

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

Dated 16th April, 2020

**Telecom Petition No.77 of 2019
(M.A. No.275 of 2019)**

Reliance Jio Infocomm Ltd.Petitioner

Versus

Tata Communications Ltd. & Anr.Respondents

**Along with
Telecom Petition No.78 of 2019
(M.A. No.277 of 2019)**

Association of Competitive Telecom OperatorsPetitioner

Versus

Tata Communications Ltd. & Ors.Respondents

Telecom Petition No.2 of 2020

Bharat Sanchar Nigam Ltd.Petitioner

Versus

Tata Communications Ltd. & Ors.Respondents

BEFORE:-

HON'BLE MR. JUSTICE SHIVA KIRTI SINGH, CHAIRPERSON

<u>In T.P.No.77/2019</u> For Petitioner (RELIANCE JIO)	:	Mr. N. Venkataraman, Sr. Advocate Mr. Gaurav Mitra, Advocate Mr. Vishnu Sharma, Advocate Ms. Shriya Rayu Chaudhuri, Advocate Mr. Jayant Mehta, Advocate Ms. Swati Sinha, Advocate Ms. Taruna Prasad, Advocate Mr. Parth Awasthi, Advocate Mr. Parv Garg, Advocate
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<u>For Respondent No.1 (TATA)</u>	:	Mr. Meet Malhotra, Sr. Advocate Mr. Ashok K. Singh, Advocate Mr. Ravi S.S. Chauhan, Advocate Mr. Aditya Vaibhav Singh, Advocate Ms. Pallak Singh, Advocate Mr. Naresh K. Gaur, Advocate
<u>For Respondent No.2 (BHARTI)</u>	:	Mr. Dushyant Dave, Sr. Advocate Mr. Harsh Kaushik, Advocate Mr. Harsh Prakash, Advocate
<u>For Respondent No.3 (TRAI)</u>	:	Ms. Maneesha Dhir, Advocate Mr. Abhishek Kumar Advocate Mr. Saransh Gupta, Advocate
<u>In T.P.No.78/2019</u> For Petitioner (ACTO)	:	Mr. Jayant K. Mehta, Advocate Mr. Parth Awasthi, Adocate Ms. Taruna A. Prasad, Advocate Mr. Parv Garg, Advocate
<u>For Respondent No.1(TATA)</u>	:	Mr. Meet Malhotra, Sr. Advocate Mr. Ashok K. Singh, Advocate Mr. Ravi S. S. Chauhan, Advocate Mr. Aditya Vaibhav Singh, Advocate Ms. Pallak Singh, Advocate Mr. Naresh K. Gaur, Advocate
<u>For Respondent No.2(BHARTI)</u>	:	Mr. Gopal Jain, Sr. Advocate Mr. Harsh Kaushik, Advocate Mr. Harsh Prakash, Advocate
<u>For Respondent No.3 (TRAI)</u>	:	Ms. Maneesha Dhir, Advocate Mr. Abhishek Kumar Advocate Mr. Saransh Gupta, Advocate
<u>In T.P.No.2/2020</u> For Petitioner (BSNL)	:	Mr. Nalin Kohli, Advocate Mr. Tejveer Singh Bhatia, Advocate Ms. Vishakha Ahuja, Advocate
<u>For Respondent No.1 (TATA)</u>	:	Mr. Meet Malhotra, Sr. Advocate Mr. Ashok K. Singh, Advocate Mr. Ravi S.S. Chauhan, Advocate Mr. Aditya Vaibhav Singh, Advocate

		Ms. Pallak Singh, Advocate Mr. Naresh K. Gaur, Advocate
<u>For Respondent No.2 (BHARTI)</u>	:	Mr. Harsh Kaushik, Advocate Mr. Harsh Prakash, Advocate
<u>For Respondent No.3 (TRAI)</u>	:	Ms. Maneesha Dhir, Advocate Mr. Abhishek Kumar Advocate Mr. Saransh Gupta, Advocate

JUDGMENT

By S.K. Singh, Chairperson – All the 3 petitions have been heard at length together because the outcome is dependent upon the answer to a common legal issue – whether the amendment Regulations of 2018 dated 28.11.2018 framed by the Telecom Regulatory Authority of India (TRAI) will have retrospective/retroactive operation so as to bind the parties to the rates redone and re-enacted through the new schedules in the amendment Regulations of 2018, with effect from 01.01.2013? While petitioners plead in favour of declaring the new schedules of 2018 to be retrospective and binding from January 2013, the respondent owners / operators of Cable Landing Stations contend otherwise. This judgment is common and shall govern all the petitions.

2. It may be useful to note that the facts relevant for the main issue of law indicated above are not in dispute and hence do not require detailed narration. For the sake of convenience, facts will be referred to from the records of T.P. No.77/2019 which has been heard as the lead matter, unless indicated otherwise.

3. The two respondents, Tata Communications Ltd. and Bharti Airtel Ltd. are owners / operators of certain facilities which have been described as Cable Landing Operations. For these facilities they are entitled to levy three distinct charges i.e. (i) Access Facilitation Charges (AFC), (ii) Co-Location Charges (CLC) and (iii) Operation and Maintenance Charges (OMC). Prior to 07.06.2007, the charges were based purely on contract between the parties. In 2007, TRAI issued the “International Telecommunication Access to Essential Facilities at Cable Landing Stations Regulations 2007” (2007 Regulations). This introduced the requirement of framing of Cable Landing Stations – Reference Interconnect Offer (RIO) to be calculated on cost based method. Such RIOs for all the three charges were required to be submitted to TRAI, the Regulator for approval. This light-touch regulation was operational till the 2007 Regulations were amended by Amendment Regulation, 2012 dated 19.10.2012. This amendment enabled TRAI to fix and specify the highest charges which could be realizable as per agreement between the parties. On 21.12.2012, TRAI fixed all the three charges vide notification which brought into effect the “International Telecommunication Landing Station Access Facilities Charges and Co-Location Charges Regulations 2012. The said Regulations (No.27 of 2012) contained 3 schedules of charges made effective from 01.01.2013.

4. Regulations 3 and 4 made charging of all the three charges (AFC, O&M charges and Co-location charges) strictly in the light of Schedules I, II and III on or after 01.01.2013, as per next dated of payment. Regulation 5 classified that TRAI may, from time to time, review and modify AFC and Co-location charges.

5. The Explanatory Memorandum (EM) to the Amendment Regulations of 2012 (No.21 of 2012) dated 19.10.2012 makes it amply clear that service availers like petitioners made a grievance that the charges for facilities of Cable Landing Stations (CLS) are too high; with costs having reduced these need to be scaled down. The owners of CLS (Tata and Airtel/ respondents) resisted the proposal but it is apparent that ceiling of the charges prescribed through the Schedules to the Amendment Regulations effective from 01.01.2013 were lower and not liked by the respondents.

6. Both Tata and Airtel moved Hon'ble Madras High Court through Writ Petitions Nos.1875 and 3652 of 2013 respectively for appropriate remedies by challenging the 2007 Regulations as well as Regulations Nos. 21 and 27 of 2012. Interim stay became operational from 24.01.2013 but ended with dismissal of the Writ Petitions by Judgment dated 11.11.2016 by a learned Single Judge of Hon'ble Madras High Court.

7. But in the intra-Court Appeals Tata and Bharti got relief as the appeals were partly allowed by judgment of the Division Bench dated 02.02.2018. It upheld the Regulations and the power of TRAI to prescribe the rates/charges which could be realized by the owners of CLS from the service providers/access seekers. But the rates prescribed through Schedules I, II and III were quashed on the finding that “utilization factor being taken as 70% and the conversion factor being fixed at 2.6” were in breach of transparency and natural justice principles which were held to be “non-negotiable ingredients of subordinate legislation.....besides being built into the sub-section 4 of Section 11 of TRAI Act.....” Both these factors needed to be reworked by TRAI after complying with the requirements of transparency and natural justice. The Division Bench ordered accordingly and directed TRAI to “redo and re-enact” the quashed Schedules within six months. As a consequence of such direction, the Regulations of 2007 and both the Regulations of 2012 were also kept in abeyance for a period of six months or till redoing/re-enacting the quashed schedules, whichever is earlier. But no comments were made in respect of agreements that operated during the interregnum.

8. The 3 aggrieved parties, Reliance Communications Ltd., The Association of Competitive Telecom Operators and TRAI preferred SLPs in the Hon’ble Supreme

Court against the Division Bench judgment dated 02.07.2018. The SLPs were disposed of by a very brief order dated 08.10.2018. Only the time given to TRAI, i.e., six months was reduced to six weeks from the date of Supreme Court's order to rework the figures in respect of both the factors as required by the findings of the Division Bench. No interference was made on the merits of the matter. All the contentions of both the sides were kept open. The parties were debarred from taking adjournment, obviously because TRAI was given a short time of six weeks with obligation to consider all the contentions of both the sides.

9. TRAI started the process for redoing and re-enacting the quashed schedules in a transparent and fair manner in consonance with principles of natural justice by issuing a Consultation Paper on 18.10.2019 and ultimately completed the exercise by notification and publication of the “International Telecommunication Cable Landing Stations Access Facilitation Charges and Co-location Charges (Amendment) Regulations, 2018” (2018 Regulations) on 28.11.2018. These Regulations are in exercise of powers under Section 36 read with several sub-clauses of clause (b) of sub-section (1) of Section 11 of the Telecom Regulatory Authority of India Act, 1997 (TRAI Act) as clearly indicated in the notification. These contain only 2 regulations made to amend the Regulation No.27 of 2012. Regulation 1 provides the nomenclature noticed above and that these shall come

into force from the date of publication in the Gazette, i.e., 28.11.2018. Regulation - 2 provides the new Schedules – I, II and III with a declaration that these shall “substitute” the three respective schedules in the Regulation No.27 of 2012.

10. The response of Reliance Jio to the Consultation Paper of TRAI is Annexure P-11. As a part of general comments, in paragraph 7 a categorical request was made to TRAI to specify the date of effect of new schedules that would be re-enacted, from 01.01.2013 because on that date the relevant Regulations of 2012 had become effective (along with the quashed schedules). But in the Amendment Regulations of 2018 TRAI has refrained from providing any separate date for the schedules to come into effect. The new schedules coming as substitutes are part of the Amendment Regulations which are stated to be effective from dated of notification, i.e., 28.11.2018.

11. The Explanatory Memorandum (EM) to the 2018 Regulations discloses that TRAI was conscious that the earlier Schedules I, II and III of 2012 stood quashed already. Also, both the factors were redone but their values have remained the same as originally determined for the old quashed schedules. So, on redoing the schedules, the rates have remained the same against which the owners of CLS had earlier preferred the writ petitions in 2013. But presently they have not leveled any

challenge to the schedules brought in through the 2018 Regulations. The EM explains that the rates in the schedules are only as the ceiling rates capable of being negotiated downwards, as per the market forces. It also appears that some new Cable Landing Stations of others had also come up in the meanwhile.

12. The petitioners have not questioned the legality of the 2018 Regulations. They have sought the follow reliefs:-

“(i) Pass an appropriate order, declaration or direction, thereby holding that the rates for Access Facilitation Charges, Co-location Charges and Operation and Maintenance Charges specified under the (revised) Schedules I, II and III to the International Telecommunication Cable Landing Stations Access Facilitation Charges and Co-location Charges (Amendment) Regulations, 2018 as notified by the Telecom Regulatory Authority of India with effect from 28.11.2018, are applicable with effect from 01.01.2013, i.e. the effective date of the principal International Telecommunication Cable Landing Stations Access Facilitation Charges and Co-location Charges Regulations, 2012;

- (ii) Pass an appropriate order or direction, thereby declaring the impugned demands raised by the Respondents No.1 and 2 upon the Petitioner for AFC, O&M Charges and CLC charges for the period 01.01.2013 till 27.11.2018 (i.e. in the interregnum between the effective date of the 2012 Regulations, and the date of notification of the 2018 Regulations, on the basis of CLS-RIO approved by the TRAI on 26.10.2007 as per the 2007 Regulations dated 07.06.2007 [Annexure P-15(Colly.) above] as *null* and *void ab initio*;
- (iii) Pass an appropriate order or direction, thereby restraining Respondents No.1 and 2 from raising demands on the Petitioner for Access Facilitation Charges, Co-location Charges and Operation and Maintenance Charges for the period 01.01.2013 to 27.11.2018 at the rates prevalent under the Cable Landing Station – Reference Interconnect Offer regime of the International Telecommunication Access to Essential facilities at Cable Landing Stations Regulations, 2007 (No.5 of 2007);
- (iv) Pass an appropriate order or direction, directing M/s. Tata Communications Ltd. (Respondent No.1) to refund to the Petitioner a

sum of INR 103.57 Crores (being INR 72.69 crores refund amount + INR 30.88 Crores interest calculated @18% p.a. till 13.02.2019) being the difference between the substantially higher amounts recovered by Respondent No.1 from the Petitioner towards Access Facilitation Charges, Co-location Charges and Operation and Maintenance Charges for the period 01.01.2013 to 11.11.2016, at the rates prevalent under the Cable Landing Station – Reference Interconnect Offer regime of the International Telecommunication Access to Essential facilities at Cable Landing Stations Regulations 2007, and the rates as specified under Schedules I, II and III as notified vide the International Telecommunication Cable Landing Stations Access Facilitation Charges and Co-location Charges (Amendment) Regulations, 2018 along with interest *pendente lite* and future interest thereon at 18% (eighteen percent per annum) until the date of realization;

- (v) Pass an appropriate order or direction, directing M/s Bharti Airtel Ltd. (Respondent No.2) to refund to the Petitioner a sum of INR 20.43 Crores (being INR 13.11 Crores refund amount + INR 7.32 Crores interest calculated @18% p.a. till 13.02.2019) being the difference between the substantially higher amounts recovered by Respondent

No.2 from the Petitioner towards Access Facilitation Charges, Co-location Charges and Operation and Maintenance Charges for the period 01.01.2013 to 11.11.2016, at the rates prevalent under the Cable Landing Station – Reference Interconnect Offer regime of the International Telecommunication Access to Essential facilities at Cable Landing Stations Regulations, 2007, and the rates as specified under Schedules I, II and III as notified vide the International Telecommunication Cable Landing Stations Access Facilitation Charges and Co-location Charges (Amendment) Regulations, 2018, along with interest *pendente lite* and future interest thereon at 18% (eighteen percent per annum) until the date of realization;

- (vi) Grant such other or further relief(s) to the Petitioner, as may be deemed just and appropriate by this Hon’ble Tribunal in the facts of the case.”

13. Clearly, the main prayer is No. (i), seeking a declaration/direction that 2018 Regulations shall apply to parties with effect from 01.01.2013, i.e., the effective date of the Regulation No.27 of 2012. Only if this No.(i) relief is granted, other reliefs may follow as a consequence. Hence, this is the principal issue of law requiring an answer for disposal of all the 3 petitions.

14. From the facts pleaded and even from the prayers in the petition it is evident that for the period 01.01.2013 till 27.11.2018, the interregnum between the effective date of Regulation No.27 of 2012 and till coming into effect of the 2018 Regulations, the parties maintained business relationship and access to CLSs were granted on the basis of agreements providing for the RIO rates prevailing under the 2007 Regulations. This was largely due to an interim order of stay by the Madras High Court on 24.01.2013 based on an undertaking that if Tata and Airtel would be found liable to pay back any amount, they would do so. After the judgment of learned Single Judge dated 11.11.2016, owners continued to raise bills at old rates but some of the access seekers like Reliance Jio did not pay. The uncertainty has continued even post Division Bench judgment dated 02.07.2018. With the notification of 2018 Regulations on 28.11.2018, the 3 new schedules certainly occupy the field and govern the 3 charges from 28.11.2018 but the rival claims for refund and demand of dues relating to the interregnum are entirely dependent upon the main issue already noticed.

15. It is pertinent to also note that post 2018 Regulations the Association of Competitive Telecom Operators, one of the petitioners moved the Hon'ble Supreme Court for seeking a clarification that when the same old rates have been

re-notified by TRAI, it should not mean that the members would have to pay at the earlier prevailing higher rates for the between 2012 and 2018. That issue was, by order dated 28.09.2019 sent to this Tribunal and parties were permitted to raise whatever pleas may be available in law. That order of the Apex Court has made the main issue in these petitions still clearer. Some of the petitions were filed subsequent to above order of 28.09.2019.

16. Later, Tata and Airtel took steps for realization of amounts, which they claimed to be outstanding towards the charges on the basis of agreements/RIO rates. Petitioners sought stay of such demands/coercive action. The Tribunal declined to grant interim relief by its order passed on 07.11.2019. Reliance Jio preferred a writ petition against the above order before Hon'ble Madras High Court. The said W.P. No.32128 of 2019 was disposed of on 14.11.2019, apparently in view of Reliance Jio agreeing to furnish Bank Guarantee for the entire claim which shall abide by the final order of this Tribunal. For final order a time frame was indicated. Airtel was directed not to effect disconnection till final adjudication. All the issues were left open to be decided by this Tribunal.

17. The relevant facts and background having been noticed, now the dispute needs to be adjudicated by considering the rival submissions.

18. On behalf of petitioners arguments were led by Mr. Venkataraman, Senior Advocate. Their stand is that – (i) since the parent Regulations of 2012(No.27 of 2012) has not been declared *ultra vires*, the quashing of schedules alone does not interfere with the continued effect of those Regulations from 01.01.2013; (ii) The absence of schedules that got quashed till their re-enactment with effect from 28.11.2018 would be immaterial because the new schedules would be retroactive from 01.01.2013 in the light of Regulations No.27 of 2012; (iii) the retroactivity of the new re-enacted schedules is evident from the word “substituted” used by TRAI in the amendment Regulations of 2018, while re-enacting the new schedules in place of the quashed schedules; (iv) sound principles of interpretation of statutes require that the new schedules be held retroactive so as to avoid any vacuum in the operation of parent Regulation No.27 of 2012 during the interregnum, to ensure justice to petitioners and to prevent unjust enrichment of Tata and Airtel; and (v) the order by the Division Bench of High Court keeping the parent Regulations No.27 of 2012 in abeyance for the period of six months granted for redoing and re-enacting the schedules was to ensure that the new schedules are effective from 01.01.2013.

19. On behalf of petitioners in T.P. No.78 of 2019 the above submissions were adopted. Additionally it was submitted that Regulation 3 of the parent Regulations of 2012 is like charging provision in a fiscal statute and the schedules are mere computation/machinery provisions hence when only the schedules were quashed, these inferior provisions can not affect the operations of main charging provisions from the due date i.e., 01.01.2013. Hence, the new schedules, regardless of the date of their re-enactment shall be retroactive from 01.01.2013. It was also contended that when the dispute arose in 2013, the rights of the parties need to be settled from that period without leaving vacuum. Lastly, it was emphasized that if the Association succeeds in this case, then its members also should be granted all the reliefs.

20. On behalf of petitioner in T.P. No.2 of 2020 also its learned counsel adopted the submissions in the lead matter. Further, he relied upon the undertaking of Airtel and other petitioner before the High Court to submit that on dismissal of the writ petitions, the undertaking should have been honoured by making refund regardless of further proceedings through appeals. Lastly he urged that petitioners deserve to get reliefs to avoid unnecessary hardship when the parent Regulations survived the challenge. Hence to avoid further continuation of mischief addressed

by the parent Regulations, a declaration be made that the new Schedules of 2018 are meant to be effective from 01.01.2013.

21. Before noticing the relevant case-laws cited on behalf of petitioners it will be useful to notice the stand of respondents, particularly Tata and Airtel. Mr.Dave, learned Senior Advocate has led the arguments on their behalf, assisted by learned counsel for Airtel. Their stand is that: (i) This Tribunal being a creature of statute cannot grant a declaratory relief as sought through the prayers made by the petitioners; (ii) the parent Regulation No.27 of 2012 does not supersede the 2007 Regulations and hence due to stay and subsequent quashing of the schedules of rates, the parties rightly conducted their business and commercial transactions during the interregnum on the basis of the approved, cost based RIO charges as per the 2007 Regulations; (iii) the mandate of the Regulations of 2012 in respect of charges in the schedules could not be enforced in view of quashing of the schedules by the High Court and its confirmation by the Apex Court; (iv) sections 36 and 37 of the TRAI Act vest Regulation making power in TRAI but there is nothing to show that such power extends explicitly or by implication to making retrospective Regulations, hence Regulation 5 in the Regulations No.27 of 2012 cannot vest power to review the schedules retrospectively; (v) the RIO based agreements during the pendency of judicial proceedings, such as one of 2014, not

under any dispute, there is no question of filling any vacuum during the interregnum; (vi) once the schedules were quashed for not being in conformity with requirements of transparency and natural justice, they became *void* leaving nothing which can legally be treated as valid and capable of being substituted with effect from 01.01.2013, hence such declaration cannot be granted; and (vii) the declaration sought by petitioners cannot be granted because *ex facie* the Regulations of 2018 along with the new schedules is effective only from 28.11.2018, contrary to what Reliance Jio sought from TRAI and Regulations of 2018 are admittedly not under challenge for a good reason that TRAI had no power to make these Regulations or the new schedules retrospective.

22. On behalf of Respondents it was pointed out that though the petitioners have tried to avoid in the prayers the word “retrospective”, the main prayer in the petitions is for a declaration that the schedules in 2018 Regulations shall apply from an earlier date, i.e. 01.01.2013. This amounts to seeking a declaration that although these Regulations came into effect in 2018, the schedules contained therein have retrospective effect from 01.01.2013. It was pointed out that in T.P. No.78/2019, there are clear pleadings that as per agreements and RIO rates of 2007 payments have been made by the members of the petitioner Association for the entire relevant period, till 27.11.2018. A prayer has been made for refund of the

alleged differential amount along with interest without any challenge to the agreements that governed the interregnum.

23. Appearing for Airtel (Respondent No.2 in T.P. 78/2019), Mr. Gopal Jain, learned Senior Advocate has further submitted that the pith and substance of the Regulation No.27 of 2012 was in the schedules specifying particular rates for different charges. Once the schedules were quashed the said Regulation became unworkable and realizing the same TRAI was directed to redo and re-enact the schedules in 6 months. This was supplemented by the order to keep the earlier Regulations in abeyance for the entire six months period. This according to learned counsel, was a clear indication by the Court that though part of the 2012 Regulations was held *intra vires*, nothing was workable till new schedules could be reworked and redone. Hence, only a limited time was granted to TRAI to do the things necessary to make the unworkable Regulations of 2012 again effective at the earliest. He replied that formulation of tariffs or such rates by TRAI is not procedural but an exercise of substance and therefore, law enjoins the duty of observing effective consultation/hearing along with due transparency. TRAI, therefore, issued a fresh Consultation Process. Such an exercise was not needed if only a clarificatory exercise was involved in re-enacting the schedules. The order of quashing had effaced the earlier schedules totally leaving nothing for

clarification or a mere procedural exercise. The case-laws, on the issue of retrospectivity/retroactivity cited by the petitioners were distinguished for these reasons as well.

24. Mr. Jain reiterated that the declaration sought by petitioners would amount to changing the date of enforcement of 2018 Regulations and this could not be done within the jurisdiction available to this Tribunal. According to him, the prospective date chosen by TRAI was to provide certainty and prevent chaos between the parties. There was no vacuum as the parties had conducted their business as per agreements which needed no disruption for the past transactions. He also relied upon the judgments cited by Mr.Dave and explained the judgments relied upon by learned Senior Counsel for the petitioners.

25. Appearing for Airtel, respondent No.2 in T.P. No.2 of 2020, Mr. Harsh Kaushik, Advocate adopted the submissions on behalf of this respondent in the other two petitions. He was permitted to refer to T.P. No.77 of 2019 to point out the relevant pleadings which show that against invoices raised by Airtel for Co-location charges on the basis of RIO based agreements, payments were made by Reliance Jio, the petitioner in T.P. No.77/2019, even after the judgments of learned Single Judge and also after that of the Division Bench of Madras High Court. In

rejoinder the stand of the petitioner is that it had raised protests but made payments to avoid disconnection. But now it is entitled to refund because of new schedules of 2018 Regulation having effect from 01.01.2013.

26. Mr. Kaushik also pressed the counter claims preferred by Airtel in T.P. No.2 of 2020 along with its reply on 29.01.2020 (of Respondent No.2). He pointed out that the principal amount and interest claimed against the petitioner, totaling Rs.62,12,512.85p is mentioned in Para 20 of the Reply-cum-Counter claim of Respondent No.2. The basis of the claim is RIO agreement as mentioned in Paras 18 and 19. According to him, the claim has to be treated as admitted and allowed accordingly because the petitioner BSNL has not filed any rejoinder or reply to deny it. Such stand of Respondent No.2 has been strongly opposed by Mr.Bhatia, learned counsel for the petitioner. He also raised limitation against part of claims. Mr.Bhatia relied on a judgment of Andhra Pradesh High Court in **Sri Rama Mahal Vs. R. Rajasekhar; 2007(6) ALD 267** and Rule 5(2) of Order VIII of CPC to submit that even if there is no pleadings in denial, the court has a discretion to ask the plaintiff to prove its facts.

27. Since the counter claim involves issues of facts and there does not appear any specific mention of such claim in the earlier orders passed for expeditiously

completing the pleadings in this petition, it is not in the interest of justice to allow the counter claim only because no rejoinder or reply was filed by petitioner. In fact no rejoinder was filed even to the reply of Tata (Respondent No.1). This was obviously for lack of specific notice of the counter claim which has been included in the reply in a rather casual manner. This petition was admitted on 20.01.2020, the very first day of listing and as per understanding among the parties that same issue is pending in two other petitions, a short time of one week was allowed for reply. Filing of rejoinder was also permitted within a short period. On the next date, i.e. 27.01.2020, this petition was listed with other two petitions to expedite the hearing of all the petitions having common issues, pending from before. Hearing was fixed for 13.02.2020. In such circumstances, it will not be fair or proper to decide the counter claim without affording an effective opportunity to the petitioner BSNL to file a reply to the counter claim, if so required in the light of decision on main common issues. This petition, therefore, shall be treated as pending for deciding the counter claim at a later stage after the common judgment and in the light thereof.

28. In all the 3 petitions, the submissions on behalf of Tata is same as that of Airtel.

29. On behalf of petitioners, Mr. Venkataraman has referred to 3 judgments to explain in general the types of control which legislature usually provides in a statute to exercise control over subordinate legislation; provide safeguards against excessive delegation and against further delegation unless specifically provided in the concerned statute. These case laws in **Atlas Cycle Industries & Ors. Vs. State of Haryana; (1979) 2 SCC 196, BSNL Vs. TRAI; (2014) 3 SCC 222** and **Lohia Machines Ltd. & Anr. Vs. Union of India & Ors.; (1985) 2 SCC 197** need no further deliberations.

30. His second set of case laws is of five Supreme Court judgments. He has relied upon three – (i) **Zile Singh Vs. State of Haryana; (2004) 8 SCC 1**, (ii) **Government of India Vs. Indian Tobacco Association; (2005) 7 SCC 396** and (iii) **Gottumukkala Venkata Krishnraju Vs. Union of India, 2018 SCC Online SC 1386** to highlight the significance and meaning of the word “substituted” when used in a statute. According to submissions, Paras 23 to 25 of **Zile Singh(supra.)**, Paras 14, 15 and 26 of **Indian Tobacco(supra.)** and Para 13-16, 18, 19 and 22 of **Gottumukkala(supra.)** are relevant and make the law clear that every statute is *prima facie* prospective unless made to operate retrospectively by express provision or by necessary implication. Substitution of a provision

results in repeal of the earlier rule and bringing into its place the new rule. Thus, it is different from “supersession” of a rule.

31. He also referred, on the above principles of law, two judgments actually cited by respondents only to explain as to why these cannot help the case of Airtel or Tata. In **ITO Vs. Ponnose; (1996) 2 SCC 351** the law enunciated in Para 5 was in the context of substitution of a definition clause. It brooks no caveat and in most uncertain terms supports the case of Airtel & Tata that when a new law affects rights, the courts will not accept it as retrospective unless such intention of the legislature is manifest from express words or necessary implication. A law by a delegated statutory authority cannot have retrospective effect unless the power to make retrospective laws is clear from the express language of the relevant statute or by necessary implication.

The attempt to distinguish and dilute the aforesaid principles of binding authority on the basis of discussions in para 7 of the same judgment cannot succeed because in para 7 the Court itself explained that rules under Article 309 of the Constitution stand on a different footing because the constitutional provisions surrounding Article 309 render this rule making power plenary in nature till such service rules are not replaced by an Act of a competent legislature.

32. In the other case **Sri Vijaylakshmi Rice Mills Vs. State of A.P; (1976)** **3SCC 37** a new provision in an Amendment Order laying down a new price in Price Control Order as a substitute for the price during the earlier period was claimed as having retrospective effect. The Court repelled the submission by observing in para 5 that no doubt the word “substitute” means “to replace” but the question is from which date the replacement of the new schedule took place. Since there was no provision in the order to indicate retrospective effect, the normal rule would make it effective only from date of notification. The Court further clarified the law that “The principle is also well settled that statutes should not be construed or impose new duties in respect of transactions which were complete at the time of the Amending Act came into force.”

Learned senior counsel for the petitioners has referred to the well recognized exceptions indicated in para 8 of this very judgment where the contention to accept the new provision as explanatory or declaratory was taken up. It was accepted that as a legal principle the presumption against construing a legislation retrospective is inapplicable when the statute is passed for the purpose of supplying an obvious omissions in a former statute or to explain a former statute. (emphasis supplied). On facts the Court held in para 9 that the Amendment Order was neither explanatory nor declaratory of any obvious omission.

33. A further submission was advanced by Mr. Venkataraman that the judgment in the ITO case (supra) cannot be applied to the Amendment Regulations of 2018 prescribing the schedules because in the present case, the High Court (DB) has upheld the vires of the other provisions of earlier Regulations and had quashed only the schedules. The judgment in Vijalakshmi (supra) was sought to be explained as inapplicable because, according to learned senior counsel, the facts narrated in para 4 were peculiar and different than the facts of the present case.

34. The submissions noted above are unacceptable. The facts pointed out do not in any way dilute the force of law as clarified by the Apex Court. The word “substitution” in an amending statute cannot by itself affect the presumption against retrospective effect more so when, as in the case at hand, the amendment is neither explanatory nor declaratory but a new exercise for reworking the charges due to one or more factors found to have been not considered in accordance with law and principles of natural justice. The law declared by the Apex Court that a delegatee, unless clearly empowered by the statute, cannot enact subordinate legislation having retrospective effect also does not get affected by facts of the case. In the present case no attempt has been made, and rightly so, to contend that TRAI Act has vested such power to TRAI. There is no scope to make such a submission because there is no provision vesting power explicitly or by necessary

implication to make Regulations with retrospective effect. Normally a regulatory authority is not even expected to do so because it can unsettle the past transactions amongst different service providers and can have devastating effects on the sector.

35. Since TRAI does not have the power to make Regulations with retrospective effect, it is not very material to consider the contention on behalf of the petitioner that the schedules can have retroactive effect because they are merely procedural and do not affect the rights and liabilities of the parties concerned. But since such an issue has been raised, it is proper to decide it. The contention, ex-facie lacks merits. The text and context in which the schedules have been enacted as a part of the relevant Regulations of 2012 and re-enacted in 2018 after a successful assail by Airtel and Tata against the 2012 schedules permit no other finding than a firm declaration that the schedules are the heart and soul of the Regulations of 2012 as they lay down the charges that govern the owners / operators of CLS as well as the other parties who avail the facilities of CLS. Clearly, the schedules have full impact upon the rights and liabilities of the parties. They cannot be treated as procedural or machinery provisions in the given context. The contrary stand of the petitioners are therefore found unacceptable. The legal presumption against retrospective effect of schedules whether in 2012 Regulations or in the Amendment Regulations of 2018 has to be accepted as valid.

36. The only significant controversy that requires immediate consideration before deciding the main issue, is whether there is anything in the text of 2018 Regulations to dispel the presumption against its effect from 01.01.2013. The effect of the word “substituted” has been noticed earlier. It means – “to replace” but unless there is something more in the text to answer – replace since when, it cannot make the new schedules effective from an earlier date than the date of notification. There is nothing more in the entire 2018 Regulations, neither explicit nor by necessary implication. Additionally, it has already been held supra that TRAI does not have power to frame Regulations effective from any earlier date. The use of word – “retroactive” by learned counsel in place of “retrospective” does not have any significance because the prayers clearly show that petitioners are seeking a declaration that the schedules re-enacted in 2018 are effective from 01.01.2013, i.e. retrospectively.

37. On behalf of petitioners, reliance has been placed upon as many as 6 judgments of Hon’ble Supreme Court to support the submission that Amendment Regulations of 2018, specifically the new schedules incorporated therein need not only an interpretation as to the date of schedules becoming effective but a purposive interpretation so as not to allow the 2007 Regulations any play and not

to render the Regulations of 2012 unworkable till 27.11.2018. The cited judgments are:

- (i) Bhakra Beas Management Board Vs Krishan Kumar Vij; (2010) 8SCC 701;
- (ii) H.S. Vankani Vs State of Gujarat; (2010) 4SCC 301;
- (iii) New India Assurance Co. Ltd. Vs Nusli Neville Wadia; (2008) 3SCC 279;
- (iv) Indian Handicrafts Emporium Vs Union of India; (2003) 7SCC 589;
- (v) D. Saibaba Vs Bar Council of India; (2003) 6SCC 186; and
- (vi) Welfare Association, A.R.P. Vs Ranjit P. Gohil; (2003) 9SCC 358

38. In Bhakra Beas case, learned senior counsel has highlighted the contents of para 31 to 36. In that case the wordings of the relevant Order of 1990 specifying promotional scales and conditions of eligibility was, as pointed out, not happily worded but its clause 2 was clear that the Order would be applicable only to directly recruited A.Es. The High Court allowed benefits of that order to a promotee A.E. In appeal the Supreme Court reversed that order because it found that clause 2 was clear, categorical and brooked of no interpretation. After analyzing various judicial precedents it further held that the interpretation of High Court was against law, public policy and would frustrate the purpose of the Order which was to grant permissible benefits only to the directly recruited A.Es.

39. The above discussed judgment requires exercise of full caution and not to indulge in interpretation when the provisions are clear and unambiguous; the

primary test being the language employed. Only if the text provides a choice between two interpretations, the Court has to prefer the one which saves its vires, the workability and secures the purpose of its enactment. The High Court had missed the clear text in clause 2 and had indulged in an interpretation which was found unacceptable as it frustrated the purpose of the Order – to make provisions only for the directly recruited A.Es.

40. The other judgments have not taken any different view. These only reiterate the well known principles of interpretation of statutes that golden rule is to go by the text when it is clear and does not brook of any different meaning. But in a contrary situation the entire context, legislative history, object and purpose of enactment etc. is required to be seen with a view to secure the intention of the legislature and to save the workability and vires, if possible.

41. In the present case the text of the 2018 Regulations alone fall for consideration as to whether it requires interpretation as claimed on behalf of the petitioners. The text is found to be clear and unambiguous and does not warrant any interpretation for making the schedules therein effective from any earlier date. Moreover, as discussed earlier, the regulator, TRAI has no power to make retrospective regulations.

42. Once the earlier schedules in the 2012 Regulations failed to muster judicial scrutiny and were quashed, only the High Court or in appeal the Supreme Court could have, if persuaded by good reasons, directed that whatever rates for relevant charges are re-determined by TRAI through new schedules would govern the parties as if effective from 01.01.2013 in place of the quashed schedules. This nature of final judgment between the parties could have also taken away the defense of Airtel & Tata based upon agreements to take care of the charges during the interregnum, based on RIO as per Regulations of 2007. Such agreements are not under challenge. The High Court has not ordered for refund of any money paid to Tata or Airtel.

43. Due to quashing of the schedules, as discussed earlier, the Regulation No.27 of 2012 have been rendered ineffective till replacement schedules were enacted as part of 2018 Regulations effective from 28.11.2018. The High Court or Supreme Court orders do not help the case of the petitioner and TRAI does not have power under the statute (TRAI Act) to make the re-enacted schedules effective from any earlier date nor it has attempted to do so in spite of a request for that made on behalf of Reliance Jio. The Amendment Regulations of 2018 laying down the reworked schedules are ex-facie effective only prospectively since the schedules do not lay down mere procedure but prescribe rates for the charges and are bound

to affect the rights and liabilities of the parties as is apparent even from the reliefs sought in these petitions, this Tribunal has no option but to conclude that petitioners case for declaring the new schedules enacted in 2018 as effective from 01.01.2013, has no merits.

44. The respondents, Airtel & Tata have relied not only on the judgments in the case of ITO (supra) and Sri Vijaylakshmi (supra) which have been discussed earlier because learned senior counsel for the petitioner cited them for the purpose of distinguishing them as inapplicable, though unsuccessfully. For the same purpose, he has dealt with two more judgments – **(i) Syniverse Technologies (India) Pvt Ltd. Vs. TRAI, by Hon’ble Delhi High Court (2019) SCC Online Del 6430** and **(ii) CIT Vs. B.C. Srinivasa Setty (1981) 2 SCC 460.**

45. In the case of Syniverse Technologies a review petition before Delhi High Court filed on behalf of Reliance Jio was pressed inter-alia, on the ground that while setting aside the PPT charges of Rs.4.00, the High Court failed to issue necessary consequential order to direct TRAI to rework the PPT charges for the period the quashed amendment was in force. To support this plea, reliance was placed upon the same Division Bench judgment of Madras High Court dated 02.07.2018 passed in favour of Tata as upheld by the Supreme Court on

18.10.2018. The Delhi High Court, in para 7, held that:- “The Division Bench of the Madras High Court, expressly permitted TRAI to proceed and frame Regulations in accordance with law. The Supreme Court has endorsed that view. This, in our opinion, does not in any manner imply that the Court authorized TRAI to frame retrospective Regulations of the kind that the Review Petitioner is seeking.” The review petition was dismissed. Nothing material was placed to distinguish the aforequoted views of Delhi High (DB) as to the import of Madras High Court (DB) judgment and the limitations of TRAI in making Regulations with retrospective effect.

46. In the case of CIT Vs. B.C. Srinivasa Setty, in the context of Section 45 of the Income Tax Act (IT Act) the Court was considering whether “goodwill” is included in the expression “Capital asset”. That judgment is not of relevance except that for interpreting the meaning of that expression, the Court held that it must enquire whether contextually section 45 excludes goodwill. Section 34 was the charging section, but the computation provisions were read with the same after observing that these together constitute an integrated code.

47. It has been submitted by learned senior counsel Mr. Venkataraman for the petitioners that in the present case the facts and provisions under consideration are entirely different, therefore the principles of charging and machinery or

computation provisions are not apt / relevant. This comment is correct, although Mr. Mehta, learned senior counsel has laboured to urge that Regulation 3 of the Regulation No.27 of 2012 is charging section and is therefore unaffected by the rates of charges being re-enacted later in 2018. This aspect has been found unacceptable earlier when in the context it has been held that the schedules are not simple procedures, they prescribe rates and affect the rights and obligations of the parties.

48. Mr. Mehta, learned senior counsel appearing for the petitioner Association (T.P No.78 of 2019) has highlighted the meaning of “substitution” by again referring to various paragraphs, particularly para 15 in the case of Government of India Vs. Indian Tobacco Association (supra). That judgment related to an exemption notification under the Customs Act, 1962, which had left out certain places / ports / depot. On representation, those were included by using the word “substitution” through an amendment notification. The Courts accepted that the amendment was clarificatory, it did not take away vested rights of any party and being an exemption notification, it deserved the beneficent construction. In paragraph 26 it was clarified that the word “substitution” may be construed also as an amendment having a prospective effect, depending upon the context. This aspect does not improve the case of the petitioners.

49. Mr. Mehta also relied upon the case of Zile Singh (supra) which has already been discussed in detail. He pointed out that this judgment has been followed in the case of **Gottumukkala Venkata Krishnamraju, A 2018 SC4197**. In this case the amendment was by “substitution” but only prospective as it was made applicable only to those serving on the date of amendment. It did not affect rights of any other party and only conferred benefits to serving Presiding Officers. He placed reliance also upon two more judgments : (i) **Citibank N.A. Vs. Hiten P Dalal & Ors; (2016)1 SCC 411**; & (ii) **Welfare Association A.R.P Vs. Ranjeet Gohil & another; (2003)9 SCC 358**. The case of Citibank related to principles governing grant of restitution in the context of section 144 of Civil Procedure Code. The present case does not involve any claim by way of restitution. The case of Welfare Association, in para 25 that has been relied upon, only reiterates the well established principle of interpretation that Court should, if possible, lean in favour of validating a law. Judgments to this effect have already been considered. These principles must have been canvassed also before the Madras High Court (DB) which still preferred to quash the part of Regulation No.27 of 2012 which consisted of the schedules containing the rates. At the present stage of lis, these principles of interpretation are not of much help. Mr. Mehta also explained the meaning of “kept in abeyance” as “in state of suspension or inactivity”. There is

no dispute on this aspect. [But how it would confer retrospectivity upon the new schedules of 2018 has not been shown at all.

50. In course of reply, Mr. Dave has placed reliance on the judgments which have been noticed earlier because these were sought to be explained by learned counsel for the petitioner but without success. These are – **(i) ITO Vs. M.C. Poonnose (supra); (ii) Sri Vijaylakshmi Rice Mills (supra); and (iii) Syniverse Technologies (supra).** In ITO, he emphasized paras 5 and 6 to substantiate the submission that TRAI cannot enact Regulations having retrospective effect. This is a sound proposition and has to be accepted. In support he has also cited case of **Hukum Chand Vs. Union of India; (1972) 2 SCC 601.** Paras 7 and 8 reiterate the same principles of law. To similar effect is the judgment in *Strawboard Manufacturing Co. Ltd. Vs. Gutta Mill Workers' Union, A 1953 SC 95.*

51. The judgments in *Sri Vijaylakshmi* and *Syniverse Technologies* have already been discussed. These also have not been distinguished or explained on material aspects and fully support the plea of Mr. Dave that the word “substitute” does not always imply retrospective substitution and in the facts and context it cannot be anything but prospective. In the *Syniverse* case, the Delhi High Court (DB) has categorically held that the Madras judgment (DB) and its endorsement by

the Supreme Court does not show that TRAI could redo fresh schedules with retrospective effect.

52. In support of the proposition that if decision or regulation is quashed for being in violation of Natural Justice, then the effect is to render the same void, reliance was placed on the judgment in the case of **Nawabkhan Abbaskhan Vs. The State of Gujarat**. Para 18 of the judgment, in the last two sentences supports the above plea. Such an order, even if void in the limited sense, is “liable to be avoided by Court with retroactive force”. This judgment has not been distinguished or explained by the other side. The law is otherwise also clear that when a declaration is made by a Court that a particular rule / law is bad leading to its being quashed, the judgment operates retroactively granting complete relief unless the Court, for reasons makes it only prospective. The Madras High Court (DB) has not restricted its judgment for only prospective operation and therefore it clearly does not help the case of the petitioners.

53. It is unacceptable that although TRAI cannot make Regulations having retrospective effect, it can achieve the same very purpose by strength of any of the provisions in the Regulations of 2012 that were made by TRAI within the same limitation flowing from the TRAI Act. This plea, which is sheet anchor of

petitioners' case has no merits and cannot be accepted. Only to avoid any semblance of conflict, the Madras High Court (DB) appears to have put the unquashed part of 2012 Regulations in abeyance, to enable TRAI to re-enact the reworked schedules in accordance with law. It could not be to confer retrospectivity to the new schedules. For that purpose an explicit order was necessary. Nothing of substance remains for adjudication. But the case laws cited by Mr. Jain and Mr. Malhotra, senior advocates who have appeared for Airtel & Tata in the tagged petitions are indicated hereinafter in brief.

54. Mr. Jain relied upon - **Union of India Vs. Deoki Nandan Aggarwal, 1992 Supp(1) SCC 323** for the proposition that it is not within the domain of Courts to rewrite legislative policy and hence TRAI was asked to do its work of redoing the schedules because the earlier schedules were quashed for good. He also relied upon – **Panchi Devi Vs. State of Rajasthan, (2009) 2 SCC 589** in support of the principle that a delegated legislation is ordinarily prospective in nature; right or liability which is created for the first time cannot be given retrospective effect. He referred to some of the case laws already cited by Mr. Dave. He showed that post the Syniverse judgment, TRAI issued an amendment Regulations on 30.9.2019 and made the fresh PPT charge effective from 11.11.2019. Additionally, he relied upon **Collector, C&C.E Vs. Oriental Timber Industries (1985) 3SCC 85,**

wherein, while allowing the appeal of Union of India, only to avoid undue hardship to the assessee, the notices were directed to be applied only for the future. This does not appear relevant except to highlight that only for prospective effect of a judgment, specific order is required to be passed.

55. Mr Malhotra has adopted the submissions advanced on behalf of Airtel and has pointed out that in EM to a notification dated 8.6.2005, TRAI admitted that it has no power to issue regulations with retrospective effect but was doing so in that matter due to a direction of TDSAT. He has relied upon **(2013) 15 SCC (State of Rajasthan Vs. Basant Agrotech India Ltd.)** to highlight inherent limitations on the power to make delegated legislation, particularly in fiscal matters (Paras 21-24).

56. On behalf of Airtel and Tata it has rightly been submitted that in fact there was no vacuum during the interregnum and the effect of quashing of schedules by High Court cannot be avoided by giving retrospective effect to the 2018 Regulations and schedules thereunder. Also no case of unjust enrichment is made out against them. Market driven prices have been realized by the parties and even if it is presumed that some refund is payable, the amount will not reach those

ultimate users who paid the prices demanded by the petitioners during the interregnum to meet the charges as per agreed rates.

57. In the final analysis, it is reiterated that this Tribunal has a limited issue to decide and in view of discussions made and findings recorded earlier in this judgment, it is held that petitioners cannot be granted the relief of declaration that the re-enacted schedules that are part of Amendment Regulations notified on 28.11.2018 are effective from an earlier date, i.e., 01.01.2013. As a result the prayers for consequential reliefs such as for refund and interest etc. also fail. All the three petitions are dismissed for lack of merits. But as indicated earlier, T.P.No.02 of 2020 shall be listed later only for considering the counter-claim as per law.

58. Before parting with the order, it is recorded that the petitions were argued and heard only on the relevant questions of law except a counter-claim in T.P.No.2 of 2020. In the written notes of submissions by Reliance Jio some additional issues of facts, apparently to question the correctness of accounts and demands by the CLS owner / operator have been introduced towards the end. Those cannot be gone into in the present proceedings in view of limited issues raised and argued. Such attempt is not appreciated.

59. Since the claims in the petitions stand dismissed, the interim orders shall cease to operate in favour of petitioners, particularly in T.P. No.77 of 2019, in view of order of Madras High Court dated 14.11.2019. The bank guarantee from HDFC Bank Ltd furnished for the entire claim under stay i.e., Rs.122,71,55,537/- (Rupees One Hundred twenty two crores Seventy one lakhs Fifty five thousand Five hundred and Thirty seven only) would now stand invoked for immediate payment to the other side – Bharti Airtel Ltd. Registry shall, if required, act accordingly to ensure payment to the concerned respondent immediately. Parties shall also act as per this order. In the facts of the case, there shall be no order as to costs.

.....**J**
(S. K. Singh)
Chairperson

pkb