

# SUPREME COURT OF INDIA

Reliance Infocomm Ltd

Vs

Bharat Sanchar Nigam Ltd.

C.A.No.936 of 2006

(S.H.Kapadia and B.Sudershan Reddy,JJ.)

30.04.2008

## JUDGMENT

### **S.H.Kapadia, J.**

This civil appeal is filed under Section 18 of Telecom Regulatory Authority of India Act, 1997 ("1997 Act") by M/s Reliance Infocomm Ltd. against judgment and order delivered by Telecom Disputes Settlement and Appellate Tribunal ("TDSAT") dated 17.1.2006 dismissing petition No. 108 of 2005 challenging the directive dated 4.3.2005 by the Telecom Regulatory Authority of India ("TRAI"), circulars dated 23.3.2005 and 26.8.2005 issued by DoT and demands raised by BSNL for ADC for the period 14.11.2004 to 26.8.2005.

2. The short question which arises for determination in this civil appeal is whether "Unlimited Cordless" service" ("the impugned service" for short) of the appellant is covered under the definition of WLL(M) service as defined in Regulation 2(xxviii) of the Telecommunication Interconnection Usage Charges Regulation, 2003 which defines WLL(M) as limited mobility service using WLL technology within Short Distance Charging Area ("SDCA"). According to TRAI and DoT, fixed wireless phones ("FWP")/fixed wireless service ("FWS") which operate beyond the subscriber's premises is classifiable as WLL(M) service for the purpose of payment of ADC to BSNL whereas, according to the appellant, FWS is limited to one base transceiver station ("BTS") within which the service operates and, consequently, this service is classifiable as WLL(F) and not as WLL(M).

Facts:

3. On 18.3.1997, appellant was granted licence by DoT for providing basic services in Gujarat which included fixed wireless services but which preferred wireless

technology for the subscriber local loop. On 20.7.2001 appellant was granted licence by DoT for providing basic services in different service areas in the country which included fixed wireline service and limited mobile service. In November, 2003 appellant was permitted to migrate to the Unified Access Service Licence ("UASL") which categorized wireless services into 3 categories, viz., fixed wireless access ("FWA"), limited mobility [WLL(M)] and fully mobile service(s). Submissions of Shri K. K. Venugopal, learned senior counsel for the appellant:

4. According to the appellant, in November, 2003 appellant was permitted to migrate to UASL under which appellant was permitted to provide following services: (i) Fixed Wireless (ii) FWA (iii) WLL(M) (iv) Fully Mobile Service. According to the appellant, ever since its migration to the UASL, it has been operating fixed services including FWA and full mobile services. The appellant was not operating WLL(M). According to the appellant, "limited mobile service" has been defined in UASL granted by DoT and in the IUC Regulation 2003 framed by TRAI under Section 11 of the 1997 Act as a service which enables operations throughout a SDCA. At this stage, it may be noted that the whole of Delhi is one single SDCA. That, appellant was, therefore, operating its FWA service within the area of one Base Transceiver Station (BTS).

5. According to the appellant a BTS is necessary wherever there is a congested area, like Chandni Chowk where digging for laying an optical fibre cable is not feasible and, in such a case, a BTS has to be set up where wireless link has to be established between the telephone exchange and the BTS which in turn could be accessed by telephone receiver set through Radio Frequency ("RF") signals. However, according to the appellant, in the case of full mobile cellular services, several BTSs. are required to be set up by each service provider in the entire service area for transmitting signals to the terminals (handsets). That, these handsets are required to be aligned electronically to a single BTS or the handset could access RF signals from other base stations BTSs. from any part of the SDCA. According to the appellant, in case of full mobility, the signals are available in the entire service area (a telecom circle equivalent to a State). Therefore, according to the appellant, fixed wireline service being a wireline service alone stood restricted to the subscriber's premises as is clearly understood even under the UASL whereas WLL(M) is defined specifically, both in the UASL as well as in the IUC Regulation 2003, as a service where mobility is restricted to the SDCA. That, in the IUC Regulation 2003, FWA [WLL(F)] service has been treated as part of the fixed services. Therefore, according to the appellant, its "unlimited cordless" service ("impugned service" for short) stood classified right from the inception as WLL(F). According to the appellant, FWA service is a wireless service, mobility is inherent in such services but that mobility is not meant for the entire SDCA as in that event such mobility would fall in the category of WLL(M)

and, therefore, according to the appellant, FWA service logically stands between a fixed wireline service restricted to the subscriber premises and WLL(M) where mobility is within the SDCA.

6. According to the appellant, the said logical concept was known to DoT and TRAI right from inception, that the technical and statutory authority understood the said concept with regard to FWA clearly to mean as restricted to one BTS and that it is in this context that the mobility of the appellant's phone is available in the restricted area of one BTS and not within the entire SDCA. That, this is the reason why even the DoT specifically inquired from the appellant vide letter dated 31.1.2005 (in the context of alleged violation of licence condition on account of certain advertisements issued by the appellant) as to whether the mobility of the appellant's phone stood limited to one BTS area or whether it is available in the area outside one BTS. This letter of DoT is relied upon by the appellant to show that right from 1997 upto 31.1.2005, DoT and TRAI understood FWA services as having mobility limited to one BTS area alone. According to the appellant, it is in the above context that even the TRAI in its Consultation Paper dated 17.3.2005 categorically stated that its intention was to permit mobility only within the coverage of RF sector of one BTS, in the area where the subscriber is registered and not to the areas which are covered by other base stations. According to the appellant, throughout the period 2003 till 4.3.2005 its service was accepted as a fixed wireless access service ("FWA service") and that only because of the advertisement issued by the appellant in January, 2005 that BSNL complained to the TRAI and to the DoT. The said advertisement was regarding Unlimited Cordless. According to the appellant, TRAI called upon the appellant vide letter dated 6.1.2005 not to advertise its impugned FWA service as "unlimited cordless". That in the said letter dated 6.1.2005 TRAI did not call upon the appellant to answer the question as to whether impugned service is available within the entire SDCA or within one RF sector of BTS. According to the appellant, such a question was not even raised by DoT in its letter dated 31.1.2005 by which only a limited clarification on the "numbering scheme" for the impugned service was asked for. That query was as follows:

"Whether fixed wireless terminal could be authenticated by BTS terminals other than by BTS serving the location of the subscriber as on 10.1.2005"

7. According to the appellant, the impugned letter of TRAI dated 4.3.2005 is an aberration for the simple reason that having accepted the impugned service as FWA as restricted to one BTS, it directs all access providers to strictly ensure that the terminal used for FWA confined to the subscriber's premises. That, having said so, TRAI thereafter hastened to refer to a question in the Consultation Paper of TRAI dated 17.3.2005 in which, after referring to the complaint of certain operators, TRAI stated that it had asked all service providers on 4.3.2005 that Fixed Wireless Terminals

("FWTs.") should provide services to the subscriber at the fixed address only, the intention being that these phones should not be in a position to offer mobility through other base stations located in other parts of the city and that the impugned service needs to be allocated to a particular RF sector of a single base station, otherwise issues of ADC and comparison with limited or full mobility may take place. According to the appellant, the above statement of TRAI itself suggests that FWA services are those which are limited to one BTS. According to the appellant, therefore, even as late as 4.3.2005 TRAI understood the concept of FWA service as limited to one base station within the SDCA. Therefore, according to the appellant, the decision of TRAI dated 4.3.2005 is an aberration. That the said decision was taken unilaterally and at the behest of BSNL without examining the merits of the contentions advanced by the access providers like Reliance Infocomm Ltd. According to the appellant, it was a unilateral decision to confine FWA services to the premises of the subscriber. According to the appellant, in any event, when the matter was a part of the Consultation Paper dated 17.3.2005 it was not open to TRAI to unilaterally issue such a direction restricting FWA services to the premises of the subscriber.

8. According to the appellant, BSNL could not have made demand on it for payment of ADC during the period 14.11.2004 to 26.8.2005 as it was admitted by TRAI and DoT that no ADC is payable on FWA services. In this connection, according to the appellant, one of the questions posed for consultation in Para 2.7 was "what criteria should be determined with regard to the range and portability/mobility of WLL (F)'s subscriber terminals". According to the appellant, the said query itself indicates that the issue as to the range of portability/mobility of WLL (F) was pending in the consultation process and, therefore, BSNL could not have raised a demand on the appellant for ADC when the matter was sub-judice. According to the appellant it is this demand of BSNL which made the appellant move TDSAT for settlement of dispute.

9. According to the appellant, circumstances mentioned above clearly indicates that in 2005 upto 4.3.2005 both DoT and TRAI understood FWA services as limited to one BTS and the decision dated 4.3.2005 given by TRAI is a unilateral decision imposing Premises Specific Restriction ("PSR") for the first time at the behest of BSNL. Further, according to the appellant, in the petition before TDSAT, the appellant has specifically posed a vital question for consideration, namely, whether the impugned service provided by the appellant should be restricted within one BTS and if so whether such service will fall in the category of WLL(F) or WLL(M) service. According to the appellant, TDSAT has not answered this question. Apart from the said question, appellant had also raised other questions such as whether the impugned directive of TRAI dated 4.3.2005 and the clarification dated 23.3.2005 by DoT for the first time introducing the concept of SPR would amount to amendment of the licence

conditions without following the consultation process as stipulated under the 1997 Act. Similarly, one more question was also raised before TDSAT as to whether directive dated 4.3.2005 was legally valid. According to the appellant, none of the said important questions have been answered by the impugned decision of the TDSAT and, therefore, the said decision needs to be set aside. According to the appellant, the said questions ought to have been decided by a statutory body consisting of technical members, particularly to analyse the above mentioned various submissions raised by the appellant.

10. According to the appellant, nowhere in the pleadings of BSNL, the issue that a WLL(F) is a service where an antenna is fixed at the top of the house connected by the wire to the handset plugged into the wall has been raised. That the said technology has not been discussed even by TDSAT in its impugned judgment. According to the appellant, the literature on this point is confusing. That, there is no affidavit to support the claim of BSNL that FWA service is one where an antenna is fixed at the top of the house connected by wire to the handset plugged into the wall and, therefore, this aspect needs to be considered by a statutory body of technical members alone. In this connection, appellant alleges that even today the affidavit of BSNL do not answer the questions posed by the appellant as to how many of their fixed wireless terminals were with the roof-top antenna and what numbering plan was followed by BSNL for their FWT and LL(M). Appellant alleges that an inference may be drawn of admission on the part of BSNL that it had 16,00,000 fixed wireless terminals which are similar to the fixed wireless telephones of the appellant as there is no denial regarding allegation made in this connection by the appellant.

11. Lastly, it is the case of the appellant that the levy of ADC is a matter of tax policy and, therefore, any provision relating to a charge has to be strictly interpreted. According to the appellant different stands taken by the authorities show that the issue as to what is WLL(F) falls in a grey area and, therefore, no ADC can be charged from the appellant. That, the said question has not been decided even by TRAI. That, the IUC Regulation 2003 are statutory in nature; they have been enacted under Section 36 of the 1997 Act; that the regulations having been tabled before both the Houses of Parliament cannot be altered or modified by circulars/letters/administrative directions issued by the Authorities under the 1997 Act including the TRAI. Contentions of Shri Gopal Subramaniam, learned senior counsel for BSNL

12. According to BSNL, the appellant's service under the name "unlimited cordless" is a WLL(M) (wireless local loop mobile service) as admittedly the said service is capable of being operated outside the subscriber's premises and within the SDCA. That the said service is squarely covered by the definition of WLL(M) as defined under clause 2(xxviii) of the IUC Regulation 2003. According to BSNL, appellant has attempted to evade its liability of paying ADC to BSNL despite providing WLL(M)

services in the garb of WLL(F). With regard to payment of IUC charges including ADC by WLL service which contains a feature of "mobility", the TRAI issued clarification dated 4.3.2005 based on exclusive definition of WLL(M) in its IUC Regulation 2003. According to BSNL, any WLL service which gives the facility of mobility beyond the premises of the subscriber and within SDCA has to be treated as WLL(M) in respect of liability to pay the ADC in accordance with the provisions of the IUC Regulation 2003. According to BSNL, subsequent to the Consultation Paper dated 17.3.2005, the TRAI reiterated vide communications dated 24.3.2005 and 31.5.2005 addressed to the appellant herein that the WLL service operating beyond the premises of a subscriber and within the SDCA is to be treated as WLL(M) for all purposes including payment of IUC/ADC and numbering plan etc.

13. On the technology side, it is the case of BSNL that payment of IUC/ADC has nothing to do with the nature of the instrument and it is the nature of service which is relevant for that purpose. That "unlimited cordless" is the service which is provided through a handheld terminal.

14. On the point of reliance placed by the appellant upon para 2.26 of the Consultation Paper it is submitted by BSNL that the Consultation Paper was only a suggestive approach. That, in any case, the question falling in consultation process was whether ADC is payable to the fixed wireless terminals. What is WLL(F) and what is WLL(M) was not the question pending in the consultation process. According to BSNL, in any case the question whether ADC is payable to the fixed wireless terminals was part of the explanatory memorandum to the IUC Regulation dated 6.1.2005 itself and, therefore, it is the case of BSNL that Para 2.26 of the Consultation Paper relied upon by the appellant was merely a suggestive approach for the future payment of ADC on WLL phones.

15. According to BSNL, there is no merit in the contention of the appellant that its impugned service is restricted to one BTS/RF centre as the same is not technologically possible. In this connection, it is submitted on behalf of BSNL that BTS has only a receiver and a transmitter. It has no Intelligent Network ("IN"). The function of the BTS is different from the functionality of Mobile Switching Centre ("MSC"). The utility of the BTS is that it receives the signals and forwards the same to the MSC. The MSC is the intelligent part of the network. BTS is not the intelligent part of the network. Registration of the numbers to be served by the service provider is an element of the intelligent network. Identification of the caller is done by the intelligent network. Therefore, according to BSNL, it would be incorrect to say that a BTS has some sort of mechanism to identify the caller and to further forward the call to the MSC. Therefore, MSC is the IN and BTS is only the transceiver (i.e. receiver and transmitter). That, the role of a base station vis-à-vis that of a MSC is, therefore, distinct and separate. According to BSNL, there is no plea even in the petition that

appellant can restrict the mobility of its service to one RF of a base station and that the services of the appellant is operable only in 1/3 of one base station zone. According to BSNL, the mobility of the service impugned cannot be restricted to the premises of the subscriber and, therefore, it has to be treated as WLL(M). This is borne out, according to BSNL, from the opinion of the manufacturers of the equipment of the appellant which clearly imports an admission of the appellant that to restrict the impugned service to the premises of the subscriber would be impractical and if it is so restricted it would adversely impact its quality. That, in any event, the impugned service is actually found to be operable throughout the SDCA and, therefore, it is a WLL (M). Therefore, according to BSNL, appellant was liable to pay ADC as per the rates prescribed by TRAI in its regulations.

16. According to BSNL, the directive/communication dated 4.3.2005 issued by the TRAI only reemphasizes the position mentioned in the IUC Regulation dated 29.10.2003, namely, that a fixed wireless terminal, if not confined to the premises of the customer, will invite mobility within SDCA which in turn would attract ADC charges on such services. Further, according to BSNL, under the terms and conditions of licence issued by Dot, the appellant had agreed to comply with the relevant International Telecom Union ("ITU") standards as also the TEC's specifications. That, even according to the generic requirements issued by TEC, the remote station of the subscriber had to be "fixed indoor wall mounted". That even as per the recommendations of the ITU, the FWA has to be a Wireless Access Application in which the location of end-user termination and the network access point to be connected to the end-user are fixed. According to BSNL, this technical information is well known and the appellant is fully aware of the concept of FWA. According to the appellant, the IUC Regulation 2003 provides for payment of IUC including ADC for telecommunications services. The definition of WLL(M) is provided for in clause 2(xxviii) which refers to limited mobility services using wireless in local loop technology within SDCA. That, Schedule III of IUC Regulation 2003 refers to service and not to instrument and makes ADC applicable for different types of calls and, therefore, the payability of ADC as per the regulations is directly related to the nature of the service and not to any kind of instrument.

17. According to BSNL, there is no merit in the submission of the appellant that DoT has reclassified the impugned service as WLL(M) as, according to BSNL, it has been made clear by the DoT on numerous occasions that if the impugned services cannot be restricted to the premises of the subscriber, it will be treated as WLL(M) for levy of ADC. That, what is clarified by TRAI and DoT is that those WLL services which operate beyond the premises of the subscriber and within the SDCA shall be treated as WLL(M) for all purposes including numbering plan, payment of IUC, payment of ADC etc. Therefore, according to BSNL, the "unlimited cordless" service of the

appellant is squarely covered by the definition of WLL(M) in clause 2(xxviii) of the IUC Regulation 2003 which defines WLL(M) phones as WLL(F) which operates within SDCA. Therefore, according to BSNL there is no merit in this civil appeal and the same deserves to be dismissed with costs.

#### Finding:

18. Regulatory regime includes methodology for calculating access deficit. Access deficit is to be funded through access deficit charge. Access deficit has to be calculated according to a formula which provides a reasonable return on the investment made, i.e., a return on capital employed. IUC/ADC is part of revenue regime. It is for TRAI to consider the framework used for calculating IUC/ADC. Costing is one of the important relevant factors to be kept in mind while calculating IUC/ADC. While doing so, the TRAI has also to keep in mind changes in technology and reduction in costs both of services as well as of equipment. ADC is a subsidy. It is given to BSNL to incur additional capital expenditure for rolling out telecom network in rural areas equivalent to approximately 10 lacs lines at the relevant time. (See: Explanatory Memorandum dated 24.1.2003). Access deficit essentially is to compensate the difference between costs and local calls revenue. In other words, when costs are more than the revenue, BSNL incurs a loss which needs to be compensated. It is the additional capital expenditure over local calls revenue for rolling out telecom network in rural areas which attracts ADC. From time to time, TRAI has issued IUC Regulations, particularly in the years 2003 and 2005. These regulations are accompanied by Explanatory Memorandums. ADC has been specified differently in these regulations for fixed, WLL (M) and cellular mobile calls. In doing so, the TRAI has kept in mind the fact that standard tariffs have been fixed for fixed line calls. (See: Table XI in Annexure A which is Explanatory Memorandum dated 24.1.2003). In the said Memorandum, basic principles underlying IUC/ADC regime has been laid down. One of the important principles laid down is that ADC shall be funded from all calls, except fixed to fixed, local etc. We have different types of calls, i.e., fixed to fixed, fixed to WLL(M), fixed to cellular, WLL(M) to fixed, WLL(M) to WLL(M) etc.

19. The purpose of the above discussion on ADC regime is to highlight the fact that ADC regime has evolved over a period of time, notified for the first time in the TRAI Regulation dated 24.1.2003 and reviewed on 29.10.2003 etc. The point to be noted is that ADC regime right from January, 2003 is a matter of policy framework initiated by TRAI to promote lower domestic prices, competition and to give rise to strong subscriber's growth. It involves pricing of services like mobile service, fixed service, WLL (M) service etc.