

TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL
NEW DELHI

Dated 25th April, 2019

Telecommunication Petition No.275 of 2009

Reliance Communications Limited
Vs.

...Petitioner

Bharat Sanchar Nigam Limited
...Respondent

BEFORE:

HON'BLE MR. JUSTICE SHIVA KIRTI SINGH, CHAIRPERSON

HON'BLE MR. A.K. BHARGAVA, MEMBER

For Petitioner

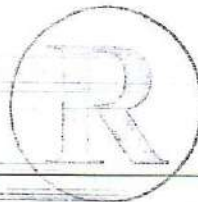
: Mr. Saket Singh, Advocate
Mr. Santosh Sachin, Advocate for
Ms. Manali Singhal, Advocate

For Respondent

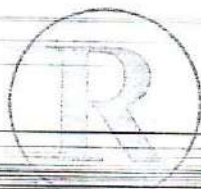
: Mr. Tejveer Singh Bhatia, Advocate
Ms. Vishakha Ahuja, Advocate
Mr. Kunal Vats, Advocate

ORDER

A K Bhargava – Since the petition was filed way back in 2009, it will be in order to start with the history of the case. The dispute is on account of the bills raised by the Respondent BSNL on 15-10-2004 and 21-3-2005 in



respect of Gujrat Circle and the disconnection notices dated 5-3-2008 and 2-2-2009 for recovery of outstanding dues. The demands raised by BSNL were on account of the allegation that the petitioner had tampered Calling Line Identification (CLI) number of international calls as domestic calls and wrongly routed such calls through the local point of interconnection (PoI) rather than the designated PoI for international calls. Aggrieved by the demands and disconnection notices, the Petitioner Ms. Reliance Communication Limited (RCom), filed this petition on 14-12-2009 praying for quashing of these impugned orders. The petition was heard and allowed by judgement and order passed on 24-5-2010 primarily on the ground that the charge under Clause 6.4.6 of the Interconnect agreement was penal in nature and it could be imposed only after complying with the requirements of natural justice. The Tribunal's judgment was taken in appeal (Civil Appeal No. 6706 of 2010) by the respondent. The Appeal was allowed by Judgment and order dated 29-11-2010 by which the Supreme Court held that the provision of Clause 6.4.6 of the Interconnect Agreement was not penal but it envisaged advance estimate of liquidated damages. Having set aside the Tribunal's Judgment, the Supreme Court remitted the matter to the Tribunal for de novo hearing in light of the law laid down by it. Tribunal



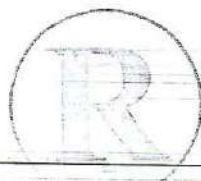
heard the main petition and after conclusion of hearing on 5.12.2011, judgment was reserved. A few days later, on 9.12.2011 the respondent filed an application (M.A. No. 324 of 2011) for taking on record a number of documents, that according to it, were in its possession and fully supported its case. A hearing was given on this application as well and order was reserved. Finally, the judgment on the main petition and the order on M.A. No. 324 of 2011 both came on the same date, i.e., 31.10.2012. The Chairperson rejected M.A. No. 324 of 2011 and allowed the petition filed by the petitioner. However, the Member wrote a separate order allowing the application and directed the respondent to file the documents in question, following which, a fresh hearing of the petition would be held. M.A. 324 of 2011 was finally heard by full bench and order was passed on 19-7-2017 allowing prayer made in the application. The documents filed by BSNL along with this application were taken on record and BSNL was allowed to prove them by leading oral evidence.

2. Few other facts are important to note in order to complete the history of the case. Petitioner Signed a BSO Interconnect Agreement with Department of Telecommunications (DoT) for interconnection of their networks within their respective circles on 18-3-1997. RCoM was allowed



to operate as a Unified Access Service provider from November 14, 2003 though it was formally granted the Unified Access Service Licence on 21st September, 2004 with effect from 14th November, 2003. An addenda dated 28-2-2006 to the Interconnect Agreement came into force between the parties after migration from BSO to UASL and the combined agreement (original agreement appended with addenda) or the "Agreement" was made effective retrospectively with effect from 14-11-2003. The Agreement deals with local calls, national long distance calls (NLDC) and international long distance calls (ILD). Calls of each trunk group are connected through dedicated ports and are chargeable at rates different from other trunk groups. Hence, depending on the number of calls handled by a particular port, charges are levied by BSNL on RCoM, at the rate of the existing call charges payable for that particular trunk group.

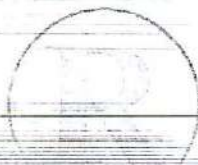
3. Being concerned about the operation of clandestine/illegal Telecommunication Centres/ Telephone Exchanges, the DoT on 24-3-2003 issued a circular specifying that Calling Line Identification (CLI) cannot be tampered with under any circumstances and also gave directions to service providers on how to prevent such tampering.



4. On 29-10-2003, TRAI issued notification regarding Telecommunication Interconnection Usage Charge (IUC) regulation. BSNL issued a circular dated 28-1-2004 on implementation of the IUC regulation 2003 in BSNL network. Para 11 of this circular reads thus

"The CLI based barring facility shall be activated at the Pops 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 groups shall be done by BSNL to ensure this objective. The calls received without CLI by BSNL from various operators shall be charged at the highest slab i.e. as for ISD calls. In case such calls are received by BSNL on a trunk group not meant for such calls then all the traffic received on such trunk group for that month billing cycle shall be charged at the rates applicable for IUC of incoming ISD calls."

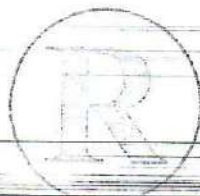
5. In September, 2004, BSNL received several complaints from its subscribers in Gujarat that they were receiving ILD calls with local CLI Numbers. On the basis of these reports, BSNL made its own enquiries by calling the local CLI number, i.e., 0281-3041000. This was on 5th October, 2004, 6th October, 2004 and 7th October, 2004. Each time the number was called the response from the other end was that the number did not exist. Therefore, on 8th October, 2004, BSNL reported the matter to Reliance and Reliance sent a report to DoT regarding the same. In the said report to DoT, Reliance stated that the wrong routing of ILD calls was being done by one of its subscribers, viz., M/s. Raj Enterprises (who was given 60 calls circuits).



The series of numbers allotted to Raj Enterprises was from 2813041000 - 2813041199, i.e., 200 numbers.

6. On 13th October, 2004, BSNL gave notice to Reliance saying that Reliance is having POIs at various Exchanges in Vadodra; that on monitoring incoming traffic to BSNL as indicated in CDRs at the above POIs, it was found that there were numerous calls with CLI as 281 3041000; that, such calls have been received from 4th September, 2004 and, therefore, BSNL will charge for all incoming calls at POI of Reliance from July, 2004. BSNL raised a provisional bill of Rs. 6,89,63,585 on 15-10-2004 in respect of "routing of ISD calls in STD Trunk Group at PBSO Pols" for July-Sept. 04. It also stated that further bills will follow as per the further investigations which are continued.

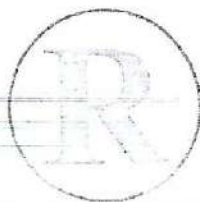
7. On 25-10-2004, BSNL issued a circular to all its officers by which continuation of unauthorized diversion in routing of ILD calls was brought to their notice with specific reference to the case of Reliance. In the circular, it is highlighted that although Reliance claims that tampering of CLI has been stopped w.e.f. 16th September, 2004, it is found that international calls have been delivered on the local POI of Reliance. This



circular further provides for the procedures to be followed to tackle the operation of unauthorized diversion/routing of calls.

8. On 21-3-2005, BSNL revised its bill on Reliance upward to Rs. 9,17,27,746 with interest from 15th October, 2004 to 15th April, 2005 at 21% p.a. for months of July, 2004 to October, 2004 in all amounting to Rs. 9,89,68,892/- for illegal routing of calls. This bill dated 21st March, 2005 superseded the earlier provisional bill dated 15th October, 2004 raised by the Vadodra Unit of BSNL for Rs. 6.89 cr. for the said period July, 2004 to September, 2004 and included the month of October 2004 as well. Interest in this bill is said to be levied as per clause 7.5 of the Agreement.

9. This demand was made on the basis that numerous calls had been detected in the POI with CLI as 281 3041000 which number pertained to ISDNB PRI connection given to M/s. Raj Enterprises of Rajkot. RCoM requested BSNL to withdraw the demand on the basis that the calls received in its POIs were neither wrongly routed nor their CLIs were tampered. They were "grey market" calls and it had cooperated with BSNL in detecting such grey market operation. Ultimately, after detailed

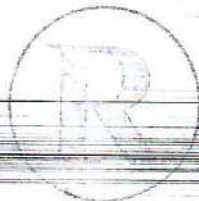


correspondence between BSNL and Reliance, petition No. 275 of 2009 was filed by Reliance against the above impugned demand.

10. We have already recounted the progress of the petition in para 1 wherein it is stated that Hon'ble Supreme Court has remanded back the matter to this tribunal after settling the law that clause 6.4.6 represents a reasonable estimate of compensation. It is instructive to note the relevant part of this judgment which is reproduced below:

"(iv) Whether clause 6.4.6 represents penalty or pre-estimate of reasonable compensation for the loss?"

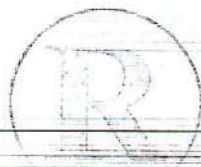
17. According to Chitty on Contracts "whether a provision is to be treated as a penalty is a matter of construction to be resolved by asking whether at the time the contract was entered into the predominant contractual function of the provision was to deter a party from breaking the contract or to compensate the innocent party for breach. The question to be always asked is whether the alleged penalty clause can pass muster as a genuine pre-estimate of loss". (See para 26-126 of Chitty on Contracts, 30th edition) The fact that damage is difficult to assess with precision strengthens the presumption that a sum agreed between the parties represents a genuine attempt to estimate it and to overcome the difficulties of proof at the trial. According to the Law of Contract by G.H. Treitel (10th edition), a clause is penal if it provides for "a payment stipulated as in terrorem of the offending party to force him to perform the contract. If, on the other hand, the clause is an attempt to estimate in advance the loss which will result from the breach, it is a liquidated damages clause. The question whether a clause is penal or pre-estimate of damages depends on its construction and on the surrounding circumstances at the time of entering into the contract". Lastly, the fact that a sum of money is payable



on breach of contract is described by the contract as "penalty" or "liquidated damages" is relevant but not decisive as to categorization.

18. Applying the above tests to facts of this case, we find that the Interconnect Agreement in question should be viewed in the context of the regulatory regime. In this case, we are concerned with telecom as a service. This is the most important circumstance to be considered as one of the main surrounding circumstances to the Interconnect Agreement. Under the Interconnect Agreement, the UASL is obliged to maintain the integrity of its exchange/POI. It is important to note that each service provider, including BSNL, is a market player/stakeholder. Each UASL is entitled to a level playing field. The nature of the call, be it local or national or international, as indicated by corresponding CLI, is the basis for the levy of IUC (including ADC). If by wrong routing of calls or by masking the cost of providing services is reduced, the concerned operator gets an undue advantage not only in the Indian market over other competing operators but also in the international market. Billing is one of the most vital aspects of this case. With technology, an international call could fall on the local POI but then the concerned operator is responsible for the identity of the call. In the case of calls which are correctly routed, the display screen with the subscriber clearly indicates whether the call bears international or local/national CLI. Similarly, when the Gateway Bypass Scam takes place and the international call(s) lands on the local POI which is not forwarded to the specified trunk group/POI, there is not only bypassing of International Gateway/ POI and National POI but also evasion of duty to maintain billing records in detail at each POIs.

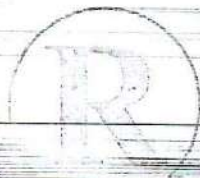
19. All this results in payment of IUC at a lower rate. All this leads to reduced cost for the defaulting UASL which provides not only increase in its profit but also gives it an advantage in international market vis-a-vis other competitors (including BSNL) because the defaulting UASL can easily price its product in the international market at a lower rate and in that sense loss is caused to BSNL. Similarly, as stated above, masking takes place as international CLI can easily be identified even when an international call lands on the local POI of the UASL, hence, the defaulting UASL resorts to masking. Hence, an



international call coming from the masked number alone cannot be taken into account. Thus, in our view, clauses 6.4.6(a) and 6.4.6(b) provide for pre-estimate of damages. It is so also for one more reason. The clause, as stated above, restricts the higher IUC rate made applicable for calls only for last two preceding months and not for last three years or the longer period. These time lines is an indicia showing that clause 6.4.6 is not penal but a pre-estimate of reasonable compensation for the loss foreseen at the time of entering into the agreement. Lastly, it may be noted that liquidated damages serve the useful purpose of avoiding litigation and promoting commercial certainty and, therefore, the court should not be astute to categorize as penalties the clauses described as liquidated damages. This principle is relevant to regulatory regimes. It is important to bear in mind that while categorizing damages as "penal" or "liquidated damages", one must keep in mind the concept of pricing of these contracts and the level playing field provided to the operators because it is on costing and pricing that the loss to BSNL is measured and, therefore, all calls during the relevant period have to be seen. [See Communications Law in India by Vikram Raghavan at page 639]. Since clause 6.4.6 represents pre-estimate of reasonable compensation, Section 74 of the Contract Act is not violated. Thus, it is not necessary to discuss various judgments of this Court under Section 74 of the Contract Act.

Conclusion

20. We need to clarify that in this case our judgment is restricted only to the interpretation of clause 6.4.6 of the Interconnect Agreement read with the Addenda. As stated above, we have held that clause 6.4.6 represents pre-estimate of reasonable compensation for the loss suffered by BSNL. **Thus, we set aside the impugned judgment and remit the matter to TDSAT to decide the matter de novo in accordance with the law laid down hereinabove. However, we need to highlight one aspect.** In the letter dated 13th October, 2004 addressed by BSNL to Reliance, it has been alleged that the calls have landed at the POs of M/s. Reliance Infocomm. Ltd. at Karellbaug, Panigate, Alkapuri, Makarpura, Padra, Dabhoi and Miyagam exchanges in Vadodara SSA. The said



letter highlights one more important aspect. It is alleged that the number 2813041000 was an unallocated number with Reliance during the relevant period. This aspect needs to be examined by TDSAT on facts.”(emphasis supplied)

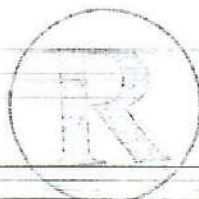
The letter dated 13-10-2004 referenced in the operating para above is reproduced below:

“Sub : illegal routing of ISD calls by Reliance through PBSO POI in BSNL

It is to inform that M/s Reliance is having Basic POI at Karelibaug, Panigate, Alkapuri, Makarpura AT & T, TAX, Padra, Dabhoi and Miyagam exchanges in Vadodara SSA, CDRs and OFCLA observation at these POIs were checked regarding periodical monitoring of incoming traffic to BSNL from private operators. It has been observed that

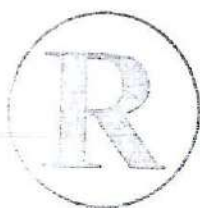
- 1. Check of CDRs of M/s Reliance Infocomm. Ltd. PBSO POIs indicate that there are numerous calls with CLI as “2813041000”. The analysis of observation taken for these calls indicates that CLI has been tampered deliberately by Reliance which is in complete violation of terms and conditions of interconnect agreement. These has been further confirmed from Reliance switch response that the number is unallocated number/number not in use.*
- 2. The calls with similar CLI have been received from the month of Sep-04. Therefore, as per letter no. : F.No. 208-20/2003-Regln. Dated 28/01/04 we shall charge @ Rs.19.15/- per minute for all incoming calls at all PBSO POI of M/s. Reliance from the month of July, 04 (Rs.19.15/- is the rate for incoming ISD calls at TAX POI of PBSOs).*
- 3. This notice is served on you to refrain from this violation of interconnect agreement and if compliance is not received in one week time, the POI at all interconnect point shall be disconnected without any further notice to you.”*

11. In this Tribunal’s judgment dated 24-5-2010 issues were listed along

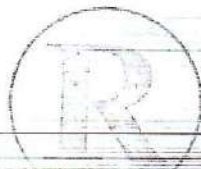


with factual matrix. In view of the judgment of the Apex Court, we need to consider the matter *de novo* in light of the law already settled. In our view, the issues that arise for our consideration in this petition are (a) whether the petitioner having cooperated and complied with various circulars of DoT and BSNL, any claims could be raised by BSNL (b) whether this is a case of wrong routing and/or masking of the calls attracting clause 6.4.6 (c) whether clause 6.4.6 inserted by reason of addenda VI on 28-2-2006 could have been given any retrospective effect from 14-11-2004. Hon'ble Supreme Court has also desired to examine the aspect whether the number 281-3041000 was an unallocated number with Reliance. We shall examine this aspect first.

12. We have already recounted that considering the evidence by way of CDRs submitted by BSNL was a major issue which has been finally decided in favor of BSNL. BSNL has led this evidence by way of affidavits of Mr. Narsinh Kanjia in respect of CDRs of Dabohi Exchange and Mr. Hitendra Prajapati in respect of CDRs of Miyagam Karjan Exchange. Cross examination has been conducted by the petitioner.

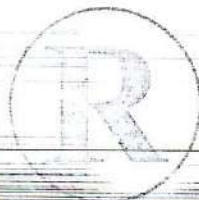


13. At the time of hearing, Mr. Saket Singh, learned counsel for the petitioner, has raised the objection that this evidence is not admissible since it does not meet the requirement of Section 65B of the Indian Evidence Act. He fairly admits that though objections were raised during the cross-examination about the authenticity of the CDRs, there was no objection raised specifically in terms of section 65B. Admittedly CDRs are computer generated data which have been printed in the Telephone Exchange of BSNL and no certificate as required under Section 65B of the Evidence Act has been submitted by BSNL. Mr. Bhatia however submits that no such objection was raised when the evidence was tendered and only belatedly this objection is being raised when he cannot take a corrective action which he could have taken otherwise. He further submits that the evidence itself states that it has been taken from computers working in normal condition. In a similar case in BP 499 Of 2015, where evidence was objected to on account of Section 65B, this Tribunal has held that "... we find no merit in the belated objection of respondent based upon Section 65B of the Evidence Act. We are fortified in our view by a recent judgment of Hon'ble Supreme Court in case of *Sonu Vs. State of Haryana; (2017) 8 SCC 570*". In this case also, we do not find any merit in belated objection



based on Section 65B of the Evidence Act.

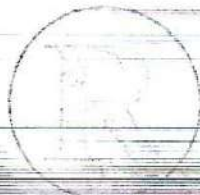
14. Mr. Saket Singh also submits that the evidence based on the CDRs is not to be relied upon since it has been taken only from two sites out of five sites involved. We find no merit in the argument. The result of these CDRs shows that the number 281-3041000 was "Un-allocated Number/Number not in use". For this purpose, calls made at different time from two geographically different sites are representative enough to be conclusive. Mr. Saket Singh also argues that such announcement could have been due to a fault or wrong routing of calls in BSNL exchanges. Such proposition has been put across during cross examination also. Witness for the respondent has denied such proposition and has stated that the exchange systems were working in normal condition. Call routing and announcements are generally tested and such faults if they remain in the system will not be for a specific number alone. In an exchange working normally, we find such argument theoretical and based on suppositions. Moreover, same observation has been obtained from two different exchanges at two different times, making such suppositions improbable. Hence, we find no basis in Mr. Saket Singh's argument. Mr. Saket Singh also argues that no conclusion can be made from



such CDRs since the calls made were of duration less than a minute and a half. Such arguments need to be rejected outright since the outcome of the call was NU tone which would not have changed with increased duration of the call. In facts of the case, we find the evidence as acceptable. Accordingly, we shall proceed on the basis of the CDRs annexed in the evidence being correct and showing that the number 281-3041000 was an unallocated number with Reliance during the relevant period.

15. Mr. Saket Singh submits that the petitioner has cooperated with the respondent and has done all that it was required to do in dealing with the case. He further argues that this is a grey market operation carried out by a third party. Petitioner has cooperated in nabbing the third party as required in the circular by DoT dated 24-6-2003 and the circular of BSNL dated 25-10-2004 listed above. Reliance has discharged all the obligations cast upon it as a service provider in terms of these circulars and it cannot be held responsible for the act of third party or grey market operator. Therefore, petitioner having no further liability, the demands must be set aside.

16. Mr. Tejvir Singh Bhatia, learned counsel for the respondent, on the other hand submits that it is not the petitioner which has proactively



unearthed the number of international calls being passed as local calls, but BSNL which has done so. DoT circular dated 24-6-2003 requires certain due diligence by the service providers which Reliance has not done. The DoT circular in question is given below:

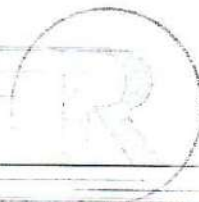
"From time to time, Vigilance Units of DoT/ BSNL/MTNL/VSNL with the help & assistance of Intelligence Agencies/Law Enforcement Agencies have unearthed operations of clandestine/illegal Telecommunications facilities/exchanges. The number of cases detected/unearthed in the recent past have substantially increased. Mostly clandestine illegal exchanges for receiving international calls and distribution to PSTN in India have been found. In the cases detected, it was observed that the miscreants had obtained following types of telecommunications facilities from the authorized service providers:

(i) For providing international connectivity, International Private Leased Circuits (IPLC), Very Small Aperture Terminal (VSAT), Internet Service Providers – Rate Access (BRA) was used.

(ii) For connecting to the domestic and, bulk telephone lines/ landlines or Cellular Mobile Telephone Connections, ISDA-BRA/PRI, bulk extension lines of EPABX, DOD junctions/E-IR2 etc. were used.

2. Operation of such clandestine/illegal telecommunications facilities has serious implications from National security point of view, besides revenue loss to the Government as well as telecom operators. This is a matter of serious concern and all possible steps need to be taken by all concerned to curb such activities. This issue was also discussed in the meeting chaired by Secretary, Telecom on 26.4.2003, held jointly with Intelligence Agencies and all Cellular Operators.

3. With a view to ensure that such activities are stopped forthwith, all the Basic/NLD/ILD Operators are hereby directed to implement the following with immediate effect:



- (i) 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.DDG (Vig.), DoT as well as all Security agencies on monthly basis. (ii) 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 anytime. The list/details of suspected subscribers should be informed to the Sr.DDG(Vigilance), DoT, West Block-I, Wing-2, R.K. Puram, New Delhi – 110066, immediately.*
- (iii) Active support must be extended by the service providers to the vigilance units of DoT, for detection of such clandestine/illegal telecommunications facilities. For this purpose, names of the Nodal officers & alternate Nodal officers in respect of each licensed service area as communicated to the Intelligence Agencies for monitoring of telecommunications, should also be forwarded to Sr.DDG(Vig). The Vigilance Unit of DoT will contact the Nodal Officer/alternate Nodal Officer, and till the time such nomination is received or in case of non-availability of such officer, the DoT vigilance units will contact the Chief Executive Officer of the licensee, for such support/coordination.*
- (iv) Calling Line Identification (CLI) shall never be tampered as the same is also required for security purposes and any violation of this amounts to breach of security. CLI Restriction should not be normally provided to the customers. Due verification for the reason of demanding the CLIR must be done before provision of the facility. It shall be the responsibility of the service provider to work out appropriate guidelines to be followed by their staff members to prevent misuse of this facility. The subscribers having*



CLIR should be listed in a password protected website with their complete address and details so that authorized Government agencies can view or download for detection and investigation of misuse. However, CLIR must not be provided in case of bulk connections, call centres telemarketing services.

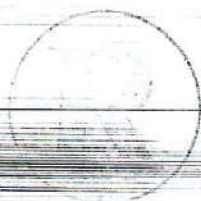
(v) Bulk users premises should be inspected by the service providers at regular intervals for satisfying themselves about bonafide use of such facilities. A record of such inspection should be maintained and preserved for minimum one year for inspection/verification by the licensing authority or a designated officer of the authority.

(vi) Leased circuits should also be checked for their bonafide use and to detect any misuse.

(vii) Subscriber's details should be available in Director Enquiry (197) unless requested by the subscriber. Otherwise, the unlisted number should be made available on the password protected website to be used by authorized agencies.

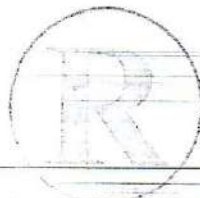
(viii) All the ILD operators should transit the CLI as received from the foreign callers. In case of CLI is not received from the distant end (foreign party) then the ILD operator in the country should introduce his assigned two digit carrier identification code followed by the country code from where the call is received in no case, the call should be offered to BSO/CMTS without any CLI. This is to identify the origin of call and ILD operator handing the call". (emphasis supplied)

The DoT circular does cast some duties upon the service provider which are preventive in nature and some which are responsive in nature that are required to be complied upon detection of such illegal operations. We have no material about compliance of the preventive part which could have absolved the petitioner. Moreover, the DoT circular deals with the "operation of clandestine/ illegal Telecommunication Centres/ Telephone



Exchanges” and does not deal with the cases where service provider also could be involved in the masking of CLI. Therefore, petitioner’s action in disclosing name and address of the purported subscriber and lodging FIR does not absolve the petitioner in case wrong routing of calls is detected.

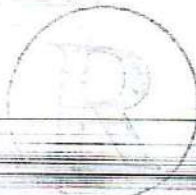
17. In the context of cooperation by the petitioner and respondent’s allegations that Reliance was delivering international calls on local Pops, Mr. Bhatia also refers to the conduct of petitioner by pointing out the service named “Home Country Direct” (HCD) offered by the petitioner in and around 2003-04. Through the HCD service, international calls traffic was brought and international CLI was replaced with local number thereby evading the payment of correct IUC charges. When discovered, DoT slapped penalty and BSNL raised demands on Reliance. Mr. Bhatia mentions that during the parallel proceedings of demands raised by BSNL, the petitioner had chosen to file an application under Section 9 of the Arbitration Act which was rejected by the learned judge of the Delhi High Court. Reliance, therefore, carried out the order of the learned single judge of the Hon’ble Division Bench where it had given a statement, inter alia, stating that it had stopped its HCD service w.e.f. 16-9-2004. He submits that the date 16-9-



2004 itself raises suspicion as to whether Reliance on its own or through its agents was trying to continue to provide international calls with tampered CLI. However, apart from the petitioner's conduct, Mr. Bhatia also reiterates respondent's stand that the analysis and observation taken along with evidence indicate that CLI has been tampered and that it is confirmed by Reliance switch response that the number is unallocated number.

18. Mr. Saket Singh also relies on the contents of BSNL circular dated 25-10-2004 to show that the petitioner has done what was required by BSNL's own circular. He also shows that even BSNL had acknowledged the support and cooperation given by the petitioner. In his support, he cites various communications and sequence of events which we find useful to list below:

08.10.04	SDE vigilance of BSNL Rajkot Telecom District informed the Petitioner that telephone No. 0280-3041000 which belongs to the Petitioner's network was suspected to engage in illegally connecting international calls to local calls displaying local numbers.
08.10.04	The petitioner along with Respondent jointly raided the premise of M/s Raj enterprise and FIR no.560/04 was registered at Praydumnagar Police station on behalf of BSNL, Rajkot City.
08.10.04	The petitioner also sent a report to the DOT Vigilance Cell giving a brief fact sheet(Pg 267) about the suspected case and further informed that the Petitioner has initiated action for disconnecting the said PRI connection of M/s Raj Enterprises.

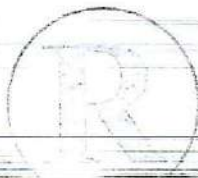


11.10.04	General manager Rajkot, BSNL called a meeting and directed petitioner for taking further action as per law and filing FIR with police.
12.10.04	The Petitioner sent complaint to the Police commissioner and requested the Commissioner to treat this letter as a FIR.
13.10.04	The BSNL Vadodara unit sent a letter alleging that the observation of CDRs with CLI 2813041000 indicated that the CLI has been tampered deliberately by Reliance. It further alleged that the tampering is confirmed from Reliance switch response that the number is unallocated number/the number not in use.
14.10.04	Petitioner in its response to letter dated 13.10.2004 indicated that the said CLI of 02813041000 is an ISDN PRI connection with 2E1s to M/s Raj Enterprises at Rajkot having office at 301 Yogi Anand, Kasturba Gandhi Road Rajkot and Police has been requested to investigate the matter and take appropriate actions.
15.10.04	Vadodara Unit of BSNL raised a bill to the tune of Rs 6,89,63,585.15/- for the period July to September 2004.
15.10.04	<u>Vadodara Unit of BSNL issued disconnection notice and raised bill of Rs. 6.89 crores alleging that the analysis observation of the alleged number shows that "this number does not exist" and therefore it was concluded that the CLI has been deliberately tampered by the Petitioner.</u>
25.10.04	BSNL HQ circular dated 25.10.2004 provides for the following procedures to be followed by the operators to tackle the operation of unauthorized diversion/ routing of calls: <ul style="list-style-type: none"> i) BSNL to ascertain whether these numbers exist in the network of operator or not. ii) In case these numbers do exist in the network of the operator, the operator should be asked to provide the details of the subscriber and physical location where these telephones have been installed. iii) These details should be verified along with the BSNL and the representative of the Petitioner and then local security should be involved to stop such illegal grey market operations.

	iv) In case the operator does not convey any or proper address of the customer, the same should be communicated to the concerned office of the Respondent BSNL.
	v) In case the concerned SSA of BSNL finds that the telephone numbers of which CLI has been received do not exist or the operator has not conveyed them any or proper address of the customer then notice for disconnection of POI should be issued in addition to raising bill for arrears of ADC for all the calls recorded on that POI.
20.11.04	The Petitioner in its response to BSNL letter dated 15.10.2004 reiterated its stand and requested BSNL to withdraw the notices and bills immediately.
18.03.05	Respondent issued a fresh disconnection notice raising thereby a consolidated demand of Rs. 9.89 crore for July- October along with interest from 15.10.2004 to 15.04.2005 as per Clause 11 of the BSNL circular dated 28.1.2004.
21.03.05	In supersession of the bill dated 15.10.2004 a further bill was raised by the Respondent on Petitioner to the tune of Rs 9,89,68,892/- along with interest. In the said bill the period was increased by including the month of October 2004 as well as also increased MOUs.
25.03.05	Petitioner reiterated its prompt cooperation and requested BSNL to withdraw the bills. It was also informed that the owner of M/s Raj Enterprises has also been arrested.
19.12.05	Petitioner reiterated its prompt cooperation and requested BSNL to withdraw the bills.
20.04.06	Petitioner reiterated its prompt cooperation and requested BSNL to withdraw the bills.
24.05.06	BSNL acknowledged the action taken by the Petitioner and further requested to furnish the copy of FIR registered against the customer.
29.05.07	BSNL again acknowledged the action taken by the Petitioner and further requested to furnish the copy of FIR registered against the customer
05.07.07	Respondent BSNL appreciated the prompt action and cooperation provided by the Petitioner. The bills were however sought to be justified by BSNL on

	the basis of Clause 2.5.4, 2.5.1 and Clause 6.4.6(a-d).
12.07.07	In response to BSNL letters dated 29.05.2007 and 5.07.2007, Petitioner informed BSNL about its prompt cooperation and compliance of BSNL directions and requested BSNL to withdraw/ cancel its bills
05.03.08	Respondent BSNL Vadodara issued disconnection notice against the demand for illegal routing under NLD service.
01.04.08	Petitioner in its response to BSNL disconnection notice dated 5.3.2008 stated that it has complied with the license as well as BSNL circular dated 25.10.2004 and further brought to notice of BSNL that bills can only be raised by BSNL in case there is no cooperation from the Petitioner/Service Providers
22.05.08	Petitioner again brought to the notice of BSNL that it has promptly acted and complied with circular dated 25.10.2004.
02.02.09	Respondent BSNL Vadodara issued fresh Disconnection notice against the demand of Rs 91727716/- for illegal routing under NLD service.
14.12.09	Petitioner files this petition

19. This long list of events and communication only shows the position taken by both the sides. There is no doubt that the information like name and address of the petitioner's subscriber of the given number was furnished to BSNL by the petitioner and that the raid on this subscriber was jointly conducted. Had it not been done, it would have invited action against the petitioner at the outset itself. This is clear from the circular of BSNL. However, by this act of cooperation alone, liability or responsibility of the petitioner does not get extinguished. To understand this, it is important



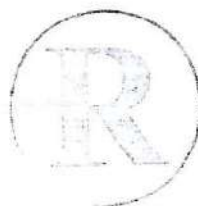
to notice the said circular dated 25-10-2004 which is given below:

"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. 16 th 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 dialling 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."

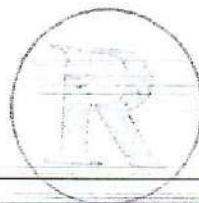
20. While the circular dated 25-10-2004 admittedly is internal to BSNL and not binding on the petitioner, the circular is of general nature and provides for an analysis and procedure in dealing with unauthorized diversion of international calls. We find such analysis and procedure reasonable and it will be appropriate to test the matter on the basis of such analysis and procedure.

21. The circular above takes note of Reliance's claim that it had stopped tampering of CLI w.e.f. 16th September 2004 and also BSNL's finding that international calls were still being delivered on local Pol of M/s RIL. It then



notes that such instances could be either tampering of CLI by Reliance or due to the illegal telephone exchanges of grey market. Recommendation then is to analyse by dialling the CLI number and ascertaining whether these numbers exist or do not exist in the network of Reliance. Para 3 deals with a situation where the numbers do exist in the network of Reliance. Such situation is attributable to grey market operations. In such case, details are to be obtained, jointly verified and with the help of local security agencies, such illegal operations are to be stopped. Para 4 attributes the instances due to RIL and prescribes for action against RIL in two situations (i) where RIL does not disclose details in case the numbers exist **or** (ii) where the number does not exist. In case the number does not exist, the inescapable conclusion is that it is a case of unauthorized diversion of routing of ILD calls, inviting action accordingly. For clarity, we again reproduce the relevant part below:

*"...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...."*(emphasis on "or" supplied).



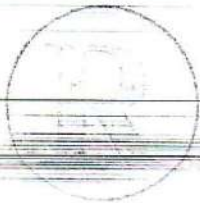
22. It is evident that BSNL had received international calls with CLI as 281-3041000. Admittedly, Reliance has furnished purported name and address of the subscriber of this number. On that basis, a joint raid has also been conducted and FIR filed. We are not aware of the result of this investigation. However, BSNL has analysed, dialed this number and found that the number does not exist. Had the number existed, calls could have been attributed to the purported owner of the number. BSNL has led the evidence and established that the number does not exist. In that situation, occurrence of calls from unallocated number on the PoI of the respondent can be attributed only to the service provider. BSNL in its first notice dated 13-10-2004 itself had indicated so while stating that *"Check of CDRs of M/s Reliance Infocomm. Ltd. PBSO POIs indicate that there are numerous calls with CLI as "2813041000". The analysis of observation taken for these calls indicates that CLI has been tampered deliberately by Reliance which is in complete violation of terms and conditions of interconnect agreement. This has been further confirmed from Reliance switch response that the number is unallocated number/number not in use"*. Of course, there could be an explanation to the issue of unallocated number/ number not in use. Any information for such explanation being in the power and possession of the petitioner, the petitioner could have furnished such explanation. However, the petitioner has chosen not to do so in face of the evidence. It has merely contested the admissibility of CDRs as evidence. In that situation, it would be logical to draw inference in line with the analysis given in the circular dated 25-10-2004. At this point, it is pertinent to notice observation from the Supreme Court judgment dated 29-1-2010 that *"Under the Interconnect*



Agreement, the UASL is obliged to maintain the integrity of its exchange/POI". Apparently, evidence shows that the petitioner has failed to maintain the integrity of its Pol. Accordingly, in view of the evidence and its observation and analysis, we find that BSNL has reasons to attribute such cases to wrong routing by Reliance attracting clause 6.4.6.

23. Next, we examine some more issues raised by the petitioner in regard to the applicability and retrospectivity of clause 6.4.6.

24. Mr. Saket Singh submits that the regime operating in 2004 was the Interconnection Agreement, IUC regulations and DoT circular where no such charges were prescribed. Only BSNL circular dated 28-1-2004 provides for charges in respect of calls without CLI and only for one month's traffic. Bill has been raised for call tampering in terms of clause 11 of this circular without applicability. In any case, BSNL not being sovereign, and this circular being unilateral and internal to BSNL, it is not binding on the petitioner. Thus, demand of BSNL is not sustainable. Mr. Bhatia points out that the question of applicability of clause 11 of this circular has been noticed in this Tribunal's judgment dated 24-5-2010 and it is recorded that *"clause 11 of the said circular has a limited application and by reason thereof sub clauses (a) and (b) of clause 6.4.6 of the Agreement should not be held to be substituted by clause 11 of the said circular"*. We see no



reason to differ with this finding. Clause 6.4.6 would be applicable in case of wrong routing of the calls. However, the crucial question to be decided is the retrospectivity of the clause 6.4.6.

25. Clause 6.4.6 was inserted with the Addenda 6 on 28-2-2006 and reads as under

"6.4.6 WRONGLY ROUTED CALLS

(a) Unauthorised calls i.e. calls other than specified for that trunk group if detected, for which the applicable IUC is higher than the IUC applicable for calls prescribed in that trunk group, then BSNL shall charge the UASL the highest applicable IUC, as applicable for such unauthorised calls, 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.

(b) the CLI based barring facility shall be activated at the POIs wherever technically feasible to ensure that the traffic handed over by 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."

26. Mr. Saket Singh submits that the clause having been amended only in 2006, the same could not have been given retrospective effect. He also

submits that in clause 1 of the Addenda, it was specifically mentioned that the same shall become applicable w.e.f. 14-11-2003 except the applicable interconnection usage charge (IUC) including access deficit charge (ADC), interconnect arrangements and associated billing arrangements. Therefore, IUC including ADC and billing arrangements were not given retrospective effect. Clause 6.4.6 merely provides for a billing arrangement and thus cannot have retrospective effect under the exception provided. Mr. Tejvir Bhatia on the other hand submits that the petitioner had never challenged the applicability of clause 6.4.6 in the original petition which is evident from the fact that the petitioner at a later date sought to amend the petition by adding para 22(a) and 22(b) and that such application was rejected by this Tribunal on 18-7-2011. It is therefore not permissible for the petitioner to raise this issue now. He also submits that clause 6.4.6, having regard to the decision of the Supreme Court, merely provides for a pre-estimate of compensation, the exclusion clause contained therein would not be applicable. Mr. Bhatia also argues that retrospective application of 6.4.6 already stands decided by this Tribunal and thus, the principle of *res judicata* and order 2 rule 2 is applicable. He cites judgment dated 17-4-2012 in TP 324 of 2010 ***Reliance Communications Ltd. Vs. Bharat Sanchar Nigam***



Limited (para 138 – 146) in support. It is relevant to notice this judgment dated 17-4-2012 wherein a similar submission as in this case on behalf of the petitioner is made and the relevant interpretation in respect clause 6.4.6 is as follows

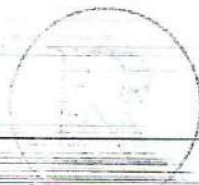
“139. Clause 6.4.6 was inserted in the Interconnection Agreement on or about February, 2006 with retrospective effect from 14.11.2003. One of the questions, which arises for consideration, is as to whether the said provision could be given a retrospective effect. Paragraph 1 of the Addenda VI to the Interconnect Agreement reads as under :

1. Each party i.e. BSNL as well as the UASL, does hereby agree to the terms & conditions as described herein which shall append as Addenda to the original agreement and the combined agreement, hereinafter called —AGREEMENT will become effective from 14th November 2003 except the applicable Interconnection Usage Charges (IUC) including ADC, Interconnection arrangements and associated billing arrangements as prescribed by BSNL Corporate Office, during this intervening period till date of signing of this Addenda

140. The parties clearly agreed that the same should be given effect to on and from 14.11.2003 i.e. with a retrospective effect. Some exceptions, however, were provided therein. The exception contained in the said paragraph refers to the quantum of IUC including ADC during the intervening period i.e. till the date of signing of the addenda.

141. It, however, does not postulate that Clause 6.4.6 cannot be given a retrospective effect in so far as it provides for a pre-estimated reasonable amount of damages, which has been suffered by the Respondent by acts of omissions and commissions on the part of the operator to avoid payment of IUC including ADC.

142. Petitioner, as noticed hereto before, had filed petitions before this Tribunal on at least two occasions. It, neither in those proceedings nor in the present proceeding, has questioned the validity of the said clause. It did not say that the said provision must be given a prospective effect.



143. In Petition No. 109 of 2008, this Tribunal has clearly held that so far as the claim of the Petitioner is concerned, so far as interpretation of Clause 6.4.6 is concerned, the same was barred under the principles of *res judicata* and/or Order II Rule 2 of the Code of Civil Procedure.

144. Petitioner had been granted liberty on various occasions to question the validity of the said provision, but it has failed and/or neglected Page 86 of 91 to do so. It may be noticed that it has, in this proceeding questioned the validity of Clause 7.5.

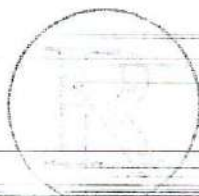
145. The parties entered into the Interconnect Agreement with effect from 14.11.2003. The subsequent events show that a consensus was arrived at that the Addenda will have a retrospective effect. We do not see any reason as to why the same is not permissible in law.

146. Question of the validity and/or applicability of Clause 6.4.6 has been raised only for the P-2 period. We have noticed hereto before that in Petition No. 109 of 2008, so far as the claim relating to P-2 period is concerned, the same was upheld in the judgment dated 15.4.2010.

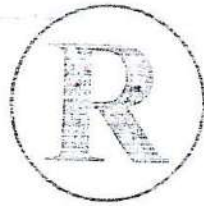
147. In view of the aforementioned categorical finding, we are of the considered opinion that Clause 6.4.6 of the Interconnect Agreement in these proceedings cannot be held to be invalid in law."

While the present case is that of CLI masking and the cited case is in the context of WLL fixed service being used as mobile service, demands in both cases pertain to "wrong routing of calls" attracting clause 6.4.6. In facts of the case, we are of the view that clause 6.4.6 is applicable retrospectively with effect from 14-11-2003.

27. In view of the discussion above, the issues before us for consideration



in this petition are answered against the petitioner. Accordingly, the petition is dismissed. No costs to either party.



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(S.K. Singh, J)

Chairperson

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(A.K. Bhargava)

Member

