TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL
NEW DELHI

Dated 1st February, 2018

Telecommunication Appeal No. 2 of 2017
M.A. No. 118 of 2017

Bharti Airtel Ltd. … Appellant

Vs.

Telecom Regulatory Authority of India & Anr. … Respondents

Along with
Telecommunication Appeal No. 3 of 2017

Idea Cellular Ltd. … Appellant

Vs.

Telecom Regulatory Authority of India & Anr. … Respondents

Telecommunication Appeal No. 1 of 2016

Bharti Airtel Ltd. … Appellant

Vs.

Telecom Regulatory Authority of India … Respondent

Telecommunication Appeal No. 1 of 2017

Idea Cellular Ltd. … Appellant

Vs.

Telecom Regulatory Authority of India … Respondent

BEFORE:

HON'BLE MR. JUSTICE SHIVA KIRTI SINGH, CHAIRPERSON
HON'BLE MR. BIPIN BIHARI SRIVASTAVA, MEMBER
HON'BLE MR. A.K. BHARGAVA, MEMBER

For Appellant – Bharti	:	Mr. Gopal Jain, Sr. Advocate Mr. Harsh Kaushik, Advocate Mr.Abhay Chattopadhyay, Advocate Ms.Kriti Awasthi, Advocate
For Appellant – IDEA	:	Mr. Soli Cooper, Sr. Advocate Mr. Anush Raajan V., Advocate Ms.Urvika Suri, Advocate Ms.Rupsha Banerjee, Advocate
For Respondent No.1(TRAI)	:	Mr. Tushar Mehta, ASG Mr. Kirtiman Singh, Advocate Mr.Prateek Dhanda, Advocate Mr.Waize Ali Noor, Advocate Mr.Momin Khan, Advocate
For Respondent No.2(Reliance Jio)	:	Mr. C.S. Vaidyanathan, Sr. Advocate Mr.Ramji Srinivasan, Sr.Advocate Mr. K.R. Sasiprabhu, Advocate Mr. Rittin Rai, Advocate Mr.Biju P. Raman, Advocate Mr. Jayank Malik, Advocate Mr.Abhas Kshetarpal, Advocate Mr.Srijan Sinha, Advocate Ms.Kritika Bhardwaj, Advocate Mr.Hiten Sampat, Advocate Ms.Shailey Saluja, Advocate Mr.Vishnu Sharma, Advocate

ORDER

By S.K. Singh, Chairperson – Before proceeding to notice the relevant facts, it will be useful to note that Telecom Appeal Nos.1 of 2016 and 2 of 2017 have been preferred by the Appellants against decision of the Telecom Regulatory Authority of India (TRAI) (respondent no.1) communicated vide letter dated 20.10.2016, finding no merit in their objections/representations against the "Welcome Offer" launched by Reliance Jio Infocomm Limited (respondent no.2) with effect from 5.9.2016 when it begin its commercial services as a new entrant in the field of Telecom Services. The other two Appeals are against similar decision of TRAI communicated vide letter dated 31.1.2017 whereby Appellants' objections to another offer by respondent no.2 under the name "Happy New Year Offer" were also held to be meritless. Since all these four Appeals are similar and connected, they have been tagged and heard together. They shall be governed by this common judgment.

2. As indicated earlier, Reliance Jio Infocomm Ltd. (R2) as a new entrant launched its commercial services with effect from 5.9.2016 and announced a "Welcome Offer" under which all services (voice, data and SMS) were offered as free to its subscribers. The Appellants made a representation to TRAI stating that

this Welcome Offer (referred to as WO hereinafter) is against the regulatory framework. Vide letter dated 20.10.2016 to the Appellants, TRAI conveyed the following:

> "(i) The revised offer of free services by RJIL has been limited to 90 days i.e. up to 03.12.2016 and, therefore, is consistent with the guidelines on promotional offers;
>
> (ii) The tariff plans offered by RJIL and the various submissions made thereafter have been examined and it is found that the tariff plans filed with TRAI cannot be considered as IUC non-compliant, predatory and discriminatory at present. However, the Authority would continue to keep a close watch on the tariffs being offered in the market by all players including RJIL."

3. Subsequent to this, R2 announced another offer under the name "Happy New Year Offer" (referred to as HNYO hereinafter) to be effective from 4.12.2016 till 3.3.2017 with benefits extended up to 31.3.2017. The Appellants again approached TRAI against this new offer. Failing to get a prompt response from TRAI, appeal was filed by the Appellants. This Tribunal urged TRAI to take a decision expeditiously in this regard. TRAI communicated its decision in this regard vide letter dated 31.1.2017 which is reproduced below:

> "The tariffs reported by M/s. RJIL under Happy New Year Offer have been examined with reference to TRAI guidelines / direction on promotional

offers and provisions of Telecommunication Tariff Order. RJIL had implemented a promotional offer as Welcome Offer validity of which was for 90 days effective from 5.9.2016. Subsequently, RJIL had implemented another Promotional Offer as Happy New Year Offer. Validity of this offer was from 4.12.2016 up to 3.3.2017.

On examination, it has been found that Happy New Year Offer launched by M/s.RJIL on 4.12.2016 is distinct from their earlier Welcome Offer and cannot be treated as an extension of the earlier promotional offer as the benefits under both set of promotional offer differ. The Happy New Year Offer gives an opening date and closing date within the prescribed limit of ninety days and the eligibility conditions. In the Happy New Year Offer there is a different data limit and a provision for getting a higher speed after prescribed payment once the Data limit is exhausted. Accordingly Happy New Year Offer is not in violation of the regulatory guidelines on promotional offer.

Your allegations that the Happy New Year Offer is violative of the principles of non-discrimination, IUC Compliance and Non-Predation have been examined with reference to extant TTO provisions / IUC Regulations on the subject and no such violation has been found."

4. Tariff is an important tool in the hands of service providers through which they outline to the public the terms and conditions of providing their telecommunications services including rates, fees, and various form of charges etc. In a competitive market, tariff plays crucial role in acquisition and retention of the subscribers. A regulatory framework for tariffs, therefore, is necessary to ensure

fair play for all the service providers in the market place. TRAI has developed and evolved regulatory framework in the form of Telecommunication Tariff Order 1999(with more than 60 amendments), Telecommunication Consumer Protection Regulation 2012(with many amendments) and few other Directions and Guidelines issued from time to time. Cornerstone of this framework is a 'light touch regulation' with forbearance prescribed for tariffs in general. The guiding principles of these regulations are that the tariffs should be Non-Discriminatory, Non-Predatory, Non-Ambiguous and Not Misleading. It is, therefore, imperative that all tariffs are rigorously tested against these principles for effective and fair regulatory regime and orderly growth of the sector.

5. Appellant's grievance is that these principles, particularly IUC-compliance and non-predatory, have not been properly/rigorously applied by TRAI against the promotional offers of R2. TRAI's examination of the issues agitated by the Appellants is reflected in the two letters cited above. First issue replied by TRAI is that the impugned tariffs under "Welcome Offer" and "Happy New Year Offer" are both limited to 90 days and are distinct from each other; thus complying with the requirement of guidelines on promotional offers. Second contention has elicited a reply from TRAI that both the impugned tariffs are IUC compliant, non-discriminatory and non-predatory; thus complying with the requirement of Telecommunication Tariff Order(TTO).

6. Since all the respondents including TRAI have raised a question as to the maintainability of these Appeals filed under section 14(b) of the Telecom Regulatory Authority of India Act (The Act), that legal issue is taken up first. Section 14 provides for establishment of this Tribunal, described as Telecom Disputes Settlement & Appellate Tribunal (TDSAT). Sub-section (a) indicates the original jurisdiction of this Tribunal under which it can adjudicate any dispute (i) between licensor and a licensee; (ii) between two or more service providers; and (iii) between a service provider and a Group of Consumers. But the vast amplitude of this power, connoted by use of the word "any dispute" has been curtailed by clauses (A), (B) and (C) in the proviso and as a result certain trade practices which are subject matters of jurisdiction of the Commission established under the Monopolies & Restrictive Trade Practices Act, 1969, complaint of an individual consumer maintainable before the Consumer Forum or Commission established under the Consumer Protection Act, 1986 and dispute between Telegraph Authority and any other person covered by sub-section (1) of Section 7(B) of the Indian Telegraph Act, 1885 have been carved out and taken away from the jurisdiction of this Tribunal. Section 14(b) describes appellate power of this Tribunal as a power to – "hear and dispose of appeal against any direction, decision or order of the Authority" under this Act.

7. The Authority under the Act is defined to be the Telecom Regulatory Authority of India (TRAI). It needs no emphasis that the appellate power covers any direction, decision or order of TRAI and such appellate power has not been truncated or qualified by any proviso.

8. The submission advanced on behalf of respondents in support of their preliminary objection to the maintainability of the appeal is on the ground that although Section 14(b) provides for appeal against any direction, decision or order of the Authority, no appeal would actually lie unless what is impugned is a direction or a decision or order that decides a *lis* and is, therefore, adjudicatory in nature. It was also submitted on the basis of amendments made in the Act in the year 2000 that the adjudicatory functions of the Authority have been done away with and are now to be exercised by this Tribunal, therefore, now appeal can lie only against directions of TRAI. In support of this stand, reliance was placed by Mr. Mehta, learned Additional Solicitor General appearing for TRAI on Judgment of the Apex Court in the case of BSNL Vs. Telecom Regulatory of India & Others (2014)3 SCC 222. Only paragraph 107 of that Judgment has been cited and it reads as follows:

> "107. The primary objective of the 2000 Amendment was to separate adjudicatory functions of TRAI from its administrative and legislative functions and ward off the criticism that the one who is empowered to make

> regulations and issue directions or pass orders is clothed with the power to decide legality thereof. The word "direction" used in Section 14(b) is referable to Sections 12(4) and 13. The word "order" is referable to Sections 11(2) and 12(1). The word "decision" has been used in Sections 14-A(2) and (7). This is because the proviso to Section 14-M postulates limited adjudicatory function of TRAI in respect of the disputes being adjudicated under Chapter IV before the 2000 Amendment. This proviso was incorporated in Section 14-M to avoid a hiatus between the coming into force of the 2000 Amendment and the establishment of TDSAT. None of the words used in Section 14(b) have anything to do with adjudication of disputes [by TRAI]."

9. The issue which was falling for decision and was discussed in paragraph 107 was whether after the 2000 Amendment in the Act, the authority was left with any separate adjudicatory functions. The words used in Section 14(b) were being relied in support of the proposition that even after the Amendment the Authority could issue directions or pass orders or make decisions and, therefore, was left with power to adjudicate disputes. This was negated by holding that none of the words used in Section 14(b) require adjudication of disputes by the Authority. The aforesaid judgment is an Authority for that proposition and it does not lay down that since Authority is no longer empowered to adjudicate disputes in view of 2000 Amendments, no appeal will lie against its direction, order or decision to this Tribunal. In fact, this paragraph also highlights the sole adjudicatory role of this

Tribunal. Mr. Mehta also placed reliance upon the judgment dated 25.4.2012 passed by the Securities Appellate Tribunal, Mumbai in Appeal No.86 of 2011 (**HB Stock Holdings Ltd Vs. SEBI and Others**) wherein it was held that mere disposal of representations filed by the Appellant with the Regulator do not confer a cause of action to approach the Appellate Tribunal. Paragraphs 5 and 6 of that judgment were read *in extenso* and relied upon.

10. The same judgment of Securities Appellate Tribunal was cited and also relied upon by the learned senior counsel, Mr. Soli Cooper, appearing for the Idea Cellular Ltd in Appeal No.3 of 2017. He placed the entire judgment and order which shows that the relevant paragraphs referred by Mr. Mehta are parts of paragraph 6 and the whole of paragraph 7. He submitted that the said judgment can be safely relied upon because while interpreting the meaning of an order which is appealable, it has been held that appeal would lie against every order or decision taken by the Board **which adversely affects rights of the parties (emphasis supplied).**

11. On careful reading of the above judgment, it becomes clear that in paragraph 7 the locus or rights of the appellants were scrutinized and it was found that he had made certain complaints in matters which did not relate to or affect his rights. However, the Board examined the allegations that some shares have been

transferred to certain entities in violation of the regulatory framework and found the allegations to be without merits. That order, by the Board, was in compliance with the directions given by the Appellate Tribunal but still the appeal was not entertained by the Tribunal on a finding that the order "in any way does not impinge on any right of the appellant". It was again emphasized that the said order or decision of the Board did not adversely affect rights of the appellant and hence at the instance of the Appellant that order was not found to be an appealable order. Accordingly, the appeal was rejected as not maintainable.

12. Learned counsel for the Appellants in some of the appeals, Mr. Gopal Jain has strongly refuted the submission that Appellate jurisdiction is not available against the impugned decisions of TRAI. He has placed reliance on paragraphs 18, 27 and 33 of the judgment of Apex Court in the case of **Cellular Operators Association and Others Vs. Union of India – (2003) 3 SCC 186** and also on paragraphs 15 to 17 of judgment of the Apex Court in the case of **Union of India Vs. Tata Teleservices Maharashtra Ltd. – (2007) 7 SCC 517**. These judgments indicate that this Tribunal is an expert body and its jurisdiction is wide. In fact, paragraph 33 of the judgment in **Cellular Operators Association of India** indicates how the jurisdiction of TRAI as a regulatory body is wide and in a given

case it may interfere with the existing rights of the licensees. Para 33 is as follows:

> **"33.** The regulatory bodies exercise wide jurisdiction. They lay down the law. They may prosecute. They may punish. Intrinsically, they act like an internal audit. They may fix the price, they may fix the area of operation and so on and so forth. While doing so, they may, as in the present case, interfere with the existing rights of the licensees."

13. On a close scrutiny of provisions in sections 11(1)(b), (c), (d), 11(2), 12 and 13 disclosing the powers of TRAI as a Regulator and in view of powers of this Tribunal constituted as Appellate Forum over the directions, orders or decisions of TRAI, we have no hesitation in rejecting the contention that the impugned decisions are not appealable. The objections or representations in the present matter were filed by Telecom Service Providers requesting for orders or directions to prevent alleged breach of orders and directions issued by TRAI in the past. Had the representations or objections found favour, a decision adverse to R2 could have been definitely appealable at the instance of R-2. In such a situation, the Appellants are definitely entitled to contend that decision of TRAI impugned in these appeals be examined on the plea that it affects them adversely and that the decisions are fit to be questioned in respect of their correctness, legality and propriety. The preliminary objection is accordingly held to be without any merits.

The appeals are found to be maintainable. To hold otherwise would mean that such orders/decisions by TRAI can never have adverse effect on a telecom service provider. Such plea would be wholly misconceived and unacceptable. If accepted, it would also render the wholesome power of appeal otiose to the large extent.

14. Some technical pleas were also raised on behalf of respondents such as impropriety of prayers in the appeals. Such pleas and also the plea that appeals are now infructuous do not have merit because Civil Procedure Code is not applicable to proceedings before this Tribunal and even if it applied, relief can always be moulded to serve the interest of justice. Further, it would not be legal and proper to refuse to decide important issues of law involved in a statutory appeal only because the impugned action has taken effect because of delay in passing orders or hearing the appeals.

15. We shall next deal with the question whether both the promotional offers are limited to 90 days as per the regulatory provision. The issue of promotional offers was first dealt with by TRAI in a letter dated 19.06.2002. Following is the relevant part of the letter:

> "….The Authority has considered the implications of offering concessions to customers and is of the view that too long a promotional period dilutes the promotional character of the tariff plan and in fact makes it a regular plan…..Service providers are therefore advised to restrict the

> validity of promotional packages and/or the benefits offered to customers under such packages on offer to a maximum of 90 days from the date of launch."

Subsequently, TRAI issued a direction on 01.09.2008. The relevant part pertaining to promotional offers is as under:

> "All access service providers shall while publishing their promotional offers to public, specify therein –
>
> (a) The eligibility criteria for such promotional offer;
>
> (b) The opening and closing dates of such promotion offer (within the existing limit of ninety days)"

16. On reading of these provisions, all parties are *ad idem* that availability of such offers must be limited to 90 days. The point of contention is whether the benefits can be extended beyond the 90 days. Learned senior counsel for M/s IDEA, Mr. Cooper, submitted that benefits of the offer should be restricted to 90 days from the date of launch of the offer. To support his submission, he argued that (a) the operating part of TRAI letter dated 19.06.2002 clearly states that the benefits should be restricted to 90 days from the date of launch. Further, this operative part is "a decision" taken by TRAI after due consideration of issues involved and accordingly TRAI should implement it in letter and spirit; (b) since the direction mentions "existing limit" of 90 days, both, the direction and the TRAI

letter should be read together which would mean that the benefits of the offer are also restricted to 90 days from the date of launch of the offer, (c) since the direction dated 01.09.2008 is silent on the period of benefits, the provisions in the letter dated 19.06.2002 should prevail. Learned ASG Mr. Tushar Mehta, appearing for TRAI (Respondent No.1), submitted that although the validity of the offer cannot extend beyond 90 days, the benefits made available under such an offer can continue even thereafter and there is no embargo of 90 days on the availability of benefits. To support this, he argued that (a) the letter dated 01.09.2002 does not have a statutory force and is not binding. (b) the direction on promotional offer does not stipulate any restrictions on duration of benefits (c) even before and after these offers of WO and HNYO, there have been other promotional offers where the benefits have extended beyond 90 days.

17. Validity of the period of benefits is an important and material part of the offer. Reading of the letter dated 19.06.2002 indicates that it conveys decision of the TRAI in respect of validity of benefits under promotional offers, in the form of an advice to the service providers. It is neither a direction nor an order because it has not been issued after a due consultation process. Therefore, in order to enforce this decision, if need be, TRAI will have to issue an appropriate order, regulation or direction in general or on a case by case basis. Subsequently, pursuant to a due consultation process, TRAI issued a direction dated 01.09.2008 on the promotional

offers. This direction has not been challenged. This direction therefore represents the intent and final view of the regulator on this issue, wherein no specific restrictions have been put in respect of benefits under a promotional offer. TRAI in its submission has merely reiterated and re-affirmed this position. In our view also, for a material restriction to be operative, it has to be clearly specified in the regulation/order/direction issued after a due consultation process. The only thing we need to test further is whether the regulator has applied his view consistently and non-discriminately. We are given to understand that TRAI has not intervened in other cases also where benefits have extended beyond 90 days, which attests to the consistency of TRAI's view. In facts of the case, we accept TRAI's submission that benefits in an offer can extend beyond 90 days.

18. The other question that needs to be answered is whether the impugned offers WO and HNYO are same or not? WO provides all services for free but restricts free data to 4GB per day. In HNYO, everything else remains the same except that the free data limit has been reduced to 1 GB per day and those subscribers who wish to use more than 1 GB may avail any of the two STVs (special tariff vouchers) that were filed along with the HNYO. Learned senior counsel for M/s Airtel, Mr. Gopal Jain repeatedly argued that these changes are cosmetic and do not change the character of the tariff plan. Therefore, HNYO is merely an extension of WO and against the regulatory guideline. TRAI relies upon the

obvious difference in 4GB and 1GB limit and considers it as a distinguishable factor. TRAI also cites the fact of STVs in this context as misplaced. The STVs are applicable only on tariff plans and not on promotional offers and mention of these in the HNYO is merely of informative nature. Hence, in our view, this factor in no way distinguishes HNYO from WO. Therefore, the only difference to be considered is the different free data limit. Is this a significant factor to make both the offers different? The matter of fact is that there is no restriction in regulation on the benefits that can be offered. Hence innumerable combinations of offers can be worked out. The essential and material components of a tariff offer are, "what" is offered, at what "rate" and in what "quantity". In the instant case, data is on offer for free but in different quantity in these two offers. Further, rationale for this change has also been stated viz. that 80% of users consume less than 1GB data per day. Mr. Gopal Jain pointed out that since majority of users consume less than 1GB data, change of limit from 4GB to 1GB does not make a difference to them. Hence, both the offers essentially are the same. Learned counsel for R2, Mr.Ramji Srinivasan, used the same fact to argue that since the average data usage happened to be less than 1GB, the change from 4GB to 1GB is certainly significant. We would like to adopt a commonsense approach here. As stated above, "quantity" being an essential and material component of the offer, a change in "quantity" would normally change the offer. But, a change from 4GB to 3.99 GB for example

would certainly not distinguish the offer as per commonsense. However, a change which is based on a rational reason (usage patter in this case) and a rational objective (such as to fine tune the data usage to reduce congestion) will distinguish one offer from another. In view of this, we concur with TRAI that the two offers are different.

19. During the course of preliminary hearing on the above twin issues, documents related to WO and HNYO were sought on affidavit. After perusal of the documents filed and preliminary submissions made by all the parties concerned, we found that some questions remain un-answered in respect of WO and HNYO. These questions were replied to by TRAI through affidavit and were also dealt with by learned ASG and learned counsel for R2 during the course of hearing. We find that the question relating to 'Reporting Requirement' is pertinent since it is central to regulations on tariff. We are conscious of the fact that the question regarding reporting requirement was not agitated by the appellants in their appeals. However, some of the pleadings and even the above mentioned two impugned orders of TRAI can be understood in right context only after taking into account how tariff reporting was done and how the reporting requirement was dealt with. Therefore, we shall avert to this issue in subsequent para, before moving on to the second part of the impugned orders of TRAI.

20. Reporting requirement is fundamental to the regulatory framework for tariffs. Through the Telecommunication Tariff (30th amendment) Order 2004, all the TSPs have been mandated to file their tariffs with TRAI within seven working days from the date of implementation of the said tariff. The current relevant portion of the TTO (30th amendment) 2004 is reproduced below:

> "Reporting Requirement" means the obligation of a service provider to report to the Authority any new tariff for telecommunication services under this Order and/or any changes therein within SEVEN days from the date of implementation of the said tariff for information and record of the Authority after conducting a self-check to ensure that the tariff plan(s) is/are consistent with the regulatory principles in all respects which inter-alia include IUC Compliance, Non-discrimination & Non-predation."

21. TRAI has stated in its affidavit dated 15.02.2017 that *"The start dates of 'Welcome Offer' and 'Happy New Year Offer' were reported to TRAI on 01.09.2016 and 07.12.2017 respectively."* We find reporting of HNYO in order but TRAI position on WO as untenable. The first document shown to us by TRAI was a letter dated 01.09.2016 filed by RJIO which lists a "Base Plan"having validity of 6 months beginning 05.09.2016. Along with rates for various items (which are not zero), it has a section under 'special benefits' which mentions *"Up to 4GB 4G LTE data free every day, all local and STD voice/video calls and SMS in home and national roaming (maximum 100 SMS per day) free* ***till 31st December***

2016.” This tariff which is filed as a **Plan Voucher**, does not mention “Welcome Offer”. As per TCPR 2012, a tariff plan cannot be marketed as a promotional plan. In any case, tariff plans and promotional plans are clearly different entities in regulatory scheme of things. Letter dated 27.09.2016 mentions “Welcome Offer” but does not specify what it is. In letter dated 12.10.2016, RJIL requests the Authority to *“consider the ‘’**special benefit’ offered under both pre-paid and post-paid tariffs filed by it to TRAI on 01.09.2016 as <u>Promotional Offer</u> for a period of 90 days, with start date of promotional offer from 05.09.2016 and end date of the offer on 03.12.2016. However, the benefits offered under the promotional offer will be available to consumers till 31.12.2016.”*** This only shows that the promotional offer under the name “Welcome Offer” having a start and end date limited to 90 days, as required by Direction 2008, did not exist in the records of TRAI. Since TRAI accepted this request of RJIL made vide letter dated 12.10.2016, the best we can agree to is that the “Welcome Offer” came to be filed on 12.10.2016. Hence, there is no escaping the fact that RJIL did not meet the reporting requirement in respect of WO. Learned counsel for R2 advanced the argument that even if there indeed was a delay in reporting, it did not have any effect on the subscribers whatsoever. If this argument is accepted, it will make the provision of reporting requirement in the regulations totally redundant. It was also alluded that this is not a significant issue and arose mainly because of a difference

in understanding as reflected in the correspondence by RJIL with TRAI. We do not subscribe to this view. It is for TRAI to decide whether and to what extent a delay of this nature is significant. TRAI of course has the power to take a lenient view and even condone this delay. However, it is required to exercise its powers in accordance with the provisions in its own regulations. The relevant provision in this case is clause 7(iii) of TTO (52nd amendment) Order 2012 which is as follows:

> "if any service provider fails to comply with the Reporting Requirement, it shall, without prejudice to the terms and conditions of its licence, or the provisions of the Act or rules or regulations or orders made, or directions issued, thereunder, be liable to pay five thousand rupees, by way of financial disincentive, for every day of delay subject to maximum of two lakh rupees as the Authority may by order direct: Provided that no order for payment of any amount by way of financial disincentive shall be made by the Authority unless the service provider has been given a reasonable opportunity of representing against the contravention of the tariff order observed by the Authority."

22. In the light of above, we direct TRAI to take appropriate action in accordance with provisions in clause 7 of TTO 1999(as amended) for non-compliance of the reporting requirement in respect of 'Welcome Offer'.

23. We now deal with the second part of the impugned letters of TRAI which relates to compliance with the regulatory principles of non-discrimination, IUC compliance and non-predation.

24. Non-discrimination in the context of tariffs has been defined in the TTO 1999 as follows:

> *"No service provider shall, in any manner, discriminate between subscribers of the same class and such classification of subscribers shall not be arbitrary."*

Appellant have not advanced any argument to show even remotely as to how the impugned tariffs are discriminatory in terms of the above definition. To be fair, they have also not pressed this issue. In facts of the case, we agree with the conclusion of TRAI that the impugned tariffs are non-discriminatory.

25. Appellants maintain that R2's tariff plans are *ex facie* IUC non-compliant. Appellants submit that IUC compliance implies that the service provider should be able to meet the IUC expenses. Under the impugned offers WO/HNYO, all services including voice services are being offered free and no amount is recoverable that can make R2 meet the IUC expenses. Appellants further rely upon the Explanatory Memorandum attached to the TTO (30th Amendment dated 16.01.204) which is reproduced below:

> "The Authority has already laid down broad regulatory principles to determine as to whether a particular manner of pricing service is anti-competitive / discriminatory etc. Further the Authority has forborne with the main tariff items in Cellular and Basic services (except rural subscribers tariff & roaming tariffs). The

IUC regime specified by the Authority reflects the underlying costs providing the service. Also the IUC charges as specified will implicitly function as a floor to the retail tariffs and thereby scope for predatory pricing or cross-subsidization is limited."

26. Appellants argue that the above EM requires the IUC charges to be the floor to the retail traffic and therefore free voice call tariff is violative of TTO. Learned counsel for R2 submitted that "free calls" are permissible by the very definition of tariff in the TTO 1999 viz. "Tariff(s)" mean(s) rates and related conditions at which telecommunication services within India and outside India may be provided including rates and related conditions at which messages shall be transmitted to any country outside India, deposits, installation fees, rentals, **free calls**, usage charges and any other related fees or service charge"(emphasis supplied). He further argued that as per regulation, there is forbearance for retail tariff which means that there can be no floor to the retails tariff. While we agree that EM cannot have the force of law, we are open to examination of what the EM suggests. A plain reading of the quoted part of the EM suggests that in the context of forbearance of tariff, authority hopes that the IUC charges prescribed by TRAI would deter service providers from indulging in predatory pricing as it would implicitly (not explicitly) act as a floor. This cannot be construed as prescription for declaring the IUC charges as floor for tariff. Clause 6(iii) of TTO states that *"Where a tariff has been specified as a floor, no tariff shall be fixed below such*

floor". Therefore, for a floor price to be effective in regulation, it has to be particularly "specified" in regulation. In the absence of such specification, no floor can be assumed for the tariffs. We, therefore, answer this question in favour of the respondents.

27. In the absence of a floor price, the question that arises is against what benchmark will a service provider do the self-check for IUC compliance? Reference has been made by both the parties to a letter dated 20.05.2003 which states that *"IUC consistency of tariffs implies that the service provider should be able to meet the IUC expenses on a weighted average basis. The relevant weighted average should be of the service segment concerned."* Learned counsel for R2 has argued that even if this approach is adopted, RJIO is IUC compliant as explained its letter dated 27.09.2016 and 12.10.2016 which has not been controverted. This explanation is based on the fact that tariff package is composite of voice and data and not the voice alone and that post the promotional offers, they will be able to recoup the IUC expenses in a short period.

28. The regulation provides for conducting a self-check for consistency with the regulatory **principle** of IUC compliance. A consistency with **principle** denotes a generality in terms of scope and would not mean a call by call basis or a real time

basis recovery of IUC expenses. Practically also the IUC settlement happens on bulk CDR basis and it is the bulk traffic (which is the aggregate resultant from all tariff plans) over a period of time that determines the IUC expenses for a service provider. These expenses have to be met by the bulk revenue again generated over a period of time. It is relevant to point out that no such period has yet been specified under the existing regulatory regime. It is needed to work out even on a rough basis – 'the relevant weighted average of the concerned service segment'. Even in its absence, the service provider, of course, needs to check that the proposed tariff would not create a disability in terms of revenue and expenses gap over a planned period. We find no such evidence or averment of disability in this case, especially because the offers were valid for a short period of 90 days each. In view of this, we are inclined to agree with TRAI that the impugned tariff offers are consistent with the principles of IUC compliance. Having said this, we wish to red flag the issue that if such offers continue in some form or the other for a longer period, open-ended provision may make every tariff justifiable, thereby making the provision itself irrelevant. Open-ended provisions also make the verification of IUC compliance difficult, if not impossible. We, therefore, direct TRAI to issue clear guidelines/benchmarks/methodology for performing self-check for consistency with the principles of IUC compliance.

29. Predation in regulation is a vast and complex subject and we do not intend to delve deep into this territory. We shall confine to the regulatory provision that while reporting the tariff, service provider should conduct a self-check for consistency with the regulatory principles which *inter alia* include non-predation. This presumes a benchmark or a criterion or a guideline or a method that can be applied to arrive at a reasonable conclusion. It has been submitted by learned ASG that predatory pricing is an abuse of dominant position by one service provider over others. Without a dominant position, temporary pricing below cost by a TSP which is not a significant market power (SMP) cannot be *per se* anti-competitive. Therefore, the first criterion is to know whether a TSP qualified to be SMP. In the context of telecommunication, the same is defined under clause 2 (xxiii) of the Telecommunication Interconnection Usage Charges Regulations 2003 as follows:

> "(xxiii) "**Significant Market Power (SMP)"** means "A Service Provider holding a share of at least **30% of total activity** in a licensed telecommunication service area. These services are categorized as Basic Service, Cellular Mobile Service, National Long Distance Service and International Long Distance Service." **Where "Activity" would mean and include any one or more of the follows:**
>
> (a) Subscriber Base
> (b) Turnover
> (c) Switching Capacity
> (d) Volume of Traffic" (emphasis supplied).

30. Since R2 is a new entrant, criterion (a), (b) and (c) above would not qualify him as SMP. As far as the volume of traffic is concerned, R2 deploys data-centric technology. We were informed that post launch of these tariff plans, there was a manifold increase in data traffic of not only R2 but the competitors as well. We find this as a welcome development. We, however, enquired that with rapid growth in data usage, is it possible that total volume of traffic of R2 crossed the 30% threshold? In response to this query, learned ASG submitted that this indeed may have happened at the end of December 2016. He, however, added that this information became available to TRAI later in March 2017 only. If that be so, TRAI's conclusion that the HNYO was non-predatory appears to be on sound footing. It only shows that because of the obvious dependency on data availability, prompt collection and dissemination of data is absolutely essential for effective regulation. We accordingly direct TRAI to work out quick collection and dissemination of relevant data related to subscriber base, turnover, switching capacity and volume of traffic, subject to practicality. Learned ASG fairly submitted that even if the data would have been available in time, it would not have automatically made a below cost tariff as non-predatory warranting immediate action like suspension. It would have required further consideration of various factors by the regulator. This being a reasonable submission, we concede

to TRAI's contention in the impugned letters that the impugned offers were non-predatory.

31. Having agreed with the submissions of learned ASG, we hasten to point out that no benchmark or guideline has been provided by TRAI as to when a below cost tariff by a SMP would become predatory, warranting action. It is also presumptive to accept that the concept of SMP evolved in the context of Telecommunication Interconnection Usage Charges Regulations 2003 is the prescribed benchmark for self-assessment in respect of a tariff's need to be non-predatory. The requirement of self-assessment binds even a new entrant in the field of Telecom Services. We, therefore, direct TRAI to issue suitable direction/order/regulation regarding benchmark/guideline that can be applied for ascertaining consistency with the principles of non-predation. We also observe that "all services free" offer is an extreme form of below cost tariff and therefore most rigorous test must be applied for regulatory compliance. Till TRAI issues the required benchmark/guidelines, as an interim measure, we further direct that no "all services free" offer in any manner will be launched by R2 (or any similarly placed TSP) without making written submissions to TRAI related to self-check for consistency with regulatory principles of non-predation. TRAI will examine these

submissions within one week and convey its approval or disapproval in writing with reasons.

32. In view of the above, we find the impugned letters of TRAI dated 20.10.2016 and 31.01.2017 to be in order requiring no intereference, subject to following:

(a) We direct TRAI to take appropriate action in accordance with provision in clause 7 of TTO 1999 (as amended) for non-compliance of the reporting requirement in respect of 'Welcome Offer'.

(b) We direct TRAI to issue clear guidelines/ benchmarks/methodology for performing self-check for consistency with the principles of IUC compliance.

(c) We direct TRAI to work out quick collection and dissemination of relevant data related to subscriber base, turnover, switching capacity and volume of traffic, subject to practicality.

(d) We direct TRAI to issue suitable direction/order/regulation regarding benchmark/guideline that can be applied for ascertaining consistency with the principles of non-predation.

(e) As an interim arrangement, till TRAI issues the required benchmark/guidelines, we further direct that, no "all services free" offer in any manner will be launched by R2 (or any other similarly placed TSP) without making written submissions to TRAI relating to self-check for consistency with regulatory principles of non-predation. TRAI will

examine such submissions within one week and convey its approval or disapproval in writing with reasons.

(f) The directions (a) to (d) above need to be carried out expeditiously and preferably within four months from today.

Telecommunication Appeals Nos.1/2016, 1/2017, 2/2017 and 3/2017 along with all miscellaneous applications are disposed of in above terms.

Before parting with this order, we (excluding Shri Bhargava) express our gratitude to the Hon'ble Member, Shri A.K. Bhargava for elucidating for us, several technical aspects of the relevant issues.

…….……
(S.K. Singh, J)
Chairperson

…….……
(B.B. Srivastava)
Member

…….……
(A.K. Bhargava)
Member

sks & pkb