

Aircel Limited and Others Vs. Bsnl and Another

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Court : Telecom Disputes Settlement and Appellate Tribunal TDSAT

Decided On : Sep-01-2010

Judge : S.B. Sinha, Chairperson, the Honourable Mr. G. D. Gaiha, Member & the Honourable Mr. P.K. Rastogi, Member

Appeal No. : Petition Nos. 57 of 2010, 63 of 2010, 64 of 2010, 65 of 2010, 66 of 2010 & 107 of 2010

Appellant : Aircel Limited and Others

Respondent : Bsnl and Another

Advocate for Pet/Ap. : For the Petitioner: Meet Malhotra, Ravi S. S. Chauhan, Ramji Srinivasan, Sr.Advocate, Navin Chawla, Sharath Sampath, Zeyaul Haque, Advocates. For the Respondent: Mr. Maninder Singh, Sr.Advocate, Mrs.P

Judgement :

S.B. Sinha

Introduction

Interpretation and/or application of some of the terms of the Interconnect Agreement entered into by and between the parties herein is involved in these petitions.

Background Facts

2. The basic fact of the matter is not in dispute.

The petitioners had been granted licenses in terms of Section 4 of the Indian Telegraphs Act, 1885 (the Act) on diverse dates. Indisputably, the Department of Telecommunications (DOT) of the Government of India is the licensor. It had the exclusive privilege to deal with the business of telecommunication. DOT had also been dealing exclusively with National Long Distance traffic and International Long Distance traffic (NLDs and ILDs) respectively.

The petitioners herein were initially granted licenses to carry out the business of telecommunications within the Circle(s) for which the licenses had been granted. A customer who intended to have a roaming facility was required to get itself registered with the operator. DOT was the only provider of services in respect of roaming signaling. By reason of various circulars issued by it and/or by reason of the conditions of license it became entitled to the roaming signaling charge.

The respondent herein is a successor in interest of DOT. The right of the DOT to obtain the usage charges for signaling network, therefore, vested in it. Indisputably, in terms of the provisions of the licenses granted to various operators as also the respondent herein, they were obligated to grant interconnect facilities to other operators whenever asked to do so. Pursuant to or in furtherance of the said mandate, the parties herein entered into agreements commonly known as 'interconnection agreements'.

3. We have noticed that the parties hereto had entered into several interconnect agreements.

4. We may take into consideration the fact involved in Petition No. 57 of 2010 : Aircel Ltd v. BSNL.

The roaming charges for using signaling hub were levied so as to enable the operator to find out the location of the person as also the authentication of the caller. The DOT, and consequently the respondent herein, had installed a Network Equipment, commonly known as CCS-7 signaling network which can also be used for the aforementioned purpose. The petitioner and the respondent entered into an

interconnect agreement on or about 17.2.03.

5. The respondent allegedly had been supplying all the requisite informations to the respondent herein and paid the requisite bills to the respondent, as and when raised, in respect of roaming signaling charges.

It, however, received a bill dated 8.1.10 for a sum of Rs.25,95,91,147/- only. According to the petitioner, the said bills had been issued purported to be in terms of clause 6.6 of the interconnect agreement, although it had not violated the undertaking furnished by it and the conditions precedent therefor were not attracted.

The petitioner made various representations, inter alia by letters dated 19.1.10, 25.1.10, 2.2.10 and 10.2.10, the salient features whereof and the issues raised by it inter-alia are as under:-

(a) The BSNL was requested to supply the process adopted for raising the bills alongwith OPC, DPC, (Originating Point Code and Destination Point Code) wise roaming signaling data for the supplementary claim for the period July 2008 to June 2009 for its own analysis.

(a) It requested BSNL to supply the SSTP data for the roaming supplementary bill for the period July 2008 to June 2009 to reconcile the huge difference in the roaming subscriber count.

(b) It stated that after analyzing the SSTP data for the month November 2008 (SSTP data only for the month of November 2008 was supplied by BSNL, though the petitioner has requested for the supply of SSTP data for the period July 2008 to June 2009) it was opined that the bill dated 8.1.09 as raised by BSNL was based on visiting in-roamers to the petitioner's circle (Tamil Nadu Circle), who were trying to latch on to the petitioner's network irrespective of the fact as to whether they had been availing roaming service from its network in Tamil Nadu circle or not.

(c) It was stated that around 52-53% of the in-roamers were from the Bharti Airtel, i.e., the subscribers who had attempted to latch but were not allowed since Bharti

Airtel did not permit roaming with other operators. Even for the signaling of these customers of Airtel, Aircel has been billed, by the respondent's own showing.

It is relevant to note that from the 'sample data' furnished by the BSNL (for November 2009), it became clear that:-

(i) there was no violation of the undertaking dated 7.11.08 given by the Aircel as there has been no allegation or evidence that signaling network was used for international roamers by the petitioner, in respect of which undertaking was given;

(ii) that 52-53% of the billing was incorrectly projected which was in fact other operator's customers and also because they are not registered with Petitioner in terms of Interconnect Agreement.

(iii) Even the rest 47-48% of the in-roaming customers are not registered subscribers of the Petitioner in terms of the Interconnect Agreement.

(d) It was further stated that as per clause 6.6 of the Interconnect Agreement the roaming signaling charges @ Rs. 25/- per subscriber per month was not based on in-roamers but to facilitate its own Tamil Nadu subscriber to roam outside the Tamil Nadu Circle and was not for other operator's subscriber roaming into Tamil Nadu circle.

(e) It further stated that BSNL took 18 months to raise the bill 08-01-2010 as against the maximum time allowed for that purpose, viz., 6 months as envisaged under the Interconnect Agreement when BSNL has itself placed the SSTP signaling facility way back in July, 2008.

6. The respondent, by its letters dated 23.1.10, 30.1.10 and 9.2.10 responded to the said representations. It sent one CDR by way of sample for the month of November, 2008 although a request had been made by the petitioner for the CDRs from July, 2008 to June, 2009. The respondent rejected the request of the petitioner to supply the SSTP data for the period July, 2008 to June, 2009, inter-alia, on the premise that the processing of such a huge volume of data was not possible. Demands have been raised only in terms of the provisions of the interconnect agreement and in particular, Clause 6.6.

7. It was contended that the Tamil Nadu Circle of the respondent could not have charged for the subscribers who had gone out of Tamil Nadu Circle and availed the signaling link of the respondent in other Circles and only in that view of the matter, the Tamil Nadu Circle of the respondent had charged for usage of signal links falling within its jurisdiction.

8. Tamil Nadu Circle had no jurisdiction to charge for the out-roamers and as such the in-roamers, i.e., the subscribers roaming in his area, were also charged.

Submissions

9. Mr. Meet Malhotra, appearing for Aircel Ltd and Mr. Ramji Srinivasan, the learned senior counsel appearing for the petitioners in the other petitions urged :-

(a) From a bare perusal of various clauses of the interconnect agreement, it would be evident that the roaming signaling charges were to be paid for actual use thereof and not for any other purpose.

(b) On perusal of the various Circular letters issued by the DOT, it would be evident that the charges prescribed therein, namely, Rs.25/- for National roaming and Rs. 50/- for International roaming per month per subscriber was required to be paid in respect of those subscribers who had been roaming and not from those who had merely registered themselves as roaming subscribers.

(c) From the Circular letters, and, in particular, Clause 6.6 of the interconnect agreement, it would appear that the same are to be read reasonably, namely, after the words “per roaming per month per roaming subscriber”, a comma should be put so as to mean that a flat rate of Rs.25/- per month per roaming subscriber would be charged from those who were registered with the same service provider for national automatic roaming and not from all subscribers who were registered with it.

(d) The very fact that the data on signaling network had to be handed over would clearly go to show that a subscriber must go out of the Circle for which it was registered and must have a roaming facility and only then, the data on signaling network are required to be handed over.

(e) The SSTP equipment being a new monitoring system installed for the purpose of finding out the details of the person who had actually been roaming and could not have been charged earlier, is itself a pointer to the fact that the roaming subscriber must be actually using the said facility.

(f) If the respondent is permitted to charge from each of the operators, both for out-roaming and in-roaming subscribers, it will unjustly enrich itself as it would be charging for in-roaming signaling from one operator and out-roaming from another operator for providing the services to the same subscriber.

(g) The provisions contained in the Circulars as also the interconnect agreement must be given a purposive meaning.

(h) The respondent and its predecessor, DOT, having continuously been charging for the out-roaming purposes, it could not have adopted a new policy decision to include the charges not only for out-roaming and in-roaming but also only for those who had registered themselves but have not availed the roaming facilities.

(i) The invocation of the penalty clause contained in Clause 6.6 of the interconnect agreement must be held to be wholly illegal, bad in law and without jurisdiction as prior thereto, neither the petitioners were given an opportunity of hearing, nor the conditions precedents existing therefor were attracted.

(j) The impugned bills could not have been issued without supplying the petitioners the readings of the SSTP equipment as also the CDRs for the period in question.

(k) The respondents were obligated to supply the details of the data on the basis whereof, the impugned bills have been levied.

(l) Had an opportunity of hearing been given to the petitioners, they could have shown that no undertaking having been given and/or violated, the question of invocation of the Clause 6.6 did not arise.

(m) The respondent, furthermore, has committed a serious error in charging interest on the purported dues and giving a retrospective effect thereto.

(n) The impugned bills could not have been issued and/or served upon the petitioners after a lapse of several years in view of the bar contained in Clause 7.3.1(iv) of the interconnect agreement which clearly provides for issuance of supplementary bills only within a period of six months.

10. Mr. Maninder Singh, the learned senior counsel appearing on behalf of the respondent, on the other hand, submitted:-

(a) The respondent in terms of the interconnect agreements, was entitled to levy charges, not only for rendering services to the out-roamers but also to the in-roamers.

(b) The liability to pay unto the respondent was in respect of utilizing “the signaling network of BSNL for each and every cellular subscriber for National and National Automatic roaming service” immediately on registration.

(c) The levy of charges is not at all dependent upon the fact as to whether any cellular subscriber registered with the CMTS provider avails their roaming services actually by moving out of the home Circle or not.

(d) Having regard to the fact that the respondent did not have any technological mechanism available with it or DOT to find out as to how many subscribers of any CMTS providers were registered for National and International call automatic roaming service and had to rely entirely upon the declaration made by the private CMTS operators, it was essential and obligatory upon them to make a correct and honest declaration thereabout so as to enable it to collect the lawful charges.

(e) The respondent only upon installation of the new signaling equipment in the year 2008 came to know about the non-declaration of the registered roaming subscribers of the petitioners and in that view of the matter, the impugned bills have rightly been raised.

(f) A distinction between ‘utilization of signaling network’ and ‘the availability of automatic roaming service’ must be borne in mind in so far as signaling network facility is provided by the respondent to private CMTS operators but the availability of automatic roaming service is granted by the CMTS operators to their respective

subscribers registered with them in respect thereof.

(g) The private operators were bound to pay for utilization of signaling network of the BSNL as per the formula/mechanism agreed to by and between the parties.

Some Provisions of the Agreement.

11. Clauses 2.2.3.7 and 6.6 inserted by the said 'Addenda' dated 24.7.07 read as under:-

"...2.2.3.6. BSNL's signaling network shall not be used for such calls for which no voice path is being established through BSNL's network except for signaling data for automatic roaming purposes and SMS Service as per clause 6.6. ...'

"...2.2.3.7 BSNL's signaling network shall not be used by CMTS PROVIDER for any purpose for which no voice path is being established through BSNL's network except for handover of signaling data for automatic roaming purposes and SMS Service as per Clause 6.6. CMTS PROVIDER shall handover signaling data for roaming purposes and SMS services as per clause 6.6 to BSNL only at SSTP connectivity at Level I TAX locations. If CMTS PROVIDER does not intend to use BSNL's signaling network for handover of signaling data for automatic roaming purposes or SMS Services as above then an undertaking to this effect shall be given by CMTS PROVIDER to BSNL circle office. In case it is subsequently found that CMTS PROVIDER, after submitting such an undertaking, is using BSNL'S signaling network for handover of signaling data for automatic roaming purposes or SMS Services or similar services then BSNL shall charge CMTS PROVIDER, along with applicable interest prescribed in the Interconnect Agreements during the prevalent time, as per provision in clause 6.6 of this agreement with retrospective date from the date of provisioning of such interconnection besides and in addition to any other action which can be taken by BSNL in accordance with law. ..."

"... 6.6 VALUE ADDED SERVICE CHARGES

Auto Roaming Services: Fixed flat rate of Rs. 25/- and Rs. 50/- per months, per roaming subscriber registered with CMTS PROVIDER for national and

International automatic roaming respectively shall be charged for use of BSNL's CCS7 links.

The number of National and International roaming subscribers will be given every calendar month by the CMTS PROVIDER to the concerned telecom circle who will issue the bill. ...”

...

“...7.2.2 Bills for telecom resources and other support facilities, such as connection charges, charges for leased facilities, charges for value added services (See 6.6, Auto Roaming charges are treated as under VALUE ADDED SERVICES...if availed!) and charges for enhancement of features, if availed by the CMTS PROVIDER at the intervals specified in this agreement....”

“...7.3.1(iv) If the bill issuing authority subsequently finds that some charges have been omitted from the bills issued, he will include the omitted charges in the subsequent bills at any time, but within 6 months from the date of issue of the relevant bill except in cases where additional billing becomes necessary due to the tariffs/rates changes notified subsequently with retrospective effect by the appropriate authority,.”

ISSUES

12. The questions which arise for consideration in these petitions are:-

(i) Whether keeping in view the interconnect agreements entered into by and between the parties hereto, the respondent is entitled to charges for using signaling network only for providing out-roaming services.

(ii) Whether the bills having been raised only for providing out-roaming service but also for in-roaming services, the respondent can take a third stand, namely, it is entitled to charges even in respect of those subscribers who merely got themselves registered for availing the roaming facilities although might not have used the same.

(iii) Whether levying charges both for providing out-roaming facilities to one service operator and consequently in-roaming facilities to the customers of another service provider, the respondent had been getting double payments.

(iv) Whether the practice having developed and accepted by the DOT and the respondent for a long time, that only charges which could be levied, were for providing facilities to the customers of a private operator, the respondent, in law, was entitled to raise fresh demands upon conferring unto itself, the benefit without arriving at a consensus, and thus, committing breach of the principles of legitimate expectation.

(v) Whether the demands made by the respondent being governed by Clause 7.3.1(iv), the impugned charges are barred by limitation.

13. We would, at the outset, notice certain Circulars issued by the DOT and/or the respondent herein, in regard to usage of charges for its signaling network. The first of such Circulars was issued on 13.5.1998, the relevant portions whereof read as under:-

“As agreed in the last, Co-ordination Meeting with COAI on 30th March. 1998, it has been decided to modify the ' above orders of utilisation charges of Rs.50/- per Kilo segment of data. It has now been decided that DOT may be paid an ad-hoc flat rate of 5% of the roaming subscription levied by the cellular operators or Rs. 25/-. whichever is more. This ad-hoc arrangement will be for a period of three months only and will be renewed after getting the CCS-7 Traffic details from the respective circles. This issues with the concurrence of Advisor (Finance).”

Yet again, on or about 6.8.98, another Circular was issued in the following terms:-

“It has been decided that DoT may be paid an adhoc flat rate of 10% of the international roaming subscription levied by the cellular operators or Rs.50/- per month, per roaming subscriber, whichever is more. This Adhoc arrangement will be for a period of 3 months and will be reviewed after getting CCS-7 traffic details from the respective circles.

The Heads of Circles /Distt./MTNL, New Delhi/Mumbai will collect the above charges from the cellular operators. Half of the amount collected per roaming subscriber as per the above formulae will be payable to VSNL.

Each Circle shall intimate Maharashtra Circle every month, the amount payable to VSNL on the above account.' Maharashtra Circle will, in turn, after receipt of the monthly statements from each Circle shall settle the account with VSNL.

The charges proposed are based on number of international roaming subscribers in a calendar month.

The number of international roaming subscribers will be given by the cellular mobile operator every calendar month to DOT/MTNL during the adhoc period of three months.

This is to be charged from the cellular operators for use of signaling links of DOT/MTNL/VSNL and may not in any way be construed as any change in license conditions regarding ceiling tariff stipulations.”

On 6.08.98, an ‘Addendum’ was issued thereto, stating-

“Addendum to the circular issued vide even number dated 13th May, 1998.

The rates specified as 5% or Rs.25/-, whichever is more, is to be treated per month, per roaming subscriber.

The number of international roaming subscribers will be given by the Cellular mobile operator every calendar month to DoT/MTNL during the adhoc period of three months.

This is to be charged from the cellular operators for use of signaling links of DoT/MTNL/VSNL and may not in any way be construed as any change in license conditions regarding' ceiling tariff stipulations.”

On 25.11.99, DOT issued another Circular, the relevant portions whereof read as under:-

“Vide the above referred circulars, adhoc charges leviable from the CMTS operators of account of national and international roaming were communicated.

2. It has now been decided to charge a fixed flat rate of Rs.25/-and Rs. 50/-, per month per roaming subscriber registered with the CMTS operator for National and International automatic roaming respectively.

3. The number of National and International roaming subscribers will be given every calendar month taken by the Circle and Metro CMTS operators to the concerned Telecom Circles/MTNL. These circles/MTNL will collect the relevant roaming charges from these CMTS operators.”

Principles of Construction

14. Before advertng to the questions noticed heretobefore, we, at the outset, may notice certain well-known principles of constructions of a document.

They are :-

(1) A contract would warrant of constructions only, if the terms thereof are vague and ambiguous, (G. Ramachander Reddy and company v. Union of India and Another [2009(6)SCC414 para 26].

(2) A contract is to be understood in its ordinary meaning, which, however, has two exceptions - (i) if the word has a technical or legal meaning; and (ii) where the context requires otherwise. (Rahee Industries Limited v. Export Credit Guarantee Corporation of India Limited and Another [2009(1)SCC138 para 5].

(3) Intention of the parties to an instrument is required to be gathered from the terms thereof and that the contract must be construed having regard thereto as well as the nature thereof. (Steel Authority of India Limited v. Gupta Brothers Steel Tubes Limited [2009(10)SCC63].

(4) A document must be read in its entirety (C. Cheriathan v. P. Narayanan Embranthiri[2009(2)SCC673 para 12]

Analysis

15. We may notice that initially, DOT and consequently, as its successor in interest, the respondent herein alone, had the NLD license. DOT had set up CCS-7 links at Level-I TAX which is a state of art technology, in the Capitals of the States ordinarily. The licensees were, therefore, required to avail the services of the BSNL for obtaining links through CCS-7 signaling system.

The respondent started its mobile service only in 2002. The private operators were also granted NLD/ILD licenses. Those private operators including the petitioners herein, however, had not put in place their own CCS-7 links so as to enable them to avail the services of the signaling network and consequently allow its customers to avail the facilities of roaming services.

The private operators, however, were charging separately for granting roaming facilities to their own customers. Indisputably, they had been charging rentals also for the said purpose. The Telecom Regulatory Authority of India, having received several complaints from the customers with regard to the levy of charges at two levels by the private operators issued certain directions which need not be noticed by us.

16. In terms of the said directions, therefore, only those who intended to avail the said roaming facilities would get themselves registered with the private cellular service operators. By reason of a Notification dated 24.1.2007, TRAI made an Order known as 'The Telecommunication Tariff (44th Amendment) Order, 2007' which came into force on 15.2.2007.

We may notice the relevant entries contained in the second schedule appended thereto:-

Schedule II Cellular Mobile telecom Services (CMTS)

ITEM TARIFF

"(14.a) Regional and National Roaming:

(14.a.i) Refundable Security Deposit Forbearance

(14.a.ii) Entry Fee (One time charge) Nil

(14.a.iii) Monthly Access Charge for Regional or National Roaming Nil

(14.a.iv) Composite charge including Public Switched Telecom Network (PSTN) charges for incoming call while Regional or National Roaming Ceiling of Rs.1.75 per minute

(14.a.v) Composite charge including Public Switched Telecom Network (PSTN) charges for outgoing local call while Regional or National Roaming Ceiling of Rs.1.40 per minute

17. In its Explanatory Memorandum, while stating the underlying principles in roaming tariff structure, TRAI stated as under:-

III No Two part charging regime

Composite roaming tariff structure was proposed by the Authority in its Consultation Paper No.16/2006 dated 24.11.2006 based on grounds of transparency and fairness for the consumer.

11.17 After detailed analysis of data on costs, traffic pattern and the number of subscribers availing roaming facility across mobile operators whose data was made available and considered for analysis, the Authority has come to the conclusion that the cost estimates are realistic and reflective of the resources utilized only when the roaming tariffs are fixed in a composite manner. It would be appropriate in this context to recall the detailed explanation of the Authority in the Consultation Paper in this aspect:-

"Separate estimates for determination of monthly rental and roaming call charges do not appear to be realistic in the present context on account of the asymmetrical distribution of In-roaming Minutes of Usage and the subscriber base availing roaming facility across operators. Data available indicates that the total number of in-roamers into the network of an operator in a particular service area is several times that of the number of subscribers who have availed roaming facility on payment of monthly rentals in the same service area of the same operator. If monthly rental has to be determined purely based on the number of subscribers with roaming facility, then the cost will be disproportionately loaded on such

roaming subscription resulting in high rental amount. Such a situation would be iniquitous and thus unfair as it does not distinguish between subscribers availing one-off roaming usage and other frequent roamers. In fact, the two part cost determination, one covering the capex recovery through monthly rental and another for meeting the opex recovery through usage charges is throwing up results indicating the anomaly described here. On the contrary, incremental cost estimates covering both capex and opex together for operators have yielded robust results providing reasonable range of costs. For this purpose the recovery of capex and the opex were added for each of the licensee and an incremental cost of roaming call per minute was derived."

11.18 A composite roaming tariff structure does not mean that capital costs associated with access to roaming facility has been left out or not taken into account. Far from that, the Authority has clearly stated in its Consultation Paper (para 5.5) that, the capital cost component has also been subsumed in the incremental cost estimates attributable to roaming and thus no category of costs has been left out.' What a composite tariff for roaming means is that there shall be a roaming tariff based on usage i.e. separately for incoming call, local outgoing call and inter-circle outgoing call while roaming on a per minute basis without the consumer having to pay any fixed monthly charges in the form of rental or otherwise. It is reiterated that costs associated with the access to roaming facility is already part of the incremental cost arising out of provision of roaming services. Further, there shall be no additional PSTN charge (later clarified by the Authority as IUC charges) allowed to be charged from the roaming subscribers as they are part of the composite roaming tariff (more discussion on this later).

11.19 In the discussions held by the Authority with the mobile service providers and their associations during the consultative process, a point was made by them that signaling charges are incurred on a per subscriber basis for providing roaming facility which is of recurring nature and therefore the two part regime containing, inter alia, rental should continue to exist in the roaming tariff structure. The Authority has found this argument of one of the mobile service providers to be untenable for the following reasons, namely:-

(a) Discussions with the industry sources reveal that by and large, mobile service providers have their own signaling system and do not depend on the incumbent operator for such a facility any more and thus monthly payment on that account on a per subscriber basis has almost ceased to exist.

(b) It is common knowledge that a mobile service provider who is either leasing capacity or setting up its own capacity for carrying long distance calls including for roaming will not have to separately incur signaling charges payable to another operator as it existed several years ago. Carriage charges determined by the Authority at Rs.0.65 per minute have been fully allowed in arriving at the incremental cost arising out of provision of roaming services.

(c) In any case, even conceding that one or two service providers are incurring expenditure on account of signaling charges, the amount reported to have been incurred by them in their data submissions to the Authority (pertaining to FY 2003-04) has been included totally without any deductions for purposes of arriving at cost estimates on account of provision of roaming services.

(d) The service providers associations who had met the Authority in a meeting held on 11.01.07, eventually conceded that on the cost estimates or the basis of the cost estimates arrived at by the Authority which are shown in the Consultation Paper are correct. Their contention was on the ground that forbearance in mobile tariffs in general had led to declining tariff environment and therefore Authority should desist from continuing with any regulation of roaming tariffs in isolation. Examination of this issue is contained in an earlier section of this Explanatory Memorandum viz. paras 11.1 to 11.7.

11.20 In this context, the Authority also recalls its Directive dated 16.6.2004 wherein it had to mandate the mobile service providers to inform the subscriber through SMS whenever they roam into another license area that they would be charged for the roaming facility only if the subscriber chooses to either make or receive a call while roaming. It was further mandated that any fixed charges for roaming such as roaming rental should not be charged unless roaming is activated i.e. a call is either made or received by a customer while roaming (Directive No.101-3/2003-MN (Pt.II) dated 16.6.2004 on auto roaming services to all prepaid

subscribers). Despite such a directive, complaints continued to be received by the Authority from prepaid subscribers for being charged roaming rental/some fixed charge even though they do not want to avail the roaming service.”

18. It is beyond any controversy that the parties herein had entered into the interconnect agreements in terms whereof the private operators were to pay a sum of Rs. 25 for providing link within India and Rs.50 for international roaming facilities. We have noticed heretobefore the relevant provisions of the agreement as also the Circular letters issued by DOT from time to time.

19. The agreement had undergone changes. Para 2.3.6 contained prohibition upon the cellular mobile service providers from using the signaling network except for such calls for which no voice file was established, except for signaling data for automatic roaming purpose and SMS service as per clause 6.6.

20. The term ‘used’, in our opinion, is of some significance. Clause 2.7 enables the CMTS providers to develop its own CCS-7 signaling network, for which, the Telecom Authority was to decide the allocation of SP codes. Clause 6.6, the interpretation whereof is in question, is in two parts - the first part whereof provides for the rate at which charges would be levied for auto-roaming services, which, indisputably, is a value added service.

It is also not in dispute that in terms of the said provision, the subscribers were required to get themselves registered with the CMTS providers for National and International automatic roaming.

21. The second part of the said provision casts a duty on the service providers to give unto the respondent the number of National and International roaming subscribers every calendar month. The said provision was amended by reason of Addenda-III inserted on 24.7.2007 whereby the words ‘for use of BSNL’s CCS-7 links’ were added after the word ‘charged’. What is the meaning of the word ‘use’ in the aforementioned context, is in question.

Interpretation Issue

22. Mr. Meet Malhotra, the learned counsel appearing on behalf of the petitioner herein for Aircel had relied upon the meaning of the said words, in some dictionaries as also some decisions which are as under:-

DEFINITION OF THE WORD 'USE'

A. CONCISE OXFORD DISCTIONARY (IXth Edition)

"...cause to act or serve for a purpose; bring into service; avail oneself of..."

B. BLACK'S LAW DICTIONARY (VIIIth Edition)

"...The application or employment of something..."

C. MITRA LEGAL and COMMERCIAL DICTIONARY (Vth Edition)

"...To employ to any purpose; deal with; make business with..."

D. ARBUCKLE SMITH V GREENOCK CORPORATION

(1960)1 ALL ER 568.

"...Use is not a word of precise meaning, but in general it conveys the idea of enjoyment derived by the user from the corpus of the object enjoyed..."

E. STATE OF UTTAR PRADESH VS RAMAGYA SHARMA

AIR 1966 SC 78 (PARA 9).

... We are unable to accede to the above contentions. There is no provision in the Control Order requiring that iron or steel acquired under the Control Order should be utilised within a specified time. If it had been the intention to include keeping or storing within the word "use" there would have been some provision regarding the period during which it would be permissible to keep or store the iron, for it is common knowledge that building operations take some considerable time and are sometimes held up for shortage of material or other reasons. Further the word 'use' must take its colour from the context in which it is used. In clause 7 the expression "use ... in accordance with the conditions contained" suggests

something done positively, e.g. utilisation or disposal. Mere 'non-use', in our opinion, is not included in the word 'use'.

23. We may also notice that whereas according to Mr. Ramji Srinivasan, the word 'roaming subscriber' is an adverb, Mr. Maninder Singh would contend that it merely describes the purpose for which such facilities are being provided.

Before considering the matter further, we may notice the dictionary meaning of the word 'roaming'. It, inter alia, means-

"To walk or move about from place to place, or to wander over or through".

24. The said dictionary meaning, however, may not be of much use for our purpose, as indisputably, the purpose for which such facilities are granted enables a subscriber to make a call although he is physically out of the Circle, for which the licensee had been granted license. The provisions, thus, are capable of two different interpretations - one of these being that the respondent would be entitled to the charges only in respect of those subscribers who, at least in a month once or more go outside the Circle in question.

25. We may place on record that there is absolutely no controversy that the charges for signaling network at the rate of Rs.25 and Rs. 50 were to be levied for roaming subscribers.

We hereat may also place on record that whereas according to the petitioner it is essential for a subscriber to avail the said facility of signaling network by going out of the Circle meaning thereby, the subscriber must be an 'out-roaming' one, according to the respondent, irrespective of the fact as to whether the subscriber has gone out of the Circle or not, the charges were payable on mere registration of the subscriber for availing the roaming service.

Intention Issue

26. It is in the aforementioned context the intention of the parties to the agreement is required to be gathered. But before we refer to the various circular letters issued by DOT, it is essential to notice the manner in which the bills were to be raised. It

may moreover be noticed that the signaling of BSNL network facilities was for location of person and authentication of the caller while roaming.

The CCS-7 signaling is a network equipment. In terms of the interconnect agreement, the service providers were to furnish the number of subscribers who had gone out of the Circle, on the basis of the said informations alone, the bills used to be prepared. The respondent, however, sometime in the year 2008, installed an equipment known as SSTP. One of the functions of the said equipment was to find out the number of subscribers of a licensee had availed the services irrespective of the fact as to whether the subscribers were out-roamers or in-roamers.

Relying on or on the basis of the reports obtained through the said instrument, additional bills were raised. Now, it stands admitted that the additional bills principally involved those who were in-roamers.

The respondent, for the aforementioned purpose, issued a circular letter to all the Chief-General-Managers (CGMs) on or about 30.10.2008 :-

“3. Field units of the BSNL have reported to this office that some of the CMTS providers/UASLs are not submitting the information of their national and international roaming subscribers to BSNL on the plea that they are not making use of the BSNL's signaling links at all in the absence of such information. BSNL's field units are not able to raise the bills to these private operators.

4. It is intimated that the mechanism for dealing with the payment of signaling link charges by the private CMTS providers/UASLs is already available in the interconnect Agreements existing between BSNL and private access providers, The relevant clauses of Interconnect Agreements existing between BSNL and private UASL's clause number may be different in different interconnect Agreements are as under similar clauses also exist in the Interconnect Agreements executed between BSNL and private CMTS providers.

5. Accordingly, all field units of BSNL are requested to take an undertaking as above form such CMTS providers/UASLs who do not intend to use the signaling

links of BSNL thereby do not submit the information of number of national and international roaming subscribers to BSNL. As these CMTS operators/UASLs do not intend to use the signaling links of BSNL thereby no bills are to be-raised to such operators.

6. Further, competent authority has decided that for the past period also, if some of the CMTS providers/UASLs who have not utilized the signaling links of BSNL thereby not submitted the requisite information of roaming subscribers to BSNL and such operators now submit an undertaking as above then bills raised to such operators as per the instructions dated 14.06.2005 based on the basis of last information submitted by these operators may be cancelled.

7. Also, as now SSTP system has been put in place in almost all the Level-I TAX (s), field units should be in a position to measure record the use of BSNL's signaling links by private operators. Therefore, it is requested to carry out the measurement of use of signaling links of BSNL by private operators for roaming and SMS purposes as above and in the event private operators, who give certificate for not using the BSNL's signaling link are found using the same, then necessary action as above may immediately be taken."

The Bills/Methodology

27. It is only thereafter that the impugned bills were issued, the details whereof are as under:-

BHARAT SANCHAR NIGAM LIMITED

O/o Chief General,

A.P,Circle, Hyderabad-1.

To,

M/s Vodafone Essar Sotith Umlted, '

Hyderabad

Billing period' July 2008TO Jun6'2009 'invoice Nb: RC-VESL/2009-10/1 . Invoice
Date: lrt/2010 Pay-by-Date; 15/01/2010

j

i Charges

per roamer No of roamers Total Charges ; billed (Rs.)

1 National Roamers Charges

26 3901740 97543500

2 International Roamers Charges

3 Total Roamers Charges 97543500

4 Total Service Tax 11700305 11700305

5 Interest on 3 above 21363490 21363490

6 Gross Amount Payable 130607295

DETAILS FOR THE ABOVE BILLING

Roaming Subscribers

Month National

Jul-08 91902

Aug-08 225193

Sep-08 278782

Oct-08 338813

Nov-08 508117

Dec-08 616151

Jan-09 614585

Feb-09 657002

Mar-09 217947

Apr-09 70264

May-09 104399

Jun-09 180785

Total 3901740

IDEA - GUJARAT

Month Default Roaming Subscribers

Jan-07 1477416

IDEA - KARNATAKA (erstwhile Spice Communications Ltd

Month Default Roaming Subscribers

Jan-07 642424

Roaming Bills Details - Aircel (P.No. 57 (C) of 2010

Roaming Charges Bills for Tamil Nadu Circle

BILL DATE BILL AMOUNT FOR THE MONTH OF

10.8.08 52,53,673 July, 2008

10.9.08 52,87,072 August, 2008

13.10.08 59,47,580 September, 2008

14.11.08 65,80,588 October, 2008

10.12.08 66,31,768 November, 2008

10.1.09 74,10,339 December, 2009

10.2.09 79,42,588 January, 2010

Vodafone

PETITION NO. CIRCLE BILL DATE BILL AMOUNT PERIOD

63/2010 (Pg.110) Andhra Pradesh 01.01.2010 13,06,07,295 July, 2001 to June 2009

-do- (pg.114) -do- 16.02.2010 22,41,68,040 May, 2002 to June, 2008

-do- (pg. 226) -do- 01.07.2010 200,23,80,764 March, 2007 to June, 2007

64/2010 (pg.133) Kolkata 08.02.2010 2,79,20,806 January, 205 to June, 2009

65/2010 (pg. 105) Gujrat 25.01.2010 9,17,122 July, 2001 to June, 2009

-do- (pg. 203) -do- 01.07.2010 45,14.63.684 June, 2007 to June, 2009

66/2010 (pg. 132) Maharashtra 22.12.2009 3,94,41,142 June, 1997 to June, 2009

-do- (pg. 145) Tamil Nadu 08.01.2010 74,23,210 July, 2008 to June, 2009

-do- (pg. 151) Kerala 05.03.2010 117177660 June, 1997 to June, 2009

-do- (pg. 247) Tamil Nadu 30.06.2010 143,16,59,850 July, 2008 to June, 2009

-do- (pg. 250) Maharashtra 01.07.2010 208,79,18,900 February, 2007 to June, 2009

-do- (pg. 253) Kerala 30.06.2010 149,08,86,425 March, 2007 to June, 2009

-do- (pg. 256) Kerala 30.06.2010 165,94,43,907 June, 1997 to June, 2009

Idea Cellular

PAGE NO. CIRCLE BILL DATE BILL AMOUNT PERIOD

167 Andhra Pradesh 02.01.2010 5,15,68,291 July, 2008 to June 2009

172 -do- 16.02.2010 9,72,19,324 June, 1998 to June, 2008

181 Himachal Pradesh 22.02.2010 62,405 September, 2006 to March, 2009

184 -Do- 25.02.2010 5390 Not Mentioned

189 Gujrat 25.01.2010 22,16,36,940 April, 1997 to June, 2009

195 Karnataka 27.01.2010 15,88,22,920 March, 1997 to June, 2009

202 Punjab 09.03.2010 20,83,982 June, 1997 to May, 2009

205 -Do- 09.03.2009 10,02,407 June, 1997to May, 2009

213 Rajasthan 31.03.2010 2,07,475 March, 2006 to June, 2009

214 -Do- 31.03.2010 89,742 March, 2006 to June, 2009

289 Punjab 01.07.2010 144,68,75,367 March, 2007 to June, 2009

293 Karnataka 30.06.2010 / 01.07.2010 106,81,70,200 March, 2005 to March, 2009

297 Andhra Pradesh 01.07.2010 213,43,21,681 April, 2003 to June, 2009

301 Himachal Pradesh 01.07.2010 5,47,84,690 October, 2006 to March, 2009

305 Rajasthan 01.07.2010 26,33,00,063 November, 2006 to June, 2009

28. By a letter dated 13.1.10, the petitioner (Vodafone) asked the respondent in regard to the mechanism as to how the said figures were arrived at, which were quite against the furnished subscriber figures for the period July, 2008 to June, 2009. The respondent, therefore, was called upon to share the details for the said months for reconciliation with its accounts. Along with the said letter, a statement showing payments made up to August, 2009 from July, 2008 was also furnished.

The respondent replied thereto in terms of its letter dated 19.10.2010, which is to the following effect:-

“Kindly refer to the subject and reference cited above (i.e., Signaling charges period July 08 - June 09 supplementary invoice- Reg. and reference to letter No. Nil dated 13.1.2010), wherein it was desired to know the mechanism for arriving the figures and details for the months of 2009 and 3/09 to reconcile. In this connection your attention is invited to the para 4 of annexure-II enclosed to your bill wherein it was mentioned that BSNL SSTP system is capable of measuring the usages of its signaling links by private CMSPs/UASLs. Accordingly the information generated by the SSTP system was forwarded to this office by our corporate office. Based on this information, and the billing information available with this office, the number of roaming subscribers to be additionally billed was arrived at and accordingly this office has raised the bill. The number of roaming subscribers accordingly billed (month-wise) was also shown to the bill itself. Hence, it is once again advised to arrange payment of the bill issued for Rs.13,06,07,295/- immediately without delay to avoid further interest for delayed payment.”

29. A bill for a sum of Rs. 224168040/- was also raised, wherefor, the difference of number of subscribers for usage of signaling links for BSNL was furnished month-wise.

30. By a letter dated 7.12.09, the respondent stated as under:-

“4. For the period from July 2008 upto June 2009, the differential bills for usages of signaling links of BSNL by private operators are to be generated as per SSTP data enclosed at Annexure-I. However, for the period prior to July 2008 i.e. from the date of commissioning of POI upto June 2008 (for which no data of usages of signaling links of BSNL by private operators is feasible from SSTP system) the bills for differential amount are to be generated by applying the pro-rata methodology which is the most efficient one, on the available data of SSTP system for July 2008 to June 2009 as submitted in para 5 and 6 below.

6. Then, this ratio ‘R’ is to be used for calculating the number of roaming subscribers making use of signaling links of BSNL (say 5) in a service area for a

particular month as under for the period starting from the commissioning of POIs upto June 2008, for which data is not available from SSTP.

7. In all the above-stated calculation, the information of number of mobile subscribers of different CMSPs/UASLs may be taken from the websites of COAI and AUSPI i.e. www.coai.com and www.auspi.in respectively.”

31. Yet again, by a letter dated 7.12.2009 issued to all General Managers, it was stated as under:-

“2.Subsequently, SSTP system has been commissioned in the BSNL's network which is capable of measuring the signaling usages of BSNL by different CMSPs/UASLs. From the comparison of the reports generated from SSTP system of BSNL regarding usages of signaling links of BSNL by various private CMSPs/UASLs for national and international roaming subscribers and the data/information submitted by private operators on monthly basis, it is noticed that in many cases, these-operators have under reported the data/information of their roaming subscribes to BSNL. This has resulted in less than- the actual recovery of signaling usages charges to BSNL. The information generated from the SSTP system for .the period, from Juiy'2008 till June 2009 is enclosed as Annexure-1.

3. In these circumstances, bills along-with applicable interest are to be raised on such private CMSPs/UASLs who have under reported the usages of signaling links of BSNL resulting into less than the actual recovery of the dues, for the differential amounts based on -the usages information generated from SSTP system of BSNL and that reported by these private CMSPs/UASLs. These bills are to be raised starting from the date of commissioning of POIs of respective CMSP/UASL.

10.Accordingly, all the field units are requested to immediately raise the bills of the differential amounts along with applicable interest on the basis of annual usages of signaling links by different CPSPs/UASLs which could not be raised on these operators due to under reporting of data/information of signaling link usages by these operatos during the relevant period. In all such cases reference date for raising the interest amounts may be taken as the date when these amounts

became due i.e. 25% of following month (for example for the month of June 08 the interest is to be charged from the 25th July 08) when this amount became payable.

11. Further, no supplementary bills for differential amounts may be raised if the signaling links usages as per SSTP system is less than the signaling links usages declared by the concerned operator for a particular month, as the same may be due to non-inclusion of some of the signaling links of private operators in SSTP system. However, such instances may be immediately brought to the notice of this office so that necessary actions for inclusion of left out signaling links of private operators may be taken.”

32. In-roamer information for Tamil Nadu service area, so far as the same related to the petitioners herein, was also annexed thereto.

Indisputably, therefore, the respondent, apart from the difference in the number of subscribers who had availed the services as furnished by the petitioners and as found in the SSTP equipment, raised additional bills only on the basis of in-roamer service.

Shift in Stand

33. It is for the first time when these petitions were filed, the respondent raised a contention before this Tribunal that it is entitled to the signaling network charges on mere registration of the subscribers with the service providers and not on the basis of the roaming services availed by the registered subscribers.

Events During the Proceedings

34. This Tribunal, by an order dated 17.3.2010, directed as under:-

“Admit.

Mr. Yoginder Handoo accepts notice on behalf of the respondent.

The question which falls for our consideration in this petition pertains to interpretation of the provisions of interconnect agreement entered into by and

between the parties hereto and in particular clause 6.6 thereof as inserted by reason of the 'Addenda' dated 24.07.2007 so far as the same relates to the concept of roaming facility vis--vis signalling facility. Whereas the contention of the learned counsel for the petitioner is that clause 6.6 would be attracted when the consumer avails the roaming facility i.e. out bound roaming facility as contradistinguished from any roaming service; according to the learned counsel for the respondent, clause 6.6 would be attracted, irrespective of the fact as to whether a customer having roaming facility would use the same out side the circle in which he is registered.

It is furthermore contended by the learned counsel for the respondent that whereas the roaming facility is to be availed by the customer, the signalling facility is availed by operators for which levy of charges of Rs. 25/- for the national roaming and Rs. 50/- for international roaming have been stipulated in the agreement.

Having heard the learned counsel for the parties and in view of the fact that the petitioner is ready and willing to supply its data to BSNL, we are of the opinion that interest of justice would be sub-served if the petitioner herein is directed to supply to the respondent the number of customers who subscribed for roaming facility, within a period of two weeks from date.

Within the aforementioned period, the respondent shall file its reply.

Within one week thereafter, rejoinder thereto may be filed. Put up the matter on 16.04.2010 for further directions.

Having regard to the fact that the petitioner is established operator, we, as at present advised, do not intend to direct the petitioner to deposit any sum with the respondent towards the impugned bills.

Subject to furnishing of the aforementioned data and compliance of other directions, till further orders, the connections of the petitioner may not be disconnected."

35. Pursuant to or in furtherance of the said directions, the Petitioner, Aircel had filed an affidavit, inter alia, stating -

“2. Figures relating to out roamers for the period July 2008 to June 2009, based on TAPIN files maintained by Mach India private limited are given in a tabulated form annexed herewith and marked as ANNEXURE ‘A’.

ANNEXURE ‘A’.

TAPIN National Outroamers Aircel-ROTN

Month Postpaid (Unique Count) Prepaid(Unique Count) Total (Unique Count)
Declared to BSNL Balance to be Declared

Jul-08 5,525 182,988 188,513 187,030 1,483

Aug-08 5,747 199,896 205,643 188,219 17,424

Sep-08 5,845 210,747 216,592 211,733 4,859

Oct-08 6,090 228,329 234,419 234,268 151

Nov-08 6,309 229,890 236,199 236,090 109

Dec-08 6,501 279,971 286,472 263,807 22,665

Jan-09 7,190 281,632 288,822 282,755 6,067

Feb-09 6,671 225,144 231,815 226,700 5,115

Mar-09 7,142 238,970 246,112 220,708 25,404

Apr-09 8,404 265,595 273,999 226,334 47,665

May-09 9,341 274,358 283,699 293,592 -9,893

Jun-09 2,691 54,036 56,727 63,651 -6,924

Total 2,634,887 114,125

Difference 4.3%

(*): The difference is due to spillover files received late from the Clearing House and reprocess difference.

3. Based on the TAPIN figures, the petitioner company has been declaring to BSNL every month the number of subscribers who out roamed and the BSNL on the said declaration has been raising bills/invoices against AIRCEL, all of which have been duly paid.

4. BSNL raised the impugned bill dated 08.01.2010 on basis (apart from out roaming subscribers of AIRCEL) of in roamers also. This was challenged in the present petition.

5. During course of arguments on 17.03.2010, BSNL took a plea (for the very first time) that it was entitled to charge a flat Rs. 25/- per subscriber per month irrespective whether the subscriber left the home circle or not i.e. BSNL is entitled to charge a flat of Rs. 25/- to all the subscribers of the petitioner company who had a roaming facility irrespective of the fact whether they used the automatic roaming signaling facility of the BSNL or not. In this regard, it is stated that for November 2008 (the only month for which BSNL furnished its corresponding SSTP data), AIRCEL had a total of 67,71,044 subscribers in the ROTN (Rest Of Tamil Nadu) circle. Of these 64,00,610 were prepaid and 370434 were post paid subscribers. Of these, out roamers were 236090 on account of which revenue of Rs. 21,84,604.25 accrued for post paid subscriber and Rs. 13,47,608.41 and Rs. 35,52,785.82 for pre paid (incoming and outgoing calls while roaming). AIRCEL, therefore had an total revenue of Rs. 70,84,998.48 on account of the aforesaid roamers. If BSNL's arguments are assumed to be correct, as against total revenue of Rs. 70 odd lakhs, AIRCEL would owe BSNL about Rs. 17 crore odd! (i.e. 67,71,044 subscribers x Rs. 25/- per subscriber = 16,92,76,100/-)."

36. The said figures were issued on the basis of the number of national out-roamers.

We may, at this stage, notice that according to Mr. Maninder Singh, the same was not relevant as 'Tapin informations' were exchanged only between two service providers for the purpose of availing of national roaming facility by the customers. It was merely a revenue sharing arrangement between two operators and has nothing to do with the present issue.

37. Our attention in this behalf has also been drawn to the details furnished by the petitioner, Vodafone, in respect of its Gujarat area being Petition No. 65/2010:-

GUJARAT SERVICE AREA

Month Number of subscribers who subscribed to roaming facility Number of subscribers who had pre-activated roaming by default

Jun-07 Nil 4,656,221

Jul-07 Nil 4,801,433

Aug-07 Nil 4,931,740

Sep-07 Nil 5,067,689

Oct-07 Nil 5,222,882

Nov-07 Nil 5,378,158

Dec-07 Nil 5,554,492

Jan-08 Nil 5,709,566

Feb-08 Nil 5,869,779

Mar-08 Nil 6,010,594

Apr-08 Nil 6,171,059

May-08 Nil 6,333,858

Jun-08 Nil 6,520,541

Sep-08 Nil 6,920,502

Oct-08 Nil 7,075,699

Nov-08 Nil 7,241,167

Dec-08 Nil 7,417,556

Jan-09 Nil 7,603,362

Feb-09 Nil 7,814,248

Mar-09 Nil 8,024,283

Apr-09 Nil 8,207,673

May-09 Nil 8,415,802

Jun-09 Nil 8,606,777

For Gujrat, in January, 2007, the declaration was made for a sum of Rs.10,494/- only.

38. Vodafone contended that it did not have all the details. It, however, filed sample copies of bills with annexures therewith, the relevant parts whereof, read as under:

“Autoroaming Charges for 1.8.2004 to 31.8.2004

National Autoroaming Subscribers : 1959

@ Rs.25/- each = Rs.48975.00

International Autoroaming Subscribers : 601

@ Rs. 50/- each = Rs.30050.00

Total Amount Payable : 79025.00

Net Amount Payable : 79025.00”

Sr. No.

(1) Auto Roam Plan

(2) No. of Subscribers

(3) Monthly Rental for Autoroam

(4) Total Rental

(5=3x4)

1

2 National

International 2054

682 25

50 51,350

34,100

TOTAL 2736 85,450

Rupees Eighty Five Thousand Four Hundred Fifty.

In regard to Andhra Pradesh Circle, it was by a letter _____

“Reference: Roaming Subscribers for the months of January 05

With reference to above, following are the details of roaming subscribers with Hutchison Essar South Ltd. Andhra Pradesh as of 31st January, 2005:

National International

1196 294”

“Please find the following number of Roaming Subscribers for the month of June 2008 for which we are routing Roaming traffic on BSNL link:

International : 2

National : 185

39. It has, however 8 lakh cellular subscribers but only 64,605 subscribers have been declared for national roaming facility and 2612 for international roaming facility. Similarly, in June, 2005, with a subscriber base of 13 lakh subscribers in Gujarat, it had declared 27,137 as national roaming subscribers and 841 as international roaming subscribers. For the month of May, 2006, Vodafone had 25 lakh subscribers but it had disclosed national roaming subscribers as 3422 and international roaming subscribers as 75. Similarly, for the month of June, 2008, although Vodafone had 65 lakh subscribers in Gujarat, it had declared 185 towards national roaming subscribers and for international roaming only 2. Similarly, by way of example, we may also notice that in the Gujarat service area, for June, 2008, out of 65,20,541 subscribers, no subscriber has been found to have availed inroaming service. We may furthermore notice the figures were provided by Vodafone to Ahmedabad Telecom District of BSNL also for the months of December, 2003, June, 2005, May, 2006 and June, 2008.

40. To the similar effect, the Idea Cellular, in respect of its Gujarat Circle, although had 1,55,990 as the enabled cellular subscribers, had shown 10494 subscribers, who had availed the services of the respondent for its Karnataka Circle, but it has disclosed the roaming subscribers to be 15087 against these total subscribers of 251457 who had admittedly had the roaming facility.

41. The respondent raised a contention that as it was found that in-roamers have outnumbered the out-roamers, a bill for in-roamers was also issued.

42. From a chart which has been filed by the petitioners, it would appear that from April, 2003 to July, 2005, there had been steady decline in the number of subscriber, who, according to the petitioner, had availed the signaling network, culminating in zero, whereafter again, it started picking up. In June, 2009, the

number of subscribers said to have availed the services was only 760.

43. The petitioners, in each of these cases, pursuant to the Order of this Tribunal dated 17.3.2010, furnished the purported details.

We have noticed the affidavit filed by Aircel.

44. 'Vodafone' and 'Idea' filed similar Affidavits.

We may notice the following from the Affidavit filed by 'Idea Cellular':-

"2. That the learned TDSAT, vide the order dated 26.4.10 passed in the above Petition, had directed the Petitioner to supply to the Respondent the number of customers who subscribed to the roaming facility during the disputed period. In compliance with the above direction, I annex herewith the data available with the Petitioner Company as ANNEXURE A. The same primarily reflects the number of subscribers who were provided roaming facility by the Petitioner company by default, that is, without asking them to opt for the same and every subscriber, without any demand on their part, had capability to roam. No other data is available at the present moment though the Petitioner Company is trying to collect the same from the old records.

3. That it is further stated that the understanding of all, including that of the Respondent, and as also reflected in the Interconnect Agreement/Addenda(s) and various circulars, has always been that the signaling charges have to be paid on the basis of roaming subscribers registered with the service provider using BSNL's CCS7 links for handover of signaling data for automatic roaming purposes i.e., on the basis of subscribers of the home network who actually roamed utilizing BSNL's CCS7 links during a particular month. The Petitioner, and to its knowledge and belief, all other operators have always declared and paid on the said basis for the signaling charges. Notwithstanding the above and without prejudice to Petitioner's contention that clause 6.6 would be attracted when the consumer avails the roaming facility i.e. out bound roaming facility utilizing BSNL's CCS7 links, the above data is being submitted in compliance with the order passed by the Hon'ble Tribunal."

45. The number of subscribers has been described / shown as Default Roaming Subscriber. In April, 2003, the figure of such subscribers was 155990 and in January, 2007 the figure was shown as 1477416.

46. Yet again, the default period roaming subscriber in January, 2007 was shown as 642424.

47. In Aircel, the number of subscribers having roaming facilities was 67.71 lakhs in November, 2008 but it declared 2.36 lakh subscribers only availing the BSNL facility. Similarly, in Idea Cellular , as disclosed in January, 2007, the roaming facility was availed by 53192 as against 1073535 subscribers. In April, 2003, only 10525 roaming subscribers have been shown although it had a default roaming subscribers of 155990.

48. It is not in dispute that some of the petitioners had written letters to the respondent herein stating that from January, 2007 onwards, presumably, in view of the TRAI's direction dated 24.1.2007, it had allowed all its subscribers to have the roaming facilities, irrespective of the fact as to whether they got themselves registered with them for the purpose of obtaining roaming facilities or not. We have noticed some of the affidavits filed by the petitioners to show that the informations furnished by them do not appear to be correct.

Clause 6.6 - Interpretation of

49. It is in the aforementioned backdrop of events, the interpretation of Clause 6.6 is required to be determined. We have placed on record the said provisions as also Clause 2.2.3.7 inserted by Addenda-III in the aforementioned interconnect agreement dated 24.7.2007 heretobefore.

50. Clause 2.2.3.7 is couched in a negative language. It prohibits CMTS providers to use the respondent's signaling network. Exceptions therefor are 'for handing over of signaling data for automatic roaming purposes' and SMS service. The manner in which the said functions were to be carried out, as indicated hereinbefore, have been laid down in Clause 6.6. It provides that in the event the CMTS providers did not intend to use BSNL's signaling network for handing over

of signaling data for automatic roaming purposes or SMS services, undertaking to that effect was to be given. The proviso appended thereto, however, contains a penal clause, in the event the CMTS provider is found to be using the respondent's signaling network for the said purpose contrary to the undertaking furnished.

51. We have referred to the aforementioned provisions, at some details, only for the purpose of showing that both the interpretations of the clause in question, as has been submitted by the petitioners, on the one hand, and the respondent, on the other hand, is possible. Both interpretations being possible, it became necessary to interpret the relevant clauses of the agreement.

52. For the aforementioned purpose only, we are of the opinion that recourse to construction of the said clause is necessary. It is on the aforementioned premise, the conduct of the respondent assumes great significance. It has not been denied or disputed by the respondent that it merely succeeded to the rights of DOT.

The formula in regard to the charges to be levied was laid down by DOT itself. From the very beginning, namely, from August, 1998, it laid down an adhoc arrangement and made the same subject to review after a period of three months, upon obtaining CCS-7 traffic details. The charges proposed were to be based on the number of national and international roaming subscribers in a calendar month. They are to be charged from cellular operators for use of signaling links. Yet again, the DOT by its Circular letter dated 10.8.1998 asked all the Heads of the Circles of the Metro Districts to evolve a system of verification of number of subscribers. The charges were finally fixed by DOT in terms of its Circular letter dated 25.11.99.

53. We may, furthermore notice that according to Mr, Srinivasan, a comma should be put after the words 'per month' in para 2 of the said letter. We, however, do not agree with the said submission, as it is possible to construe the said paragraph both in the light of clause 6.6 as it originally stood as well as amended in terms of Addenda-III of the year 2007. Even otherwise, in a case of this nature recourse to the said interpretation process is neither necessary not desirable.

54. Even if a plain meaning is given thereto, the roaming charges were to be collected from the CMTS operators on the basis of the number of national and international roaming subscribers per month. Had the intention of DOT been to levy charges only on the basis of the number of such subscribers availing the roaming facilities on their mere registration, it could have said so. There was no reason for it to provide for the details with regard to the mode and manner in which the charges are to be levied and/or from whom. It was also not necessary for the DOT to employ the word 'use' both in different clauses of the agreement and, in particular, in clause 6.6.

55. From the meaning of the words as defined in the dictionaries referred to by Mr. Malhotra, it is evident that it denotes a positive act and not a negative one. It is also evident from the decision of the Supreme Court in State of Uttar Pradesh(Supra).

Effect of "Post Contractual Conduct" for intent, interpretation

56. Objective of every interpreter of a document should be as to how a third party would consider the contract. Kim Lewison states as under:

"In other words "intention" is equivalent to "meaning". However, Lord Hoffmann has pointed out an important qualification to this principle. In Mannai Investment Co. Ltd. v Eagle Star Life Assurance Society Ltd. he said:

It is of course true that the law is not concerned with the speaker's subjective intentions. But the notion that the law's concern is therefore with the 'meaning of his words' conceals an important ambiguity. The ambiguity lies in a failure to distinguish between the meanings of words and the question of what would be understood as the meaning of a person who uses words. The meaning of words, as they would appear in a dictionary, and the effect of their syntactical arrangement, as it would appear in a grammar, is part of the material which we use to understand a speaker's utterance. But it is only a part; another part is our knowledge of the background against which the utterance was made. It is that background which enables us, not only to choose the intended meaning when a word has more than one dictionary meaning but also, in the ways I have

explained, to understand a speaker's meaning, often without ambiguity, when he has used the wrong words."

It is also well settled that a commercial document should be construed in "business commonsense", although the application of the said rule has some limitation. Kim Lewison states the law thus :

"The interpretation of a written contract involves the ascertainment of the words used by the parties and the determination, subject to any rule of law, of the legal effect of those words."(2.01)

"2.02 Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.

The modern starting point is Lord Hoffmann's statement that:

"Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract."

As he explained in *Kirin-Amgen Inc v Hoechst Marion Roussel Ltd*:

"Construction, whether of a patent or any other document, is of course not directly concerned with what the author meant to say. There is no window into the mind of the patentee or the author of any other document. Construction is objective in the sense that it is concerned with what a reasonable person to whom the utterance was addressed would have understood the author to be using the words to mean. Notice, however, that it is not, as is sometimes said, ' the meaning of the words the author used', but rather what the notional addressee would have understood the author to mean by using those words. The meaning of words is a matter of convention, governed by rules, which can be found in dictionaries and grammars. What the author would have been understood to mean by using those words is not simply a matter of rules, It is highly sensitive to the context of and background to

the particular utterance. It depends not only upon the words the author has chosen but also upon the identity of the audience he is taken to have been addressing and the knowledge and assumptions which one attributes to that audience.”

Furthermore, the author states :

“Lord Hoffmann’s reformulation by reference to the reasonable outsider, rather than by reference to the parties themselves, emphasizes the objective nature of the task. Indeed, the phrase “the intention of the parties” does not appear at all in the five principles he laid down. This is a reflection of the philosophical basis of interpretation in English law; namely that it is an objective exercise.

This is not a new approach. Even in the more traditional formulations of the purpose of interpretation judges have been careful to stress that when they speak of the intention of the parties, they are ascertaining their presumed intention objectively.

Thus in *Reardon Smith Line Ltd v Hansen-Tangen*, Lord Wilberforce said:

“When one speaks of the intention of the parties to the contract one speaks objectively-the parties cannot themselves give direct evidence of what their intention was-and what must be ascertained is what is to be taken as the intention which reasonable people would have had if placed in the situation of the parties.”

57. It is now a well-settled principle of law that each word used should be given effect to. No word should be considered to be a surplusage or otiose. The construction put by the maker of the document assumes importance, having regard to the doctrine of ‘Estoppel by Convention’. The principle of estoppel by convention shall apply, if it is found that the makers of the document understood the meaning of a clause in a particular manner.

58. Recently, in *Clear Media(India) Pvt Ltd v. Union of India and Anr.*, Petition No. 248(C) of 2009 disposed of on 9.7.2010, this Tribunal held as under:-

“In *Amalgamated Investment and Property Company Limited Vs. Texas Commerce International Bank Ltd.*, reported in 1981 Vol. 3 All ER page 577 - Lord

Donaldson M. R., held as under :-

“Subsequent conduct

For many years I thought that when the meaning of a contract was uncertain, you could look at the subsequent conduct of the parties so as to ascertain it. That seemed to me sensible enough. The parties themselves should know what they meant by their words better than anyone else. In this I was supported by *Watchem v. Attorney General of East African Protectorate* (1919) AC 533, [1918-19] All ER Rep 455, a Privy Council case which was applied repeatedly in my early days in the common law courts. But it was always repudiated by the more logical minds in Chancery. Eventually, the logicians prevailed. In *James Miller (James) and Partners Ltd v. Whitworth Street Estates (Manchester) Ltd* [1970] 1 All ER 796 at 798, [1970] AC 583 at 603 Lord Reid said :

‘...it is not legitimate to use as an aid in the construction of the contract anything which the parties said or did after it was made. Otherwise one might have the result that a contract meant one thing the day it was signed, but by reason of subsequent events meant something different a month or a year later.’

I can understand the logic of it when the construction is clear, but not when it is unclear. Still, we must accept it. Nevertheless a way of escape was left open by a Viscount Dilhorne in that very case when he said [1970] 1 All ER 796 at 805 [1970] AC 583 at 611) : “....subsequent conduct by one party may give rise to an estoppel.”

So, here we have available to us in point of practice if not in law, evidence of subsequent conduct to come to our aid. It is available, not so as to construe the contract, but to see how they themselves acted on it. Under the guise of estoppels we can prevent either party from going back on the interpretation they themselves gave to it.”

It was furthermore observed :-

“If parties to a contract, by their course of dealing, put a particular interpretation on the terms of it, on the faith of which each of them to the knowledge of the other

acts and conducts their mutual affairs, they are bound by that interpretation just as if they had written it down as being a variation of the contract. There is no need to inquire whether their particular interpretation is correct or not, or whether they were mistaken or not, or whether they had in mind the original terms or not. Suffice it that they have, by the course of dealing, put their own interpretation on their contract, and cannot be allowed to go back on it.

To us, the phrase of Latham CJ and Dixon J in the Australian High Court in *Grundt v Great Boulder Pty Gold Mines Ltd* (1937)99CLR 641 the parties by their course of dealing adopted a conventional basis for the governance of the relations between them, and are bound by it. I care not whether this is put as an agreed variation of the contract or as a species of estoppel. They are bound by the 'conventional basis' on which they conducted their affairs. The reason is because it would be altogether unjust to allow either party to insist on the strict interpretation of the original terms of the contract when it would be inequitable to do so, having regard to dealings which have taken place between the parties. That is the principle on which we acted in *Crabb v Arun District Council* [1975] 3 All ER 865, [1976] Ch 179. It is particularly appropriate here where the judges differ as to what is the correct interpretation of the terms of the guarantee. The trial judge interpreted it one way. We interpret it in another way. It is only fair and just that the difference should be solved by the course of dealing, but the interpretation which the parties themselves put on it and on which they have conducted their affairs for years."

In Anson's Law of Contract 28th Edition, the learned author has, upon referring to the case of *Amalgamated Investment (Supra)*, stated as under :-

"When the parties have acted in a transaction upon a common assumption (either of fact or law, whether due to mistake or misrepresentation) that a given state of facts is to be accepted between them as true, then as regards that transaction each will be estopped against the other from questioning the truth of the statement of the facts so assumed where it would be unjust and unconscionable to resile from the common assumption. There must be some mutually manifest conduct by

the parties, which is based on a common but mistaken assumption which the parties have agreed on, and such agreement may be inferred from conduct or even from silence.”

Kim Lewison in Interpretation of Contracts states the exception to the Parol Evidence Rule, a rule generally recognized under English Law that other evidence may not be adduced to contradict the provisions of a contract contained in a written document as thus:

“First, evidence is admissible to show that the contract is not yet in force by reason of an unfulfilled condition precedent. So in *Pym v Campbell* the parties entered into a written agreement for the sale of a share in an invention. The purchaser was allowed to give oral evidence that it had been agreed that the agreement was not to come into operation until the invention had been approved by an engineer appointed by the purchaser. All members of the court distinguished the parol evidence rule. As Erle J. said: “in the present case the defence begins one step earlier.” The reasoning of the court also suggests that evidence would have been admissible to show that the parties had no intention to contract. So also parties are entitled to lead evidence to show that a written document has been executed in escrow only. Thus in *Guardhouse v Blackburn*, sir J. P. Wilde said:

..... If the written document is alleged to have been signed under condition that it should not operate except in certain events parol evidence has been admitted at law to prove such condition and the breach of it.”

59. The doctrine of ‘Executive Interpretation’ has been applied to for the purpose of Interpretation of Statute in *Pepper Vs. Hart* [1993 Appeal Cases page 593].

In *RanB Falcon (A) Pvt Ltd v. CIT* [2008(12)SCC466 at 479], it has been held as follows :-

“34. Rules of executive construction in a situation of this nature may also be applied. Where a representation is made by the maker of legislation at the time of introduction of the Bill or construction thereupon is put by the executive upon its coming into force, the same carries a great weight.

35. In this regard, we may refer to the decision of the House of Lords in *R. (Westminster City Council) v. National Asylum Support Service* and its interpretation of the decision in *Pepper v. Hart* on the question of “executive estoppels”. In the former decision, Lord Steyn stated : (WLR p. 2959, para 6):

6. If exceptionally there is found in the Explanatory Notes a clear assurance by the executive to parliament about the meaning of a clause, or the circumstances in which a power will or will not be used, that assurance may in principle be admitted against the executive in proceedings in which the executive places a contrary contention, before a court.”

36. A similar interpretation was rendered by Lord Hope of Craighead in *Wilson v. First County Trust Ltd (No.2)*, wherein it was stated LWLR p. 600, para 113):

“113.As I understand it (*Pepper v. Hart*) it recognized a limited exception to the general rule that resort to Hansard was inadmissible. Its purpose is to prevent the executive seeking to place a meaning on words used in legislation which is different from that which ministers attributed to those words when promoting the legislation in Parliament.”

37. For a detailed analysis of the rule of executive estoppels useful reference may be to the article authored by Francis Bennion entitled “Executive Estoppel: *Pepper v. Hart* Revisited”, published in *Public Law*, Spring 2007, p. 1 which throws a new light on the subject matter.”

In *Mahalakshmi Sugar Mills Co. Ltd. v. Union of India*, (2009) 16 SCC569, at page 592, the Supreme Court of India referred to the said decision, stating:-

“62. Rules of executive construction in a situation of this nature may also be applied, where a representation is made by the maker of legislation at the time of introduction of the Bill or construction thereupon is put by the executive upon its coming into force, the same carries a great weight.

63. In this regard, we may refer to the decision of the House of Lords in *R. (Westminster City Council) v. National Asylum Support Service* and its interpretation of the decision in *Pepper v. Hart* on the question of “executive

estoppels". In the former decision, Lord Steyn stated :

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64.A similar interpretation was rendered by Lord Hope of Craighead in *Wilson v. First County Trust Ltd (No.2)*, wherein it was stated:

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65. See for a detailed analysis of the rule of executive estoppels in a writing of Francis Bennion entitled "*Executive Estoppel: Pepper v. Hart Revisited*", published in *Public Law*, Spring 2007, p. 1".

60. It is also of some importance to notice that the noted commentator on Interpretation of Statute, Francis Bennion, in an Article published in 2007 *Public Law*, said that the said decision may have to be re-visited. So long, however, the same is not done, in our opinion, it is permissible to refer to the doctrine of 'Executive Estoppel' by the Courts of Law.

External Evidence

61. Another aspect of the matter cannot also be lost sight of. The respondent had installed a very sophisticated equipment in the year 2008, commonly known as SSTP. According to the respondent, the revised bills were issued relying on or on the basis thereof. When the petitioners intended to ascertain as to the principles applied, they were informed as is also evident from the supplementary bills, that in-roamers were also considered therefor. If that be so, the subscribers, whether out-bound or in-bound, according to the respondent, were bound to pay the

signaling network charges. It again was dependent on 'user'.

62.It is only on the first date of hearing that an oral submission was advanced, pursuant whereto, as noticed hereinbefore, interim directions were issued.

During pendency of these petitions, fresh bills have been raised treating all the customers of the petitioners as availing the said facility and thus, making them liable to pay a sum of Rs.25 per registered subscriber. The respondent, in our opinion, could not have done so having regard to the meaning ascribed to clause 6.6 itself. Even in the 'Addenda', it inserted a few words in clause 6.6. It may be contended that the said words had been inserted by way of abundant caution. But then it may or may not be. Such addition would clearly go to show that the purpose for levy of the charge had been clearly stated. If both the parties had understood the interpretation in a particular manner, their intention in regard thereto must be held to be clear.

63.Furthermore, by raising bills for providing in-roaming services, the respondent had clearly gone beyond the plain meaning of the said words. The agreement by and between the parties thereto were for availing signaling network facility. Those who had entered into the licensed circle of another licensee for availing the facilities, were not the subscribers of a licensee whose subscribers they were. They could have been included for the purpose of levy of charges only when the respondent itself understood the purpose for which the charges are levied. The bills for the month of January, 2010, therefore, also provides for external evidence with regard to the meaning actually attributed to clause 6.6 by the respondent itself.

64.The methodology adopted for issuance of bills by the respondent should be held to be sacrosanct. We may notice that according to Aircel, after the impugned bills were raised, the petitioner had terminated its signaling arrangement with the BSNL and had been using the signaling facilities from another operator, wherefor, it pays about 12 paise per roaming consumer per month.

65.We, therefore, have no hesitation in holding that construction of clause 6.6 should be as propounded by the petitioners and not the one propounded by the

respondent.

Effect of the Returns filed by the Petitioners - Lawful Charges

66. There is, however, another aspect of the matter. To our query made to the learned counsel for the petitioners, it has clearly been stated that when a subscriber registered with the CMTS operator, goes out of the Circle, the signaling network starts working. The identity of the said subscriber as also his location, becomes known. It has also been accepted that the said fact is recorded in the system of the service provider.

67. We, however, are of the opinion, keeping in view the fact that the petitioners were bound to pay the lawful charges to the respondent, they should supply all their CDRs in their possession, at least for a period of three years from the date of raising of the impugned bill, i.e., as for example, in Aircel, from January, 2007. We issue this direction having regard to the fact that the number of persons registered with CMTS operators for the purpose of availing roaming services and, thus, using the signaling network of the respondent, was not in the public domain. The petitioners were bound to provide such informations to the respondent. Prima facie, it is difficult for us to believe that although the number of subscribers had gone up manifold, the number of persons availing the out-roaming facilities would go down and further down, even it will go to the extent of zero or less than even 200 in respect of the services which have fairly picked as for example Andhra Pradesh or Gujarat.

Limitation Issue

68. Mr. Malhotra and Mr. Srinivasan submitted that in view of clause 7.3.1(iv), the period of limitation would be six months. It reads as under:-

“...7.3.1(iv) If the bill issuing authority subsequently finds that some charges have been omitted from the bills issued, he will include the omitted charges in the subsequent bills at any time, but within 6 months from the date of issue of the relevant bill except in cases where additional billing becomes necessary due to the tariffs/rates changes notified subsequently with retrospective effect by the

appropriate authority,.”

69.It is true that the number of subscribers of each of the service providers was in public domain but not the number of registered subscribers who had been availing the signaling network facilities of the respondent. If the petitioners are guilty of suppression of the number of subscribers availing such facilities, although it was within their knowledge, we fail to see as to how the limitation clause as contained in the agreement shall be applicable, particularly, having regard to the provisions contained in Section 28 of the Indian Contract Act.

70.In Petition no. 146 of 2005, M/s Bharti Televentures Ltd Vs. BSNL, disposed of on 18.12.2009, this Tribunal opined as under:-

“45.The said clauses on a bare perusal would clearly show that the same in this case have no application. By reason of the provision contained in a contract, the statutory period of limitation cannot be curtailed as would be evident from Section 28 of the Indian Contract Act.

46. The Supreme Court of India in the case of National Insurance Company Vs. Sujir Ganesh Nayak, 1997(4)SCC 366 held that curtailment of the period of limitation provided by law is not permissible and is hit by the Section 28 of the Indian Contract Act.”

71.A similar view was taken by this Tribunal also in Petition No. 166 of 2006 Reliance Infocom Ltd v. BSNL, disposed of on 15th April, 2010.

CONCLUSION

72.We, therefore, are of the opinion that this Tribunal, keeping in view the purpose for which it has been established, which includes the public interest, should issue a direction as mentioned hereinbefore, namely, all the petitioners shall supply to the respondent their respective CDRs for a period of three years prior to issuance of the bill and the respondent shall supply the details of SSTP (Standalone Signaling Transfer Point) information to the Petitioners since 2008 (i.e., date of commissioning of this equipment) so as to enable the respondents to raise fresh bill(s) and petitioner to cross verify the details of their CDRs and for the

aforementioned purpose, the provisions of clause 7.3.4 of the Interconnect Agreement will have no application. By this process, the bills can be raised with mathematical exactitude to eliminate possibility of dispute and unnecessary litigations.

73.We also hold that construction of clause 6.6 should be as propounded by the petitioner and not by the respondent.

74.This Tribunal should, therefore, grant a relief to the petitioners only in part. We direct accordingly. For the reasons aforementioned, these petitions are allowed in part and to the extent mentioned hereinbefore and with the aforementioned observations and directions.

In view of the divided success, the parties shall pay and bear their own costs.

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