

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

Dated 18th October, 2019

**Telecommunication Petition No. 10 of 2016
M.A.No.113 of 2016 and 87 of 2017**

Cellular Operators Association of India & Ors. ... Petitioners
Vs.
Bharat Sanchar Nigam Ltd. ... Respondent

**Telecommunication Petition No.232 of 2015
M.A. No. 132 of 2016 and 96 of 2017**

Bharti Airtel LimitedPetitioner
Versus
Bharat Sanchar Nigam Ltd.Respondent

BEFORE:

**HON'BLE MR. JUSTICE SHIVA KIRTI SINGH, CHAIRPERSON
HON'BLE MR. A.K. BHARGAVA, MEMBER**

In P.No. 232 of 2015:

For Petitioner : Mr. Ravi S.S. Chauhan, Advocate

In P.No.10/ 232/15:

For Petitioner Nos. 1,3,6,7,11,12 : Mr. Dhruv Mehta, Sr. Advocate
Mr. Harsh Kaushik, Advocate
Mr. Abhay Chattopadhyay, Advoc
Ms. Nikita Chitale, Advocate
Ms. Anupama Dhruv, Advocate

For Petitioner Nos. 4-5 : Mr. Saket Singh, Advocate



Mr.Sharath Sampath,Advocate
Mr.Manikya Khanna,Advocate

For Petitioner Nos.9-10

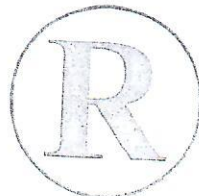
: Mr. Saket Singh, Advocate
Mr. Chaitanya Safaya, Advocate
Mr.Sharath Sampath,Advocate
Mr.Manikya Khanna,Advocate
Ms.Akansha Sharma,Advocate

For Respondent

: Mr.Tejveer Singh Bhatia,Advocate
Ms. Vishakha Ahuja, Advocate
Mr. Kartikeya Pant, Advocate
Ms. Chandrika Sharma, Advocate

ORDER

A. K. Bhargava - Telecom Petitions 232/2015 and TP 10/2016 have been filed challenging the circular dated 30-3-2015 (referred to as 2015 circular hereinafter) issued by the respondent, Bharat Sanchar Nigam Limited (BSNL). Later similar circulars issued by the respondent on 15-2-2016 (2016 circular) , 27-1-2017 (2017 circular) and 19-2-2018 (2018 circular) were also permitted to be impugned as part of these petitions. Interim protection was granted in respect of all the impugned circular except the 2018 circular. For the purpose of discussions, TP 10/2016 filed by Cellular Operators Association of India Ltd. (COAI) along with several other Telecom Service Providers (TSPs) will be referred, unless otherwise specified.



2. Prayers in TP 10/2016 are as follows:

- (a) Set aside and quash the impugned circular/letter bearing no. 2-2/2009-R&C(CFA) dated 30.3.2015 and reinstate the rates derived from circular dated 12.6.2012 in accordance with TDSAT judgment dated 20.8.2014 and 14.10.2014.
- (b) Set aside and quash all demand for infrastructure charges for active link raised by the respondent on the petitioners based upon circular/letter bearing no. 2-2/2009-R&C(CFA) dated 30.3.2015 and direct the respondent all amounts collected from the petitioners on basis of the said circular along with interest at such rates as prescribed in the interconnect agreement.
- (c) Set aside and quash all demand letters issued by the respondent revising the infrastructure charges on the basis of reclassification of cities / towns by the central government by way of its office memorandum dated 21.07.2015.
- (d) Set aside and quash the letter bearing no. 6-9/2015-NM (Infra) dated 29.01.2016 and direct the respondent to negotiate with the petitioners for fixing the rates of infrastructure and space charges for active links.
- (e) Pass an ad-interim ex-parte order in terms of prayer (a) and (c) above
- (f) Pass an ad-interim ex-parte order restraining the respondent from taking any coercive steps against the petitioners for recovery of any amounts under the demand letters issued by the respondent, revising the infrastructure charges on the basis of reclassification of cities / towns by the central government by way of its office memorandum dated 21.07.2015.
- (g) Pass such other and further order(s) as may be deemed fit and proper in the facts and circumstances of the case.

3. Petitioner TSPs have a long standing relationship with respondent BSNL since 2002 governed by Interconnect Agreement, amended from time to time. The dispute between the parties is related to infrastructure charges for active links provided by BSNL across the country to the TSPs. We notice some relevant clauses 2.1.10 and 6.3.3 of the interconnect agreement in respect of such charges, which are produced below:



“2.1.10 Irrespective of who owns a transmission system of the link interconnecting one party’s exchange to the exchange of the other party, each party subject to availability and feasibility may provide accommodation for the terminals of such equipment of the other party located in its premises. Each party may permit mounting of antennae for interconnect link owned by the other party on its transmission towers subject to feasibility. The provider of such facility shall determine rental for use of such space and mounting. Arrangements for installation, operation and maintenance of such equipment will be arrived at by mutual agreement.”

“6.3.3 It shall not be mandatory for BSNL to provide any infrastructure to CMTS PROVIDER which CMTS himself is supposed to arrange. In case the CMTS PROVIDER is not able to bring its interconnecting transmission link up to the BSNL’s designated exchange for the POI, BSNL may subject to availability and payment of the prescribed charges by CMTS PROVIDER, provide inter exchange junctions on PCMs from the exchange up to which the CMTS PROVIDER has brought its transmission link to the location of POI. These charges shall be same as prescribed by TRAI for leased lines from time to time or on R&G terms and conditions as the case may be.

For any other infrastructure link space in BSNL’s building, provision of power supply, air conditioning, mounting of antennas on towers or building tops if feasible, the charges and other terms and conditions for the same shall be as prescribed by BSNL from time to time separately.”

4. The infrastructure charges comprise of two components – charges for building space and charges for miscellaneous infrastructure services like power, air-conditioning etc. The history of these charges dates back to 1997. Since then many circulars have been issued in this respect. In 2006, BSNL came up with a classification criteria for fixing these charges which was based on Government of India’s 2004 HRA circular. The 2004 HRA circular provided for 5 categories of cities i.e. A1/A/B1/B2/C which BSNL simplified to 4 categories i.e. A/B/C/Unclassified. The Government revised the classification of cities for HRA purposes in 2008 as X



for A1 (of GoI 2004 circular), Y for A, B1 and B2 and Z for C and unclassified. BSNL revised the classification of cities by a circular in 2012 as X (corresponding to A1 cities of BSNL 2006 circular), Y (corresponding to A, B1 and B2 cities of BSNL 2006 circular) and Z (corresponding to C and unclassified cities of BSNL 2006 circular). Along with the classification, the 2012 circular revised the rates for infrastructure charges also.

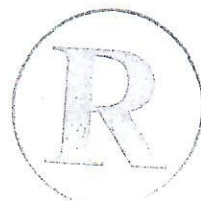
5. The 2012 circular of BSNL came to be challenged in TDSAT. This Tribunal passed the judgment on 20-8-2014 (referred to as '2014 judgment' hereinafter).

The operative part of the judgment is as follows:

"In view of the aforesaid circumstances, while upholding the right of the respondent-BSNL to revise the rates of the infrastructure facilities in question, we direct that the revised rates as per the circular dated 12.06.2012 of the Respondent shall be applicable with effect from 01.04.2013 which is the next financial year. Up to 31.03.2013, the infrastructure facilities provided by the respondent to the petitioners shall be charged at the rates and as per classification of cities as prescribed in the circular dated 30.05.2006."

6. Pursuant to this judgment, BSNL issued certain demands on TSPs. Aggrieved by these demands, TSPs filed application seeking clarification. On 14-10-2014, the Tribunal issued following orders (referred to as '2014 order' hereinafter) clarifying the position:

"Our attention is drawn to a letter dated 05-09-2014 referring to certain bills raised by the respondent [Annexure -C, page 33 of the M.A. folder, M.A. no. 277 of 2014]. As per this letter, the rates charged in the bills are worked out by notionally increasing the rates mentioned in the



circular dated 12-06- 2012 with effect from 01-04-2009. Further as per the letter, this notional increase is as per the Tribunal judgment. The relevant part of the latter is as under:

"Your kind attention is invited to the judgment given by TDSAT on 20-08-2014 in Petition No, 578 of 2012 that there will be notional increase in Infrastructure charges w.e.f. 01-04-2009 and actual recovery of differential w.e.f. 01-04-2013."

We, however, do not find any such direction in the judgment. On the contrary, if the rates mentioned in this circular are to be taken w.e.f. 01.04.2009 and then notionally increased by certain percentage every year to arrive at a rate to be applicable from 01.04.2013, it will be contrary to the letter and spirit of the judgment. The direction in the judgment is clear that revised rates as per the circular dated 12.06.2012 shall be applicable w.e.f. 01.04.2013 and, therefore, the rate which was applied as per the circular w.e.f 01-04-2009 is to be applied w.e.f. 01.04.2013 without any notional increase."

7. Being aggrieved by the clarification order dated 14-10-2014, BSNL has challenged the same along with the main order, before the Hon'ble Supreme Court. The appeal has been admitted but no stay is granted. BSNL have raised the demands and TSPs have the made payment as per the 2014 order of this Tribunal.

8. In 2015, vide Impugned circular dated 30-3-2015, BSNL revised the infrastructure charges for active links of licensed TSPs, to be applicable w.e.f. 1-4-2015, leviable in advance for the year 2015-2016. Reason for revision is advanced as the commercial viability and enhanced maintenance cost. For the convenience, impugned circular is reproduced below:

"SUBJECT: Infrastructure Charges for Active Links of licensed telecom Service providers



To conform the commercial viability of infrastructure charges due to enhance maintenance cost, the competent authority has reviewed the current infrastructure charges and it has been decided to revise the charges w.e.f. 01.04.2015 as details given:

1. Charges for building space

(Rates for one transmission bay including space for one box of transmission and DDF as required)

S No.	Classification of cities / towns	Charges wef 01.04.2015
1	X	Rs 1,09,139 per annum per bay
2	Y	Rs 84,886 per annum per bay
3	Z	Rs 47,159 per annum per bay

2. Misc. Infrastructure Service Charges : These charges include the sharing of following services

1. DC power at 48 v up to 10 A/ transmission bay
2. AC power for lights, fans, testing instruments etc.
3. Air conditioning charges (sharing of existing air conditioning system)
4. Generator backup
5. Earthing charges (Trapping from exchange earth bar is allowed)
6. Fire equipment (sharing in case of requirement)

S No.	Classification of cities / towns	Charges wef 01.04.2015
1	X	Rs 5,23,989 per annum per bay
2	Y	Rs 4,71,590 per annum per bay
3	Z	Rs 3,53,692 per annum per bay

3 Other terms and condition applicable to above charges are:

- I. These charges will be leviable in advance for the year 2015-16
- II. These charges applicable for existing as well as new infrastructure to be provided w.e.f. 01.04.2015
- III. TAXs, duties as per govt. order time to time will be levied extra.
- IV. This circular is issued based on the approval of competent authority in NWO-CFA file no. 6-9/2015-NM (Infra), for any clarification / correspondence, in this regard,



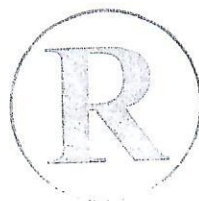
matter may be taken up with NWO – CFA section, BSNL corporate office, Janpath, New Delhi 110001 (Tel No. 011-23711795 and Fax No. 011-23734135).

4. *In case TSP wishes to surrender the infrastructure facilities then they may be allowed to convey their decision within one month of issue of the bills. In this case provisional bill may be issued for infrastructure charges to be levied "in terms & conditions of BSNL circular dated 06.01.2009" at the rates as Hon'ble TDSAT judgment dated 20.08.2014 & 14.10.2014 will be applicable subject to outcome of the Civil Appeal pending before the Hon'ble Supreme Court (CA No. 1699 to 1723 of 2015).*
9. Basic grievance of the petitioner arises on the grounds that (a) 2015 circular is in the teeth of 2014 judgment and clarification order (b) the exercise done in 2015 circular is in effect a retrospective charge (c) the increase through revision is excessive and arbitrary. On the other hand, stand of the respondent is that (a) 2015 circular is not in violation of 2014 judgment (b) charges are revised but made effective from prospective date only (c) reasons and methodology for revised charges have been advanced and are not arbitrary or unreasonable.
10. Mr. Dhruv Mehta appears for the petitioner COAI. He points out that the revised rates as given in the impugned order of 2015 are arrived at by calculating the rates given in 2012 circular, to be applicable w.e.f. 1-4-2009 with further 10% Year to Year increase. He submits that : this is in clear violation of 2014 judgment as clarified by the order of 2014 that rates revised as per 2012 circular shall be applicable w.e.f. 1-4-2013, and therefore, the rate which was applied applied as per the circular w.e.f. 1-4-2009 is to be applied w.e.f. 1-4-2013 without scope for



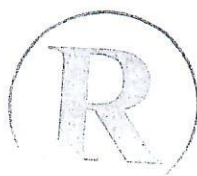
any notional increase; the 2014 order categorically held that the respondent's approach in applying the rates in 2012 circular with effect from 1-4-2009 and thereafter notionally increasing the same by 10% percentage every year to arrive the rate to be applicable from 1-4-2013 was contrary to the letter and spirit of the 2014 judgment and order. Petitioners' case is that through the 2015 circular, by adopting the methodology which did not find favor in 2014 judgment, respondent is trying to indirectly achieve what it could not do through 2012 circular, on account of 2014 judgment. Mr. Mehta submits that such circumvention of the 2014 judgment and order be not allowed.

11. Mr. Tejveer Singh Bhatia, appearing for the respondent, submits that there is no contravention or circumvention of the 2014 judgment and order. He points out that 2014 judgment in fact upholds respondent's right to revise classification and revision of rates. It did not interfere with the 2012 circular, only prohibited retrospective demands. Clarificatory order 2014 should be read in entirety including the part which states that *"We however make it clear that this will be without prejudice to the right of the respondent-BSNL, to revise the rates prospectively, and in accordance with the agreement between the parties."* He further submits that the 2014 judgment only makes the rates of 2012 circular effective from 1-4-2013 which can be valid without change for a financial year.



Nowhere does it put any bar on revision of classification or rates in future. It is not the ratio of the judgment that 2012 circular rates will remain the base rates in perpetuity, to be increased only by 10% year to year. Rates are fixed for a particular financial year and can be revised after the expiry of that financial year. Rates of 2012 circular have in fact been applied for the whole financial year 2013-14 and even 2014-2015. The 2015 circular revises the rates and classification for the year 2015-16 which cannot be termed as contravention of the 2014 judgment. On simple reading of the judgment, we agree with Mr. Bhatia's submission that there is no bar on revision of classification or rates for future.

12. To the argument related to 'letter and spirit of the judgment' as stated in 2014 order, Mr. Bhatia replies that the clarification order goes beyond the relief granted in the main judgment. A clarification order ought not to go beyond the reliefs granted in the main order. In support of this proposition he cites **2019 SCC online SC 173** *Union of India vs. Captain Gurdev Singh & Anr.* (para 21,22,23,24) and **(2004) 12 SCC 713** *Ramchandra Singh vs. Savitri Devi & Ors.* (para 1,3,6,8,10,24). Principally, we have no difficulty with this proposition. The statement in 2014 order regarding 'contrary to the letter and spirit of the judgment' is in the context of a methodology used by the respondent post 2014 judgment and should be read limited to this extent. Subsequent operative part of



the 2014 order that the rate which was applied as per the circular w.e.f. 1-4-2009 is to be applied w.e.f. 1-4-2013 without any notional increase also has limited applicability only to the extent that it will be applied w.e.f. 1-4-2013. In our opinion, beyond this limited prescription, it should not be seen as laying down the law in terms of methodology or what could be 'letter and spirit of the judgment' in terms of a particular methodology. The 2014 order unless set aside, binds the parties in respect of demands for a particular year only. It lacks the necessary ingredients of a binding precedent on the issues at hand.

13. Mr. Mehta submits that 2014 judgment has categorically assailed the retrospective charging. He shows that 2015 rates are exactly the rates prescribed in 2012 circular w.e.f. 2009 with notional increase of 10% per year. Thus, respondent has indirectly made the charges effective from retrospective date. Mr. Bhatia reiterates that the respondent is merely exercising its right to review and revise the rates and is free to adopt the method for such revision. He emphatically submits that in 2015 circular, the calculated rate is applied only prospectively. Accordingly, there is no circumvention of the 2014 judgment. We note here that any revision of rate would require some kind of methodology. Methodology is merely a tool. Unless prescribed by law or agreement, a party in its wisdom may choose any particular methodology/tool. Of course, such a



methodology should be reasonable so as to meet reasonable objectives. Respondent has set out the objective as commercial viability and increase in maintenance cost. We find no reason to hold such objectives as unreasonable. The method itself involves a base rate, base year and a reasonable rate of increase (i.e. 10%) on base rate to arrive at a rate for a particular year. In principle, we find such methodology perfectly reasonable. We may add here that we have already discussed the issue of law and agreement in respect of methodology in para 11 and 12 above. We thus do not find anything improper so far, in the rates revised in 2015 circular.

14. Petitioner is also aggrieved by the manner of classification of cities as well, which Mr. Mehta terms as unilateral and arbitrary. For example, respondent chose to arbitrarily adopt the rates of erstwhile A1 and A category city under 2004 circular to arrive at the rate of X and Y category in a manner that it resulted in a higher multiple to the disadvantage of the petitioner. On such grounds, both classification and rates are claimed to be not sustainable. Mr. Bhatia submits in reply that assuming worst against him for classification of the cities, he need not rely on 2012 circular which the petitioner has successfully challenged. However, the petitioner apparently has had no grouse with the 2006 circular. He relies on 2006 circular which clearly provides as under:



"4. Applicability of above charges –

a) These revised rates will be applicable w.e.f. 1st April, 2006 with a provision of 10% annual increase every year, i.e., 01.04.2007 onwards. Billing cycle shall be from 01.04. to 31.03 of every year. Hence, billing cycle for all existing links may be shifted to the new arrangement.

b)

c) In case of change of classification of cities, higher classification will be applicable at the time of yearly renewal only. The charges will be applicable financial year wise"

Mr. Bhatia submits that admitted position is that the classification of cities by Gol for HRA was changed on 29-8-2008. Accordingly, BSNL has also re-categorized these cities in 2015 circular. BSNL in its 2006 circular had clubbed cities earlier categorized as A and A1 as 'A', B1 and B2 as 'B', C as 'C' and unclassified remained as unclassified. In 2015 circular, BSNL has merely modified its earlier categorization in line with the 2008 HRA circular. While doing so, there arose an anomaly which resulted in having the same rates for the new categories 'X' and 'Y'. This was taken care of by BSNL by a well explained methodology. We note that having adopted the methodology of classification of cities having relation to HRA circular, respondent had reason to re-categorize after 2008. Doing so belatedly in 2015 cannot be held against the respondent. HRA circular is only a trigger or benchmark, and not a blueprint or exact prescription for such charges. 2006 circular classification is based on one such benchmark of 2004 HRA circular based on which BSNL devised its classification. When new benchmark in terms of 2008 circular is announced, it is not unreasonable to re-work old scheme of 2006



circular, keeping new benchmark in mind and arrive at a new scheme for classification for infra charges. There may be many ways of working out such new scheme, some of which may be optimum/beneficial for petitioner and some of them may be optimum/beneficial to the respondent. Respondent has chosen a scheme based on 2006 circular criteria (extracted above) and has reasonably explained its approach to fix the rates for X and Y categories. That such approach results into a differential that is adverse to the petitioner cannot be the reason to term it as arbitrary or irrational, unless it is shown that such rates are in violent disregard to the prevalent market rates. This has not been shown. In the facts of the case, we, therefore, agree with the submissions of the respondent that classification is not arbitrary or irrational.

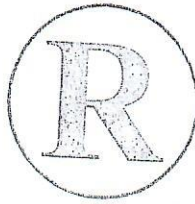
15. Mr. Mehta submits that the rates prescribed through 2015 circular being 61% higher than the 2013-14 rates, are excessive. In support, he gives us the calculations. He further submits that it is settled law that even where a clause in the agreement gives a State instrumentality an unrestricted power to fix a price, it would have to be exercised in accordance with the principles of rationality and reasonableness (*Karnataka Industrial Areas Development Board & Anr. Vs. Prakash Dal Mills & Ors, (2011) 6SCC 714, para 23-35*). He submits that in the present case, even assuming that respondent has unbridled power to fix the



rates, there is no rational basis for a 61% increase in the rates and therefore the same cannot be deemed to be sustainable in law. Mr. Bhatia terms this argument as fallacious. He submits that arrangement between the parties is a purely commercial arrangement. The increase in rates is necessitated because of increased maintenance cost and commercial viability. This reason has been clearly specified in the circular. Against the backdrop of subdued rates, this increase of 60% on account of commercial considerations cannot be termed as excessive. In any case, the petitioner is not bound to opt for services of the respondent, as clearly stipulated in the agreement and the circular. Thus no irrationality can be attached to the increased rates. We note that in a commercial arrangement, matter of rates being higher or excessive is a matter of perspective. A steep revision in rate may be seen as a correction to recover the costs sufficiently or as a revenue enhancement tool. A test for rationality or reasonableness would be to compare it to the rates offered by competitors for same services or by the same or other service providers for similar services. We find no such comparison given by either of the parties. Respondent has given broad reasons for increase and petitioner appears to take 10% increase year to year forever as norm for reasonability. Petitioner has merely claimed increased rates as excessive without supporting it with data or evidence. Under the circumstances, we are not inclined to consider this as a sufficient ground for setting aside the rates of 2015 circular.



16. In view of the discussions in paras above, we find no good reason to interfere with the impugned circular dated 30-3-2015 and subsequent impugned circulars issued on same lines. Accordingly the prayers in TP Nos. 10/2016 and 232/2015 are disallowed. As a consequence, the interim orders stand vacated and all pending MAs also stand disposed of. Respondent may raise demands, if any, for differential unpaid amount, in accordance with this order, along with a simple interest of 9% per year for the concerned period. No order as to costs.



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

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(A.K. Bhargava)
Member