal Jain, Ld. Senior Counsel appearing for the respondent, submitted as under:

1. The 2009 regulations do not fix the charges but prescribe in the proviso to Schedule IV, the principals which have to be followed while fixing the SMS termination charges. These cardinal principals of transparency, reciprocity and non-discrimination have a bearing on the contract between the parties.

2. The regulations have a general application for SMS termination charges and provide the overall framework/architecture within which an arrangement can be entered into between parties. This has the effect of interfering with/overriding existing contractual relationships between service providers.
3. It was recognized that there was a traffic imbalance and the objective of TRAI in issuing the 2009 regulations was to provide a solution to the problem and to remedy unfair advantage and commercial gain to some service providers at the cost of the others. It was for this that the principals to be followed were prescribed in 2009 regulations.

Citing the judgment of the Apex Court in PTC india Ltd. Vs. Central Electricity Regulatory Commission¹, he submitted that a regulation, as a part of regulatory framework, intervenes and even overrides existing contracts. In

¹ (2010) 4 SCC 603.

regard to his submissions, he also relied on the judgment of the Tribunal in Noida Software Technology Park Ltd. Vs. Media Pro Enterprises² and Aircel Vs. Bharti Airtel³.

We are not convinced with the above submissions for the following reasons.

The 2009 regulation only provided forbearance with regard to the SMS termination charges. It did not give any mandate to charge for the same. As long as the agreement between the parties met the criteria of transparency, reciprocity and non-discrimination, there was no violation of the regulations. The agreement not to charge each other for termination of SMS, which was on a reciprocal basis, did not violate any of the three conditions given in the proviso to the 2009 regulation. If the respondents had some other arrangement with some other service provider on a mutually agreed basis, it

² Petitions No. 295 (C) and 526 (C) of 2014, judgment delivered on 7th December, 2015.

³ Petition No. 130 of 2012, judgment dated 24.09.2012.

was not necessary to have the same arrangement with the petitioner also as the petitioner did not want it.

As a matter of fact, in the explanatory memorandum to the 2009 regulation, the regulator noted 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.”

(emphasis supplied).

It is a matter of record that the regulator even questioned the charge of 10p per SMS vide its letter dated 22nd February, 2011. The relevant part of this 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.”

The facts of Aircel vs. Bharti were different as in that case, the interconnect agreement was silent in regard to SMS termination charges. As a matter of fact, the Tribunal in that case observed that “Bill and Keep” [same as not charging each other] could as well be a method if mutually agreed. The observation is as under:

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

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

This means the parties are free to fix any rate of IUC for SMS among themselves. “Bill and Keep” also can be one system of IUC for SMS if agreed between the parties.”

(emphasis supplied)

In the above case, the Chairman of the Tribunal observed as under:

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

(emphasis supplied)

We, therefore, find that the agreement between the parties is not contrary to the 2009 regulations and there was no mandate to the respondent to levy any charge for the SMS termination. That being so, a unilateral novation of an existing contract is not permissible in law. We may note that the contract specifically provided that any amendments in the same shall be based on mutual agreements in writing. Clause 3.1 of the interconnect reads as under:

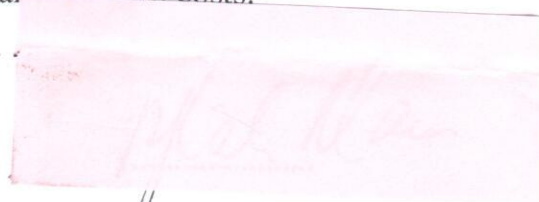
“3.1 This agreement shall be valid and effective as long as the Licences granted to both the Parties are valid, unless terminated in accordance with the provisions of clause 20 of this Agreement. Provided however, this agreement shall be terminated, if, either party ceases to hold a Licence under Section 4 of the Indian Telegraph Act. **Any amendments to this Agreement shall be based on mutual agreements in writing** and shall be registered with TRAI”. (emphasis supplied).

In regard to the submission that there was imbalance of traffic due to commercial/bulk SMS terminated by the petitioner on the network of the respondent, we may note that the regulator was seized of the issue and prescribed a charge of 5p per SMS vide its notification dated 25th October, 2011, and subsequently in May 2013, a 5p per SMS charge was also provided

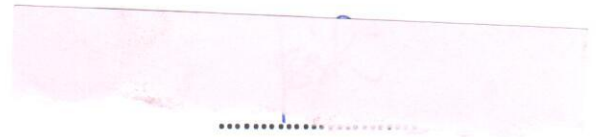
for transactional SMS. In any case, there was forbearance for SMS termination charge right from the inception (2001) and the respondent entered into interconnect agreements on its own volition.

To conclude, we find that the agreement between the parties was on a “Bill and Keep” basis as per which none of the parties charged the other for SMS termination. The unilateral novation of the agreement by the respondent and the demand based on 10p per SMS termination are not tenable in law.

The petition is accordingly allowed. Parties to bear their own costs.



(Aftab Alam)
Chairperson



(Kuldip Singh)
Member



(B.B. Srivastava)
Member