SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com

Cellular Operators Association Vs. Telecom Regulatory Authority of

Cellular Operators Association Vs. Telecom Regulatory Authority of

SooperKanoon Citation : sooperkanoon.com/52388

Court : SEBI Securities and Exchange Board of India or Securities Appellate Tribunal SAT

Decided On : Sep-21-2005

Judge : N S Hegde, V Vaish, D Sehgal

Appellant : Cellular Operators Association

Respondent : Telecom Regulatory Authority of

Advocate for Def. : Mr. Meet Malhotra, Mr. Maninder Singh

Advocate for Pet/Ap. : Mr. Naveen Chawla

Judgement :

1. The Appellant No. 1 is a society registered under the Societies Registration Act, 1908, and all the private GSM Cellular Operators including the other Appellants herein, are the members of the said Association. Appellants No. 2 to 8 are companies registered under the Companies Act, 1956 and have been issued Licenses by the Central Government under Section 4 of the Indian Telegraph Act to establish, maintain and operate Cellular Mobile Telephone Services in their respective Service Areas.

2. Respondent No. 1 is a Regulatory Authority established under Section 3 of the Telecom Regulatory Authority of India Act, 1997 as amended by the Telecom Regulatory Authority of India Act, 2000 (hereinafter referred to as `The Act') and charged with the performance of the functions enumerated under Section 11 of the

Act.

3. Respondent No. 2 is a Service Provider operating Cellular Mobile and Fixed Services across India except in Delhi Metro and Mumbai Metro.

4. When the case came up for initial hearing for directions on 7th July 2005, Dr. Abhishek Singhvi, Sr. Advocate & Learned Counsel appearing for the Appellants sought one week's time to withdraw the Writ Petition filed by them before the Hon'ble High Court of Delhi. Time prayed for was granted and M.A. No. 115 of 2005 stood disposed of. Subsequently, M.A. Nos. 177 and 178 of 2005 were filed by the Cellular Operators Association of India (COAI) to implead Bharat Sanchar Nigam Limited (BSNL) as one of the Respondents, which was accepted, thus disposing of the said M.As. M.A. No. 179 of 2005 was filed by the Appellants to modify the appeal which was allowed and thus disposed of. After completion of impleadments the matter was heard on 17th August 2005.

5. In the present Appeal the Appellants challenge The Telecommunication Interconnection Usage Charges (Fifth Amendment) Regulation (7 of 2005) dated 11th April 2005 (hereinafter referred to as the `Impugned Regulation') as according to them the same has been issued without following a transparent consultation process and without affording an opportunity of hearing to the appellant and/or its members, thereby violating the mandate of transparency as laid out under Section 11 (4) of the TRAI Act as also the principles of natural justice; and secondly, because the Respondent sought to give a new definition to National and International roaming calls and introduce new set of ADC charges for these subscribers that were not prevalent in Interconnection Usage Charges Regulation of 2005 (IUC Regulation). The Appellants have prayed for the following relief:- (a) This Hon'ble Tribunal may be pleased to set aside and quash "The Telecommunication Interconnection Usage Charges (Fifth Amendment) Regulation (7 of 2005)" issued by Respondent No. 1 on 11th April 2005.

(b) pass such other and further orders as may be deemed fit and proper in the facts and circumstances of the case.

The Appellants have also by way of amendment prayed for orders as follows:- (aa) This Hon'ble Tribunal may be pleased to set aside and quash the Circular bearing No. 352-1/2005-Regin dated 9th May 2005 issued by Respondent No. 2 and further restrain the Respondent No. 2 from seeking implementation of the same from the Appellants.

(bb) This Hon'ble Tribunal may be pleased to pass an ad-interim ex-parte order staying the operation of Circular bearing No. 352-1/2005-Regn dated 9th May 2005 issued by Respondent No. 2 and further restraining the Respondent No. 2 from seeking implementation of the same from the Appellants.

6. Since it was decided to hear the matter to its finality this Tribunal did not consider it necessary to grant the interim prayer (bb) of the Appellants.

7. While opening the argument in defense of the Appellants, Dr.

Abhishek M. Singhvi, learned Sr. Counsel, stated that there are basically three issues involved which are as under:- (i) In the Impugned Regulation ADC has been introduced for the roaming subscribers in violation of the basic definition and very purpose of ADC. The calls made by a roaming subscriber to another cellular subscriber in the same circle which attracted no ADC till now being Intra-circle calls are now being treated as Inter-circle calls vide the Impugned Regulation and hence subject to a levy of Re 0.30 ADC for National Roaming and Rs. 3.25 for International Roaming.

(ii) The Impugned Regulation was issued due to extraneous reasons without going through consultation process violating the mandate of transparency under Section 11 (4) of the TRAI Act, and lastly (iii) While issuing the Impugned Regulation the principle of natural justice was totally violated in that no opportunity of hearing was given to the Appellants.

8. On the question of ADC the Learned Senior Counsel for the Appellants said that it was introduced vide IUC Regulation (1 of 2003) dated 24th January 2003 and was also covered in detail in the IUC Regulation 4 of 2003 dated 29th October 2003. Section IV of this IUC deals with this under Schedule III which is reproduced

as under:- "3.1 Access Deficit Charge shall be applicable for the specified category of calls mentioned in Table III. The ADC will be payable to Basic Service operators on a per minute basis by the Basic, Cellular, National Long Distance and International Long Distance service providers.

The ADC applicable for different types of calls are mentioned in Table III. The rates are shown on a per minute bulk settlement basis.

Access Deficit Charge applicable for various type of Calls----------Access Deficit Local Intra Circle Calls Inter Circle CallsChargesIn Rs. per minute Local 0-50 kms. 50 kms.

0-50 kms. 50-200 kms.200 kms.----------Fixed - Fixed 0.00 0.00 0.30 0.30 0.50 0.80Fixed - WLL (M) 0.30 0.30 0.30 0.30 0.50 0.80Fixed - Cellular 0.30 0.30 0.30 0.30 0.50 0.80WLL (M) - Fixed 0.30 0.30 0.30 0.30 0.50 0.80WLL (M) - WLL (M) 0.00 0.00 0.00 0.30 0.50 0.80WLL (M) - Cellular 0.00 0.00 0.00 0.30 0.50 0.80Cellular - Fixed 0.30 0.30 0.30 0.30 0.50 0.80Cellular - WLL (M) 0.00 0.00 0.00 0.30 0.50 0.80Cellular - Cellular 0.00 0.00 0.00 0.30 0.50 0.80---------- 9. It was pointed out by him that it was clear from the last line of the Table above that no ADC was contemplated to be charged for Intra-Circle calls from Cellular to Cellular subscribers as per this IUC. It was also emphasized by him that basic objective of ADC is to provide cross subsidy to BSNL / MTNL or other Basic Service providers to compensate for provision of telecom facilities in rural areas. He referred to the relevant extract of IUC 2003 which is reproduced below:- "2. The IUC Regulation of 24th January 2003 included origination, carriage and termination charges as well as the access deficit charges to cover the access deficit that arises for basic service operators on account of the access tariffs being below costs. Prior to the opening up of the telecom sector, the loss due to access deficit for basic service operators was being taken care of through a cross-subsidy from profits to BSOs from a share of the domestic and international long distance tariffs. With competition in the domestic and international long distance segments as well as

among the fixed line/WLL (M) and cellular mobile, leading to a sharp decline in the prevailing tariffs, the extent of cross subsidy has decreased in a major way. The competition in long distance markets continues and this will mean that the tariffs are likely to decline further. In such a scenario, since the access deficit for fixed line arises due to tariffs being specified for social reasons, there is a case for providing the access deficit amounts to these service providers. In contrast to the fixed line service providers, the other access providers have tariff forbearance for call charges, and are allowed to charge higher average amounts for local calls than those charged by fixed line operators." 10. He said that subsequently, vide Notification dated 6th January 2005 the TRAI revised the levy of ADC on National Long Distance (NLD) & International Long Distance (ILD) calls but the Intra-circle calls from Cellular to Cellular were not touched. The Senior Counsel stated that till this time there was no indication or information by TRAI about any levy of ADC for Cellular to Cellular Intra-circle calls including those made by roamers.

11. However, he went on to state that, in the Impugned Regulation of 11th April 2005 the TRAI suddenly sprung a surprise by treating the National Roaming subscriber calls as National Long Distance and International Roamers as International Long Distance calls. They imposed a levy of Re. 0.30 of ADC on such calls for National Roamers and Rs. 3.25 for International Roamers.

12. During the course of the arguments the learned Senior Counsel brought to our notice that TRAI had done detailed exercise to work out the requirement of the size of ADC to be created for BSNL. Relevant extracts as read out by the Counsel from TRAI Notification dated 29th October 2003 along with the Table are reproduced hereunder:- "51. As mentioned above, the Authority has obtained data on, inter alia, the minutes of use by subscribers of different service providers. Since the data obtained from the service providers is not comprehensive, they do not show consistent estimates. Based on the information submitted by the service providers, the Authority has estimated the minutes of traffic flows among the different services such that these flows are consistent. The data has been made consistent using certain assumptions about traffic flows on different routes, based on discussions with the largest operator, i.e. the BSNL. Based on unaudited data provided by the operators and also by using estimates for BSNL based on their

audited data as normated data for other service providers also, the ADC has been calculated for other BSOs. This shows that the BSOs have a high element of reported inefficient costs in comparison to BSNL. The data provided by the BSOs appears to be unreliable because it results in some extreme and even absurd estimates of costs. Their cost based rentals and termination charges are high in comparison to BSNL, in some cases by amounts which do not appear reasonable. The Authority therefore, decided to use the audited BSNL data as a normative.

52. The estimated access deficit for BSNL is shown in Table 7, which indicates the impact of various components on the access deficit calculated. The total access deficit amount to be funded for BSNL, after correction for net revenues from local calls and including the deficit on account of "0 to 50 kms.", is Rs. 5,335 crores. If we take the other basic service operators also into account, and apply the BSNL access deficit per subscriber without the Government compensation to BSNL, the total access deficit amount increases to Rs. 6,330 crores.---------- Table 7----------Cost based rental per sub per month In Rs. 361Total cost of Rental In Rs. Crores 14865 Total Rental Revenue In Rs. Crores 6425 Total Rental Deficit In Rs. Crores 84410-50 kms call deficit In Rs. Crores 216Free Call deficit (taken intoaccount in local call surplus) In Rs. Crores 0----------Total Deficit In Rs. Crores 8657----------Surplus & Compensationsfrom surplus in termination charge In Rs. Crores 1456 Government compensations In Rs. Crores 1865 Net Access Deficit In Rs. Crores 5335---------- 13. Learned Senior Counsel for the Appellants stated that the amount of Rs. 5335 crore worked out in 2003 remained operative till January 2005 and the amount of ADC to be charged for each type of call was also specified in the Regulation. TRAI took note of the growth in subscriber base and vide its notification dated 6th January 2005 issued directives. Relevant portions of the notification dated 6.1.2005 are reproduced as under:- 3. The exceptional growth in subscriber base has resulted in a substantial change in the situation that was considered for determining the ADC regime notified in the Regulation of 29th October 2003. The large unanticipated increase in Mobile subscriber base has led to a much higher number of total minutes, which

fund the overall ADC amount. Thus, even with the same amount of ADC funds to be collected, the per minute ADC charge can be lower due to the increase in minutes on which the ADC charge is applied, Inter-alia taking this important factor into account, the Authority has conducted another review of the ADC regime based on its Consultation Paper of 23rd June 2004.

6. ...The Authority is of the view that the domestic tariffs need to consistently decline below the threshold level that has been reached, in order to provide a sustained boost to subscriber growth and tele-density in the country.

7. In specifying its revised ADC regime, the Authority has given particular emphasis to provide a strong basis for a further decrease in domestic prices and boosting subscriber growth, as well as to pave the way towards as much similarity in long distance charges as possible (i.e. working towards a "death of distance" which the technological change is bringing about). Thus, the Authority expects that the regime notified under this Regulation will be followed by a competitive market response resulting in a reduction in call charges, which in turn should add to the subscriber growth and greater availability of telecom services. The Authority will be monitoring the prices, including through the special Software that it is developing for comparison of tariff packages.

9. In the present review, the Authority's assessment is based mainly on the increased minutes available to fund the ADC. The main focus of the ADC regime has been BSNL, and in the revised regime, the Authority has provided BSNL with the same ADC funds as were specified under the regime notified in the Regulation of 29th October 2003. However, even with the same amount of ADC funding, the per minute ADC charge would go down due to the larger base of subscribers and consequently of the relevant minutes of use." 14. The case for ADC was fully covered in the IUC Regulation dated 6th January 2005, he said. Even at this stage TRAI did not contemplate introducing ADC for Intra-circle calls for the Roamers because without this, enough funds were being generated to meet the quantum required.

Therefore, to introduce ADC for Roamers suddenly in April 2005 due to extraneous reasons as per the Impugned Regulation is Ultra Vires.

15. Dr. Singhvi said that this introduction of ADC has been done without any impact assessment. He stated that the whole case started from the Circular issued by the BSNL on 29th January 2005 in purported implementation of the Telecom IUC 1 of 2005 dated 6th January 2005 issued by Respondent No. 1, which laid down the revised ADC payable by the operators. BSNL by way of above Circular sought to unilaterally change the rules of interconnection and forced the Cellular Operators to: (i) add new Trunk Groups for the CMTS POI (Cellular Mobile Telephone Services Point of Interconnect) at Level 1 TAX for National and International roaming subscriber traffic; and (ii) share 50% of their revenue from National and International Roaming Subscribers.

He said that the BSNL's case in the Circular revolved around addition of separate Trunk Groups and for revenue share for the roaming subscribers. It had nothing to do with ADC.16. The Appellants made a representation to the Respondent No. 1 on the issues raised by BSNL vide their letter dated 31st January 2005. He re-emphasised that in the said representation it was stated that the action of BSNL was unilateral and that no mention was made by BSNL about the ADC charge to be levied from the roamers. Learned Senior Counsel for the Appellants also brought to our notice that another representation was made by the Cellular Operators Association of India to TRAI on 7th February 2005 wherein it was pointed out that BSNL was charging NLD and ILD ADCs from the roamers without any reason. Relevant extracts are reproduced below:- "...The IUC Regulation of 6th January 2005 does not in any manner give authority to BSNL to unilaterally introduce different routing and charging methods for National and International roaming calls.

In any event, if BSNL is imposing the changes due to the non-availability of CDR based billing in its network, then such costs to be incurred by private CMSPs should be borne by BSNL.

Moreover, the number of trunk groups now being increased by BSNL is only till such time CDR based billing is introduced in BSNL's network (para 11 (c) of BSNL Circular) and after which the trunk groups are to be merged. Since the CMSPs do not have the capability to segregate the roaming calls into separate trunk groups,

the existing arrangements should therefore continue to avoid any inconvenience to the consumers and incurring of unnecessary costs by the CMSPs.

...Refer Item 50 to 55 of Section E Annexure I of BSNL Circular. The trunk group has been shown as EE. ADC of Rs. 3.25 is being levied for such calls originated by International roamers roaming in India and terminating in BSNL's network. All calls, which originate within the geographical boundaries of India and terminate in India are national calls. So BSNL is charging ILD ADC instead of NLD ADC without any reason and is not justified." 17. The learned Sr. Counsel stated that TRAI issued a letter dated 11th March 2005 to all on the applicability of ADC and revenue sharing arrangements on roaming calls. Relevant extracts of the TRAI letter dated 11.3.2005 is reproduced as under:- "TRAI vide its notification dated 6th January 2005 had issued IUC Regulation (1 of 2005), which has been implemented from 1st February 2005. BSNL vide its letter dated 31st January 2005 forwarded a copy of its implementation circular to TRAI. In para 2.2 of the BSNL's IUC implementation circular, BSNL has made some changes in the call routing arrangements wherein new trunk groups have been added for CMTS POI at Level 1 TAX for National and International roaming subscribers traffic.

On page 11 of Annx 1 of implementation plan, BSNL has indicated that proposed charges at Level 1 TAX Trunk group are provisional. BSNL has mentioned in its implementation plan that since CMSPs are charging approximately Rs. 100/- per minute from the International roaming subscribers in their network therefore CMSPs should share revenue in 50: 50 basis with BSNL.

The Authority received representation from COAI that the above mentioned action of BSNL would adversely impact the business of cellular operators both in terms of revenue and costs. Moreover, even physical implementation of separate trunk group is almost impossible in the extremely short time given. It was also stated that the implementation of such a scheme for ADC did not require trunk groups, and could be done on the basis of CDR. Authority received representation from AUSPI also stating that separate trunk group is not required and sharing of 50% of the retail charges from the International roaming subscriber has no relation to IUC payments and hence be dispensed with.

Based on the above the Authority had meetings with BSNL, COAI, AUSPI and switch Manufacturers/suppliers.

BSNL had stated in its submission that roaming calls are premium in nature, CMSPs themselves are treating roaming calls differently from local calls in terms of charges. They are charging National roaming customers a higher charge varying from Rs. 3/- to Rs. 5/- per minute. The cellular operators are charging approximately Rs. 100/- per minute from international roaming subscribers, and BSNL gets paid for termination and carriage charges only. The licenses for cellular services are issued for specific service areas. The Interconnect Agreements are signed by BSNL with CMSPs for the concerned service area. Roaming customers are from a different Service Area and are not covered for the general treatment provided in the Interconnect Agreements. BSNL stated that it is ready to accept this traffic, provided BSNL gets paid for ADC and share in higher profit from such calls. BSNL, thus had proposed an equitable revenue share arrangement between CMSPs and BSNL. BSNL also stated that there is a possibility of misuse in case no ADC is applicable on roaming calls, as the integrated operator would bypass the ADC regime by showing even their national/international calls as call from a roaming subscriber (i.e. by showing the call as not being subject to ADC). BSNL has also informed that they have CDR at Level-1 and will have CDR based system at Level-II within 2 months.

COAI in its representation stated that although some of its members have signed the Interconnect agreement but still they are unable to implement the agreement due to technical difficulties. BSNL's Circular for different trunk groups for calls originated by in-roamers has not taken into account all the call scenarios.

Normally routing of traffic is decided on the basis of dialed number (B number) and to implement the routing as proposed by BSNL in its IUC implementation plan A number has to be seen before routing. This will create lot of processor load on the Switch. This arrangement will also reduce trunking efficiency. To implement such routing the MSC dimensioning will change resulting in higher CAPEX. COAI further added that whatever the arrangement, which it was of the view should be based on CDR, the same arrangement should be applied in toto for CELL-ONE

also COAI apprehended that roaming rates will go up due to BSNL's circular.

AUSPI in its representation submitted that there is no need for separate trunk group when operators are ready to provide their CDRs for reconciliation to BSNL. BSNL can verify from the CDR whether the call is from roaming subscriber or not. AUSPI had emphasized that BSNL have CDR based billing at Level I TAX so the need to create separate trunk group at Level I TAX does not arise.

Several equipment manufacturers and equipment suppliers informed that due to routing based on `A' number, additional processor load will be of the order of 10% or more. This will also reduce Circuit Utilisation and trunking efficiency.

Authority has examined the various issue raised during the meetings and written submissions by BSNL, COAI and AUSPI and its discussions with Equipment Manufacturers. The Authority observed that formation of separate trunk group will reduce the traffic handling capacity at the POI and would therefore be inefficient arrangement. Further, since the matter can be addressed without resorting to formation of separate trunk groups for national and international roaming subscribers and BSNL is already in the process of implementing CDR based billing system, an arrangement based on CDR system should be used. In the mean time, till CDR based systems are put in place, operators could supply the complete Call Data Records (CDR) separately to BSNL for the calls made by their national and international subscribes.

The Authority has also observed that private cellular operators are themselves treating calls originated by their home network customers separately from the calls originated by the roaming customers belonging to their own network in other service area. The Authority has also observed that the possibilities of misuse of POIs by cellular operators exist if they hand over incoming international calls as well as incoming inter-circle calls as local calls to BSNL.

To avoid such misuse of POI, all calls made by the national roamer subscribers should be treated as long distance calls and all calls by the international roaming subscribers should be treated as incoming international call. As such for all calls made by National roamers while in a different Service Area, ADC charge for

national calls with ADC will be applicable. For International Roamers while making any call while in India, an ADC of Rs. 3.25 per minute should be applicable, until any further change in the regime by the Authority. Please send your comments, if any, within three days of receipt of this letter.

The Authority has noted the point that BSNL has raised the issue of sharing revenue from cellular operators on the latter ground that they are charging higher rate from national and international roaming subscribers as compared to the calls from their home network subscribers. The Authority is going to issue a consultation paper soon which will address issues like revenue share arrangement between terminating network and visiting network.

18. Learned Senior Counsel for the Appellant said that as per this letter TRAI agreed with the contention of the Appellants on the issue of separate trunk groups that these were not considered necessary. On the second issue he said that it was incorrect to state that the Authority held meetings with BSNL, Cellular Operators Association of India (COAI) and Association of Unified Service Providers of India (AUSPI) and equipment manufacturers. According to him no meeting was held with the appellant or its members.

19. The learned Sr. Counsel also stated that the issue of ADC had never been raised by anyone including BSNL and the Appellants. When the comments were being sought by TRAI, the final order i.e. the Impugned Regulation should not have been issued without getting the comments or carrying out consultations in this regard. Dr. Singhvi also brought to our notice a letter written by one of their members BPL Mobile Cellular Limited to TRAI on the same lines as was done by the Appellants but there was no reply.

20. Respondent No. 1 in its Explanatory Memorandum issued with the Impugned Regulation has stated that it has observed that the possibility of misuse of Point of Interconnect (POI) by Cellular Operators exists if they hand over the incoming international calls as well as incoming Intra-circle calls as local calls to BSNL. It is to avoid such possibility of misuse of POI that all calls from National Roamers and International Roamers while in different service area will be charged Re 0.30 and Rs. 3.25 per minute respectively as ADC.21. Dr. Singhvi challenged the basis for

introduction of ADC to check misuse as Ultra Vires and said that there are other measures available to check misuse rather than imposing ADC for a reason which is not the basic objective for imposition of ADC. According to Dr. Singhvi, Respondent No. 1 can introduce measures like policing, monitoring and having such other checks rather than issuing a blanket order in the garb of this Regulation treating all roaming calls as Inter-circle.

22. Dr. Singhvi stated that going by the chronology of issue of Regulations, Circular of BSNL and representations by the Appellants and their Member they were neither heard nor the change was brought about after going through a consultation process. He said that a mere notification and letter dated 17th March 2005 prior to the issue of the Impugned Regulation violate these two principles -- Natural Justice and Transparency.

23. While speaking on Transparency, learned Senior Counsel for the Appellants stated that levy of ADC has to be preceded by a consultation process and mentioned that this process is very well known to the Authority, Industry and all the Regulatory System. For imposition of this ADC in Impugned Regulation IUC 2005 no views were taken from the Appellants or consumers as was done in the past. According to him, both the spirit of natural justice and transparency were thus totally violated and it was only high handedness on the part of Respondent No.1 to issue such an Impugned Regulation without any consideration for consumers and Appellants.

24. For justifying his case for Natural Justice and Transparency, the learned Sr. Counsel for the appellant also relied on some of this Tribunal's judgments. In Appeal 1 of 2001 - BSNL v. COAI - relevant extracts of this Tribunal's judgment dated 24th April 2001 are reproduced below:- "In exercise of powers under section 11(2) of the TRAI Act, TRAI notified the Telecommunication Tariff (11th Amendments) Order, 2001.

This order provided that the revised pulse rates shall be applicable to inter network calls. No hearing was given to BSNL before passing these orders by the Telecom Regulatory Authority of India Act, 1997(as amended). On 25th January 2001, BSNL made a representation to the TRAI objecting to the Notification of the date.

On 26th January 2001 the new tariff policy was implemented by BSNL and on 1st February 2001 the new rentals were made leviable effectively by BSNL. On 7th February, 2001 TRAI informed BSNL upon a perusal of the representation of the BSNL as well as a discussion held at the level of the Secretaries, Secretary TRAI with the representative of the BSNL, the decision of the TRAI will continue to be in force and BSNL was directed to implement the decision of TRAI. There is no dispute that BSNL was not given any hearing before a decision was arrived at by TRAI and the direction and or orders on 25th January and 7th February, 2001 were passed by TRAI. A post facto hearing was given to the representative of the BSNL by the Secretary, TRAI will and not by the TRAI itself. ...

Since the defect of not giving a hearing to the BSNL goes to the root of the matter we set aside the impugned orders/directions given by TRAI on 25th January and 7th February 2001. TRAI will be at liberty to pass fresh order and/or directions in accordance with law after giving all the parties a fresh hearing." 25. Similarly, in Appeal No. 5 of 2005 - VSNL v. COAI dated 28th April 2005 - this Tribunal had ordered as follows:- "We must, therefore, overrule the objection of TRAI that this appeal is not maintainable inasmuch as tariff fixation under Section 11(2) of the Act is a legislative function. Such a submission is patently against the provisions of the Act, under which an order of the TRAI including an order under Section 11(2) is appealable to TDSAT. That being the position, it is difficult to appreciate the argument that TRAI is not required to comply with the principles of natural justice and therefore, not required to disclose the material relied upon or methodology and the data used for working out the costs of E1, DS-3, STM-1 circuits nor give reasons in support of such functions in exercise of its power of price fixation.

We, therefore, direct that all the documents and information as asked for by the VSNL, the appellant, be supplied it by TRAI. In this view of the matter we are of the opinion that in the absence of non-disclosure of information to the appellant principles of natural justice have been violated and so also TRAI has breached the mandatory requirement of transparency in its functioning as required under Section 11(4) of the TRAI Act." "The Authority shall ensure transparency while exercising its powers and discharging its functions." 26. Dr. Singhvi also relied upon the judgment in Appeal Nos. 11 & 12 of 2002 - BSNL v. TRAI dated 27th

April 2005 [(2005) 5 Comp LJ 292] - on jurisdiction issue that the Regulation can be challenged in TDSAT.27. While summing up his submissions the Learned Senior Counsel for the Appellant stated that ADC as a concept was introduced basically as cross-subsidy to be taken from private operators and given to BSNL to cover some of the mandatory burdens under which it has to function. He said that ADC is specific in terms of quantum worked out after a comprehensive impact assessment. Since the required finance on account of ADC to be given to BSNL was calculated as Rs. 5335 crore and also there was a provision to adjust this upward or downward, the introduction of Re 0.30 on the roamers is extraneous to the concept of ADC taking into account irrelevant considerations and failing to take into account relevant considerations. In the end he stated that this Impugned Regulation to plug the alleged misuse is legally not tenable.

28. Mr. Meet Malhotra, learned Counsel for the Respondent No. 1, stated that the appellant has challenged the issue of Impugned Regulation basically on three counts:- (iii) Without any basis and for irrelevant consideration to prevent the imaginary misuse.

29. At the outset on the point of natural justice he said that the issue of the Impugned Regulation was a legislative action. Unless Act provides specifically there is no need of any hearing to be given. He stated that oral hearing was given.

30. Mr. Malhotra said that the Appellants' view that ADC was never an issue is totally denied. He said that as per IUC Regulation 2005 dated 6th January 2005 there is a mention of Access Deficit Charge in Table-III where there is a column for Intra-circle calls. He stated that till January 2005, ADC was being charged for the calls made from Cellular to Fixed telephones whereas Cellular to Cellular Intra-circle calls were exempt from paying ADC which by the Impugned Regulation have also been included in the category for levying of ADC. He reinforced this point by stating that in the schedule describing ADC, Cellular to Cellular calls were mentioned with Zero paise ADC but now an amount has been specified for the same. Appellants cannot, therefore, say that the issue was not known to them. He restated the point that the concept of ADC was known to the Appellants all along relying on the Circular No.F. No. 352-1/2005-Regln dated 29th January 2005

issued by BSNL.

Extracts of the relevant portion of this circular is reproduced below:- "2.1 For the sake of convenience & quick implementation, total Interconnection Usage Charge (IUC) (consisting of three components i.e. termination charges, carriage charges and ADC), for each type of calls have been worked out. List of charges for call types under various interconnection scenarios along with trunk group required is given in Annexure I in the form of various tables. Explanatory notes have been given at the end of the Annexure I." 31. Mr. Malhotra gave the break-up of the various components of the charges of calls as under wherein Re. 0.30 ADC is an integral part of these charges, which are contained in Annex-1 of the BSNL Circular dated 29.1.1005:---------- "Calls originated from National Roaming Cellular Subscribers roaming in CMTS network handed over to BSNL---------- Type of Calls Charges Charges Trunk Payable by payable by group---------- (Rupees per Minute)"33. CMTS to BSO (F,M)/Cellular 0.79* 0.00 ED transited by BSNL Termination - Re. 0.30; ADC - Re. 0.30; Transit - 0.19 p---------- Originated from International Roaming Cellular Subscribers roaming in CMTS Network.----------Type of Calls Charges Charges Trunk Payable by payable by group---------- (Rupees per Minute)"33. CMTS to BSO (F,M)/Cellular 3.74* 0.00 EE transited by BSNL Termination - Re. 0.30; ADC - Rs. 3.25; Transit - 0.19 p---------- 32. Referring to the letter No. TVR/COAI/022 dated 31.1.2005 of COAI to TRAI, he said that Appellants themselves have made a mention of ADC charge of Re. 0.30 per minute for Intra as well as Inter circle calls.

He said that the handing over of the calls was the main problem and that is why separate trunk group case was initiated by BSNL. He also referred to the letter of COAI dated 7.2.2005 to TRAI, wherein the Appellants have asked for Cell One to

be considered on the same terms for roaming. Extracts of the relevant paragraph in COAI's letter dated 31.1.2005 is reproduced as follows:- "3. The same scenario is valid for Cell One subscribers considering CMTS (A) as Cell One MSC. So Cell One subscriber also needs to pay more for such roaming calls (i.e. higher ADC)." 33. The same issue is raised in COAI's letter dated 31.1.2005 extracts of which are also reproduced:- "Refer Item 50 to 55 of Section E Annexure I of BSNL circular. The trunk group has been shown as EE. ADC of Rs. 3.25 is being levied for such calls originated by international roamers roaming in India and terminating in BSNL's network. All calls, which originate within the geographical boundaries of India and terminate in India, are national calls. So BSNL is charging ILD ADC instead of NLD ADC without any reason and is not justified." 34. He said that the Appellants are interpreting the Roamer's calls as Intra-circle calls (local calls) for the purpose of ADC whereas for all other purposes they themselves are not treating these as local calls.

The fact that the private operators are charging more for such calls i.e. Rs. 3 - 5 per minute for national roaming and Rs. 100/- per minute for international roaming, it cannot be treated as a local call since these tariffs are manifold higher than the tariff for a local call.

35. Mr. Malhotra said that inadequacy of hearing is different from no hearing and pointed out that as per Respondent's letter dated 11.3.2005 the Appellants were given three days' time to give their views. After six days the Appellants wrote a letter dated 17.3.2005 to TRAI wherein they have not stated anywhere that they have not been heard and even the letter from their member BPL Mobile Cellular Limited does not mention a word about the imposition of ADC as a sudden action. He stated that interaction with the Authority is a continuous process and in their letter dated 11.3.2005 the TRAI have made a mention about the representation from the Appellants and also meetings with BSNL, the Appellants, AUSPI and other Switch manufacturers/suppliers. Therefore, learned Counsel for Respondent No. 1 said that it proves that continuous interaction was on and the appellant's plea that no chance of hearing being given is wrong. He quoted from the Explanatory Memorandum of the Regulation dated 6.1.2005, relevant portion of which is reproduced as follows:- "17...The Authority will be conducting a review of

the ADC rates within 3 to 6 months of its implementation and consider whether the underlying data used by it in the present set of calculations including forecasts has been robust and matches with the subsequent monthly long distance traffic minutes and ADC submissions. The Authority will review the ADC rates without going in for any consultation process in case new figures of data suggest that revision of ADC values is justified for the last two quarters of the new annual cycle of ADC." 36. On the issue of likely misuse, Mr. Malhotra said that this step had to be taken since there was a possibility of passing on the Inter-circle calls as Intra-circle calls. He quoted from the Explanatory notes of the TRAI's Impugned Regulation dated 11th April 2005, which is reproduced as under:- "8. The Authority has also observed that private cellular operators are themselves treating calls originated by their home network customers separately from the calls originated by the roaming customers belonging to their own network in other service area. The Authority has also observed that the possibilities of misuse of POIs by cellular operators exist if they hand over incoming international calls as well as incoming inter-circle calls as local calls to BSNL.

To avoid such misuse of POI, all calls from the national roaming subscribers should be treated as long distance calls and all calls from the international roaming subscribers should be treated as incoming international calls. As such for all calls from National Inroamers while in a different Service Area, ADC charge for national calls with ADC will be applicable. For International Roamers while making any call while in India, an ADC of Rs. 3.25 per minute should be applicable. A letter in this regard was issued by Authority to all service providers on 11.3.05 seeking their final comments.

Comments had been received from COAI and BPL only and the Authority found that issues raised by COAI and BPL had already been discussed and considered." 37. Learned Counsel for the Respondent No. 1 reiterated that since the Appellants were not treating Roamer's calls as Intra-circle, the Authority had no choice but to impose ADC on such calls.

38. The learned Counsel stated that this arrangement is an interim measure and the whole ADC regime is under review. TRAI will soon come out with a

consultation paper on the subject in the near future and a new system will be in place.

39. Lastly, the Learned Counsel stated that the IUC 2005 is a piece of subordinate legislation in exercise of powers conferred upon TRAI under Section 36 read with Section 11 (1)(b)(ii), (iii) and (iv) of the TRAI Act. Hence it was not appealable before this Tribunal.

40. Mr. Maninder Singh, learned Counsel for Respondent No. 2, stated that he was the main beneficiary of receiving the Access Deficit Charge and it is for this reason that he issued the Circular dated 29th January 2005 of which ADC was part and parcel. However, the Learned Counsel for Respondent-2 stated that primarily his case is not for ADC but for revenue share with the private operators for NLD and ILD roamers. He said since the roamers were not treated as local subscribers and his network was being used he had a right to revenue share. It was argued by him that it is an admitted position that private operators were charging Rs. 3 - 5 per minute for national roaming and Rs. 100/- per minute from international roaming from the subscribers. He stated that the BSNL for their Cell One consumers does not charge any such additional amount and also informed us that the concept of numbering plan was different for local, NLD and ILD subscribers. While local calls were to be handed over at the local POI, the STD and ISD calls were to be handed over at the respective NLD and ILD POIs. He gave an example of the system of placing different coloured post boxes for collecting the mail meant for local, national and international destinations, which helps the postal authorities to sort the mail easily and more conveniently. Similar was the case for handing over of the local, NLD and ILD calls, he contended. As per the interconnect agreement and correct sharing of the revenue this handing over of the calls has to be corrected.

41. Mr. Singh stated that even with Call Data Record (CDR) billing system there is a requirement of manual system to bifurcate the local calls from the NLD calls and within the NLD calls it is not possible to differentiate between an actual NLD call from that of a roamer call.

Therefore, there was a definite case of misuse where the NLD calls of roamers can be passed off as local calls.

42. Mr. Singh, therefore, reiterated that with the present system it is not possible for the BSNL to identify the Intra-circle calls vis-is Inter-circle calls made by roamers in that circle. He brought to our notice by quoting from the charts and graphs submitted by him vide his letter dated 5th February 2005 addressed to TRAI that while the subscriber base is going up the number of calls on account of STD/ISD are dwindling. According to him this was happening because the NLD calls were handed over as local calls. In this respect he stated that creation of separate trunk group was desirable and would resolve the problem of misuse of POIs by private cellular operators for hand over of incoming international calls as well as incoming Inter-circle calls as local calls to BSNL. An extract of the relevant paragraph as appearing in BSNL's letter No. 351-1/2005-Regln. Dated 5th February 2005 is reproduced as follows:- "4.3 In the new Interconnect Agreement signed by cellular/UASL operators in Clause 2.15.2, it has been stated that "Calls from fully mobile subscribers of other telecom service providers of the same / different service area (National Roaming) or other country (International Roaming), roaming in the network of UASL shall be handed over by UASL to BSNL on separate trunk groups at the Gateway TAX of BSNL of that service area." As indicated in para 3 above, the list of such agreements is enclosed." He submitted that TRAI, however, stopped this initiative of BSNL stating that this activity will take time and as the new ADC regime is likely to come into force shortly this will not serve the purpose.

43. On the issue of natural justice brought about by the appellant that ADC was never the issue he said that it was always the contention of the Respondent No. 2 to treat the roaming calls as STD/ISD. He brought to our notice submissions made by the appellant in rejoinder to the pleadings of BSNL that since 6th June 2003 Respondent No. 2 had been requesting the TRAI to treat national roaming calls as long distance calls. An extract of the relevant para contained in the Replication on Behalf of the Appellants to the Reply Filed by BSNL is reproduced below:- "8. That the contents of the paragraph No. 8, contain the relevant dates in the submission of Respondent No. 2 BSNL. The contents thereof, as far as are matters of record

are not denied. A bare reading of the list of dates would show that right since 6.6.2003, the Respondent No. 2 has been requesting the TRAI to treat a national roaming call as a long distance call. However, this submission of Respondent No. 2 has not found favour with TRAI. Finally respondent No. 2 in a unilateral action imposed a condition of creation of separate trunk groups for handing over roaming calls.

As the said action was unilateral in nature and without any sanction of TRAI, the Appellants protested against the same. The Respondent No. 1, after granting a hearing to the Appellants on this issue called upon Respondent No. 2 to give its comments vide communication dated 11.3.2005. Respondent No. 2 purportedly gave its comment vide letter dated 23.2.2005 has also in the meeting held between the Respondent No. 1 and Respondent No. 2 alone on 24.2.2005. It is after this meeting that Respondent No. 1 issued its letter dated 11.3.2005 seeking comments of the Appellants on the proposed action.

Therefore, after the stated consultation between Respondent No. 1 and Respondent No. 2, no opportunity of hearing whatsoever was granted to the Appellants." 44. He went on to state that the Appellants never differed or raised objection on the submissions made by him on the fall in STD/ISD traffic. He also stated that ADC is linked to creation of separate trunk groups and the Appellants were completely in the picture right from the beginning about this particular issue. He, therefore, sided with the Respondent No. 1 on the issue of opportunity of hearing given to the Appellants. On this issue he stated that this was a wrong statement by the Appellant on affidavit and therefore calls for a case to be filed against them for perjury as was done in another case by this Tribunal earlier vide its judgment dated 13.8.2001. He also stated that on this very ground the petition need to be rejected.

45. Last but not the least, the learned Counsel for the Respondent No.2 again stated that his case was not for ADC but for revenue share.

This charge of Re. 0.30 in the Impugned Regulation caters for ADC whereas he wants his share from the calls of roamers which the operators are themselves not treating as local calls and charging different tariffs for the same.

46. Mr. Maninder Singh, learned Counsel for Respondent No. 2, justified his action of sending the Circular as freedom available to him. In support of his argument he quoted the judgment in W.P. No. 6543 of 1999 and C.W. No. 6483 of 1999 - MTNL v. TRAI and etc., which is reproduced as follows:- "48. Thus, it is clear that the Authority itself understood that its own function under Section 11(1)(d) was only to intervene in the event of the service providers not being able to arrive at an arrangement. It is clear that an arrangement does not necessarily imply an agreement. However, these are matters in which the service provider must be first given an opportunity to arrive at an arrangement amongst themselves. The question of regulation would only arise if the service providers are not able to arrive at an arrangement. The Authority may law down guidelines regarding those arrangement, provided the guidelines are not contrary to the terms of a license or a policy - decision taken by the Government." 47. Refuting the points put across by the Respondent Nos. 1 & 2, Mr.

Naveen Chawla, learned Counsel for the Appellants, made the following submissions to reinforce the arguments initially made by his senior colleague.

(a) The question of ADC for Intra-circle calls even by roamers was neither considered nor discussed and was suddenly incorporated in the Impugned Regulation.

(b) The Respondent No. 2 vide their Circular dated 29.1.2005 had only raised the issue for creation of separate trunk groups.

(c) At no stage the Appellants were heard by Respondent No. 1 and he challenged the Learned Counsels for Respondents No. 1 & 2 to produce any evidence on that account.

(e) Sudden introduction of ADC @ Re. 0.30 per minute on the Roamer's calls to put a stop to the likely and imaginary misuse is not legally tenable since both the object and purpose of ADC are completely defeated. From the first IUC till the Impugned Regulation nowhere ADC was introduced to stop the likely misuse. The fall in traffic of STD and ISD for BSNL is not because of alleged handing of STD calls as local calls but because now there are other NLD operators also in the field

thereby reducing the traffic on BSNL network.

(f) There are only two private NLD operators viz. Airtel and Reliance. The burden of Re. 0.30 ADC has been imposed on all the roamers of all the operators which is totally unjustified since only these two NLD private operators can indulge in any imaginary misuse, if at all. Till 11.3.2005 even BSNL has not mentioned anything about ADC. (g) TRAI after having established the requirement of Rs. 5335 crore as ADC subsidy to be created cannot suddenly change the ADC regime to include Intra-circle calls also in the ambit as Inter-circle calls.

(h) Respondent No. 1 themselves have ruled out the suggestion of BSNL to create separate trunk groups and have separate Call Data Record based billing system which will eliminate the misuse, if any.

Thus the case of misuse also automatically falls through.

(i) In the end he submitted that this addition of Re. 0.30 as ADC without going through the consultation process and without giving any opportunity of hearing as a part of natural justice and changing the basic objective of ADC is totally violative of all the rules.

48. Having heard the arguments of the Appellant and both the Respondents in detail, we find that the following issues emerge before us for consideration:- (a) The issue of jurisdiction of TDSAT to adjudicate disputes arising out of the Regulation issued by TRAI, particularly so, in this case.

(b) Whether it is in order to treat Intra-circle calls made by Roamers when they move out to visiting network as Inter-circle calls and consequently subjecting them to ADC? (c) Whether levy of ADC on Roamer's call is in consonance with the basic objective of ADC for which it was introduced i.e.

cross-subsidy? (d) Whether introduction of ADC on Roamer's call to stop the likely misuse is in order? (e) Whether creation of separate Trunk Groups by BSNL is related to ADC? (f) On the issue of transparency, was a Consultation Paper necessary to bring about an amendment to IUC before issue of the Impugned Regulation and if so, whether the procedure was followed? (g) On the issue of

natural justice, whether it was necessary for TRAI to have given an opportunity of hearing to the Appellants before issue of the Impugned Regulation and if so, whether this opportunity was afforded? (a) The Appellants in their appeal have declared that the subject matter of the direction, decision or order against which they want redressal is within the jurisdiction of this Tribunal.

Learned Counsel for Respondent No. 1 was of the view that IUC 2005 made by TRAI has been done in exercise of powers conferred upon it under Section 36 read with Section 11 (1)(b) (ii), (iii) and (iv) of the TRAI Act. This regulation is a piece of subordinate legislation and not appealable before the Hon'ble Tribunal in terms of the provisions contained in Section 14(b) of the TRAI Act.

A similar case of jurisdiction, in Appeal Nos. 11 & 12 of 2002 - BSNL v. TRAI dated 27th April 2005, came before us where there was a preliminary objection to hear the cases pertaining to disputes arising consequent to Regulation issued by TRAI. That appeal also, incidentally, pertained to the issue of ADC.Following extracts of this Tribunal's judgment in the above-mentioned Appeal amply clarify the position of jurisdiction of this Tribunal vis-is adjudication of any dispute arising out of a Regulation of TRAI. "...In this view of the matter, we reject the submission of TRAI that it has effectually barred jurisdiction to hear the present appeal by framing Regulation under Section 36 of the Act. We rather hold that even if the Regulation in the present case is a subordinate legislation, validly made, any dispute arising thereunder is within the jurisdiction of TDSAT as conferred upon it by the Act and no subordinate legislation can take away that jurisdiction. Any clause in the Regulation which seeks to divest the TDSAT to adjudicate upon any dispute is non-est and has to be ignored." In view of the above, we continue to hold that the objection of the Respondent is not valid and we, therefore, proceeded to hear the present Appeal on merit.

(b) For the purpose of determining the call status of Roamers we consider it pertinent to understand the terms SDCA, local^1, Intra-circle^2 and Inter-circle^3 calls. Table-III of the IUC Regulation 2003 lays down the levy of ADC on various types of calls in Rupees per minute i.e. Fixed to Fixed, Fixed to WLL (M), Cellular to Fixed and Cellular to Cellular etc. etc. All the calls made are divided into three

categories i.e. local, Intra-circle and Inter-circle. For Cellular to Cellular calls there is no ADC levy on local & Intra-circle Calls as per IUC 2003. We observed the same thing in IUC 2005 issued on 6.1.2005 where no change was made on levy of ADC for Intra-circle calls from Cellular to Cellular. In these two Regulations i.e. till January 2005 there is no differentiation between Intra-circle calls made by a subscriber located in his original network or when he becomes a Roamer and makes a call while located in visiting network - both were considered at par so far as ADC is concerned.

The contention of the Respondents that since the private operators were charging Rs. 3 - 5 per minute for national roaming calls and Rs. 100/- per minute for an international roaming call and therefore they themselves are treating the roamers calls differently needs examination. During the arguments it was brought out amply by the Respondents that since the private operators were not treating them as local calls they were well within their right to impose ADC on the calls made by the roamers. We are, however, of the view that these charges have no correlation/linkage with category of calls i.e. Inter or Intra-circle calls. These charges are made by the operators for making available the network and the facilities to the roamers outside their own network. We have also been given to understand that these are not in contravention to the tariff laid down by TRAI i.e. they are within the permissible limits. The question before us is whether the calls made by Roamers at Visited Network are to be treated as Intra-circle or Inter-circle for the purpose of ADC. It goes without saying that when a roamer makes a STD call from the visiting network he will be charged STD charges and the charges to be levied as per IUC by the networks being used for transit and termination. This in any case will attract ADC being Inter-circle calls. We are at the moment limiting our discussion to charges made on account of ADC for treatment of this call as local / Intra-circle or Inter-circle.

In line with the definition given by the TRAI in their notification, if the calls are made within the circle whether in the original or visiting network, logically the call should be treated as Intra-circle.

Just by the mere fact that a subscriber moves out of his original network and roams in a visiting network, the original definition and the concept of Intra- circle v. Inter-circle does not change. It is a different matter whether BSNL has the facility to identify and differentiate between these calls which is dealt with subsequently. The exercise undertaken by TRAI clearly indicates that roaming calls have been treated as NLD/ILD calls for the purpose of preventing an alleged misuse of points of interconnection and to prevent the said abuse by imposition of ADC.The consultation paper preceding the issue of IUC 2003 dated 29.10.2003 considered a point on the applicability of ADC for roaming subscribers.

We however find that this was not made applicable till the notification of January 2005 and from the Explanatory Notes given by the TRAI in the IUC Regulation there was a thinking on their part to reduce the ADC because of increase in the number of subscribers and to merge it with USO Fund ultimately. From the arguments of both sides and the documents produced, it is evident that the idea of ADC on Roamer's call was triggered by the Circular dated 29.1.2005 of BSNL mooted by the Respondent No. 1 in their letter of 11th March 2005 and introduced vide Impugned Regulation.

(c) The basic purpose of ADC is to offset the deficit that arises to fixed line operators, primarily BSNL wherever their tariffs had to be specified below cost for socio-economic reasons. Starting with `The Telecommunication Interconnection Usage Charges Regulation 2003 issued on 24.1.2003 the amount of ADC was ascertained by TRAI and thereafter a formula was worked out for recovering the said amount. This remained operative till all subsequent amendments after January 2003 up to the IUC Regulation 2005 issued on 6.1.2005. It is seen from the records in petition as well as the replies that an amount of Rs. 5335 crore was to be generated for BSNL. To generate this fund the applicability of ADC on various types of calls was listed which can be seen in the Table reproduced in a previous page. The Intra-circle cellular calls were exempt from such levy. It means that there was no requirement of levying ADC on Roamer's since the assessed amount of Rs. 5335 crore could be generated without this. This was repeated in the 6.1.2005 notification. In the Explanatory Memorandum at Annexure `A' to January 2005 Regulation this has been emphasized. In para 9 of this Explanatory

Memorandum TRAI has re-emphasised that even per minute ADC charge is likely to go down due to the large number of increase of subscribers and subsequently relevant minutes of use. According to TRAI even with the revised regime issued in January 2005 BSNL has been provided with same ADC funds as was specified under the regime notified in the Regulation of 29.10.2003. The basic objective of ADC, therefore, is very clear i.e. cross subsidy. Till the January 2005 Regulation, we find that there was no proposal by TRAI to increase the ADC amount and in fact they were expecting more generation of ADC because of the increased number of subscriber base and consequent increase in minutes of calls. Contrarily, the introduction of ADC on Roamer's calls will increase the total amount of ADC. The levy of Re. 0.30 per minute on Roamer's calls, therefore, we find is in contravention to the basic objective of ADC and the amount worked out for the same.

(d) We find that the introduction of ADC on the Roamer's calls has been introduced to avoid misuse of POI by the cellular operators if they hand over incoming international as well as incoming Inter-circle calls as local calls to BSNL. It is also clear from the last but one paragraph of TRAI's letter dated 11.3.2005, to avoid such misuse of POI, TRAI has directed that all calls of national roaming subscribers should be treated as National Long Distance calls and all calls of international roaming subscribers should be treated as incoming International Long Distance calls. As such for all calls made by National roamers while in a different Service Area, ADC charge for national calls i.e. Re. 0.30 per minute will be applicable. For International Roamers while making any call while in India, an ADC of Rs. 3.25 per minute should be applicable, until any further change in the regime by the Authority. We do not question the powers of TRAI to change the classification of calls or to introduce ADC on the changed classification. But the reason to introduce ADC on roamers to stop the likely misuse is questionable. Two points merit consideration:- - We are changing the basic definition of circles i.e. Inter & Intra or in other words for the roamers this boundary is demolished.

- Secondly, even when roamer makes Intra-circle calls he is made to pay ADC which is anti-consumer.

To prevent the likely misuse of calls there are other means available which can be considered for enforcement. We find from TRAI's submission during the argument and also in one of the letters that CDR can resolve the issue. There may be an answer if the CDR can be passed on by the private operators to BSNL and the correct charges can be levied on various types of calls based on that CDR.We found from the arguments of Respondent No. 2 that there was an apprehension on their part that the private operators could pass on the calls on their POIs as local calls whereas these calls in effect are NLD/ILD calls. It is for this reason that they approached TRAI for creation of separate trunk groups. Though introduction of separate trunk groups would have facilitated the BSNL to differentiate between a roamer's call from that of a local subscriber call, the TRAI while rejecting their demand stated that since Call Data Record billing system was soon to be in place, no useful purpose would be served in creation of separate trunk groups which also is a time consuming process. It was also mentioned to us by the Learned Counsel for Respondent No. 1 that the Authority will soon be going afresh into the whole issue of ADC and this order was of an interim nature. We also find from the language that TRAI is quite explicit in stating that this applicability of ADC was until any further change in the regime by the Authority. Three days' notice, though considered too short, for the stakeholders to give comments also reflects on the TRAI that they were expecting comments/views and, therefore, there was not a certainty of applicability of the ADC under question. In any case, this is not the final order which is contemplated by TRAI to come out with after consultation process.

As we see the crux of the problem lies in differentiating and identifying these calls as Intra-circle of Inter-circle by the BSNL.

They contend that STD / ISD calls were continuously on the decline thereby eating into their revenue and they apprehend that reason for this was that some of the NLD/ILD calls are being passed on by the private operators as local / Intra-circle calls. We, however, notice that the NLD / ILD calls are to be handled by the NLD / ILD licensees.

Presently, there are only two private operators viz. Bharti (Airtel) and Reliance. The order of TRAI, however, makes it compulsory for calls made by roaming subscribers of all cellular operators to be treated as NLD calls even if they do not pertain to the cellular operators who do not have NLD/ILD licence. This in true sense is not justified.

Secondly, in our view, to stop a misuse of licence condition by a licensee we cannot use the instrument of ADC. ADC is meant for a particular purpose - a noble objective. The amount being collected as ADC from a roaming subscriber will be over and above the amount earlier worked out by TRAI to be given to BSNL. Imposition of ADC for stopping the likely misuse does not seem to be in order.

(e) On the issue of Separate Trunk Groups, TRAI turned down the proposal of BSNL to introduce separate trunk groups and have made a mention that introduction of CDR based billing system by the BSNL will resolve the problem. The whole problem in the instant appeal appears to be the stated inability of BSNL to find out whether a call is made by a roamer or is it a call from the original network of roamers and being marked as a roaming call. In our view if the CDR based billing system is introduced it will clearly indicate whether the subscriber making a call is a roamer or a local subscriber as this system also inter-alia gives information of location of the subscriber. We support the view of TRAI that BSNL should introduce this CDR billing system at the earliest and also the approach indicated by TRAI that private operators should pass on their CDR to BSNL.

(f) On the issue of transparency raised by the Appellants, we feel that in the instant case there was no necessity of going through a formal consultation paper to be issued by TRAI, since it is a continuous, ongoing and evolutionary process. The regime of ADC is well-known since the January 2003 Regulation and subsequent amendments. We also find from the document submitted by the Appellants themselves that TRAI had made a mention in the Explanatory Note that they are considering imposition of ADC on the roamers. Therefore, to say that this issue suddenly came up is not correct. It is a different matter whether it falls within the classical definition and the objective of ADC or not.

We feel that since it was an ongoing process there was no need for issuance of any formal consultation paper. This was mentioned by TRAI in their letter that amendment will be issued without any consultation process.

(g) On the issue of natural justice the Appellants have claimed that hearing should have been given to them before issuing the Impugned Regulation. They have quoted this Tribunal's judgment in a similar Appeal No. 5 of 2005 (VSNL v. TRAI) where this issue of natural justice had been raised. However, that case is entirely different from the present appeal. In Appeal No. 5 of 2005 the data used by TRAI to arrive at a decision was that of the VSNL themselves. Therefore, we had considered that in the interest of natural justice they should have disclosed to them the method of working of the rates of IPLC circuit / bandwidth. In the instant case data and record were all available to all the Appellants. This case, therefore, does not fall in the same category and we do not accept the arguments of the Appellants to justify their case of natural justice having been denied. However, we are of the view that Respondent No. 1, having asked for comments from the Appellants, gave a very short notice of 3 days time for the same.

Relevant lines asking comments from the Appellants is as under:- "...Please send your comments, if any, within three days of receipt of this letter." We, feel that if more time had been given to the Appellants to apply their mind on the issue being raised by the Respondent No. 1, this would have facilitated them to present their case/views in a better manner.

During the course of hearing we have been very clearly told by the Learned Counsel for Respondent No. 1 that this Order is interim in nature and TRAI is soon coming out with a final recommendation on the ADC regime. Be that as it may, even as an interim measure ADC cannot be imposed on Intra-circle calls for the sole purpose of preventing the likely misuse of roaming calls.

49. In view of the above, we hold that the action of TRAI of imposing ADC on roaming subscribers to arrest the likely misuse of calls by the private operators in passing of the ILD/NLD calls as local calls by the roamers would be in contradiction to the aims and objectives of ADC and is, therefore, not in order. We feel that rather than bringing these calls within the ambit of the ADC regime TRAI

should have taken alternative measures to stop the alleged misuse, if any.

50. Here in above we have noted the arguments of the Learned Counsel for BSNL that its demand is for additional revenue share because of the excess charges collected by the private operators on roaming calls. We express no opinion on this question since the same does not arise for consideration in this appeal.

(a) set aside the Impugned Telecommunication Interconnection Usage Charges (Fifth Amendment) Regulation (7 of 2005) issued by Respondent No. 1 on 11th April 2005; (b) we also set aside the Circular bearing No. 352-1/2005-Regin.

Dated 9th May 2005 issued by Respondent No. 2 and further restrain Respondent No. 2 from seeking implementation of the same from the Appellants.

1. SDCA means Short Distance Charging Area and roughly corresponds to a Tehsil or Municipal limits of a town and all the calls made by/to a fixed line subscriber within this area are termed as a local calls.

2. Intra-circle call means a call made by a Cellular subscriber to another Cellular subscriber, where no ADC is levied.

3. Inter-circle call means a call made by a Cellular subscriber belonging to one circle to Cellular subscriber belonging to another circle and connectivity is established through a NLD operator.

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com