

3. Exercising its power under Section 11(1)(b)(ii) of the TRAI Act on 12th July, 2002, the TRAI issued Regulation called "Telecommunication Interconnection (Reference Interconnect Officer) Regulation, 2002" (RIO Regulation). By way of this RIO Regulation, the TRAI inter alia directed that all telecommunication service providers holding significant market power should publish a draft Interconnection Agreement **with the prior approval of the TRAI** which would form the basis for negotiation of future interconnection agreement.

4. The BSNL submitted its RIO to the TRAI for approval. The latter by a letter dated 9.10.2002 addressed to the BSNL held that 29 clauses in the said RIO were unreasonable and unjustified hence brought about unilateral changes in the BSNL's RIO without assigning any reason thereof and directed BSNL to make changes in its RIO after incorporating the changes made by the TRAI and publish the same within the time frame fixed in the Regulation.

5. This letter of TRAI was challenged by the BSNL before this Tribunal by way of Appeal No.11 of 2002. In the said Appeal, the BSNL questioned the jurisdiction of the TRAI to bring about the 29 changes suggested in the impugned letter of the TRAI.

6. When the Appeal was pending before this Tribunal at the instance of this Tribunal, BSNL and TRAI held several meetings in an attempt to arrive at a mutually acceptable settlement consequent to which 21 out of 29 proposed changes were resolved between the parties.

7. Consequent to the above resolution between the parties, the BSNL filed charts before this Tribunal showing how many issues remained unsettled. Since 8 of the issues remained unsettled, this Tribunal heard the parties on those issues and by its Judgment dated 27th April, 2005 held that the terms of interconnection should be mutually negotiated between the parties and that the freedom of service provider to enter into mutual negotiations and agreements with other service providers in the matter of interconnection has to be given due recognition and the same should not be undermined. In this background, this Tribunal went on to examine and adjudicate on those specific issues which had remained unresolved between the TRAI and the BSNL.

8. After settling those disputed issues by its Order dated 27th April, 2005 this Tribunal in its Judgment at para 35 held thus:-

“...35. In the above background we now venture to look into the outstanding points of difference between TRAI and BSNL/MTNL in regard to the RIO to be published by BSNL/MTNL after approval by TRAI. One option we could have exercised was to remit the matter to TRAI for having a relook in the light of the observations made by us in this Order and either convey its approval to the terms as indicated by BSNL/MTNL or if it so wishes to suggest variations or any changes clearly indicating their reasons for doing so. However, **in view of the material submitted before us during the course of hearing in this matter whereby the positions of BSNL/MTNL and TRAI have become fairly clear, and we have also given extensive oral hearing to the Counsels in this regard, we do not think it will serve any purpose to send the matter back to TRAI as that course will also delay the matter further.** Subject to what we have stated above we deal with the points of difference as under:....”

9. After so observing this Tribunal further held:-

“...By the approach mentioned above, we have tried to take care of the points of difference between BSNL/MTNL and TRAI arising out of the letters dated 9.10.2002 and this should now form the basis on which BSNL/MTNL may go ahead and publish their RIOs within 90 days of this order.....” (emphasis supplied)

10. From the above, it is clear that having resolved the above issues this Tribunal directed the BSNL to go ahead and publish their RIOs within 90 days of the said Order. Consequently, it is stated by the BSNL that in compliance with the said directions of this Tribunal it published the RIOs within 90 days in its website incorporating the changes as agreed upon and/or decided by this Tribunal.

11. It is this publication of the RIO in the website of the BSNL on 25th July, 2005 when is taken exception to by the TRAI on the ground that even after this Tribunal decided the disputed issues, the BSNL had no authority to publish the RIO **without the prior approval of the TRAI**, hence has issued the impugned Show Cause Notice which while calling upon the BSNL to explain why proceedings should not be initiated against it, the TRAI also directed the BSNL to withdraw the RIO from its website with immediate effect. This proposed action contemplated to be taken by the TRAI under Section 29 read with Section 34 of the TRAI Act is challenged in this appeal.

12. On behalf of the BSNL it is contended that assuming that a prior approval of the TRAI of the RIOs before publishing was necessary in the ordinary course, in view of the facts and circumstances of the present case such a prior approval was not necessary since the impugned publication was made by the BSNL pursuant to a direction issued by this Tribunal which was made in appeal against orders of the TRAI. Therefore, it is contended on behalf The BSNL that the impugned Show Cause Notice is without authority of law and contrary to the directions issued by this Tribunal as per its Order dated 27th April, 2005.

13. On behalf of the TRAI it is contended that irrespective of the fact that the terms of the RIO were settled by an Order of this Tribunal and the Tribunal had directed the BSNL on facts of the case to publish the said RIOs in its website, it was mandatory under Section 11(1)(b)(ii) of the TRAI Act for the BSNL to obtain the prior approval of the TRAI before it published the final RIO because it is the TRAI which alone could give such approval.

14. From the above pleadings of the parties, a short question arises for our consideration that is, when this Tribunal gives a direction in its appellate jurisdiction, whether the compliance of such directions could be made independent of the approval of the TRAI or whether it is subject to further approval of the TRAI.

15. While disposing of the concerned Appeal this Tribunal in para 34 of its Judgment, observed that while exercising its power of approval, the TRAI did not have the powers to impose a new set of terms and conditions and its duty while so considering the conditions formulated by the BSNL was basically to ensure that the basic structure of the model RIO is adhered to and the various points which have been identified in the model RIO have been reasonably addressed. It is in this background, in the earlier order this Tribunal directed the parties to sit across the table and arrive at a consensus in regard to 29 issues in regard to which the parties concerned were not at ad idem. Pursuant to the said direction of this Tribunal, the parties settled their disputes in regard to 21 out of 29 disputed issues and the difference between the parties remained in regard to 8 of such issues. These 8 issues were then decided by this Tribunal. Having settled these disputes between the parties. Bearing in mind the time already consumed in settling these issues, this Tribunal directed in that order that the BSNL may go ahead and publish their RIOs within 90 days of that order.

16. It is in the above background, the BSNL contends that it published its RIOs in website without seeking further approval from the TRAI which it contends is unnecessary since this Tribunal as an appellate authority had directed it to publish the RIO.

17. As noted above, the learned counsel for the Respondent, TRAI has submitted that since prior approval of the TRAI before publishing the RIO is a condition precedent under section 11(1)(b)(ii) of the TRAI Act and Regulation framed therein, even after the directions of this Tribunal, it is mandatory for BSNL to have sought the approval before publishing the RIOs.

18. We are not inclined to accept this extreme proposition advanced on behalf of the TRAI. First of all, it should be borne in mind that this Tribunal is a statutory Appellate Tribunal which has been empowered under Section 14-A of the TRAI Act to entertain an appeal against any direction or decision of the TRAI and has been empowered to make such orders as the Tribunal thinks fit, of course, within the framework of the statute. It is a well established principle in law that an Appellate Tribunal entertaining an appeal against the order of a subordinate authority has the same power as the original authority while disposing of the appeal. Therefore, if this Tribunal has come to the conclusion that the refusal of prior approval by the TRAI was erroneous then it is not necessary for this Tribunal to again remand the matter back to the TRAI with a direction that it shall give the required approval. In our opinion, it would suffice if the error pointed out by the aggrieved party is rectified by this Tribunal then as a consequential order it could itself direct the concerned party to go ahead and publish the RIOs without seeking further approval from the TRAI because, in our opinion, such right to grant approval after rectifying the error in appeal is inherent in an appellate authority. This does not, however, mean that this Tribunal has the jurisdiction to entertain an application for approval as an original authority that is to say, if the BSNL had approached this Tribunal after preparing the RIOs to seek approval of this Tribunal for the first time without approaching TRAI, this Tribunal would not have had the power to grant such approval. In the instant case, the differences between the BSNL and TRAI were resolved by this Tribunal sitting as an appellate authority, therefore, it had the necessary concomitant power of permitting (approving) the publication of the RIOs as accepted by this Tribunal. If the TRAI is aggrieved with such decision of this Tribunal of settling the terms of the RIO it could have preferred an appeal against the order of this Tribunal but it could not have initiated action as has been done by the impugned Show Cause Notice because the approval before publication of RIO was

granted by this Tribunal and it is in compliance of the direction of this Tribunal the BSNL published the RIOs.

19. In this view of the matter, we are of the opinion that the Show Cause Notice dated 12th November, 2005 issued by the Respondent/TRAI annexed to this Petition as Annexure-I is without authority of law. Therefore, the same is held to be inoperative.

20. Appeal allowed.

.....J
(N. Santosh Hegde)
Chairperson

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(Vinod Vaish)
Member

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(D.P. Sehgal)
Member