

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

Dated 31 March, 2016

Telecommunication Petition No.8 of 2015

M/s Vodafone India Ltd. & Ors.

...Petitioners

Vs.

Bharat Sanchar Nigam Ltd.

...Respondent

BEFORE:

HON'BLE MR. JUSTICE AFTAB ALAM, CHAIRPERSON

HON'BLE DR. KULDIP SINGH, MEMBER

HON'BLE MR. BIPIN BIHARI SRIVASTAVA, MEMBER

For Petitioner

: Mr. Saket Singh, Advocate

For Respondents

: Mr. Abhishek Kumar, Advocate
Mr. K. Vijay Kumar, Advocate
Mr. Ashwin Rakesh, Advocate for
Ms. Maneesha Dhir, Advocate

ORDER**Kuldip Singh:**

The petitioners are seeking a declaration that the letters of the respondent dated 11.12.2012 and 26.06.2013, to the extent that that these seek to limit the obligation to pay SMS termination charges only with effect from 16.12.2012, and letter of the respondent dated 19.11.2014 which seeks to further limit the obligation to pay SMS termination charges with effect from 01.06.2013, are contrary to the interconnect agreements, as amended from time to time, between the parties. They further seek a declaration that the respondent is liable to pay SMS termination charges to the petitioners for the period 1.04.2011 to 31.05.2013. In view of the agreement between the parties as well as the regulations of the TRAI, the petitioners are claiming an amount of Rs. 17,20,48,252/- along with interest as per rate provided in the interconnect agreements. They are also claiming a sum of Rs. 10,46,27,230/- towards service tax.

The petitioners are part of a group of companies. They are telecom service providers and have been granted licenses by the Department of Telecom, Union of India, under section 4 of the Indian Telegraph Act. The respondent is a PSU and also a telecom service provider providing licensed telecom services pan India. The parties have entered into interconnect

agreements for various service areas details of which are given at page 4 para 4 of the paper book.

By an addendum dated 13.04.2010, clause 6.7 relating to IUC (Interconnect Usage Charge) for SMS was amended as under:

“6.7.1 UASL shall pay an IUC OF Rs.0.10 per SMS to BSNL for termination of its SMSs (Short message service) at the BSNL’s network in the same service area. On reciprocal basis, BSNL shall also pay the termination charges @ Rs.0.10 per SMS to UASL for termination of its SMSs on the network of UASL.

6.7.2 In addition to termination charges prescribed in clause 6.7.1 above, carriage charges of Rs. 0.20 per SMS shall be payable by UASL to BSNL in case of termination of its SMSs in other service areas.

6.7.3 Details regarding handover and routing arrangements for intra service area and inter-service area SMSs shall be finalized subsequently through mutual discussions. The arrangement/agreement for termination charges and carriage charges in clause 6.7.1 and clause 6.7.2 above shall come into force prospectively after finalization of such handover and routing arrangements”

A new clause 7.2.1 was also added with stipulated that:

“7.2.1 Bill for IUC will be issued on monthly basis by the designated unit of BSNL to the UASL and such bills shall be payable within 15 days from the date of issue. The UASL for the IUC, if any, due to it, may also issue similar bills.”

On 07.09.2011, the petitioners wrote to the respondent that for the period April to July 2011, there was a net imbalance of SMS traffic for which a net

amount of Rs. 2,79,52,971/- (@ 10p per SMS) was payable by the respondent. After some further correspondence and meeting between the parties, on 11.12.2012 the respondent wrote to the petitioners that the agreement relating to SMS termination charge will be given effect from 16.12.2012.

On 29.01.2013, the petitioners raised bills on the respondent for the period from 16.12.2012 to 31.12.2012. There was some further correspondence from the petitioner to the respondent. However, no payment was made by the respondent. Subsequent to the issue of 2013 regulation¹ that fixed the SMS termination charge at 2 paisa per SMS with effect from 1st June 2013, by a letter dated 26.06.2013, the respondent informed the petitioners that bills for SMS termination will be raised @ 10p per SMS for the period from 16.12.2012 to 31.05.2013.

On the same date, i.e. 26.06.2013, the respondent issued letters to various other service providers stating that bills for SMS termination charges shall be raised by the respondent with effect from 01.04.2011 to 31.05.2013. Aggrieved by this, the petitioner addressed further letters to the respondent, inter-alia, asking it to make payment for SMS termination charges at the rate of 10p for the period from 01.04.2011 to 31.05.2013. After some further correspondence, and meeting between the parties, it was on 19.11.2014 that the petitioners received a letter from the respondent in which it expressed its inability to

¹ We have described the regulatory framework in *Aircel Vs. Vodafone*, petition no. 843 of 2012.

implement the addenda agreement and purported to inform the petitioners that based on the TRAI regulations, it was ready for payment of SMS charges on reciprocal basis with effect from 01.06.2013. It is in these circumstances that the petitioner came to the Tribunal.

The case of the respondent is that it asked all the other telecom service providers to sign the addenda as signed with the petitioners. As none of them came forward to sign the same, it addressed letters to them on 16.12.2010, 20.12.2010 and 24.01.2011. However, on 22.02.2011, the TRAI wrote to all the service providers including the respondent stating that the SMS termination charges sought to be levied by some of the operators do not seem to have been determined on the basis of cost and these have still not been incorporated in all agreements of the service providers and thus selective application of termination charges in non-transparent and discriminatory manner contravenes the regulations. There was some further correspondence between the TRAI and the respondent, as well as the respondent and the service providers. On 19.11.2014, the respondent addressed a letter to the petitioners referring to discussions in a meeting held on 12.11.2014 and the letter of TRAI dated 22.02.2011, and stating that since TRAI had not given permission to the respondent to raise bills with whom the respondent had signed the addenda, it had not raised bills, and expressed its inability to implement the addenda.

The case of the respondent in a nut shell is that since the other operators did not come forward to sign the addenda and also as it did not get permission from the TRAI, it could not have implemented the addenda with the petitioners. In regard to this stand of the respondent, Ms. Dhir, Ld. Counsel for the respondent, relied on *Avishek Goenka Vs. Union of India and Anr.*²

We find the above hard to believe. We may note that though the TRAI addressed letters to the respondent on 22.02.2011, and though the other operators had not executed the addenda with the respondent, in a meeting held as late as on 11.12.2012, it decided to implement the same with effect from 16.12.2012. We may further note that as late as 26.06.2013, it addressed a communication to the other service providers stating that bills for SMS termination for the period from 1.4.2011 to 31.05.2013 will be raised at the rate of 10p per SMS. However, vide a letter addressed on the same date to the petitioners, it mentioned the period as 16.12.2012 to 31.05.2013.

Be that as it may, the Tribunal has already held in the case of *Aircel Vs. Bharti*³ that the termination rate of 10p per SMS was the prevailing market rate and even if the agreement between the parties was silent on the issue, if the petitioner wanted to continue terminating SMS on the network of the respondent, it had to pay this charge. The relevant parts of that judgment are as under:

² (2012) 5 SCC 275.

³ Petition No. 130 of 2012 judgement dated 24 September, 2012.

“36.It is seen that no agreement has been executed between the parties for interconnection charges for SMS. The SMS services between the parties are based on unwritten understanding. If one party doest (sic) not want to continue the arrangement, without charges, we cannot force that party to continue with the arrangement. Therefore, in the present case, it is for the respondent to terminate the existing arrangement, if it so wishes.”

“ 39.In a case of this nature the doctrine of restitution shall apply. The Petitioner cannot unjustly enrich itself in terms of the interim order passed by this Tribunal. Such restitution must be based on the materials placed on record. Therefore, we issue directions to restitute the respondent an amount it has suffered loss by way of damages. **A direction is issued that the period during which the order of injunction remained operative, the Petitioner shall pay to the Respondent Interconnection Usage charges @ 10paise/SMSon net inflow of traffic.**”

(emphasis supplied).

In the present case, there is a specific agreement between the parties as per which the rate for SMS termination is 10p per SMS. We find that the respondent cannot wriggle out of the agreed clause just because some other operators did not execute the same addenda. We may also note that in a regime of forbearance, it is perfectly lawful if two parties mutually agree on a rate which is not found to be in violation of a regulation.

We now come to another contention of the respondent. As per it, under clause 6.7.3, details regarding handover and routing arrangements for inter-service area SMS were to be finalized subsequently through mutual discussions

and the agreement for termination charges was to come into force only on the finalization of the same.

Clause 6.7.3 reads as under:

“6.7.3 Details regarding handover and routing arrangements for intra service area and inter-service area SMSs shall be finalized subsequently through mutual discussions. The arrangement/agreement for termination charges and carriage charges in clause 6.7.1 and **clause 6.7.2 above shall come into force prospectively after finalization of such handover and routing arrangements**”

(emphasis supplied)

We may note that a meeting was held by the respondent on 3.12.2012. It was explained by the respondent in the meeting that since other operators had not come forward to sign the agreement with the respondent, it had not acted on the agreements. However, in view of the changed scenario due to a Judgement of the Tribunal, respondent has considered to make the agreements operational with effect from 16.12.2012. The details of billing, process of reconciliation, revenue collection etc. were specified in that meeting. Paras 3 and 4 of the minutes dated 11.12.2012 read as under:

“3.0 BSNL side explained the reasons of not acting upon this agreement so far such as other operators have not been coming forward to sign the agreement and TRAI's directions on the matter.

4.0 In view of changed scenario due to recent TDSAT judgement on SMS termination dispute between Airtel and M/s. Tata Teleservices Ltd, BSNL has considered to make this agreement operational. **It was decided after considerable discussion with these three operators viz. M/s Idea, Vodafone and Airtel that the**

agreement dated 23.2.2010 will be made operational w.e.f. 16.12.2012. Billing will be done at zonal level by Circles having BSNL, SMSCs located i.e. Punjab, Tamil Nadu, Maharashtra & West Bengal. Process of reconciliation, revenue collection etc. will be same as applicable for Voice IUC.”

(emphasis supplied)

There is nothing on record to show that there was any arrangement in place in terms of clause 6.7.3 prior to that. We may note that the petitioner was a party in the meeting and it even raised bills on the respondent for the period from 16.12.2012 to 31.12.2012 vide letter 29.01.2013. Though, the petitioner subsequently raised the issue of discrimination when the respondent asked the other service providers for implementing the SMS charging from 1.4.2011, the reply of the respondent is that the same was never implemented. We may note that prior to the addenda signed on 13.04.2010 vide which the clause 6.7 was amended, the agreement between the parties specifically provided for bill and keep in terms of an earlier addendum dated 25.11.2005. We find that the amended clause 6.7 came into force on 16.12.2012 when the arrangements in terms of clause 6.7.3 were finalized and put in place. We may note here that billing and reconciliation for SMS termination were complex issues and, therefore, routing and handover at proper point of interconnect, where these could be done properly, was important. It was only in the meeting referred

above that billing and reconciliation etc. was decided. In our view, prior to 16.12.2012 the agreement was continuing to be bill and keep.

Further, in case of Aircel Vs. Vodafone⁴, in regard to service tax and promotional SMS, the Tribunal has decided as under:

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

“..... since the charge for promotional SMS was fixed on 25th October, 2011 by the regulation, the respondent cannot charge 10p for such SMS over and above that provided for in the regulation from the time that same came into effect.”

In view of the foregoing, we direct the petitioners to provide the necessary details, including bifurcation of SMS data (promotional and other than promotional), for the period from 16.12. 2012 to 31.05.2013, to the respondent. The respondent is directed to complete the reconciliation of data within four weeks of the receipt of these details. Based on the reconciliation, the amount found payable shall be paid within a period of four weeks.

⁴ Petition No. 843 of 2012.

The petitions are partially allowed to the extent above and with the above directions. There will be no order as to costs.

.....
(Aftab Alam)
Chairperson

.....
(Kuldip Singh)
Member

.....
(B.B. Srivastava)
Member