

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 11.11.2016

CORAM:

THE HONOURABLE MR.JUSTICE S.MANIKUMAR

Writ Petition Nos.1875 and 3652 of 2013
and Connected Miscellaneous Petitions

Tata Communications Ltd.,
Through its Assistant Manager (HR),
V.Geetha, registered office
at Mumbai-400 001

... Petitioner in
W.P.No.1875 of 2013

Bharti Airtel Ltd.,
Represented by its Legal Manager,
Harish Rangarajan
Chennai-600 002

... Petitioner in
W.P.No.3652 of 2013

Vs.

1. Telecom Regulatory Authority of India,
Mahanagar Door Sanchar Bhawan,
Jawahar Lal Nehru Marg,
Next to Dr. Zakir Hussain College,
New Delhi 110 002.

2. Bharat Sanchar Nigam Ltd.,
Rep., by its Assistant General Manager (Legal),
O/o. Chief General Manager Mtce,
Southern Telecom Region,
11, Link Road, Ganapathy Colony,
Guindy, Chennai 600 032.

3. Association of Competitive Telecom Operators
601, Nirmal Towers,
26, Barakhamba Road,
Connaught Place, New Delhi 110 001.
rep by its Authorized Signatory
Mr.Manoj Misra

... Respondents 1 to 3 in both
the WPs

4. Reliance Communications Ltd.,
Having Registered office at
H Block Ist Floor, Dhirabhai Ambani
Knowledge City
Navi Mumbai-400 710
(Respondents 2 to 4 are impleaded
vide order, dated 11.11.2016 made in
M.P.Nos.4 to 6 in W.P.No.1875/13 and
M.P.Nos.3, 5 and 6 in W.P.No.3652/13)

..4th Respondent in both WPs

Prayer in W.P.No.1875 of 2013: Writ Petition filed under Article 226 of the Constitution of India praying for a Writ of Certiorarified Mandamus, to call for the records of the respondent, pertaining to the impugned Regulations, International Telecommunication Access to Essential Facilities at Cable Landing Stations (Amendment) Regulations (No.5 of 2007), dated 07.06.2007 (No.21 of 2012), dated 19.10.2012 and International Telecommunication Cable Landing Stations Access Facilitation Charges and Co-allocation Charges Regulations, 2012 (No.27 of 2012), dated 21.12.2012, and after perusing, quash the same and thereby, consequentially direct the Respondent from not giving effect to the impugned regulations.

Prayer in W.P.No.3652 of 2013: Writ Petition filed under Article 226 of the Constitution of India praying for a Writ of Certiorarified Mandamus, to call for the records of the respondent, being the International Telecommunication Access to Essential Facilities at Cable Landing Stations International Telecommunications Access to Essential Facilities at Cable Landing Stations (Amendment) Regulations (No.5 of 2007), dated 07.06.2007, as amended by the (No.21 of 2012), dated 19.10.2012 and International Telecommunication Cable Landing Stations Access Facilitation Charges and Co-allocation Charges Regulations, 2012 (No.27 of 2012), dated 21.12.2012, and after perusing, quash the same and thereby, consequentially direct the Respondent from not giving effect to the impugned regulations.

For Petitioner : Mr.C.S.Vaidyanathan, Senior Advocate
(in W.P.No.1875/13) for M/s.K.Harishankar

For Petitioner : Mr.P.S.Raman, Senior Advocate
(in WP 3652/13) for M/s.Satish Parasaran

For 1st Respondent : Mr.R.Muthukumaraswamy, Sr. Advocate
Assisted by Dr.M.Devendran
Standing Counsel for TRAI

For 2nd Respondent : Mr.V.T.Gopalan, Senior Advocate,
for Dr.S.Seethalakshmi,
Standing Counsel for BSNL

For 3rd Respondent : Mr.S.Parthasarathy, Senior Advocate,
for M/s.Fox Mandal & Associates

For 4th Respondent : Mr.A.L.Somayaji, Senior Advocate
for M/s.R.Venkatavaradhan

COMMON ORDER

Common issue that arises for consideration is, whether, the impugned regulations, International Telecommunication Access to Essential Facilities at Cable Landing Stations (Amendment) Regulations (No.5 of 2007), dated 07.06.2007, as amended by the (No.21 of 2012), dated 19.10.2012 and International Telecommunication Cable Landing Stations Access Facilitation Charges and Co-allocation Charges Regulations, 2012 (No.27 of 2012), dated 21.12.2012, are to be quashed and consequently, whether the respondent should be restrained from giving effect to the impugned regulations.

2. In the Impugned Regulations, Respondent-TRAI has restricted the fundamental right to carry on business, under Article 19(1)(g) of the Constitution of the Petitioner, which can be justified only on any of the grounds set out in Article 19(6) i.e., restrictions made by law, which are in the interest of the general public and which are reasonable as the language of Article 19(6) provides.

3. Apart from the legislative competence of the respondent TRAI, Impugned Regulations also have to be tested on the anvil of serving any public interest whatsoever. The issue of Public Interest already stands decided against the respondent by the Hon'ble Division Bench decided on 25.06.2013 and the said judgment having attained finality, the respondent is barred under the principles of res judicata. The impugned regulations of the respondent are to be tested on the jurisdiction power and authority of the Respondent TRAI to frame the impugned regulations, as compliance of transparency. Furthermore, proceedings being quasi judicial in nature, the regulations are to be tested on the grounds of compliance with the Principles of Natural Justice.

4. The petitioners have further submitted that the power claimed by TRAI, by the recent amendment made to the license, cannot validate exercise of regulation making power, since an amendment to a contract, between the licensor and licensee,

cannot vest regulatory power in TRAI nor can it amend Section 11 of the TRAI Act. The Regulations relate to providing access to Cable Landing Station and do not relate to "interconnection" within the meaning of Section 11(1)(b)(i) to (iv) of the Act nor is it specifically authorized under Section 36 of the Act.

5. The petitioners have contended that regulations are not authorized by law and exercise of such regulation making power, is ultra vires, under Article 19(6) of the Constitution, insofar as it seeks to restrict their exercise of fundamental right to carry on a business under Article 19(1)(g) of the Constitution. Exercise of such regulatory powers by TRAI, purportedly to prevent abuse of dominant position by the owners of CLS, is beyond the jurisdiction of TRAI, inasmuch as, that is the subject/issue separately dealt with by the Parliament, under the Competition Act, 2002, vesting the powers on the issue with the Competition Commission of India. If at all, the TRAI could only have made a reference to the Competition Commission in terms of Section 21 of the Competition Act, 2002.

6. The petitioners have further contended that the Regulations are not made in public interest, as held by the Division Bench of the High Court in Writ Appeal No.855 of 2013, dated 25.06.2013. All the parties including, respondent-TRAI, are bound by the doctrine of res-judicata and the said issue cannot be re-agitated, in which case, Regulations cannot be saved by Article 19(6) and have to be set aside. According to them, regulations are excessive and disproportionate and do not constitute a reasonable restriction.

7. According to the petitioners, assuming without admitting, the original Regulation of 2007 is valid, the amendment made to the same on 19.10.2012, is vitiated inasmuch as the said regulation has been made in gross violation of the principles of natural justice, as well as, the mandatory requirement of transparency, in terms of section 11(4) of the TRAI Act, 1997. Since the same do not empower the TRAI to make an independent regulation specifying uniform charges for all Cable Landing Stations.

8. The petitioners have further submitted that December 2012 Regulations, specifying the charges, are violative of the principles of natural justice and there is a failure to comply with the requirement of transparency, apart from being arbitrary, unreasonable and expropriatory. It does not reimburse the costs incurred by the petitioners and is not in conformity with the methodology and the actual principles followed for approval of charges in 2007. According to the petitioners, onus is on TRAI to justify the departure from the methodology and the norms adopted under 2007 regulations and they have failed to do so, nor been able to justify the assumptions made in the

determination of costs which has led to a sharp reduction in the charges to a substantially below cost level.

9. The Petitioners have challenged the impugned three regulations, namely, (i) International Telecommunication Access to Essential Facilities at Cable Landing Stations Regulations 2007 (5 of 2007) dated 07.06.2007, (ii) International Telecommunication Access to Essential Facilities at Cable Landing Stations (Amended) Regulations 2012 (21 of 2012) dated 19.10.2012 and (iii) International Telecommunication Cable Landing Stations Access Facilitation Charges and Co-location charges Regulations, 2012 (no.27 of 2012) dated 21.12.2012, on the main ground that the said regulations are without jurisdiction and that the power to frame these Regulations is derived from an amendment to a license agreement, between the petitioners and DoT and the respondent-TRAI is not even a party.

10. It is the further contention of the petitioners that though the respondent-TRAI has got powers, under Section 36 of the TRAI Act, to make regulations, insofar as the impugned Regulations, dated 07.06.2007, 19.10.2012 and 21.12.2012 are concerned, TRAI does not have the power to frame the Regulations, as there is no function prescribed for regulating infrastructure sharing charges/access charges, for sharing infrastructure facilities, created under the license, like towers by mobile operators or Cable Landing Stations by International Long Distance Operators (ILDOS) and also there is no provision which empowers respondent-TRAI, to prescribe charges in this regard for Cable Landing Stations. Powers and functions of the TRAI, are set out in Sections 11 to 13, in particular, Section 11(1)(b) of the Act. Section 36 and Section 11(1)(b) of the TRAI Act, 1997 read as follows:-

"36. Power to make Regulations.-

(1) The Authority may, by notification, make Regulations consistent with this Act and the rules made there under to carry out the purposes of this Act.

(2) In particular, and without prejudice to the generality of the foregoing power, such Regulations may provide for all or any of the following matters, namely:-

(a) the times and places of meetings of the Authority and the procedure to be followed at such meetings under sub-section (1) of section 8, including quorum necessary for the transaction of business;

(b) the transaction of business at the meetings of

the Authority under sub-section (4) of section 8;

(d) matters in respect of which register is to be maintained by the authority [under sub-clause (vii) of clause (b)] of sub-section (1) of section 11;

(e) levy of fee and lay down such other requirements on fulfillment of which a copy of register may be obtained [under sub-clause (viii) of clause (b)] of sub-section (1) of section 11;

(f) levy of fees and other charges [under clause (c) of sub-section (1) of section 11;”

Section 11(1)(b) -

Functions of Authority (1) Notwithstanding anything contained in the Indian Telegraph Act, 1885 (13 of 1885), the functions of the Authority shall be to-

(b) discharge the following functions, namely:-

(i) ensure compliance of terms and conditions of licence;

(ii) notwithstanding anything contained in the terms and conditions of the licence granted before the commencement of the Telecom Regulatory Authority of India (Amendment) Act, 2000, fix the terms and conditions of inter-connectivity between the service provider;

(iii) ensure technical compatibility and effective inter-connection between different service providers;

(iv) regulate arrangement amongst service providers of sharing their revenue derived from providing telecommunication services;

(v) lay-down the standards of quality of service to be provided by the service providers and ensure the quality of service and conduct the periodical survey of such service provided by the service providers so as to protect interest of the consumers of telecommunication service;

(vi) lay-down and ensure the time period for providing local and long distance circuits of telecommunication between different service providers;

(vii) maintain register of interconnect agreements

and of all such other matters as may be provided in the Regulations;

(viii) keep register maintained under clause (vii) open for inspection to keep member of public on payment of such fee and compliance of such other requirement as may be provided in the Regulations;

(ix) ensure effective compliance of universal service obligations;"

11. The petitioners have further contended that the above fact has been recognized by the Respondent-TRAI, in its recommendations, dated 16.12.2005. In Para 3.3 of the said recommendation, respondent-TRAI, has stated that,

"the CLS owning ILDO should be mandated through license amendment to publish the terms & conditions of such access with prior approval of regulator. This provision will enable TRAI to issue requisite regulation to ensure efficient, transparent & non-discriminatory access to the essential facilities at CLSs including fixing the cost-based access charges"

In consonance with the same, the respondent-TRAI, at para 4.6, has made recommendations, requiring the ILDO to seek approval of TRAI, regarding terms and conditions for access provision, as also empowering the TRAI to specify cost based access charges in its Regulations and furthermore that this can be carried out by bringing out suitable amendments to the International Long Distance License Agreement. The said extract reads as follows:-

"4.6.2 The ILDO owning the Cable Landing Station should also be mandated to publish, with prior approval of the Regulator, the terms and conditions and specify cost-based access charges through its regulation.

4.6.3 Clause 2.2[b] of ILD service license should be suitably amended for this purpose and the existing time limits mentioned therein may be deleted."

12. Pursuant to the above recommendation, the licensor, the Department of Telecommunication has amended the License Agreement on 15.01.2007, to provide for the authority of the respondent to give prior approval for conditions of access provision and that the charges for such access to be governed by regulations, as may be made by TRAI/ DoT. The relevant extract reads as follow:-

"The amended clause 2.2 (c) is as under:

"Equal access to bottleneck facilities at the Cable Land Stations (CLS) including landing facilities for submarine cables for licensed operators on the basis of non discrimination shall be mandatory. The terms and conditions for such access provision shall be published with prior approval of the TRAI, by the Licensee owning the cable landing station. The charges for such access provision shall be governed by the regulations/ orders as may be made by the TRAI/ DoT from time to time".

13. Pursuant to the above amendment, respondent-TRAI has brought out its consultation paper on 13.04.2007, seeking to frame Regulations. In Para 1.5 of the said Consultation Paper, it has been stated that the respondent has assumed power to frame regulation, pursuant to the amendment to the license provision on 15.01.2007. The relevant extract reads as follows:-

"The licensor has also amended relevant clauses in ILD license vide letter no. 16-3/2006-BS-I dated 15th January 2007 to enable TRAI to bring out regulations to ensure efficient, transparent and no discriminatory "Access to Essential Facilities including Landing Facilities for Submarine Cables at Cable Landing Stations"

The same was reiterated in the Explanatory Memorandum to impugned Regulation, dated 07.06.2007, wherein at paragraph 1.2 of the Explanatory Memorandum it has been again stated that,

"The Department has also amended relevant clauses in ILD licence to enable TRAI to bring out regulations to ensure efficient, transparent and non-discriminatory Access to Essential Facilitation (including landing facilities) for submarine cables at Cable Landing Stations"(emphasis supplied).

14. As far as the Explanatory Memorandum is concerned, the Respondent TRAI in two of its three impugned Regulations, namely 7th June' 2007 and 21st December, 2012 Regulations provide a statement of objects and reasons, which is a part of the said Regulations as reflected in the Note to this effect, at the end of the Regulation, which reads as follows:-

"Note. The Explanatory memorandum explains the objects and reasons of the International Telecommunication Access to Essential Facilities at Cable Landing Stations Regulations, 2007 (5 of 2007)"

15. According to the petitioners, the impugned regulation, dated 19.10.2012, does not include the Explanatory Memorandum as a part of the Regulation, unlike the other two. This itself demonstrates that it is by conscious design that the Explanatory Memorandum of 7th June, 2007 and 21st December, 2012 Regulations have been treated as part of the Regulation themselves with the consequence that the Respondent cannot improve/retract/detract from such statutory reasons. Although such note is not available in the 19th October 2012 Regulation, it is submitted that the Explanatory Memorandum of that Regulation also cannot be improved/retracted/detracted.

16. Though it is the consistent stand of respondent-TRAI that jurisdiction, power and authority of the TRAI to frame the impugned Regulations, are derived from the license amendment, it is the submission of the petitioners that the terms and conditions of the license cannot empower TRAI to regulate a business, since it would be a restraint on the fundamental right to carry on business, guaranteed by Article 19(1)(g) of the Constitution, which can be restricted or regulated, only in terms of Article 19(6).

17. Realizing the legal lacuna, TRAI has sought for an amendment to Section 11(1)(b) of the TRAI Act, by seeking insertion of access in Section 11(1)(b)(ii). By way of an amendment to the Licence Agreement, the TRAI traces its power to frame the impugned Regulations. It is the contention of the petitioners that under Section 36(1), the power of the TRAI is to make Regulations, consistent with the Act and the rules made thereunder, a license agreement issued by the DoT, under an enabling provision of the proviso to Section 4(1) of the Indian Telegraph Act, 1885, cannot confer any power or authority to the TRAI to frame Regulation. The power to frame Regulation, which is a subordinate/delegated legislation, is not traceable to any provision of the TRAI Act, rather as the Respondent itself admits, it is by virtue of an amendment to a license that it seeks to frame the Regulation.

18. The writ petitioners have contended that the respondent TRAI, in its Counter Affidavit or at the time of oral submissions has not in any manner dealt with its admitted lack of jurisdiction by relying upon a contract/ License Agreement to frame a subordinate legislation. There is a deafening silence by the Respondent TRAI on the jurisdiction aspect and relied upon the amendment to the license agreement of the Petitioner, as set out in great detail in the recommendations of 16.12.2005, Consultation Papers of 13 April, 2007 and the Explanatory Memorandum to the Impugned Regulations of 07.06.2007.

19. According to the writ petitioners, the respondent-TRAI has sought to wriggle out of the admitted lack of jurisdiction, by now shifting its stand and making out an entirely new case in the pleadings filed before this Hon'ble Court which is at total variance from its stand in the recommendation of 16.12.2005, consultation paper of 13.04.2007 and the impugned Regulation of 07.06.2007, respondent TRAI has sought to detract and improve upon this glaring deficiency in affidavits filed before this Court, which as per the law laid down by Hon'ble Supreme Court as well as this Court is not permissible. At this juncture, reference has been made to **M.S.Gill and Another vs. The Chief Election Commissioner, New Delhi and others**, reported in (1978) 1 SCC 405, wherein, at Paragraph 8, it has been held as follows:

"8. The second equally relevant matter is that when a statutory functionary makes an order based on certain ground, its validity must be judged by the reasons so mentioned and cannot be supplemented by fresh reason in the shape of affidavit or otherwise. Otherwise, an order bad in the beginning may, by the time it comes to Court on account of a challenge, get validated by additional ground later brought out. We may here draw attention to the observations of Bose, J. in *Gordhandas Bhanji*':

Public orders, publicly made, in exercise of a statutory authority cannot be construed in the light of explanations subsequently given by the officer making the order of what he meant, or what was in his mind, or what he intended to do. Public orders made by public authorities are meant to have public effect and are intended to affect the actings and conduct of those to whom they are addressed and must be construed objectively with reference to the language used in the order itself."

Reference has also been made on the decisions in **Hindustan Petroleum Corporation Ltd. vs. Darius Shapur Chenai and Others** [(2005) 7 SCC 627 (para 24)] and **Bhikhubhai Vithalbhai Patel vs. State of Gujarat** [(2008) 4 SCC 144 (para 35)].

20. It is further submitted that the Hon'ble Supreme Court in **Sanjeev Coke Manufacturing Company Vs. M/s Bharat Coking Coal Limited and Another** reported in (1983) 1 SCC 147, has deprecated the practice of trying to improve upon the objectives of a legislation by way of affidavit filed subsequently in courts. In the present case, the Explanatory Memorandum in the Regulations of 7th June 2007 very clearly set out the basis of the said Regulations being the amendment to the License Agreement, which the respondent TRAI has now sought to further improve and enlarge by furnishing self contradictory reasons. In fact,

respondent-TRAI itself had relied upon this judgment, which squarely applies against itself. Relevant paragraph from **Sanjeev Coke's** case (cited supra), is extracted hereunder:-

"25. Shri Ashoke Sen drew pointed attention to the earlier affidavits filed on behalf of Bharat Coking Coal Limited and commented severely on the alleged contradictory reasons given therein for the exclusion of certain coke over plants from the Coking Coal Mines (Nationalisation) Act. But, in the ultimate analysis, we are not really to concern ourselves with the hollowness or the self-condemnatory nature of the statements made in the affidavits filed by the respondents to justify and sustain the legislation. The deponents of the affidavits filed into court may speak for the parties on whose behalf they swear to the statements. They do not speak for the Parliament. No one may speak for the Parliament and Parliament is never before the Court. After Parliament has said what it intends to say, only the court may say what the Parliament meant to say. None else. Once a statute leaves Parliament House, the Court is the only authentic voice which may echo (interpret) the Parliament. This the court will do with reference to the language of the statute and other permissible aids. The executive Government may place before the Court their understanding of what Parliament has said or intend to say or what they think was Parliament's object and all the facts and circumstances which in their view led to the legislation. When they do so, they do not speak for Parliament. No Act of Parliament may be struck down because of the understanding or misunderstanding of Parliament intention by the executive Government or because their (the Government's) spokesmen do not bring out relevant circumstances but indulge in empty and self-defeating affidavits. They do not and they cannot bind Parliament. Validity of legislation is not to be judged merely by affidavits filed on behalf of the State, but by all the relevant circumstances which the Court may ultimately find and more especially by what may be gathered from what the legislature has itself said".

21. It is the further contention of the petitioners that respondent TRAI in view of the glaring deficiency and lack of jurisdiction to frame the impugned Regulations has now come forthwith several new contentions/arguments, which admittedly do not form part of the impugned Regulations and stand from 2005 till date, and it is only a post facto rationalization. The

respondent has sought to justify the impugned Regulations under Section 11(1)(b) (i) to (iv), the preamble. The respondent has at great length has tried to demonstrate that power to frame the regulation is relatable to the various functions of TRAI under Section 11(1)(b) and the Preamble to the Act. On one hand, the respondent does not deal with the earlier stand from 2005 onwards in various recommendations/ consultation papers culminating in the impugned Regulations of 07.06.2007, till the filing of the Counter Affidavit, where the basis for the impugned Regulations is the amendment to the License Agreement, from where the power is derived. The respondent first recommended to the licensor DoT to amend the ILD License Agreement to enable TRAI to frame regulation, waited for such amendment to be carried out by the licensor DoT and it is only after issue of such amendment by DoT on 15.01.2007 that the process of framing the impugned Regulations commenced with the issuance of Consultation Paper dated 13.04.2007. To reiterate, the respondent has not dealt with this aspect in the pleadings in this regard, however, now has gone to great length to justify this on various new grounds.

22. It is further contended that TRAI has relied upon its regulation making power under Section 36(1) of the TRAI Act, which states that "The Authority may, by notification, make regulations consistent with this Act and the rules made thereunder to carry out the purposes of this Act", read with preamble of the Act which states that, "An Act provide for the establishment of (Telecom Regulatory Authority of India and the Telecom Disputes settlement and Appellate Tribunal to regulate the telecommunication services, adjudicate disputes, dispose of appeals and to protect the interests of service providers and consumers of the telecom sector, to promote and ensure orderly growth of the telecom sector) and for matters connected therewith or incidental thereto".

23. Though TRAI has contended that the Impugned Regulations have been issued, in accordance with the preamble, viz., to protect the interests of service providers and consumers of the Telecom Sector and to regulate the telecommunication services and further contended that access facilitation service, being provided by OCLS is a telecommunication service and therefore, by virtue of the preamble of TRAI Act, 1997, TRAI is empowered to regulate and also contended that the regulation is being carried out to promote the interest of the consumers as access facilitation charges have a nexus with broadband services being provided to the consumers, it is the contention of the petitioners that the above contentions are now being advanced by TRAI, to justify the lack of jurisdiction. It is further contended that though TRAI has ample powers to make regulations, it should be consistent with the Act, to carry out the purposes of the Act. The clause "consistent with the Act" circumscribes

the power of the TRAI to make regulations. However, the same can be made, only where it is empowered to perform such a function under the Act. According to the petitioners, since the Act does not permit the regulation of infrastructure sharing charges, the TRAI cannot rely upon preamble to do indirectly what it cannot do directly.

24. Referring to the decision in **BSNL vs. TRAI [Civil Appeal No.5253 of 2010, dated 06.12.2013]**, the petitioners have contended that the issue that is relevant is the power and the legislative heads, under which, the TRAI could frame Regulations under Section 36 of the TRAI Act, 1997. Referring to the submission of the learned Solicitor General of India, in the above case, with regard to Paragraph 24 of the abovesaid judgment that the TRAI could make Regulations on matters specified in different sections of the TRAI Act, it is the case of the petitioners that preamble would not lend support to the competence of framing the impugned regulations. Paragraph 24 of the abovesaid judgment is extracted hereunder:

"24. Shri R.F. Nariman, learned Solicitor General argued that the power vested in the Authority to make Regulations for carrying out the Act is very wide and is not controlled by Section 36(2), which provides for framing of Regulations on specified matters. He submitted that if power is conferred upon a statutory authority to make subordinate legislation in general terms, the particularization of the topics is merely illustrative and does not limit the scope of the general power. Learned Solicitor General further argued that for carrying out the purposes of the Act, the Authority can make Regulations on various matters specified in other sections including Sections 8(1), 8(4), 11(1)(b), 12(4) and 13. He submitted that the Regulations made under Section 36(1) and (2) are in the nature of subordinate legislation and are required to be laid before each House of Parliament in terms of Section 36(2) will make the provision otiose and the Court should not adopt that course."

Attention of this Court is also invited to Paragraphs 34 and 35 of the abovesaid judgment and the same is extracted hereunder:

"35. It is thus evident that the term 'regulate' is elastic enough to include the power to issue directions or to make Regulations and the mere fact that the expression "as may be provided in the Regulations" appearing in Clauses (vii) and (viii) of Section 11(1)(b) has not been used in other clauses of that Sub-section does not mean that the Regulations cannot be framed under Section 36 on the subjects specified in Clauses (i) to (vi) of Section 11(1)(b).

In fact, by framing Regulations under Section 36, the Authority can facilitate the exercise of functions under various clauses of Section 11(1)(b) including Clauses (i) to (vi).

36. We may now advert to section 36. Under Sub-section (1) thereof the Authority can make Regulations to carry out the purposes of the Act specified in various provisions of the Act including Sections 11,12 and 13."

25. Writ Petitioners also drew the attention of this Court to the judgment of the Hon'ble Apex Court in **Union of India Vs. Elphinstone Spinning and Weaving Co. Ltd and Others** reported in (2001) 4 SCC 139, wherein, the Hon'ble Supreme Court held that, "a preamble not being an enacting provision is not of the same weight as an aid to construction of the Act as other relevant enacting work. If in an Act the preamble is a general or brief statement of the main purpose, as in the present case it may well be of little value." Paragraph 17 of the said judgment is extracted hereunder:

"17. It has been held in several cases that a long title along with the Preamble or even in its absence is a good guide regarding the object, scope or purpose of the Act whereas the Preamble being only an abbreviation for purposes of reference is not a useful aid to construction. The Preamble of an Act, no doubt, can also be read along with other provisions of the Act to find out the meaning of the words in enacting provisions to decide whether they are clear or ambiguous, but the Preamble in itself not being an enacting provision is not of the same weight as an aid to construction of a section of the Act as are other relevant enacting words to be found elsewhere in the Act. The utility of the Preamble diminishes on a conclusion as to clarity of enacting provisions. It is, therefore, said that the Preamble is not to influence the meaning otherwise ascribable to the enacting parts unless there is a compelling reason for it. If in an Act the Preamble is a general or brief statement of the main purpose, it may well be of little value. Mudholkar, J. had observed in *Burrakur Coal Co. Ltd v. Union of India*.

"It is one of the cardinal principles of construction that where the language of an Act is clear, the Preamble must be disregarded though, where the object or meaning of an enactment is not clear, the Preamble may be resorted to explain it. Again, where very general language is used in an enactment, which it is clear must be intended to have a limited application, the Preamble may be used to indicate to

what particular instances the enactment is intended to apply. We cannot, therefore, start with the Preamble for construing the provisions of an act, though we would be justified in resorting to it, nay, we will be required to do so, if we find that the language used by Parliament is ambiguous or is too general though in point of fact Parliament intended that it should have a limited application".

26. Reliance has also been made to the decision in **R.Venkataswami Naidu and Another v. Narasram Naraindas Alias Purshottamdas** reported in **AIR 1966 SC 361**, at paragraph 17, held that,

"a preamble is a key to the interpretation of a statute but it is not ordinarily an independent enactment conferring rights or taking them away and cannot restrict or widen the enacting part which is clear and unambiguous."

By referring to the above judgment, it is the submission of the learned Senior Counsel that a preamble cannot in any manner be construed as a legislative head for enactment of a delegated legislation.

27. Attention of this Court was also invited to the judgment in **V.Sudheer v. Bar Council of India & Anr.**, reported in **AIR 1999 SC 1167**, wherein, at Paragraph 20, it has been held as follows:

"20. We may now refer to Section 49 of the Act, which deals with general power of Bar Council of India to make Rules. Sub-section (1) thereof lays down that the Bar Council of India may make rules for discharging its functions under this Act, and, in particular, such rules may prescribe on various topics as enumerated therein from clauses (a) to (j). A mere look at the aforesaid provision makes it clear that the rule making power entrusted to the Bar Council of India by the legislature is an ancillary power for fructifying and effectively discharging its statutory functions laid down by the Act. Consequently, Rules to be framed under Section 49(1) must have a statutory peg on which to hang. If there is no such statutory peg the rule which is sought to be enacted de hors such a peg will have no foothold and will become still born. The statutory functions entrusted by the legislature to the Bar Council of India under the Act so far as relevant for our present purpose and which could be relied upon by Shri Rao, learned senior counsel for the respondent Bar Council of India, are Section 7(1)(h) and Section 24(3)(d). We have seen earlier that neither of these statutory provisions

entitles the Bar Council of India to provide for the disqualification or a disability or an additional condition for enrolment of a person who is otherwise eligible to be enrolled as an advocate under Section 24(1). Once that conclusion is reached, the very foundation for supporting the impugned rules gets knocked off. Consequently, if any such rule is framed, supposedly by exercise of the rule making power as enumerated in Section 49(1)(af), (ag) or (ah) on which also reliance was placed by Shri Rao, the said rule having not been made for discharging any of the statutory functions of the Bar Council of India in this connection must necessarily fail as it would be ultra vires the statutory functions of the Bar Council of India. Any rule framed by rule making authority going beyond its statutory functions must necessarily be held to be ultra vires and inoperative at law. Consequently, the valiant attempt made by Shri Rao for sustaining the Rules under Section 49(1)(af), (ag) and (ah) would remain abortive only on this short ground."

28. Reference has been made to a decision in **Indian Council of Legal Aid and Advice etc. etc. Vs. Bar Council of India and Another**, reported in **AIR 1995 SC 691**, at Paragraph 12, the Hon'ble Apex Court held as follows:

"12. There is no specific provision in Section 7 of the Act which enumerates the functions of the Bar Council of India empowering it to fix the maximum age beyond which entry in to the profession would be barred. That is why reliance is placed on the rule making power of the Bar Council of India enshrined in Section 49. That Section empowers the making of rule by the Bar Council of India 'for discharging its functions' under the Act, and, in particular, such rules may prescribe the class or category of persons entitled to be enrolled as advocates. The functions of the Bar Council of India enumerated in Section 7 do not envisage laying down a stipulated disqualifying persons otherwise qualified from entering the legal profession merely because they have completed the age of 45 years. On the other hand Section 24A was introduced by Section 19 of Act 60 of 1973 with effect from 31st January, 1974 to disqualify certain persons from entering the legal profession for a limited period. By the impugned rule every person even if qualified but has completed 45 years of age is debarred for all times from enrolment as an advocate. If it had been possible to restrict the entry of even those class or category of persons referred to in Section 24A by a mere rule made by the Bar Council of

India, where was the need for a statutory amendment? That is is presumably because matters concerning disqualification even for a limited period was considered to be falling outside the ken of rule making power, being a matter of public policy. It is difficult to accept the interpretation that all those above the age group of 45 years constitute class within the scope of clause (ag) of Section 49(1) of the Act to permit the Bar Council of India to debar their entry into the profession for all times. In the guise of making a rule the Bar Council of India is virtually introducing an additional clause in Section 24 of the Act prescribing an upper age ceiling of completed age of 45 years beyond which no person shall be eligible for enrolment as an advocate or is inserting an additional clause in Section 24A of the Act prescribing a disqualification. Viewed from either point of view we are clearly of the opinion that the rule making power under clause (ag) of Section 49 (1) of the Act does not confer any such power on the Bar Council of India. We are unable to subscribe to the view that all those who have completed the age of 45 years and are otherwise eligible to be enrolled as advocates constitute a class or category which can be disqualified as single block from entering the profession. Besides, as stated above clause (ag) identification and specification of a class or category of persons 'entitled' to be enrolled as advocates and not 'disentitled to be enrolled as an advocates. We, therefore, are of the opinion the impugned rule is beyond the rule making power of the Bar Council of India and is, therefore, ultra vires the Act."

29. In **MTNL v. Telecom Regulatory Authority of India** reported in **AIR 2000 Delhi 208**, relied on by the learned counsel for the petitioners, at Paragraphs 39 and 40, the Delhi High Court held as follows:

"39. Mr. Andhyarujina and Dr. Singhavi submitted that Section 36 conferred on the Authority the power to make regulations. It was submitted that the regulations, which can be made, were those which were necessary to carry out the purposes of the said Act. It was submitted that the instances given under Section 36(2) were merely illustrative and not exhaustive. It was submitted that the illustration did not detract or limit the general power under Section 36(1) to lay down all such regulations as were necessary to carry out the purposes of the Act. It was submitted that therefore, the functions under Section

11(1) could also be performed by issuance of regulations under Section 36.

40. It is correct that the illustrations given under Section 36(2) are merely illustrative and not exhaustive. However, as stated above, what cannot be done directly cannot be done indirectly. Thus, even though the Authority may be free to lay down regulations necessary for the purposes of carrying out the purposes of the Act, it cannot be regulation convey a power or a function. Thus, for example, in the guise of a regulation, the Authority cannot lay down or vary terms and conditions of a license to a service provider nor lay down or vary terms and conditions of a license to a service provider nor lay down the necessity or timing for introduction of a new service provider. In the guise of regulations, the Authority cannot lay down or vary terms and conditions of a license to a service provider nor lay down the necessity or timing for introduction of a new service provider. In the guise of regulations, the Authority cannot lay down the type of equipment which is to be used in the network nor the type of technology which is necessary for telecommunication. In the guise of regulation, the Authority cannot regulate matters related to the telecommunication industry i.e. matters in respect of which it is merely to render advice to the Government. The powers to issue regulations under Section 36 has to be exercised consistent with the provisions of the said Act and the rules framed by the Government. This power cannot be used to subvert the provisions of the said Act and to assume powers and functions not conferred by the said Act."

30. On the above aspect, TRAI has relied on a decision in **Secretary, Ministry of Chemicals & Fertilizers, Government of India Vs. Cipla Ltd., & Others** reported in (2003) 7 SCC 1, wherein, at Paragraph 4.3, held that broadly, the subordinate law making authority is guided by the policy and objective of the primary legislation disclosed by the preamble and other provisions. According to the petitioners, the said judgment is most certainly not a proposition for the authority that the preamble independently can be relied upon as a head and a provision for the purposes of framing a regulation.

31. Referring to **Sanjeev Coke Manufacturing Company's** case (cited supra), it is the contention of the learned Senior Counsel for the petitioners that the above judgment would not lend any support to the case of TRAI and their Explanatory Memorandum to the impugned Regulation, dated 07.06.2007, would reflect that it is only by virtue of amendment to the License

Agreement, TRAI seeks to acquire jurisdiction to frame the impugned Regulation.

32. On the contention that TRAI has got jurisdiction to frame the impugned regulation, in accordance with Section 36(1), read with Section 11(1)(b)(i) of the TRAI Act, attention of this Court was also invited by the petitioners to Section 11(1)(b)(i), which reads that, "ensure compliance of terms and conditions of license;" and contended that the above provision is the basis for the impugned Regulations, as reflected in the recommendations, dated 16.12.2005, Consultation Paper, dated 13.04.2007 and Impugned Regulation, dated 07.06.2007, on the fallacious premise that amendment of licence will empower it to frame Regulations.

33. According to the learned Senior Counsel for the petitioners, the power to frame regulation cannot be derived from provisions of the license agreement. Section 36(1) of the Act, does not confer any power to frame the impugned regulations. Reference is made on the decision in **Union of India and Another v. Association of Unified Telecom Service Providers of India and Others** reported in (2011) 10 SCC 543, wherein, at Paragraph 39, the Hon'ble Supreme Court, held that, "the license granted under Section 4(1) of the Telegraph Act as in the case of an ILD License is in the nature of a contract between the Central Government and the Licensee" and at Paragraph 40 is extracted below,

"once a license is issued under the proviso to sub section (1) of Section 4 of the Telegraph Act, the license become a contract between the licensor and licensee. Consequently, the terms and conditions of the license including the definition of adjusted gross revenue in the license agreement are part of a contract between the licensor and licensee."

34. According to the learned Senior Counsel for the petitioners, TRAI has recognized the fact that access facilitation is one of access to the essential facilities of a Cable Landing Station, classified under the infrastructure sharing and it is not an issue of interconnection and because it lacked jurisdiction to legislate on this subject, it cannot sought for an amendment to the TRAI Act, 1997. It is also submitted that as a statutory authority, TRAI has a duty to disclose that it had sought an amendment to section 11(1)(b)(ii), by addition/insertion of access, in addition to interconnection to overcome its lack of power in an ongoing litigation with BSNL. According to the learned Senior Counsel, though TRAI has stated that proposed amendment is only an clarity, it is a misleading statement.

35. According to the petitioners, the respondent has itself recognized the fact that access facilitation is one of access to the essential facilities of a Cable Landing Station, admittedly classified under the infrastructure sharing and is not an issue of interconnection and because it lacked jurisdiction to legislate on this subject it has sought an amendment to the TRAI Act, 1997 and in which respect a proposal has been forwarded to the Department of Telecommunication. This fact has never been disclosed by the Respondent and the Petitioners came to learn of this proposal from a news report in Telecom LIVE a Magazine published from Delhi in February 2013, which has extracted the proposed amendment to Section 11(1)(b) (ii) of the TRAI Act, 1997. The relevant extract from the said proposal, as carried in the news, item reads as follows:-

"Existing Section 11(1)(b)(ii): Notwithstanding anything contained in the terms and conditions of the license granted before the commencement of the telecom Regulatory Authority of India (Amendment) Act, 2000, fix the terms and conditions of inter-connectivity between the service providers;

Proposed: Notwithstanding anything contained in the terms and conditions of the license fix the terms and conditions of access and inter-connectivity between the service providers.

Decision: It was agreed to as the per the stand of DoT conveyed in the ongoing matter between TRAI and BSNL in an ongoing supreme Court case based on advice of Attorney General."

(Refer:- Annexure -1 at page 3 of the additional typed set filed with Rejoinder on 07.01.2014)

36. According to the petitioners, the amendment to the TRAI Act, 1997 has been sought by the respondent, due to ongoing litigation in Hon'ble Supreme Court, on the basis of legal opinion given by the Attorney General and it is denied that the amendment is sought for, by way of abundant clarity. According to the petitioners, as a statutory authority it had a duty to disclose that it had sought an amendment to section 11(1)(b)(ii) by addition / insertion of access in addition to interconnection to overcome its lack of power in an ongoing litigation with BSNL as per the advice of Attorney General.

37. On the Principle of *Contemporanea Exposito* and the understanding of TRAI, about interconnection, that did not, include access to CLS, learned Senior Counsel appearing for the petitioners placed reliance on decisions in **State of Tamil Nadu v. Mahi Traders & Ors.**, reported in **AIR 1989 SC 1167** and **P. Kasilingam and Others v. P.S.G. College of Technology and Others**

reported in **AIR 1995 SCC 1395**. Relevant paragraphs in both the decisions are extracted hereunder,

(i) In **State of Tamil Nadu v. Mahi Traders & Ors.**, reported in **AIR 1989 SC 1167**, at Paragraph 5, the Hon'ble Supreme Court held as follows:

"5. We have heard learned counsel on both sides at length and come to the conclusion that the assesses are entitled to the benefit of Sections 14 and 15 of the CST Act in respect of the two items in question. As far as the first item is concerned, it is common ground that leather splits are nothing but cut pieces of hides and skins. We fail to see how they cease to be hides and skins. It is no doubt true that they are cheaper and have a separate name but the name only indicates that they are cut pieces. It is not because they have ceased to be hides and skins and constitute a different commercial commodity that they are called 'scraps'. Some of the dealers purchase and sell such splits and such turnover is considerable. There is no material to suggest that they are useless or worthless articles. A loose description of them 'scrap' cannot deprive them of the benefit of section 14 of the Act."

(ii) In **P. Kasilingam and Others v. P.S.G. College of Technology and Others** reported in **AIR 1995 SCC 1395**, the Hon'ble Supreme Court, at Paragraph 20, held as follows:

"20. The Rules have been made in exercise of the power conferred by Section 53 of the Act. Under Section 54(2) of the Act every rule made under the Act is required to be placed on the table of both Houses of the Legislature as soon as possible after it is made. It is accepted principle of statutory construction that "rules made under a statute are a legitimate aid to construction of the statutes Contemporanea Exposition [See: Crates on Statute Law, 7th Edition pp.157-158; **Tata Engineering and Locomotive Company Ltd. v. Gram Panchayat Pimpri Waghare** MANU/SC/0346/1976: [1977] 1 SCR 306]. Rule 2 (b) and Rule 2(d) defining the expression "College" and "Director" can, therefore, be taken into consideration as contemporanea exposition for construing the expression "Private College" in Section 2(8) of the Act. Moreover, the Act and the Rules form part of a composite scheme. Many of the provisions of the Act can be put into operation only after the relevant provision or form is prescribed in the Rules. In the absence of the Rules the Act cannot be enforced. If it is held that Rules do not apply to technical educational institutions the provisions of the Act cannot be enforced in respect of such

institution. There is, therefore, no escape from the conclusion that professional and technical educational institutions are excluded from the ambit of the Act and the High Court has rightly taken the said view. Since we agree with the view of the High Court that professional and technical educational institutions are not covered by the Act and the Rules, we do not consider it necessary to go into the question whether the provisions of the Act fall within the ambit of Entry 25 of List III and do not relate to Entry 66 of List I."

38. It is the contention of the learned Senior Counsel that all along, TRAI has relied on Sections 11(1)(b)(ii) & (iii), relating to interconnection to derive power to frame the impugned Regulations. The clauses are as follows:

"11(1) Notwithstanding anything contained in the Indian Telegraph Act, 1885 (13 of 1885), the functions of the Authority shall be to- (b) discharge the following functions, namely:-

.....

(ii) notwithstanding anything contained in the terms and conditions of the license granted before the commencement of the Telecom Regulatory Authority of India (Amendment) Act, 2000, fix the terms and conditions of inter-connectivity between the service providers;

(iii) Ensure technical compatibility and effective inter-connection between different service providers;"

39. According to the learned Senior Counsel, sub clause (ii) relates to the power of the TRAI to fix terms and conditions of interconnection between the service providers and Sub Clause (iii) relates to the power of the TRAI to ensure technical compatibility and effective interconnection between service providers. It is further submitted that the TRAI has never construed access to essential facilities at cable landing system as a case of interconnection. According to him, the term. "interconnection" has been construed and defined in very specific terms by the TRAI in its various Regulations starting from the year, 1999.

40 It is also the submission of the learned Senior Counsel appearing for the petitioners that there are three major Regulations of TRAI, along with its amendments and the meaning and applicability of the term "interconnection", as understood by the Industry, means, access to CLS and the agreements (access facilitations agreements), in respect of the same, has never been construed to be covered as a case of interconnection." In this context, he drew the attention of this Court to the

Telecommunication Interconnection (Charges and Revenue Sharing) Regulations, 2001. He further submitted that Telecommunication Interconnection Usage Charges (IUC) Regulation, 2003 and its later amendments, which states that the Interconnection Charge and the Revenue Sharing amongst various service providers, as per various schedules provided in the Regulation of 2001 and in the later Regulations from 2003 onwards.

41. According to the learned Senior Counsel, had access to CLS, been a case covered under interconnection, in the understanding of the TRAI as well as the industry, then TRAI would have required to add one more schedule to the Regulations of 2001 or could have dealt with the same in the Interconnect Usage Charges Regulations issued in 2003 and thereafter. It is also submitted that had access to CLS been a case covered under interconnection in 2001 Regulations (which incidentally dealt with revenue share applicable for ILDOs), there was no need or reason for TRAI to have sought for the amendment in the License agreement vide its recommendations of 2005 and therefore, it is his submission that access to CLS has never been construed to be covered as a case under the term "interconnection" by the TRAI and the industry at large.

42. According to the learned Senior Counsel, the term "interconnection" has been defined by TRAI in the Telecommunication Interconnection (Charges and Revenue Sharing) Regulations, 2001 and the same definition has been followed in the successive Regulations, on the subject, "Interconnection" means the commercial and technical arrangements under which service providers connect their equipment, network and services to enable their customers to have access to the customers, services and networks of other service providers. The case of provision of access to CLS which is provided by the owner of CLS like the Petitioner, such access is provided to other eligible ITEs (ILDOs) so that they can access the international bandwidth owned by them through the CLS of the Petitioner. The Petitioners in this case are neither connecting its network with the network of the eligible ITE nor do the act of providing access to the eligible ITE to the Petitioner's CLS enables the customer of eligible ITE to access the customers of Petitioner. It is therefore abundantly clear that access to CLS is not covered under the term "Interconnection" as defined by the Respondent TRAI.

43. Relying on the Register of Interconnect Agreement Regulations, 1999 and its subsequent amendments of 03.02.2004 and 31.12.2004, the petitioners have submitted that as per the regulations, interconnect agreements, between all service providers of telecommunication services, are required to be registered with the respondent TRAI, within 30 days, of the execution or modification of such agreements. Moreover, 1999

Regulations and the subsequent amendments also bring out important aspects in the definition of the term Interconnection.

44. It is submitted that had access to CLS been construed to be a case of interconnection by Respondent TRAI and the industry there would have been an obligation cast upon the owner of the CLS including the Petitioners to file the Access Facilitation Agreements which it enters into with the eligible ITEs prior to providing Access to CLS. It is submitted that the petitioners, as the owners of CLS, providing access to its CLS to the eligible ITEs have never filed Access Facilitation Agreements with the Respondent as might have been required if Access to CLS was a case of interconnection nor has the Respondent TRAI ever sought to impose such an obligation upon the Petitioners and other OCLSs and rightly so as the case of access to CLS is not a case of interconnection.

45. On the Telecommunication Interconnection (Reference Interconnect Offer) Regulation, 2002, the petitioners have submitted that this Regulation required publishing of Reference Interconnect Offer (RIO) by service providers holding significant market power and such RIO has to stipulate service providers the terms and conditions on which it will agree to interconnect its network with the network of any other service provider seeking interconnection. Had access to CLS been the case of interconnection, the Respondent TRAI would have in such a case imposed the obligation of issuing the RIO upon the Petitioners as in the year 2002 when the RIO Regulation was issued by Respondent TRAI, the Petitioners was the only owner of the CLSs in the country. Absence of such a prescription or imposition by the Respondent TRAI on the Petitioners clearly establishes the fact that the access to CLS was never construed to be covered under the term interconnection.

46. Therefore, it is the contention of the petitioners that after consideration and examination of all the three Regulations, it can be concluded that had access to CLS been a case of interconnection, the above Regulations which are generic in nature to all the service providers would have been made applicable to Cable Landing Stations and which could have been done by the Respondent in various ways. Firstly, it could have required the Petitioners to file all access facilitation agreements with the Respondent TRAI in terms of the RICA Regulations, 1999. Secondly, in terms of the RIO Regulations of 2002 the Petitioners would have been required to furnish its RIO for access facilitation on its website. Respondent TRAI had sought furnishing/ filing of RIO by the Petitioner, but for voice services only and consciously excluded the access to Cable Landing Stations. Thirdly, if it was a case of Interconnection as now sought to be justified by Respondent all that was required by Respondent TRAI was to amend any of the above

Regulations by insertion of a Schedule relating to CLS as a Schedule in this connection have been inserted for voice services in respect of Mobile and basic operators in RIO Regulations 2002.

47. All the Regulations relating and construing Interconnection as above also deal with Interconnection only in the context of voice telephony, broadcasting and cable services. In fact, the Register of Interconnect Agreement Regulations of 1999 were amended in 2004 by inclusion of broadcasters, multi system operators and cable operators. If access to Cable Landing System is Interconnection then there would have been an amendment to any of the above Regulations. It is important to note from the above Regulations that Respondent TRAI has very consciously and carefully defined the services, in respect of which Interconnection in terms of Section 11(1)(b)(ii) (iii) and (iv) takes place and in the case of any additional services to be included, like broadcasting, multisystem operators & Cable Operators, the Respondent has explicitly amended the Regulations to include these services.

48. Admittedly, facilitation of access to the CLS owned by the Petitioners to the other ILDOs/ IGSPs is a case of infrastructure sharing and in no manner can be said to be interconnection because interconnection has been construed by TRAI in the Interconnection Usage Charge Regulation, 2003 to be the commercial and technical arrangement under which service providers connect their equipment, networks and services to enable their customers to have access to the customers, services and network of other service providers. Interconnection charge has been defined to mean the charges for interconnection levied by an interconnection provider, on an interconnection seeker and interconnection provider have also been defined to mean service provider to whose network interconnection is sought for providing telecom services and interconnection seeker is one who seeks interconnection to the network of the interconnection provider. The relevant definitions are extracted herein below:

"Interconnection" means the commercial and technical arrangements under which service providers connect their equipment, networks and services to enable their customers to have access to the customers, services and networks of other service providers.

"Interconnection charge" means the charge for interconnection levied by an interconnection provider on an interconnection seeker.

"Interconnection provider" means the service provider to whose network an interconnection is sought for providing telecommunication services.

"Interconnection Seeker" means the service provider who seeks interconnection to the network of the interconnection provider."

49. The Commercial and technical arrangement as far as access facilitation is concerned is that the owner of the Cable Landing Station facilitates eligible ITE access to the bandwidth owned by that eligible ITE through the equipment set up created by the OCLS in its Cable Landing Station for that purpose and this is the nomenclature of the Regulation. This is evident from the block diagram relating to Cable Landing Station as reproduced in the writ Petition. Attention was also invited to Page 4 of Vol.I of the Petitioner's typed set.

50. The petitioners have further submitted that the access facilitation cannot in any manner be construed to be interconnection for the reasons that there is no connection of the equipment, network, services of one service provider to the equipment, network, services of another service provider. As evident from the block diagram at Page 4 of the Writ Petition, it is the bandwidth owned by the eligible ITE on the cable which enters the facility, part of the CLS and it is the same bandwidth owned by the eligible ITE which exits from this facility. The only service provided by the CLS owner is that of providing and enabling access to the bandwidth owned by the eligible ITE to the eligible ITE. However, the same was not controverted by TRAI. Reference can be made to Annexure 25 Page 659 of Vol.I of the Petitioner's Typed set, wherein, the respondent-TRAI has submitted as follows:

"The Commercial and technical arrangement as far as access facilitation is concerned is that the owner of the Cable Landing Station facilitates access, which is the nomenclature of the Regulation of the International Submarine cable owner who wishes to access the domestic network in a particular country by means of the Cable Landing Station. This is evident from the block diagram relating to Cable Landing Station as reproduced hereinabove."

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51. On the submission made by respondent-TRAI, in its counter affidavit that the CLS is a bottleneck facility and it does not dispute the fact that there is no interconnection, within the meaning of the regulation, as framed by the TRAI, the writ petitioners have submitted that the interconnection in factual terms means connectivity between equipment, network and services of one service provider with that of another service

provider, so as to enable customers of one service provider to have access to the customers of the other service provider. But, in the present case, there are no such customers, because access to essential facility is confined only to service provider, who are licensed to provide ILD / IGSP services. In this regard, the entire list of customers of the Petitioners, numbering 12, setting out their shares in the revenue generated by the Petitioners, has been furnished in the rejoinder affidavit.

52. It is the case of the petitioners that there are no two networks between whom the connectivity is provided as already set out in the Block Diagram above and which has not been controverted by the Respondent TRAI. The respondent never construed access to essential facilities at cable landing system as a case of interconnection. Respondent TRAI never construed access to Cable Landing Station as Interconnection, had it been the case it would have included access to Cable Landing Station by amendment to the above said Regulations as detailed above. The Petitioners have already dealt with hereinabove under the heading "Jurisdiction, Power and Authority to frame the Impugned Regulations", the manner in which Respondent TRAI has derived his power to frame the impugned Regulations, namely by first seeking an amendment to the ILD license Agreement, and then framing the impugned Regulations. Even in the Consultation Papers, leading to the recommendation of 16 December 2005 and the Consultation Paper leading to the first impugned Regulation of 07 June 2007 the Respondent has consistently construed access to Cable Landing Station as not being interconnection at all places and at all times the reference has been to "access" with no reference to "Interconnection" and which is the correct position. The relevant paragraphs and their extracts in this regard, are as follows:

"4.2.2The Landing station owners provide access to submarine cable bandwidth purchased by the service providers from cable consortium/ carriers under the provisions of landing party signatory agreement signed between cable owners and landing station party. As per the existing terms & conditions of their licenses they are not mandated to provide the landing facilities for new cables planned by Competitive operators/international carriers.

4.3.4 Another stakeholder strongly emphasized that cable-landing station is a bottleneck facility and the incumbent operator has been able to inhibit the growth of competition in access to the international bandwidth. Most of the cable systems are accessible only through the CLSs of incumbent operator

and other ILDO's and ISP's have been finding it difficult to access the bandwidth purchased by them directly from the owners of the other cable system.

4.3.5 Many other stakeholders stated that there are limited numbers of cable landing stations (CLS) in the country and the existing landing stations are under the control of only two operators, though 5 ILDO licenses have been issued. The stakeholders requested the regulator to take some immediate short-term measures to address the issue of access to cable landing station and at the same time initiate steps on long-term basis for mandating open access to the CLS for new cables.

4.4.6 Moreover, the measures to promote competition in IPLC segment in India are designed to encourage the emergence of new competitors who would invest in more infrastructures. The ability of new licensees to compete would be greatly assisted by their ability to buy capacity on a range of cables, as well as by installing their own cables. This will need the permission for landing of new cables by an operator at the CLS owned by competing operators. This would both increase the capacity terminating in India and increase the speed with which new competitors can start to operate effectively. This requires that the access to submarine cable capacity and landing facilities at a CLS be open and non-discriminatory, both commercially and physically. The terms and conditions for such access including the charges should be finalized under regulatory supervision and the operators should be required to publish the terms & conditions as to how other ILDOs can access the cable capacity as well as landing facility commercially. An enabling provision in the ILDO license is required for this.

4.5.3... Also, it is not economically prudent to duplicate the CLS facilities for every new cable, as it is technically feasible & commercially desirable as well as efficient to land multiple cables on same CLS. Therefore, access to the international capacity as well as landing facilities need to be mandated and the terms of conditions of such access to be fair, transparent and non-discriminatory. For this the regulator is required to fix the cost based access charges as well lay down the board principal underlying the terms and conditions.

4.6.2 The ILDO owning the Cable Landing Station should also be mandated to publish, with prior approval of the Regulatory, the terms and conditions

for all such Access provision. Regulator may also determine and specify cost-based access charges through its regulation".

53. The petitioners have further submitted that when there is a lack of jurisdiction to frame regulations, on the basis of an amendment to a contract, was pleaded in the Writ Petition, the respondent then took the stand in its reply to stay vacate application, Writ Appeal filed before the Division Bench on 15.04.2013 as well as in the Counter Affidavit before this Court on 28.11.2013, that this is an issue of interconnection in terms of sub clauses (ii) & (iii) of 11(1)(b) of TRAI Act, 1997. In this regard, the Respondent relied upon a license clause, clause 17.9 of the ILD License which equates access and interconnection. The relevant extract in this regard reads as follows:-

"133(a) Firstly, the Writ Petitioner is unnecessarily attempting to create confusion by arguing that the word access and interconnection are separate and different. The license agreement signed by Writ Petitioner does not distinguish between the word access and interconnection. Clause 17.9 of LID License clearly uses the word "access" or "interconnection".

54. On the contention of TRAI, as regards License Clause 17.9, the petitioners have contended that if the said clause has already been in existence from the execution of the License Agreement, there was no need for the Respondent TRAI to seek amendment to the license terms, vide its recommendation of 1612.2005 and the consequent amendment of the License of Clause 2.2 (C), allegedly empower the TRAI to frame regulation in this regard. Respondent is now seeking to rely upon license provision to construe a Regulation, when the Act and the Regulation are self contained code and interconnection has been elaborately defined in the Regulation themselves. Clause 17.9 reads as follows:

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"17.9 The charges for access or interconnection with other networks shall be based on mutual agreements between the service providers subject to the restrictions issued from time to time by TRAI under TRAI Act, 1997".

Interconnection has been construed in the license agreement under the definition clause, Clause 16 which reads as follows:

"16. "INTERCONNECTION" is as defined by the TRAI vide its regulations issued in this respect."

55. The petitioners have further submitted that Clause 17.9, read with the definition of 'Interconnection' leads it to the Respondent to construe 'interconnection' in its Regulations. Had this been a case of interconnection, all that was required for the Respondent was to act in terms of the three Regulations relating to interconnection dealt with in detail above, which occupy the legislative space in this regard as mentioned in the earlier sections. The response of the learned counsel for TRAI has been to give an interpretation to the definition of Interconnection by giving a disjunctive meaning, contrary to the definition of Interconnection where equipment, network, services have been read conjunctively.

56. On the above, the writ petitioners have further submitted that the term "Interconnection" has been consistently construed in the same manner and Interconnection only contemplates a situation whereby services, equipment and network of one service provider are connected to the services, equipment and network of other service providers, so that the customers of one service provider can access the customers, services and networks of other service providers,. Such an interpretation is contrary to the plain and literal meaning of the Regulations. In fact, the definition of interconnection has undergone amendments in respect of the Register of Interconnect Agreements Regulations 1999 (2 of 1999), where at one point the Respondent had amended the said definition by inclusion of and/or in February 2004, which again was amended on 31.12.2004 to restore conjunctive nature of the interconnection definition. The original definition of interconnection as on 31.08.1999, amendment of 3rd February' 2004 and amendment of 31.12.2004 are set out herein below:-

"31st August, 1999: The Register of Interconnect Agreements Regulations 1999 (2 of 1999)

2. In these Regulations, unless the context otherwise requires:

iv. "interconnection" means the commercial and technical arrangements under which service providers connect their equipment, networks and services to enable their customers to have access to the customers, services, and networks of other service providers" 3rd February , 2004.

The Register of Interconnect Agreements (First Amendment) Regulations 2004 (2 of 2004)

1. Clause (iv) of Regulation 2 of the Principal Regulation shall be substituted to read as under.

"Interconnection" means the commercial and technical arrangements under which service providers connect including through electro-magnetic signals, their equipments, networks and services to enable their customers to have access to the customers, services and/or networks of other service providers.

31st December, 2004: The entry under clause (iv) of regulation 2 of the Principal Regulation shall be substituted to read as under:

"Interconnection means the commercial and technical arrangements under which service providers connect their equipment, networks and services to enable their customers to have access to the customers, services and networks of other service providers."

57. The petitioners have further submitted that the respondent in its sur-rejoinder of 06.02.2014 has taken yet another stand, that the definition of interconnection cannot be construed in terms of other regulations made by respondent TRAI, which gives it a restricted meaning. The said paragraph is extracted hereunder:

"5(k) In this connection, it is submitted that the word interconnection in the Act is not defined. Meaning of such a word cannot be understood and its entire amplitude cannot be determined by definition made in a regulation. The definition of interconnection given by the Authority in certain regulations are relevant for the purposes of those particular regulations. The word used in the Act has to be understood in its widest amplitude and cannot be given a restricted meaning that too on the basis of definition given in a regulation."

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58. In response of the above, the petitioners have further submitted that interconnection as defined and construed by itself in three distinct Regulations with multiple amendments, defined it in a manner which clearly excludes the infrastructure sharing arrangement under the impugned Regulations from being

interconnection and has therefore, sought to distinguish the applicability of these Regulations being allegedly in a different context. This contention of the respondent is negated by its own Regulations. The first impugned Regulation of 07.06.2007 and the third impugned Regulation of 21.12.2012 at clauses 2(x) and 2(p) respectively both adopt words and expressions used in these Regulations but not defined shall have the meaning assigned to them in the Act or Rules or other Regulations. Both the clauses are identically worded and are extracted herein below:-

"2(x) all other words and expressions used in these regulations but not defined, and defined in the Act and the rules and other regulations made thereunder, shall have the meaning respectively assigned to them in the Act or the rules or other regulations, as the case may be."

"2(p) all other words and expressions used in these regulations but not defined, and defined in the Act and the rules and other regulations made thereunder, shall have the meanings respectively assigned to them in the Act or the rules or other regulations, as the case may be."

59. In view of the above categorical adoption of definitions, not defined in the impugned regulation, but defined in other regulations of respondent TRAI, it is patently false, erroneous and misleading for the Respondent TRAI to assert that the definition of interconnection, interconnection charge, interconnection seeker and interconnection provider in other Regulations cannot be adopted.

60. On the Rules of statutory interpretation, in **NAIR Service Society v. Dr.T.Beermasthan and Others [(2009) 5 SCC 545]**, wherein, at Paragraphs 32 and 54, held as follows:

"32. In our opinion an accepted practice which has been followed by PSC for so long a period should not be lightly disturbed, unless there are compelling reasons. If two interpretations of the Rules are possible, the interpretation which favours the practice which was being followed for a long period should ordinarily be preferred unless it is clearly in violation of the Rules."

54..... If the statute is clear as it is in this case, it has to be read as it is, and the literal rule of interpretation is to be applied. In our opinion

intention seeking is ordinarily to be done only when the statute is not clear."

61. In **Gurudevdatto Vksss Mary Adit and Others vs. State of Maharashtra and Others** reported in (2001) 4 SCC 534, at Paragraph 26, the Hon'ble Supreme Court held as follows:

"26. Further we wish to clarify that it is cardinal principle of interpretation of statute that the words of a statute must be understood in their natural, ordinary or popular sense and construed according to their grammatical meaning, unless such construction leads to some absurdity or unless there is something in the context or in the object of the statute to suggest to the contrary. The golden rule is that the words of a statute must prima facie be given their ordinary meaning. It is yet another rule of construction that when the words of the statute are clear, plain and unambiguous, then the courts are bound to give effect to that meaning, irrespective of the consequences. It is said that the words themselves best declare the intention of the law-giver."

62. The petitioners have submitted that expression "interconnection" has a well understood connotation amongst the people conversant with the subject matter. Such expressions relied to be given the meaning in which it is understood by persons in the industry since they are the one who are familiar with that expression.

63. In **The Tata Engineering and Locomotive Company Ltd Vs. Gram Panchayat Pimpri Waghere** [AIR 1976 SC 2463], at Paragraph 14, the Hon'ble Supreme Court held as follows:

"14. The word "house" is not defined in the Act. This Court in *Ramavtar v. Assistant Sales Tax Officer, Akola* MANU/ SC/0320/1961: [1962]1SCR279 said that the correct approach is to construe the word in that sense which people conversant with the subject matter with which the statute is dealing would attribute to it."

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64. In **Gui-ATI and Company Vs. The Commissioner of Sales Tax, U.P. Lucknow** [MANU/SC/1338/2013], the Hon'ble Supreme Court, at Paragraphs 16, 17 and 18, held as follows:

"16. It is trite that there is no fixed test for classification of a taxable commodity and the most

commonly employed is the "common parlance test". Whether a particular article will fall within a particular tariff heading or not has to be decided on the basis of the tangible material for evidence to determine how such an article is understood in "common parlance" or in its popular sense meaning. This is to say, comprehending the term in same context as those who are concerned with it and it is that the sense in which they understand it that constitutes the definitive index of the legislative intention, when the statute was enacted. (A. Nagaraju Bros. v. State of A.P. MANU/SC/1585/1994: 1994 SUPP (3) SCC 122; Delhi Cloth and General Mills Co. Ltd v. state of Rajasthan MANU/SC/0761/1996: (1996) 2 SCC 449; CCE V. Wochardt life sciences ltd. MANU/SC/0267/2012: (2012) 5 SCC 585]

17. The use of "common parlance" test and its advantage over the "etymological" test has been very aptly explained by this Court in context of term "furniture" in Craft Interiors (P) Ltd. v. CCE Manu/SC/4823/2006: (2006) 12 SCC 250. This Court has observed as under:-

18. We may add that sometimes chairs, beds, tables, desks, etc. are affixed to the ground, but nevertheless they will still be called as furniture (one may recall the fixed bed in Sherlock Holme's story "the Speckled Band"). This is because when we interpret a word we should not only see the dictionary meaning but even more the popular meaning which the word has acquired in common parlance. As stated by K.L. Sarkar (in his book Mimansa Rules of Interpretation) "the popular meaning overpowers the etymological meaning."

19. To give an example, the word "pankaja" literally means born in mud. The word "panka" means "mud" and the word "ja" means, "which is born in". Hence the etymological meaning of the word "pankaja" is that "which is born in mud". However, by popular usage the word "pankaja" has acquired a particular meaning in common parlance i.e. lotus. This meaning will, therefore, prevail over the etymological meanings".

20. Similarly, the word "furniture" has a meaning in common parlance which every layman understands. It commonly refers to chairs, desks, tables, beds, etc. Hence we should give it this popular meaning.

18. In our considered view, the words with which we are concerned must be construed in the sense which

is imputed to them by the persons who deal in and who consume such articles and therefore, we should now explore the meaning and usage of terms "foodstuffs", "food colours" and "food essences" in their common parlance."

65. In **Union of India & Another Vs. Delhi Cloth and General Mills Co. Ltd & Ors. [AIR 1963 SC 791]**, the Hon'ble Supreme Court, at Paragraph 13, held as follows:

"13. On a consideration of all these materials we have no doubt about the correctness of the respondents' case that the raw oil purchased by the respondents for the purpose of manufacture of Vanaspati does not become at any stage "refined oil" as is known to the consumers and the commercial community".

66. It is also an accepted rule of interpretation that the courts will not supply or add words. Infact the submission of TRAI is that the expression "access" should be added to section 11(1)(b) (ii) to (iv). This is clearly impermissible as held by the Hon'ble Supreme Court in **Dadi Jagannadham v. Jammulu Ramulu & Others** reported in **(2001) 7 SCC 71**, at para 13, held as follows:

"13. The settled principles of interpretation are that the court must proceed on the assumption that the legislature did not make a mistake and that it did what it intended to do. The Court must, as far as possible, adopt a construction which will carry out the obvious intention of the legislature. Undoubtedly if there is a defect or an omission in the words used by the legislature, the court would not go to its aid to correct or make up the deficiency. The Court could not add words to a statute or read words into it which are not there, especially when the literal reading produces an intelligible result. The court cannot aid the legislature's defective phrasing of an Act, or add and mend, and, by construction, make up deficiencies which are there."

67. In the context of the very expression "interconnection" the TDSAT in the case of **BSNL v. TRAI [dated 23.01.2009]**, held that the provision of domestic lease circuit does not constitute interconnection. It is worthwhile to extract Paragraphs 24 and 27, as follows:

"24. The next contention of the Appellants is that provision of DLC does not constitute an 'Interconnection' and therefore the impugned Regulations are without jurisdiction. According to the Appellants, the definition of a leased circuit either by the Authority or by the International Telecom Union (ITU) shows that it is a dedicated link to be provided by a service provider for the exclusive facility of a consumer and is therefore not interconnection. Their connection is that since the impugned Regulations are issued invoking the provisions of Section 11 of the TRAI Act and since this section deals only with issues of interconnection, and since the leased circuit does not constitute interconnection, the impugned Regulations are void ab initio. The contention of the Respondent on the other hand is that the Appellants are trying to take a very narrow definition of the term interconnection and that the Appellants are trying to take a very narrow definition of the term interconnection and that the Appellants are trying to take a very narrow definition of the term interconnection and that the definition provides for a situation where the customer of one service provider may have access to the customers of other service providers or to the networks alone or services alone of other service providers. Viewed in this context, he argues, leased circuit does constitute interconnection and that the impugned Regulations are therefore perfectly legal.

27. There are two main aspects in dealing with this issue. Firstly, a perusal of the definition of the term 'interconnection' shows that it is intended to enable one set of customers to have access to another set of customers. The Respondent has argued that it is not essential that there should be two sets of customers and that it is sufficient if a customer of one service provider has access to the service of another service provider."

The TRAI has also understood the term interconnection in the context of the customers of one service provider accessing the customers of other service provider contemporaneously.

68. The petitioners have further submitted that access to CLS or access facilitation is not a case of interconnection as defined, construed and understood by respondent, in its different regulations, is evident from the definition of charges prescribed for access facilitation. As already stated hereinabove, as well as in the Writ Petition, the interconnection, interconnection seeker, interconnection

provider, interconnection charges and interconnection usage charge have been given identical definitions in two distinct Regulations. Had this been a case of interconnection all that the Respondent TRAI required to do was to adopt and include these definitions in the impugned Regulations. However, in recognition of the fact that this is not a case of interconnection, the Respondent therefore, has construed the charges to be paid under the impugned Regulation as access facilitation charges and rightly so since the owner of the CLS is facilitating access to the international bandwidth through the Cable Landing Station.

69. On the infrastructure sharing, TRAI presented a Case Study India in the ITU ASP COE Workshop on Infrastructure Sharing, dated 31st August 2010 to 03rd September 2010 at Bangkok, Thailand. The presentation states that sharing of Copper local loop is not mandated. The presentation clearly in slide 36 & 37 classifies the Cable Landing Station as a case of Infrastructure Sharing. In the conclusion slide No.42, the following is stated:

(i) Regulators and policy makers should encourage sharing of infrastructure.

(ii) Passive infrastructure sharing among service providers on mutual agreement basis may be preferred rather than regulatory mandates.

(iii) Infrastructure sharing is usually commercially driven, however constant regulatory watch and time to time appropriate broad guidelines are necessary.

70. TRAI Consultation Paper No.1/2011, dated 14th January, 2011, on the issues related to Telecommunications Infrastructure policy. The Consultation Paper at Page 25 classifies Cable Landing Station as an infrastructure which requires to be shared with and accessed by other eligible Service Providers as follows:

"D3 - Cable Landing Stations

1.31. A submarine cable landing station has the following infrastructure to which other eligible service providers will need access:

- Fibre Distribution Frame
- Equipment Room
- Network Operation Centre (NOC)
- Digital Distribution Frame
- Backhaul Termination

- Landing Facilities

71. The service provider seeking to use submarine cable landing facilities need to collocate their equipment in the owner's premises and for this they need facilities including building space, power, environment services, security and site maintenance." The Consultation Paper at Page 24 & 25 states as follows:

"The issues relating to long distance networks are supported by regulations. This consultation paper does not attempt to deal with these matters. However, cable landing stations being infrastructure elements that are important to promote competition in international bandwidth the Authority invites comments from the stakeholders on the methods of encouraging more ILDOs to set up cable landing stations."

72. TRAI Recommendations on Telecommunications Infrastructure Policy dated 12 April' 2011, also classifies Cable Landing Stations as an infrastructure and covers the same under the Infrastructure Policy recommended by it. Relevant extracts of the recommendations are reproduced below:

"5. This infrastructure policy covers various elements of the infrastructure like optical fibre network, towers, cable landing stations, IP networks, evolving technologies like IBS, DAS etc." "1.5 In view of the above, it will be perhaps appropriate that rather than looking at it from the point of view of a particular category of service providers, the network is conceived as a combination of infrastructure elements capable of delivering various services. Accordingly, following infrastructure elements, which are of key importance in meeting the requirements of telecommunications infrastructure, have been discussed in the subsequent paragraphs:

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- Towers
- In Building Solution (IBS)
- Distributed Antenna System (DAS)
- Cable Landing Station (CLS)".

1.102. Infrastructure for providing international bandwidth consists of three parts. Submarine optical fibre cable network which reaches through sea in the country, cable landing station where these optical fibre cables land and back haul long distance network which distributes the landed bandwidth across the country and finally access network which transports the bandwidth to end customers.

1.103. The first two parts, the Optical fibre cable network and cable landing station, fall under ILDO licence and ISP licencees having permission to establish submarine cable landing stations for International Gateway for Internet. Developing the optical fibre network through sea is the most capital intensive component. In comparison, cable landing stations where multiple submarine cables are terminated is far less capital intensive. An ILDO can develop its own optical cable network, become one of the members of consortium developing the optical fibre cable network or can buy bulk bandwidth on this cable network. Similarly ILDOs can have their own cable landing station or access other's cable landing station by paying access facilitation charges as per the RIO approved by TRAI.

1.104. Submarine cables are getting added according to country's bandwidth requirement at regular interval. Three to four new cables like GBI and WACS are also planned for landing in India. Moreover advancements in technology like DWDM have enabled multifold bandwidth to be derived from the same fibre. A single fibre itself can provide a capacity of 1 Terabit. Therefore, there is no constraint on cable side. The new cables are either landed on existing cable landing station or on a new landing station depending upon the space available in the CLS and requirement of diversity for routing of traffic. Currently there are 24 ILDOs providing ILDO services in the country. However, Cable landing stations are owned and managed by only four major ILDOs. Other ILDOs use the CLS facilities of these major ILDOs and pay according to RIO approved by TRAI on 26.10.2007 and on 25.05.2009.

1.105. New landing stations will come up based on new cables planned for landing. The decision of setting up of the cable landing station gets taken at the investment stage. In case of ILD operator owning the cable, the cable landing decision is taken by itself. For consortium cable, number of cable landing stations in a country are generally get decided at the

investment planning stage and finalisation of construction and maintenance agreement. In both the cases once decision of setting up of CLS and its location is finalised, the uncertainty in terms of various approvals will have to be removed at the earliest in view of huge investments on submarine cable system and early decision on approval or otherwise is required.

1.106. The Authority recommends that a single window system for providing clearance to the operators intending to establish cable landing station should be established at DoT. The operator desiring to establish cable landing station should submit all the forms required by all concerned ministries to this single window agency and final approval of clearance should be intimated by the single window agency within six months." Attention of this Court was invited to TRAI Recommendations, dated 12th April 2011.

73. The Telecommunication Development Bureau (TDB) of the International Telecommunication Union (ITU) and the Telecom Regulatory Authority of India (TRAI) jointly organized the "ITU/TRAI International Training Programme (ITP) for 2012", from 2-4 April 2012, in Hyderabad wherein presentations were given by TRAI on the issue of "interconnection" and on the subject of "Infrastructure Sharing and Open Access to Cable Landing Stations". The petitioners have further submitted that a bare perusal of both these presentations clearly bring out that Cable Landing Station access is not a case of interconnection and Cable Landing Station is a case of infrastructure sharing as per the understanding and stand of Respondent in its presentations given to the international community in the year 2012. It is relevant to note that the above block diagram of essential facility of a sub marine cable system reproduced above very clearly shows this as infrastructure sharing and therefore there is no question of any interconnection.

74. It is relevant to note that all the cases of infrastructure sharing namely, towers, in building solution (Towers/ telecom infrastructure in any building, distributors antenna system and cable landing station has been the subject matter of recommendation by the TRAI vide its recommendation of 12.04.2011. In none of the other category is there any regulation/ intervention by the TRAI in any manner as this is in clear recognition of the fact that access to CLS is a case of infrastructure sharing and not interconnection.

75. On the presentations on Interconnection and Infrastructure Sharing of TRAI, it is submitted that two separate presentations relating to two different telecommunication regimes, one of infrastructure sharing and the other of interconnection and these two presentations are relevant, as they have been made by the very same person and functionary of TRAI, who has deposed to all the pleadings of the Respondent TRAI before this Court and reflects the admitted position. The salient and significant features of the presentations are as follows:-

"In the interconnection presentation the said deponent has construed interconnection and interconnection usage charge which are defined as follows:-

* Interconnection:- Two networks interconnect so as to enable their respective customers to communicate with one another".

* Interconnection Usage Charges (IUC): "IUC are charges payable by one telecom operator to the other for use of the latter's network either for originating, terminating or transiting / carrying a call".

76. According to the petitioners, the slide at page 313 of the additional typed set of documents, filed by the petitioners, on 07.03.2014, refers to interconnection and interconnection usage charge, with user like end to end service as if it were a single seamless network. This essentially means that there are customers at both the ends of two different networks, which in no manner bare any resemblance to access facilitation. Therefore, it is very clear from the presentation that interconnection has been construed and regulated by the TRAI in the context of voice telephony because that is the manner in which the schematic diagram has been set out. Had cable landing station been an interconnection issue, as is being claimed now as an afterthought, the Respondent would have most certainly dealt with CLS in this presentation, however chose not to do so and it has made part of a separate presentation on infrastructure sharing dealt with in the next paragraph.

77. A presentation on "Infrastructure Sharing and Open Access to Cable Landing Station" was separately made by the Respondent. In this presentation access facility and co-location has been dealt with. What is extremely relevant to note in this presentation is that a schematic diagram of a Cable Landing Station is set out which very clearly demonstrates that there are no two telecommunication operators interconnecting in the

Cable Landing Station, the point of presence of the other telecom operator is shown after the cable has exited from the Cable Landing Station beyond the backhaul circuit.

78. Section 11(1)(b)(iv) relating to revenue sharing is not applicable in the case of access to CLS. Section 11(1)(b)(iv) regulate arrangement amongst service providers of sharing their revenue derived from providing telecommunication services. Reading of the above clause discloses that it is the revenue arising out of providing a common service provided to a customer which has to be shared between the various interconnecting service providers. In nutshell, this clause as evident from the above relates to sharing of revenue generated by provision of a service by two or more interconnecting operators to the end customers.

79. As regards the Respondent's contention that Section 11(1)(b)(iv) relating to sharing of telecommunication revenue is concerned, the same, in no manner covers the present case, as there is no case of revenue sharing and the eligible ITE is paying cost based access charges to the owner of the CLS for accessing its own bandwidth through the access facilitation set up installed by the owner of the CLS. The said provision relates to sharing of revenue out of provision of telecommunication services in which it is a situation where provision of telecommunication service by two or three operators in conjunction generates the revenue, which is then apportioned between the different operators. In this regard, the Respondent has framed "The Telecommunication Interconnection (Charges and Revenue Sharing) Regulation, 2001" and the "Interconnection Usage Charges Regulations, 2003" along with their subsequent amendments have been framed specifically for commercial arrangements envisaged by this provision and these Regulations deal with Revenue sharing arrangement as spelt out in Regulation 4 of these Regulations. It is important to note that these Regulations also define interconnection, interconnection seeker, and provider etc. clearly disclosing that access facilitation cannot be interconnection. In the present case there is no question for provision of service by two or more operators, as far as the CLS is concerned the operator who owns the capacity on the submarine cable accesses its own capacity through the CLS owned by the Petitioners, for which, it pays Access Facilitation Charges and thereafter it is the same capacity belonging to the same operator which exits the CLS and is connected to the domestic network. There is no question of any revenue being generated by joint activities of two service providers accruing out of a third party or a consumer. It is surprising that the Respondent has concealed its own Regulation in this regard towards advancing a patently erroneous argument.

80. The petitioners have contended that a bare reading of "The Telecommunication Interconnection (Charges and Revenue Sharing) Regulation, 2001" relating to revenue sharing discloses the network / equipment to which it is applicable. In fact, the definition Section at Clause 2 defines all the services to which it is applicable, which nowhere mentions Cable Landing Station. There are two Schedules appended to the said Regulation which refer to revenue sharing for basic services and revenue sharing for cellular mobile. Had access to CLS been a case of revenue sharing, the Respondent TRAI need not have brought out a separate regulation, all it needed to do was to bring forth a third Schedule to the Regulation by amending the same and including access facilitation in this Regulation.

81. It is also their case that the purport of the said statutory provision i.e. 11(1)(b)(iv), read with the Regulations framed in terms thereof very clearly relates to voice telephony and no other segment like Cable Landing Station. An important aspect in the case of revenue sharing as envisaged and covered under Section 11(1)(b)(iv) of the TRAI Act is that two or more service providers provide service to consumers and the revenue earned from that customer by one of the service provider is shared amongst these service providers as per the above Regulations as per the interconnection usage charges mandated in the Regulations. For example, a call by a mobile consumer 'X' belonging to service provider 'A' to a mobile consumer 'Y' belonging to service provider 'B' in the same service area, the charges for the call are paid by mobile consumer 'X' to service provider 'A'. Since the call is completed in the network of service provider 'B', service provider 'A' pays termination charge for the call to service provider 'B' out of the revenues which it has earned from mobile consumer 'X'. This is a classic case of revenue sharing and the termination charges for termination of the call are stipulated in Interconnection Usage Charges Regulations of the Respondent. The second example would be a call by a mobile consumer 'X' belonging to service provider 'A' to a mobile consumer 'Y' belonging to service provider 'B' in the different service area. Service provider 'A' will handover such call to a national long distance service provider (NLDO) i.e. service provider 'C', who will carry the call to the service provider 'B' and handover the call for termination / completion in the network of service provider. In this case the service provider 'A' provides the origination services, service provider 'C' provides the National Long Distance Carriage services and service provider 'B' provides the termination / completion services. The charges for the call are paid by mobile consumer 'X' to service provider 'A'. Since the call is carried by service provider 'C' by providing domestic carriage services

and completed in the network of service provider 'B', service provider 'A' pays domestic carriage charges to service provider 'C' and termination charge for the call to service provider 'B' out of the revenues which it has earned from mobile consumer 'X'. This is also a classic case of revenue sharing and the termination charges for termination of the call are stipulated in Interconnection Usage Charges Regulations of the Respondent.

82. In response to the plea that providing access to CLS is a Telecommunication service, the writ petitioners have contended that at Para 136 of the Counter Affidavit and which has also been submitted in the course of the hearing, TRAI has made a submission that the equipment used in a CLS is squarely covered under Section 3(i)(AA) and that under Section 2(1)(k) "Telecommunication Service" is defined and therefore, this is a case of Telecommunication Services and not infrastructure sharing and that the equipment used by the owner of the CLS is a Telecommunication Service, it is case of the petitioners that the above contention is not comprehensible, because the issue is not whether providing access to the CLS is a telecommunication service or otherwise, the issue is whether the Respondent has the power to regulate the charges for infrastructure sharing. This infrastructure sharing is only between operators licensed by the Telegraph Authority under Section 4 of the Indian Telegraph Act, 1885. Irrespective of whether the infrastructure sharing being provided by owner of CLS to eligible ITEs is a telecommunication service, the fact of the matter is that access facilitation services does not flow out from the services which OCLS as an ILDO is licensed to provide and which is covered under scope of service of its license agreement. This is evident from Clause 2(h) the definition of eligible Indian International Telecommunication Entity. In the impugned Regulations of 2012 the said definition reads as follows:-

"Clause 2(h) "eligible Indian International Telecommunication Entity" means -

(i) an International Long Distance Operator, holding licence to act as such, and, who has been allowed under the licence to seek access to the international submarine cable capacity in submarine cable system landing at the cable landing stations in India; or

(ii) an Internet Service Provider, holding valid international gateway permission or licence to act as such, and, who has be allowed under the licence to seek access to the International submarine cable capacity in submarine cable system landing at the cable landing stations in India;"

83. The petitioners have further submitted that the Respondent-TRAI is conscious of the fact that providing access to infrastructure like cable landing station is not telecommunication service. That is the reason why while notifying the rates at which telecommunication services shall be provided under the Act, by reason of the Telecommunication Tariff Order issued in March 1999 and as amended from time to time, the charges for the provision of access to cable landing station has not been specified. However, if as contended now by TRAI, the provision of access to CLS is "Telecommunication Service" then the power to determine and notify the rates is found in Section 11(2) of the Act and the same will have to be done by means of an order notified in the Gazette. This would immediately have made the said order subject to an appeal under Section 14 of the Act. The Respondent TRAI cannot therefore on the one hand seek to issue a regulation and on the other when confronted with the submission that the same is ultra vires Section 11(1)(b), take up the plea that they are merely regulating telecommunication service by prescribing the rates. This is without prejudice to the submission of the petitioners that the provision of access to CLS is not a telecommunication service as per the scope of service clause of the License Agreement for the ILD services held by the Petitioner. Had this been a case of telecommunication service the Respondent TRAI would not have dealt with it as infrastructure sharing which they have in the various recommendations, presentation etc. as set out herein above.

84. The petitioners have further submitted that the primary reasons articulated by TRAI for specifying the charges payable by a person seeking access to a cable landing station or for regulating such charges is that there is abuse of dominant position by the owners of cable landing station in India and that they are in the nature of a monopoly and they indulged in practices which deny access to cable landing station on fair and non discriminatory terms. If this is the justification for the impugned regulation then the same is beyond the powers of TRAI in terms of discharging its functions under Chapter III of the TRAI Act relating to Section 11,12 & 13 of the said Act. The Parliament has enacted the Competition Act, 2002 (Act 12 of 2003) with the express object of establishing a commission to prevent practices having adverse effect on competition, to promote and sustain competition in market, to protect the interest of consumers and to ensure freedom of trade carried out by other participants in the markets. Section 3 deals with prohibition of anti-competitive agreement and section 4 deals with prohibition of abuse of dominant position. Section 18 mandates the commission to eliminate such practices and Section 19 to 26 sets out an elaborate procedure for inquiry into such abuse of dominant positions by an enterprise and section 27

empowers the commission to pass orders to restrain such abuse of dominant position, remedy the same, impose penalty, award compensation and direct that agreement shall stand modified as specified in the order of the Commission. The Competition Act has been given an overriding effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force by virtue of Section 60 of that Act. It is therefore apparent that the parliamentary intent is to vest the exclusive power of prohibition of abuse of dominant position in the Competition Commission of India, which necessarily has amongst others a Member with expertise in law. In fact, a retired judge of this Court is a member of the Competition Commission, the procedure prescribed is adjudicatory and quasi judicial, any allegation or complaint of abuse of dominant position will have to be inquired into and investigated by the Director General of the Competition Commission, where after opportunities given to the complainant as well as to the person accused of abusing dominant position. There are valuable safeguards contained in the Competition Act before any such conclusion is arrived at whether any Enterprise is abusing its dominant position. In the present case the TRAI without holding any such inquiry and without discussing the relevant facts and submissions of the petitioners to substantiate that there is no such abuse of dominant position has arrived at conclusion and chosen to exercise the power to make regulation. In fact, Section 21 of the Competition Act obligates the TRAI if they were of the view that the owners of cable landing station were abusing the dominant position to make a reference to Competition Commission. Section 21 is set out herein below:

"21. Reference by statutory authority (1) Where in the course of proceedings before any statutory authority an issue is raised by any party that any decision which such statutory authority has taken or proposes to take, is or would be contrary to any of the provisions of this Act, then such statutory authority may make a reference in respect of such issue of the Commission.

(2) On receipt of a reference under sub-section (1), the Commission shall, after hearing the parties to the proceedings, give its opinion to such statutory authority which shall thereafter pass such order on the issues referred to in that sub-section as it deems fit:

Provided that the commission shall give its opinion under this section within sixty days of receipt of such reference."

This clause contains provisions relating to the circumstances under which a reference can be made to the Commission by

statutory authorities. It provides that if in the course of a proceeding before any statutory authority, entrusted with the responsibility of regulating any goods or service or market therefor, a party has raised an issue that the decision taken by the statutory authority would be contrary to the provisions of the Bill, then the statutory authority shall be bound to make a reference to the Commission. The commission shall after hearing parties to the proceedings, give to the statutory authority its opinion and the statutory authority shall thereafter pass its orders.

85. The Competition Commission would have been obliged to investigate in case a reference was made by the Respondent on the allegation on misuse of dominance and would have provided its findings to the Respondent. It is only thereafter, that the power could have been exercised, if at all by the Respondent. This aspect has assumed particular significance in view of the forceful and repeated submission made by TRAI that the owners of CLS are abusing the dominant position and therefore it became necessary to regulate, firstly by mandating prior approval of the rates and thereafter by TRAI itself specifying the rates.

86. It is submitted that had the case been referred to the Competition Commission, the Commission would then have considered the same under sub section 4 of Section 19, amongst other factors the following, namely (1) Size and Resource of the enterprise, (2) Economic power of the enterprise, (3) vertical integration of the enterprises, whether there are any entry barriers including barriers such as regulatory barriers, financial risk, high capital cost of entry, technical entry barriers, economies of scale, high cost of substitutable service, etc. It would then perforce have found that the complainants have greater economic power and that there are no entry barriers and if they had so wanted they could have easily set up their own cable landing station.

87. Though respondent-TRAI has made two fold submissions on access to CLS, being a bottleneck facility, which is allegedly the basis for the impugned Regulations and thereafter has made out an entirely new case in their response to sur-rejoinder by alleging that the petitioners exercise a monopolistic power by virtue of having more CLSs and consequently, controlling access to CLS, the petitioners have further submitted that CLS is not a Bottleneck Facility. The Respondent TRAI has sought to justify the impugned regulations on the basis of its recommendations of 16.12.2005 (Page 117 Volume I of the Petitioner's Typed Set) where it had recommended the amendment of clause 2.2(c) to continue to ensure that access to CLS continues to remain as a bottleneck facility.

88. It is relevant to note that when the first ILD License Agreement were mandated by the licensor after recommendations by the Respondent TRAI, Clause 2.2(c) of the ILD License Agreement mandated that access to CLS would be a bottleneck facility for a period of 3 years. Thereafter, in 2005 the TRAI on its own made recommendation to the DoT to remove the sunset clause and permanently include access to CLS as a bottleneck facility. The Respondent TRAI furthermore has brought out the three impugned Regulations on this basis. Significantly, the Respondent has admitted that debottlenecking has taken place in the consultation paper of 22.03.2012 leading to be impugned October 2012 Regulation.

89. As regards the contention that there is no Monopoly, the petitioners have submitted that for the first time in the pleadings before this Hon'ble Court and that too in the sur-rejoinder of 06.02.2014 a new case has been made out namely that the Petitioners have a monopoly by virtue of controlling access to CLS. In fact, the arguments of Monopoly which is made for the first time is reflected in Para 15 of the sur-rejoinder, where it has been stated that allegedly high Access Facilitation Charges are responsible for higher cost of IPLC and which enables the petitioners to have higher overall revenues. The submission made by the Respondent in this regard being of relevance are extracted herein below:

"15. In reply to Para 11(a) it is submitted that the Petitioner is unnecessarily quoting various revenue figures to confuse this Hon'ble Court. The Petitioner is trying to emphasis on the fact that revenue involved in the cable landing station business is very small. Therefore, it is necessary to explain the whole business and the associated revenue with the entire business and not the revenue of the cable landing station alone.

Indian International long distance operator/ Internet Service Provider (ISP) require international private leased circuits (IPLC) to provide internet, broadband and voice services to the consumers. BPO/ KPO also require IPLC for their business. Now these ILDOs/ ISPs / KPOs/ BPOs have two choices, either they can buy IPLC circuit from the operators like, M/s.Tata and Bharti, who offer IPLC rates, which includes price of international bandwidth as well as cable landing station charges. The service providers can also buy the international bandwidth from the foreign operators who are partners in the consortium but do not own the

cable landing station in India. In this case, they have to additionally pay Access Facilitation Charges to the owners of cable landing stations. International bandwidth without cable landing station charges is available at very competitive prices as lot of bandwidth is available in the submarine cable. Since operators like Petitioners are also in the same market offering consumers/ ISPs IPLC directly, it is in their business interest to have higher access facilitation charges so that the total price of IPLC remains high for other Indian ILDOs and they are able to sell the product i.e. IPLC which includes cable landing station charges at high prices to the ISPs / Indian consumers'. Though revenue out of access facilitation charges may be less, but it helps operators like Petitioners to have high prices for IPLC for India and not allowing operators, who are not owning cable landing stations, to compete with them as other ILDOs are not able to buy competitive international bandwidth in the absence of reasonable access facilitation charges by owners of the cable landing station like the Petitioners. By having higher access facilitation charges Petitioner is able to protect their entire revenue of ILD sector which is around Rs.3,000 Crores. Therefore, the revenue of Rs.25.36 Crores as mentioned by the petitioners, is irrelevant.

For 2012-13, the petitioners have gross revenues of Rs.6158 crores from ILD Sector which is 46% of total revenue of ILD sector i.e. Rs.13000 crores. The Petitioners, just to protect their revenue of Rs.6158 crores are not allowing the ILD Sector revenue to grow. Not allowing growth in the revenue in the ILD sector is resulting in loss to the Government in the form of license fee and non-availability of broadband at affordable rates to the consumers. The petitioners have admitted that the cost of setting up a cable landing station is in the range of Rs.20-50 crores and they have further admitted that they have earned Rs.25.36 crores in the financial year 2012 (this figure may be wrong, as explained in the reply to Para 11 (i)). Petitioners are not taking into account the revenues generated from providing cable landing station access facilitation to itself.

Further, the contention of the petitioners are that fixing of grossly below cost cable landing station charges will act as disincentive and deterrent for setting up of further CLS by the service provider is grossly misleading and incorrect. It is submitted that the charges that have been fixed by the Authority

are cost based and have been finalized after taking the relevant data from the Petitioners i.e. both Tata and Bharti. It may also be relevant to note that presently there are four owners of cable landing stations in India. Out of which, only two have challenged the regulations made by the Respondent Authority. The other two owners are before this Hon'ble Court and are supporting the impugned regulations. Further the other ILDO license holders who are prospective owners of cable landing stations have also not challenged the said regulations but are before this Hon'ble Court supporting the impugned Regulations. Hence, the argument that the present lower charges would be detrimental to public interest is an unsubstantiated averment and is hence denied. It is further submitted that the Respondent has stated in detail in its counter-affidavit at Paras 72-76, the adverse impact of the non implementation of the impugned regulations".

90. On the allegation that 12 out of 15 CLS in India are owned by the petitioners, the petitioners have further submitted that the revenue from AFC is miniscule. The most important aspect in so far as monopoly is concerned is that there has to be a significant market share reflected in the revenue derived from the service which enables the dominant operator to dictate and control the market and the process realized supernormal profits. This assertion is contrary to all norms of dominant market share/ significant market share/ monopoly as defined and understood internationally, which is set out in the subsequent paragraphs.

91. In fact, the petitioners, in this regard, have dealt with this submission in Para 11(a) of its rejoinder, where it has dealt with the insignificant revenue from this segment and the size of its customers who are some of the largest international telecommunication entities. As already stated herein above, access facilitation being in the nature of infrastructure sharing it is only those operators possessing ILD / IGSP licenses, who can set up as well as access CLSs. No other service provider / customer without a license can access this service.

92. The International Long Distance (ILD) segment of telecommunication services in India contribute to 5.27% of gross revenue generated from telecom services. This is according to the Respondent itself in its Consultation Paper of 22 March 2012 wherein at paragraph 2.11 it has estimated the total revenue

from telecom services in the financial year 2010-11 at Rs.171718.56 crores, of which the International Long Distance segment according to it contributed Rs.9054.45 crores. The relevant extract from para 2.11 is as follows:

"2.11 The Gross Revenue (GR) from ILD segment in India was Rs. 9054.45 Crores in the F.Y. 2010-11 up by 2.55% from Rs. 8829.13 Crores in F.Y. 2009-10. In F.Y. 2010-11, the ILD services contributed 5.27% of the total revenue of telecom services, which stood at Rs. 171718.56 Crores.

The whole bogey of public interest and the alleged monopoly of the petitioners, enabling them, to allegedly dictate prices and make CLS a bottleneck facility has no basis for two reasons, firstly the cost of setting up a Cable Landing Station (CLS) is insignificant compared to the cost of establishing the submarine system and secondly the revenue derived from Access Facilitation Charges (AFC) is insignificant amount compared to not only the whole for telecom services but in comparison to the turnover of any individual telecom operator.

As regards the first submission, the Respondents themselves in their recommendations to amend the license agreement to enable them to give power to frame impugned regulation of 16th December 2005 have themselves stated that the cost of setting up a Cable Landing Station (CLS) is in the range of Rs. 20 crores to 50 crores and it takes about nine months to a year for setting up such infrastructure. The relevant extract is as follows:-

"4.1.4 ...that establishing an international cable system including landing facilities in India not only requires a large investment but is also a cumbersome process involving various time-consuming clearances including security clearance, maritime clearance, civil authorities permissions etc. On an average setting up of a cable landing station can cost between Rs. 20 crores to 50 crores depending upon the location in the country. In the Indian conditions, the time required to set up a CLS can be a minimum of 9 months and is normally more than a year. Of course, a CLS is always built to have enough capacity for multiple cables to land therein in future.

The cost of submarine system income works out a minimum is in the range of Rs. 600 to Rs. 1200 crores depending upon the distance and the destination covered, for instance establishing a cable to

Singapore would be cheaper than establishing a cable to London. In any event as compared to the cost of setting up a Cable Landing Station, a time frame of 9 to 11 months which is insignificant for an infrastructure facility, it is obvious that there are no barriers to entry for any submarine cable operator to set up its own Cable Landing Station. In fact, this to be encouraged by the Respondent towards creating infrastructure and furthermore as already been demonstrated in the Writ Petition, the number of Cable Landing Station has shown an increase from one owner to five owners from 2002 till date after the opening of the sector to private players.

As regards the second submission, the total revenue from their Cable Landing Station for the financial year 2012 is Rs.25.36 crores and if the impugned regulations are implemented the same will be reduced to Rs.2.67 crores. The Petitioner has 12 number of customers who are eligible telecom service providers (eligible ITEs) and each one of these telecom provider are large business entities like Vodafone, AT&T, Bharti, Cable and Wireless, Verizon, RCOM etc. each of which are internationally big telecom entity with revenue running into tens of thousand of crores and in this context the Access Facilitation Charges of Rs. 25.36 crores distributed over 12 service provider constitute an insignificant portion of the revenue to each of these customers.

Further, if the charges are reduced as per the impugned Regulation, the entire business of the Petitioner becomes unviable as revenue are reduced from Rs. 25.36 crores to Rs. 2.67 crores as there is huge under recovery of cost as demonstrated in the petition. Furthermore, fixing of grossly below cost, Cable Landing Station charges will act as disincentive and deterrence for setting up a further infrastructure of Cable Landing Station (CLS) by the telecom service providers (ILDO and IGSP) which would mean that international submarine cables being planned in future globally will not be able to land in India hampering international connectivity of the country. There is, therefore, no public interest whatsoever which will be served by the impugned Regulation, rather public interest will be adversely affected. The balance of convenience therefore does not lie in implementing the impugned Regulation driving CLS owner into under recovery of cost, making the CLS business unviable, thereby deterring growth of international connectivity towards India, rather the balance of convenience lies

in continuation of status quo in terms of existing CLS charges owners being allowed to charge at their existing cost based charges.

93. The petitioners have further submitted that there are a total of 11 CLSs in the country, out of which 7 are owned by them. To therefore build a prejudicial argument on a misrepresentation is unbecoming of a statutory body. A presentation by the Respondents functionary, the deponent in the pleadings before this Court on 04.04.2012, discloses the true picture (Page 363 documents filed with sur-rejoinder), where 10 CLSs have been shown and since then there has been an addition of one CLS belonging to SIFY at Mumbai for GBI Cable.

94. The petitioners have further submitted that there are three new cable systems which will be landing in India in the next two years if not more which will result in new CLSs owned by Reliance JIO (3 CLS), Vodafone(1) and SINGTEL(1). There would be at least 5 more CLSs within the next two years. Thus there will be 17 CLSs in India in the year 2016 which would be owned by 8 OCLs.

95. As far as the bottleneck facility aspect is concerned, the petitioners have further submitted that the same has been addressed under a separate head on the need to regulate. The new submission of monopoly as detailed above has been brought for the first time in the sur-rejoinder, not part of the consultation process in any of the three impugned regulations, neither in the explanatory memorandum to any of the three impugned regulations and to which there was no reference also in the pleadings filed for over one year before this Court, viz., the vacate stay petition, the appeal filed before the Hon'ble Division bench, the Counter Affidavit of 28.11.2013. It figures for the first time in the sur-rejoinder of 06.02.2014 and is obviously an afterthought and therefore deserves to be rejected at the threshold. In any case if the Respondent case is to resort to regulation on the basis of abuse of dominance, in such a case the statutory competence to issue a determination vests with the Competition Commission of India as dealt with above.

96. Without prejudice to the above, as regards essential facility, the petitioner has submitted that the same has been defined and construed in economic parlance. This has been dealt in detail in the Petitioner's response to the 22 March 2012 Consultation Paper, in respect of the essential facility test. This has been construed in several reputed Journals and Publications in Telecommunications. The effective test of an essential facility is that they are exclusively / predominantly

provided by a single or limited number of suppliers and cannot be economically or technically substituted.

97. At the present stage of market maturity, CLS does not pass the test of being bottleneck /essential facility in India as per global benchmarking of the implementation essential facility concept/law: The term essential facility has been defined and interpreted as follows:

"Essential facilities are resources or facilities that have the following properties:

- * They are critical inputs to retail production. Essential facilities are located at the wholesale level of the production chain, and are essential inputs in the production or supply of the retail product or service.

- * They are fully owned and controlled by vertically integrated incumbent firms. The owner of the facility participates in the retail as well as the wholesale stage of the market.

- * They are a monopoly. Retail competitors can only acquire an essential facility from the incumbent firm that owns and controls it.

- * It is not feasible, either economically or technologically, for retail competitors to duplicate the essential facility or develop a substitute for it."

98. In Page 38 of Telecommunications Regulation Handbook, "Essential facilities" means, facilities of a public telecommunications transport network or service that, (a) are exclusively or predominantly provided by a single or limited number of suppliers; and (b) cannot feasibly be economically or technically substituted in order to provide a service.

99. The essential facility doctrine originated in the United States in a case brought under the Sherman Act in 1912. The European Union has also developed a corresponding doctrine which has been applied to infrastructural facilities such as ports. In practice, the essential facility doctrine is usually applied where the dominant position is either 'an act of God', i.e. caused by geographic conditions, or first mover advantages, e.g., an incumbent's telecommunication network'. 'Over the years, there are some criteria that have been enunciated in court cases and have become guidelines in the assessment of what

should be ruled an essential facility. These criteria can be summarized in the following four points:

1. The facility must be controlled by a dominant firm;
2. Competing firms must lack a realistic ability to reproduce the facility
3. Access to the facility is necessary in order to compete in the related market. It must be feasible to provide access to the facility
4. The ICT Regulation Toolkit-Practice Note.

100. In *Snam/Tariffe di Vettoriamiento*, the Italian Competition Authority defined "essential facility" as, "all infrastructure that is necessary for accessing a market and which is neither easily reproducible at a reasonable cost in the short term nor interchangeable with other products/services". Agencies consistently identified the principal common elements of an essential facility as: (1) access to the facility must be essential to reach customers; and (2) replication or duplication of the facility must be impossible or not reasonably feasible.

101. Thus, the petitioners have submitted that the test of a facility being "essential" is not easily passed. The facility cannot be something that gives only a small or a short term advantage, it has to be a substantial and long term benefit. Alternative facilities would have to be such poor substitutes that they would not allow rivals to compete. The test is the ability to duplicate the input. In the case of a submarine cable landing station clearly there are robust alternatives. Thus in the countries where there are large number of international submarine cables landing in to the country at number of CLSS owned by various OCLSS, the test for CLS being essential or bottleneck facility would not be able to pass. This would be more so since the Government and TRAI have already taken steps long back to remove legal barriers to the entry in the market of international telecommunication services to the international carriers which allows such global carriers to construct CLS infrastructure in the country. Thus on interpretation of the essential/bottleneck facility global interpretation and practices, the CLSS in India at the present stage of maturity of the market cannot be treated as a essential/bottleneck facility and CLS Access Charges should be left to be governed by the market forces with attendant regulatory oversight in form of reporting requirement. The above is extracted from a response to the Consultation Paper of 22.03.2012 leading to the impugned regulation of 19.10.2012.

102. According to the petitioners, access to CLS by

application of above facts nowhere qualifies to be a bottleneck essential facility as the Petitioner is not a vertically integrated incumbent operator, the access seekers are not competitors in the manner construed in the definition as possessing the requisite licenses to set up their own CLSs including the financial wherewithal. In the reply to the application filed by ACTO- Intervener, the Petitioner has annexed a chart being Annexure-2 to the said reply where it has demonstrated the huge revenues generated by all the members of ACTO, including all the customers of the Petitioner. Reference in this regard has also been made in the rejoinder affidavit of the Petitioner of 06.01.2014 whereas Paragraph 11(j) where the relevant paragraph from the earlier reply have been extracted to the following effect:-

"That large multinational telecommunication operators who are customers of CLS have chosen not to set up their own CLS, rather seek virtually free entry/access of their cable into India. These international telecommunication giants have through their association i.e. Association of Competitive Telecom Operators sought to be impleaded in the present proceeding by filing an application to which the Petitioner has filed a response where it has been pointed out that such operators are being given a subsidy by the TRAI by fixing below cost prices in the form of the impugned Regulations. The relevant extract from the Petitioner's reply in the said application reads as follows:

"5. That the Petitioner has undertaken an exercise of comparing the cost of investment in cable system by members of the Association, their annual revenues, the percentage of cost of setting up of Cable Landing Station (CLS) with respect to investment and the percentage of cost of setting up of Cable Landing Station (CLS) as compared to their annual revenue. The Petitioner has furthermore given a comparison of total revenue from Cable Landing Station (CLS), compared to the total revenue of these operators.

This information in the annexed chart is derived from publicly available document relating to the members of the applicant Association, their balance sheet etc.

6. That the above table very clearly discloses the following:

(a) The cost of building of Cable Landing Station (CLS) in comparison to the investment in the Cable System is in the range of 10% to 12%.

(b) The cost of building a Cable Landing Station (CLS) as a percentage of the annual revenue of each of the members of this Association ranging from 0.05% for Verizon and AT&T to 0.209% for C&W. In other words the cost of Cable Landing Station (CLS) is miniscule, compared to the annual revenue of each of these giants.

(c) The percentage of total revenue of the Petitioner from Cable Landing Station (CLS) is miniscule compared to the total revenue of the operators ranging from 0.0039% of AT&T revenue to 0.1739% of C&W revenue."

103. The petitioners have further submitted that there is no regulatory barrier after 2002, when the ILD Services were opened up and each one of the members of ACTO has ILD License. Furthermore, the Regulations prescribe that both the owner of the CLS as well as the access seeker have to have the same license i.e. either an ILD License or an IGSP License. There is therefore no unequal bargaining power. All the members of ACTO as also BSNL and RCOM have license. BSNL and RCOM have already set up CLS and nothing prevents multinational entities like AT&T, VERIZON, etc. from having their own CLSs. There is therefore no barrier to entry to any of the 12 customers of the Petitioner towards setting up their own CLS. The Respondent TRAI has very significantly admitted in its recommendations of 12.04.2011 on infrastructure policy (Page 166 of additional type set at Page 223-224 & 225) where it has admitted that access to CLS is far less capital intensive and therefore to only substantiate the Petitioners submission that there is no barrier to entry. The relevant paragraphs which have also been extracted in the reply to sur-rejoinder are also extracted herein below:-

"1.103 The first two parts, the Optical fibre cable network and cable landing station, fall under ILDO licence and ISP licencees having permission to establish submarine cable landing stations for International Gateway for Internet. Developing the optical fibre network through sea is the most capital intensive component. In comparison, cable landing stations where multiple submarine cables are terminated is far less capital intensive. An ILDO can develop its own optical cable network, become one of the members of consortium developing the optical fibre cable network or can buy bulk bandwidth on this cable network. Similarly ILDOs can have their own cable landing station or access other's cable landing station by paying access facilitation charges as per the RIO approved by TRAI.

1.104. Submarine cables are getting added according to country's band width requirement at regular interval. Three to four new cables like GBI and WACS are also planned for landing in India. Moreover advancements in technology like DWDM have enabled multifold bandwidth to be derived from the same fibre. A single fibre itself can provide a capacity of 1 Terabit. Therefore, there is no constraint on cable side. The new cables are either landed on existing cable landing station or on a new landing station depending upon the space available in the CLS and requirement of diversity for routing of traffic. Currently there are 24 ILDOs providing ILDO services in the country. However, Cable landing stations are owned and managed by only four major ILDOs. Other ILDOs use the CLS facilities of these major ILDOs and pay according to RIO approved by TRAI on 26.10.2007 and on 25.05.2009.

1.105. New landing stations will come up based on new cables planned for landing. The decision of setting up of the cable landing station gets taken at the investment stage. In case of ILDO operator owning the cable, the cable landing decision is taken by itself. For consortium cable, number of cable landing stations in a country are generally get decided at the investment planning stage and finalisation of construction and maintenance agreement. In both the cases once decision of setting up of CLS and its location is finalised, the uncertainty in terms of various approvals will have to be removed at the earliest in view of huge investments on submarine cable system and early decision on approval or otherwise is required.

1.106. The Authority recommends that a single window system for providing clearance to the operators intending to establish cable landing station should be established at DoT. The operator desiring to establish cable landing station should submit all the forms required by all concerned ministries to this single window agency and final approval of clearance should be intimated by the single window agency within six months."

104. As regards, the monopoly arguments raised for the first time in the response to sur-rejoinder, the petitioners have submitted that there is no factual basis to demonstrate the nexus between access facilitation charges and IPLC prices in India. In this regard, the Respondent TRAI had sought to build a

false case by stating in Para 21 of the sur-rejoinder that access facilitation is 45% of total IPLC cost. This submission has been made by the Respondent TRAI only to justify its arguments of monopoly, but has been effectively demonstrated to be false by the Petitioner in its reply to sur-rejoinder of 07.04.2014, where at Para 4 the Petitioner has demonstrated that the actual ratio of access facilitation charges to IPLC is 3.7% and not 45% as falsely represented by the Respondent TRAI. Needless to state after this false averment has been exposed, the Respondent TRAI chose not to address this contention nor tender any apology for having made false averment during the oral submission.

105. It is their further case that the respondent TRAI in sur-rejoinder sought to draw a parallel between the Cable Landing Station and an Airport, where it has stated that asking for building a separate CLS by every ILDO is like mandating every airline to construct its own airport in every city of the country. The Petitioner in its reply to the sur-rejoinder, dated 07.04.2014, has effectively demolished this contention by showing that the setting up airports and CLS are governed by different consideration. Whereas every ILDO is licensed to build a CLS and at the same time land a submarine cable, this is not the case of licensing an airline and to run operation, an airline is not licensed to set up an airport for which there is entirely different regime and the cost of setting up an airport can actually then far higher than setting up an airport. The respondent in its recommendations on infrastructure policy of 12 April 2011 (Page 166 at 223-224 of the Additional typed set filed by Petitioner on 07.04.2014) has itself demonstrated that setting up of a CLS is far less capital intensive than setting up a submarine cable system. Needless to state after this contention being thoroughly demolished, the Respondent TRAI chose not to make oral submissions in this regard.

106. The petitioners have further submitted that the respondent TRAI in its Counter Affidavit as well as in Writ Appeal has raised the bogey of Public Interest, inter alia, that access facilitation is a crucial input for internet growth and broadband penetration in the country. This is the justification for imposing a restriction under Article 19(6) upon the Petitioner's fundamental right to carry on business in terms of Article 19(1)(g) and on which copious submissions have been made by the Respondent TRAI and the intervener i.e., ACTO and M/s.Reliance. However, this contention of the respondent and the intervener have been decided by the Division Bench in its judgment rendered in the Writ Appeal filed by the Respondent TRAI by judgment of 25.06.2013.

107. On the aspect of bar of resjudicata, it is submitted that respondent TRAI has raised the issue of public interest namely that is against the interest of consumers as it impedes broadband penetration and growth owing to allegedly high prices of Access Facilitation Charges. In this regard, respondent TRAI in its Writ Appeal had raised this ground in the Memorandum of Grounds as well as during arguments which are extracted herein below. However, the Division Bench in its judgment dated 25.06.2013 on a consideration of the facts and circumstances rejected the submission and concluded that there was no public interest in imposing the restriction. The said finding is conclusive and constitutes res judicata and cannot therefore be re-agitated. The said grounds are repetition of the contentions advanced by the respondent in the present proceedings and they are extracted herein below:-

"10. That non-implementation of these regulations would lead to a situation wherein, the petitioner enjoys monopolistic status and thus will be able to thwart competition, in the international long distance market. This is anti-competitive and against the interests of the consumers at large who would be deprived of the benefit of lower tariff. The stay order helps the petitioner to price its services in a manner that is not justified/ cost-based.

12. That non-implementation of these regulations would affect availability of international bandwidth and penetration of Internet/ broadband in the Country. There is great deal of public interest involved and the non-implementation of these regulations directly affects such interest. It is submitted that the order of this Hon'ble Court staying the operations of these regulations compromises the implementation of one of the most important vision in the proposed National telecom Policy 2012 which is "broadband on demand". The relevant part of the National telecom Policy 2012 states as follows:

"On the other, the ability of the poorer sections of the society, both in rural and urban arrears, to benefit from technology needs to be enhanced. NTP 2012 has the vision broadband on demand and envisages leveraging telecom infrastructure to enable all citizens and businesses, both in rural and urban areas, to participate in the Internet and Web economy thereby ensuring equitable and inclusive development across the nation. It provides the enabling framework for enhancing India's competitiveness in all spheres of the economy. NTP 2012 envisages support to platform

neutral services in E-governance and M-governance in key social sectors such as health, education and agriculture that are at present limited to a few organizations in isolated pockets. This will expand the footprint of these services and thus foster an atmosphere of participative democracy delivery model that is truly citizen-centric."

13. That for the purposes of ensuring and implementing the policy of maximum penetration of internet in rural and urban areas, it is of paramount importance that access to international connectivity is provided at competitive rates so that the internet and broadband is affordable along with proliferation of e-education, e-commerce and e-governance in the country.

14. That non-implementation of these regulations would affect the quality of service, speed of broadband, availability of international bandwidth at competitive rates to the Indian consumers and would also adversely affect the growth of the business process Industry in the country such as BPO/KPO providing employment to number of persons. Hence significant public interest is involved and any grant of injunction or continuance thereof will seriously affect the public interest which cannot be compensated otherwise."

This contention has been further urged at the time of arguments by the learned Additional Solicitor General on behalf of Respondent TRAI and the same has been dealt in the Judgment of the Hon'ble Division Bench in the Writ Appeal in para 7, 12 and 18 in the following terms:-

"7. Contending that the various parameters for grant of interim orders had not been followed by the learned Single Judge, Learned Additional Solicitor General placed reliance on the decision reported in **(1995) 3 SCC 33 (Mahadeo Shelke and others V. Pune Municipal Corporation and another)**, that only in extreme cases, an order of stay could be granted; even then, the law laid down by the Apex Court in the decision reported in **(1994) 4 SCC 225 (Morgan Stanley Mutual Fund V. Kartick Das)** has to be necessarily kept in mind before granting any interim relief. He further contends that the order passed is certainly against the interests of the consumers; that allowing the Writ Petitioners to enjoy the benefit of stay would certainly go against the telecom policy of the appellant, consequently, the stay has to be vacated.

12. Explaining in detail as to the Regulatory Authority's jurisdiction as given under the provisions of the Telecom Regulatory Authority of India Act, 1987, Learned Additional Solicitor General submitted that when the Writ Petitioners had not challenged the 2007 Regulation, but had submitted themselves to the rates fixed by the appellant herein, the grounds now taken as though TRAI had no authority to fix the rates, is totally contrary to their conduct. In the background of the public injury caused on the stay of the Regulation and the impact thereon on a common man's right to have access at formidable rates to the services from the access providers, he submitted that the stay granted be vacated. He further submitted that keeping in mind the growth of Telecom industry and its impact on the economic growth of the country, in public interest, the stay has to be vacated.

18. As regards the contention of the appellant on the public injury caused by the grant of stay, on the contention of the learned Additional Solicitor General that permitting the writ petitioners to charge the price different from TRAI price would affect the common man, he submitted that no materials have been placed by the appellant herein as regards the public injury suffered by the Government."

The above contention of respondent TRAI was categorically rejected and dealt with by the Hon'ble Division Bench at para 49 where it was categorically rejected in the following words:-

"49..... Except for a loud noise made on the so-called injury to the economy and the impact which would lead to crumbling of the economy and the national policy on telecom services, we do not find any factual basis for making such an allegation and hence, this line of contention merits to be dismissed straight away".

Thereafter, the Hon'ble Division Bench at para 54 dismissed the appeals in the following terms:-

"54. In the light of the above, we dismiss the Writ Appeals filed by the appellants. Since the Writ Petitions are already heard in part, we direct the parties to move the concerned Court for hearing the Writ Petitions. The parties are directed to go ahead with the hearing of the main Writ Petitions at the stage it was left before the learned single Judge".

108. It is the case of the petitioners that the above

decision clearly demonstrates that the respondent is barred by resjudicata in raising the same issue. It is settled law that there can be resjudicata at different stages of the same litigation. In this regard, the Hon'ble Supreme Court in its judgment reported as **U.P. State Road Transport Corporation v. State of U.P. and Another** reported in (2005) 1 SCC 444, at Paragraph 11, held as follows:-

"11. The principle of res judicata is based on the need of giving finality to judicial decisions. The principle which prevents the same case being twice litigated is of general application and is not limited by the specific words of Section 11 of the Code of Civil Procedure in this respect. Res judicata applies also as between two stages in the same litigation to this extent that a court, whether the trial court or a higher court parties to reagitate the matter again at a subsequent stage of the same proceedings. (See Satyadhan Ghosal v. Deorajin Debi.). "

109. The petitioner has relied on the judgment of Hon'ble Supreme Court reported as **C.V. Rajendran and another vs. N.M. Muhammed Kunhi** reported in (2002) 7 SCC 447, wherein, at para 6, the Court held as under:

"6..... The principle of res judicata applies as between two stages in the same litigation so that if an issue has been decided at an earlier stage against a party, it cannot be allowed to be reagitated by him at a subsequent stage in the same suit or proceedings. This position is laid down in Hope Plantations Ltd. v. Taluk Land Board to which one of us (Syed Shah Mohammed Quadri, J.) was a party.

110. The Petitioners have relied on the judgment reported in (2005) 1 SCC 787 [**Bhanu Kumar Jain Vs. Archana Kumar and Another**], wherein, it is held that :-

"18. It is now well settled that principles of res judicata apply in different stages of the same proceedings. (See Sathyadhan Ghosal v. Deorajin Debi AIR 1960 SC 941 and Prahalad Singh V. Col. Sukhdev Singh (1987) 1 SCC 727) 19 In Y.B. Patil it was held : (SCC P. 68, Para 4)

"4..... It is well settled that principles of res judicata can be invoked not only in separate subsequent proceedings, they also get attracted in

subsequent stage of the same proceedings. Once an order made in the course of a proceeding becomes final, it would be binding at the subsequent stage of that proceeding."

111. The issue of public interest therefore having been decided by the Hon'ble Division Bench, cannot be re-agitated in the present proceedings, the judgment of 25th June, 2013 having attained finality is therefore not available to the Respondent TRAI and the intervener who were parties to the appeal before the Hon'ble Division Bench. Consequently, there being no public interest, which is the only ground available to the Respondent under Article 19(6) of the Constitution, the impugned regulations are therefore liable to be quashed and set aside.

112. On the aspect of Broadband and Internet Penetration, it is submitted that according to the respondent, the access facilitation is a very high portion and percentage of bandwidth charges being upto 56% of the bandwidth charges. It is significant to note that the Respondent TRAI in its application for stay vacate filed on 16.02.2013 has made copious submissions in respect of the public interest element as to how regulation of access facilitation charges is necessary in terms of the National Telecom Policy of broadband on demand, at Para 6, 9 (j). The Petitioner has comprehensively dealt with all these submissions in his rejoinder as well as in the earlier reply to the stay vacate application to the following effect:-

- Internationally reputed agencies assess growth of broadband at 35% CAGR over the last five years, India is ranked 11th by number of subscribers and 3rd by growth. (Economic Times).
- Access to CLS is not an essential input for broadband growth as three largest operators like BSNL, Reliance and MTNL, the first two with one CLS and MTNL without any CLS would not be occupying top position.
- NASCOM report shows unprecedented growth for software industry year on year.
- There is no nexus of AFC charges with broadband penetration, evident from three Government documents, White Paper of August 2010 from Advisor to PM, recommendations on Broadband by Respondent TRAI on December 2010 and National Telecom Policy of 2012.
- All the above three documents pinpoint lack of last mile network for broadband penetration.
- Availability of bandwidth in India has increased in

last five years with 5 new cables and 4 new Cable Landing Stations.

The relevant extract from the rejoinder is as follows:-

"(b) That as regards the alleged impact on broadband penetration and that Cable Landing Station constitute a bottleneck, facts belie the Respondent's stand. Economic Times quoted in its publication "Indians broadband base grows 24.5 per cent in 2011 to 13.33 million" on 21st March' 12 - "India is one of the fastest growing broadband players in the world; Ranking 11th in the world by number of broad band subscriber; Ranked 3rd by growth".

	2007	2009	2009	2010	2011	2012	CAGR
Broadband Users (Thousands)	3,083	3,872	6,218	8,770	11,509	13,790	
Growth over Previous year		26%	61%	41%	31%	20%	35%
Penetration (% of Population)	1.40%	1.70%	2.70%	3.80%	4.90%	6%	

According to Telegeography (Independent source tracing bandwidth usage pattern internationally), India is witnessing a healthy growth in numbers of broadband users @35% CAGR over the last 5 years.

(c) Further the claim that access to submarine CLS is an essential input for the broadband penetration is wrongly represented and misleading. It is explained in the table provided to TRAI as well as part of the reply to Consultation Paper of 19 October 2012. The domestic network route cable is excluding the copper cable extensions. The source of the % share of Broadband is from TRAI quarterly report of April-2012. The details of the fiber route Kms is taken from the National Broadband Plan published by TRAI in December-2010. From the Table above it is evident that the broadband penetration is directly proportional to the availability of the last mile copper and/or Fiber connectivity, especially the last mile fiber connectivity. Moreover it is a well-accepted fact that bandwidth cost is a small percentage of the overall cost of providing a broadband connection. As seen from the table above, the Petitioner TCL is in the 8th Position with 0.84% of the total market share whereas other non CLS owners including MTNL/You Broadband/Hathaway Cable & Data com Pvt. Ltd are much above the TCL. If Cable Landing Station alone was the clinching factor to dictate the cost advantage, BSNL and Reliance with only one and two CLS respectively and

MTNL without any CLS would not be occupying top 3 slots as above. This raises a different question-Is CLS access charges the bottleneck or the last mile access/cost the real reason behind the poor penetration of the broadband market.

Further, as per Indian IT-BPO Industry FY2012 as landmark year, the petitioners have submitted that while the Indian IT-BPO industry weathered uncertainties in the global business environment, this is also the year when the industry is set to reach a significant milestone - aggregate revenue for FY2012 is expected to cross USD 100 billion. Aggregate IT software and services revenue (excluding hardware) is estimated at USD 88 billion.

- Milestone year for Indian IT-BPO industry-aggregate revenues cross the USD 100 billion mark, exports at USD 69 billion
- Within the global sourcing industry, India was able to increase its market share from 51 per cent in 2009, to 58 per cent in 2011, highlighting India's continued competitiveness and the effectiveness of India-based providers delivering transformational benefits.
- The industry continues to be a net employment generator - expected to add 230,000 jobs in FY2012, thus providing direct employment to about 2.8 million, and indirectly employing 8.9 million people
- The industry's share of total Indian exports (merchandise plus services) increased from less than 4 per cent in FY1998 to about 25 per cent in FY2012
- While the global macroeconomic scenario remained uncertain, the industry exhibited resilience and adaptability in continually reinventing itself to retain its appeal to clients.
- Here again for a IT-BPO industry , bandwidth cost is a miniscule component of the overall cost of the project of setting up and running an IT-BPO project.

(d) That the fact that CLS access facilitation charges have no nexus with the rate of broadband penetration and that the causes and reasons for broadband penetration lie elsewhere is clearly evident from three documents of the Government of India. The White paper in Aug-2010 from the Office of Advisor to the Prime Minister (Public information infrastructure & innovation(headed by Sam Pitroda) states as follows:

"The primary cause of low penetration of broadband

in rural areas is non-availability of required transmission channels to villages, due to high cost of service roll out and lack of viable business models."

"Laying optical fiber cable networks on a large scale will be critical for providing high speed, secure and reliable Internet access and network connectivity to Panchayats. There is an urgent need to focus attention on optical fiber so that most of the internet traffic is handled by the optical fiber network"

"Realising the impact of connectivity on economic development, governments in most developing and developed economies have invested resources in increasing optical fiber to create a robust IT backbone."

(ii) Further the Recommendations on National Broadband Plan by TRAI in Dec-10 states as follows:

5.47. Internationally, considering the long term sustainability, security and reliability aspect among various available technologies, most countries have adopted Optical Fiber based connectivity for rural needs. It is observed that all National level broadband plans provide for the reach of broadband upto rural and remote areas through OF network.

5.48. The Government has proposed to implement a massive programme of broadband for all, under which all the 250,000 Gram Panchayats in the country will be provided high speed broadband connectivity by 2012. In its consultation paper, the Authority has sought the views of the stakeholders regarding the need to create a national optical fiber network extending upto villages. Majority of stakeholders supported the idea of creating optical fiber network upto village level. Some stakeholders are of the view that wireless technologies are capable of handling the village requirement and there is no need for OFC upto village level.

5.56 The problem of availability of high bandwidth fiber optic network is not limited to rural areas. Growth of broadband in urban areas too is limited by non-availability of fiber in the aggregation and the access networks.

(iii) Also the NTP-2012(National Telecom Policy -2012) states as follows:

"1.3. To lay special emphasis on providing reliable and affordable broadband access to rural and remote areas by appropriate combination of optical

fiber, wireless, VSAT and other technologies. Optical fiber network will be initially laid up to the village panchayat level by funding from the Universal Service Obligation Fund (USOF). Extension of optical fiber connectivity from village panchayats to be taken up progressively to all villages and habitations.

1.4. Provide appropriate incentives for rural rollout.

1.8. To establish appropriate institutional framework to coordinate with different government departments / agencies for laying and upkeep of telecom cables including Optical Fiber Cables for rapid expansion of broadband in the country.

In all the 3 documents which are driving the broadband policy (including the one by TRAI), nowhere it is mentioned that the CLS access or the International BW prices are hindering the broadband penetration. All have pointed out to non-availability of last mile network access/Optical fiber access as the main reason behind the poor broadband penetration. And for the same reason, Government of India had constituted the NOFA(National Optical Fiber Agency) and SOFA(State Optical Fiber Agency) to build the National Optical Fiber Network with a planned expenditure of Rs. 20,000 Crore to facilitate the proper penetration of the Broadband to 2,50,000 Panchayats.

.....

It is worth mentioning that Chennai- Los Angeles rates are much lower than the Beijing-Los Angeles rates despite the fact that the infrastructure involved in the Chennai-Los Angeles is much more than the infrastructure required for delivery of the Beijing -Los Angeles circuit.

As compared to the Growth of the total international Traffic from India, Please refer the table below which highlights the Compounded Annual Growth Rate (CAGR) of International traffic of India. This is with reference to the other BRICS Countries (Brazil, Russia, India, China and South Africa).

CAGR of Total international traffic from BRICS Countries (for period 2010-2014)

As seen above the Growth of international traffic requirement from India is growing at a fast rate of

62% CAGR more than any of the counterpart BRICS countries. The Respondent has also raised a concern on the quality of service relating this to the CLS access and non-availability of international Bandwidth without giving any supporting information for the same.

However referring to the "Quality of service performance of Broadband Service Providers" in Annexure 4.3 of The Indian Telecom Services Performance Indicators July - September, 2012 published by TRAI on 11th Jan-2013 shows that all the Broadband service providers are doing very well with reference to the Benchmark parameters for Bandwidth Utilization/Throughput and packet Loss which can be attributed to Access of International BW. On the contrary the Benchmark parameters are not met by the service providers for cases pertaining to Fault Management, Billing performance and Response time to the customer for assistance which are very operator specific and has got nothing to do with access to international BW.

With reference to the above, it can be seen that poor performance of broadband services is not related to bandwidth issues but more on last mile faults and billing issues and the Petitioner fails to understand the reason of raising the issue of poor performance and relating this to the present subject in discussion which are not related at all, even as per the reports published by the respondent.

Further, the respondent in its reply has emphasized again and again that the public interest will be hampered. As seen from the above description all the action on the Broad band /KPO/BPO growth, Quality of service and the reduction in the IPLC pricing, are totally in sync with the increases in the number of Cable Landing Stations in the last 5-6 years which is fuelling the growing demand of the international traffic and this in the past 5-6 years.

(f) It may be noted that international BW availability has grown over the period of the last 5 years which is evident from the graphs depicting the increase in the number of submarine cables and Cable Landing Stations. In all total 5 new cables and 4 new CLS have been built from between 2007-2012.

"I submit that the Respondent again has made a misleading allegation stating that while bandwidth prices have come down but access facilitation charges have remained high and which is 56% of the total

bandwidth cost. This is patently erroneous and misleading statement as the facts are otherwise. This comparison of bandwidth and access charges is completely erroneous, bandwidth prices are market driven in terms of demand and supply and for a very long time, there has been excess bandwidth in the international market as a result of which various companies owning bandwidth have had to sell out either their assets or the companies bought over. Access charges on the other hand have to be cost based as per the respondent's own showing and to compare the two is erroneous and make an allegation that it is 56% of the bandwidth is again patently false. Telegeography, an annual publication which deals in international submarine cable network and authority on the subject has very clearly disclosed that access charges are minor proportion of bandwidth prices. On comparing the IPLC prizes of STM-1 as given by Telegeography with respect to the AFA charges: following is the observation:

			CY07	CY08	CY09	CY10	CY11	CY12
London-Mumbai								
Bandwidth Price STM1	USDMRC		80618	63443	56824	33792	2824	20006
Existing AFA Charges	SMW4	USDMRC	801	801	767	752	737	682
Existing AFA Charges	SMW3	USDMRC	582	582	557	546	535	495
AFA as a % of Bandwidth Price	SMW4		1.096	1.394	1.496	2.2%	2.69	3.496
AFA as a % of Bandwidth Price	SMW3		0.7%	0.9	1.0%	1.6%	1.9%	2.5%
Filled AFA Charges	SMW4	USDMRC						455
Filled AFA Charges	SMW3	USDMRC						349
AFA as a % of Bandwidth Price	SMW4							2.3%
AFA as a % of Bandwidth Price	SMW3							1.796

It may further be noted that in the effort to reach at a predetermined charges for the AFA pricing,

TRAI had insisted/pressed to the Petitioner to work on a methodology (Cost + BW base Model) in which the actual market prices of the bandwidth rate between VSB to LVSB in Mumbai region was used. The working was discussed in detail with TRAI and was later supplied to TRAI on 27 September 2012. Upon seeing that this methodology is not reaching to the pre-determined intention to artificially reduce the cost based price, the respondent had reverted on the old model of cost based working.

The High prices of the Cost+ bandwidth based model further emphasizes that the model adopted and approved by the respondent in the year 2007 was best to be followed as it was actual cost based working.

TRAI trotted out the reason in Consultation Paper of capacity usage has gone up to 70% and costs have come down. The finding is not sustainable. It has proceeded on this erroneous premise. The reason now advanced is delay in approval of rates, but not due to the petitioner's fault. Moreover, that provision is also retained, hence two alternative methods at their whim to choose without any guidelines."

113. As regards the customers of the petitioner's large International Telecommunication entities, the petitioners have submitted that the users of Cable Landing Station are typically licensed telecom service provider entities who have ownership/ part ownership/ lease in cable landing station in India and, therefore, there is no impact in the manner that the Respondent has sought to portray. It was open for these telecom service providers namely ILDOs and IGSPs to have created their own CLS infrastructure for the purpose of accessing the bandwidth on a cable owned by them in view of no entry barriers by spending upfront CAPEX but they have as a conscious business decision chosen to use the CLS infrastructure created by other OCLs. In fact, the Petitioner owning the largest number of Cable Landing Station, has a revenue of about Rs.25.36 crores on annual basis which amply demonstrates that the size of the market is too insignificant for the Respondent to regulate.

114. Writ petitioners have contended that large multinational telecommunication operators who are customers of CLS have chosen not to set up their own CLS, rather seek virtually free entry/access of their cable into India. These international telecommunication giants have through their association i.e. Association of Competitive Telecom Operators (ACTO) sought to be impleaded in the present proceeding by filing an application to which the Petitioner has filed a

response where it has been pointed out that such operators are being given a subsidy by the TRAI by fixing below cost prices in the form of the impugned Regulations. The relevant facts are as follows:

- The cost of establishing a CLS is around 10% or less than that of submarine cable system
- The cost of CLS in terms of annual revenues of the Petitioners customer is a fraction of such revenues (0.05% for Verizon and AT&T to 0.209% for C&W).
- As of 31 March 2012 the Petitioner generated Rs.25.35 crores as Access Facilitation Charges for 5 CLS over 12 customers, 57% of revenue from multinational entities.
- Lowering of AFC will be a direct subsidy to multinational entities and be a disincentive to building fresh CLS.

115. On the allegation of High Access Facilitation Charges in India comparison to International Access Facilitation Charges, it is submitted that respondent TRAI has raised a bogey of High Access Facilitation Charges in India in comparison to International Access Facilitation Charges in this regard the Petitioner in its rejoinder has submitted to the following effect demonstrating that international charges are multiple times than the Indian charges. The international rates for Access Facilitation are far less than that in India as evident from the table set out in the rejoinder. The petitioners have dealt with the fact in the Rejoinder at Paragraph 12 to the following effect:-

"12. The the Respondent TRAI has made patently erroneous statements and allegations, where it has alleged that the charges in the rest of the world for access i.e. South East Asia, Far East and Western Europe are far less than that in India. This is patently false statement as the Petitioner as early as on 24 August 2012 in the course of response sought by the Respondent herein had set out in detail as to the charges in different countries across the same region and where the rates are as high as three to nine times. The only place where rates are low and uniform in all capacity is Singapore because it is merely across connection between fiber and does not require laying of extra fiber.

.....

That as regards the submission of the Respondent relating to transparency and how it has allegedly adhered to such standards all that the Respondent has stated in this regard is a recital of the number of

consultations it has carried out overlooking and disregarding the fact, that it has not dealt in any manner on the necessity to regulate, not given any reason for adopting diametrically opposite costing methodology in 2007 and 2012. In 2007, the Respondent has recognized and proceeded on the basis that cost vary across different landing stations and accordingly cost based charges will also vary, whereas in 2012 it has adopted a uniform model of cost. There is no costing methodology disclosed in the impugned regulation of 21 December 2012, no break up of different elements of cost whether it is CAPEX or OPEX, no reason given for assuming a uniform built capacity, contradictory approach in terms of adopting multiple of 2.6 for assessment of higher capacities etc. The Petitioner in the Writ Petition as well as in its detailed submissions in Annexure 25 to the Writ Petition has set out in extenso to the manner in which the Respondent has failed to exercise transparency with the implication that it has led to significant under recovery of costs."

116. It is the case of the petitioners that the respondent TRAI has made false and misleading averments as regards inflating the cost of Access Facilitation vis-a-vis IPLC rates in the counter affidavit of 28 November 2013 and compounding it in sur-rejoinder by further false averments, which have been effectively rebutted in rejoinder and the reply to sur rejoinder. On the ground that the impugned regulations constitute unreasonable restrictions, it is submitted that,

(1) There is neither monopoly nor abuse of dominant power by the owners of Cable Landing Stations as submitted in detail in the aforementioned paragraphs.

(2) There is absolutely no justification or necessity for TRAI to intercede and curtail the party autonomy in the contractual matter of negotiating rates for access to cable landing stations, inasmuch as the access seekers are much bigger in terms of revenue and market value as well as resources as compared to the owners of Cable Landing Stations.

(3) There is no entry barrier for the setting up their own Cable Landing Station either regulatory or commercial or otherwise. The fact that they have chosen not to set it up in the last more than 10 years would show that it is only because it is not economically viable for them or sufficiently profitable that they have chosen not to set it up. Obviously they are not persons who have long term

interest in setting up infrastructure in India but want to abuse the market and regulatory situation to their advantage on a pretense of abuse of dominant position by owners of CLSs and seeking below cost charges for such access. This would be economically ruinous for the owners of CLS and would also mean financial setback for the existing CLS with a total disincentive for any new person making investment in setting up a CLS. Far from increasing competition in the CLS segment such below cost rates will mean the number of owners of CLS will not increase.

117. The petitioners have contended that there is absolutely no necessity for regulatory intervention at this stage of market maturity in respect of regulation of Access Facilitation Charges. Assuming without admitting that there is a need for regulatory intervention, it is submitted that the restriction imposed by such regulatory intervention will have to be proportional to the demand of the competitive market forces or the market condition.

118. In **N.K. Bajpai Vs. Union of India and Another (2012) 4 SCC 653**, relied on by the petitioners, at Paragraphs 14 to 16, it is held as follows:

"14. Where the Court applies the test of "proximate and direct nexus with the expression", the Court also has to keep in mind that the restriction should be founded on the principle of least invasiveness i.e. the restriction should be imposed in a manner and to the extent which is unavoidable in a given situation. The Court would also take into consideration whether the anticipated event would or would not be intrinsically dangerous to public interest.

15. Now, we have to examine the various tests that have been applied over a period of time to examine the validity and/or reasonability of the restrictions imposed upon the rights.

16. No person can be divested of his fundamental rights. They are incapable of being taken away or bridged. All that the State can do, by exercise of its legislative power, is to regulate these rights by imposition of reasonable restrictions on them. Upon an analysis of the law, the following tests emerge:

(a) The restriction can be imposed only by or under the authority of law. It cannot be imposed by exercise of executive power without any law to back it up.

(b) Each restriction must be reasonable. (c) A restriction must be related to the purpose mentioned in Article 19(2)."

119. In **Management of Coimbatore District Central Co-Operative Bank Vs. Secretary, Coimbatore District Central Co-Operative Bank Employees Association and Anr.**, reported in (2007) 4 SCC 669, the Hon'ble Supreme Court, at paragraphs 12 and 13, held as follows:

"12. So far as the doctrine of proportionality is concerned, there is no gainsaying that the said doctrine has not only arrived at in our legal system but has come to stay. With the rapid growth of administrative Law and the need and necessity to control possible abuse of discretionary powers by various administrative authorities, certain principles have been evolved by Courts. If an action taken by any authority is contrary to law, improper, unreasonable, irrational or otherwise, unreasonable, a court of Law can interfere with such action by exercising power of judicial review. One of such modes of exercising power, known to law is the 'doctrine of proportionality'.

13. 'Proportionality' is a principle where the Court is concerned with the process, method or manner in which the decision-maker has ordered his priorities, reached a conclusion or arrived at a decision. The very essence of decision-making consists in the attribution of relative importance to the factors and considerations in the case. The doctrine of proportionality thus Smith states that 'proportionality' involves 'balancing test' and 'necessity test'. Whereas the former ('balancing test') permits scrutiny of excessive onerous penalties or infringement of rights or interest and a manifest imbalance of relevant considerations, the latter ('necessity test') requires infringement of human rights to the least restrictive alternative."

120. In **Godawat Pan Masala Product Vs. Union of India** reported in MANU/SC/0574/2004 : (2004) 7 SCC 68, at Paragraphs 48, 49, 57 to 60, 73 to 76, the Hon'ble Apex Court held as follows:

".... 48. Learned counsel for the appellants contend that the impugned notification is violative of the fundamental rights guaranteed under Article 19(1) (g) as it is excessively restrictive in nature. While the notification seeks to ban pan masala which does not include tobacco, it does not at the same time ban tobacco in any form. The literature produced by the State of Maharashtra before the High Court suggested, undoubtedly that consumption of tobacco in any form was injurious to health, but that consumption of pan masala was likely to be addictive and lead to hypermagnesia. Strangely, the states did not ban chewing tobacco or other tobacco products which contain almost cent percent tobacco, but they banned the sale of gutka which contains only about 6 per cent of tobacco and pan masala, which contains no tobacco whatsoever, even accepting on the correctness of the material presented. Further, the literature produced by the States indicates that pan masala is addictive amongst children and, therefore, likely to be injurious to their health in the long run. Assuming this to be true, the restriction could only have been on sale to under-aged persons and not by way of a total ban. Thus, in our view, the impugned notification is violative of the fundamental rights of the appellants-guaranteed under Article 19(1)(g), both because it is unreasonable and also because it is excessive in nature. A contrast with the provisions of the Act 34 of 2003 in this regard would drive home the point.

49. while dealing with the nature of a reasonable restriction on the fundamental rights under Article 19 (1)(g), this court observed in MMohd. Faruk v. MANU/SC/0046/1969: State of Madhya Pradesh and Ors., [1970] 1 SCR 156 as under:

"the impugned notification, though technically within the competence of the State Government, directly infringes the fundamental right of the petitioner guaranteed by Article 19(1)(g), and may be upheld only if it be established that it seeks to impose reasonable restriction in the interest of the general public and a less drastic restriction will not ensure the interest of the general public. The court must in considering the validity of the impugned law imposing a prohibition on the carrying on of a business or profession, attempt an evaluation of its direct and immediate impact upon the fundamental rights of the citizens affected thereby and the larger public interest sought to be ensured in the light of the object sought to be achieved, the necessity to restrict the citizen's freedom, the inherent

pernicious nature of the act prohibited or its capacity or tendency to be harmful to the general public, the possibility of achieving the object by imposing a less drastic restraint, and in the absence of exceptional situations such as the prevalence of a state of emergency - national or local - or the necessity to maintain essential supplies, or the necessity to stop activities inherently dangerous, the existence of a machinery to satisfy the administrative authority that no case for imposing the restriction is made out or that a less drastic restriction may ensure the object intended to be achieved"

57. Learned counsel highlighted the observations of this Court in *Maneka Gandhi v. Union of India*, (1978) 2SCR 621 and contended that irrespective of whether the power to issue the impugned notification is a legislative power or an executive power, it must pass the test of fairness in procedure. Any provision of law which enables to an authority by a notification to bring to standstill a business, which is otherwise permitted by law, must be held to be arbitrary; unfair and an abridgment of the fundamental rights guaranteed under Article 14 of the Constitution. (See: also in this connection *Kanti Lal Babulal v. MANU /SC/0308/1967: H.C. Patel*, (1968) 1 SCR 735, *Ajay Hasia and Ors. v. MANU/SC/0498/1980: Khalid Mujib Sehravardi and Ors.*, (1981) ILLJ 103SC and *Delhi Transport Corporation v. MANU/SC/0031/1999: D.T.C. Mazdoor Congress and Ors.*, (1991) ILLJ 3955C.

58. It is in the light of these authorities that we are required to adjudge the constitutionality of the interpretation put on Section 7(iv).

59. Learned counsel for the States, however, urge that the impugned notification is a legislative act and not an administrative Act. Thus, according to them, there is no question of giving a hearing before taking a policy decision to ban the manufacture for sale, storage, sale and distribution of pan masala and Gutka.

60. We are unable to accept the contention of the States. In our view, the scheme of the Act suggests that a decision to ban an article injurious to health, when used as food or as an intergradient in the manufacture of any article of food, can only be the result of broader policy. Hence, this larger power appears to have been located only in the Central Government under Section 23(1A)(f) and not in the state Food (Health) Authority. As we have already

pointed out, the power of the State Food (Health) Authority. As we have already designed to deal with local emergencies. In our considered view, the impugned notification is certainly an administrative act and not a legislative act. Inasmuch as by an executive act the manufacture for sale, storage, sale or distribution of the concerned article has been banned so as to interfere with the fundamental rights of the appellants guaranteed under Articles 14 and 19 of the Constitution of India, the impugned notification is illegal and unconstitutional.

73. Learned Counsel for the State of Maharashtra cited *Union of India and Anr. V. Manu/sc/0076/1987: Cynamide India Ltd and Anr. (1987) 2 SCR 841*, where this Court observed thus:

"The third observation we wish to make is, price fixation is more in the nature of a legislative activity than any other. It is true that, with the proliferation of delegated legislation, there is a tendency for the line between legislation and administration to vanish into an illusion. Administrative quasi-judicial decisions tend to merge in legislative activity and, conversely, legislative and administrative functions, it has been said, is difficult in theory and impossible in practice'. Though difficult, it is necessary that the line must sometimes be drawn as different legal rights and consequences may ensue. The distinction between the two has usually been expressed as 'one between the general and the particular'. 'A legislative act is the creation and promulgation of a general rule of conduct without reference to particular cases; an administrative act is the making and issue of a specific direction or the application of a general rule to a particular case in accordance with the requirements of policy'. 'Legislation is the process of formulating a general rule of conduct without reference to particular cases and usually operating in future; administration is the process of performing particular acts, of issuing particular orders or of making decisions which apply general rules to particular cases'. It has also been said: 'Rule-making is normally directed toward the formulation of requirements having a general application to all members of a broadly identifiable class', while, 'adjudication, on the other hand, applies to specific individuals or situations'. But, this is only a broad distinction, not necessarily always true. Administration and administrative adjudication may also be of general application and there may be

legislation of particular application only. That is not ruled out. Again, adjudication determines past and present facts and declares rights and liabilities while legislation indicates the future course of action. Adjudication is determinative of the past and the present while legislation is indicative of the future. The object of the rule, the reach of its application, the rights and obligations arising out of it, its intended effect on past, present and future events, its form, the manner of its promulgation are some factors which may help in drawing the line between legislative and non legislative acts."

74. We are, however, unable to accept the contention of the learned counsel for the state of Maharashtra that, because the notification is generally intended, it is necessarily a legislative act and therefore there was no question of complying with principles of natural justice. If that were so, then every executive act could masquerade as a legislative act and escape the procedural mechanism of fair play and natural justice.

75. In **State of Tamil Nadu v . Manu/SC/0836/1998: K. Sabanayagam and Anr., AIR 1997 SC4325**, this Court after referring to the aforesaid observations of Chinnappa Reddy, J. in *Cynamide (Supra)*, observed that even when exercising a legislative function the delegate may in a given case be required to consider the view point which may be likely to be affected by the exercise of power:

(1) when the legislature has completed its task of enacting a statute, the entire superstructure of the legislation is ready but its future applicability to a given area is left to the subjective satisfaction of the delegate (as in **Tulsipur Sugar Co. Case, MANU/SC/0336/1980: [1980] 2 SCR 1111**

(2) where the delegate has to decide whether and under what circumstances a legislation which has already come into force is to be partially withdrawn from operation in a given area or in a given cases so as not to be applicable to a given class of persons who are otherwise admittedly governed by the Act;

(3) where the exercise of conditional legislation would depend upon satisfaction of the delegate on objective facts placed by one class of persons seeking benefit of such an exercise with a view to deprive the rival class of persons who otherwise might have already got statutory benefits under the Act and who are likely to lose the existing benefit because of

exercise of such a power by the delegate. This Court emphasized that in the third type of cases the satisfaction of the delegate. This Court emphasized that in the third type of cases the satisfaction of the delegate must necessarily be based on objective considerations and, irrespective of whether the exercise of such power is judicial or quasi judicial function, still it has to be treated to be one which requires objective consideration of relevant factual data pressed into service by one side, which could be rebutted by the other side, who would be adversely affected if such exercise of power is undertaken by the delegate.

76. In our view, even if the impugned notification falls into the last of the above category of cases, whatever the material the Food (Health) Authority had, before taking a decision on articles in question, ought to have been presented to the appellants who are likely to be affected by the ban order. The principle of natural justice requires that they should have been given an opportunity of meeting such facts. This has not been done in the present case. For the reason also, the notification is bad in law."

121. The TRAI in its consultation paper of 22 March 2012, specifically posed the following 10 questions:-

Q1: Which of the following method of regulating Access Facilitation Charges and Co- location charges (AFC & CLC) should be used in India?

(a) The prevalent method i.e. submission of AFC & CLC by owner of the cable landing station (OCLS) and approval by the TRAI after scrutiny

(b) Submission of AFC & CLC by OCLS and approval by TRAI after consultation with other stakeholders

(c) Fixing of cost based AFC & CLC by TRAI

(d) Left for mutual negotiation between OCLS and the Indian International Telecommunication Entity (ITE)

(e) Any other method, please elaborate in detail.

Q 2: In case AFC & CLC are regulated using method (a) or method (b) above, is there a need to issue guidelines containing algorithm and network elements to be considered for calculating AFC & CLC to the OCLSs? If yes, what should be these guidelines?

Q 3: In case, AFC & CLC are regulated using method

(a), (b) or (c) above, please suggest the value of pre-tax WACC, method of depreciation and useful life of each network element? Please provide justification in support of your answer.

Q 4: Which cost heads/ network elements should be included/ excluded while calculating Access Facilitation and Co-location charges? Please enumerate the items with specific reasons.

Q5: What should be periodicity of revision of AFC & CLC? Support your view with reasons.

Q 6: In case, cost based AFC & CLC are fixed by TRAI, which costing methodology should be applied to determine these charges? Please support your view with a fully developed cost model along with methodology, calculation sheets and justification thereof.

Q 7: Whether Access Facilitation charges and O&M charges should be dependent on capacity (i.e. STM-1, STM-4 or STM-16) activated? Support your view with reasons.

Q 8: If Access Facilitation charges and O&M charges are fixed on the basis of capacity activated;

(a) Should the charges be linearly proportionate to the capacity activated; or

(b) Should the interface capacity as provided by the submarine cable system at the cable landing station be charged as a base charge while higher or lower bandwidth be charged as the base charge plus charges for multiplexing/ de-multiplexing?

Q 9: Whether there is a need to fix Access Facilitation charges for all types of submarine cables? If no, which kind of submarine cables may be exempted and why?

Q 10: Is there a need to introduce any new provision or to modify/delete any of the clauses of the 'International Telecommunication Access to Essential Facilities at Cable Landing Stations Regulation 2007', in order to facilitate access to essential facilities at cable landing station?

122. The petitioners have further submitted that having received responses from all the stakeholders on the merits and demerits of each one of the options, there is not even a consideration of the same either in the Explanatory Memorandum of October 2012 or December, 2012 Regulations. There is total non application of mind to the need for regulation or the extent

of Regulation. TRAI, without consideration, has rejected the submission of the Petitioners and jumped to the conclusion, unsupported by reason, that the situation warrants TRAI to specify the rates. This is completely at variance with the 2007 Regulation which only required prior approval of the rates by proposals being submitted by OCLS consideration thereof by TRAI after examining relevant costs and methodology. This process was adopted in 2007 while approving the rates and it is not as if the OCLS are charging rates determined on their whims but are charging rates duly approved by TRAI. The reasons pointed out by the access seeker that the rates need to be brought down substantially by TRAI itself specifying the rates where that the utilization of capacity has gone up and the price of equipment have come down. OCLS in their submissions have pointed out the fallacy of these contentions but TRAI does not even discuss it either in the explanatory memorandum of October or December 2012 Regulations. Thus, Regulation of October 2012 in so far as vests the power of TRAI to specify the rates and regulation of December 2012 which actually specify the rates are both completely arbitrary and unreasonable restriction which are not saved by Article 19(6) of the Constitution. These issues in respect of costs and utilization have been dealt in greater detail in the relevant sections.

123. It is further submitted that from 2005 onwards, the respondent has deliberated the need to regulate the sector and the approach of the TRAI can be divided into two stages. In the first stage, starting from the Regulation 2007 until December 2012, the emphasis was on supervisory regulation based on costs of the owners of the Cable Landing Stations and since 21 December 2012, the respondent has proceeded by direct Regulation, prescribing charges for access facilitation, co-location. The rationale for the latter is that it was not possible for TRAI to evaluate individual costing of different CLSs and therefore disregarding the self admitted fact that individual costing and consequently charges for access will vary from CLS to CLS, it suddenly evolved a standardised costing model and prescribed charges far below the actual cost. However, even on examining the facts and parameters, by TRAI's own self admitted standards, in none of the impugned Regulation or the Explanatory Memorandum have the Respondent (TRAI) considered the submission of the Petitioner. In its response to the Respondents query of 22 June 2011 seeking the extent of regulatory practice as well as the petitioners response to the 22 March 2012 Consultation Paper, the petitioner has dealt, in extenso on the growth of the national market for CLS, number of service providers, increase in the number of cables, comparison with international practices where there is very little regulation. However, none of this has been dealt with in the Explanatory Memorandum of the impugned Regulations of October 2012. The

respondent has consistently disregarded available information regarding the availability and increase in the number of CLS and submarine cable and whether it requires or needs to be regulated. There are multiple issues relating to the requirement and need for Regulation and which is inter alia evident from the following:-

(i) It was noticed by the Respondent in its recommendation of 16 December 2005 on the need for greater Regulation in this scope that the capital cost of setting up a CLS in the range of twenty to fifty crores, it was further more observed that setting up of a CLS is a time consuming and capital intensive process, not feasible for a new operator to set up a CLS for new cable and did not make sense to duplicate the extensive CLS infrastructure in the country, when many cable can be landed at the same CLS. Therefore, multiple cables owned by the different operators should be made to land on a common CLS for economic reason by a mandate through terms and conditions of the license.

(ii) It is an assumption that the cost is huge for a CLS, defies logic as the cost of submarine runs into hundreds of crores and the cost of a CLS would therefore be a fraction of the entire cost of a submarine cable. The cost of building the CLS is roughly 10% of the total cost of building the submarine cable system.

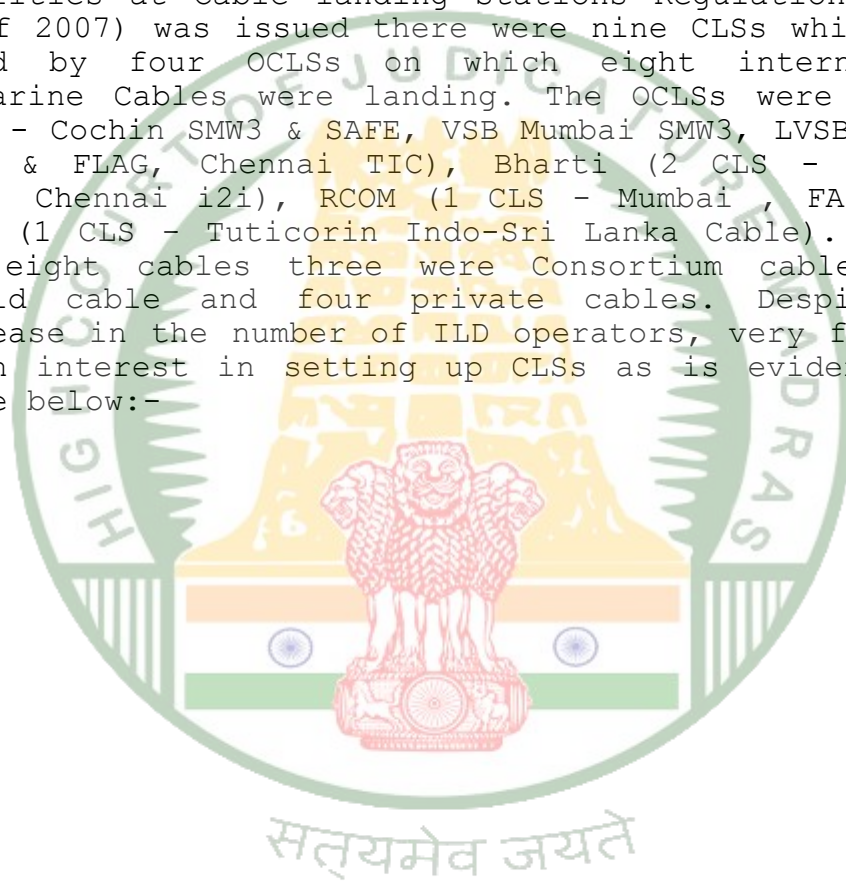
(iii) Most assumptions on the part of the TRAI that CLS constitute a bottleneck requiring Regulation so called huge cost and being capital intensive in nature is erroneous as only a minimum of nine months is required to install one CLS. As far as time period is concerned the period of nine months is much less than what is required to install and establish a submarine cable system and CLS only comprises one of the landing station for such submarine cable. Cost of building a Cable Landing Station although capital intensive is a fraction of the cost required to build the international submarine cable itself and therefore most of the Consortium/Private owned cables landing in

India since 2005 have landed on newly built cable landing stations instead of at existing CLSs. For example, IMEWE , a consortium cable, is landing at Mumbai, India at two different new cable landing stations with in Mumbai each owned by Tata Communications Ltd and M/s. Bharti Airtel. Similarly, Sify ,choose to build its own cable landing station in Mumbai for its GBI cable despite of the fact that there was a choice of existing and well established CLSs owned by Tata Communications Ltd , M/s. Bharti Airtel , and Reliance Communications Ltd available to Sify to choose from. Further, Sify, the latest entrant to land GBI cable in Mumbai never initiated dialogue with well established CLS owner like Tata Communications Ltd having 3 well diversified CLS in Mumbai on the possibility of landing GBI Cable in any of TCL CLS. The other reason for trend of each international submarine cable owner choosing to land on a new CLS is the QoS consideration. Due to very high dependency of customers/users on international telecom services, expectation of quality of service mainly uptime has gone up very high. One of the ways to maintain high uptime is to avoid any common point of failure. A CLS can potentially be a common point of failure with very severe impact effecting very large number of customers/ services. Government policies should also therefore encourage the building of multiple cable landing stations in order to minimize common points of failure; Government policies should not incentivize new cables to land in exactly the same place as other cables. Current CLS owners (now that competition in India is firmly entrenched) have a financial incentive to allow new cable system builders to purchase the ability to use their existing cable stations. Builders of new cable systems have some incentive to avoid crowded CLS (where cables already land), as the bandwidth derived from cable(s) passing through such a CLS will be in less demand among customers.

(iv) Thus it can be clearly seen by the events which have happened since December, 2005, when the recommendations were given by TRAI for treating CLS as an essential/bottleneck facility, that in so far as landing of new international submarine cables in India is concerned, Cable Landing Station facility is not a bottleneck facility. The aforesaid is also clearly established by the fact that since 2005, cable owners, by and large, continued to prefer establishing new CLS for their upcoming/planned cables in-spite of the availability of choice of landing at existing CLS. It

is also a fact that not a single international cable operator/consortium/carrier or Indian ILDO has complained that it has been denied the landing facilities by any of the OCLSS in India.

Even in terms of numbers in the last ten years the numbers of CLS has gone up increasing to eleven which are owned between five ILD operators. In 2007, when the International Telecommunication Access to Essential Facilities at Cable landing Stations Regulations, 2007 (5 of 2007) was issued there were nine CLSSs which were owned by four OCLSSs on which eight international Submarine Cables were landing. The OCLSSs were TCL (4 CLSSs - Cochin SMW3 & SAFE, VSB Mumbai SMW3, LVSB Mumbai SMW4 & FLAG, Chennai TIC), Bharti (2 CLS - Chennai SMW4, Chennai i2i), RCOM (1 CLS - Mumbai, FALCON) & BSNL (1 CLS - Tuticorin Indo-Sri Lanka Cable). Out of the eight cables three were Consortium cables, one Hybrid cable and four private cables. Despite the increase in the number of ILD operators, very few have shown interest in setting up CLSSs as is evident from table below:-



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ILDO with Effective License dt. 2002-2005	ILDO with Effective License dt. 2006-2008	ILDO with Effective License dt. 2009-2012
M/s Reliance Communications Limited (BT)	M/s.i2i Enterprises Ltd. Communications Pvt. Ltd)	M/s Singtel global (India) Private Ltd.
M/s Bharti Airtel Ltd	M/s.AT&T Global Network Services India Pvt. Ltd.	M/s Datacom Solutions Private Ltd.
M/s Videsh Nigam Ltd. (Tata Communications Ltd)	M/s.Vodafone Essar Ltd.	M/s Unitech Long Distance Communications Services Ltd
M/s Bharat Nigam Ltd.	M/s.Sify Communications Ltd.	M/s Pacific Internet India Private Limited
	M/s.Dishnet Wireless Ltd.	M/s Telstra Telecommunications Pvt. Limited
	M/s.Tulip IT Services Ltd.	M/s Infotel Telecom Limited
	M/s.Spice Communications Ltd	
	M/s.Veriion Communications India Private Limited	
	M/s.Cable & Wireless Networks India Private Limited	
	M/s.P3 Technologies PvtLtd.	
	M/s.Mahanagar Telephone Nigam Ltd.	
	M/s.Equant Networks Private Ltd	
	M/s.Citicom Networks Pvt. Ltd	
	M/s.Swan Telecom Pvt. Ltd.	

CLS Owner Vs. CLS Owner Vs. Licensed CLS Owner Vs.
 Licensed ILDO =4/4 ILDO =1/14 Licensed ILDO =0/6
 Over all CLS Owner Tjioie Highlighted an?
 Vs. Licensed ILDO iv/Mi owner of
 ILDO=5/24 CIS

(vi) It may be recounted that up till the financial year 2005-06 only four Operators had taken licenses for ILD services and the number of Service Providers increased post the liberalization of licensing regime for ILD service license. There were five licenses issued in 2006, three in 2007, eight in 2008 and three up to April 2009 taking the number of ILD Service Licensees to 24. However, on examination of the position of the submarine cables landing in

India, the associated CLSs and OCLSs, only one new OCLS (Sify) is emerging out of the >19 new ILDO Licensees who took License from July 2006 onwards till date. As on date there are 13 submarine cables landing in to India in the 11 CLSs owned by TCL (5), Bharti (2), RCOM (2), Sify (1) & BSNL (1) respectively. Thus it can be seen that despite the liberalization of the licensing regime and the access to the landing station, the same has not acted as a catalyst for attracting investments from most of the post- July 2006 licensed ILDOs in the capital intensive submarine cable construction and the associated landing station infrastructure. The option to build CLS infrastructure along with associated international submarine cable landing in to India was and is open to all the ILDOs since 2006 under the liberalized policy regime. The deliberate decision by the majority of such post- July 2006 licensed ILDOs, under current policies, to refrain from investing in building infrastructure in India indicates that market has matured in India therefore there is no need to continue regulating access to the CLS.

(vii) Whether there is a monopoly situation in respect of CLS/ OCLS: Out of the three new consortium cables which came in to being since 2006, two (IMEWE and SMW4) are landing at more than one CLS providing choice of CLS and OCLS for the eligible ITEs to access the bandwidth. There are now 13 Cables landing on 11 CLSs owned by 5 OCLSs. Further, there are 5 terabit submarine cable routes going east of India (owned by 4 ILDOs) and 5 terabit submarine cable routes (owned by 3 ILDOs) , going to west of India and also 6 cables routes to gulf destinations from India(owned by 4 ILDOs). Each terabit cable is potentially capable of meeting entire country's bandwidth requirement on that route. Thus on any given international submarine cable route from India, adequate choice of CLSs and OCLSs at diversified CLSs as well as bandwidth is available for purchase. Therefore, there is intense competition amongst the various entities owning the Cable Landing Station/cable for providing international bandwidth capacities to the eligible Indian ITEs along with access to the Cable Landing Station. It is, therefore, no longer a valid statement that either the Cable Landing Stations or the international capacity in India is owned by a single or small number of players. Going forward the three new international cables which will come in to India and the five Cable Landing Stations are being set up as per the following details [(RJIL-3 CLSs for AAG, BBG & I-I Cable), (Singtel -

1 CLS for SMW- 5 cable) and (Vodafone - 1 CLS for BBG cable)]. Thus at the end of 2016, there would be total of 16 CLSs owned by 8 OCLSs out of which Petitioner will have only 5 CLSs. It is also observed that in similar scenarios in other markets globally, regulations are withdrawn once the competition matured like Australia, US, UK etc. With so much capacity available, OCLSs are incited to compete for the wholesale business (as well as using it for enterprise offerings). OCLSs want to earn income from the capacity that they have invested in any way they can.

Since the market forces and competition have already taken over, it is submitted that CLS no longer remains the bottleneck facility from any angle and market forces are already working with each OCLS trying to grab a major share of the market, it is submitted that the charges for the CLS access should be left unregulated.

(viii) As per the extracts of the December 2005 Recommendations of TRAI, there were two issues regarding bottleneck to essential facilities at a landing station. One was denial of access to the international capacity of a Consortium cable by a CLS owner and the other was denial of landing facility to a third party who possess the requisite license desirous of landing new cable at the CLS of a carrier. The purpose of the regulatory action was to remove these bottlenecks. As on date, there is no known or reported case of denial of access to the international capacity of a Consortium cable by the CLS owner nor any third party had sought landing of a new cable at any of the existing CLSs. Also out of the three new consortium cables which have come up since 2006, two (SMW4 & IMEWE) are landing at more than one CLS providing choice of CLS and OCLS for the eligible ITEs to access the bandwidth. Further, as multiple choices of CLSs as well as submarine cables from different OCLSs are available resulting in multiple choices for the eligible ITEs which is a clear sign of evolution and maturity of the competition and maturing of the market in India over a period, there is no need to continue treating CLS as a bottleneck facility.

(ix) Submarine cables and cable landing stations are not a type of natural monopoly like last mile access loops are. Each submarine cable investment can be evaluated on a standalone business case and is not intrinsically hampered by or dependent on prior investments in the sector. Both the i2i cable system

and the Tata Indicom Cable required the creation of new cable landing stations in Chennai. These investments were justified based on the standalone business cases prepared for them. Therefore there is no basis for suggesting that only an erstwhile incumbent or selected few licensed ILDOs can justify or bear the investment in a cable landing station. Since adequate time has been provided to new entrants to invest in cable infrastructure and there is no evidence of a 'natural monopoly' in this sector, extending the Bottleneck Facility clause would not serve any benefit to the industry and the customers.

(x) That as far as the global scenario in terms of CLS is concerned the numbers of CLSs have increased along with the numbers of Submarine Cable. This is evident from a table from the December, 2005 recommendations of TRAI regarding access to essential facilities with additional details of Indian position as on date highlighted in yellow as under:

Table 4.2: Details of Cable Landing Stations (CLS) and Cable Systems

			Landing at CLSs
Malaysia	1	4	9
Singapore	2	4	8
Hong Kong	4	6	10
United Kingdom	7	8	11
USA	17	22	30
Canada	3	3	4
Australia	2	7	8
Brazil	3	4	6
Russia	2	3	4
Philippines	3	3	5
India	2	5	8
India as on date	5	11	13
India projection 2016	8	>15	>13

124. From the above, the petitioners have further contended that the number of OCLS, CLS and cables landing in India have increased substantially as on date and is likely to grow further. On a comparison with countries like Australia, U K, Brazil, Philippines, Canada where the CLS access was not regulated in December, 2005 itself, the state of competition in India is now as fully robust. It is noted from examination of global practices that even in formerly CLS access regulated countries, the regulation of access to CLS was withdrawn when these countries had lesser number of Cables, OCLSs and CLSs as

compared to India statistics as on date as the competition was adjudged to have matured in those countries. Thus on the examination of the global practices as of December, 2005 and the current figures of India a clear case is made out for cessation of regulation in respect of access to the CLS due to market forces taking over.

125. During the course of submissions, the petitioners have invited the attention of this Court to the manner in which the United State Trade Representative (USTR), which is part of the office of the President of United State, has been actively pursuing with the Respondent TRAI towards increase regulation and prescription of lower access facilitation charges for the Cable Landing Station in India. This fact had come to the notice of the Petitioner recently from the annual reports from 2005 onwards till date of the USTR. The Petitioner in this regard has filed a detailed affidavit on 07.04.2014, where it has demonstrated the co-relation between the dissatisfaction/displeasure of the USTR and its censuring the respondent TRAI through various representations and consequent action of the respondent TRAI in bringing about the three impugned regulations. in fact, it is relevant to note that the USTR report of March 2005 records the USTR's displeasure and suddenly respondent TRAI on its own brings out the recommendation of 16.12.2005 where it sought amendment to the ILD License Agreement allegedly empowering / enabling itself to bring forth the impugned regulations. The Petitioner craves leave of this Hon'ble Court to refer to the contents of the affidavit of 07.04.2014.

126. The Petitioner, by a detailed affidavit on 07th April, 2014, pursuant to oral submissions made has placed on record the annual reports of the United States Trade Representative (USTR) of the Office of the President of United States, where the USTR reports disclose a clear co-relation at their attempts at persuading the respondent TRAI to bring forth the impugned regulations, their displeasure at the TRAI not acting upon their request and TRAI subsequently exceeding to such dictates. The USTR represents the interest of the Multinational corporations who in the present proceedings are represented by the ACTO. Very pertinently, the entire exercise of framing the impugned regulation was kicked off by the TRAI through a suo moto recommendation of 16th December 2005 where it recommended amendment to the ILD License provisions to enable the TRAI to frame the impugned Regulations and which was pursuant to the annual report of USTR of March 2005, where it had castigated the TRAI for not acting in the interest of the US Corporations. The Petitioner for the sake of brevity is not extrapolating on the

facts in this regard, but places reliance on the affidavit as filed. This clearly discloses that irrelevant considerations, namely lobbying/ advocacy by multinational corporations through the USTR is the basis for the impugned regulations and on this ground alone they deserves to be set aside.

127. It is further submitted that the impugned Regulations suffer from the vice of arbitrariness, more particularly Regulations of 19th October 2012 and 21st December, 2012. A large number of the issues addressed in this section relate to and have been extrapolated in detail in other sections, for the sake of convenience the petitioner is setting out the gist of its submissions on this aspect. The very purpose of framing this Regulation is hit by arbitrariness, for the following reasons:-

1. There is no Open House Discussion.
2. There is no hearing by the Authority.
3. There is no transparency.
4. There is violation of the principles of natural justice.
5. There is wilful non application of mind.

128. It is submitted that the Consultation Paper for this Regulation was issued on 22 March 2012, when the Respondent TRAI was already seized of the submission of revised rates by the Petitioner in respect of CLS access charges in terms of the 07 June, 2007 Regulations. The Consultation Paper in fact commended the working of the 2007 Regulations by stating at para 1.16 (page 319 Vol. I Petitioner's typed set) to the following effect,

"1.16 The Regulation has paved way towards debottlenecking the essential facility at Cable landing stations, which resulted in a significant competition in international bandwidth segment. The enhanced competition has helped in reduction of the prices of international bandwidth substantially in India during the past four years."

129. Writ petitioners have submitted that there is a categorical admission by TRAI that the bottlenecking has been achieved. Respondent has relied extensively upon the license provision of access to CLS being a bottleneck facility while framing the impugned Regulation of 2007, once the bottlenecking has been achieved the alleged purpose of the license amendment

which was carried out on a suo moto recommendation of the TRAI has been achieved.

130. The petitioners have further submitted that there was no Open House Discussion or any hearing given to the Petitioner, the Petitioner had various discussions/ meetings with the officials of the TRAI between May to August, 2012, all of which related to initially on the methodology used by the Petitioner for computation of Access Facilitation Charges and thereafter from August 2012 onwards, TRAI called for the meetings to discuss the revised RIO rates submitted by the Petitioner in terms of 2007 Regulations submitted in November 2010. While the Petitioner submitted its final calculations on 27 September 2012 and was waiting for the approval from the Respondent suddenly out of the blue the impugned Regulations of 19th October 2012 were published.

131. The petitioners have further submitted that though the respondent has raised 10 issues for consultation (page 355-357 Vol.I of the Petitioner's typed set) and in the Explanatory Memorandum addressed only one issue, namely Question No.1., i.e. the method and need for Regulation was dealt with and that too in a very sketchy manner and the reasons given in support of the decision are without any basis and rationale.

132. Considering that the de-bottlenecking of CLS as a facility as per the Respondent's own stated stand have been achieved, not to furnish any reasons and peremptorily amend the parent Regulation by empowering itself to prescribe charges, required reasons to be furnished, more so when the purpose of the Explanatory Memorandum is to deal with the contentions of all the stakeholders and arrive at a reasoned decision. Referring to Paragraph 10 at page 526 in Volume II of the typed set, the petitioners have submitted that the only reason advanced by the respondent towards framing the impugned regulations is that

"the process of approval of the charges involves scrutiny by TRAI of costing elements considered, costs and costing methodology employed by OCLS and final approval by TRAI, it takes more time and provide competitive advantage to the owner of Cable Landing Station as OCLS is also integrated operator "

133. The petitioners have further submitted that reason aggrieved by TRAI, is totally arbitrary and contrary to its own parent regulation of 7th June 2007, where specific time lines have been set out for approval of charges by the Respondent TRAI upto a maximum of 60 days. The Petitioner had furnished its

revised rates for approval to the Respondent in November 2010, which were never approved and for which the Petitioner was called for giving a presentation in January 2011 and thereafter number of meetings were held with the officials of the Respondent TRAI in August-September 2012. To attribute an alleged delay furnishing a benefit to the OCLS is totally without any foundation when the TRAI itself has not followed its statutory time lines stipulated in the 7th June 2007 Regulation in respect of revised charges submitted by the petitioner in November 2010.

134. Writ petitioners have further submitted that regulation of 2007 amply discloses the understanding of TRAI on the term interconnection as involving interconnection of the network of 2 or more service providers as contrasted with the expression "Access". The impugned regulation makes applicable the definition of the terms and expressions not defined in the impugned regulation but defined in other regulations to be understood and interpreted in the manner defined in other regulations. The terms and conditions of the ILD license also would support this contention in so far as it defines interconnection.

135. As regards 21st December, 2012 Regulations, the petitioners have submitted that this Regulation is arbitrary, unreasonable, without application of mind and stipulate rates excessively below costs for inter alia the following reasons. The Petitioner is setting out the reasons in brief, as they have been elaborately dealt with in other sections:-

- a. There is no Open House Discussion.
- b. There is no hearing by the Authority.
- c. There is no transparency.
- d. There is violation of the principles of natural justice.
- e. Erroneous assumptions made basis of such assumptions made not given and when errors pointed out the same not considered.
- f. There is wilful non application of mind.
- g. The Regulation is framed in great haste in two months' time and inspite of repeated assertions by the Petitioner that there was no clarity on most of the issues, such objections have been disregarded showing willful non application of mind.
- h. As regards multiple issues namely taking erroneous capacity forecast of 60Gbps, adoption of utilization factor of 70%, multiplication factor of

2.6, instead of 4 assessment of CAPEX and OPEX, there is arbitrariness writ large which has been dealt with extensively in the section relating to determination of costs.

i. The Explanatory Memorandum of the 2007 Regulation laid special emphasis that the charges for Access Facilitation should be on the basis of cost and OCLS should be provided the opportunity to determine such charges on the basis of its cost, submit the same to the Authority for its approval. The Explanatory Memorandum also stated that the prior approval of the TRAI will ensure transparency, fairness and reasonability in respect of the charges. The Para 2.12.2. of the EM to the 2007 regulation is extracted below:-

"2.12.2 The Authority examined the principle that whether the cost based charges for access facilitation and co-location charges are required to be prescribed in the regulations or OCLS are mandated to publish non-discriminatory and transparent charges for access facilitation and co-location etc. The Authority observed that in most of the countries the charges are published by the OCLS with the prior approval of the regulator. The Authority is also of the view that to have reasonable and fair charges, the need is to have such charges on cost oriented basis and also to provide first opportunity to the owner of the cable landing station. It is appropriate that OCLS determine the charges on the basis of cost oriented principles taking into account the cost involved in access facilitation,, operation & maintenance, cancellation and in provisioning of co-location facilities including co-location space and submit to the Authority. However, these charges will be approved by the TRAI on the basis of well- established costing methodology already in vogue in the Authority. Prior -approval of the TRAI will ensure transparency, fairness and reasonability and also OCLS will not tend to adopt an arbitrary approach in prescribing various charges. Therefore, the Authority has made provisions in these regulations to address this issue."

136. It is further submitted that the impugned Regulations of 2012 both of 19 October 2012 and 21 December, 2012 in the matter of principles are antithesis of the principles expounded by the Authority in its 2007 Regulations. there are no justified reasons, explanations or rationale available for this 180 degree shift in the stand of the Authority in as much as the OCLS is

deprived of its opportunity to present the cost based charges and secondly the charges promulgated by the Respondent in its December 2012 Regulation are neither cost based nor they take into account the actual cost and utilization figures. The Respondent has arbitrarily assumed the power to specify the CLS charges without taking into considerations the principles propounded in its earlier Regulations and the decision for the same is taken on flimsy and arbitrary grounds.

137. The Explanatory Memorandum of the 2007 Regulations also laid special emphasis that the charges for Access Facilitation should be submitted to the TRAI for approval with information concerning the costs components, costing methodology and calculation sheets. The EM also stated that Access facilitation charges are based on the non-recurring initial cost of the new access arrangement, including such elements as the cost of construction, equipment and cross-connect access which are specific to such arrangements. Similarly, co-connect access which are specific to such arrangements. Similarly, co-location cost will also comprise the recurring rental and operation and maintenance cost of building support and maintenance, leasehold, power and other utilities. Thus it was clear that each CLS charges will depend upon the location of CLS, equipment deployed etc. and charges were required to be submitted for each of the CLS which were different due to these factors but were approved by the Respondent on the basis of costs. The relevant para 2.16.2 of the EM states as under:-

"2.16.2 Charges for co-location and access should be determined first by the cable landing station owner based on the relevant cost and should be submitted to the TRAI for approval with information concerning the costs components, costing methodology and calculation sheets. Without having details of the costing elements and methodology adopted by the OCLS, it would be very difficult for the, TRAI to evaluate these charges and approve the same. Access facilitation charges are based on the non-recurring initial cost of the new access arrangement, including such elements as the cost of construction, equipment and cross-connect access which are specific to such arrangements. Similarly, co-location cost will also comprise the recurring rental and operation and maintenance cost of building support and maintenance, leasehold, power and other utilities. These costs also are specific to each access arrangement or co-location facilities and, therefore, the Authority is of the view that OCLS should submit CLS-RIO as per the various provisions in these regulations and as per the Schedule annexed with these regulations along with the details of costing

elements, methodology employed and calculation sheets etc."

138. The petitioners have further submitted that the impugned regulations are vitiated for violation of transparency and natural justice. In support of the same, they have relied on the following decisions,

(i) In **Kumari Shrilekha Vidhyarthi and Others Vs. State of U.P. & Others [(1991) 1 SCC 212 Para 36 & 37]**,

"36. The meaning and true import of arbitrariness is more easily visualized than precisely stated or defined. The question, whether an impugned act is arbitrary or not, is ultimately to be answered on the facts and in the circumstances of a given case. An obvious test to apply is to see whether there is any discernible principle emerging from the impugned act and if so, does it satisfy the test of reasonableness. Where a mode is prescribed for doing an act and there is no impediment in following that procedure, performance of the act otherwise and in a manner which does not disclose any discernible principle which is reasonable, may itself attract the vice of arbitrariness. Every State action must be informed by reason and it follows that an act uninformed by reason, is arbitrary. Rule of law contemplates governance by laws and not by humour, whims or caprices of the men to whom the governance is entrusted for the time being. It is trite that be you ever so high, the laws are above you'. This is what men in power must remember, always.

37. Almost a quarter century back, this Court in **S.G. Jaisinghani v. Union of India and Ors.**, [1967] 2 SCR 703, at p. 718-19, indicated the test of arbitrariness and the pit-falls to be avoided in all State actions to prevent that vice, in a passage as under:

"In this context it is important to emphasize that the absence of arbitrary power is the first essential of the rule of law upon which our whole constitutional system is based. In a system governed by rule of law, discretion, when conferred upon executive authorities, must be confined within clearly defined limits. The rule of law from this point of view means that decisions should be made by the application of known principles and rules and, in general, such decisions should be predictable and the

citizen should know where he is. If a decision is taken without any principle or without any rule it is unpredictable and such a decision is the antithesis of a decision taken in accordance with the rule of law. (See Dicey--"Law of the Constitution"-Tenth Edn., Introduction cx). "Law has reached its finest moments", stated Douglas, J. in *United States v. Wunderlick*, (*), "when it has freed man from the unlimited discretion of some ruler ... Where discretion is absolute, man has always suffered". It is in this sense that the rule of law may be said to be the sworn enemy of caprice. Discretion, as Lord Mansfield stated it in classic terms in the case of *John Wilker* (*), "means sound discretion guided by law. It must be governed by rule, not humour: it must not be arbitrary, vague and fanciful."

(ii) In **Delhi Science Forum and others v. Union of India** reported in **AIR 1996 SC 1356**, at Paragraph 10, the Hon'ble Apex Court held as follows:

"10. There is no dispute that the expression telegraph as defined in the Act shall include telephones and telecommunications services. Sub-section (1) of Section 4 on plain reading vests the right of exclusive privilege of establishing, maintaining and working telegraphs in the Central Government, but the proviso thereof enables the Central Government to grant licence, on such conditions and in consideration of such payments as it thinks fit, to any person to establish, maintain and work telegraph within any part of India. It is true that the Act was enacted as early as in the year 1885 and central Government exercised the exclusive privilege of establishing, maintaining and working telegraphs for more than a century. But the framers of the Act since the very beginning conceived and contemplated that a situation may arise when the Central Government may have to grant a licence to any Person to establish, maintain or work such telegraph including telephone within any part of India. With that object in view, it was provided and prescribed that licence may be granted to any person on such conditions and in consideration of such payments as the Central Government may think fit. If proviso to sub-section (1) of Section 4 itself provides for grant of licence on condition to be prescribed and considerations to be paid to any person, then whenever such licence is granted, such grantee can establish, maintain or work the telephone system in that part of

India. In view of the clear and unambiguous proviso to sub-section (1) of Section 4, enabling the Central Government to grant licences for establishment, maintenance or working of telegraphs including telecommunications, how can it be held that the privilege which has been vested by sub-section (1) of Section 4 of the Act in the Central Government cannot be granted to others on conditions and for considerations regarding payments? According to us the power and authority of the Central Government to grant licences to private bodies including Companies subject to conditions and considerations for payments cannot be questioned. That right flows from the same sub-section (1) of Section 4 which vests that privilege and right in the Central Government. Of course, there can be controversy in respect of the manner in which such right and privilege which has been vested in the Central Government has been parted with in favour of private bodies. It cannot be disputed that in respect of grant of any right or licence by the Central Government or an authority which can be held to be State within the meaning of Article 12 of the Constitution not only the source of the power has to be traced, but it has also to be found that the procedure adopted for such grant was reasonable, rational and in conformity with the conditions which had been announced. Statutory authorities have some times used their discretionary power to confer social or economic benefits on a particular section or group of community. The plea raised is that the Act vests power in them to be exercised as they think fit. This is a misconception. Such provisions while vesting powers in authorities including the Central Government also enjoin a fiduciary duty to act with due restraint, to avoid 'misplaced philanthropy or ideology. Reference can be made to **Roberts v. Hopewood, (1925) A.C. 578; Prescott v. Birmingham Corporation, (1954) 3 All E.R. 698; Taylor & Ors. v. Munrow (1960) 1 All E.R. 455; Bromley London Borough Council v. Greater London Council and another, (1982) 1 All E.R. 129.**

As such the Central Government while exercising its statutory power under first proviso to Section 4 (1) of the Act, of granting licences for establishment, maintenance and working of Telecommunications has a fiduciary duty as well. The new experiment has to fulfill the tests laid down by courts for exercise of a statutory discretion. It cannot be exercised in a manner which can be held to be unlawful and which is now known in administrative law as Wednesbury principle, stated in **Associated**

Provincial Picture Houses Ltd. v. Wednesbury Corp, (1947) 2 All E.R. 680. The aforesaid principle is attracted where it is shown, that an authority exercising the discretion has taken a decision which is devoid of any plausible justification and any authority having reasonable persons could not have taken the said decision. In the case of Bromley LBC (supra) it was said by Lord Diplock:-

"Powers to direct or approve the general level and structure offers to be charged by the LTE for the carriage of passengers on its transport system, although unqualified by any express words in the Act. may none the less be subject to implied limitations when expressed to be exercisable by a local authority such as the GLC.

As such Central Government is expected to put such conditions while granting licences, which shall safeguard the public interest and the interest of the nation. Such conditions should be commensurate with the obligations that flow while parting with the privilege which has been exclusively vested in the Central Government by the Act."

(iii) In **East Coast Railway And Another Vs. Mahadev Appa Rao and Others** reported in (2010) 7 SCC 678, at Paragraph 21 to 25, the Hon'ble Apex Court held as follows:

"21. There is no precise statutory or other definition of the term "arbitrary". In **Kumari Shrivlekha Vidyarthi and Ors. v. State of U.P. and Ors. (AIR 1991 SC 537)**, this Court explained that the true import of the expression "arbitrariness" is more easily visualized than precisely stated or defined and that whether or not an act is arbitrary would be determined on the facts and circumstances of a given case. This Court observed: (see p. 243, para 36)

"36. The meaning and true import of arbitrariness is more easily visualized than precisely stated or defined. The question, whether an impugned act is arbitrary or not, is ultimately to be answered on the facts and in the circumstances of a given case. An obvious test to apply is to see whether there is any discernible principle emerging from the impugned act and if so, does it satisfy the test of reasonableness. Where a mode is prescribed for doing an act and there is no impediment in following that procedure, performance of the act otherwise and in a manner which does not disclose any discernible principle which is

reasonable, may itself attract the vice of arbitrariness. Every State action must be informed by reason and it follows that an act uninformed by reason, is arbitrary. Rule of law contemplates governance by laws and not by humour, whims or caprices of the men to whom the governance is entrusted for the time being. It is trite that 'be you ever so high, the laws are above you'. This is what men in power must remember, always."

22. Dealing with the principle governing exercise of official power Prof. De Smith, Woolf & Jowell in their celebrated book on "Judicial Review of Administrative Action" emphasized how the decision-maker invested with the wide discretion is expected to exercise that discretion in accordance with the general principles governing exercise of power in a constitutional democracy unless of course the statute under which such power is exercisable indicates otherwise. One of the most fundamental principles of rule of law recognized in all democratic systems is that the power vested in any competent authority shall not be exercised arbitrarily and that the power is exercised that it does not lead to any unfair discrimination. The following passage from the above is in this regard apposite:

"We have seen in a number of situations how the scope of an official power cannot be interpreted in isolation from general principles governing the exercise of power in a constitutional democracy. The courts presume that these principles apply to the exercise of all powers and that even where the decision-maker is invested with wide discretion, that discretion is to be exercised in accordance with those principles unless Parliament clearly indicates otherwise. One such principle, the rule of law, contains within it a number of requirements such as the right of the individual to access to the law and that power should not be arbitrarily exercised. The rule of law above all rests upon the principle of legal certainty, which will be considered here, along with a principle which is partly but not wholly contained within the rule of law, namely, the principle of equality, or equal treatment without unfair discrimination."

23. Arbitrariness in the making of an order by an authority can manifest itself in different forms. Non-application of mind by the authority making the order is only one of them. Every order passed by a public authority must disclose due and proper application of

mind by the person making the order. This may be evident from the order itself or the record contemporaneously maintained. Application of mind is best demonstrated by disclosure of mind by the authority making the order. And disclosure is best done by recording the reasons that led the authority to pass the order in question. Absence of reasons either in the order passed by the authority or in the record contemporaneously maintained is clearly suggestive of the order being arbitrary hence legally unsustainable.

24. In the instant case the order passed by the competent authority does not state any reasons whatsoever for the cancellation of the typing test. It is nobody's case that any such reasons were set out even in any contemporaneous record or file. In the absence of reasons in support of the order it is difficult to assume that the authority had properly applied its mind before passing the order cancelling the test.

25. Mr. Malhotra's contention that the order was passed entirely on the basis of the complaint received from the unsuccessful candidates is also of no assistance. The fact that some representations were received against the test or the procedure followed for the same could not by itself justify cancellation of the test unless the authority concerned applied its mind to the allegations leveled by the persons making the representation and came to the conclusion that the grievance made in the complaint was not without merit."

(iv) In **West Bengal Electricity Regulatory Commission v. C.E.S.C. Ltd etc.** reported in **AIR 2002 SC 3588**, at Paragraph 39 and 40, held as follows:

"39. Having considered the finding of the High Court, we are of the opinion that though generally it is true that the price fixation is in the nature of a legislative action and no rule of natural justice is applicable, **(See Shri Sitaram Sugar Company Ltd., and Anr. Etc. v. Union of India and Ors. MANU/SC/0249/1990: [1990]1 SCR 909)**, the said principle cannot be applied where the statute itself has provided a right of representation to the party concerned, therefore, it will be our endeavour to find out whether, as contended by learned counsel for the appellants, the statute has provided such a right to

the consumers or not.

40. While considering his question, it is relevant to notice that so far as the 1948 Act is concerned, the consumers had no such specific right. But we notice that the 1998 Act brought about a substantial change in the manner in which the determination of tariff has to be made. It not only took away the right of the licensee or a utility to determine the tariff, but also conferred the said power on the commission. This was done because one of the primary objects of the 1998 Act was to create an independent regulatory with the power of determining the tariff, bearing in mind the interests of the consumers whose rights were till then totally neglected. The fact that the Commission was obligated to bear in mind the interests of the consumers is also indicative of the fact that the Commission had to hear the consumers in regard to fixation of tariff. This right of the consumers is further supported by the language of Section 26 of the Act, which specifically mandates the Commission to authorize any person as it deems fit to represent the interest of the consumers in all proceedings before it. If the above provision of the Act is read in conjunction with Sections 22 and 29 read with Section 28 (2)(d) of the Act, 1998 Act, it is clear that the commission while framing the regulations must keep in mind the interest of the consumers for the purpose of determining the tariff. At this stage, it may be worthwhile to notice the mandate of the Parliament in Section 37 of the 1998 Act to the commission that the Commission should ensure transparency while exercising its powers and discharging its functions, which also indicates that the proceedings of the Commission should be public which, in itself, shows participation by interested persons. That apart, the State of West Bengal in exercise of its power under Section 57 of the Act has enacted the West Bengal Electricity Regulatory Commission (Appointment of Chairperson and Members Functions, Budget and Annual Report) Rules, 1999. In the said rule under Rule 4 (SIC) the State Government has provided that the commission before taking any decision on the rates of tariff must notify its intention in this behalf, in leading newspapers of West Bengal and hold public hearing for the said purpose (emphasis supplied). Even the Commission under the power conferred on it in Section 58 of the Act, has framed the West Bengal Electricity Regulatory Commission (Conduct of Business) Regulations, 2000 as amended by Regulations dated 3.2.2000, wherein, under

Regulation 18 the Commission, can permit an association or other body corporate or any group of consumers to participate in any proceedings before the Commission, on such terms and conditions, including, in regard to be nature and extent of participation as the Commission may consider appropriate. The Commission under Regulation 19 is also empowered to notify a procedure to association, groups forums or body corporate or registered consumer associations, for the purpose of representation before the Commission. These Regulations also provide for the procedure for the filing of affidavits, pleadings, service of notice and the right of participation. Under Regulation 32 of the manner of hearing before the Commission is also provided for. These rules and regulations framed by the State Government and the Commission will have to be placed before the State legislature under Section 59 of the 1998 Act. Thus, these rules and regulations have the necessary statutory force. A combined reading of these provisions of the Act, rules and regulations, clearly shows that the statute has unequivocally provided a right of hearing/ representation to the consumer, though the manner of exercise of such right is to be regulated by the Commission. This right of the consumer is neither indiscriminate nor unregulated as erroneously held by the High Court. It is true that in Calcutta the respondent company supplies energy to nearly 17 lacs consumers, but the statute does not give individual rights to every one of these consumers. The same is controlled by the Regulations. Therefore, the question of indiscriminate hearing as held by the High Court will not arise. That apart, when a statute confers a right which is in conformity with the principles of natural justice, in our opinion, the same cannot be negative by a court on an imaginary ground that there is a likelihood of an unmanageable hearing before the forum concerned. As noticed above, though normally price fixation is in the nature of a legislative function and the principles of natural justice are not normally applicable, in cases where such right is conferred under a statute, it becomes a vested right, compliance of which becomes mandatory. While the requirement of the principles of natural justice can be taken away by a statute, such a right when given under the statute cannot be taken away by courts on the ground of practical convenience, even if such inconvenience does in fact exist. In our opinion, statute having conferred a right on the consumer to be heard in the matter pertaining to determination of the tariff, the

High Court was in error in denying that right to be consumers. Consequently, the right of the consumer of prefer an appeal under Section 27 of the 1998 Act to the High Court is similar, if they are in any manner aggrieved by any order made by the Commission. Alternatively, if the company is an aggrieved party and if it prefers an appeal, then it has to make such of those consumers who have been heard by the Commission, as party respondent, and such consumers will have the right of audience before the appellate court."

(v) In **Indian Express News Paper v. Union of India** reported in **AIR (1986) SC 515**, at Paragraphs 71 and 77, the Hon'ble Apex Court held as follows:

"71. We shall assume for purposes of these cases that the power to grant exemption under Section 25 of the Customs Act, 1962 is a legislative power and a notification issued by the Government the render amounts to a piece of subordinate legislation. Even then the notification is liable to be questioned on the ground that it is an unreasonable one.

76. We do not, therefore find much substance in the contention that the courts cannot at all exercise judicial control over the impugned notifications. In cases, where the power vested in the Government is a power which has got to be exercised in the public interest as it happens to be here, the Court may require the Government to exercise that power in a reasonable way in accordance with the spirit of the Constitution."

(vi) In **Sri Malaprabha Cooperative Sugar Factory Ltd Vs. Union of India** reported in **AIR 1994 SC 1311**, at Paragraphs 57 and 58, the Hon'ble Apex Court held as follows:

"57. The order under Section 3(2)(f) is quasi-judicial in character. It is a specific order directed to a particular individual in order to enable the Central Government to purchase a certain quantity of commodity from the person holding it. It is an order of compulsory sale. When a compulsory sale is required to be made the question would naturally, arise what is the price to be paid for that commodity".

58. Section 3(3C) provides for the ascertainment of such a price. This has been so held in *Union of India v. Cyanamid India Ltd.* MANU/SC/0076/1987: [1987] 2 SCR 841]"

(vii) In **DAI ICHI Kakaria Ltd Vs. Union of India and Others [(2000) 4 SCC 57]**, the Hon'ble Apex Court, at Paragraph 8, held that,

"8. In *Indian Express Newspapers (Bombay) P. Ltd v. Union of India* the scope of interference in the notification issued under Section 25 of the Customs Act, 1962 is considered. This Court held that power to grant exemption under Section 25 of the Customs Act is a legislative power and a notification issued by the Government thereunder amounts to a piece of subordinate legislation, even then the notification is liable to be questioned on the ground that it is an unreasonable one inasmuch as a piece of subordinate legislation does not carry the same degree of immunity which is enjoyed by a statute passed by a competent legislature. Subordinate legislation may be questioned on any of the grounds on which plenary legislation can be challenged: (i) that it does not conform to the statute under which it is made; (ii) that it is contrary to some other statute inasmuch as subordinate legislation must yield to plenary legislation; (iii) that it is unreasonable in the sense that it is manifestly arbitrary. The embargo of arbitrariness is embodied in Article 14 of the Constitution. An inquiry into the vires of delegated legislation must be confined to the ground on which the plenary legislation may be questioned, except that subordinate legislation cannot be questioned on the ground of violation of the principle of natural justice on which administrative action may be questioned. In cases where power vested in the Government is a power which has got to be exercised in public interest, as is the case in the present case, the court may require the Government to exercise that power in a reasonable way in accordance with the spirit of the Constitution. The mere fact that a notification issued under Section 25 of the Customs Act is required to be laid before Parliament under Section 159 of the Customs Act does not make any substantial difference as regards the jurisdiction of the Court to pronounce on its validity. Section 25 of the Customs Act under which notifications are issued confers a power on the Central Government coupled with a duty to examine the whole issue in the light public interest. If the

Central Government is satisfied that it is necessary in the public interest so to do, it may exempt generally either absolutely or subject to such conditions, goods of any description, from the whole or any part of the customs duty leviable thereon. Power exercisable under Section 25 of the Customs Act, is no doubt discretionary, but it is not unrestricted. The pattern of the law imposing customs duties and the manner in which it is operated to a certain extent exposes the citizens who are liable to pay customs duties to the vagaries of executive discretion. While Parliament has imposed duties by enacting the Customs Act and the Customs Tariff Act, 1975, the executive Government is given wide power by Section 25 of the Customs Act to grant exemption from the levy of customs duty. It is ordinarily assumed that while such wide power is given to the Government, it will consider all relevant aspects governing the question whether exemption should be granted or not."

139. As regards natural justice, the petitioners have further submitted that the hearing of the decision will have to be by the same person otherwise there will be failure in compliance with the principles of natural justice. This has been so held by the Hon'ble Supreme Court in **Gullapalli Nageswar Rao and Ors. Vs. Andhra Pradesh State Road Transport Corporation and Anr.** [MANU/SC/0017/1958, AIR 1959 SC 308, para 22, 23 & 45],

"22. The following procedure was in fact followed by the Government in this case: After the scheme was prepared and published in the Official Gazette, the petitioners and others filed objections before the Secretary to Government Transport Department, within the time prescribed, 138 objections were received and individual notices were issued by the Government by registered post to all the objectors fixing the date of the hearing for December 26, 1957. The Secretary to Government, Home Department, in charge of Transport, heard the representations made by the objectors, some in person and others through their advocates, and also the representations made by the General Manager of the Road Transport Undertaking. The Secretary, after hearing the objections, prepared notes and placed the entire matter, with his notes, before the Chief Minister, who considered the matter and passed orders rejecting the objections and approving the scheme; and the approved scheme was thereafter issued in the name of the Governor.

23. On the aforesaid facts, the first contention

raised is that the State Government in approving the scheme was discharging a quasi judicial act and therefore the Government should have given a personal hearing to the objectors instead of entrusting that duty to its Secretary, Secondly, it is stated that a judicial hearing implies that the same person hears and gives the decision. But in this case the hearing is given by the Secretary and the decision by the Chief Minister. Thirdly, it is contended on the same hypothesis, that even if the hearing given by the Secretary be deemed to be a hearing given by the State Government, the hearing is vitiated by the fact that the Secretary who gave the hearing is the Secretary in charge of the Transport Department. The Transport Department, it is stated, in effect was made the judge of its own cause, and this offends one of the fundamental principles of judicial procedure. Lastly, it was pointed out that though the enquiry was posted for hearing on December 26, 1957, even before the enquiry was commenced, the Chief Secretary to the Government gave an interview to the 'Deccan Chronicle' and the 'Golconda Patrika' to the effect that the Government had already taken a decision to nationalize the road transport in Krishna District and some routes had been chosen, including the Guntur-Vijayawada route, thereby indicating that the Government has prejudged the case before holding the enquiry. The learned Attorney General counters the said argument by stating that the State Government strictly followed the procedure prescribed under Section 68-C of the Act, that the said Government, being an impersonal body, gave the hearing through the machinery prescribed by law, that the said Government was discharging only an administrative act and not a judicial act in the matter of approving the scheme, that even if it did perform a judicial act, the Home Secretary in charge of Transport Department had only collected the material and the final orders were made only by the Chief Minister and that the Chief Secretary's press interview was nothing more than a mere indication of the factum of the proposed scheme.

The second objection of the petitioners is that while the Act and the Rules framed thereunder impose a duty on the State Government to give a personal hearing, the procedure prescribed by the Rules impose a duty on the Secretary to hear and the Chief Minister to decide. This divided responsibility is destructive of the concept of judicial hearing. Such a procedure defeats the object of personal hearing. Personal hearing enables the authority concerned to watch the

demeanor of the witnesses and clear up his doubts during the course of the arguments, and the party appearing to persuade the authority by reasoned arguments to accept his point of view. If one person hears and another decides, then personal hearing becomes an empty formality. We therefore hold that the said procedure followed in this case also offends another basic principle of judicial procedure."

140. The said decision was followed by the Hon'ble Supreme Court in the case of **Automotive Tyre Manufacturers Association Vs. The Designated Authority and Ors.** [(2011) 2 SCC 258], wherein, at Paragraphs 55, 57 and 59, held as follows:

"55. It is trite that rules of "natural justice" are not embodied rules. The phrase "natural justice" is also not capable of a precise definition. The underlying principle of natural justice, evolved under the common law, is to check arbitrary exercise of power by the State or its functionaries. Therefore, the principle implies a duty to act fairly i.e. fair play in action. In *A.K. Kraipak* (supra), it was observed that the aim of rules of natural justice is to secure justice or to put it negatively to prevent miscarriage of justice.

57. In *Swadeshi Cotton Mills Vs. Union of India*⁶⁵, *R.S. Sarkaria, J.*, speaking for the majority in a three-Judge Bench, lucidly explained the meaning and scope of the concept of "natural justice". Referring to several decisions, His Lordship observed thus:

"Rules of natural justice are not embodied rules. Being means to an end and not an end in themselves, it is not possible to make an exhaustive catalogue of such rules. But there are two fundamental maxims of natural justice viz. (i) *audi alteram partem* and (ii) *nemo iudex in re sua*. The *audi alteram partem* rule has many facets, two of them being (a) notice of the case to be met; and (b) opportunity to explain. This rule cannot be sacrificed at the altar of administrative convenience or celerity. The general principles distinguished from an absolute rule of uniform application seems to be that where a statute does not, in terms, exclude this rule of prior hearing but contemplates a post-decisional hearing amounting to a full review of the original order on merits, then such a statute would be construed as excluding the *audi alteram partem* rule at the pre-decisional stage. Conversely if the statute conferring the power is silent with regard to the giving of a pre-decisional

hearing to the person affected and the administrative decision taken by the authority involves civil consequences of a grave nature, and no full review or appeal on merits against that decision is provided, courts will be extremely reluctant to construe such a statute as excluding the duty of affording even a minimal hearing, shorn of all its formal trappings and dilatory features at the pre-decisional stage, unless, viewed pragmatically, it would paralyse the administrative process or frustrate the need for utmost promptitude. In short, this rule of fair play must not be jettisoned save in very exceptional circumstances where compulsive necessity so demands. The court must make every effort to salvage this cardinal rule to the maximum extent possible, with situational modifications. But, the core of it must, however, remain, namely, that the person affected must .

59. In light of the aforementioned legal position and the elaborate procedure prescribed in Rule 6 of 1995 Rules, which the DA is obliged to adhere to while conducting investigations, we are convinced that duty to follow the principles of natural justice is implicit in the exercise of power conferred on him under the said Rules. In so far as the instant case is concerned, though it was sought to be pleaded on behalf of the respondents that the incumbent DA had issued a common notice to the Advocates for ATMA and Ningbo Nylon, for oral hearing on 9th March 2005, however, there is no document on 66 record indicating that pursuant to ATMA letter dated 24th January 2005, notice for oral hearing was issued to them by the incumbent DA. Moreover, the alleged opportunity of oral hearing on 9th March, 2005, being in relation to the price undertaking offer by Ningbo Nylon, cannot be likened to a public hearing contemplated under Rule 6 (6) of the 1995 Rules. The procedure prescribed in the 1995 Rules imposes a duty on the DA to afford to all the parties, who have filed objections and adduced evidence, a personal hearing before taking a final decision in the matter. Even written arguments are no substitute for an oral hearing. A personal hearing enables the authority concerned to watch the demeanor of the witnesses etc. and also clear up his doubts during the course of the arguments. Moreover, it was also observed in Gullapalli (supra), if one person hears and other decides, then personal hearing becomes an empty formality. In the present case, admittedly, the entire material had been collected by the predecessor of the DA; he had allowed the interested

parties and/or their representatives to present the relevant information before him in terms of Rule 6(6) but the final findings in the form of an order were recorded by the successor DA, who had no occasion to hear the appellants herein. In our opinion, the final order passed by the new DA offends the basic principle of natural justice. Thus, the impugned notification having been issued on the basis of the final findings of the DA, who failed to follow the principles of natural justice, cannot be sustained. It is quashed accordingly."

141. As regards the vesting of power and functions by the Parliament including by Section 11 on TRAI, the petitioners have submitted that it is conditional upon compliance with the requirement of transparency under Section 11(4) of the TRAI Act. The Authority is required to strictly comply with "Transparency" and all that necessary comprehends, while exercising any of its powers and discharging any of its functions. There is no exception to mandatory requirement of section 11(4) in respect of regulation making. The entire exercise of the Respondent TRAI is vitiated by lack of transparency, not only in terms of the procedure followed, but also in terms of the non disclosure of relevant materials and most crucially the costing calculations and cost methodology to be followed. The requirement of transparency is prescribed under Section 11(4) of the TRAI Act, 1997, the relevant extract reads as follows:

"The Authority shall ensure transparency while exercising its powers and discharging its functions."

142. The prescription in terms of Section 11(4) is mandatory as it requires that the TRAI "shall ensure transparency" while exercising its powers and functions. The Regulations have been ostensibly framed under Section 36 relating to the "Power to make Regulations" and under Sections 11, 12 and 13 which are under the heading of "POWERS AND FUNCTIONS OF THE AUTHORITY" IN CHAPTER III. In other words whenever the Respondent TRAI acts under Section 36 and under Section 11 of the TRAI Act as it has purportedly under the impugned Regulation, there is a mandatory requirement to ensure transparency. Transparency has been defined in various dictionaries, as follows:

Black's Law Dictionary:

The definition of transparency in Black's Law Dictionary is as under:

Openness: Clarity; lack of guile and attempts to hide damaging information. The word is used of financial disclosures, organizational policies and practices, lawmaking, and other activities where organisations interaction with the public.

The definition in Black's law dictionary is comprehensive as after construing transparency as openness, clarity, lack of guide and attempts to hide damaging information, it also defines the areas to which it is extended namely financial disclosures, organizational policies and practices, law making and other activities where the organizations interact with the public fitting, the present facts.

Business Dictionary.Com: The definition of transparency in Business Dictionary.com is construed as under: Essential condition for a free and open exchange whereby the rules and reasons behind regulatory measures are fair and clear to all participants.

143. The petitioners have further submitted that the respondent-TRAI has also construed transparency in this manner, as for any Regulation published, by it follows a step by step process, best articulated in the power point presentation, by the Secretary of the Respondent-TRAI in Chennai, conducted by the TDSAT and the same are extracted hereunder:

"Regulatory Process (Adopted by TRAI):

To Ensure Transparency TRAI adopts the following process before taking any regulatory decisions:

- * Consultation paper is issued soliciting comments from stakeholders.

- * The comments of the stake holders are published on the website.

- * Stakeholders are invited in the Open House Discussions (OHDs) organized in different parts of the country."

144. Therefore, the petitioners have submitted that the Government on a regulation can make sub-ordinate legislation without having to explain the jurisdiction or without having to show that it is not arbitrary or unreasonable if these are to be shown, the additional requirement in respect of the regulations under the new economic regime starting from 1991 has to be consistent with international requirement. Regulatory Transparency comprehends within itself the following process:

- (i) Articulated reasons for any regulation or change in regulation.
- (ii) Initiate a proposal on basis of such articulated reason
- (iii) Invite responses from all stakeholders
- (iv) Consider the responses including the criticism on the proposal and alternative suggested.
- (v) Give a hearing to all stakeholders specifically by the decision maker.
- (vi) Evaluate alternate options with due application of mind and free from any predetermined biased or preconceived approach.
- (vii) After following the procedure and after adequate consideration to all the factors including the view of all the stake holders, arrive at a decision.
- (viii) Give adequate publicity to the said decision with Explanatory Memorandum articulating the reasons and rationale for the decision and the consideration of various views of the stakeholder in the manner of a speaking order.

145. This is the regulatory framework which has been evolved in this country consistent with the best international practice and WTO guideline and is in vogue in sectors like power, highways, airport, and environment as also telecom. Even in respect of changes in Policy by the Govt., the Court insists that it must be informed with reasons and adequately justified and it cannot be arbitrary and whimsical. It may be noted that while bringing out the new telecom policy 2012, the Government of India rightfully undertook extensive consultations with all the relevant stakeholders before arriving at the same policy.

146. The practice in the very case of the CLS when the recommendations of 2005 were issued and the impugned Regulation of 2007 was issued as also in respect of other Regulations by TRAI on substantive issues like IUC Charges, Spectrum related issues has been consistent with what is set out above, in fact TRAI has expounded the regulatory transparency in the manner described above set out above in a presentation which the Secretary to the Respondent TRAI gave in a seminar held by TDSAT. It is therefore, mysterious and baffling as to why in the present case the Respondent TRAI has not only departed from the aforesaid practices and requirement of transparency but are justifying the same on the basis of argument that exercise of sub ordinate legislative power does not require following the abovementioned procedure. This argument is advanced contrary to

what is laid down by the Supreme Court even in respect of subordinate legislative power in respect of price fixation such as in the case of Cynamide/ Sitaram Sugar and also in the case of VSNL Vs. TRAI in the IPLC Case of 28th April, 2005.

147. The Open House Discussion is a statutory requirement under the TRAI Act, 1997 as it is the only time when the full Authority comprising of the Chairperson and the Members give hearing to the stakeholders including the affected parties. The statute in terms of Section 11(4) requires transparency to be ensured by "the Authority", "Authority" is defined and construed in Section 3 of the Act to be the Chairperson and the Members. Section 3 being of relevance is extracted herein below:-

"3. On the commencement of the Telecom Regulatory Authority of India (Amendment) Act, 2000, a person appointed as Chairperson of the Authority and every other person appointed as member and holding office as such immediately before such commencement shall vacate their respective offices and such Chairperson and such other members shall be entitled to claim compensation not exceeding three months pay and allowances for the premature termination of the term of their offices or of any contract of service].

148. The requirement therefore in terms of the above provisions is for the Chairperson and Members to give a hearing, admittedly which has not been carried out by the respondent while framing the 19th October 2012 and 21st December, 2012 impugned Regulations. The Respondent TRAI interacted through their various officers, namely Principal Adviser, Adviser and other Officials while undertaking the process of framing the impugned Regulation of 21st December 2012. No such interaction/hearing was given to the Petitioner while framing the impugned Regulation of 19th October, 2012, despite the Petitioner having furnished its detailed response to the consultation paper of 22nd March 2012.

149. Respondent TRAI through its functionaries as above and not the Authority had meetings with the Petitioners on submission of cost data in terms of the RIO submitted in 2010. This is evident from the communications dated 18.05.2012 and 17.08.2012 during the period May 2012 till September, 2012. (Refer List of Dates filed by the Petitioner on 25 March 2013). Under Section 33 of the TRAI Act, 1997, which provide for

delegation, the Authority may delegate all its powers under the Act, save and except the power to settle disputes and to make Regulations under Section 33. Section 33 reads as follows:-

"33. Delegation- The Authority may, be general or special order in writing, delegate to any member, officer of the Authority or any other person subject to such conditions, if any, as may be specified in the order, such of its powers and functions under this Act (except the power to settle dispute under Chapter IV and to make regulation under Section 36 as it may deem necessary."

150. On the submission of TRAI that over a period of time the nature of the consultation has evolved and therefore they have dispensed with Open House Discussion and the proceedings were shown to the Authority who had applied their mind and considered all facts prior to framing the impugned Regulations, the petitioners in their rejoinder, have submitted that the fact that the consultation process has evolved and therefore, TRAI has dispensed with Open House Discussion does not retract from the fact that Open House Discussion was the only mode of the Authority to give a hearing, if they dispensed with Open House Discussion they should have evolved another mechanism for the Authority to give a hearing, the result is that no hearing has been given by the Authority to the Petitioner while performing an essential legislative function.

151. It is the admitted case of TRAI that no open house discussion have taken place while framing in the two impugned Regulations of 19 October 2012 and 21 December 2012. In fact, the impugned Regulation of 21 December 2012 which actually entailed the maximum amount of work in terms of assessment of cost of individual element work etc. was actually framed in a tearing hurry in barely two months, between the initiation of Consultation of 19.10.2012 and framing of the impugned Regulation on 21 December 2012. It is the stated case of TRAI by its Secretary in the abovementioned presentation in a TDSAT seminar that open house discussion are a part and parcel of transparency which admittedly not having been carried out, vitiates the entire process of framing the impugned Regulation.

152. The petitioners have further submitted that it is the practice of the Respondent TRAI to give an Explanatory Memorandum to every Regulation published by it and which is the case as far as the impugned Regulations are concerned as well. In fact in the impugned Regulations of 07 June 2007 and 21 December 2012 there is a Note set out at the end of the

Regulations, that the Explanatory Memorandum explains the objects and reasons of the said Regulation. The said extract taken from 21 December 2012 Regulation, but identically phrased for other impugned Regulations reads as follows:

"The Explanatory Memorandum explains the objects and reasons of the International Telecommunication Cable Landing Stations Access Facilitation Charges and Co-location Charges Regulations, 2012". (Refer page 625 (at 633) Vol.II of the petitioner's typed set)

153. The petitioners have contended that it is settled law that while principles of natural justice may vary across different situations, the content and width of the applicability of the principles of natural justice will turn upon every fact situation and more so when the statute itself prescribes. Based on the statutory provision and the practices of the Respondent TRAI the following emerges:

- The parent Act itself mandatorily prescribes ensuring transparency by the TRAI while exercising its powers and discharging its function, therefore fully applicable to the impugned Regulations.
- The Respondent TRAI therefore itself in terms of the statutory requirement has followed a multi stage process of consultation and furthermore adducing reasons in support of its impugned Regulations.
- It is the admitted case that no open house discussion have been carried out, thereby the two impugned Regulations of 19 October 2012 and 21 December 2012 are in violation of transparency and the principles of natural justice.
- The impugned Regulations and more particularly that of 21 December 2012 has itself stated that "the objects and reasons" have been explained.

154. The petitioners have further submitted that the Explanatory Memorandum therefore has to be tested on the basis of whether or not reasons have been provided. Reasons have been construed and defined as under:

"Words & Phrases (Volume 36 page 403)

- i. Under statute providing that removals from appointive offices of city of Lawrence shall be accompanied by statement of "reason or reasons" therefore under signature of director removing officer, statement must be somewhat definite and detailed. McKenna v. White, 192 N.E. 84, 85, 287 Mass 495.

ii. Legislature held to have made distinction between "cause" and "reasons" for removal of civil service officers; "cause" occasioning removal and being succinct statement of that which produces or leads to removal as result and implying a reasonable ground of removal, while "reasons" are circumstances of proof, facts or motives, which generate conviction that there ought to be a removal. McKenna v. While, 192 N. E. 84, 85, 287 Mass. 495

iii. Under the statute for the removal of employee from classified civil service for such cause as well promote efficiency of the service and for reason given in writing, the requirement of "reasons" for removal of a Deputy Collector of Internal Revenue were not satisfied by a conclusion of "unsuitability" based upon vague references to the Deputy's answer and facts developed during the investigation. Mulligan v Andrews, 211 F.2d 28, 30, 93 U.S. App. D.C. 375. The New Shorter Oxford English Dictionary

i) A cause of a fact, situation, event, or thing, esp. one adduced as an explanation; cause, ground..

ii) A statement used as an argument to justify or condemn some act, or to prove or disprove some assertion or belief.

iii) A statement, a narrative, a speech; a saying, an observation; talk, discourse; an account or explanation of, or answer to, something."

155. It is further submitted that the Respondent TRAI having itself acknowledged that in terms of the impugned Regulations that it has to give reasons, the efficacy of such reasons which have to be tested, whether the statements in the Explanatory Memorandum can be construed to be reasons. That there are various heads of submissions under which no reasons or any adequate reasons have been furnished by the respondent in terms of its professed statutory obligation as set out in the note to the impugned Regulation and which are dealt with under the individual heads of submission. The petitioners have contended that it has been held by the Hon'ble Supreme Court that not only reasons have to be stated, but such reasons must be relevant reasons and it is only when reasons are set out in such a form, this enables effective exercise of writ jurisdiction. Reference has been made to a decision in **Organo Chemical Industries vs. Union of India** reported in (1979) 4 SCC 573, wherein, at paragraph 33, it held as follows:

"33. Fair play in Administration is a finer juristic Facet, at once fundamental and inviolable and natural justice is an inalienable that the imposition of damages on a party, after a statutory hearing, is a quasi-judicial direction. This Court has impressed the

requirements of natural justice on such jurisdictions and one such desideratum is spelling out reasons for the order made, in other words, a speaking order. The inscrutable face of a sphinx is ordinarily incongruous with a judicial or quasi-judicial performance. It is, in my view, an imperative of Section 14-B that the Commissioner shall give reasons for his order imposing damages on an employer. The constitutionality of the power, tested on the anvil of Article 14 and 19, necessitates this prescription. Such a guarantee ensure rational action by the officer, because reasons imply relevant reasons, not capricious ink and the need for cogency rivets the officer's mind to the pertinent material on record. Moreover, once reasons are set down, the order readily exposes itself to the writ jurisdiction of the court under Article 226 so that perversity, illiteracy, extraneous influence, mala fides and other blatant infirmities straight get caught and corrected. Thus, viewing the situation from the conspectus of requirements and remedies, statutory agencies may be inhibited and the scare of arbitrary behavior allayed once reasons are required to be given."

156. The petitioners have relied on a decision in **Union of India vs. Jaiprakash Singh** reported in (2007) 10 SCC 712, wherein, at paragraph 7, the Hon'ble Court has observed that reasons are livelinks between the mind of the decision maker to the controversy in question and decision or conclusion arrived at. The same principle has been reiterated in **Ramaverma Bharatham Puram vs. State of Kerala & Others** (1979) 4 SCC 782 at paragraphs 14 and 15.

157. The petitioners have further submitted that it is well settled that mere findings alone are insufficient and reasons in support have to be given. It is relevant to extract Paragraph 7 of the judgment in **Goralal vs. Union of India** reported in (2003) 12 SCC 459, as follows:-

"7. The point for determination in this case is: whether the arbitrator ought to have given reasons in support of his findings, along with the sums awarded, on each item of dispute. To decide this point, we have to go by the text and the context of clause 70 of the arbitration agreement quoted above. Under the said clause, the arbitrator was required to identify each individual item of dispute and give his findings thereon along with the sum awarded. In this context, one has to read the word "findings" with the expression "on each item of dispute" and if so read it is clear that the word "finding" denotes "reasons" in

support of the said conclusion on each item of dispute. The word "finding" has been defined in "Words and Phrases, Permanent Edn., 17, West Publishing Co." to mean "an ascertainment of facts and the result of investigations". Applying the above test to clause 70, we are of the view that the arbitrator was required to give reasons in support of his findings on the items of dispute along with the sums awarded. "

158. However, the response of TRAI has been to totally overlook, the statutory provision, the prescription of transparency including the prescription in the impugned Regulation for providing reasons. In this connection it has relied on a series of judgments of the Hon'ble Supreme Court relating to the Essential Commodities Act and fixation of prices therein totally unconnected to the present fact. Alternatively, it has been the submission of the Counsel for TRAI, at the time of hearing by reading out extracts from the Consultation Paper and Explanatory Memorandum to try and demonstrate that relevant factors have been considered and therefore that is sufficient for the purposes of compliance with transparency and natural justice. In response to the above, the petitioners have submitted as follows:

(a) The Essential Commodities Act fundamentally relates to commodities which are essential for mass public consumption and which in the view of the Government is required to be regulated for the purposes of equitable distribution, availability at fair prices, maintaining or increasing supply, the Central Government may regulate by providing for regulating or prohibiting the production, supply and distribution of such commodity. The Act in Section 2 (a) defines the essential commodities, inter alia, cattle fodder, coal, cotton, drugs, food stock, iron and steel etc. and which can be further enlarged by inclusion of a commodity deemed to be essential by notification by the Central Government. Admittedly access to CLS has not been declared to be an Essential Commodity by the Central Government and therefore the said Act cannot be made applicable in the present case.

(b) The purpose, object and policy of the Essential Commodities Act, 1955 and the TRAI Act, 1997 are different, as set out in the preamble to the said Acts. The Essential Commodities Act is stated to be an Act "in the interest of the general public, for the control of the production, supply and distribution of, and trade and commerce, in certain commodities" wherein the preamble of the TRAI Act, 1997 inter alia states that its purpose is "to protect the interest of

service provider and consumers of the telecom sector, to promote and ensure orderly growth of the telecom sector". The Essential Commodities Act is geared only towards the interest of general public, whereas the TRAI Act requires the TRAI to protect the interests of both service providers and consumers, to ensure orderly growth of telecom sector.

(c) The service provider and the consumer in the case of access to CLS are both parties with equal bargaining powers as the requirement of the impugned Regulation is that the access provider and the access seeker both have to be holders of ILD Licenses or IGSP Licenses. This is the requirement of all the three impugned Regulations, where it is only an "Eligible Indian International Telecommunication Entity" defines in the Regulation (2 (1) of 7 June 2007 Regulation-Page 247 & 248 Vol.I Petitioner's typed set), who are eligible to access the essential facility to the CLS.

(d) The customers of the Petitioner numbering twelve in all and barring two or three are all multiple times the size of the Petitioner. This has been demonstrated by the Petitioner in the reply to the Application filed by the Intervener ACTO and which is an Annexure to the said reply (Para 11(J) of Rejoinder as well as Reply to the Application of Intervener ACTO at Para 6,7,8 & 9). There is therefore no question of there being any similarity between the commodities regulated under the Essential Commodities Act and that of access to the CLS.

(e) The Essential Commodities Act does not have a requirement of transparency, unlike the TRAI Act wherein, there is an express provision to ensure transparency.

(f) Essential Commodities Act has two distinct sets of provisions one under Section 3(2)(c) in regard to fixing of prices and another for compulsory acquisition under Section 3(2)(f) read with Section 3(3)(A), 3(3)(B), 3(3)(C) of the Act while the latter group of Sections have been construed as requiring compliance with principles of natural justice even if the essential commodity is to be acquired, Section 3(2)(c) is a provision to control prices in extra ordinary and emergent circumstances, which may even involve the goods having to be sold at below costs. No such power has been conferred on TRAI and the regulatory philosophy articulated by TRAI while specifying the charges is that it will be on cost plus basis. This would mean there has to be a quasi judicial exercise to determine the cost after hearing parties, application of mind and evolving a cost methodology and determination of each element of cost.

Further methodology articulated by TRAI itself is such determination will be separate from each CLS.

159. As regards reliance placed by TRAI judgment of the Essential Commodities Act namely in **Shri Sitaram Sugar Company Limited and Another vs. Union of India and Others [AIR 1990 SC 1277]**, reliance has been placed on paragraph 57 of the judgment wherein the role of the Court that it does not act like a Chartered Accountant or like a Income Tax Officer or that it is not concerned with individual case in particular. The only role is to examine due regard to considerations provided in the statute. Then reliance is placed upon **Union of India and Another vs. Cynamide India Ltd. and Another** in paragraphs 5, 27 and 28 on the finding of the Hon'ble Court that legislative action is not subject to the principles of natural justice (para 5) and the observation of the Court in paragraph 27 and 28 is relates to the facts of that case namely fixation of prices under Drugs (Prices Control) Order is a quasi judicial attracting the principles of natural justice and furthermore given the legislative nature of activity of the Government, it is clear that the Government is under no obligation to make any disclosure of any information received and considered by it in making the order, but even while holding that that it is a legislative activity the Hon'ble Supreme Court held that

"but in order to render effective the right to seek a review given to an aggrieved person we think that the government, if so requested by the aggrieved manufacturer is under an obligation to disclose any relevant information which may reasonably be disclosed pertaining to 'the average cost of production of the bulk drug manufactured by an efficient manufacturer' and 'the reasonable return on net worth'. For example, the manufacturer may require the government to give information regarding the particulars detailed in Form No. 1 of the Fourth Schedule which have been taken into account and those which have been excluded. The manufacturer may also require to be informed the elements which were taken into account and those which were excluded in assessing the 'free reserves' entering into the calculation of 'net worth'. These particulars which he may seek from the government are mentioned by us only by way of illustration. He may seek any other relevant information which the government shall not unreasonably deny".

This is in a situation where the Statute (Essential Commodities Act) does not provide for natural justice.

160. According to the petitioners, the above judgments relate to price fixation under the Essential Commodities Act, in the present case, the subject matter is the TRAI Act, 1997 with

the requirement to ensure transparency (lacking in the Essential Commodities Act), the understanding of the Respondent TRAI in prescribing for itself the detailed process of consultation including holding Open House Discussions by the decision making Authority with all the relevant stakeholders and giving reasons, the requirement to explain the objects and reasons being set out in the Regulation itself. The scheme of the TRAI Act and the impugned Regulations in respect of transparency has not even been adverted to by TRAI.

161. The above landmark judgments cited by TRAI also makes a distinction between price fixation as a legislative and quasi-judicial and quasi administrative activity. This has been set out in paragraph 7 of the Cynamide India Limited and another case where the Hon'ble Supreme Court has referred to a situation that price fixation may assume as administrative or quasi-judicial character, namely,

"Price fixation may occasionally assume an administrative or quasi-judicial character when it relates to acquisition or requisition of goods or property from individuals and it becomes necessary to fix the price separately in relation to such individuals. Such situations may arise when the owner of property or goods is compelled to sell his property or goods to the government or its nominee and the price to be paid is directed by the legislature to be determined according to the statutory guidelines laid down by it. In such situation the determination of price may acquire a quasi-judicial character".

162. The present is a case of quasi-judicial and quasi-administrative activity, as it is the admitted case that assessment of cost and fixation of Access Facilitation charges has been based upon cost data of two individual ILD Operators, namely the Petitioner and Bharti Airtel, the entire consultation process was carried out by ascertaining the cost data of two Petitioners as set out in extenso in the Consultation Paper as well as in the Explanatory Memorandum as envisaged in paragraph 7 of Cynamide India Ltd. and another. Had the Respondent considered this to be essential commodity which could have brought out under the Notification under the said Act, which obviously did not knowing fully well that this is not essential commodity.

163. In the above cases the issue is one of price fixation for items of the consumption by the general public as observed by the Hon'ble Supreme Court, in the present case there are twelve customers of the Petitioner as set out in (paragraph 11 (J) of the rejoinder as well as the reply to the application by the intervener ACTO) at paragraph 6, 7, 8 and 9 where the

Petitioner has set out in detailed the size of such huge international communication whose Revenues are multiple times that of the Petitioner. The relevant extracts from the said reply are enclosed alongwith for the sake of convenience, clearly demonstrating that the facility in respect of which charges are sought to be prescribed by the Respondent TRAI are in no manner an essential commodity or an item of mass consumption requiring to be treated at par as an essential commodity.

164. The petitioners have contended that in the judgment of the Constitution Bench of **Shri Sitaram Sugar Co. Ltd. vs. Union of India, (1990) 3 SCC 223** though in the context of the Essential Commodities Act the principle of natural justice would be restricted, nevertheless the Hon'ble Supreme Court held that it has to be inspired by reasons and that the Government cannot fix any arbitrary price based on extraneous consideration and that arbitrary action will attract the prohibition of Article 14. The relevant extract of paras 45, 46, 47 and 48 reads as follows:

"45. It is nevertheless imperative that the action of the authority should be inspired by reason: **Saraswati Industrial Syndicate Ltd.**' [at SCR pp. 961, 962; SCC p.636, para 13] The government cannot fix prices on extraneous considerations:

46. Any arbitrary action, whether in the nature of a legislative or administrative or quasi-judicial exercise of power, is liable to attract the prohibition of Article 14 of the Constitution. As stated in **E.P. Royappa vs. State of Tamil Nadu** "equality and republic while the other, to the whim and caprice of an absolute monarch". Unguided and unrestricted power is affected by the vice of discrimination **Maneka Gandhi vs. Union of India**. The principle of equality enshrined in Article 14 must guide every State action, whether it be legislative, executive, or quasi-judicial:

47. Power delegated by statute is limited by its terms and subordinate to its objects. The delegate must act in good faith, reasonably, intra vires the power granted, and on relevant consideration of material facts. All his decisions, whether characterised as legislative or administrative or quasi-judicial, must be in harmony with the Constitution and other laws of the land. They must be "reasonably related to the purposes of the enabling legislation". See **Leila Mourning v. Family Publications Service**. If they are manifestly unjust or oppressive or outrageous or directed to an unauthorised end or do not tend in some degree to the accomplishment of the objects of delegation, court

might well say, "Parliament never intended to give authority to make such rules; they are unreasonable and ultra vires": per Lord Russel of Killowen, C.J. in *Kruse v. Johnson*.

48. The doctrine of judicial review implies that the repository of power acts within the bounds of the power delegated and he does not abuse his power. He must act reasonably and in good faith. It is not only sufficient that an instrument is intra vires the parent Act, but it must also be consistent with the constitutional principal ; *Maneka Gandhi v. Union of India* (SCCp. 314-15) "

According to the petitioners, the above Judgments in the context of the Essential Commodities Act, which has stated purpose is for the general public, excludes natural justice, even then the Hon'ble Supreme Court has held that there is a requirement to give a reasoned decision.

165. The petitioners have further submitted that there is no power to prescribe uniform charges in terms of 21.12.2012 regulation. Without prejudice to the above submissions, regarding jurisdiction to frame the impugned Regulations, it is submitted that the 21.12.2012 Regulations are illegal and ultra vires the 07.06.2007 and 19.10.2012 Regulations, inasmuch as there is no power conferred upon TRAI to prescribe uniform charges, assuming that it had the power to do so, though not admitting. It is the admitted case of TRAI that it is only upon the amendment to 2007 Regulations, by insertion of proviso by Regulation of 19 October 2012, the respondent was empowered to frame the impugned Regulations of 21 December 2012. Even assuming, though not admitting that the Respondent TRAI is correct in assuming powers to prescribe charges, however the same cannot be uniform charges for all CLSs as prescribed in the 21 December 2012 Regulation but have to be individual charges based on individual costs in terms of 2007 Regulation. The scheme and application of the 07.06.2007 Regulation is to treat every CLS as a distinct entity for the purposes of assessment of cost and consequently charge for access by every CLS. This is evident from Regulations 3, 4, 5, 6, 7, 8, 9, 10, 12 and 14.

166. Regulation 3 prescribes fair and non - discriminatory access, provide landing facilities, submit RIO, application, Regulation 4 requires every access seeker to apply to owner of the CLS, Regulation 5 relates to the terms of confirmation by owner of CLS, Regulation 6 relates to entering agreement for CLS. Regulation 10 which is relevant provides for access facilitation charges and payment terms, Regulation 10 (1) provides for the access facilitation charges to be in terms of Part II of Schedule, Regulation 10(1)(a) provides for it to be

paid to the owner of the CLS, 10(1)(b) says that it has to be determined on the basis of the cost of network elements, involved in the provision of access and distributed over the complete capacity of the system. Regulations 12 and 14 relate to cancellation and restoration of access facilitation.

167. The 19th October, 2012 Regulations amended the said Regulation by inserting a proviso into clauses 10, 12 and 14 of the 2007 Regulation giving power to TRAI to prescribe charges. Pursuant to the amendment of 19th October 2012, the amended regulations of 07 June 2007 and in particular Regulations 10, 12, 14 and 16 reads as follows:-

"10. Access Facilitation Charges and payment terms- (1) For the purposes of accessing the landing facilities at a cable landing station the Access Facilitation Charges as specified in Part II of the Schedule shall be -

(a) payable by the eligible Indian International Telecommunication Entity to the owner of the cable landing station:

(b) determined on the basis of the cost of network elements involved in the provision of access and distributed over the complete capacity of the system.

(2) The Access Facilitation arrangement shall, subject to the payment of the operation and maintenance charges by the eligible Indian International Telecommunication Entity to the owner of cable landing station, continue to be in force during the period of Indefeasible Right of Use or on an annual lease basis, as the case may be.

(3) The owner of cable landing station shall allow the eligible Indian International Telecommunication Entity to provide Grooming Services at cable landing section of such owner.

(4) The Access Facilitation Charges referred to in sub-regulation (1) and sub-regulation (2) shall be such as had been included in the Cable Landing Station - Reference Interconnect Offer published under sub-regulation (4) of regulation 3:

Provided that the Authority may specify Access Facilitation Charges which shall be payable by a class or classes of eligible Indian International Telecommunication Entity and in such case the approval of the Access Facilitation Charges, as specified in Part II of the Schedule, by the Authority shall not be required to be obtained under these regulations.]

(Inserted by amendment regulation of 19th October 2012)

12. Cancellation charges- (1) In case the eligible Indian International Telecommunication Entity fails to acquire number of units mentioned in clause (a) of sub-regulation (2) of regulation 4, either due to withdrawing of authorization or rescinding of agreement referred to in regulation 7 or any other reasons, cancellation charges for the units not so acquired shall be payable by such eligible Indian International Telecommunication Entity to the owner of the cable landing station.

(2) The Cancellation charges referred to in sub-regulation (1) shall be such as had been included in the Cable Landing Station-Reference Interconnect Offer published under sub-regulation (4) of regulation 3: Provided that the Authority may specify cancellation charges which shall be payable by a class or classes of eligible Indian International Telecommunication Entity and in such case the approval of the cancellation charges, as specified in part II of the Schedule, by the Authority shall not be required to be obtained under these regulations.

14. Restoration of Access Facilitation - (1) In case the license of the eligible Indian International Telecommunication Entity has been terminated or suspended but the same is subsequently restored, the Access Facilitation arrangement, if discontinued due to such termination or suspension under Regulation 13 may be restored by the owner of cable landing station upon payment of all costs incurred by the owner of cable landing station for the purposes of reconnection or restoration of the Access Facilities, as the case may be, by the eligible Indian International Telecommunication Entity to the owner of cable landing station and such reconnection or restoration charges shall be such as may be mutually agreed upon between them or failing which in accordance with the costs specified in Part II of the Schedule.

(2) If an authorization of the eligible Indian International Telecommunication entity or arrangement entered into by it to acquire reference Capacity on Indefeasible Right of Use or lease from submarine cable system or from a member of the submarine cable system consortium or from concerned submarine cable consortium, has been earlier withdrawn or rescinded but is subsequently restored, the access facilitation arrangement, if discontinued due to such withdrawal or rescinding may be restored by the owner of cable landing station upon payment of all costs incurred by owner of cable landing station for the purpose of

reconnection or restoration, as the case may be, by landing station and such reconnection or restoration charges shall be such as may be mutually agreed upon them or failing which in accordance with the costs specified in Part II of the Schedule.

3. The restoration charges referred to in sub-regulation (1) and (2) shall be such as had been mutually agreed between the eligible International Telecommunication Entity and owner of Cable Landing Station or as specified in Part II of the schedule:"

Provided that the Authority may specify restoration charges which shall be payable by a class of classes of eligible Indian International Telecommunication Entity and in such case the approval of the restoration charges, as specified in part II of the Schedule, by the Authority shall not be required to be obtained under these regulations."] ⁽¹⁾

16. Co-location charges and payment terms,.... (1) The Co-location charges shall be payable, by the eligible Indian International Telecommunication Entity who has been provided Co-location by the owner of cable landing station, to such owner of the cable landing station within five days of entering into an agreement under sub-regulation (5) of regulation 15.

Provided that the Authority may specify, such Co-location charges which shall be payable by a class or classes of eligible Indian International Telecommunication Entity and in such case the approval of the Co-location charges, as specified in part II of the Schedule, by the Authority shall not be required to be obtained under these regulations."]

168. The petitioners have further submitted that Regulation 10 prescribes that the access facilitation charges will be determined on the basis of the costs of network elements involved in the provision of access and distributed over the complete capacity of the system. This therefore, clearly means and specifies that the charges will have to be specific to every individual CLS based on its costs. This is also a note appended to Part II of the Schedule which reads as follows:-

"NOTE: The owner of cable landing station shall provide to the Authority, the costing elements considered, their costs and costing methodology employed along with calculations sheet in arriving at the charges submitted above in Part-II of the Schedule of these regulations for international submarine cable capacity access and co-location facilities etc., while submitting the Cable Landing Station- Reference

Interconnect Offer as per clause (d) of sub-regulation (1) of regulation 3."

169. The petitioners have further submitted that the charges for every CLS will have to be on an individual basis, such charges being based on the cost of the various network elements of such CLS. The insertion of the proviso by the amendment of 19.10.2012 only gives power to the Respondent TRAI to prescribe charges, which means apart from submission of the RIO, the TRAI will also have the power to prescribe charges. However, it is significant that the power to prescribe charges by the TRAI in terms of Regulation 10 has to be specific to every CLS, based on its cost and cannot be a uniform charge. The prescription therefore, of uniform charges in terms of Regulation 3 under the Schedule to the 21.12.2012 Regulation is therefore in violation of the parent Regulations of 2007 as amended in 19.10.2012.

170. The petitioners have further submitted that it is a well settled proposition in law that a proviso is only an exception to the main provision and cannot override the main enactment. In this regard the Hon'ble Supreme Court in the case of **Dwarka Prasad vs. Dwarka Das Saraf, (1976) 1 SCC 128** at paragraph 18 has observed as follows:"

"18..... A proviso must be limited to the subject-matter of the enacting clause. It is a settled rule of construction that a proviso must prima facie be read and considered in relation to the principal matter to which it is a proviso. It is not a separate or independent enactment. Words are dependent on the principal enacting words to which they are tacked as a proviso. They cannot be read as divorced from their context' (1912 AC 544). If the rule of construction is that prima facie a proviso should be limited in its operation to the subject-matter of the enacting clause, should, the stand we have taken is sound. To expand the enacting clause, inflated by the proviso, sins against the fundamental rule of construction that a proviso must be considered in relation to the principal matter to which it stands as a proviso".

Thereafter the Hon'ble Supreme Court has held to similar effect in the following judgments:

- i) M/s Ram Narain Sons Ltd. vs. Asst. Commissioner of Sales Tax and Others - AIR 1955 SC 765 (Para 10)
- ii) Abdul Jabbar Butt vs. State of Jammu & Kashmir AIR 1957 SC 281 (para 8)
- iii) Kerala State Housing Board and Others vs. Ramapriya Hotels (P) Ltd. and Others (1994) 5 SCC 672 (para 6 and 7)
- iv) Nagar Palika Nigam vs. Krishi Upaj Mandi

Samiti and Others - (2008) 12 SCC 364 (para 9)

v) Haryana State Cooperative Land Development Bank Ltd. vs. Haryana State Cooperative Land Development Banks Employees Union and another - (2004) 1 SCC 574 (para 9)

171. On the submission of the learned Senior Counsel for TRAI that by virtue of the 21.12.2012 Regulation the earlier regulations of 07.06.2007 and 19.10.2012 stood repealed, the petitioners have made following reasons:-

* The 21.12.2012 Regulation does not have a clause repealing the earlier Regulations.

* The Explanatory Memorandum to the 21.12.2012 Regulation from para 1 to 3 sets out the genesis of the said Regulation where there is a reference to the 2007 Regulation, followed by the 19.10.2012 Regulations, empowering and enabling the Respondent TRAI to issue the 21.12.2012 Regulation. Rather than repeal, the said Regulation specifically adopts and affirms the earlier Regulations.

* Furthermore, even in the pleadings, the Respondent TRAI in its narration of facts at Para 38, 39, 40, 41, 54, 55, 56, 57 have referred to and have affirmatively adopted the two earlier impugned Regulations.

* The reference in the Consultation Paper of 19 October 2012 leading to the impugned Regulations of 21 December 2012, to the 07 June 2007 Regulation as amended by 19 October 2012 Regulation is as "the Principal Regulations" (refer page 494 at 517 para 40 Volume-II of Petitioners' Typed set).

172. Without prejudice to the above, the petitioners have further submitted that even if both the procedures namely the procedure for fixing charges on the basis of RIO in terms of Regulations 3, 7 and 10 of the 07.06.2007 Regulation and the prescription of charges in terms of the 21.12.2012 Regulation continue to co-exists, the law laid down by the Hon'ble Supreme Court is very clear that in the event of two procedure co-existing for the determination of liability, the one less drastic and burdensome should be followed. This is the ratio of the judgment of the Hon'ble Supreme Court in a constitution bench of 7 judges in the case of **Maganlal Chhaganlal vs. Municipal Corporation of Greater Mumbai and Ors** reported in (1974) 2 SCC 402. Relevant paragraphs in this regard are

extracted,

"40. It is, therefore, clear from these decisions that where there, are two procedures for determination and enforcement of a liability, be it, civil or criminal or revenue, one of which is substantially more drastic and prejudicial than the other, and they operate in the same field, without any guiding policy or principle available from the legislation as to when one or the other procedure shall be followed, the law providing for the more drastic and prejudicial procedure would be liable to be condemned as discriminatory and void. This principle has held the field for, over twenty years and it is logically sound and unexceptionable. The respondents however, tried to narrow its scope and ambit by contending that it applies only where the choice of two alternative procedures is vested in the same, authority without any policy or principle being provided by the legislature to guide and control the exercise of his discretion and it has no validity where the initiation of one procedure is in the hands of one authority and, the initiation of the other in the hands of another. The respondents pointed out that Chapter VA of the Municipal Act does not leave it to the; discretion of the Municipal Commissioner to adopt at his own sweet will the special procedure provided in that Chapter or the ordinary procedure of a civil suit as he thinks fit. The initiation of, special procedure provided in Chapter VA is, no doubt, with the Municipal Commissioner as he is to issue a notice under section 105B(2), but so far as the ordinary procedure of a civil suit is concerned, it is not in the hands of the Municipal Commissioner to initiate it since the suit can be filed by the Municipal Corporation only with the previous approval of the Standing Committee under the provisions, of the Municipal Act. The arbitrary choice of two alternative procedures is, therefore, not given to the same authority and there is accordingly no violation of article 14. This contention of the respondents, is, in our opinion, having regard to the substance of the guarantee of equality, untenable and cannot be accepted. It proceeds on a misconception of the true principle on which this Court, has struck down laws providing for special procedure which is substantially more drastic and prejudicial than the ordinary procedure. principle as well as precedent, clearly appreciated, would remove the mist of misunderstanding surrounding this facet of constitutional quality. The principle which emerges from the decisions of this Court-and we have

already discussed some of the important decisions-is that where persons similarly circumstanced are exposed to the procedures for determination of liability, one being more drastic and prejudicial than the other and no guidelines are provided by the legislature as to when one procedure shall be followed or the other. to that one person may be subjected to the more drastic and prejudicial procedure while the other may be subjected to the more favourable one, without there being any valid justification for distinguishing between the two, the law providing for the more drastic and prejudicial procedure is liable to be struck down as discriminatory. It is not necessary, in order to incur the condemnation of the equality clause, that the initiation of both procedures should be left to the arbitrary discretion of one and the same, authority. What the equality clause strikes, is discrimination, howsoever it results. It is not constricted by any constitutional dogma or rigid formula. There is an infinite variety of ways in which discrimination may occur. It may assume multitudinous forms. But wherever it is found and howsoever it arises, it is within the inhibition of the equality clause. Where, therefore, as between persons similarly situated, one may be subjected to one procedure while another may be subjected to the other, without there being any rational basis for distinction and one procedure is substantially more drastic, and prejudicial than the other, unjust discrimination would result, irrespective of whether the arbitrary choice of initiation of the two procedures is vested in the same authority or not. Indeed to the person subjected to the more drastic and onerous procedure it is immaterial whether such procedure is put into operation by one or the other organ or agency of the Government or the public authority. It is poor comfort to him to be told that he is treated differently from others like him, but the differential treatment emanates from one organ or agency of the Government or the public authority as distinct from another. His rejoinder would immediately be that it makes no difference, because, whichever be they organ or agency of the Government or the public authority which initiates the differential treatment against him, it is traceable to the broad source of State power or power of the public authority. The unequal treatment by reason of the adoption of the substantially more drastic and onerous procedure would be meted out to him by the Administration in its larger sense- may be legally particularised in the shape of different instrumentalities-and he would

suffer all the, same. We are here dealing with the common man and when action is initiated against him for determining his liability to eviction, it would be incomprehensible to him to make a distinction between Municipal Commissioner and Municipal Corporation or Collector and Government. It would be nothing short of hyper technicality to say that action against him is initiated not by the Municipal Corporation or the Government but by the Municipal Commissioner or the Collector. The constitutionality of a statutory provision cannot turn on mere difference of the hands that harm, though both belong to the Government or the Municipal Corporation, for otherwise it would be easy to circumvent the guarantee of equality and to rob it of its substance by a subtle and well-manipulated statutory provision vesting the more drastic and prejudicial procedure in a different organ of the Government or public authority than the one in whose hands lies the power to, initiate the ordinary procedure. That would be disastrous. We must look at the substance and not the mere form. In fact in Suraj Mull Mohta's case (supra) and Shree Meenakshi Mills case (supra) the special procedure under the Income Tax Investigation Commission Act could be initiated by the Central Government while the ordinary procedure under the Income Tax Act could be initiated by an altogether different authority, namely, the income Tax Officer, and yet it was held that section 5, sub-section (4) in one case and section 5, sub-section (1) in the other were violative of article 14 since the two procedures, one substantially more drastic and judicial than the other, operated in the same field without any guideline being provided by the legislature as to when one or the other shall be adopted. Moreover, it is not correct to say that it is the Municipal Commissioner who would initiate the special procedure set out in Chapter VA. The Municipal Commissioner would be moved by the Estate Officer of the Municipal Corporation to issue a notice under section 105B, subsection just as a civil court would be moved by the Municipal Corporation to issue process against the occupant. Alternatively, the matter can also be viewed from a slightly different standpoint. When a Municipal Commissioner issues notice under section 105B, sub-section (2) initiating the special procedure against an occupant, he really acts on behalf and for the benefit of the Municipal Corporation-he seeks to enforce the right of the Municipal Corporation. Therefore, it is really the Municipal Corporation which avails of the special

procedure set out in Chapter VA. The scope and content of the aforementioned rule against.

41. It was then contended on behalf of the respondents that even where two procedures are available against a person, one substantially more drastic and prejudicial than the other, and there is no guiding principle or policy laid down by the legislature as to when one or the other shall be adopted, there would be no violation of the equality clause, if both procedures are fair. The argument was that the special procedure provided by the legislature would not fall foul of the equality clause even if it is substantially more drastic and prejudicial than the ordinary procedure, if it is otherwise fair and reasonable. This argument was sought to be supported by reference to certain observations in the minority judgment in *Northern India Caterers Ltd. v. State of Punjab*.⁽¹⁾ But we do not think- this is sound¹ in the context of the guarantee of equality although its relevance to reasonable restrictions under article 19 is obvious. When we are dealing with a question under article 14, we have to enter the comparative arena for determining whether there is equal treatment of persons similarly situated so far as the procedure for determination of liability is concerned. Mere fairness of the special procedure which is impugned as discriminatory is not enough to take it out of the inhibition of article 14. The fairness of the special procedure would undoubtedly be relevant if the special procedure is challenged as imposing unreasonable restriction under article 19(1) (f). it would also be relevant if the special procedure were assailed as being in violation of the due process clause in a country like the United States. But where the attack is under article 14, what we have to consider is whether there is equality before law, and there the question that has to be asked and answered is whether the two procedures are so disparate substantially and qualitatively as to lead to unequal treatment. (1)- [1967] 3 S.C.R. 399 Equality before law cannot be denied to a person by telling him "It is true that you are being treated differently from others who are similarly situate with you and the procedure to which you are subjected is definitely more drastic and prejudicial as compared to the procedure to which others are subjected, but you should not complain because the procedure adopted against you is quite fair". The question which such a person would legitimately ask is : " why am I being dealt with under the more drastic and prejudicial procedure when

others, similarly situate as myself are dealt with under the ordinary procedure which is less drastic and onerous ?" There would have to be a rational answer to this query in order to meet the challenge of article 14. It is, therefore, no argument on the part of the respondents to say that the special procedure set out in Chapter VA of the Municipal Act is fair and consequently it does not have to stand the test of article 14."

173. The writ petitioners have contended that TRAI, being a statutory regulator has resorted to making palpably false and misleading assertions with deliberate intent. On one hand, TRAI hides behind the veil of limited judicial review as there being a presumption of genuineness to the action of a statutory authority, on the other hand when its various findings have been effectively demonstrated to be erroneous by the Petitioner has resorted to absolutely false and misleading averments.

174. As regards clubbing of Infrastructure/Bandwidth Use/Access to CLS of CLS Owner and Access Seeker, the petitioners have submitted that the respondent has in the first instance alleged and averred in its reply to the rejoinder of 06.02.2014 that the essential facilities for access to CLS are also used by the Petitioner and therefore, the notional revenue accruing to the Petitioner by use of its own facilities should be added to the total revenue from access to CLS and has in turn made the allegation against the Petitioner of understating its revenue from access to CLS. Secondly, this has been followed up at the time of oral submission by reliance upon a judgment of the TDSAT in the IPLC case relating to the Petitioner of 28.11.2005, whereby the Hon'ble TDSAT has recorded capacity utilization on the submarine cable of 70%. Thirdly, the Petitioner on the above basis has sought to therefore, justify a capacity utilization of 70% as taken in the Explanatory Memorandum, which contention of the Respondent have been effectively rebutted at Annexure 25 (Page 676-678, Vol.II of the Petitioner's typed set.)

175. The petitioners have contended that the single common thread running through the above submissions of the Respondent is predicated on a falsification of facts and which is clubbing together the access of the Petitioner to its bandwidth with that of the access facility set up by the Petitioner or for that matter any other owner of CLS for access seekers as mandated by the license. This is because if the falsification of the respondent were to be true then the Petitioner along with other access seekers will have a common facility to access the bandwidth on the submarine cable and consequently, the notional revenue accruing to the Petitioner could be added to access facilitation revenue, thereby giving a false justification to

the respondent's assertion. Even if the capacity being utilized by the Petitioner is added up then also the capacity utilization is far less than 70%. According to the petitioners, the above submission are based on assertions on the sur-rejoinder as well as patently false and fabricated documents handed over in court.

176. The Respondent in its sur-rejoinder at Para 23 has made an assertion that the total activated capacity of the Petitioner at 5 CLSs is 632.70 Gbps, which includes capacity on cable belonging to the Petitioner as well and if the revenue from the entire capacity is to be calculated then this would result in a total revenue of Rs.129.14 crores. In other words, the Respondent has stated that the Petitioner's allegedly own notional revenue should be a part of the total revenue from provision of access facilitation. The relevant Para 23 reads as follows:-

"23. In reply to para 11(i), it is submitted that prescribing charges for CLS is a cost based exercise for estimating the access facilitation charges. The Petitioners because of their narrow view to serve their vested interests are not able to appreciate the elasticity available in the market in the ILD sector. Once these charges would become applicable, ILD revenue will increase multiple times with the growth of broadband and BPO/KPO. If the charges are affordable, the full elasticity of market shall be exploited. In the mobile sector today we have more than 900 million subscribers. This has been achieved by making tariff affordable through fixing cost based interconnection charges by the regulator.

As per information received from the Petitioners which was also published by respondent in its consultation paper dated 22 March 2012, the Petitioner has an activated capacity of 632.70 Gbps at 5 Cable Landing Stations. Presently the Petitioner charges the access seekers @ an average Rs. 2.0 crores per 10 GBPS / STM 64. Taking this Court, as an average annual Access Facilitation Charges (AFC), the revenue for 632.70 Gbps (around equivalent 63 STM 64 capacity) activated capacity comes to around 127 crores. It is 5 times of the revenue of Rs. 25.36 crores shown by the petitioner. It seems perhaps, the petitioner has not taken into account the revenue generated from providing access to their own ILDO. It is submitted that above table also suggest that out of total activated capacity as on 31st march 2011 about 20% capacities was used by other ILDOs where as 80% of the activated capacity was used by Petitioner for their own ILDO.

177. It is rebutted by the petitioner in its additional affidavit filed on 07.04.2014 by demonstrating that access facilitation in terms of a license agreement and as per the TRAI's own three impugned regulations relates to that provided to other operators as a separate infrastructure is created for them and in the context of impugned regulation it is the costing of such infrastructure which requires to be assessed. This is the basis on which the impugned regulations have been framed and obviously the understanding of TRAI from the very beginning. In this regard, the respondent had rebutted this assertion in its affidavit as follows:-

"That the Respondent has made out a self serving argument that while calculating the revenue from access facilitation charges by the Petitioner from its CLSs, it has not included revenue accrued out of landing its own bandwidth in the same CLS and which if added would take the annual revenue into the range of Rs. 127 crores. This contention raised by the Respondent, is misleading and false for the reason that under its License Agreement every licensee is mandated to provide access to other operator to its CLS towards which a separate set up has to be established. It is the cost of this set up which is subject matter of the impugned Regulation and every owner of CLS sets up this access facility only for other operator and not for itself and therefore it is the Revenue and costing of this access facility has to be in terms of revenue earned from other operators and the cost of services provided to other operators. This has been the understanding of the Respondent all these years on the basis of which it has sought cost data from the Petitioner and carried out its fallacious costing exercise and which is evident from the following licensing / regulatory provision,

"(a) The licensor in both the original and the amended license provisions of 15.01.2007 (refer page 168 - Vol. I) has referred to equal access to bottleneck facilities at the CLSs. The original as well as amended clauses in this regard reads as follows: "Original Clause:

2.2 (c). Equal access to bottleneck facilities for international bandwidth owned by national and International band width providers shall be permitted for a period of five years from the date of issue of the guidelines for grant of license for ILD service or three years from the date of issue of first license for ILD service, whichever is earlier, on the terms and conditions to be mutually agreed.

Amended Clause:

2.2(c). Equal access to bottleneck facilities at

the Cable Landing Stations (CLS) including landing facilities for submarine cables for licensed operators on the basis of non discrimination shall be mandatory. The terms and conditions for such access provision shall be published with prior approval of the TRAI, by the Licensee owning the cable landing station. The charges for such access provision shall be governed shall be governed by regulations / orders as may be made by the TRAI / DOT from time to time."

178. The petitioners have further submitted that as evident from the above clauses and more so the amended clause, the relevant facility is the access to bottleneck facilities at the CLSs. Both the licence clauses, the unamended and the amended have been framed in consultation with the Respondent in terms of Section 11(1)(a)(ii) of the TRAI Act. The first Consultation Paper itself of 13.04.2007 is styled as "Access to Essential Facilities (Including Landing Facilities for Submarine Cables) at Cable Landing Stations" and the Regulation defined Access Facilitation in the following terms:

"2(a). Access Facilitation means access or interconnection, as the case may be, to the essential facilities (including landing facilities for submarine cable) at cable landing station"

In fact, the Consultation Paper of 22.03.2012 of the Respondent (Annexure -17 page 311) the reference is to "Access to necessary facilities at CLS (para 1.12 and subsequent paragraph 2 refers to 2007 Regulation) which again relate to access to essential facility at CLS.

(b) That the above facts very clearly disclose that the subject matter of Regulation of the CLS is the facilitation of access to an eligible ITE so that it can access the international bandwidth owned by it on the submarine cable through a technical set-up facility established by the OCLS in its CLS exclusively for the purpose, which facility in terms of the license is required to be set up for other operators and in respect of which the cost have been assessed and there is no question of including any notional revenue of the Access Facilitation Charges (AFC) accruing to the Petitioner from itself. That, it is a fact that the operating cost of an access facility to a CLS is very high and in this regard, the Petitioner reiterates one of its submission made in the Writ Petition that only if three items of Operating Expenses (OPEX) are taken the same will be far in excess of the revenue accruing to the Petitioner in terms of the impugned Regulation. The three major cost component for OPEX are manpower cost for operation, power and rental and the same has been

taken by the Respondent in the impugned Regulations of 21.12.2012, though break up has not been given.

CLS	Total Opex	Opex - Top 3 items
BKC, Mumbai	74,68,280	57,23,902
VSF, CNI	58,49,243	64,39,521
VSF, ERK	28,33,250	20,42,644
LVSE,Prabhadevi, Mumbai	3,13,14,81	2 1,99,45,162
VSF, Fort, Mumbai	1,49,36,45	0 85,09,045
Total	6,60,07,03	4 4,26,63,275

(c) As seen from the Table above the Impugned regulation is resulting into the reduction of the AFA revenue from Rs. 25 Cr to 2.5 Cr as against the 6.6 Cr of OPEX only. It may be noted here that the 3 Major component of OPEX, namely Space, Power and rental itself is 4.26 Cr. This clearly indicates that the gross and arbitrary calculations done by the respondent to arrive at the charges as per the impugned regulations. (c) That one of the Members of ACTO is France Telecom where it exercises coercive business practices to realise access revenues from its CLS in Marseille. France Telecom owns the CLS for cable IMEWE in Marseille and for assessing any capacity in the cable, France is the only provider. France Telecom excludes co-location of other cables in its CLS by keeping co-location charges excessively high and thereby ensures that bandwidth is purchased only from itself.

(d) This is very much unlike India where CLS owners are providing co-location to all access seekers in the CLS and therefore there is a choice in terms of the ultimate customer buying bandwidth from two different cable owners.

(e) That access charges in large number of countries are many times that of India which is evident from the tables given therein. Table -2 below gives the comparison of the SMW-4 AFA charges of TCL with the similar charges with other cable system. This is captured for STM-64 capacity and the rates mentioned below are the negotiated rates with the respective operators. These are Monthly recurring charges in USD. As seen from table -1 therein, the charges for accessing the STM-16 capacity from other CLS is multiple times than what other operators are being charged by TCL in India. Similarly in Table -2 the charges for accessing STM-64 capacity are multiple times in some cases and are equivalent or little less than the charges that operators seeking AFA in India for SMW-4 are charged.

(f) It is relevant to note that the Access charges for Singapore on both the Table -1 and Table -2. The charges are the same irrespective of the capacity in both the tables. These charges will remain the same irrespective of the capacity interface i.e. (STM-

1/STM-4/STM-16/STM-64) Interestingly the same cable landing at different countries has vastly different rates for access.

179. The petitioners have contended that TRAI has now sought to reintroduce the same argument in a different form and which occurred at the time of oral submissions being made whereby a chart of a CLS was handed over by the respondent's Counsel in court at the hearing on 07.04.2014. A copy of the said chart is annexed and marked as Annexure-1. The said chart shows a single point access for the Petitioner as well as other access seeker to the submarine cable through the CLS, the effect of which is that the access facilitation of the Petitioner and other access seeker is through a common infrastructure. The implication of this being obvious that the cost of access should be clubbed together for both the Petitioner as well as other access seekers, resulting in increase in capacity utilization, thereby reducing per unit cost providing the Respondent's with justification for their artificially low costs. In actual fact both the infrastructures are distinct, as mandated under the License Agreement the Petitioner has to make a separate provision for access for other access seeker and a correct diagrammatic presentation is annexed and marked as Annexure- 2 (i). That the respondent has now sought to build on this false assertion by equating this to the 70% utilization of submarine cable in the IPLC case, the relevant paragraph relied upon being extracted herein below:-

"25. It is submitted that the Petitioner, vide appeal No. 10 of 2005, challenged the International Private Leased Circuits (IPLC half circuits) Tariff Order of TRAI dated 8th October, 2005 (Telecommunication Tariff (39th amendment) order, 2005) whereby TRAI had fixed ceiling tariffs of IPLC circuits. The Hon'ble TDSAT, vide its judgment dated 28th November, 2005, dismissed the appeal with cost and in para 13.3 held as under:-

"During arguments we had occasion to see the papers submitted by TRAI which clearly brought out the position that the inspection team had unearthed certain information which had earlier not been given by VSNL. Also the figure of E-1s indicating capacity utilized was entirely based on the information given by VSNL. Also VSNL itself had indicated that 30% of capacity was unutilized. While we do appreciate VSNL argument that for efficient and reliable IPLC service some provision has to be made to be provided for restoration / redundancy, we see considerable merit in TRAI's argument that with only 70% capacity being utilized, the remaining 30% un-utilized capacity

would suffice for meeting the requirement of redundancy."(emphasis supplied)

The Hon'ble TDSAT concluded vide para 21 of the judgment that "For the reason stated above, we find no merit in this appeal and find no reason to interfere with the impugned notification. Hence, we dismiss this appeal and direct that the notification in question be brought into effect immediately by TRAI so that the benefit of the notification to the consumer is not delayed further. Appeal dismissed with cost computed at Rs. 50,000/-."

180. The petitioners have further submitted that the reliance on the above extract of judgment is not even plausible for the Respondent TRAI even if its false assertions in terms of Para 23 of the sur-rejoinder and the chart handed over are held to be true for the simple reason that then also the capacity utilization is less than 70%. In any case a separate technical set up for facilitating access to the international bandwidth to the eligible ITEs has been built by the Petitioner and it is the capacity utilization of that set up which has been erroneously assumed to be 70% which defies the utilization trends and the forecast. Otherwise, the 70% capacity in a submarine cable includes the entire capacity drawn from the submarine cable, which includes the capacity of the owner of the CLS and that of other access seekers.

181. In fact, the figures of the TRAI again unwittingly demonstrate the true factual position namely that the capacity utilization across different CLSS varies which is why every CLS has to be assessed for costs on an individual basis. The capacity utilization for each CLS taken for the Respondent's TRAI chart shows that the capacity utilization for the 5 CLSS of the Petitioner are vastly different as demonstrated. The concerted manner in which the Respondent TRAI has sought to falsify facts requires dismissal of the petition on this ground alone.

182. On the contention that Access Facilitation Charges are 45% of IPLC Rate, it is submitted that TRAI in Para 19 of its reply to sur-rejoinder has made a false and misleading assertion that the Petitioner access facilitation charges are 45% of IPLC rates to the following effect. According to the petitioner, this has been effectively rebutted by the Petitioner in Para 4 of its reply to sur-rejoinder showing that it is not 45% but 3.7%, relying on the very same chart as relied upon by TRAI. The averment of TRAI reads as follows:-

"A closer perusal of the chart would show that the IPLC rate from London to Mumbai for STM-1 is 16,693 USD for quarter 1 in the year 2012. This approximately works out to around Rs.10 lakhs. The Access Facilitation Charges presently applicable for STM-1 for the cable landing station owned by the Petitioner at Mumbai is Rs.4,41,656. This shows that nearly 45% of the IPLC rate is being charged annually by the Petitioner from the seeker. This completely belies the argument taken by the Petitioner in para 11 (a) of Rejoinder that the cost of setting up a cable landing station (CLS) is insignificant compared to the cost of establishing the submarine system. It also demonstrates that the present Access Facilitation Charges of cable landing station are very high and anti-competitive."

In response to the above, the contention of the Petitioner in paragraph 4 of its reply to sur-rejoinder has effectively dealt with this contention which reads as follows:-

"4. The Respondent has made a false and misleading allegation in paragraph 19 that Access Facilitation Charges are 45% of the IPLC rate, by relying on figures quoted by the Petitioner in its rejoinder affidavit.

The chart cited by the Petitioner shows the price of a STM 1 at 16,693 USD on a monthly recurring basis, which the respondent has conveniently taken to be an annual charge. TRAI is comparing the monthly recurring charges of the 1xSTM-1 charges of INR 10 lakhs between Mumbai-London with the Annual recurring charges of access facilitation of 1xSTM-1 at LVSB Mumbai which is INR 4,41,656. Based on this, the Respondent is coming out with a conclusion that AFA rate of 1xSTM-1 is 45% of the Total IPLC rate. This is completely wrong and denied.

- As per the correct working the Monthly recurring charges of 1xSTM-1 between MMB- London is INR 10 Lakhs.
- And the Monthly recurring charges of AFA for 1xSTM-1 in LVSB Mumbai will be = $4,41,656/12$ = INR 36804.
- And hence the percentage contribution of the AFA to the IPLC rate is hardly 3.7% and not 45% as wrongly represented by TRAI."

183. On the Access Facilitation 56% of Bandwidth Cost, the TRAI at Para 52 of its Counter Affidavit has asserted that

access facilitation charges are 56% of total bandwidth cost. The said Para 52 of Counter Affidavit reads as follows:-

"It is submitted that in response to the consultation paper, majority of the stakeholders were of the view that there is an urgent need to reduce the access facilitation charge and co-location charges to reasonable and comparable levels in order to ensure continued growth in India's international telecommunication market. They were of the view that though the bandwidth charges have come down significantly but the access facilitation charge and co-location charges have remained the same. These charges are now as high as 56% of the total bandwidth cost which is quite significant and if it is not brought down, it will stifle completion in the international bandwidth market. The stakeholder further suggested that the method of fixing cost-based access facilitation charge and co-location charge by the Authority is the most appropriate in the given situation when these charges are significantly high as a percentage of the bandwidth charges"

184. The Petitioner in its rejoinder at Para 22 has stated that it has been demonstrated that this 56% is patently false by relying upon figures given by the "International Telecommunication Journal Telegeography" the said paragraph reads as follows:-

"I submit that the Respondent again has made a misleading allegation stating that while bandwidth prices have come down but access facilitation charges have remained high and which is 56% of the total bandwidth cost. This is patently erroneous and misleading statement as the facts are otherwise. This comparison of bandwidth and access charges is completely erroneous, bandwidth prices are market driven in terms of demand and supply and for a very long time, there has been excess bandwidth in the international market as a result of which various companies owning bandwidth have had to sell out either their assets or the companies bought over. Access charges on the other hand have to be cost based as per the Respondent's own showing and to compare the two is erroneous and make an allegation that it is 56% of the bandwidth is again patently false. Telegeography, an annual publication which deals in international submarine cable network and authority on the subject has very clearly disclosed that access charges are minor proportion of bandwidth prices.

It may further be noted that in the effort to reach at a predetermined charges for the AFA pricing, TRAI had insisted/pressed to the Petitioner to work on

a methodology (Cost + BW base Model) in which the actual market prices of the bandwidth rate between VSB to LVSB in Mumbai region was used. The working was discussed in detail with TRAI and was later supplied to TRAI on 27 September 2012. Upon seeing that this methodology is not reaching to the pre-determined intention to artificially reduce the cost based price, the Respondent had reverted on the old model of cost based working.

The High prices of the Cost+ bandwidth based model further emphasizes that the model adopted and approved by the Respondent in the year 2007 was best to be followed as it was actual cost based working.

TRAI trotted out the reason in Consultation Paper of capacity usage has gone up to 70% and costs have come down. But finding this not sustainable has not advanced this reason, yet in cost assumption, has proceeded on this erroneous premise. The reason now advanced is delay in approval of rates, but not due to our fault. Moreover, that provision is also retained, hence two alternative methods at their whim to choose without any guidelines.

185. On the onus of building CLS in Consortium Model, it has been contended by TRAI that it is always the local incumbent operators on whom the onus to invest in CLS facility under the consortium model falls upon globally. It is submitted that the contention of the respondent is wrong and misleading. It is denied that under the consortium model the local incumbent telecom service provider is given the responsibility for construction and management of CLS, being reimbursed by the consortium. This is a factually incorrect submission as there is no rule that only one member of the consortium will build a CLS, for instance, IMEWE has two CLSs in Mumbai one owned by M/s. Bharti and the other by TCL. The logic of the dominant and incumbent being given the option to build CLS is also incorrect in the case of BSNL which should have built the CLS for Europe India Gateway (EIG) cable or should have opted for a Second CLS, but chose not to do so as it wanted to avoid the cost of building the CLS. It is stated that as markets have grown and new operators have come in, new entrant private operators and even the foreign operators have built CLS. For instance, it is reported that the new consortium cable SMW-5 in which Reliance Jio and Vodafone are participating, they are planning to build a separate CLS in Mumbai and Chennai respectively. Even internationally, over a period of time the non-local operators including the Petitioner have and are building CLS in foreign countries. For instance,

(i) Verizon which is a Telecom operator of the USA is building a SMW-4 in Baxautie, Maresllie, France. The rest of the contents of the paragraph under reply are

wrong and are denied.

(ii) MTN which is a local Player in South Africa has build CLSs in Ghana, Nigeria and Ivory Coast for the WACS cable system.

(iii) Verizon a Foreign Player in UK has built the CLS for the EIG cable system at Marselle, France.

(iv) The Petitioner has build the CLS in Seixal (Portugal) for WACS cable system, even though local incumbent (Portugal telecom) is on the consortium and has drawing its capacity using the Petitioner's CLS.

(v) The Petitioner has built CLS in High bridge, UK for WACS cable system, even though local incumbent (C&W- Vodafone) is on the consortium.

(vi) Here it is also worth mentioning that the petitioner has built multiple CLS across the globe in different countries to land its private cables which enables it to provide the seamless connectivity around the globe.

186. On the aspect of determination of costs, the petitioner has submitted that TRAI has expounded the regulatory philosophy in regard to specification of charges as one which will follow the cost plus principle i.e. to say the owners of CLS will be fully reimbursed the cost incurred by them in setting up the access facilitation set up established by them for the sole purpose of providing access to CLS to the eligible ITEs and will also be given a reasonable margin of profit. It is the specific case of the Petitioner that the sharp reduction in the charges by the December 2012 Regulation by as much as 97% in some cases from 2007 rates approved by TRAI which again were on cost basis, does not even meet the actual costs. This has not even been contradicted by TRAI and no effort has been made by TRAI to show that the charges specified by them will actually reimburse the OCLS of the cost incurred by them. They admit that the costs have been determined on certain assumptions such as taking a uniform high capacity forecast of 60Gbps, utilization of capacity of 70% and that adoption of multiple of 2.6 etc.

187. It is submitted that one of the primary reasons for the drastic reduction in costs is assumption of capacity utilization of 70% by the TRAI, uniformly across different CLSs along with the capacity forecast of 60 Gbps. The Respondent TRAI had unwittingly admitted to the error / falsity of this assumption in a table filed along with the reply to the sur-rejoinder, where it has shown different capacity utilization across different CLSs and far below the assumption of 70%. The effect of a higher capacity utilization that the denominated increases, artificially reducing the per unit cost which is part of a pre-meditated exercise of the TRAI.

188. On the issue of estoppel, the petitioners have submitted that TRAI has in the Explanatory Memorandum to the 21 December 2012 Regulation failed to give reasons on two important aspects, namely the calculation of cost and costing methodology. It is relevant to note that in so far as fixation of prices for IPLC tariff in 2005 are concerned, TRAI had brought out a tariff order under Section 11(2), which was required to be in compliance with Section 11(4) relating to transparency. In the case of **Videsh Sanchar Nigam Limited Vs. TRAI**, Appeal No. 5 of 2005 dated 28.04.2005 the first tariff order was set aside by Hon'ble TDSAT on the ground that relevant material relied upon by the Respondent TRAI has not been disclosed to the Petitioner including calculation of cost and costing methodology. The absence of no documents of information is in violation of the Principle of natural justice and TRAI has breached and mandatory requirements of transparency. The relevant extract from the judgment reads as follows:

"TRAI did not disclose various documents and information on which it acted. In its rejoinder Petitioner has specified the documents of which it seeks disclosure and these are:

"a) Report by M/s. Ernst & Young or any other consultant engaged by the TRAI.

b) Copy of articles/ reports/ information derived from Telegeography and copy of articles/ reports/ information derived from Primetrica and Gartner.

c) The costing methodology and calculation for arriving at a cost of Rs.7.4 to 9 lakhs for E-1 circuit.

d) The manner in which the costing multiple of 1:8:23 has been worked out.

e) Any other report of consultant and/or information used in the determination of prices and not disclosed in the explanatory memorandum.

It is the contention of Mr.Kapur, Learned Senior Advocate for TRAI, that reports of the consultant Ernst and Young and others were used merely to determine if there was any need to fixation of tariff for IPLC and those documents, therefore, could not be disclosed. Explanatory Memorandum to the impugned tariff order does, however, show use of these reports. As to whether these reports have been used for limited purpose as contended by TRAI, Petitioner will have certainly a right to know. It was the submission of

TRAI that fixation of tariff could only be challenged on the ground of unreasonableness or arbitrariness and on demonstrative grounds. It is difficult to appreciate this argument. How could there be a challenge to the order unless all the records on the basis of which action was initiated and the impugned tariff order was based were made known to the Petitioner. Mr. Kapur submitted that TRAI has no objection to show all these documents to TDSAT but TRAI had certainly reservations to furnishing these to the Petitioner. We do not want to enter into the exercise of examining the records ourselves without the Petitioner having access to the same. If any such document influences us it will certainly be prejudicial and unfair to the Petitioner.

On the question how far TRAI can withhold the information on the basis of confidentiality of document we had occasion to consider this question in the case of Bharat Sanchar Nigam Ltd Vs. TRAI in Appeal No.31 of 2003 decided 13.12.2004. TDSAT observed:

"Now the question arises how this Tribunal will look into the matter of the claim of non disclosure of material. The Tribunal will look into the question of claim of confidentiality only if the party submitting information or material to TRAI made a request that such information be not disclosed to other service providers. It is not enough that a mere request is made; it should be supported with substantial reasons for withholding materials for inspection by the other party. It should be explained how the disclosure of information would result in substantial competitive harm to the information provider. Each case will have to be examined on the facts of the case. We have to balance the interest in disclosure and the interest in preserving the confidentiality of competitive sensitive material. What we find in the present case is that there is no request from any of the service providers from whom data has been collected for its non disclosure and as a matter of fact during the course of arguments before us also, learned counsel, for service providers stated that they had no objections to the data being shown to the BSNL, the Petitioner".

We, therefore, direct that all the documents and information as asked for by the VSNL, the Petitioner, be supplied it by TRAI. In this view of the matter we

are of the opinion that in the absence of non-disclosure of information to the Petitioner principles of natural justice have been violated and so also TRAI has breached the mandatory requirement of transparency in its functioning as required under Section 11(4) of the TRAI Act.

We could ourselves have heard the matter finally after the documents and information are supplied to the Petitioner but then the Petitioner would be deprived of its right to be heard by TRAI and their further statutory right of appeal. We are, therefore, of the opinion that the matter should be heard by the TRAI. We accordingly set aside the impugned order and remand the matter to TRAI to have fresh look after giving full opportunity to the Petitioner keeping in view the observations made by us in this order.

189. It is the contention of the petitioners that the above judgment has been upheld by the Hon'ble Supreme Court and therefore the requirement to furnish costing methodology and calculation and operates as an issue estoppel in so far as TRAI is concerned. This is without prejudice to the Petitioner's primary submissions that requirement to furnish cost calculation and costing methodology is also in terms of its statutory obligation as set out herein above. In this regard, the law regarding Issue Estoppel has been discussed extensively in the judgment of the Hon'ble Supreme Court in **Bhanu Kumar Jain v. Archana Kumar and Another** reported in **2005 (1) SCC 787**, wherein, it has been held as follows:

"30. Res judicata debars a court from exercising its jurisdiction to determine the lis if it has attained finality between the parties whereas the doctrine issue estoppels is invoked against the party. If such an issue is decided against him, he would be stopped from raising the same in the latter proceeding.

32..... A cause of action estoppels arises where in two different proceedings identical issues are raised, in which event, the latter proceedings between the same parties shall be dealt with similarly as was done in the previous proceedings."

190. According to the petitioners, the earlier case was an exercise of jurisdiction under section 11(2) and the present one is an exercise of jurisdiction allegedly under Section 11(1) (b), both of which are required to be in conformity with Section 11 (4) prescribing transparency. In the earlier case the matter related to fixation of IPLC Tariffs which inter alia involved

calculation of costs of network elements of international submarine cables, whereas the present is a case of assessing the costs of network elements relating to the access to essential facility of the CLS, both being segments of connectivity provided by international submarine cable network.

191. According to the petitioners that the respondent has acknowledged the identity of the network elements in both the exercises by erroneously relying upon the extract of a judgment rendered in the IPLC case of 20th November 2005 as regards capacity utilization in the submarine cable (controverted by Petitioner at relevant place as IPLC capacity is not a network element in the present case) at Para 25 of reply to Rejoinder of the Respondent TRAI. As both the exercises entail fixation of cost based charges/ tariffs the exercise for assessment of costs has to be similar and also acknowledged as such by the Respondent TRAI. In such identity of exercises, the Respondent ought to have disclosed cost calculation and methodology in terms of the earlier judgment of 28th April, 2005 and which operates against the said respondent as an issue of estoppel.

192. On the issue, regarding the jurisdiction of this Court to review the exercise of costing, it is the submissions of the Respondents' counsel that the TRAI is an expert body and which while exercising its function, the scope of judicial review is limited, confined to a few parameters. Reliance has been placed on judgment rendered by the Hon'ble Supreme Court in **Shri Sitaram Sugar Company Limited and Another vs. Union of India and Others [AIR 1990 SC 1277, Para 57]**, held that the judicial review is not concerned with matters of economic policy. Thereafter, he made submissions on three aspects, viz., 70% capacity utilization, limited judicial review and complex factor.

193. As regards the issue of jurisdiction of this Court to review the exercise of costing, it is the submission of the petitioners that

(a) The prescription of transparency under Section 11(4), the statement of objections and reasons in the impugned regulations, coupled with the practice of the Respondent TRAI itself demonstrates that the contention now advanced in the present proceedings is without any merit and basis. In the Section relating to transparency herein above, these aspects have been dealt with in detail, same are not repeated for the sake of brevity and reliance is placed on the same.

(b) The Respondent's sole basis of its contention, its reliance on the Essential Commodities Act, 1955

and construction given thereto in various judgments of Supreme Court, which has already been discussed and dissected above and the same is reiterated. At the cost of repetition, even in respect of the Essential Commodities Act, as per the law laid down in the case of **Union of India Vs. Cynamide India Ltd [(1987) 2 SCC 720]** the Hon'ble Court has held in Para 7 as under:-

"7. Price fixation may occasionally assume an administrative or quasi-judicial character when it relates to acquisition or requisition of goods or property from individuals and it becomes necessary to fix the price separately in relation to such individuals. Such situations may arise when the owner of property or goods is compelled to sell his property or goods to the government or its nominee and the price to be paid is directed by the legislature to be determined according to the statutory guidelines laid down by it. In such situation the determination of price may acquire a quasi-judicial character".

This is precisely the position, except that TRAI Act, 1997 expressly requires observance of transparency, as detailed above and the respondent has accordingly followed the practice of determining the "cost based charges" on the basis of cost data of the two petitioners before this Court, as reflected in the consultation paper of 19 October, 2012 as also in the objects in the Explanatory Memorandum setting of the objects and reasons. This being the case, the Respondent has taken a wholly contradictory and illegal stand.

(c) The respondent furthermore in a past practice relating to determination of tariff under Section 11 (2) for IPLC has been required / directed to follow the disclosure of cost calculation and costing methodology as detailed under the heading 'Issue Estoppel' hereinabove, by a judgment of the Hon'ble TDSAT in the matter of VSNL Vs. TRAI in its Appeal No.5 of 2005 rendered on 28.04.2005. As already stated in the Petition, the Petitioner prior to 2008 was known as Videsh Sanchar Nigam Limited, which has attained finality, the appeal being dismissed by the Hon'ble Supreme Court.

(d) Under Section 23 of the TRAI Act which is in the Chapter 'Dealing with Finance, Accounts and Audits' pertaining to TRAI as the accounts of TRAI are subject to audit of the Comptroller and Auditor General of India, there is a reason provided in the explanation that the decisions of the Authority taken in discharge of its function under Sections 11(1)(b) and 11(2) and

13, being matters appealable to the Appellate Tribunal shall not be subject to Audit. This provision has been construed against TRAI as requiring full compliance with the principles of natural justice and transparency by the Hon'ble TDSAT in the aforementioned judgment of VSNL Vs. TRAI in its Appeal No.5 of 2005 rendered on 28.04.2005, in the following terms:-

"The question before us is, can there be any limitation on the power of the Appellate Authority while hearing and disposing of the Appeal when the appellant challenges the impugned order and the challenge is on the ground that the order has been passed without giving proper opportunity to the appellant, in breach of the principles of natural justice and in breach of the mandatory requirement for the TRAI to ensure transparency while exercising its powers and discharging its functions.

It is interesting to note the Explanation to Section 23 of the Act which was added by the amending Act 2 of 2000. This Section 23 is in the Chapter dealing with finance, accounts and audit pertaining to the TRAI. The accounts of the TRAI are subject to audit by the Comptroller and Auditor General of India. There is, however, an explanation as to what decisions of the TRAI are not subject to audit and it is what is provided in the Explanation which is as under:

"For the removal of doubts it is hereby declared that the decisions of the Authority taken in discharge of its functions under clause (b) of sub-section (1) and sub-section (2) of Section 11 and Section 13, being matters appealable to the Appellate Tribunal, shall not be subject to audit under this Section."

The statutory prescription is therefore clear that nature of judicial review has to the equivalent of audit as carried out by the Comptroller and Auditor General of India and therefore of a far more rigorous character. The position does not alter, whether judicial review of a decision of the TRAI is carried out by the TDSAT or by this Hon'ble High Court or any other judicial forum.

(e) The Petitioner in various sections hereinabove set out the scope and jurisdiction of the Respondent TRAI in terms of bar to raising new pleas, transparency, issue estoppel, no power to prescribe uniform charges for all CLSs etc. made extensive submission which have largely dealt with the exercise of determination of costs. The submissions made in the above sections are reiterated in this section and are

not repeated for the sake of brevity."

194. On merits, the petitioners have dealt in extenso in respect of the determination of costs, the manner, the methodology, the calculations for CAPEX and OPEX in respect of all heads. Detailed submissions have been made by the Petitioner in Annexure 25, which is an affidavit adducing and elaborating on the grounds in the Writ Petition where submissions have been elaborated on the grounds pleaded in the writ petition. The respondent has very conveniently chosen not to respond to the submissions made in Annexure 25. The Respondent not having transverse the submissions in annexure 25, the same are deemed to the admitted.

195. The Respondent's counsel at the time of hearing did not advert to the contents of Annexure 25, in fact submissions made related to reading of the Consultation Paper to the 19.10.2012 Regulations and the Explanatory Memorandum to the two impugned regulations of 19.10.2012 and 20.12.2012. Respondent's Counsel however did not deal with the submissions made by the Petitioner as regards the various infirmities to the determination of costs. None of the issues raised by the Petitioner exposing the glaring deficiency and infirmities in the entire exercise of determination of costs have been dealt with. In short the respondents neither in their pleading, nor in their submissions made at the bar have dealt with any of the contentions set out in Annexure 25 (relating to determination of costs Page 667-687 Vol.II of the Petitioner's typed set) . The Petitioners have reiterated their submission on the various infirmities in the entire costing exercise, under individual head as follows, and the references made by the Respondent TRAI in its consultation paper and the Explanatory Memorandum will be given at the relevant places.

196. According to the petitioners, the respondent has assessed the costs for arriving at Access Facilitation Charges by examining the cost data of two CLS owners, the Petitioner and M/s Bharti Ltd. Costs have been determined separately for Capital Expenditure (CAPEX) and Operating Expenditure (OPEX). That the Respondent has dealt with several aspects and elements of costs, which are discussed under various heads in the subsequent paragraphs, the major issues, are as follows:

"It is a fact that costing methodology for different network elements of CLS in the 07 June 2007 Regulation as approved by the Respondent for various CLSs owned by the Petitioner and costing methodology

given in the 21 December 2012 Regulation take diametrically opposing approaches, the approvals under the first Regulation of 2007 recognises and treats every individual CLS as an independent entity for the purpose of assessing costs and consequently fixing different charges for the same, whereas the impugned Regulation of 21 December 2012 adopts a uniform hypothetical cost as a result of which cost based charges have been reduced up to 97 per cent. Furthermore, the basis of assessing each individual CLS as an independent cost entity and the methodology in this regard, the TRAI had approved of this costing methodology in the, statutory filings under the 2007 Regulations. As already stated herein above, the amendment of 19.10.2012 to the 07.06.2007 Regulation is by insertion of a proviso empowering the TRAI to prescribe charges. The parent regulations prescribe fixation of cost based charges for every individual CLS, which vary across CLSs. The proviso at best can empower the Respondent to prescribe charges based on cost for every individual CLS, but most certainly cannot empower the Respondent TRAI to prescribe uniform charges for all the CLSs. The prescription of such uniform charges for all the CLSs is therefore ultra vires the parent regulation and void ab initio.

197. In its response, TRAI has sought to make out a case that as if the Petitioner had consented to the fixation of uniform rate across CLS and this is being pleaded at Para 62 of the Counter Affidavit to the following effect:-

"There was discussion on the issue that whether charges for access and co-location to different cable landing station can be uniform. Petitioner agreed and recorded that if Authority unifies these rates then, the Fort, Mumbai rates for the rental/ Power may be taken for all stations as reference."

198. It is submitted by the petitioners that along with the issuance of amendment regulation, TRAI has also issued a Consultation Paper on Estimation of CLS charges dated 19.10.12 wherein model calculations based on some costs have been done in the CP and we have been asked to comment on the cost data and costing methodology. Since there were number of issues in the cost taken as well as in methodology adopted, we had requested for a clarification meeting before we could submit a substantive response to the CP, while being thankful to Authority for affording an opportunity of the meeting, it was submitted that

the access facilitation charges proposed in the consultation paper apart from not being clear. In respect of methodology and assumed costs were also substantially below cost and the intention of the meeting was to apprise TRAI about TCL Submissions on the methodology, costs required to be considered. It was also indicated that since the CLS infrastructure is already available on the ground and running, all the network elements/ costs invested needs to be taken into account while deriving cost based access facilitation/ co-location charges.

199. It has been submitted time and again by the learned Senior Counsel for the respondent-TRAI as well as pleaded in the counter affidavit that the Petitioner had agreed to all the proposals of the Respondent TRAI including uniform charges. The very preamble of the Minutes demonstrates that the Petitioner as late as 04.12.2012, two weeks before the issuance of the December Regulation had no clarity on the costing methodology and manner of calculation leading to below costs recovery.

200. As regards the submission of the respondent that the Petitioners had consented to uniform charges, the petitioners have submitted that the above statement is misleading as the said minutes contained the issues and aspects and component of costs on which the Petitioner had reservations and it is only in respect of one such head where the Petitioner stated that while costs varied across different CLSSs, however, if the Respondent did want to unify these rates then the cost for only rental / power for Mumbai may be taken as a reference. This submission being of relevance is extracted herein below:-

"As already submitted the AFC and co-lo charges will vary from location to Location depending on the Rental/Power/Manpower cost contributing towards O&M. The Difference in the same is evident on the working of TRAI in the co-lo charges of Mumbai and Chennai. As discussed, if authority desires to unify these rates then, the Fort, Mumbai rates for the rental/ power may be taken for all stations as reference".

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201. From the above, the petitioners were very clear that costs were different and only as a measure of acceding to TRAI insistence had agreed for a common rate to be taken for rental/ power. It is significant to note that the first sentence of the above extract relates to different charges for rental / power /

manpower, however, the Petitioner did not agree to unification of equipment and manpower cost and limited it only to rental and power. Secondly, the Regulations in any event require different charges for different CLSs and even assuming the Respondents' case to be correct, though not admitting being contrary to record and fact, consent cannot confer jurisdiction.

202. The petitioners have further submitted that there is no costing methodology disclosed in the December 2012 Regulation which is in clear violation of the transparency requirement under Section 11 (4) of the TRAI Act 1997, the Respondent as per its own showing had taken cost figures from the Petitioner and another operator, however, neither has the methodology been disclosed nor the figures published relate to the Petitioner. The rationale for benchmarking a single CLS access charges for all the Cable Landing Stations has been explained in the explanatory memorandum of the impugned regulation dated 21.12.12 as follows:

"31. TRAI is of the opinion that work done to provide access facilitation at a cable landing station is same for all cable landing stations. Therefore, it is not required to estimate the cost based charges separately for each cable landing stations. The only variation could be due to space and electricity charges if the cable landing stations are located in two different cities. Therefore, in its calculations, TRAI has used space and electricity charges for Mumbai, which are the highest among various locations. During the consultation process also, stakeholders were generally of the view that determination of Access Facilitation charges, one for CLS and other one for alternate location (MMR) would be adequate. As these charges are ceiling charges, the Authority is of the opinion that higher of the costs of the two OCLSs, calculated separately for CLS and MMR may be taken for prescribing these charges."

The above reasoning of the TRAI is violative of the prescription for assessment of costs and fixation of charges separately for each CLS in terms of the parent Regulation, which are described as such by the Respondent TRAI and which aspect has already been dealt with in the section relating to no power to prescribe uniform charges, in terms of 21.12.2012 Regulation.

203. The petitioner has further submitted that the rationale as above is faulty even on Respondent's own showing while approving CLS access charges in the year 2007 as also its statement given in the explanatory memorandum to the impugned regulation dated 21.12.12 reproduced below:

"2..... The Authority further noted that though the work done in providing Access Facilitation is same irrespective of specific cable landing station, the Access Facilitation and Co-location charges varies between different operators based on their network configuration and costing methodology."

Thus, the petitioners have submitted that the decision of the Respondent to benchmark the CLS access charges as uniform charge for all the CLSs of various OCLSs is not only violative of Section 11 (4) of the TRAI Act, 1997 as not a single Open House session was held by the Respondent on the issue but is admittedly contradictory to Respondents own conduct from 2007 to 2012 and understanding and is purely arbitrary at the behest of those stakeholders who are desirous of sharing the CLS infrastructure of the Petitioner at below cost. In any event, as already stated herein above the Regulations require fixation of cost based charges for every individual CLS, whether published in the RIO by the Petitioner or prescribed by the TRAI.

204. According to the petitioners, built capacity is an important factor in assessing per unit for cost has been assumed to be uniform for all CLSs, when none of the CLSs have provided for such built capacity. The actual assessment and figures provided to the Respondent have been ignored/overlooked. It is further contended that the respondent has again assumed a capacity utilization of 70 per cent which is erroneous as the capacity utilisation as per figures provided to the Respondent for different CLS is in the region of 1 to 27 per cent, based on actual figures.

205. As far as assessment of Capital Expenditure (CAPEX) is concerned, it is submitted that the respondent has not provided calculation in terms of cost for all the different network elements as to required, only given the list of items considered and arrived at a lump sum figures. The non application of mind is evident from the fact that even after including four additional items of cost over and above that in the Consultation Paper, the cost per unit has actually been reduced from the Consultation Paper to the impugned Regulation. Similarly for OPEX, the Respondent has disclosed that non calculation against different elements and has arrived at a lump sum figure which does not correspond to the cost of any CLS, the man power cost under OPEX has been taken as a percentage of CAPEX, when there is no relation between the two. The Project Management cost has been taken as a percentage of CAPEX when it is clear that there is no linear relation between the two.

206. The petitioners have further submitted that tax has been assumed at an arbitrary figure of 18 per cent whereas Petitioner had demonstrated that taxes and duty on imported items including logistic amounts 23 per cent, no reasons have been furnished for disallowing the tax and logistics figure of 23 per cent. The Foreign Exchange Rate has been assumed at an arbitrary figure of Rs.52 per dollar, when the exchange rate on the date of Regulation was Rs.55.08 and is expected to go higher.

207. The petitioner has further submitted that the respondent has adopted multiple of 2.6 for assessment of higher capacity, when the actual multiple of higher capacity is four, on the ground that there is an "Economy of scale" at higher capacity, which is squarely contrary to its findings in 2007 that as far as assessment of costs are concerned there is no economy of scale at higher capacity. No reasons whatsoever have been given in support of the findings by the Respondent on the above issue and there is therefore, clear violation of the transparency requirement under Section 11 (4) of the TRAI Act. There is significant and huge under recovery of costs as a result of the impugned charges, to the extent of 75 to 93 per cent across different CLS.

208. According to the petitioners, in the 2012 Regulation, the respondents prescribed a uniform and allegedly cost based charge which is in complete contradiction and about turn from the practice and Regulatory mechanism of 5 years and for which no cogent reasons has been advanced. Both the 2007 and December 2012 Regulations are in existence and both have contradictory approaches to costing, one assesses individual Landing Stations on an actual basis and the latter uses a hypothetical uniform cost model.

209. The petitioners have further submitted that from 2007 until the impugned December Regulations, the respondent proceeded on the basis of ground reality that costs varied across different CLSs depending upon the locations and other factors. Furthermore, cost being assessed on a replacement basis as also on the capacity utilized and built up are strong variables for cost, not only across different CLSs but across time for the same CLS. This is reflected in the RIO filing of 2007, 2010 and 2012 under the June 2007 Regulations and as approved by the Respondent in 2007.

210. In the Consultation Paper of 19 October 2012 at paragraph 22 the respondent in a very cryptic manner, has observed that as the work done for each CLS is the same, it would not be necessary to have separate cost based charges for each CLS. The paragraph reads as follows:-

"the work done for access facilitation at CLS is the same for all CLSs"

211. As regards cost assessed individually for each CLS, the petitioners have submitted that in the 2007 Regulations, all the operators, mentioned herein, were required to file the cost for each individual CLS, on the basis of which the Petitioner and other operators fixed their Access Facilitation Cost. The cost based charges of four CLSs of the Petitioner as approved by the Respondent TRAI in 2007, charges submitted in 2010 and those prescribed in the 21.12.2012. The table therein clearly demonstrates two important facts, firstly, that costs and consequently charges for different CLSs will always be different, the same being recognized by TRAI and secondly, the prescription of alleged costs based charges in December, 2012 as led to reduction of charges across different capacities from 75% to 97% from 2007 to 2012, clearly demonstrating the arbitrariness of the specified charges.

212. By the impugned Regulation of December 2012, the Respondent has fixed a common Access Facilitation Charge for all the CLSs, in marked departure to previous practice, the charges prescribed under the impugned Regulation are lower by up to 97 per cent across different CLSs as already demonstrated hereinabove, the charges fixed by the impugned Regulation as shown against the charges approved by the TRAI shows a steep decline, for which the justification is non-existent. In this regard, the respondent-TRAI has made following submissions:

"(i) The prescription of uniform charges by the Respondent TRAI is illegal and excess of the power under 07.06.2007 and 19.10.2012 regulations, which have empowered the TRAI to prescribe charges, but which has to be individual and specific to every CLS.

(ii) The only justification given in the Consultation Paper is that "the work done for access facilitation at CLS is the same for all CLSs", which is akin to say that there is no difference between a 5 MW power plant and 500 MW power plant as the work done is the same. The Respondent has nowhere disclosed as to the manner in which costs can be assessed on the basis of similar work being done. In fact, it has a requirement of transparency that when there is a diametric change in approach the Respondent is required to give cogent reasons and not mere ipse-dixit that work done is the same.

(iii) The other reason advanced in the Explanatory Memorandum to the impugned Regulation was that the

time taken for assessment of costing elements on an individual basis being long, coupled with the fact that the work done is the same the TRAI proceeded to assess costs on a uniform basis. The relevant extract reads as follows:

"On the basis of comments received from the stakeholders, the authority notes that since the process of approval of the charges involve scrutiny by TRAI of costing elements considered, costs and costing methodology employed by OCLS, discussion with OCLS and final approval by TRAI, it takes time and provides competitive advantage to the owner of cable landing station as OCLS is also integrated operator owning bandwidth in submarine cable system".

213. To the above submissions, the petitioners have contended that the assessment of cost cannot be based on the specious ground that it takes time to assess, which again is admittedly wrong as the 2007 Regulations stipulate a time line for every event in fixing of charges. It is denied that the process of assessment of costs takes time for various reasons, firstly, the 2007 Regulation themselves under Regulation 3 sets out a time frame for every stage, 60 days for approval of RIO by the Respondent, 15 days after such approvals for publication on website, 10 days for owner of CLS to respond to access seeker and 5 days within which agreement has to be entered into after confirmation of owner of CLS. The time frame being statutorily prescribed, for the Respondent to say that the time taken is long is contrary to fact and certainly no basis for uniform costing and pricing. The Petitioner in 2010 had submitted its RIO to the Respondent on the request of the Respondent, however, the Respondent did not even revert until 6 months and it was therefore in breach of Regulation 3(3) which required Respondent to respond within 60 days. The relevant extract of Regulation 3 (3) reads as follows:

"The Authority shall approve the Cable Landing Station-Reference Interconnect Offer within sixty days from the date of its submission under sub-regulation (1) of the Authority:"

214. It is submitted that the costing methodology of the Respondent discloses no clarity in terms of the manner and working in which the estimates and assessment of CAPEX and OPEX have been arrived at. Admittedly cost data have been obtained from two operators, Petitioner and M/s. Bharti on the basis of which assessments have been made in the Consultation Paper and the Explanatory Memorandum to the impugned Regulation. Most of the figures disclosed either in the Consultation Paper or in the Explanatory Memorandum nowhere approximate to the data furnished

by the Petitioner, infact there is a huge gulf between the figures furnished by the Petitioner and those assessed by the Respondent. The fact that the Respondent took the data of the Petitioner and M/s. Bharti Airtel is evident from para 14 of the Consultation Paper of 19 October 2012, and the relevant extract of which reads as follows:-

"14. On the other hand, two of the OCLSS i.e. M/s TCL and M/s Bharti are of the view that consortium does not provide all types of the interfaces needed by the ITE.

.....Therefore, after identifying the network elements, the cost data submitted by these two OCLSS have been used by TRAI in the proposed model for estimation of the charges".

215. The Petitioner had infact in consonance with the extant practice of the TRAI in terms of the 2007 Regulation had furnished figures of each individual CLS and as already stated herein above, the Petitioner in response to the Consultation Paper had categorically stated that there was no clarity in the working and methodology of the TRAI in arriving at the cost of various elements, which was again reiterated in the presentation to the Respondent on 29 November 2012. The Petitioner in response of 08 November 2012 had stated to the following effect:

"We would also like to submit that the methodology for working out the access facilitation charges and the cost numbers taken in the Consultation Paper require clarifications as they are not in line with the discussions held with TRAI in the month of August & September, 2012. The issues on which clarity is required are detailed in Anneuxre-1. Due to lack of clarity as mentioned, we are not in a position to give a substantial response to the Consultation Paper".

and this was further reiterated in the presentation to the TRAI made on 29 November 2012, the relevant extract of which reads as follows:

Cost Consumption:

* On the direction of TRAI, TCL had submitted fact based actual cost information with backup to TRAI, which have not been used in the cost assumptions in the CP.

* The basis of the cost assumptions taken by TRAI in the CP is not transparent and clear.

Methodology

* Based on multiple discussions with TRAI, TCL had submitted detailed costing methodology, and accordingly AFA Charges were calculated and submitted.

* The methodology used by TRAI in the CP is not in line with business reality/ benchmark parameters adopted by the industry.

* It is also not clear from the CP if TRAI will prescribe charges for each individual CLS"

As already stated above, the respondent had categorically reiterated it in the minutes of meeting of 4.12.2012, which minutes are being relied upon by TRAI as an alleged concession to various proposals.

216. It is further case of the petitioners that the issues on which the respondent had not provided clarity either in terms of methodology, or in terms of actual figures (figures in the Consultation Paper and the impugned Regulation do not match with Petitioners figure) have been set out in a tabular form in 08 November 2012 response to the Petitioner. The manner in which the respondent dealt with the said queries/clarifications raised by the Petitioner are set out in the form of a chart.

217. On the elements of cost, the respondent has added up Capital Expenditure (CAPEX) and (Operating Expenditure (OPEX) cost elements to arrive at a single figure of cost on the basis of which it has purportedly fixed the Access Facilitation Charges. The respondent-TRAII, at Paragraph 67 in the Counter Affidavit, has stated that, "the petitioner is fully aware of the costing methodology adopted by the authority which have been explained in the multiple rounds of consultative process adopted by the authority including personal hearing. The estimation of access facilitation charges have been explained in para 9 to 40 of the Explanatory Memorandum to the Regulations along with figures and tables". TRAI, in Para 37 of the response to Rejoinder of 06.02.2014 has relied upon the various paragraphs of the Explanatory Memorandum.

218. It is the submission of the petitioners that the respondent-TRAII has not disclosed the costing methodology and the calculations for arriving at the costs. In this regard, all that the respondent has done is set out the various items under different heads of costs, namely CAPEX and OPEX (CAPEX at Para 13 of the Explanatory Memorandum and OPEX at para 28 of the Explanatory Memorandum (Refer:Pages 639 and 645 Vol.II of Petitioner's typed set). This is all then reflected in a single figure of costs for CAPEX (Table-D at Page 642 Vol.II of Petitioner's typed set) and OPEX (Table-F at Page-645 Vol.II of Petitioner's typed set) and finally a consolidated figure of costs at Table -G & H. The entire exercise of assessment of costs in which different elements of costs are considered, value

ascribed to them and then added up to arrive at the figure of total costs has not been disclosed.

219. It is the case of the petitioners that there cannot be any meaningful challenge if the methodology and calculations are not disclosed. In any event, the individual costs of the Petitioner are far in excess of the lump sum figure of the respondent leading to under recovery. During the consultation process, it was pointed out that three items of costs have been excluded which were shown as being added in the final exercise, however, the total cost after such addition came down to Rs.19.05. Lakhs.

220. The respondent has used a single measure of built capacity for arriving at a uniform figure of cost across different Cable Landing Stations. As far as assessment of costs are concerned, built capacity is an important element in determination because cost is determined on per unit basis and the total cost divided by the built capacity. The respondent has assumed a uniform figure of 60GB (gigabytes) across all landing stations. This is contrary to fact and record as the data available with the TRAI discloses that built capacity will vary across different CLSSs and barring one CLS in Mumbai, the other three CLSSs will not have the built capacity of 60 GB on the basis of which, TRAI has arrived at the cost figure. The error of TRAI in assuming a built capacity of 60G is evident from the data available with them, regarding built capacity of different CLS of the Petitioner in terms of the disclosure to TRAI.

221. In the **Explanatory Memorandum** to the impugned regulation, the respondent has not disclosed the basis on which the 60G capacity has been used, this is inspite of the fact that when in the response to the Consultation Paper, as recorded in the Minutes of Meeting of 4 December 2012 the Petitioner has very clearly stated that network design must be based on forecasted capacity as otherwise it will lead to under recovery of cost. As already evident from the abovesaid table, the built capacity submitted is far below the figure used by TRAI. The full implication of this assumption of the TRAI is better understood and appreciated in the context of the utilized capacity which again the assumption of TRAI is based on erroneous facts, dealt with in the subsequent section. The relevant extract from the Minutes of Meeting dated 4 December 2012 read as below:-

"It is also important to note that Network design must be based on forecasted / expected utilization. This will facilitate proper buildup of the Network and

interface cards. In the absence of the same TCL would not be able to model the equipment and order the required interfaces thereby not able to meet the requirement for of delivery timeline of the customer demand for the required interfaces. The assumption of ramp up taken by TRAI in the estimation in the CP will lead to grossly below cost recovery from access facilitation charges. It is therefore requested that the forecast as proposed by TCL may be taken into account while computing the access facilitation charges. Secondly, The access requirement of each cable and cable landing station would have a different assumption of ramp up depending upon the past performance& popularity of the cable/its capacity among user community".

The submission of the petitioners had also been emphasized greatly during the oral submissions made, as the implication of a built capacity at 60 G, is not uniformed for all CLSs, and in any case, for the only CLS in Mumbai, the said capacity would be achieved in 2016 and never for the other CLSs. Assumption of high hypothetical capacity has the effect of greatly reducing costs.

222. It is submitted that TRAI in this regard has not dealt with this specific submission of the petitioners. All that the respondent has done is to read out the paragraph of the Explanatory Memorandum which has been questioned and more pertinently has also alleged that this issue was never raised by the Petitioner. Allegation of the respondent is false and misleading even as late as 04.12.2012 this has been categorically averred. A copy of the Minutes of the Meeting dated 04 December 2012 is available at page 739- 768 Vol. II of the Petitioner's Typed Set.

223. On capacity utilisation, the petitioners have submitted that the capacity utilization is an important element in estimating costs as this is taken as a percentage of the built capacity and the total cost divided by the utilized capacity is the per unit cost. In the present case, as already stated hereinabove the Respondent has taken a very high figure of built capacity of 60GB, which is demonstratively higher than the built capacity which information was disclosed and available with the TRAI under the statutory RIO filing. To compound matters and artificially lower the costs, the Respondent has taken a capacity utilization of 70%, which is erroneous for the following reasons:-

"(i) This issue has been raised in the Consultation Paper where in paragraph 29 it has

been very cryptically observed that on the basis of discussions with OCLSS and other stakeholders and also taking into account the data submitted by them for various cable landing stations, the utilization factor of 70% has been taken into account, relevant extract is "On the basis of discussions with OCLSS and other stakeholders and also taking into account the data submitted by them for various cable landing stations, the utilization factor of 70% has been taken into account

It is grossly unfair and arbitrary to take figure of Capacity Utilisation from "Stakeholders", i.e. customers (seeking to share CLS infrastructure of the Petitioner) of Petitioner who have no clue about utilization and are not owner of CLS and have a vested interest in reducing costs.

No basis is provided for this figure, when the TRAI already had an information with it of the Petitioner and other operators in terms of the RIO filing of 2007, 2010 and 2012 which showed far lesser capacity utilization.

This information has been filed with the TRAI on 27 September 2012 which also contains commercially confidential information, nevertheless as far as capacity utilization is concerned the Petitioner have already furnished capacity utilization for the 5 CLSSs.

(ii) In the Consultation Paper and Explanatory Memorandum the Respondent has used stakeholder's comments as utilization factor of 70%, which is contrary to fact and record and the finding of the TRAI is erroneous, signifying an arbitrary approach.

In terms of the data available with it of the statutory RIO filing as set out hereinabove the actual figures were available with the TRAI but it has sought to rely upon hypothetical figure from customers who would have obvious interest in reducing cost.

This is clearly violative of the requirement of transparency and principles of natural justice apart from being arbitrary."

224. According to the petitioners, the implication of assuming of higher capacity of 60GB and coupled with the higher utilization capacity of 70% is that cost per unit gets reduced drastically. The per unit cost are arrived by dividing total

cost by capacity, assumption of a higher capacity of 60 GB coupled with the higher utilization of 70% leads to an increase in the denominator thereby vastly reducing per unit cost. The charges fixed by the TRAI correspondingly will lead to a huge under recovery in cost which is dealt with in subsequent paragraphs. Comparison of the assumption of the TRAI against actual figures of capacity built and utilized shows that the percentage of utilization which has been assumed as uniform by the TRAI of 42GB per CLS is factually erroneous, utilization has been in the range of 1% to 27% with two out of five CLS showing utilization in single digits.

225. The response of the respondent's counsel is that the Petitioner had agreed to this figure of capacity utilization of 70% which is again false and misleading. A further submission made by the Petitioner's counsel is by reliance upon the Judgment of the TDSAT in the case of the Petitioner of 28.11.2005 (Para 25 of reply to rejoinder) to the following effect:-

"25.It is submitted that the Petitioner, vide appeal No. 10 of 2005, challenged the International Private Leased Circuits (IPLC half circuits) Tariff Order of TRAI dated 8th October, 2005 (Telecommunication Tariff (39th amendment) order, 2005) whereby TRAI had fixed ceiling tariffs of IPLC circuits. The Hon'ble TDSAT, vide its judgment dated 28th November, 2005, dismissed the appeal with cost and in para 13.3 held as under:-

"During arguments we had occasion to see the papers submitted by TRAI which clearly brought out the position that the inspection team had unearthed certain information which had earlier not been given by VSNL. Also the figure of E-1s indicating capacity utilized was entirely based on the information given by VSNL. Also VSNL itself had indicated that 30% of capacity was unutilized. While we do appreciate VSNL argument that for efficient and reliable IPLC service some provision has to be made to provided for restoration / redundancy, we see considerable merit in TRAI's argument that with only 70% capacity being utilized, the remaining 30% un-utilized capacity would suffice for meeting the requirement of redundancy."(emphasis supplied)

The Hon'ble TDSAT concluded vide para 21 of the judgment that,

"For the reason stated above, we find no merit in this appeal and find no reason to interfere with the impugned notification. Hence, we dismiss this appeal

and direct that the notification in question be brought into effect immediately by TRAI so that the benefit of the notification to the consumer is not delayed further. Appeal dismissed with cost computed at Rs. 50,000/-."

226. The Petitioner had emphatically rejected this assumption of the Respondent TRAI and which is recorded in the minutes of meeting of 04.12.2012. The relevant extract in this regard has already been extracted herein above in respect of built capacity. The submission relating to 70% capacity utilization in the judgment of the TDSAT is dealt with under a separate head, briefly stating that the 70% utilization of a submarine cable is based on the total capacity used, including the Petitioner own capacity. The access facilitation to CLS relates only to the facility to be used by other operators and not for the Petitioner's own capacity and therefore, the question of a 70% capacity utilization cannot arise. In fact, the Respondent in this regard has sought to make a false and misleading allegation that AFA revenue should also include notional revenue from the Petitioner's own IPLC business. However, this was effectively rebutted in the response to the sur-rejoinder by the Petitioner by pointing out that access facilitation is only in respect of other operator as mandated by the license and the regulation. This submission of the TRAI is an extension of the same misleading argument.

227. For the purposes of calculation of CAPEX, the respondent has only given the items which it has considered for calculation of CAPEX, without giving the costing of each of these elements as is required. The Respondent has given a lumpsum figure relating to CAPEX items, without apportionment among the different elements. The TRAI at para 13 has very cryptically set out the CAPEX element allegedly considered by them at table A, B(i) (ii) and (iii), without disclosing any figures against each item or the reasons for the same.

228. Without apportioning any figure of each of these elements, it arrived at two different sets of cost figures for the two operators considered and table arrived at the total annual cost of Rs.24.51 lakhs for one operator and Rs. 18.88 Lakhs for another operator. Correspondingly, higher figures have been arrived at for alternate location. The method of calculation of the amount in each element has not been mentioned or disclosed. There is complete non-disclosure of costing methodology. In the Consultation Paper, the respondent had disclosed certain figures against each one of the element of cost, which figure had been disputed by the Petitioner in its

response as grossly undervaluing the actual cost. The table 3, at para 26 of the Consultation Paper shows the break-up of the CAPEX for different elements on,

(a) No break up of cost against each of the costing element has been given in the Explanatory Memorandum, whereas some explanation, whosoever faulty and opaque was given in the Consultation Paper.

(b) The methodology of working out the total and average CAPEX is not disclosed anywhere in the Explanatory Memorandum, and therefore it is not possible for the Petitioner to assess and understand as to how its own data has been used for the purpose of calculations. It is relevant to note that the Hon'ble TDSAT in a similar case, by judgment of 28 April 2005 has struck down tariff order of the Respondent on the ground of costing methodology not being disclosed.

(c) The Petitioner has very categorically in its response to Consultation Paper of 08 November 2012 in the presentation to the TRAI on 29 November 2012 and its communication of 4 December 2012, communicating the Minutes of Meeting have very clearly expressed its helplessness to give any substantial response as costing methodology has not been disclosed.

(d) The irony is that the Respondent very "generously" concedes to have added four elements of cost at the time of issuing the impugned Regulation, which it has not considered previously namely item 5, 6 and 7 and tax in table 'A' hereinabove, even after inclusion of which the access facilitation charges in the impugned Regulation is lower than that proposed in the Consultation Paper. The access facilitation charges proposed in the Consultation Paper was Rs. 23.8 lakhs for a 10 GB at alternate location, which in the impugned regulation has been reduced to Rs. 19.5 lakhs. There is no reason, methodology given as to how this lower figure has been arrived at after adding additional elements of cost.

229. According to the petitioners, the respondent has even on a statutory duty like taxes assumed a lower figure, lower than the actual figure of tax. The Petitioner has to import equipment on which in addition to Customs Duty, Octroi and Logistic charges are incurred as equipments are handed over by vendor at international destination and the cost of carriage and duties into India are borne by the Petitioner. Accordingly, the Petitioner has furnished documentary evidence in support of its claim relating to taxes / duties and charges for carriage/

logistics. In this regard, the Petitioner have furnished to the Respondent a break up of each of the duty, tax and logistic relevant amounting to 23%. The Respondent at para 17 of the Explanatory Memorandum have erroneously recorded a figure of 18% towards such charges in the following terms, without giving any reasons for rejecting the Petitioner's figures:-

"M/s TCL has submitted that the TRAI has taken cost from Purchase Order (PO) submitted by them which does not include taxes paid to various agencies by TCL. Accordingly, in the revised calculations, Taxes @ 18% have been taken into account".

The response of the TRAI during submission has been only to reiterate its Explanatory Memorandum without dealing with the above submission of the Petitioner.

230. The respondent, in its Explanatory Memorandum, has Project Management cost at 10 per cent of the CAPEX, it records the Petitioner submissions that Project Management cost has to be on an actual basis, however, arrived at a figure of 10 per cent on the basis that in the September 2012, RIO figures submitted by the Petitioner, Project Management cost was 6 per cent of CAPEX and that M/s Bharti Airtel Ltd. was 10 per cent and therefore a figure of 10 per cent has been taken. The relevant extract reads as follows:-

"M/s.TCL has also submitted that the project management cost, which was allowed by TRAI as 10% of CAPEX items, should be based on actual costs. As per the data submitted by M/s TCL their project management cost was around 6% of the CAPEX. The other OCLS viz. M/s Bharti Airtel in its calculation has taken project management cost as 10% of CAPEX items. Therefore, TRAI has taken project management cost @ 10% of CAPEX" (refer Explanatory Memorandum of 21.12.2012, page 625@641 at para 17, Vol-II of the Petitioner's Typed Set).

231. The petitioners have submitted that the Linking Project Management cost as percentage of CAPEX is without any basis as there is no co-relation between the two. The Project Management cost furnished by the Petitioner in September 2012 and CAPEX were absolute numbers and figures and one was not treated as being dependent on the others. To create a co-relation, when there is none and furthermore by giving no reasons as to why they are being co- related is in violation of principle of natural justice and in the requirement of transparency. A copy of Project Management costing showing the break up under different heads for September 2012 is available at page 493,

Vol. II of the Petitioner's Typed Set. Even 6% attributed to the Petitioner in the Explanatory Memorandum was not in response to the Consultation Paper. The Petitioner while examining its documents in this regard has found that in its RIO filing of September 2012, the figure of cost of Project Management as a figure was 6 per cent of figure of cost. It is in this manner that the Petitioner has deduced as to how this figure percentage has been worked out, TRAI has furnished no documents no reasons in this regard. The response of the TRAI during submission has been only to reiterate its Explanatory Memorandum without dealing with the above submission of the Petitioner.

232. On Foreign Exchange Rate, the respondent has arrived that the Foreign Exchange Rate for the dollar, which it had fixed at Rs.52 for every dollar, disregarding the fact is that on the date of the Regulation the prevailing rate was Rs.55.60. Paragraph 18 reads as follows:-

"Both the OCLSs had provided the costs of the equipments in US Dollars. In the consultation paper, conversion rate used was Rs.50 for 1 US Dollar. On the basis of submissions by the service providers and the period of Purchase Orders submitted by the OCLSs, the conversion rate has been revised upward from Rs. 50 to Rs.52".

Copy of RBI notification is available at pages Given the present trend the dollar rate is likely to fluctuate in the range of Rs.55 to 60, which increases actual cost, which the Respondent has failed to factor.

233. The reference for excluding standby equipment by the TRAI in the Consultation Paper has not been given, there is a reference in paragraph 14 that one of the operators i.e. the Petitioner had proposed two Digital Cross Connect (DXC) and at paragraph 15 , the TRAI said that it proposes one Digital Cross Connect (DXC) in the module for access facilities. The relevant extract from the Consultation Paper reads as follows:-

"These OCLSs have also submitted that TRAI should take into consideration all the network elements used by them for provisioning of access facilitation as per their network architecture. In fact, one of the OCLS has proposed two Digital Cross Connect (DXC) for provisioning of access facilitation at the cable landing station"

"On the issue of the desirability of including DXC (s) in the model for providing access facilitation at cable landing station, TRAI had a number of discussions with OCLs on the issue and has proposed one DXC in the model for access facilitation at CLS".

The above was opposed vehemently by the petitioners, in its response of 08th November, 29 November and 04 December 2012, emphasising that non furnishing of standby equipment will result in poor quality of service. In any event this standby equipment has been and will continue to be a part of all CLSs it is already installed in three CLS when costs are assessed, they have to be incurred because that are installed and functioning. Exclusion of such items cannot be a matter of opinion. In fact, the very same architecture of the CLS with standby equipment was approved by the TRAI in the RIO filing of 2007.

234. On the life of equipment and WACC, it is submitted that the respondent has disregarded the factual situation. The Petitioner has submitted that life of equipment is 5 years where as the Respondent has taken a figure of 10 years. The Petitioner has submitted its response repeatedly that the figure of 5 years as life of Transmission equipment is relevant in today's context, taking into consideration the technological obsolescence which is a major factor which reduces life of equipment, either because of the introduction of new technology or the requirement from the customer itself changes. WACC cannot be benchmarked as a standard figure across all operators, it varies according to the risk factor, share holder & debt equity ratio for every organization. With hardening interest rates and rising inflationary pressure WACC is expected to rise significantly in the near future. Statistics disclose that the index in India has an annual return of 16 per cent and after adding company & industry risk this will further increase.

235. As regards OPEX, the respondent in its Consultation Paper had taken OPEX at 30 per cent of CAPEX but in the Explanatory Memorandum itself, bowing to the response from the Petitioner and M/s Bharti Airtel Ltd. it has very generously agreed that there is no co- relation and therefore, taken OPEX on an actual basis. This is where the transparency of the Respondent ends, as thereafter a lumpsum number for OPEX is taken in Para28 Table F(i), for two operators i.e. owners of CLS. In which for one the figure is 19.93 lacs and for another figure is 25.01 lacs for access facilitation at the CLS. RIO filing of 27 September 2012 had given a detail break up of OPEX for different CLSs, which is at Annexure 19 of the Petitioners' Typed set, Volume-II at page 493. It is relevant to note that

this is actual expenditure incurred by the Petitioner and disclosed as late as September 2012 to the Respondent. A comparison of the actual operating expenditure incurred by the Petitioner against the figure arrived at by the Respondent in the Explanatory Memorandum is set out in the tabular form herein below:-

OPEX in INR lac	BKC	VSBC Chennai	VSBC Ernakulan	VSBC Mumbai	LVSB Mumbai
OPEX as per TCL submission	90.71	127.18	48.52	203.52	435.09
OPEX as per TRAI notification 21/12/2012	25.01	25.01	25.01	25.01	78.30
UNDER RECOVERY OF OPEX	65.70	102.17	23.51	178.51	356.78

236. The above table very clearly discloses that operating expenditure which is continuously incurred on a daily basis and data for which is based on actual. The Petitioner being a listed Company as well as holding license from the Department of Telecommunication is required to undertake audit through statutory auditors, these figures of actual cost therefore would be checked, cross checked before submission and acceptance by auditors.

"That only if three items of Operating Expenses (OPEX) are taken the same will be far in excess of the revenue accruing to the Petitioner in terms of the impugned Regulation. The three major cost component for OPEX are manpower cost for operation, power and rental and the same has been taken by the Respondent in the impugned Regulations of 21.12.2012, though break up has not been given.

CLS	Total Opex	Opex - Top 3 items
BKC, Mumbai	74,68,280	57,23,902
VSBC, CNI	28,49,243	64,39,521
VSBC, ERK	23,33,250	20,42,644
LVSB, Prabhadevi, Mumbai	3,19,14,812	1,99,45,162
VSBC, Fort, Mumbai	1,49,36,450	35,09,045
Total	6,60,07,034	4,26,63,275

As seen from the Table above the Impugned regulation is resulting into the reduction of the AFA revenue from ~ 25 Cr to 2.5 Cr as against the 6.6 Cr of OPEX only. It may be noted here that the 3 Major component of OPEX, namely Space, Power and rental itself is 4.26 Cr. This clearly indicates that the gross and arbitrary calculations done by the respondent to arrive at the charges as per the impugned regulations."

That without prejudice to the above that even the alleged break up given by the Respondent in table E relating to OPEX items in the Explanatory Memorandum to the impugned Regulation of 21 December 2012 discloses no clarity, methodology or transparency.

237. The petitioners have further submitted that no clarity is given by respondent on the methodology adopted here for item (iii). A single amount of Rs.9926/- has been mentioned. There is also no clarity on the space reserved for future expansion of the Petitioner's network which will be required to serve the access facilitation. Also no clarity on the above methodology whether any space has been reserved for future requirement in the MMR locations to provide co-location space to access seeker in the MMR locations.

238. According to the petitioners, the space and building infrastructure development is a high lead time and a very capital intensive activity. And this is also subjected to scope of further expansion of the raw land into a telco grade space. In all the locations where, the present MMR, are housed, the petitioners are already running short of space and Power for meeting its day today requirement. By not considering any space reservation for the Petitioner's own equipment as well as at MMR location will result in the complete halt in any provisioning for future requirement.

239. The petitioners have further submitted that the logic of taking the OPEX for Manpower for O&M as % of the CAPEX is not right, as the reduction in CAPEX is not directly proportionate to reduction in OPEX for Manpower. The Manpower cost for O&M is by and large a standard figure for a particular technical setup. Further, the Manpower Cost for O&M is taken as 2% of CAPEX, which is a clear undervaluation of the Manpower cost required for the normal day to day operations/testing and maintenance. It may be noted that the reduction in CAPEX is not directly proportionate to reduction in OPEX.

240. According to the petitioners, the Company over head where TRAI has assumed 10% of OPEX. The company overhead is required to be taken as 29% of the OPEX. Considering 10% of OPEX as Company overhead is incorrect. The Petitioner in its working had given the detailed Break up of:

(i) Rental rates with documentary support.

(ii) Power cost per rate and the escalation of the power cost over the period of 5 years + processed power.

(iii) Detailed break up of Manpower cost for Operations and Maintenance.

(iv) Per Sq feet O&M and the security charges.

241. For use of multiple of 2.6 for assessing cost of higher capacities, it is submitted that though this issue relates to costing methodology, it is however dealt with as a separate and independent head on account of its significance in vastly reducing the cost. The TRAI has adopted a factually erroneous assumption of economies of scale being available while assigning cost of higher capacities which has been demonstrated to the contrary to the Respondent, which it is however not dealt with in the Explanatory Memorandum, while adhering to the multiple of 2.6. Capacity for Access facility is sold at four different levels, depending upon the requirement of the access seeker. The first basic unit of capacity is STM 1 which is equivalent to 155 Mbps, STM-4 is 4 times STM1, STM-16 is 4 times STM-4, STM-64 is 4 times STM-16, equivalent to 10 GBS in terms of capacity to carry voice and data services. It has been demonstrated by the Petitioner, that in the prevailing market and the present cost environment the cost of an STM-1 and STM-4 are equivalent, the cost of an STM-16 is four times of STM-4 and STM-64 correspondingly is four times of STM-16. This information has been filed by the Petitioner with the Respondent in response to the Consultation Paper. In its response of 08 November 2012 the Petitioner specifically stated that:

"Since AFA charges are worked out on cost basis, the concept of economy of scale is not applicable here. In the set up the STM-64 card cost is ~ 4 times to STM-16 cost and STM-16 cost is ~4 times the STM-1/4 cost. And hence the division of higher capacity into lower by dividing the same by a factor of 2.6 to is not appropriate as it would result in under recovery of the cost".

242. Furthermore, in the presentation made to the respondent on 29 November 2012, the Petitioner provided actual data of cost procurement for different capacities from one vendor named ECI (Electronics Corporation of Israel), a reputed Israel company where the procurement of equipment for different capacities did not show "any economy of scale". The extract from the presentation is already available at Slide No.11 of the presentation made on 29 November 2012 (Annexure- 24). It was further reiterated in the Minutes of Meeting dated 04 December 2012.

243. The response of TRAI in its counter affidavit at Para 112 and 113 it has been to rely upon Para 32 & 33 of the Explanatory Memorandum to the 21.12.2012 Regulation which justifies the use of multiple of 2.6 on two factors of economic of scale at higher capacity and prevailing market prices for domestic lease circuits. It was furthermore suggested by the Respondent that the higher factor of four will result in a low price for STM 1 and a high price for STM 64, not providing "advantage of scale or economy for higher prices".

244. In the submissions made by the learned Counsel for the Respondent TRAI, it had been urged that there are economies of scale at higher capacity and a parallel was drawn with the prices for a 1 Inch, 4 Inch and 16 Inch diameter pipe saying that the cost does not increase in linear multiples. The respondent's counsel also read out the Minutes of the Meeting of 08.08.2007 where the Respondent TRAI has observed that costs of Higher Capacity are in terms of the linear multiple, however, the true contradictory submissions were not written.

245. The above submission has been controverted by the Petitioner at Para 97, 98 & 99 of the Rejoinder of 06.01.2014, where the reference to the TRAI's own admission of the minutes of meeting of 08.08.2007 that there are no economy of scale in respect of cost for higher capacity. As regards, the other submissions. The Respondent TRAI have not dealt with the Petitioner's submissions made in the Rejoinder relating to domestic lease circuits at Para 99, which is erroneous for the following reasons:-

(a) It relates to domestic lease circuit and not to access facilitation, for which considerations are different.

(b) This relates to prices, whereas the admitted case is that it is dealing with cost based recovery and the cost of higher capacities are a linear multiplies of the physical capacity as demonstrated by the working submitted by the Petitioner

(c) The very working relied upon by the Respondent was actually discarded by it when it found that even adoption of this multiple on the basis of prices was working out to a higher figure of cost. This only demonstrates that the Respondent had a fixed agenda of pre-determined cost and discarding relevant information which did not suit its agenda."

The Respondents have made contradictory submissions, relying

upon the true position as reflected in the Minutes of 08.08.2007 and also advancing the simile about pipes with different capacities having costs which do not increase proportionately.

246. Significantly, TRAI in its communication of 10 August 2007 had enclosed the Minutes of Meeting of 08 August 2007 where the Respondent specifically admits that there is no benefit of scale of economies, the relevant extract reads as follows:

"vi). It appears that there is no benefit of scale of economy in case of higher capacity i.e. STM-4, STM-16;"

That the implication of adopting this multiple is that it leads to significant under recovery of cost even on the basis of the assumptions adopted by the Respondent.

a) 2.6 factor used to derive cost of higher interfaces: Deriving the cost of Higher interface by multiplying the same with a factor of 2.6 is not correct.

b) Since AFA charges are worked out on cost basis, the concept of economy of scale and relating the same to BW pricing is not correct. In the set up the STM-64 card cost is ~ 4 times to STM-16 cost and STM-16 cost is 4 times the STM-1/4 cost.

The Total cost per annum comes at 2.15 Cr as per TRAI working for 60G capacity delivery. Taking the example of the overall cost for the delivery of CLS access at alternate locations, where in it is assumed that in case all the capacity of 60G (384 STM-1 equivalent) is sold for a particular Interface (STM-1/4/16/64) we have worked out the cost recovery in table below. From the table below it is clear that in case when higher interface (STM-16/64) are sold the cost recovery is significantly less and when the lower interface (STM-1/4) are sold the cost recovery is significantly high. It may be noted that the Petitioner throughout has submitted that the Petitioner is only looking at the cost recovery and not either over or under recovery.

Also it may please be noted that the actual requirement of higher and lower interfaces may vary as per the demand from time to time from the customers and any fixation of charges as mentioned below will result in either under recover or over recovery of the cost.

Description	STM-1	STM-4	STM-16	STM-64
Rate of Interface as per TRAI Notification	111,000	288,000	750,000	1,950,000

Assuming that all the 334xSTM-1 96xSTM-4 24xSTM-16 6xSTM-64 60G capacity is sold for that interface only. The the total capacity sold is				
STM-1 Equivalent	334	334	334	334
No of Interface sold	334	96	24	6
in case all the capacity is sold for that interface only				
Charges as per TRAI working (In INR. Cr.	4.26	2.76	1.80	1.17
Over all cost recovers as proposed by TRAI (in INRCr.)	2.16	2.16	2.16	2.16
Conclusion of cost Recovery	Over recovery (of+ 2.11 Cr)	Over recovery (of+ 0.61 Cr)	Under recovery (of - 0.36 Cr)	Under recovery (of-0.99 Cr)

As far as the configuration of equipment at a CLS is concerned, the Respondent has excluded the back up of transmission equipment- the standby Digital Cross Connect (DXC) and DWDM.

Both these equipment are used by as standby in the event of failure of the main equipment or primary equipment in this regard. Non-inclusion of the backup equipment is not in line with the standard architecture adopted by the Petitioner for delivery of the circuit to its customer and will result in severe service degradation."

247. The petitioners have submitted that the Regulation of 07.06.2007 and the Regulation of 21.12.2012 take diametrically opposing approach. Firstly, the 2007 regulatory proceeds on the basis that access charges for different landing stations will vary as the element of costing for landing station vary, the access charges mean last based. It is on this basis that the 2007 Regulation prescribed publication of a Reference Interconnect Offer (RIO) for every individual CLS with different charges. The Petitioner submitted three Reference Interconnect Offer one in 2007, the second in 2010 and the third in 2012 to the Respondent for the different CLS and the charges and cost based charges for different CLSs varied were different for each individual CLS and given the dynamics of cost reduction over the year also were reduced in successive Reference Interconnect Offer (RIO). This is evident from the comparison of an access charges for STM1 are different for the landing stations of the Petitioner, across three periods.

248. The petitioners have further submitted that while in 2007 CO RIO required interaction with the Respondent prior its publication, the 2010 and 2012 RIOs were submitted and no clarifications or objections were raised by the Respondent. On the other hand, the approach in the December 2012 Regulation has been to take costing on a uniform basis across all CLSs of all operators and arrived at a uniform rate. Apart from the fact that there has been an arbitrary reduction in cost based charges, in certain cases up to 97 per cent this approach of the Respondent is contradictory to its approach from 2007 until the publication of the impugned Regulation of December 2012 where it had established regime of recognising that cost vary across CLS and consequently access charges will be different. The contradiction in approach is evident from the following documents of the TRAI:-

(i) It is the Consultation Paper of 13 April 2007 at paragraph 4.2 recognises that the charges levied by a CLS owner are based on individual network element of the concern CLS. Four types of charges have been set out, under each of which there has been stated that the cost will depend on the network elements and the facilitation. The relevant is extracted 4.2 are produced herein below:-

"4.2 Charges payable by the International Telecom Entity (ITE) to OCLS

The charges for access facilitation/co-location are normally cost oriented, which are payable by the eligible ITEs. Normally, such charges are to be filed by the OCLS to the regulator for approval.

4.2.1 Access Facilitation Charge

The Access facilitation charge is paid by the ITEs to the owner of the cable landing station so as to access the capacity acquired on IRU basis or a short-term lease basis from the owners of the cable/consortia. This charge is based on the cost of various network elements required for provision of access distributed over the complete capacity of the system. This is a one time charge and is generally disputed by the new entrants on the grounds that the incumbent operator who also generally owns landing station fixes a very high amount which is totally disproportionate to the cost of network elements involved in the provision of access.

4.2.2. Operation & Maintenance (O&M) Charge

The operation and maintenance charge (O&M) is the annual expense being claimed by the cable landing station owner from the service providers who uses its

facilities for accessing the capacity. Worldwide regulators have mandated that the access charges as well as O & M charges would be based on the corresponding costs of network elements used for such services. O & M charges are normally be calculated taking into account the total operation cost distributed over the system capacity.

4.2.3. Co-location Charges

These charges include the charges for housing the equipment of the eligible ITEs or customers in the premises of service providers and can include lease charges for space, equipment room, power supply etc.

4.2.4. Cable Landing Facility Charges

These charges include the charges that a new entrant will be required to pay to avail landing facilities at a cable landing station. These can consist of lease rental for cableway, rental for Fiber Distribution Frame (FDF), equipment room, equipment rack and the Digital Distribution Frame (DDF) in addition to up-gradation cost of power system. This charge will generally depend upon the capital costs involved in such facilities."

(ii). The Regulation 10(I) of the 07June 2007 Regulation provides that access facilitation charges will be "determined on the basis of cost of network elements involves the provisions of access and distribution of complete capacity of the system".

"10. Access Facilitation Charges and payment terms.

(1) For the purposes of accessing the landing facilities at a cable landing station the Access Facilitation charges as specified in Part II of the Schedule shall be ---

a) Payable by the eligible Indian International Telecommunication Entity to owner of the cable landing station;

b) determined on the basis of the cost of network elements involved in the provision of access and distributed over the complete capacity of the system".

(iii). In the Consultation Paper of 19 October 2012 the TRAI has disregarded the previous approach of findings in the 2007 Regulation by a cryptic observation that the work done for the access work done for access facilitation at cable landing station is the same for all cable landing stations. Therefore, it may not be required to estimate the cost based

charges separately for each cable landing stations. The only variation could be due to space and electricity charges if the cable landing stations are located at two different cities, which may be a small portion of total costs. No reason has been given for a departure from the past practice of assessing network elements, but standardizing a model of a landing station when the factors which determines the cost of variable for each. No rationale or reason has been given for such departure and about turn, disregarding the cost data available with the TRAI for different network elements of different CLSSs."

249. It is submitted by the petitioners that primary reason admitted by the TRAI for bringing out the impugned Regulation of October 2012 and December 2012 are not based on any objective fact or criteria, because the TRAI did not want to undertake the task of assessing RIO, it did not want to burden itself with the task of examining cost data and therefore choose to fix standard prices across CLSSs. This is evident from the observation of the Respondent from the Explanatory Memorandum of both the Regulation where it has said that since the process of approval of the charges involve scrutiny by TRAI of costing elements considered, costs and costing methodology employed by OCLS and final approval by TRAI, it takes more time and provides competitive advantage to the owner of cable landing station as OCLS is also integrated operator owning bandwidth in submarine cable system.

250. On the contra, it is the submission of the respondent-TRAI that TRAI is a statutory body established under an Act of Parliament, inter alia, to regulate telecom services and to protect the interest of service providers and consumers of the telecom sector, to promote and ensure orderly growth of the telecom sector and for matters connected therewith or incidental thereto. The Preamble of TRAI Act, 1997 reads as under :-

"An Act to provide for the establishment of the Telecom Regulatory Authority of India and the Telecom Disputes Settlement and Appellate Tribunal to regulate the telecommunications services, adjudicate disputes, dispose of appeals and to protect the interests of service providers and consumers of the telecom sector, to promote and ensure orderly growth of the telecom sector and for matters connected therewith or incidental thereto".

251. TRAI is an expert body established and incorporated by

an Act of Parliament under section 3 of the TRAI Act, 1997 and consists of a Chairperson, two whole-time and two part-time members appointed by the Central Government from amongst the persons who have special knowledge of, and professional experience in, telecommunication, industry, finance, accountancy, law, management or consumer affairs.

252. The functions of TRAI are contained under section 11 of TRAI Act which confers recommendatory functions under Section 11 (1)(a), regulatory functions under Section 11(1)(b) and tariff fixation functions under Section 11(2) on TRAI. Section 11 begins with a non-obstante clause stating that the said provision is notwithstanding anything contained in the Indian Telegraph Act, 1885 under which the licence has been granted to M/s Tata Communications Ltd. The said section 11 of TRAI Act reads as under:-

"11. Functions of Authority.- (1) Notwithstanding anything contained in the Indian Telegraph Act, 1885, the functions of the Authority shall be to-

- (a)
- (b) discharge the following functions, namely:
 - (i) ensure compliance of terms and conditions of licence;
 - (ii) notwithstanding anything contained in the terms and conditions of the licence granted before the commencement of the Telecom Regulatory Authority of India (Amendment) Act, 2000, fix the terms and conditions of inter-connectivity between the service providers;
 - (iii) ensure technical compatibility and effective inter-connection between different service providers;
 - (iv) regulate arrangement amongst service providers of sharing their revenue derived from providing telecommunication services;
 - (v) lay down the standards of quality of service to be provided by the service providers and ensure the quality of service and conduct the periodical survey of such service provided by the service providers so as to protect interest of the consumers of telecommunication services;
 - (vi) lay down and ensure the time period for providing local and long distance circuits of telecommunication between different service providers;
 - (vii) maintain register of interconnect agreements and of all such other matters as may be provided in

the Regulations;

(viii) keep register maintained under clause (vii) open for inspection to any member of public on payment of such fee and compliance of such other requirement as may be provided in the regulations;

(ix) ensure effective compliance of universal service obligations.

(c)

(d)

(2)

(3)

(4) The Authority shall ensure transparency while exercising its powers and discharging its functions."

253. Under Section 12(4) and 13 the Authority has the power to issue directions. For violation of its directions, the Authority can institute a criminal complaint against the service provider under Section 29 of the Act. Section 36 of TRAI Act confers power on TRAI to make regulations to carry out the purposes of TRAI Act and reads as under:-

"36. Power to make regulations.- (1) The Authority may, by notification, make regulations consistent with this Act and the rules made thereunder to carry out the purposes of this Act.

(2) In particular, and without prejudice to the generality of the foregoing power, such regulations may provide for all or any of the following matters, namely:-

(a) the times and places of meetings of the Authority and the procedure to be followed at such meetings under sub-section (1) of section 8, including quorum necessary for the transaction of business;"

254. The regulations made by the Authority in exercise of power conferred upon it under Section 36 of the TRAI Act are in the nature of subordinate legislation. The Regulations framed by TRAI under Section 36 of the Act are laid before each house of the Parliament which can approve, modify or annul the Regulations so laid. The said section 37 reads as under :-

"37. Rules and regulations to be laid before Parliament.- Every rule and every regulation made under this Act shall be laid, as soon as may be after

it is made, before each House of Parliament, which it is in session, for a total period of thirty days which may be comprised in one session or in two or more successive session, and if, before the expiry of the session immediately following the session or the successive sessions aforesaid, both Houses agree in making any modification in the rules or regulation or both Houses agree that the rule or regulation should not be made, the rule or regulation shall thereafter have effect only in such modification or annulment shall be without prejudice to the validity of anything previously done under that rules or regulations."

255. It is submitted that the petitioners have prayed for quashing of the above-mentioned three Regulations. These impugned regulations are framed under Section 36 of the TRAI Act, 1997 and were laid before the Parliament on 10.09.2007, 05.12.2012 and 06.03.2013 respectively. The impugned Regulations are thus, subordinate Legislation.

256. On the Cable Landing Stations (CLS), the respondent-TRAI has submitted that besides dealing with various aspects of the cable landing station and the relationship of the owner of the cable landing station (OCLS) with the seeker of interconnection at the facility, the third regulation dated 21.12.2012 prescribes the various charges which can be charged by the owner of the cable landing station while providing interconnection to the seeker at the cable landing station or at a co-location. Before proceeding any further, it is pertinent to understand the features, working and certain unique characteristics of the cable landing station. Perusal of block diagram, which is annexed, as Annexure-A, would show that there are essentially three components of a cable landing station-

a) the first is the submarine cable system which comprises of the cable coming from the sea (the WET Portion),

b) the cable landing station which houses the equipments of the consortium, the equipments of the OCLS and the equipments of the seeker (THE CABLE LANDING STATION),

c) the third component comprises of the connections emanating from the seekers equipment which are then taken by the seeker who is an ILDO licensee through the national long distance operator (NLDO) and the access provider to the eventual customer who can be an individual customer using broadband or an institutional customer like BPO, KPO et cetera (The BACKHAUL FACILITY)

257. On the Submarine Cable System, the respondent-TRAI

submitted that it consists of a communication cable laid on the seabed between cable landing stations on the land to carry telecommunication signals across stretches of ocean. The submarine cable systems use optical fibre cables to carry international traffic. Owing to huge transmission capacity of optical fibre cables, such systems have become the backbone of international long distance (ILD) service.

258. The process of planning and installing a cable system is very complicated and can be compared to any other complex project management. It is an extremely capital intensive project which takes extremely long time to materialize. Traditionally, owing to the fact that laying of a submarine cable is a capital intensive and time taking project, the cable is owned by a consortium of members who belong to different countries. The relationship between the various consortium members belonging to different countries is governed by the construction and maintenance agreement (C&MA) entered into between them after extensive negotiations.

259. It is submitted that the total capacity in the submarine cables is owned jointly by the consortia members. Each member owns a particular percentage of the total bandwidth. The total capacity in the submarine cables is divided into minimum investment units (MIU). The ILD operators and Internet Service Providers (ISP) having permission for International Gateway who were referred to as seekers in the block diagram enter into an agreement with any of the consortium members to buy the bandwidth capacity owned by them in terms of indefeasible right of use (IRUs). These are sold through capacity purchase agreements (CPA) wherein the buyer is often asked to purchase a unit of capacity for the remaining design life of a particular cable.

[2.1.2 The Wet Portion: This element is the submarine optical fibre cable itself. From regulatory perspective, it is relevant to consider three aspects of this i.e. the construction, provisioning and support/ maintenance of cable facilities. There are several barriers to entry into submarine cable markets, e.g. long lead times, limited number of undersea cable supply and limited expertise available for laying submarine cables in addition to requirements for many clearances from Govt. agencies. The process of planning and installing a cable system is very complicated and can be compared to any other complex project management.

2.2.1: Elements of Submarine Cable System: The schematic block diagram of a typical submarine cable

system is shown in figure.1 below. Submarine cables traditionally were sponsored by consortium of owners and always the dominant or monopoly operators from a large number of countries were the founding members of such consortia or cable clubs. The legal document for these consortia has been the Construction Maintenance Agreement (C & MA), which the consortia members negotiate among themselves. Capacity in submarine cables owned by consortia, has been divided into Minimum Investment Units (MIU). This concept of MIU doesn't apply to consortia and private cable operators sell capacity on cables in terms of Indefeasible Right of Use (IRU). These IRUs are sold through Capacity Purchase Agreements (CPA) often asking a buyer to obtain a unit of capacity for the remaining design life of a participate cable.]

260. It is significant to note that there are several barriers to entry into submarine cable markets example long lead times, limited number of undersea cable supply and limited expertise available for laying submarine cables in addition to requirements for many clearances from government agencies. Hence the process of planning and installing a cable system is very complicated. Further, being a capital intensive project the cable is owned by a consortium of members who enter into an agreement amongst themselves after great deal of negotiations. These are complex and time taking negotiations which are not easily fructified. It is thus not easy for any existing ILD operator in India to become a member of an existing consortium which owns a submarine cable or to form a new consortium at will and in a short period of time.

261. A submarine Cable Landing Station is a technical facility at which international submarine cables come onshore and terminate. Generally, these buildings, which contain the onshore end of the submarine fibre-optic cable, houses necessary equipment to interconnect and pass traffic to and from the submarine cable and are the point where the submarine cable capacity is connected to the domestic backhaul circuit. The building which is shown as a big box in the block diagram contains three types of equipments. The first set of equipments are the ones that are owned by the consortium itself. The second set of equipments are owned by the cable landing station owner and the third set comprises of the equipments of the seeker who is seeking interconnection.

262. The impugned regulations seek to regulate the relationship and the charges for the interconnection between the

equipment of the owner of the cable landing station and the equipment of the interconnection seeker. It is only through this interconnection at this point between the equipment of the owner of the cable landing station and equipment of the interconnection seeker that any reception or transmission of signs and signals including voice and data et cetera happens between the Indian backhaul facility and the international bandwidth in the submarine cable.

263. The ownership and the operation of the Cable Landing Station infrastructure is dependent upon the regulations of the specific country where the submarine cable coming from the sea lands. In India, the cable Landing Station can only be built, owned and accessed under International Long Distance Operator License (ILDO) and Internet service provider Licensee having permission to setup International Gateway issued under Section 4 of the Telegraph Act, 1885. It is submitted that both the petitioners being owners of the cable landing station are ILDO license holders or Internet service providers having permission for International Gateway. The interconnection seekers are also ILDO license holders. It is submitted that CLS being a Licensed activity is a subject matter of Regulation.

264. The fact that in India the cable landing station can be owned, built and accessed by a person who is a licensee under section 4 of the Telegraph act, 1885 is very significant. The grant of license under section 4 of the Telegraph act, 1885 signifies that the equipment owned and installed by the owner of the cable landing station at its premises is nothing but a Telegraph under section 3 (1) (AA) of the act. This means that the equipments are capable of transmission and reception of signs and signals, et cetera. These equipments and the service provided by the owner of the cable landing station would qualify as telecommunication service under section 2 (1) (k) of the TRAI act.

265. This aspect assumes significance to establish that the cable landing station is not merely an infrastructure which is being shared amongst the service providers but is a place where telecommunication service is being provided. It is a licensed activity which can be carried out only in terms of the license conditions which are binding on the Petitioner Licensee who is a signatory to such a license. It is also relevant for the purposes of demonstrating and establishing that there is an interconnection between the equipments of the owner of the cable landing station and that of the interconnection seeker at the cable landing station. The submissions on these aspects have been made at an appropriate place in the written submissions.

266. A very significant characteristic of the cable landing station is that generally the owner of the cable landing station is a member of the consortium which owns the submarine cable. As such the owner of the cable landing station owns a certain percentage of the bandwidth out of the total bandwidth carried in the submarine cable. Usually, the consortium members decide amongst themselves that one of the members would establish the cable landing station in the country to which it belongs. It is pertinent to note that in India all the owners of the cable landing station which includes the petitioners are members of the consortium which owns the submarine cable landing at their cable landing station and are owners of certain percentage of the bandwidth in the submarine cable. It is also pertinent to note that the part of cost of establishing a cable landing station is reimbursed by the consortium members to the owner of the cable landing station.

[Many service providers have submitted that CLS access charges need to be re-determined in view of manifold increase in capacity utilization and the fact that the costs (OPEX + Capex) incurred by OCLS for setting up a CLS is reimbursed by consortium members under the C&M Agreement. Some service providers have stated that the Access Facilitation Charges for CLS should be in line with the international trends and TRAI must take into account the agreement between consortiums and OCLS so that they are not overcompensated for the same.]

[2.7(a). In a consortium model, operators form a closed club to construct, operate and maintain a submarine cable system and thereby they secure more favorable terms for submarine cable capacity than non consortium members. Construction, operation and maintenance (O&M) and other terms of a submarine cable system are governed by a Construction and Maintenance Agreement (C&MA), entered among the consortium members. A typical consortium has the following operating mechanism:

(a) The members of consortium raise the funds for constructing the submarine cable system, which includes the laying of cable in the sea-bed and construction of cable landing stations on the shore ends.]

[Normally an eligible Indian International Telecommunication Entity would be required to pay charges for following items to the Owner of Cable Landing Station:

1. Access Facilitation Charge

2. Annual Operation and Maintenance (O&M) Charge

3. Cable Landing Station's cost component in case if it is not included in other head of Charges

Under the Consortium Cables, the owner of International Submarine Cable capacity who sells the reference capacity has to bear the cost component of Cable Landing Station which normally is passed on to the purchaser of the reference capacity either upfront or upon usage of capacity. All the cost components from Beach Man Hole (BMH) up to Optical Distribution Frame (ODF)/Digital Distribution Frame (DDF) are paid for by the consortia. The Owner of Cable Landing Station in the respective country has the obligation as a member of the consortia to operate and maintain the Cable Landing Station and to provide international telecom services to other telecom operators and consortia members. It is the way in which these services are provided by the Owner of Cable Landing Stations that if not provided transparently and non-discriminative basis creates the bottleneck effect at Cable Landing Stations. It is for these reasons the Open Access need to be regulated so as to allow the open and reasonable access to such essential facilities at Cable Landing Stations in India. Even the Owner of Cable Landing Station has to bear the cost for accessing the international submarine cable capacity for his own use to consortia. In other scenario, Cable Landing Station access charge, which is not included in the Reference Capacity by the owner of International submarine cable system, are payable to Owner of Cable Landing Station by an eligible Indian International Telecommunication Entity. Cable landing Station cost component is distributed over the International submarine cable capacity. Also it is observed that the generally the cable landing station capital cost keep reducing as the capacity utilization increases.

Therefore, the owner of Cable Landing Station need to declare:

(i) the Cable Landing Station cost for various systems 17 declared to consortium

(ii) Capacity level determined over which such landing station costs are to be recovered and

(iii) Cumulative capacity utilization on each of the system since commencement of Cable Landing Station separately for its own usage and third party usage.

An eligible Indian International Telecommunication

Entity needs in addition to access facilitation, the co-location facility for its equipment to be installed either at Cable Landing Station itself or by establishing virtual co-location nearby to the Cable Landing Station. The Owner of Cable Landing Station need to provide within reasonable timeframe the access to the building and co-location space or provide the facility for virtual co-location based on commercial terms and conditions.

It is necessary for an eligible Indian International Telecommunication Entity to have the right to utilize the backhaul facilities available at Cable Landing Station from any of the service providers. Interconnection between co-location areas need to be provided by the Owner of the Cable Landing Station on fair and reasonable terms.

The Owner of Cable Landing Station need to provide the interconnection to the Optical Distribution Frame (ODF)/Digital Distribution Frame (DDF) on cost based commercial terms in a time bound manner. The access seeker needs to have the co-location space in the Cable Landing Station so as to provide its own backhaul and backhaul to other such access seekers.]

267. In 2002, the petitioner was the only owner of cable landing stations. Presently the petitioner owns five Cable Landing Stations located in Chennai, Mumbai and Ernakulam serving in all eight cable systems. Presently, there are 11 cable landing stations owned by five different owners and serving 15 cable system Landing in India. Besides the petitioner Tatas, Bharti Airtel owns four, reliance two and BSNL one. As on 22.02.2012 there are 27 ILDO license operators. Reference has been made to PAGE 361 VOLUME 1.

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Sl.No	Name of the ILD Operator	Effective Date of Licensee
1	M/s Reliance Communications Limited	25.02.02
2	M/s Bharti Airtel Limited	14.03.02

Sl.No	Name of the ILD Operator	Effective Date of Licensee
3	M/s Data Access Limited (Licence under suspension)	27.03.02
4	M/s Bharat Sanchar Nigam Ltd	29.01.03
5	M/s Videsh Sanchar Nigam Ltd. (Tata Communications Ltd.) (Effective from 01.04.02)	05.02.04
6	M/s i2i Enterprises Ltd. (BT Global Communications Pvt. Ltd.)	11.07.06
7	M/s AT&T Global Network Services Pvt. Ltd.	09.10.06
8	M/s Vodafone Essar South Ltd.	13.11.06
9	M/s Sify Communications Ltd.	21.11.06
10	M/s Dishnet Wireless ltd.	13.12.06
11	M/s BT Telecom India Pvt. Ltd.	20.02.07
12	M/s Tulip IT Services Ltd.	06.07.07
13	M/s Spice Communications Ltd.	08.08.07
14	M/s Verizon Communications India Private Limited	03.01.08
15	M/s Cable & Wireless Networks India Private Limited	15.02.2008
16	M/s P3 Technologies Private Limited	28.02.2008
17	M/s Mahanagar Telephone Nigam Limited	18.06.2008
18	M/s Equant Network Services India Private Limited	20.06.2008
19	M/s Swan Connect Communications Private Limited	12.08.2008 (Surrendered on 22.08.2009)
20	M/s Citicom Networks Private Limited	03.10.2008
21	M/s Swan Telecom Private Limited (M/s Etisalat DB Telecom Private Limited)	06.10.2008
22	M/s SingTel Global (India) Private Limited	05.03.2009
23	M/s Datacom Solutions Private Limited	18.03.2009
24	M/s Unitech Long Distance Communication Services Limited	28.04.2009

Sl.No	Name of the ILD Operator	Effective Date of Licensee
25	M/s Pacific Internet India Private Limited	22.01.2010
26	M/s Telstra Telecommunications Pvt. Limited 11.10.2011	
27	M/s Infotel Telecom Limited	14.02.2012

268. The ILDO operators who are holding a license but are not owners of the cable landing station are providing ILD service to their customers. The international long distance operators provide BEARER services so that end to end services such as voice, data, fax, video and multimedia sector can be provided by the access providers to the customers. A perusal of the block diagram, mentioned therein, would show that the end consumer who is either an individual or an institutional consumer like BPO, KPO et cetera seeks a broadband connection from its access provider. The access provider hands over the call, data et cetera to the national long distance operator (NLDO) who carries this beyond the service area of the access provider. The NLDO then hands over the call, data et cetera to the ILDO Operator. The equipment of this ILDO operator at the CLS is interconnected with the equipment of the OCLS which allows the transmission of the calls, data, etc. to the international carrier to be taken to the customer abroad through the bandwidth of one of the consortium members which was purchased by the seeker ILDO operator.

269. As regards CLS is a bottleneck facility, it is submitted that the cable landing station is a bottleneck facility. It has been recognised in the license terms and conditions as a bottleneck facility in clause 2.2 (c) of the license terms and conditions both in 2002 as well as after its amendment in 2006. In fact, as will be seen hereinbelow, the authority had specifically raised an issue in its consultation paper dated 06.06.2005 as to whether after three years of the opening up of the ILD sector and several service provider obtained licenses, the cable landing station has ceased to be a bottleneck facility or not? The authority after the consultation process formulated its recommendations and stated that the CLS continues to be a bottleneck facility and that several measures are required to be taken to increase competition in the sector for which certain amendments in the license are required. Accordingly, the license terms and conditions were amended wherein the fact that the CLS is a bottleneck facility continues to be mentioned.

270. It is submitted that the petitioner being a licensee is a signatory to the license and is bound by the terms and conditions of the license. The said terms and conditions have not been challenged by the petitioner. Hence, the petitioner has got no ground to contend that the cable landing station has ceased to be a bottleneck facility. The reasons why the cable landing station is a bottleneck facility are many. Firstly, as has been noticed hereinabove, the owner of the cable landing station is a consortium member and owns a certain percentage of the bandwidth in the submarine cable. The owner of the cable landing station being an ILDO operator also provides ILD service to end consumers. Hence, the owner of the cable landing station being owner of the bandwidth as well as a person who provides services to the end consumers has a competitive advantage over the other ILDO operators who are not owners of the cable landing station. This is a vertical integration.

271. The ILDO operators who were not owners of the cable landing station seek access/interconnection to the equipment of the owner of the cable landing station. This is to gain access to the bandwidth in the submarine cable that it had purchased through an agreement with one of the consortium members. If the charges at the cable landing station are higher then even though the bandwidth charges may be lower and available at competitively lower rates, the seeker ILDO operator is not in a position to compete with the owner of the cable landing station who is providing end services to the consumer also. This results in the seeker ILDO operator to enter into an agreement with the owner of the cable landing station purchasing the bandwidth also that is owned by the owner of the cable landing station so as to get a competitive package which would enable it to provide services to its customers at competitive rates. Thus owing to higher access charges the owners of the cable landing station deny equal access to the seekers. This results in:

a) a lot of bandwidth owned by other consortium members in the submarine cable going unutilized even though they may be available at competitive rates,

b) it leads to thwarting of the competition and denies the seeker ILDO from developing attractive packages and providing the service to the end consumer at attractive and competitive rates,

c) it leads to the owner of the cable landing station gaining a competitive advantage and in securing higher profits for its business as it is able to not only get access charges for the CLS but is also able to sell its bandwidth owned by it in the submarine cable.

272. The ILDO operators who seek access to the cable landing station are also capable of building their own cable landing stations. However, the building of the cable landing station which may not by itself be capital intensive would be meaningless if there is no submarine cable which would land there. As noticed above, the submarine cables are owned by consortium members and the formation of the consortium itself is a very complex and time taking project. It has also been stated above that one or two of the consortium members is authorized under the agreement by the consortia to build the cable landing station at its native country for which the part of cost of CLS is reimbursed by the consortium members. Hence in effect the owner of the cable landing station would need to be a member of consortium which owns a submarine cable and which would land at that particular cable landing station. Thus, the seeker ILDO operator who does not own cable landing station has to necessarily access the bandwidth available to it through an agreement with one of the consortium members after gaining access to the cable landing station owned by the petitioner. If the charges for gaining access/interconnection to the equipment of the cable landing station owner at the CLS are not cost based and are higher then it would not be viable to the seeker. Further, the owner of the cable landing station can also cause non-price constraints such as delaying or denying access. It is in that sense that the cable landing station is a bottleneck facility.

273. In addition to this it is also a matter of concern to reduce the cost by having effective and efficient utilization of resources and also by introducing the effective competition in the market. In other words it is not economically prudent to duplicate the CLS facilities for every new cable as it is technically feasible and commercially desirable to land multiple cables on the same CLS. Thus, considering the fact that the fewer cable landing station owners are:

a) denying access or delaying access to the other seeker ILDO operators by charging higher charges,

b) The incumbent OCLS being the owner of the bandwidth as well as being an ILD service provider catering to end users, it has a competitive advantage over the seeker ILDO operators who are not OCLS,

c) the fact that establishing a submarine cable after formation of a consortium is a capital intensive and time taking procedure due to various commercial as

well as administrative constraints,

d) even though the establishment of a cable landing station may not be by itself be a capital intensive exercise still without a cable landing at the cable landing station the establishment of a cable landing station by an ILDO operator is meaningless,

e) the fact that it is not economically prudent to duplicate the CLS facilities for every new cable are reasons that make cable landing station a bottleneck facility.

274. It is submitted that under such circumstances equal access to the international capacity as well as landing facilities needs to be mandated and the terms of conditions of such access needs to be fair, transparent and non-discriminatory. To achieve this purpose, the situation mandates that the regulator fixes the cost-based access charges as well as lay down the broad principles underlying the terms and conditions governing the relationship between the owner of the cable landing station and the seeker ILDO operator.

275. As stated above, the cable landing station is recognised as a bottleneck facility by the license to which the petitioner is a signatory. The terms and conditions of the license have not been modified and have not been challenged by the petitioner. Hence the fact remains that CLS is a bottleneck facility which needs to be regulated by the authority as per the terms and conditions of the licence itself. In that sense, the framing of the impugned regulations and prescribing charges by the regulator is nothing but an exercise to ensure equal access to the bottleneck facilities on a non-discriminatory basis at fair, transparent and cost based charges. This would ensure that the cable landing station does not remain a bottleneck facility.

[4.1.3 The first ILD license was issued in Feb. 2002 and therefore, the new ILDOs were entitled for equal ease of access to bottleneck facilities at Cable Landing Station of the incumbent operator upto Feb. 2005. As per the license, the terms and conditions of such access were to be mutually agreed between the parties concerned. However, it is observed that there is no standard/published access facilitation agreement, which the new service providers can make use of for availing of access to international cable capacity. In these circumstances there has been a scope for delay in provisioning of access to the capacity acquired by the competing operators from incumbent and other carriers. Also as the terms &

conditions of such access are to be mutually agreed between the parties concerned, the regulator is not in a position to intervene in such matters.

4.1.4 The continued control of international capacities, Cable Landing Stations (CLS) and associated facilities by only few operators can enable the owners to stall or delay entry of competitive operators and thus create major bottleneck to the growth of international telecom services. Problems can also be faced by operators who have acquired capacity in a cable system from some other international carrier and wishing to access this capacity at the landing station of an existing operator. Discussions with industry sources suggested that establishing an international cable system including landing facilities in India not only requires a large investment but is also a cumbersome process involving various timeconsuming clearances including security clearance, maritime clearance, civil authorities permissions etc. On an average setting up of a cable landing station can cost between Rs. 20 crores to 50 crores depending upon the location in the country. In the Indian conditions, the time required to setup a CLS can be a minimum of 9 months and is normally more than a year. Of course, a CLS is always built to have enough capacity for multiple cables to land therein in future.

4.1.5 As setting up CLS is a very time consuming & capital-intensive process, it is not feasible for a new operator to set up a CLS for new cables and neither it makes economic sense to duplicate the expensive CLSs infrastructure in the Country, when many cables can be landed on the same CLS. Therefore, multiple cables owned by different operators should be made to land on a common CLS for economic reasons by a mandate through terms and conditions of the license.

4.2.1 Normally the submarine cable system operator or the owner manages and controls the landing station also. For consortium cable typically the consortia member in each country where the cable lands, manages the landing station. In future, it is always possible that a situation could arise wherein change of ownership of submarine cable and / or change in the ownership of landing stations could take place impacting the relationship between these two entities. It is thus evident that under circumstances of monopoly or limited number of cable landing stations there appears a need for mandating the access to CLS for the international bandwidth as well as for landing

of new cables by competitive operators.

4.3.1 Many Stakeholders stated in their written submissions that cable landing stations in India retain their bottleneck nature since four of the five existing cable landing stations (CLS) are under the control of single incumbent operator. It was stated that the incumbent operator has been denying access for international bandwidth to various competing operators on one pretext or the other. It was also mentioned that, the incumbent operator in India has been using its bottleneck control of its cable-landing stations to limit the availability of international capacities to competing operators.

4.3.2 Some stakeholders opined in their written submissions as well as open house discussions that dominant incumbent operator has fixed prohibitive access charges for the international capacity which are very high as compared to the charges prevailing in the Asia Pacific region. The stakeholders also pointed out that the incumbent operator should be mandated to publish its tariffs for access and other terms and conditions on the website so as to make them transparent and non-discriminatory.

4.3.3 One of the stakeholders pointed out that the regulator should mandate cost based equal ease of access to CLS. The access conditions for CLS should be transparent, non-discriminatory and fair. The owner of CLS should provide similar terms and conditions to a competitive service provider as being provided to its own subsidiary/wing in the provision of access to CLS.

4.3.4 Another stakeholder strongly emphasized that cable-landing station is a bottleneck facility and the incumbent operator has been able to inhibit the growth of competition in access to the international bandwidth. Most of the cable systems are accessible only through the CLSs of incumbent operator and other ILDO's and ISP's have been finding it difficult to access the bandwidth purchased by them directly from the owners of the other cable system.

4.4.1 CLS is an essential network facility for a submarine cable, and it is not economically efficient to duplicate such a facility for new cables since it would involve considerable costs and time & also will be against the prudent economical principles. It is always desirable to land new submarine cable on the existing CLS to avoid costs & delays associated with building a separate CLS for every cable. Also the cost associated with "Operation & Maintenance" of an

international cable system can be reduced significantly by sharing the landing facilities of existing cable system.

4.4.2 Generally, there are two issues regarding bottleneck to essential facilities at a landing station. One is denial of access to the international capacity of a consortium cable by the CLS owner. The other issue is denial of landing facilities to a third party who possesses the requisite license desirous of landing new cable at the CLS of a carrier. Both these can lead to creation of bottlenecks and therefore needs to be removed through regulatory mandate.

4.4.3 As can be seen in the International Practices at Annex 1, one of the worth considering regulatory intervention for access to a CLS was made by IDA, the Singapore regulator by applying the interconnection regulation pertaining to switched voice services to access to CLS also. The variety of cables landing there is amongst highest in Asia with multiple ownership structures. But as the majority of landing stations are owned and operated by SingTel, the incumbent and that fact combined with the wide experiences of many operators that SingTel will exploit the bottleneck aspects of the access to and through these cable landing stations led IDA to conclude that the RIO should apply to the detailed aspects of rights and obligations of the Facility Based Operators (FBO) in access to international capacity as well as landing facilities at CLS. In Singapore for obtaining an FBO license there is no entry fee but an annual license fee of 1% of Gross Turnover is levied subject to a minimum of S\$1,00,000 per year.

4.4.4 The stakeholders in their submissions suggested the Singapore model as a basis for regulation in India which mandates only the dominant operator to provide regulated access to its CLS facilities. However, the Hong Kong model of applying the regulations to all CLSs and not just to the CLSs owned by the dominant operator appears to be more appropriate. This is because of non-discrimination among the operators and on the basis that any ILDO should have the right to nondiscriminatory access to any cable. In Hong Kong, for landing any Submarine Cables in the country, a cable based External FTNS (Fixed Telecom Network Service) license is required for which a performance Bond of HK\$20 million is to be submitted but no entry fee is levied.

4.4.6 Moreover, the measures to promote

competition in IPLC segment in India are designed to encourage the emergence of new competitors who would invest in more infrastructures. The ability of new licensees to compete would be greatly assisted by their ability to buy capacity on a range of cables, as well as by installing their own cables. This will need the permission for landing of new cables by an operator at the CLS owned by competing operators. This would both increase the capacity terminating in India and increase the speed with which new competitors can start to operate effectively. This requires that the access to submarine cable capacity and landing facilities at a CLS be open and non-discriminatory, both commercially and physically. The terms and conditions for such access including the charges should be finalized under regulatory supervision and the operators should be required to publish the terms & conditions as to how other ILDOs can access the cable capacity as well as landing facility commercially. An enabling provision in the ILDO license is required for this.

4.4.7 The ILDO, which owns and operates the CLS for a cable should have an obligation to provide the services required to activate and manage the capacity on the cable for any other ILDO who has the right to use such capacity by virtue of its licence in the country. In turn, this leads to the conclusion that the ILDO, which owns and operates a CLS, should have explicit obligations to provide access to other ILDOs and other service providers for the capacity they wish to procure. The obligations should be for the life of the cable system and the terms and conditions on which these are provided including the access charges and the principles underlying these terms and conditions should be fair and non-discriminatory and finalized under regulatory supervision.

4.5.1 From the above, it can be concluded that main issues leading to creation of bottleneck at a CLS are denial of access to the existing international capacity of a submarine cable and denial of landing facilities for new consortium/ privately owned cable. The regulators in many countries have removed such bottlenecks by mandating the nondiscriminatory, fair and open access at the CLSs in their countries. In case of Hong Kong, two consortium/ privately owned cables and in case of Singapore, three such cables have been permitted to land at the CLSs not owned by the owners of such cable systems after enabling regulation was put in place.

4.5.2 Even after 3 years of competition in ILD sector, the new entrants are not able to provide an effective competition in IPLC market and the incumbent operator continues to be dominant player in the market. As discussed above, the dominance of ownership of CLSS with incumbent operator could be one such factor, which inhibits the effectiveness of competition. As brought out in para 4.1.4, the number of clearances required and the time taken for installation and commissioning of CLS in addition to substantial cost involved, contributes for making this a bottleneck facility. Authority's concern always has been to reduce the cost by effective and efficient utilization of resources and also by introducing the effective competition in the market. The international practice in many countries also establishes the sharing of CLS by multiple international cable carriers. Keeping this in view, Authority considers that CLS owners should be mandated to share the facility with various international cable carriers.

4.5.3 The significant power to control the critical resource of international cable capacity through controlling the access and landing facilities at CLSS has been well recognized and has led many countries, to establish clear obligations and rights of access to these stations. The grounds of such action are that the international capacity provided by these cables is a critical input element to all international services. Also, it is not economically prudent to duplicate the CLS facilities for every new cable, as it is technically feasible & commercially desirable as well as efficient to land multiple cables on same CLS. Therefore, access to the international capacity as well as landing facilities needs to be mandated and the terms of conditions of such access to be fair, transparent and non-discriminatory. For this the regulator is required to fix the cost based access charges as well as lay down the broad principles underlying the terms and conditions.

2.10.5 Control of International capacities, cable landing stations and associated facilities by only few operators can enable the owners to stall or delay entry of new operators. Problems can also be faced by operators who have acquired capacity in a cable system from other International carrier/submarine cable owner and wishing to access this capacity at the landing station of an ILDO. Discussions with industry sources suggested that establishing an International cable system including landing facilities in India not only requires a huge amount of investment but is also a

time consuming process involving various clearances including security clearance, maritime clearance and civil authorities permissions etc. Thus, the control of access to the cable landing stations makes it possible for the owner of the access facility to impose non-price constraints affecting the competition. The licensor issued first ILD licence in Feb. 2002 and therefore, the new ILDOs were entitled for equal ease of access to bottleneck facilities at Submarine Cable Landing Station of the incumbent operator upto Feb. 2005. As per the licence, the terms and conditions of such access were to be mutually agreed. It is observed that there is no standard/published access agreement, which the new service providers can easily make use for availing of access to International submarine cable capacity. In such circumstances there is always a scope for delay/denial of access to the capacity acquired by the competing new operators or any other service provider.

4.1.1 It is necessary for other ILDOs and ISPs with International Gateway permission to have access to, and co-locate at, the cable landing stations operated by owner of cable landing stations, because without such access and co-location it would not be possible for such operators to use the capacity they acquire or lease on any submarine cable for the provision of International Bandwidth. It is also necessary for other ILDOs to have Landing facilities at cable landing station. It has been recognized that there is potential for cable system owner particularly the incumbent or operator with significant market power (SMP) to delay the provision of resources through higher charges or any other barriers preventing the competition by new entrants. The Primary Regulatory concern is to ensure that the incumbent/operator with significant market power having control over the cable system and CLS do not resort to non-price discrimination like denial/ delay in providing access, unreasonable terms and conditions for Access etc. Therefore, it is felt that there is a need to have consultation over the issues related with Access Facilitation and Co-location including Access Facilitation Charges, O&M Charges, Co-location Charges, Time frame and other terms and conditions of Access at cable landing stations.

4.1.3 Charges for Accessing International Submarine Cable capacity: Normally an eligible Indian International Telecommunication Entity would be required to pay charges for following items to the Owner of Cable Landing Station:

1. Access Facilitation Charge
2. Annual Operation and Maintenance (O&M) Charge
3. Cable Landing Station's cost component in case if it is not included in other head of Charges

Under the Consortium Cables, the owner of International Submarine Cable capacity who sells the reference capacity has to bear the cost component of Cable Landing Station which normally is passed on to the purchaser of the reference capacity either upfront or upon usage of capacity. All the cost components from Beach Man Hole (BMH) up to Optical Distribution Frame (ODF)/Digital Distribution Frame (DDF) are paid for by the consortia. The Owner of Cable Landing Station in the respective country has the obligation as a member of the consortia to operate and maintain the Cable Landing Station and to provide international telecom services to other telecom operators and consortia members. It is the way in which these services are provided by the Owner of Cable Landing Stations that if not provided transparently and non-discriminative basis creates the bottleneck effect at Cable Landing Stations. It is for these reasons the Open Access need to be regulated so as to allow the open and reasonable access to such essential facilities at Cable Landing Stations in India. Even the Owner of Cable Landing Station has to bear the cost for accessing the international submarine cable capacity for his own use to consortia. In other scenario, Cable Landing Station access charge, which is not included in the Reference Capacity by the owner of International submarine cable system, are payable to Owner of Cable Landing Station by an eligible Indian International Telecommunication Entity. Cable landing Station cost component is distributed over the International submarine cable capacity. Also it is observed that the generally the cable landing station capital cost keep reducing as the capacity utilization increases.

Therefore, the owner of Cable Landing Station need to declare:

- (i) the Cable Landing Station cost for various systems declared to consortium
- (ii) Capacity level determined over which such landing station costs are to be recovered and
- (iii) Cumulative capacity utilization on each of the system since commencement of Cable Landing Station separately for its own usage and third party usage.

An eligible Indian International Telecommunication Entity needs in addition to access facilitation, the co-location facility for its equipment to be installed either at Cable Landing Station itself or by establishing virtual co-location nearby to the Cable Landing Station. The Owner of Cable Landing Station need to provide within reasonable timeframe the access to the building and co-location space or provide the facility for virtual co-location based on commercial terms and conditions.

It is necessary for an eligible Indian International Telecommunication Entity to have the right to utilize the backhaul facilities available at Cable Landing Station from any of the service providers. Interconnection between co-location areas need to be provided by the Owner of the Cable Landing Station on fair and reasonable terms.

The Owner of Cable Landing Station need to provide the interconnection to the Optical Distribution Frame (ODF)/Digital Distribution Frame (DDF) on cost based commercial terms in a time bound manner. The access seeker needs to have the co-location space in the Cable Landing Station so as to provide its own backhaul and backhaul to other such access seekers.]

276. On public interest, it is submitted that denial of equal access to the bottleneck facilities at the cable landing station in a non-discriminatory manner on terms that are unfair, non-transparent and on charges that are not cost-based by the owner of the cable landing station, directly and materially prejudices the interests of the consumers. A perusal of the block diagram, mentioned therein, would show that the end consumer who may be an individual or an institutional consumer like the BPO, KPO, etc. would take a broadband connection from an access provider. This access provider in turn would hand-over the voice, data, etc. of the consumer to the NLDO to carry the same outside its service area. The NLDO then hands over the voice, data, etc. of the consumer to the ILDO. The ILDO who is not a cable landing station owner would then seek interconnection of its equipments with the equipments of the OCLS at the cable landing station. This interconnection would facilitate the transmission of the voice, data, etc. through the bandwidth purchased by the seeker ILDO from one of the consortium members to the international carrier, who will in turn take it to the international consumer or server, et cetera. In the same fashion information/data/voice call would come to the Indian consumer. For this service the consumer pays a certain amount to the access provider who in turn pays to the ILDO as well as the NLDO a portion of that

amount. In this chain, if the access charges at the cable landing station are high or are not cost based then it leads to higher charges for the service given to the consumer. Hence higher access charges at the cable landing station is directly proportional to the charges paid by the consumer for the broadband services that it has taken. As such, fixation of cost based charges by the authority to ensure equal access on non-discriminatory basis to the seeker ILDO is a step which is aimed towards protecting the interests of the consumer.

277. It is also pertinent to note, that in this era of information explosion it is paramount that the consumers get access to broadband at lower rates and at higher speed. Affordable rates coupled with high-quality of broadband service would ensure effective and higher penetration of broadband service in the country. In fact, the respondent wishes to present the following reports which would indicate the situation of broadband in India is quite dismal:

As per the report published in December 2012 by McKinsey & Company titled "Online and Upcoming: The Internet's Impact on India", India is ranked 49 out of 57 countries on Internet infrastructure and environment.

World Economic Forum has released Global Information Technology Report 2013 wherein India is ranked 68th out of 144 economies in the Network Readiness Index (NRI) 2013.

As per the Annexure 3 and 4 of report of the Broadband Commission under ITU "The state of Broadband 2012; Achieving Digital Inclusion for All" depicting fixed and mobile broadband penetration worldwide during 2011, India stood at 112th and 106th position respectively amongst around 170 countries of the world.

278. It is submitted that one of the avowed objectives of the National Telecom Policy of 2012 is to ensure broadband on demand and high rural penetration of broadband in India. The present status vis-à-vis Targets in NTP'2012 clearly shows that lot of work needs to be done to achieve the targets. Status of Broadband Subscribers in India as on 30th Sept, 2013: 15.36 million Targets as per NTP 2012:

- Broadband on demand by the year 2015.
- 175 million broadband connections by the year 2017
- 600 million by the year 2020 at minimum 2 Mbps

download speed and making available higher of at least 100 Mbps on demand.

-Provide high speed and high quality broadband access to all village panchayats through a combination of technologies by the year 2014 and progressively to all villages and habitations by 2020

-To revise the existing broadband download speed of 256 Kbps to 512 Kbps and subsequently to 2 Mbps by 2015 and higher speeds of at least 100 Mbps thereafter

As per the report published in December 2012 by McKinsey & Company titled "Online and Upcoming: The Internet's Impact on India", India is ranked 49 out of 57 countries on Internet infrastructure and environment. According to the report, average bandwidth per capita in India is significantly lower than in many other aspiring countries. One of the key finding of the report is that average international bandwidth capacity for every 10,000 people across the seven aspiring countries (Argentina, Brazil, China, Malaysia, the Philippines, South Africa and Vietnam) is 28 Mbps versus 6 Mbps in India.

279. As per the above mentioned report, at \$61 per Mbps (on a PPP basis), India has one of the highest median costs of broadband access among comparable countries – more than four times that of China, Brazil and Argentina, and 20 to 30 percent higher than that of Vietnam and Malaysia. Most of the data that is originated by Indian consumers is delivered through servers located outside the country. Therefore, availability of sufficient capacity at affordable price is a prerequisite for faster growth of broadband in the country.

280. It is submitted that higher access charges at the cable landing station is a major factor which stands in the way of the broadband services becoming affordable. Higher access charges at CLS thwart competition. Thus as there is inadequate and ineffective competition the broadband charges remain unaffordable and the quality of speed remains deplorable. The choices available to the consumer remain limited. This leads to directly affecting the interests of the end consumers of broadband and also delays the achieving of the objective as contemplated in NTP 2012 which is achieving higher broadband penetration with higher speeds.

281. TRAI has further submitted that prior to 2001, Videsh Sanchar Nigam Ltd was a public sector enterprise which was incorporated in 1986 to cater to overseas communication services. It had cable Landing stations at Mumbai and Cochin and was solely responsible for providing international connectivity to consumers and telecom operators for various telecom and data services. It was the only International Long Distance Operator

(ILDO) in the country. On 12.11.2001, TRAI recommended to the government for open competition in the International Long Distance (ILD) service. This was the first step towards opening up the ILD sector in India.

282. On 15.01.2002, the government accepting the Recommendations decided to open the International Long Distance Service without any restriction on the number of operators. The service could commence from 1 April 2002. Accordingly the government issued broad guidelines for issue of license for international long distance service (ILD service) in India. The guidelines provided that the license shall be issued on a non-exclusive basis initially for a period of 20 years (clause 4). There was one time entry fee of Rs.25 crores. (clause 7). Besides entry fee there was an annual license fee of 15% of the adjusted gross revenue (clause 11).

283. Equal access to bottleneck facilities for international bandwidth owned by National and international bandwidth operators shall be permitted for a period of five years from the date of issue of these guidelines or three years from the date of issue of first license for royalty service whichever is earlier on the terms and conditions to be mutually agreed (clause 19). Licenses will be issued without any restriction on the number of entrants for ILD service (clause 27). Provisions regarding interconnection agreements between the ILD service providers and the terms and conditions was provided for (clauses 29, 30 and 32). The charges for access or interconnection with other networks shall be based on mutual agreements between the service providers subject to the restrictions issued from time to time by TRAI, under TRAI Act, 1997. Attention of this Court was invited to Clause 34.

284. It is further submitted that on 14.03.2002, the Bharti Airtel Ltd was granted the ILD license from DoT. On 05.02.2004, the Tata communication Ltd has signed the ILD license effective from 01. 04. 2002. Tatas had taken over the management of VSNL after it was privatized in 2002. The ILDO license contained a clause 2.2 (b) which read as follows:

'equal access to bottleneck facilities for international bandwidth owned by national and international bandwidth providers shall be permitted for a period of five years from the date of issue of the guidelines for grant of license for ILD service or

three years from the date of issue of first license for ILD service whichever is earlier, on the terms and conditions to be mutually agreed.'

Hence, the license recognized CLS to be a Bottleneck facility mandating the licensee to give equal access. Secondly, the grant of equal access to bottleneck facility was hedged by a sunset clause. It was expected that after opening the sector and issuing ILDO licenses to multiple licensees there would be enough competition in 5 years from the date of issuance of guidelines and the CLS will cease to be a bottleneck facility. Another feature was that the terms and conditions for such agreements had to be mutually agreed between parties.

[2.2 (a) The ILD Service is basically a network carriage service (also called Bearer) providing International connectivity to the Network operated by foreign carriers. The ILD service provider is permitted full flexibility to offer all types of bearer services from an integrated platform. ILD service providers will provide bearer services so that end-to-end tele-services such as voice, data, fax, video and multi-media etc. can be provided by Access Providers to the customers. Except "Global Mobile Personal Communication Service (GMPCS) including through INMARSAT" for which a separate licence is required, other listed services at Appendix are permitted to the LICENSEE. ILD service providers would be permitted to offer international bandwidth on lease to other operators. ILD service provider shall not access the subscribers directly which should be through NLD service provider or Access Provider. Resellers are not permitted.

(b) ILD service provider can enter into an agreement for leased lines with the Access Providers/NLD service provider.

Further, ILD Service Providers can access the subscribers directly only for provision of international Leased Circuits/Close Under Groups (CUGs.). Leased circuit is defined as virtual private network (VPN) using circuit or packet switched (IP Protocol) technology apart from point to point non-switched physical connections/transmission bandwidth. Public network is not to be connected with leased circuits/CUGs.

(b) Equal access to bottleneck facilities for international bandwidth owned by national and international band width providers shall be permitted for a period of five years from the date of issue of

the guidelines for grant of licence for ILD service or three years from the date of issue of first licence for ILD service, whichever is earlier, on the terms and conditions to be mutually agreed.

15. OBLIGATIONS IMPOSED ON THE LICENSEE:

15.1. The provisions of the Indian Telegraph Act 1885, the Indian Wireless Telegraphy Act 1933, and the Telecom Regulatory Authority of India Act, 1997 and rules & regulations framed thereunder as modified from time to time or any other statute on the replacement of either or all shall govern this LICENCE.

17. NETWORK INTERCONNECTION

17.1 It shall be mandatory for all NLD service providers and all ILD Service providers to provide interconnection to each other whereby the subscribers could have a free choice to make international long distance calls through any ILD service provider. International Long Distance traffic should be routed through network of NLD service providers, to the ILD service providers gateways for onward transmission to international networks. However, the access provider shall not refuse to interconnect with the LICENSEE directly in situations where ILD Gateway Switches, and that of Access Provider's (GMSC/ Transit Switch) are located at the same station of Level -I TAX.

17.5 The terms and conditions of interconnection including standard interfaces, points of interconnection and technical aspects will be such as mutually agreed between the service providers.

17.7 The ILD Service Licensee shall comply with any direction on interconnection regulations issued by the TRAI under TRAI Act, 1997.

17.9 The charges for access or interconnection with other networks shall be based on mutual agreements between the service providers subject to the restrictions issued from time to time by TRAI under TRAI Act, 1997.

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"ACCESS PROVIDERS" means the Basic, Cellular and Cable Service Providers who have a direct access with the subscribers.

"INTERCONNECTION" is as defined by the TRAI vide its regulations issued in this respect.]

285. It is also submitted that on 06.06.2005, after expiry of three years of the issuance of the ILDO License (sunset clause 2.2(c) in License) it was expected that enough competition would have been achieved after the ILD sector was opened in 2002. However, the Authority received several representations which indicated that CLS continued to be a bottleneck facility and there was lack of competition. Accordingly, TRAI initiated consultation process on measures to promote competition in international private leased circuits (IPLC) in India under which one of the issues was whether the submarine cable Landing stations could still be considered a bottleneck facility in India.

[International Private Leased Circuit (IPLC) is one of the most significant elements of International Connectivity for International Telecom Services like ILD, Internet, Broadband and ITES. This resource is key to success of BPO, ITES and broadband services in the country leading to growth of employment and GDP. The international connectivity consists of distant end IPLC (half circuit), near end IPLC (half circuit) and Access to submarine Cable Landing Station. At the time of opening up of International Long distance telecom service to private sector in the year 2002, the Government had realized that Submarine Cable Landing Station is essentially a 'bottleneck facility' and the fact that access to international connectivity would be severely affected by monopolistic position of the incumbent ILD operator.

1.1.2 Competition was introduced in the year 2002 in the ILDO segment. Despite this, the IPLC tariffs in India have not come down to the levels witnessed in other countries in Asia reflecting the lack of effective competition in the market. On these grounds, stakeholders have represented to the Authority to take steps to facilitate more competition in this segment. One of the voluntary associations submitted to the Authority that, ILDOs are bound by the conditions of license to offer bottleneck facilities to all users and other ILDOs. The access to international cable capacity is a bottleneck at this time, as India has limited number of landing stations. It was also represented that ILDOs especially those owning landing facilities should be made to offer a discounted rate to other ILDOs so as to generate the higher order capacity utilization and also to encourage sharing of this 'bottleneck facility'.

1.3.1 Many representations have been received

during the year regarding high charges for the international connectivity as well as allegedly anti-competitive behavior by the dominant operator. These representations have been of following types:

i. Higher and commercially non-competitive charges for international bandwidth by the incumbent hampering the growth of Broadband and Internet in the country.

ii. Problem faced by Indian ISPs in accessing the international carriers' cable directly at the landing station of incumbent.

iii. Delays and problems faced in co-location of the equipment by new ILDOs at the incumbent ILDOs premises.

iv. Non-permissibility of reselling of international bandwidth in India.

v. Differential tariff charged for IPLC resources provided to ILDO and ISPs.

vi. Higher charges for access to international capacity.

vii. Non-availability of sufficient & reliable international bandwidth at competitive prices for growth of BPO and ITES sector.

viii. Need for restoration facilities as a backup for ChennaiSingapore cable to enable customer traffic to be transferred on a alternate cable in case of failure.

1.3.2 The observations made on the above highlight that there is lack of effective competition in the IPLC segment and suitable measures are required to bring down the costs of IPLC for the end users. Generally, following methods have been utilized by regulators to achieve this objective:

i. Fixing up of ceiling tariff for various capacities of IPLC, in case the market price is much higher in comparison with the international benchmarks and general trend in telecom.

ii. Permitting resellers in the IPLC market, which are essentially non-facility based operators.

iii. Removing barriers for access to cable landing stations.

iv. Facilitating mutual sharing of landing station infrastructure as well as international cable capacities among the carriers.

1.3.5 Regarding (iii) above, the licensor while

opening up the sector had foreseen the possibility of landing stations being misused by a monopoly owner of these stations to delay development of competition. There appears to be need to facilitate the access to cable landing station by new service providers as well as by the new international cable carriers. This aspect has been discussed in more detail in the following sections of this chapter.

1.4.1 Normally the submarine cable operator or the owner manages and controls the landing station also. For consortia cable typically the consortia member in each country where the cable lands, manages the landing station. In future, it is always possible that a situation could arise wherein change of ownership of submarine cable and / or change in the ownership of landing stations could take place impacting the relationship between these two entities. It is thus evident that under circumstances of monopoly or limited number of cable landing stations or other circumstances there could be a need for regulating the access to submarine cable landing station.

1.4.3 Regulators in various countries have felt the necessity of issuing explicit directives/regulations/order for access to submarine cable capacities. These generally include:

a) Circumstances under which submarine cable landing facilities are considered as bottleneck facilities.

b) Close monitoring and scrutinizing the situation of possible anticompetitive behaviour in order to ascertain whether the incumbent operator continues to control most of the submarine cable landing facilities in its country.

c) Charges for Landing Facility, Access & Collocation.

d) Time Limit for Provision of Landing Facility & Access.

2.2 In India, the international long distance (ILD) segment was opened to competition in 2002. Videsh Sanchar Nigam Ltd. (VSNL) is the incumbent operator with landing station facilities at Mumbai, Cochin and Chennai. The other ILDOs are Bharti Infotel, Reliance Infocomm, BSNL and Data Access. Bharti Infotel owns a landing station facility at Chennai. Bharti Infotel has reported that their capacity for the IPLC is limited to non-restorable category. As of now, Reliance Infocomm has not yet

established their own cable landing facilities. M/s Data Access and M/s BSNL do not own cablelanding facilities. Thus, the prevalent market structure for provisioning of IPLC in India is such that there are only three active players (who currently own the cables) and only two of them have cable-landing facilities. It is gathered that in many countries the number of such players is very large and most of them are NonFacility Based Operators, i.e., without owning the cable landing systems. Further, at present, resellers in the ILDO market are not permitted in India as per the license conditions and the focus till now has been on building additional international capacity.

2.2.1 Lack of competition in the IPLC market, or price for IPLC being much above cost, also implies a non-level playing field for the operators which use IPLC as an input but do not own it, as these operators have to compete in their service market with owners of IPLC which could charge prices much above costs unless regulated. For instance, the IPLC providers are also Internet Service Provider and thus they compete with other Internet service providers who use international bandwidth resources to compete with IPLC providers. Similarly, these IPLC providers (facility based ILDOs) are also providing international long distance telephony and to that extent 8 non-facility based ILDOs have to depend upon facilities of these IPLC providers.

2.2.2 At the time of opening up the sector for competition, VSNL, the incumbent operator was the only operator in the international telecom market. Therefore, enabling provision for new entrants was incorporated in the ILD licences which states as under: "Equal access to bottleneck facilities for international bandwidth owned by national and international bandwidth providers shall be permitted for a period of five years from the date of issue of the guidelines for grant of licence for ILD service or three years from the date of issue of first licence for ILD service, whichever is earlier, on the terms and conditions to be mutually agreed". This provision has since lapsed in February 2005, i.e., after completion of 3 years time period after issue of first private licence for ILD services in February 2002.

2.3 Control of international capacities, cable landing stations and associated facilities by only few operators can enable the owners to stall or delay entry of competitive operators. Problems can also be

faced by operators who have acquired capacity in a cable system from other international carrier and wishing to access this capacity at the landing station of an ILDO. Discussions with industry sources suggested that establishing an international cable system including landing facilities in India not only requires a huge amount of investment but is also a time consuming process involving various clearances including security clearance, maritime clearance, civil authorities permissions etc. Thus, the control of access to the cable landing stations makes it possible for the owner of the access facility to impose non-price constraints affecting the competition.

2.4 The licensor issued first ILD license in Feb. 2002 and therefore, the new ILDOs were entitled for equal ease of access to bottleneck facilities at Submarine Cable Landing Station of the incumbent operator upto Feb. 2005. As per the license, the terms and conditions of such access were to be mutually agreed. However, it is observed that there is no standard/published access agreement, which the new service providers can easily make use of for availing of access to international cable capacity. In these circumstances there is always a scope for delay/denial of access to the capacity acquired by the competing operators or any other service provider.

2.5 Also it is observed that problems were faced by new service providers including ISPs to have timely access to international capacity at a competitive tariff. Additionally, non-tariff issues like provision of data security monitoring system, provision of grooming service and co-location are known to result in delay in provisioning of capacity. Also, some industry organizations have represented that there is a shortage of high quality reliable international connectivity at competitive price.

2.6 Thus in order to enable timely provision of international capacities at affordable price to meet the need of all the end users and industry at large there is a need to facilitate further competition through different regulatory interventions.

5.1 The Regulatory Concerns 5.1.1 Regulators in many countries have been concerned about the lack of competition in international connectivity market. It has been recognized that there is potential for cable system owner particularly the incumbent to delay the provision of resources through tariff and non-tariff barriers preventing the competition by new entrants.

The Primary Regulatory concern is to ensure that the incumbent having control over the cable system do not resort to non-price discrimination like denial/ delay in providing access, providing poor quality of service, unreasonable terms and conditions for Access etc. 5.1.2 Therefore, it is felt that there is a need to have consultation over the issue related with introduction of resellers and retail-minus wholesale pricing, facilitation of mutual infrastructure sharing, registration of international cable carriers, Charges for Physical Facilities, Access Charges, O&M Charges, Co-location Charges, Timeframe and other terms and conditions of Access at cable landing stations.

286. On 14.12.2015, the Department of Telecommunication, in order to promote further development in the sector and increase competition issued the revised guidelines for issue of license for international long distance service, wherein the entry fee for ILD license was reduced to Rs.2.5 crores from Rs.25 crores and the annual license fee was reduced from 15% of the adjusted gross revenue to 6%. In terms of the revised guidelines the license agreement was modified w.e.f 01.01.2006.

[5.1. LICENSEE shall pay one time Entry Fee of Rs 25.00 crores (Rupees twenty five crores only), which shall be non-refundable and shall be payable before signing of LICENCE.

5.2. In addition to entry fee described above the annual licence fee shall be 15% of the Adjusted Gross Revenue (AGR) inclusive of USO levy. AGR is as defined in the definition. The licence fee shall be payable quarterly in advance. Full details of the settlement regime through accounting rate mechanisms shall be required to be filed by the LICENSEE with the Licensor on regular basis. All bilateral settlements between the ILD service licensee and other foreign partner (carrier) shall be through normal banking channels in a transparent manner."

Thus, in order to ensure increase in competition, the Licensor opened the sector upon recommendations of TRAI, granted licenses and modified terms of license to facilitate further competition. Along side the regulator was examining ways to further increase the competition. One of the steps taken by the Authority was to prescribe tariff rates for International Private Leased Circuits (IPLC). This was done to ensure that cost based tariffs are charged from the consumer and level playing field is ensured amongst the service providers.

287. On 16.12.2005, TRAI in pursuance to the consultation process submitted its recommendation on 16.12.2005. The relevant portion of the recommendations read as follows:

"4.6 Recommendation:4.6.1. The authority therefore, recommends that equal access to bottleneck facility at the cable Landing stations (CLS), including landing facilities for submarine cables by licensed operators on the basis of nondiscrimination, without any sunset clause, should be mandated.

4.6.2. The ILD owning the cable Landing Station should also be mandated to publish, with prior approval of the regulator, the terms and conditions for all such access provision. Regulator may also determine and specify cost-based access charges through its regulation.

4.6.3. Clause 2.2 (b) of ILD service license should be suitably amended for this purpose and the existing time limits mentioned therein may be deleted." SEE PAGE 118 AT 145 - 146."

In the body of the Recommendations, the Authority examined the reasons for lack of competition:

[1. BACKGROUND - NEED FOR EFFECTIVE COMPETITION IN IPLC SEGMENT

1.1 Software exporters, BPO units, banks and other financial services companies, Internet Service Providers (ISPs) and ILDOs are key users of IPLCs. IPLC is also considered to be one of the basic requirements for Information Technology (IT) and IT-Enabled Services (ITES) industries like Business Process Outsourcing (BPO) and Knowledge Process Outsourcing (KPO). India has emerged as one of the leading providers of ITES in the world and is fast acquiring a formidable reputation in this sector. In addition, ISPs use IPLC for their upstream connectivity abroad. The price of IPLC as well as access to essential facilities at CLSSs needs to be based on competitive costs for these important initiatives. Further, growth of broadband is now a major objective of the Government as indicated by various Government initiatives including the Broadband Policy 2004 of the Government, which also provides a basis for fundamentally transforming the socio-economic opportunities in rural India. This requires consumer prices for the various broadband-based services to be affordable.

1.2 The ILD segment of telecom sector was opened

for competition in March 2002 on recommendations of TRAI. During the three years period since 2002, the Authority has been closely monitoring the market developments in the ILD sector in general and in IPLC segment in particular. Observing the market price of IPLC to be on higher side TRAI fixed ceiling tariff for IPLC during September 2005 to bring down cost for the users by an extent of 59% for higher capacities. Beside the IPLC tariffs, the ceiling tariffs for Domestic Leased Circuits (DLC) have also been lowered substantially, with a reduction of 70% over the market price for higher capacities.

1.3 At the time of opening up the sector for competition, VSNL, the incumbent operator was the only operator in the International Long Distance (ILD) market. Therefore, enabling provision for access to bottleneck facility for international bandwidth for new entrants was incorporated in clause 2.2(b) of the ILD licences, which states as under:

"Equal access to bottleneck facilities for international bandwidth owned by national and international bandwidth providers shall be permitted for a period of five years from the date of issue of the guidelines for grant of licence for ILD service or three years from the date of issue of first licence for ILD service, whichever is earlier, on the terms and conditions to be mutually agreed".

1.4 Videsh Sanchar Nigam Ltd. (VSNL) is the incumbent operator with landing station facilities at Mumbai, Cochin and Chennai. The other ILDOs are Bharti Infotel, Reliance Infocomm, BSNL and Data Access. Out of these ILDOs, Bharati Infotel only owns a Cable Landing Station. At present, Reliance Infocomm & M/s BSNL are still in the process of setting up their own cable-landing facilities and M/s Data Access is not known to provide any service now. Thus, the prevalent market structure for provisioning of IPLC in India is such that there are only three players (who currently own the international cables) and only two of them own the cable-landing stations. As of now, Reliance Infocomm is dependent upon the CLS facility of VSNL to access its capacity available in FLAG cable system owned by it.

1.5 During finalization of ceiling tariffs for IPLC, it was observed that fixation of ceiling tariff alone is not sufficient in long-term as some impediments still existed, which are identified to be following:

- Problems in access to international bandwidth and cable landing stations

- Difficulties in Co-location of equipment at Cable Landing Stations including the landing facilities for new cables.

- High Access charges for facilities at Cable Landing Stations.

- Limited number of players in ILD market

1.6 It was noted that the IPLC providers (who own facilities) are also providing international long distance telephony and some of the ILDOs who are not owning international capacities have to depend upon facilities of IPLC providers owning such capacities. Similarly, the IPLC providers are also Internet Service Providers and thus they compete with other Internet service providers who use their international bandwidth resources. In such a scenario, lack of competition in IPLC market may lead to non-level playing field among the operators owning IPLC facilities and those who have to lease these facilities from their competitors in their service segment.

1.7 In view of the above and the recent developments in the Indian market for IPLC, the Authority decided to initiate a consultation process to deliberate upon various issues pertaining to competition in the IPLC market and issued a consultation paper on "Measures to Promote Competition in International Private Leased Circuits (IPLC) in India" in June 2005. The open house discussions on this were held at Mumbai and New Delhi during July 2005. The Authority considered the existing market conditions in India for IPLC including market prices, its market structure, and the conditions prevalent elsewhere in the region and the practices governing regulation of IPLC in other jurisdictions to draw various conclusions which form the basis of recommendations on these issues. These recommendations are presented in the subsequent chapters as follows: -

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i) Entry Fee and Annual License Fee (Revenue Share).

ii) Introduction of resale in IPLC segment.

iii) Access to Essential facilities including landing facilities for new cables at cable landing stations.

iv) Registration of non-ILDO international cable carriers with the licensor.

4.1.3 The first ILD license was issued in Feb. 2002 and therefore, the new ILDOs were entitled for equal ease of access to bottleneck facilities at Cable Landing Station of the incumbent operator upto Feb. 2005. As per the license, the terms and conditions of such access were to be mutually agreed between the parties concerned. However, it is observed that there is no standard/published access facilitation agreement, which the new service providers can make use of for availing of access to international cable capacity. In these circumstances there has been a scope for delay in provisioning of access to the capacity acquired by the competing operators from incumbent and other carriers. Also as the terms & conditions of such access are to be mutually agreed between the parties concerned, the regulator is not in a position to intervene in such matters.

4.1.4 The continued control of international capacities, Cable Landing Stations (CLS) and associated facilities by only few operators can enable the owners to stall or delay entry of competitive operators and thus create major bottleneck to the growth of international telecom services. Problems can also be faced by operators who have acquired capacity in a cable system from some other international carrier and wishing to access this capacity at the landing station of an existing operator. Discussions with industry sources suggested that establishing an international cable system including landing facilities in India not only requires a large investment but is also a cumbersome process involving various timeconsuming clearances including security clearance, maritime clearance, civil authorities permissions etc. On an average setting up of a cable landing station can cost between Rs. 20 crores to 50 crores depending upon the location in the country. In the Indian conditions, the time required to setup a CLS can be a minimum of 9 months and is normally more than a year. Of course, a CLS is always built to have enough capacity for multiple cables to land therein in future.

4.1.5 As setting up CLS is a very time consuming & capital-intensive process, it is not feasible for a new operator to set up a CLS for new cables and neither it makes economic sense to duplicate the expensive CLSs infrastructure in the Country, when many cables can be landed on the same CLS. Therefore, multiple cables owned by different operators should be made to land on a common CLS for economic reasons by a mandate through terms and conditions of the license.

4.4.2 Generally, there are two issues regarding bottleneck to essential facilities at a landing station. One is denial of access to the international capacity of a consortium cable by the CLS owner. The other issue is denial of landing facilities to a third party who possesses the requisite license desirous of landing new cable at the CLS of a carrier. Both these can lead to creation of bottlenecks and therefore needs to be removed through regulatory mandate.

4.4.6 Moreover, the measures to promote competition in IPLC segment in India are designed to encourage the emergence of new competitors who would invest in more infrastructures. The ability of new licensees to compete would be greatly assisted by their ability to buy capacity on a range of cables, as well as by installing their own cables. This will need the permission for landing of new cables by an operator at the CLS owned by competing operators. This would both increase the capacity terminating in India and increase the speed with which new competitors can start to operate effectively. This requires that the access to submarine cable capacity and landing facilities at a CLS be open and non-discriminatory, both commercially and physically. The terms and conditions for such access including the charges should be finalized under regulatory supervision and the operators should be required to publish the terms & conditions as to how other ILDOs can access the cable capacity as well as landing facility commercially. An enabling provision in the ILDO license is required for this.

4.4.7 The ILDO, which owns and operates the CLS for a cable should have an obligation to provide the services required to activate and manage the capacity on the cable for any other ILDO who has the right to use such capacity by virtue of its licence in the country. In turn, this leads to the conclusion that the ILDO, which owns and operates a CLS, should have explicit obligations to provide access to other ILDOs and other service providers for the capacity they wish to procure. The obligations should be for the life of

the cable system and the terms and conditions on which these are provided including the access charges and the principles underlying these terms and conditions should be fair and non-discriminatory and finalized under regulatory supervision.

4.5.1 From the above, it can be concluded that main issues leading to creation of bottleneck at a CLS are denial of access to the existing international capacity of a submarine cable and denial of landing facilities for new consortium/ privately owned cable. The regulators in many countries have removed such bottlenecks by mandating the nondiscriminatory, fair and open access at the CLSs in their countries. In case of Hong Kong, two consortium/ privately owned cables and in case of Singapore, three such cables have been permitted to land at the CLSs not owned by the owners of such cable systems after enabling regulation was put in place.

4.5.2 Even after 3 years of competition in ILDC sector, the new entrants are not able to provide an effective competition in IPLC market and the incumbent operator continues to be dominant player in the market. As discussed above, the dominance of ownership of CLSs with incumbent operator could be one such factor, which inhibits the effectiveness of competition. As brought out in para 4.1.4, the number of clearances required and the time taken for installation and commissioning of CLS in addition to substantial cost involved, contributes for making this a bottleneck facility. Authority's concern always has been to reduce the cost by effective and efficient utilization of resources and also by introducing the effective competition in the market. The international practice in many countries also establishes the sharing of CLS by multiple international cable carriers. Keeping this in view, Authority considers that CLS owners should be mandated to share the facility with various international cable carriers.

4.5.3 The significant power to control the critical resource of international cable capacity through controlling the access and landing facilities at CLSs has been well recognized and has led many countries, to establish clear obligations and rights of access to these stations. The grounds of such action are that the international capacity provided by these cables is a critical input element to all international services. Also, it is not economically prudent to duplicate the CLS facilities for every new cable, as it is technically feasible & commercially desirable as

well as efficient to land multiple cables on same CLS. Therefore, access to the international capacity as well as landing facilities needs to be mandated and the terms of conditions of such access to be fair, transparent and non-discriminatory. For this the regulator is required to fix the cost based access charges as well as lay down the broad principles underlying the terms and conditions.

4.5.6 For this purpose enabling provision is required in the ILDO license agreement, whereupon the requisite regulation including the cost based charges can be framed up by the regulator. For this the Clause 2.2(b) of ILDO license, which had a provision for equal ease of access to bottleneck facilities for international bandwidth and has since lapsed, needs to be modified. Such modification is permissible under Clause 12.1 of ILDO license, which empowers the licensor to do so in case it is felt necessary or expedient to do so in public interest."

Thus, the Authority concluded that:

- a) the CLS continues to be a bottleneck facility,
- b) there is lack of competition which requires regulatory intervention,
- c) there cannot be a sunset clause of 3 or 5 years as it existed earlier,
- d) there is a need to modify the terms and conditions of the license which said that terms and conditions of agreement shall be mutually agreed. This is because any attempt by the Authority in exercise of its powers under the TRAI Act to fix the terms and conditions between the OCLS and the seeker or fix charges for the access would be viewed as being in conflict with the existing term of license mandating mutually agreed terms. Hence, the existing term needed to be modified so that any future fixation of terms or charges by the Authority is not in conflict with the terms of the License.

288. On 23.11.2006, the DoT issued a letter dated 23. 11. 2006 where it stated that it has accepted the following two recommendations:

1. Introduction of resale in IPL C segment.
2. Access to essential facilities including landing facilities for submarine cables at cable Landing stations.

The letter then stated that *"it is requested that the detailed terms and conditions in respect of these two recommendations may please be submitted to DoT. Relevant clauses of the license agreement shall be suitably amended upon receipt of the detail of terms and conditions from TRA I."* It is thus clear that the DOT specifically asked for the terms and condition in relation to the above two recommendations that were accepted by it so that it can carry out suitable amendment in the license agreement.

289. On 07.12.2006, TRAI vide its letter dated 7.12.2006 pointed out that it would be imperative for the licensor to make necessary amendments in the ILD license specifically in clauses 2.2 (c), 17.5 and 17.10, so as to give effect to the recommendations. The suggested text of the amended clauses was given in an Annexure enclosed with the letter. A perusal of the suggested text of the amended clause 2.2(c) would show that the licensor has eventually accepted the suggested text of the amended clause without any modification except adding the words DoT. *Para 4 of this letter makes it clear that the amendment to the license is sought in advance so that the terms finalized by TRAI in exercise of its powers under the TRAI Act is not in conflict with the license terms.*

290. It is further submitted that on 15.01.2007, the Department of Telecommunications accepted the suggested text of the amended clause given by TRAI and amended the ILD service license. The new clause 2.2 (c) reads as follows:

"equal access to bottleneck facilities at the cable Landing stations (CLS) including landing facilities for submarine cable for licensed operators on the basis of non-discrimination shall be mandatory. The terms and conditions for such access provision shall be published with prior approval of the TRAI, by the licensee owning the cable Landing Station. The charges for such access provision shall be governed by the regulations/orders as may be made by the TRA I/DoT from time to time".

291. On 13.04.2007, after the Amendments to the License, TRAI issued a consultation paper on Access to Essential Facilities (including Landing Facilities For Submarine Cables)

at Cable Landing Stations on 13.04.2007 to explore the nature of Regulatory intervention. Along with the said consultation paper, TRAI also provided a proposed draft regulation. The Authority mooted adoption of a soft regulatory intervention approach and thought it fit not to prescribe the cost based charges itself but as a first step to allow the OCLS to determine the cost based charges themselves and seek approval of the Authority which shall be given on the basis of well established principles of costing methodology.

[The Telecom Regulatory Authority of India (TRAI) had earlier observed that International Private Leased Circuits (IPLC) segment is lacking competition needed for creating conducive environment for growth of various telecom services and requires soft regulatory intervention. In order to enhance competition in international bandwidth connectivity segment, TRAI had issued Consultation Paper No.5/2005 "Measures to Promote Competition in International Private Leased Circuits (IPLC) in India", in June 2005. The Authority made recommendations to the Department of Telecommunications (DOT) on "Measures to Promote Competition in International Private Leased Circuits (IPLC) in India" on December 16, 2005.

4.5.1 Taking into consideration the International practices in general and Indian Scenario in particular as discussed above, TRAI has framed the draft regulations on "The International Telecommunication Access to Essential Facilities (Including Landing Facilities for Submarine Cables) at Cable Landing Stations" which also mandates publication of "Cable Landing Station-Reference Interconnect Offer (CLS-RIO)".

Following issues have been addressed in the proposed regulations/CLS-RIO for facilitating and enabling the timely provision of access to essential facilities including landing facilities and Co-location at CLS, on fair and non-discriminatory basis to the requesting service provider by the Owner of Cable Landing Station.

- Eligibility for Access Facilitation
- Access Facilitation and Interconnection including time frame
- Co-location facility
- Capacity up-gradation
- Grooming Service
- Minimum Commitment Period of the Co-location Service
- Co-location site access lead-time and related issues
- Landing Facilities]

Issues 1 and 2 of the Consultation, relied on by TRAI are as follows:

[1. (a) Is regulation required to be issued by the TRAI for mandating CLS-RIO to access the essential facilities and co-location at cable landing stations?

(b) If yes, whether the draft regulations (at Chapter 5) framed for access to essential facilities including landing facilities and Co-location at Cable Landing Station (CLS), enable the timely provision with fair, equitable, transparent and non-discriminatory basis to requesting eligible Indian International Telecommunication Entity from the Owner of Cable Landing Stations?

(c) In case considered inadequate, please give reasons and suggest any other additional/ alternative regulations required to achieve the basic objective of timely, fair and non-discriminatory access at CLS and Co-location with reasons thereof.

2. (a) Whether the charges for Co-location and access to CLS for landing facilities should be specified by TRAI or should it be left to commercial negotiations between an eligible Indian International Telecommunication Entity and the Owner of Cable Landing Station?

(b) Give reasons for your comments.

(c) If the above charges are to be specified by TRAI, what elements are to be taken in to consideration and which costing methodology is to be employed? Give cost of individual elements separately and detailed calculation sheet?"]

Question was raised whether TRAI should specify charges?

[1.5 TRAI's recommendations pertaining to (a) Introduction of Resale in IPLC segments and (b) Access to Essential Facilities including landing facilities for submarine cables at cable landing stations have been accepted by the licensor [copy at Annexure 1]. The Licensor has also amended relevant clauses in ILD licence vide letter no.16-3/2006-BS-I dated 15th January 2007 to enable TRAI to bring out regulations to ensure efficient, transparent and non discriminatory "Access to Essential Facilities including Landing Facilities for Submarine Cables at Cable Landing Stations".

1.6 Normally the submarine cable operator or the owner manages and controls the landing station also.

For consortia cable typically the consortia member in each country where the cable lands, manages the landing station. In future, it is always possible that a situation could arise wherein change of ownership of submarine cable and / or change in the ownership of landing stations could take place impacting the relationship between these two entities. It is also possible that new submarine cables may land in the country. It is thus evident that under circumstances of monopoly or limited number of cable landing stations or other circumstances there is a need for regulating the access to submarine cable landing stations.

1.7 The Regulations to ensure efficient, transparent and non-discriminatory access to submarine cable at the landing station is required so that:

a) The new operators have access to the capacity in the same way as the consortium members.

b) Activated capacity is not unduly delayed by consortia member(s) having control over CLS.

c) Charges are transparent and non-discriminatory to consortia-members or non-members.

d) Restoration and maintenance services are ensured which is provided through a Service Level Agreement (SLA).

1.8 Regulators in various countries have felt the necessity of issuing explicit directives/regulations/order for access to submarine cable capacities. These generally include:

a) Submarine cable landing facilities which are considered as bottleneck facilities.

b) Close monitoring and scrutinizing the situation of possible anti-competitive behaviour in order to ascertain whether the incumbent operator / operator with Significant Market Power (SMP) continues to control most of the submarine cable landing facilities in its country.

c) Charges for Access, Co-location and Landing Facility

d) Time Limit for Provision of Access, Co-location and Landing Facility.

2.10.4 In the beginning after liberalization, ILDO licences were acquired by Bharti Airtel Ltd., Reliance Communications, Bharat Sanchar Nigam Ltd (BSNL) and Data Access Ltd. However Data Access Limited is not operational at present. The sector was

further liberalized in the year 2005-06 when Government reduced the entry fee for ILD Licence from Rs. 25 crore to Rs. 2.5 crore and annual revenue share reduced to 6% from 15% both for existing and new ILDOs. After reduction of entry /Licence fee, six new ILD licences have been issued. (Annex 3 provides name of all ILDOs as on 20.03.2007)

2.10.5 Control of International capacities, cable landing stations and associated facilities by only few operators can enable the owners to stall or delay entry of new operators. Problems can also be faced by operators who have acquired capacity in a cable system from other International carrier/submarine cable owner and wishing to access this capacity at the landing station of an ILDO. Discussions with industry sources suggested that establishing an International cable system including landing facilities in India not only requires a huge amount of investment but is also a time consuming process involving various clearances including security clearance, maritime clearance and civil authorities permissions etc. Thus, the control of access to the cable landing stations makes it possible for the owner of the access facility to impose non-price constraints affecting the competition. The licensor issued first ILD licence in Feb. 2002 and therefore, the new ILDOs were entitled for equal ease of access to bottleneck facilities at Submarine Cable Landing Station of the incumbent operator upto Feb. 2005. As per the licence, the terms and conditions of such access were to be mutually agreed. It is observed that there is no standard/published access agreement, which the new service providers can easily make use for availing of access to International submarine cable capacity. In such circumstances there is always a scope for delay/denial of access to the capacity acquired by the competing new operators or any other service provider.

2.10.6 Also it is observed that problems were faced by new service providers including ISPs to have timely access to International submarine cable capacity at a competitive tariff. Additionally, non-tariff issues like provision of grooming service and Co-location are known to result in delay in provisioning of capacity. Also, some industry organizations have represented that there is a shortage of high quality reliable international connectivity at competitive price. Thus in order to enable timely provision of International submarine capacities at affordable price to meet the need of all the end users and industry at large, there is a need

of regulatory interventions by way of making regulations for the access facilities and Co-location at CLS.

2.10.7 The summary of Present International Bandwidth situation in the country is given below:

- * No. of ILDOs.....11
- * No. of CLS.....6
- * No. of Cable Systems.....9
- * Total Designed Capacity.....18. 60 Tbps
- * Total Lit (Equipped) Capacity.....655 Gbps (3.5% of design capacity)
- * Total Protected Capacity available....100 Gbps* (15% of lit capacity)
- * Total Utilized Capacity.....87 Gbps (87% of protected capacity, 13% of total lit capacity)
- * Total Spare Capacity.....553.50 Gbps (85% of total lit capacity)
- * 10 Gb each on TIC & i2i have mutual protection as a swap arrangement between VSNL & Bharti.

4.5.14. The Authority examined the principle whether the cost based charges for access facilitation and co-location charges are required to be prescribed in the regulations. The Authority observed that in most of the countries the charges are published by the OCLS with the prior approval of the Regulator. The Authority is also of the view that to reach on realistic cost based charges and provide first opportunity to the owner of the cabling landing station, it is a better that OCLS determine the charges on the basis of the cost involved in access facilitation and to provide co-location. However these charges are to be approved by the TRAI on the basis of well-established principles of costing methodology used by the Authority in various regulations time to time. For proper examination by the Authority, it is required that OCLS furnish cost of the network elements involved in access facilitation and also the various cost components involved in providing co-location facility. Costing methodology along with calculation sheet to arrive at the various charges i.e. access facilitation charges, operation and maintenance charges and co-location charges is also required to be furnished by owner of cable landing station to the Authority.]

292. It is further submitted that on 07.06.2007, TRAI issued the International Telecommunication Access to Essential Facilities at Cable Landing Stations. The salient features of the aforesaid regulations are as under:

(i) the said regulation has been issued in exercise of powers conferred upon TRAI under section 36 read with section 11(1)(b) (ii), (iii) and (iv) of the TRAI act, 1997.

(ii) Regulation 2 sets out the definitions. The relevant definitions are A) Access facilitation, b) Access facilitation charges, F) cable Landing Station, G) cable Landing Station - reference interconnect offer, H) co-location facilities, I) co-location charges, l) eligible Indian International Telecommunication Entity, p) License, v) owner of cable landing station.

(iii) Regulation 3 provides for:

a) the owner of cable Landing Station shall provide access to any eligible Indian International telecommunication entity, on fair and non-discriminatory terms and conditions, at its cable Landing stations.

b) OCLS shall submit a "cable Landing Station reference interconnect offer" to TRAI, in a specified format, containing the terms and conditions of access facilities and co-location facilities including landing facilities for submarine cables at its cable Landing stations for its approval within 30 days from the date of commencement of the Regulations.

c) The Authority shall approve the RIO within 60 days of submission of RIO. On getting approval from TRAI, OCLS shall publish the RIO within 15 days of Approval. However, under the proviso the Authority could suggest modifications which had to be carried out by the OCLS.

(iv) regulation 10 provides for Access facilitation charges and payment terms. It provides as follows: (1) for the purposes of accessing the landing facilities at a cable Landing Station the Access facilitation charges are specified in part II of the schedule shall be----

a) payable by the eligible Indian International telecommunication entity to the owner of the cable Landing Station;

b) determined on the basis of the cost of network elements involved in the provision of access and distributed over the complete capacity of the system."

(v) Schedule gives the form of the RIO at page 265 volume 1. Cl. 1.2 at pg 268 would show that the charges are for 3 years.

(vi) Explanatory Memorandum to the Regulations.

The explanatory memorandum to the regulations provides for the various considerations and reasons for issuance of the regulation. The relevant paragraphs of the EM are:

Cl.1.1 and 1.2 for background at pg 281;

1.1 International Private Leased Circuits (IPLC) is one of the significant elements of international connectivity for Internet, Broadband and IP enabled services. The international connectivity consists of distant end IPLC half circuit, near end IPLC half circuit and access to submarine cable landing stations. At the time of opening of the international long distance telecom services to private sector in the year 2002, the Government had realized that submarine cable landing station is essentially a bottleneck facility and the fact that access to international connectivity would be severally influenced by monopolistic position of the incumbent International Long Distance (ILD) operator. 1.2 In order to enhance competition in international connectivity segment, Telecom Regulatory Authority of India (TRAI) initiated a consultation process in June 2005. TRAI made recommendations to Department of Telecommunications (DOT) on measures to promote competition in International Private Leased Circuits in India on December 16, 2005. TRAI's recommendations pertaining to access to essential facilities including landing facilities for submarine cables have been accepted by the licensor. The Department has also amended relevant clauses in ILD licence to enable TRAI to bring out regulations to ensure efficient, transparent and non-discriminatory Access to Essential Facilities (including landing facilities) for submarine cables at Cable Landing Stations.

Cl. 1.3 at pg 281 gives details of how consultation was carried out in a transparent manner;

"1.3 The Authority has, thereafter, for the purpose of bringing out regulations to ensure efficient, transparent and non-discriminatory access to Essential Facilities, including landing facilities

for submarine cables, at Cable Landing Stations released a Consultation Paper on 13th April, 2007 including the draft regulations with detailed description to various terms & conditions proposed for access facilitation for submarine cables at Cable Landing Station (CLS) and co-location of equipment at CLS. The stakeholders were to submit written comments by the 30th April 2007. On the request of some of the stakeholders, the date for submission of written comments was extended till the 7th May 2007. Written comments were received from AT&T, Orange Business Services, BT Global Services, BSNL, MTNL, Bharti, VSNL, Reliance, Cables & Wireless, Sify Communications Ltd., Verizon Communications Pvt. Ltd., ISPAI, Telxess Consulting Service Pvt. Ltd. and Asia Pacific Carriers' Coalition. Gist of comments received from stakeholders by the extended date of submission of comments i.e. 7th May 2007 was placed on the TRAI's website. Open House Discussion was held on 14th May 2007 in 36 Delhi with the stakeholders wherein stakeholders had expressed their views on various aspects of the subject."

Cl. 2.2.2 at pg 282 shows that the argument that the present regulation must govern the dominant OCLSs like the Petitioners was rejected;

2.2.2 In this matter, the Authority noted that majority of the stakeholders are in favour of mandating access and co-location to submarine cable landing station, which is an essential input for many international telecommunication services. The Authority further noted that limiting the scope of this regulation to mandate access, co-location and backhaul arrangement at cable landing station controlled only by dominant / incumbent operators would not yield the optimum results and will also hinder the emergence of sustainable competitive market. It may also impose burden and obligation only on dominant / incumbent operators to meet request for access and would, therefore, not be fair. The Authority is of the view that adequate competition is not there at present in accessing international bandwidth. Therefore, to create effective competition in the sector, Cable Landing Station-Reference Interconnect Offer (CLS-RIO) needs to be mandated for the owner of all cable landing stations including those would be commissioned in the future.

Cl. 2.4 at pg 283: The suggestion of stakeholders that they should be allowed to comment on the RIO terms submitted by OCLS to TRAI before approval was

rejected. This in effect meant that the charges in RIO were not approved after wide consultation.

2.4. ISSUE 3: COMMENT OF OTHER PARTIES ON CLS-RIO SUBMITTED BY OWNER OF CABLE LANDING STATION (OCLS) TO THE AUTHORITY FOR APPROVAL

2.4.1 Following comment received on the issue: Other parties may wish to comment on the proposed CLS-RIO terms which is submitted to the Authority for approval.

2.4.2 The Authority has noted this point of view of one of the stakeholders and is of the view that this is not relevant and appropriate to seek the comments on the CLS-RIO submitted by the OCLS to the Authority for approval. Since OCLS, while submitting the CLS-RIO, has been mandated to submit the detail of network cost elements and costing methodology adopted to arrive at the charges prescribed in various parts of the CLS-RIO. Therefore, the Authority is of the opinion that seeking comments again of stakeholders may unnecessarily delay the whole process and at the same time adequate opportunity has already been given to stakeholders.

Cl. 2.10.2 at pg 287 provides that the authority is of the opinion that the role of TRAI should be purely on need basis and once the cable Landing Station - reference interconnect offer is approved by the TRAI and published by the OCLS and on the basis of which such Access facilitation agreement is made should be adequate and there is no need for prior approval of all agreements. Further to maintain transparency and non-discrimination, it would be appropriate if the interconnect agreement is submitted to the authority for registration within 15 days from the date of the agreement.

2.10.2 The Authority is of the opinion that the role of TRAI should be purely on need basis and once the Cable Landing Station - Reference Interconnect Offer (CLS-RIO) is approved by the TRAI and published by OCLS and on the basis of which such Access Facilitation Agreement is made should be adequate. Further to maintain transparency and non-discrimination, it would be appropriate if the interconnect agreement is submitted to the Authority for registration within 15 days from the date of the agreement. Accordingly provision has been made in these regulations.

Cl.2.12.2 at pg 288-289: The authority examined the principle that whether the cost based charges for

Access facilitation and co-location charges are required to be prescribed in the regulations or OCLS are mandated to publish non-discriminatory and transparent charges for Access facilitation and co-location etc. The authority observed that in most of the countries the charges are published by the OCLS with the prior approval of the regulator. The authority is also the view that to have reasonable and fair charges, the need is to have such charges on cost oriented basis and also to provide first opportunity to the owner of the cable Landing Station. However, these charges will be approved by the TRAI on the basis of well established costing methodology. Prior approval of TRAI will ensure transparency, fairness and reasonability and also OCLS will not tend to adopt an arbitrary approach in prescribing various charges.

Thus, the Authority refrained from prescribing charges and gave the first opportunity to the OCLS to give a fair and cost based charges for approval. It was expected that the OCLS will not adopt an arbitrary approach. Pages 203 and 240 of the consultation paper may be seen.

293. In the year 2007, owners of cable Landing Station submitted cable Landing stations - reference interconnection offer for their cable landing stations. On 08.08.2007, TRAI convened a meeting with the petitioner. Minutes of the meeting recorded that the respondent sought further information on costing details and also make certain observation and finding. It is evident from the minutes that the Petitioner had submitted incomplete and unclear data, methodology, etc. That one of the significant observation is to the effect that there is no benefit of scale of economy in case of higher capacities. It is contended by the petitioner that the TRAI in its latest regulation has done precisely the converse by assuming that there are economies of scale in higher capacity.

294. It is further submitted that on 26.10.2007, the reference interconnection offers submitted by the various owners of the cable landing stations were approved by TRAI. ON 06.10.2010, TRAI, vide its letter dated 06.10.2010 while inviting the attention of the petitioner to regulation 25 of the regulations of 2007 and the requirement of para 1.2 of part II of the schedule to the regulations, which indicate that the applicability of the Access facilitation charges, annual operation and maintenance charges and co-location charges is for a period of three years requested the petitioner to resubmit the RIO within 30 days from the date of the letter in order to align

Access facilitation charges, annual operation and maintenance charges and co-location charges with the current costs and utilisation. Pursuant to this the petitioner submitted its revised RIO on 18.11.2010 And also gave a presentation to TRAI on its revised RIO on 06.01.2011.

295. On 22.06.2011, while the examination of revised RIO's submitted by various OCLS was under process, the Authority received representations from a number of service providers and their associations requesting formal broad base consultation with all industry players on review of Access facilitation charges. They submitted that since the year 2007, when TRAI had issued its regulations, there has been a dramatic change in the international bandwidth market both in terms of a significant drop in the prices of IPLC as well as an exponential rise in capacity utilization of submarine cable systems. They further submitted that international capacity utilization at the major cable landing stations in India has also gone up by at least ten times since 2007. They argued that the increased capacity utilization should have translated in proportional reduction in Access Facilitation Charges and Operation and Maintenance (O&M) Charges, however, these charges have remained virtually unchanged since 2007. As a result, CLS facility continues to remain a bottleneck facility and, therefore, there is no effective competition possible in the sector for the ILDOs, who do not own cable landing stations. They also represented that:

i) CLS access charges in India are extremely high and a comparison with other South East Asian countries shows that the charges prevalent in these countries are just a fraction of what is being charged in India;

ii) Countries in South East Asia, Far East and Western Europe regions do not have multiple charges for access to cable landing station facilities but levy a token RIO/ cross-connect charge as most of the operational and recurring costs are recovered from consortium members and original signatories;

iii) Each consortium reimburses CLS owners the cost associated with buildings and operational expenses in running these stations.

296. TRAI has further submitted that the Authority had earlier rejected the proposal to have consultation on the RIO rates before granting approval. The Authority had also hoped that the OCLSs will give non-arbitrary and cost based rates and hence it did not prescribe charges but gave first opportunity to OCLS to give cost based charges. Thus, in light of the representations and in order to provide fair opportunity to all

stakeholders and to maintain transparency in reviewing the access facilitation charges, the Authority considered it appropriate to collect the relevant information.

297. TRAI, vide its letter, dated 22.06.2011, requested all ILDOs to furnish information on eight questions. These questions concerned the prevalent regulatory practices in other countries for providing such Access, whether the Access facilitation charges/co-location charges were specified/approved by the regulator in other countries, if not, then what is the mechanism prevalent for these charges? The letter also sought information on what element should be taken into consideration by the regulator for determining the Access facilitation charges/co-location charges, whether in other countries the Access facilitation charges are dependent on the capacity activated, whether various charges like Access facilitation charges, backhaul charges and co-location charges are clubbed together or applied separately in other countries, whether Access facilitation charges are dependent on the submarine cable systems/cable Landing Station. Besides this, information was also sought on the estimates of how much international bandwidth is being consumed in India at that point of time and what is the expected consumption in three years, five years and 10 years. Paragraph 4 of this letter clearly points out that TRAI had received representations from service providers and their associations requesting formal broadbase consultation with all industry players on review of Access facilitation charges. It was in this light that in order to provide fair opportunity to all stakeholders and to maintain transparency in reviewing the Access facilitation charges that the authority considered it appropriate to collect the relevant information. This letter seeking information on eight questions is nothing but a pre-consultation paper. On 16.08.2011, the petitioners have submitted its response to the above said queries raised in the letter. It is pertinent to note that the petitioner claimed confidentiality with regard to the information supplied.

298. On 22.03.2012, based on the inputs received in the pre-consultation stage i.e. responses received to the 8 queries in the letter dated 22.06.2011, the TRAI issued a consultation paper, on Access facilitation charges and co-location charges at cable landing stations inviting comments from stakeholders by 5. 4. 2012 and counter comments by 12.4.2012. All comments were put on TRAI website.

299. TRAI has further contended that Clauses 1.4 to 1.16 deal with the historical background relating to opening up of ILD service and various methods employed by both the licensor as

well as the regulatory authority in increasing competition in the ILD sector in India. The effect of the steps like opening up of the sector and issuance of licenses in 2002, recommendations of TRAI dated 16. 12. 2005 leading to an amendment of the license terms and conditions, revision of the license terms with regard to decrease in the entry fee as well as in the annual revenue share and the 2007 regulation of the authority leading to the approval of the RIOs of the OCLSs were examined and it was concluded in clause 1.16 that the regulation of 2007 has paved way towards debottlenecking the essential facility at cable landing stations. It was also observed at clause 1.11 that due to various policy and regulatory interventions the competition amongst the ILDO's had grown. However, it has been noticed in subsequent paragraphs that the objective/purpose was far from being achieved and hence there was a need for review.

[C - Opening of ILD Service And Competition in the ILD Sector in India:

1.4. On 12.11.2001, TRAI recommended open competition in the international long distance (ILD) service. Vide Department of Telecommunication's guidelines dated 15.01.2002, the Indian Government decided to open the international long distance (ILD) service since 01.04.2002 to the private operators without any restriction on the number of operators.

1.5. At the time of opening up the ILD sector for competition, Videsh Sanchar Nigam Ltd (VSNL), the incumbent operator was the only operator in the international long distance (ILD) market. The enabling provision for access to bottleneck facility for international bandwidth for new entrants was incorporated in clause 2.2 (b) of the ILD licenses, which states as below:

"Equal access to bottleneck facilities for international bandwidth owned by national and international bandwidth providers shall be permitted for a period of five years from the date of issue of the guidelines for grant of license for ILD service or three years from the date of issue of first license for ILD service, whichever is earlier, on the terms and conditions to be mutually agreed".

1.6. Soon after opening of the ILD services, Bharti Airtel Ltd, Reliance Communications, Bharat Sanchar Nigam Ltd (BSNL) and Data Access Ltd. acquired ILDO licenses in India.

1.7. In June, 2005, TRAI initiated a consultation on measures to promote competition in IPLC in India under which one of the issues was whether the submarine cable landing stations could still be

considered a bottleneck facility in India.

1.8. Based on the consultation, TRAI sent the following recommendation to the Central Government on 16.12.2005: Consultation Paper on Access Facilitation Charges and Co-location Charges at Cable Landing Stations 3 Telecom Regulatory Authority of India

"...equal access to bottleneck facility at the CLS, including landing facilities for submarine cables by licensed operators on the basis of non discrimination, without any sunset clause, should be mandated. ... The ILDO owning the Cable Landing Station should also be mandated to publish, with prior approval of the Regulator, the terms and conditions for all such Access provision. Regulator may also determine and specify cost-based access charges through its regulation."

TRAI also recommended that the ILD license should be suitably amended for this purpose.

1.9. On 23.11.2006, the Central Government accepted the recommendations of TRAI and amended the relevant clauses in international long distance (ILD) service license vide amendment dated 15.01.2007 to ensure efficient, transparent and non-discriminatory access facilities for submarine cables at cable landing stations. The amended clause of the ILD service license is given below:

"Equal access to bottleneck facilities at the Cable Landing Stations (CLS) including landing facilities for submarine cables for licensed operators on the basis of non discrimination shall be mandatory. The terms and conditions for such access provision shall be published with prior approval of the TRAI, by the Licensee owning the cable landing station. The charges for such access provision shall be governed by the regulations/ orders as may be made by the TRAI/DoT from time to time".

1.10. Meanwhile, Department of Telecommunications (DoT) also revised the entry fee for new ILDO license from Rs. 25 Crore to Rs. 2.5 Crore and annual revenue share to 6% from existing 15% both for existing and new ILDOs to be effective from 01.01.2006. Consultation Paper on Access Facilitation Charges and Co-location Charges at Cable Landing Stations 4 Telecom Regulatory Authority of India

1.11. As a result of the various policy and regulatory interventions, the competition amongst the ILDOs grew as six new ILDOs viz. M/s i2i Enterprises

Ltd. (BT Global Communications India Pvt. Ltd.), M/s AT&T Global Network Services India Pvt. Ltd., M/s Vodafone Essar South Ltd., M/s Sify Communications Ltd., M/s Dishnet Wireless Ltd., M/s BT Telecom India Pvt. Ltd. acquired new licenses in the F.Y. 2006-07, thereby increasing the total number of ILDOs to 11, as on 31.03.2007.

D- Regulatory intervention for Access to Essential facilities at CLS

1.12. TRAI observed that the competition in IPLC segment may be further enhanced if the ILD licensees entering the market have adequate access to necessary facilities at cable landing stations. In order to ensure this access, TRAI realized the need of a regulation which may allow the ILD licensees to

- (a) have access to the cable landing stations;
- (b) physically collocate their own equipment necessary for connection in the cable landing stations;
- (c) interconnect at the cable landing station to any operator's equipment in the cable landing station at any technically feasible point and
- (d) access backhaul circuits of all types in a timely fashion, under terms and conditions and rates that are cost oriented, transparent and nondiscriminatory.

1.13. In order to deliberate on the various aspects of the afore-mentioned issues, TRAI initiated a consultation process on 'Access to Essential Facilities (including Landing Facilities for Submarine Cables) at Cable Landing Stations' in April 2007.

1.14. Based on the inputs received in the consultation process and further analysis thereof, TRAI issued 'International Telecommunication Access to Essential facilities at Cable Landing Stations Regulation, 2007' on 07.06.2007. The salient points of the Regulation are as below:

(a) The owner of cable landing station (OCLS) shall provide access to any eligible Indian International Telecommunication Entity, on fair and nondiscriminatory terms and conditions, at its cable landing stations.

(b) OCLS shall submit a 'Cable landing Station Reference Interconnect Offer (CLS RIO)' to TRAI, in a specified format, containing the terms and conditions of access facilities and co-location facilities

including landing facilities for sub-marine cables at its cable landing stations for its approval.

(c) On getting approval from TRAI, OCLS shall publish the RIO.

1.15. Subsequently, the owners of cables landing stations submitted CLS-RIO for their CLSs, which were approved by TRAI on 26.10.2007 after several discussions with them. Later, M/s BSNL submitted their CLS-RIO for the cable landing station at Tuticorin, Tamilnadu, which was approved by the Authority on 22.05.2009.

1.16. The Regulation has paved way towards debottlenecking the essential facility at cable landing stations, which resulted in a significant competition in international bandwidth segment. The enhanced competition has helped in reduction of the prices of international bandwidth substantially in India during the past four years.]

300. TRAI has further submitted that Clauses 1.17 to 1.24 deal with the issue of need for review on the basis of the various representations received from the service providers and their association requesting formal broad-based consultation with regard to the RIO rates of OCLS and the decision to issue a pre-consultation questionnaire. It is noticed in clause 1.24 that the responses that had been received from 14 service providers and 2 service providers Associations and the inputs contained therein were taken into consideration while drafting the consultation paper.

[E- Need for review

1.17. In the year 2010, some of the service providers represented to the TRAI that the access facilitation charges and co-location charges at cable landing station need a review as the cost of telecom equipment has gone down while the capacity utilization of cable landing station has gone up over a period of the previous three years.

1.18. With a view to align Access Facilitation Charges, Annual O&M Charges and Co-location Charges with the current costs and utilization, TRAI sent letters to the owners of cable landing stations (OCLSs) on 06.10.2010 to resubmit the revised Access Facilitation Charges, Annual O&M Charges, Co-location Charges for all of their cable landing stations (CLSs), including the new CLSs commissioned after October 2007. In response, the OCLSs submitted the requisite details to TRAI.

1.19. In the meantime, TRAI received representation from some of the service providers and their association requesting formal broad based consultation with all industry players on review of Access Facilitation Charges. They submitted that there has been a dramatic change in the international bandwidth market both in terms of a significant drop in the prices of IPLC as well as an exponential rise in capacity utilization of submarine cable systems since 2007. They further submitted that international capacity utilization at the major cable landing stations in India has gone up by at least 10 times since 2007. They argued that the increased capacity utilization should have translated in proportionately reduced Access Facilitation Charges and Operation and Maintenance (O&M) Charges. The service providers further submitted that these charges have remained virtually unchanged since 2007, as a result, CLS facility continues to remain a bottleneck facility and, therefore, there is no effective competition possible in the sector for the ILDOs, who do not own cable landing stations.

1.20. The service providers pointed out that CLS access charges now constitute 45- 55% of total charges on international capacity whereas the remaining 55-45% cost includes undersea fiber transport, CLS charges and IP port charges at the foreign end. They argued that this clearly reflects a very high and disproportionate CLS access charges in India. Further, they submitted that owing to very high Access Facilitation Charges, the advantage of availability of international bandwidth at competitive prices is not passing on to the customers, which is adversely affecting the proliferation of broadband services in the country.

1.21. The service providers emphasized that there is an urgent need for review of access facilitation charges in order to enable growth of the ILDO sector and to promote growth of broadband penetration in India. They also requested that the access charges should be determined on the basis of incremental cost and that the stakeholders should also be involved during the finalization of Access Charges of CLS.

1.22. In view of the various representations from the ILD service providers and their industry association, TRAI issued a letter dated 22.06.2011 wherein the ILD service providers and their industry associations were requested to furnish their comments on the following issues pertaining to 'International

Telecommunication Access to Essential facilities at Cable Landing Stations'.

(a) What are the prevalent regulatory practices in other countries for providing access to other service providers at cable landing stations by owners of the cable landing stations?

(b) Whether access facilitation charges/collocation charges for cable landing station are specified/ approved by the regulator in other countries? If yes, what is the approach/ methodology being followed by the regulator in determining these charges?

(c) In case access facilitation charges/co-location charges are not being specified/ approved by the regulator in other countries, what is the other mechanism prevalent for these charges?

(d) What elements are being taken into consideration by other regulators/ operators for determining access facilitation charges/co-location charges? Please explain with the detailed note, justification and diagram starting from man-hole to "meet-me-room" for each submarine cable landing in India, clearly indicating cost recovery mechanism for each element involved in providing access facilitation/co-location. In case, costs of some of the network elements are being taken care by the consortium, please submit relevant portion of the consortium agreement in support of your answer.

(e) Are access facilitation charges in other countries dependent on the capacity (i.e. STM-1, STM-4 or STM-16) activated?

(f) Are access facilitation charges, backhaul charges (i.e. from cable landing station to meet-me-room) and collocation charges are clubbed together or applied separately in other countries?

(g) Whether access facilitation charges are dependent on the submarine cable system/ cable landing station?

(h) According to published data/ reports or your own estimates, how much International bandwidth is being consumed in India at present? What would be the requirement of international bandwidth for India for coming three years, five years and ten years?

(i) Any other relevant information related to subject along with all necessary details.

1.23. Apart from the above information, International Long Distance Operators (ILDs) and Internet Service Providers (ISPs) with international gateway permission were requested to furnish the information in respect of international bandwidth owned/acquired and international bandwidth utilization.

1.24. Association of Competitive Telecom Operators (ACTO) vide their letter dated 28.06.2011 requested for extension of one month for submission of requisite information, due to enormity of task involved. The Authority extended the last date of submission up to 16.08.2011. Responses have been received from 14 service providers and 2 service providers associations. The inputs provided by these service providers and associations have been taken into consideration while drafting this consultation paper.]

301. Clause 2.11 at page 330 gives details of the gross revenue from ILD segment in India.

[D- ILD Sector in India

2.11. The Gross Revenue (GR) from ILD segment in India was Rs. 9054.45 Crores in the F.Y. 2010-11 up by 2.55% from Rs. 8829.13 Crores in F.Y. 2009-10. In F.Y. 2010-11, the ILD services contributed 5.27% of the total revenue of telecom services, which stood at Rs. 171718.56 Crores.]

302. Clauses 2.19, 2.22 - 2.28 at pages 337 - 339 gives reasons for a need to have a fresh look into the access facilitation charge at CLS.

[2.19. In reply to the TRAI's letter dated 06.10.2010, an ILD service provider has submitted a report to TRAI titled 'Future regulation of cable landing station charges in India' prepared by Plum consulting, London. The report emphasizes that the cable landing station market in India is highly concentrated. While Tata Communication Ltd. (TCL) has a market share of over 60%, TCL and Bharti Airtel Ltd. together have a 93% market share. The report further argues that the data suggests that the competition between international cables is likely to be limited by the lack of competition at the cable landing stations.

2.22. Thus the present international bandwidth market may be characterized by four factors:

(a) High growth rate of demand of international bandwidth

(b) A large number of ILDO licensees; presently there are 27 ILDO licensees.

(c) Moderate number of consortium cables; presently there are six consortium cables.

(d) Low competition in CLS market; The CLS market is highly concentrated where two major players command a significant market share.

2.28. Thus in order to bridge the digital divide and to further boost Indian economy, it is imperative that the international bandwidth prices are affordable and, therefore, the access facilitation charge at CLS, which presently constitutes a significant portion of it, needs a fresh look. This consultation paper is an attempt in this direction.]

303. TRAI has further submitted that Clauses 3.9 to 3.15 deal with the two conclusions reached in the 2007 regulation wherein it was stated that as a first step the authority would require the OCLS to give the cost based charges after hoping that they will not tend to adopt an arbitrary approach in prescribing various charges. Secondly, the authority had at that point of time decided against putting the RIO rates for further consultation before giving its approval. These two conclusions were objected to by various stakeholders and hence the question 1 was framed for consultation which listed out all available options for determining the charges.

[B. Approaches for Fixing of Access Facilitation Charges and Co-location Charges]

3.9. In response to the Consultation Paper on 'Access to Essential Facilities (including Landing Facilities for Submarine Cables) at Cable Landing Stations dated 13.04.2007, majority of the stakeholders were of the opinion that access facilitation and collocation charges should be determined by the cable landing station owner based on the relevant costs and should be submitted to the TRAI for approval with information concerning the underlying cost components and the costs submitted by the OCLS can be scrutinized by TRAI for reasonability.

3.10. After deliberating on the issue, the Authority made the following observations regarding the approach of fixing the Access Facilitation and Co-location charges:

"The Authority examined the principle that whether

the cost based charges for access facilitation and collocation charges are required to be prescribed in the regulations or OCLS are mandated to publish nondiscriminatory and transparent charges for access facilitation and collocation etc. The Authority observed that in most of the countries, the charges are published by the OCLS with the prior approval of the regulator. The Authority is also of the view that to have reasonable and fair charges, the need is to have such charges on cost-oriented basis and also to provide first opportunity to the owner of cable landing station. ... Prior approval of the TRAI will ensure transparency, fairness and reasonability and also OCLS will not tend to adopt an arbitrary approach in prescribing various charges."

3.11. Regarding the matter pertaining to 'the need of comment of other parties on CLS-RIO submitted by OCLS to TRAI for approval', divergent inputs were received in response to the consultation paper dated 13.04.2007. While some stakeholders were of the opinion that The OCLS may be asked to declare the various cost elements of CLS to TRAI in confidence, the others stated that there are likely to be other interested parties who may wish to comment on the proposed CLS-RIO terms.

3.12. After deliberating on the matter, the Authority observed the following regarding seeking comments from the stakeholders on the CLS-RIO submitted by the OCLS:

"...the Authority is of the opinion that seeking comments again from stakeholders may unnecessarily delay the whole process and at the same adequate opportunity has already been given to stakeholders."

3.13. In view of the afore-mentioned points, in the International Telecommunication Access to Essential Facilities at Cable Landing Stations Regulation 2007, TRAI mandated that OCLSs should submit a 'Cable landing Station Reference Interconnect Offer (CLS RIO)' to TRAI, for approval.

3.14. However, many service providers in their recent representations to TRAI have submitted that TRAI should no longer follow the present procedure under which it approves individual party submissions of cost data that are never publicly disclosed unless approved. They have further submitted that the submission of cost data by the OCLS to TRAI must be shared with all the stakeholders.

3.15. On the other hand, Owners of Cable Landing

Stations (OCLS) have submitted that Cable Landing Station is not a bottleneck facility and there is no need to continue regulating access facilitation/ collocation charges. They have argued that since 2005, cable owners, by and large, continued to prefer establishing new CLS for their upcoming/planned cables in spite of the availability of choice of landing at existing CLS and not a single international cable operator/consortium/carrier or Indian ILDO has complained that it has been denied the landing facilities by any of the OCLSs in India.]

304. TRAI has further submitted that Clause 3.16 provides that the 2007 regulation provided that the charges have to be determined on the basis of cost of network elements involved however it did not mandate any algorithm or methodology to calculate the said charges. As such the method of calculation of the various charges varied for different OCLSs which yielded variation in the charges for different CLSs. This led to question 2.

[B- Need for issuing Guidelines to OCLS for calculating AFC & CLC

3.16. As per the 'International Telecommunication Access to Essential Facilities at Cable Landing Stations Regulation 2007', Access Facilitation Charge is to be determined on the basis of the cost of network elements involved in the provision of access and distributed over the complete capacity of the system. However, it does not mandate any algorithm or a methodology to calculate AFC & CLC. While scrutinizing the CLS-RIO submitted by the various OCLSs in 2007, TRAI observed that the method of calculation of AFC & CLC varies for different OCLSs, which yields variation in AFC & CLC for different CLSs.]

305. TRAI has further submitted that Clauses 3.22 - 3.23 along with charts furnished, would show the claim of various service providers that in the RIO the charges that were submitted by the OCLSs were not cost based. In clause 3.26 at page 349 the submission of various service providers that the capacity utilisation has increased and that the costs for setting up of a CLS is to a great extent reimbursed by the consortium members means that the charges need to be re-determined and OCLS should not be over-compensated. Clauses 3.22 to 3.23 at page No.347 are extracted hereunder:

[3.22. In order to ascertain the authenticity of the costs submitted by OCLSs in CLSRIO in July 2007,

TRAI sought detailed calculation sheets from OCLSs indicating only those cost items which were not being reimbursed by consortiums. The OCLSs submitted that the costs included in their calculations are not being reimbursed from consortiums. Generic descriptions of the items considered for arriving at Access Facilitation charges, O&M Charges and Colocation charges by the OCLS for the various possible scenarios i.e. (i) access facilitation at CLS (ii) access facilitation at alternate co-location and (iii) access facilitation at virtual co-location along with the schematic diagrams of respective CLSs are enclosed as Annexure-II, Annexure-III and Annexure-IV.

3.23. However, in the recent representations received by TRAI from the service providers, some of the service providers have submitted that the Access Facilitation charges payable to the OCLS are not cost based. They have emphasized that CLS access charges in India are extremely high when compared with similar competitive telecom markets in other jurisdictions. For example the RIO access charges for SMW4 in India is high by 251 times for 10G/ STM 64 when compared with South East Asian Countries (India's SMW4 Access charges = US\$ 6,28,100 vs South east Asian Countries SMW4 Access charges = US\$2500).

3.26. Many service providers have submitted that CLS access charges need to be re-determined in view of manifold increase in capacity utilization and the fact that the costs (OPEX + Capex) incurred by OCLS for setting up a CLS is reimbursed by consortium members under the C&M Agreement. Some service providers have stated that the Access Facilitation Charges for CLS should be in line with the international trends and TRAI must take into account the agreement between consortiums and OCLS so that they are not overcompensated for the same.]

306. Based on the inputs received, the consultation paper formulated 10 questions for consideration which are as follows:

"Q1: Which of the following method of regulating Access Facilitation Charges and Co-location charges (AFC & CLC) should be used in India?

(a) The prevalent method i.e. submission of AFC & CLC by owner of the cable landing station (OCLS) and approval by the TRAI after scrutiny

(b) Submission of AFC & CLC by OCLS and approval by TRAI after consultation with other stakeholders

- (c) Fixing of cost based AFC & CLC by TRAI
- (d) Left for mutual negotiation between OCLS and the Indian International Telecommunication Entity (ITE)
- (e) Any other method, please elaborate in detail.

Q 2: In case AFC & CLC are regulated using method (a) or method (b) above, is there a need to issue guidelines containing algorithm and network elements to be considered for calculating AFC & CLC to the OCLSs? If yes, what should be these guidelines?

Q 3: In case, AFC & CLC are regulated using method (a), (b) or (c) above, please suggest the value of pre-tax WACC, method of depreciation and useful life of each network element? Please provide justification in support of your answer.

Q 4: Which cost heads/ network elements should be included/ excluded while calculating Access Facilitation and Co-location charges? Please enumerate the items with specific reasons.

Q5: What should be periodicity of revision of AFC & CLC? Support your view with reasons.

Q 6: In case, cost based AFC & CLC are fixed by TRAI, which costing methodology should be applied to determine these charges? Please support your view with a fully developed cost model along with methodology, calculation sheets and justification thereof.

Q 7: Whether Access Facilitation charges and O&M charges should be dependent on capacity (i.e. STM-1, STM-4 or STM-16) activated? Support your view with reasons.

Q 8: If Access Facilitation charges and O&M charges are fixed on the basis of capacity activated; (a) Should the charges be linearly proportionate to the capacity activated; or (b) Should the interface capacity as provided by the submarine cable system at the cable landing station be charged as a base charge while higher or lower bandwidth be charged as the base charge plus charges for multiplexing/ de-multiplexing?

Q 9: Whether there is a need to fix Access Facilitation charges for all types of submarine cables? If no, which kind of submarine cables may be exempted and why?

Q 10: Is there a need to introduce any new provision or to modify/delete any of the clauses of the 'International Telecommunication Access to Essential Facilities at Cable Landing Stations Regulation 2007', in order to facilitate access to essential facilities at cable landing station?]

307. Page 361 gives the list of ILD Licensees as on 22.02.2012. The same is extracted hereunder:

Sl.No	Name of the ILD Operator	Effective Date of Licensee
1	M/s Reliance Communications Limited	25.02.02
2	M/s Bharti Airtel Limited	14.03.02
3	M/s Data Access Limited (Licence under suspension)	27.03.02
4	M/s Bharat Sanchar Nigam Ltd	29.01.03
5	M/s Videsh Sanchar Nigam Ltd. (Tata Communications Ltd.) (Effective from 01.04.02)	05.02.04
6	M/s i2i Enterprises Ltd. (BT Global Communications Pvt. Ltd.)	11.07.06
7	M/s AT&T Global Network Services Pvt. Ltd.	09.10.06
8	M/s Vodafone Essar South Ltd.	13.11.06
9	M/s Sify Communications Ltd.	21.11.06
10	M/s Dishnet Wireless ltd.	13.12.06
11	M/s BT Telecom India Pvt. Ltd.	20.02.07
12	M/s Tulip IT Services Ltd.	06.07.07
13	M/s Spice Communications Ltd.	08.08.07
14	M/s Verizon Communications India Private Limited	03.01.08
15	M/s Cable & Wireless Networks India Private Limited	15.02.2008
16	M/s P3 Technologies Private Limited	28.02.2008
17	M/s Mahanagar Telephone Nigam Limited	18.06.2008
18	M/s Equant Network Services India Private Limited	20.06.2008

Sl.No	Name of the ILD Operator	Effective Date of Licensee
19	M/s Swan Connect Communications Private Limited	12.08.2008 (Surrendered on 22.08.2009)
20	M/s Citicom Networks Private Limited	03.10.2008
21	M/s Swan Telecom Private Limited (M/s Etisalat DB Telecom Private Limited)	06.10.2008
22	M/s SingTel Global (India) Private Limited	05.03.2009
23	M/s Datacom Solutions Private Limited	18.03.2009
24	M/s Unitech Long Distance Communication Services Limited	28.04.2009
25	M/s Pacific Internet India Private Limited	22.01.2010
26	M/s Telstra Telecommunications Pvt. Limited 11.10.2011	
27	M/s Infotel Telecom Limited	14.02.2012

Pursuant to this, the petitioner submitted its views in response to the consultation paper and also gave a presentation on 18.06.2012. It gave its final submissions on CLS charges on 27.09.2012.

308. It is submitted that in response to the consultation paper, majority of the stakeholders were of the view that there is an urgent need to reduce the Access facilitation charge and co-location charges to reasonable and comparable level in order to ensure continued growth in India's international telecommunication market. They were of the view that though the bandwidth charges have come down significantly but the Access facilitation charge and co-location charges of remained the same. The stakeholder further suggested that the method of fixing cost-based Access facilitation charge and co-location charge by TRAI is the most appropriate in the given situation when these charges are significantly high as a percentage of the bandwidth charges. Paragraph 52 at Pages 23 and 24, reads thus,

"52. It is submitted that in response to the consultation paper, majority of the stakeholders were of the view that there is an urgent need to reduce the access facilitation charge and co-location charges to

reasonable and comparable levels in order to ensure continued growth in India's international telecommunication market. They were of the view that though the bandwidth charges have come down significantly but the access facilitation charge and co-location charges have remained the same. These charges are now as high as 56% of the total bandwidth cost which is quite significant and if it is not brought down, it will stifle competition in the international bandwidth market. The stakeholder further suggested that the method of fixing cost-based access facilitation charge and co-location charge by the Authority is the most appropriate in the given situation when these charges are significantly high as a percentage of the bandwidth charges."

309. On 19.10.2012, based on the inputs received in the consultation process the authority decided question 10 and question 1(c) [relating to fixing of cost-based AFC and CLC by TRAI] of the consultation paper and came out with an amendment to the 2007 regulations titled International Telecommunication Access to Essential Facilities at Cable Landing Stations (Amendment) Regulations, 2012. Vide the said Amendment, a sub regulation 4 was introduced in regulation 10. It provided that,

"the Access facilitation charges referred to in sub regulation (1) and sub regulation (2) shall be such as had been included in the cable Landing Station reference interconnect offer published under sub regulation (4) of regulation 3:

provided that the authority may specify Access facilitation charges which shall be payable by a class or classes of eligible Indian International telecommunication entity and in such case the approval of the Access facilitation charges, as specified in part II of the schedule, by the authority shall not be required to be obtained under these regulations".

Similar changes were made in regulation 12, 14 and 16 respectively. Relevant Explanatory Memorandum is extracted as follows:

"8. Another stakeholder was of the view that the prevalent arrangement i.e. submission of AFC and CLC by owner of the cable landing station and approval by

the TRAI after scrutiny has not served the purpose. In the last four years, the bandwidth charges have come down significantly but AFC and CLC have remained the same. These charges are now as high as 56% of the total bandwidth cost which is quite significant and if not brought down, will stifle competition in the international bandwidth market. The stakeholder further suggested that the method of fixing cost based AFC and CLC by TRAI is the most appropriate in the given situation when these charges are significantly high as a percentage of the BW charges. One of the association submitted that countries in South East Asia, Far East and Western Europe regions do not have multiple charges for access to cable landing station facilities but levy a token RIO/ cross-connect charge as most of the operational and recurring costs are recovered from consortium members and original signatories. Another stakeholder also preferred that TRAI should impose cost based pricing and mentioned that other options given in the consultation paper are highly inappropriate given the circumstances and experience to date.

9. The owners of the Cable Landing stations who own majority of cable landing stations submitted that there is no justification to continue treating CLS as an essential/bottleneck facility and the existing AFC and CLC should be left to the market forces.

10. The Authority noted that the number of submarine cable systems landing in India have now increased to 15 from the earlier 10 nos. as in 2007 and these numbers are further likely to increase. Further, it has also been noted that out of present 15 nos. of Cable Landing stations for various cable systems, 12 nos. of Cable Landing Stations for various cable systems are owned by two OCLSs. As per the present provision of the regulation owner of cable landing station is required to submit the CLS-RIO including charges mentioned in PartII of the schedule before the date of coming into existence cable landing station. The charges submitted by owner of the cable landing station are required to be further discussed with them and after getting complete details from the OCLS these charges are required to be approved by the Authority in 60 days. Since the process of approval of the charges involve scrutiny by TRAI of costing elements considered, costs and costing methodology employed by OCLS and final approval by TRAI, it takes more time and provides competitive advantage to the owner of cable landing station as OCLS is also integrated operator owning bandwidth in submarine

cable system. The Authority further noted that though the work done in providing Access Facilitation is same irrespective of specific cable landing station, the Access Facilitation and Co-location charges varies between different operators based on their network configuration and costing methodology.

11. In view of the above, the Authority has decided to amend the regulations making suitable provisions for specifying Access Facilitation Charges, Co-location Charges and other related charges like Cancellation Charges and Restoration Charges.]

310. It is submitted that on the basis of the comments received from the stakeholders in the consultation process under the consultation paper dated 22.03.2012, the TRAI upon analysis noted that since the process of approval of the charges involve scrutiny by TRAI of costing elements considered, costs and costing methodology employed by OCLS, discussion with other stakeholders and final approval by TRAI, it will take considerable time and will provide competitive advantage to the owner of cable landing stations as OCLS is also integrated operator owning bandwidth in submarine cables system. TRAI also noted that the work done in providing Access facilitation is same irrespective of specific cable Landing Station. Considering all these aspects, the above amendment to the 2007 regulation was carried out.

311. Regarding the other remaining issues of the consultation paper of 22.03.2013, the TRAI released another consultation paper on "Estimation of Access Facilitation Charges and Co-location Charges at Cable Landing Stations" seeking comments of stakeholder by 6.11.2012 and counter comments by 14.11.2012. The comments were put on the Web-site. It is noticed at para-8 at page 500 that the said consultation process is in continuation of the earlier consultation process. It has been pointed out that based on the inputs received in the earlier consultation process of 22.03.2013, the access facilitation and co-location charges have been estimated and are now being put up for consultation through the consultation paper of 19.10.2012.

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312. Thus, it can be seen that the consultation paper of 22.03.2013 raised 10 questions on approach to be adopted for estimation of charges. Question 1 and 10 were decided by the Authority after examining the stakeholders comments which led to the amendment Regulation of 19.10.2012. On the remaining issues after examining the comments received, the Authority took a view

on those issues and made actual estimations. The view/stand taken by the Authority along with the actual estimations were again put up for consultation vide consultation paper dated 19.10.2012.

[Issues for Consultation Stakeholders are requested to comment on:

1. Cost data and costing methodology used for estimating the access facilitation charges and co-location charges in this consultation paper. In case of a different proposal, kindly support your submission with all relevant information including cost and preferred costing methodology.

2. On the power requirement of the transmission equipment i.e. DWDM, DXC equipped with different capacities, supplied by different equipment manufacturers.

3. Percentage used for OPEX and capacity utilisation factor with supporting data on each OPEX item specially on space and power consumption of various equipments.

4. Whether ceiling of uniform Access Facilitation Charges may be prescribed for all Cable Landing Stations in two categories i.e. AFC at CLS and AFC at alternate Co-location, or these charges should be dependent on submarine cable system or location of cable landing stations?

5. Whether prescribing the access facilitation charges on IRU basis is required?

6. Whether uniform co-location charges may be prescribed or such charges should be location dependent?

7. Whether the restoration and cancellation charges should be either a fixed charge or based on a percentage of the AFC. In case of fixed charge, should the present charges be continued or need revision?

8. Any other comment related to Access Facilitation Charges, Co-location charges and other related charges like cancellation charges, restoration charges along with all necessary details.]

After identifying the network elements, the cost data submitted by the two OCLSS that is the petitioners Tata and Bharti have been used by the authority in the proposed model for estimation of the charges.

[C- Estimation of access facilitation charges at cable landing stations

12. Based on the cost data and costing methodology details given by the OCLSS, several discussions held with them and also taking into consideration the submissions made by various stakeholders, the Network elements and CAPEX items required for providing access facilitation were identified. Cost data submitted by various OCLSSs have been analysed to find annualized capital cost, OPEX and Utilization etc. Steps followed for estimation of access facilitation charges are as follows:

(a) Identification of network elements

13. During the consultation process, some of the service providers have submitted that for providing access facilitation at cable landing station no active element is required as consortium of submarine cable or owner of the submarine cable itself provide interfaces of various capacities at cable landing station and the cost of these network elements required for interfaces of various capacities is also reimbursed to owner of cable landing station by the consortium. Therefore, only passive element i.e. Optical Distribution Frame (ODF) is required for provisioning access facilitation at 10 G level or any other level which is provided by the consortium. In case, ITE requires lower capacity from the OCLS, then only cost related to multiplexer may be taken into account. This argument is also supported by two of the OCLSSs i.e. M/s. Reliance and BSNL.

14. On the other hand, two of the OCLSSs i.e. M/s. TCL and M/s. Bharti are of the view that consortium does not provide all types of the interfaces needed by the ITE. They submitted that even if consortium provides the required interfaces, it would not be appropriate to provide direct access to the submarine cable without using multiplexer provisioned by OCLS as the network management system and control of the network element owned by consortium are not in the control of OCLSSs directly. Therefore, in their view, it is not possible for them to provide access facilitation directly using only ODF. These OCLSSs have also submitted that TRAI should take into consideration all the network elements used by them for provisioning of access facilitation as per their network architecture. In fact, one of the OCLS has proposed two Digital Cross Connect (DXC) for provisioning of access facilitation at the cable landing station. These two OCLSSs have 12 out of 15

cable landing stations for various cables and have majority share in provision of access facilitation in the country. Therefore, after identifying the network elements, the cost data submitted by these two OCLSS have been used by TRAI in the proposed model for estimation of the charges.]

TRAI has identified network elements as indicated in the diagram taking one DXC in the model for access facilitation at CLS for estimating the access facilitation charges at CLS and alternate co-location.

[15. On the issue of desirability of including DXC (s) in the model for providing access facilitation at cable landing station, TRAI had a number of discussions with OCLSS on this issue and has proposed one DXC in the model for access facilitation at CLS.

16. After several discussions with the OCLSS and also taking into consideration the submission made by various stakeholders, TRAI identified network elements as indicated in the following diagrams for estimating access facilitation charges at cable landing station and alternate co-location.]

The details of the Items used for provisioning of AFC at CLS and alternate co-location.

[17. As per the data submitted by the various stakeholders including the OCLSS, the network elements used for providing access facilitation at cable landing station and alternate co-location are listed in Table 1 and Tables 2(a), (b) and 2(c), respectively. Table 1 lists the CAPEX items used for access facilitation at CLS:

Table 1

CAPEX items used for access facilitation at CLS

Sl.No.	Description
I	ODF (Optical Distribution Frame)
II	Digital Cross Connect (DXC)
III	Fiber Patch Cords
IV	Inter Floor cabling and tray work
V	Project Management cost

18. Table 2(a) to 2(c) list the CAPEX items used for access facilitation at alternate co-location:

Table 2(a)

CAPEX items used for access facilitation at alternate co-location

(At CLS Access Section)

Sl.No.	Description
I	ODF (Optical Distribution Frame)
II	Digital Cross Connection
III	DWDM Equipment
IV	Fiber Patch Cords
V	Inter Floor cabling and tray work
VI	Project Management cost

Table 2(b)

CAPEX items used for access facilitation at alternate co-location

(Link between CLS Access Section and MMR)

Sl.No.	Description
I	Fiber between CLS and MMR

Table 2(c)

CAPEX items used for access facilitation at alternate co-location

(At MMR Section)

Sl.No.	Description
I	ODF (Optical Distribution Frame)
II	Digital Cross Connection
III	DWDM Equipment
IV	Fiber Patch Cords
V	Inter Floor cabling and tray work
VI	Project Management cost

The details of the cost data used for the Capex items. The data of the two petitioners have been used and the reasons for giving a uniform charge for all CLSs, are as follows:

[19. While arriving at a model for calculating/estimating the access facilitation charges, it was seen that the two OCLSs, whose data has been used for estimation purpose have employed equipments of different capacities in their CLSs. In one case, the OCLS has used the DXC of capacity of 640 G while another OCLS has used 4 DXCs of 120 G capacity each for providing access facilitation to the International Telecommunication Entity (ITE).

20. In addition, the OCLS have configured their network at the respective CLS based on their projections for demand of circuits of various capacities i.e. STM-1, STM-4, STM-16 and STM-64. Accordingly, there has been a variation of access facilitation charges among various cable landing stations. The OCLSs have configured their network elements for provisioning of a preassumed configuration of various capacities i.e. STM-1, STM-4, STM-16 and STM-64. The capacity so created was again converted into STM-1 capacity to calculate the access facilitation charges for one STM-1. The cost of circuits of higher capacities were being calculated with the multiplier of 4, 16 and 64 on the access facilitation charges for one STM-1 to get access facilitation charges for STM-4, STM-16 and STM-64. In this methodology there was no advantage of scale of economy and the AFC of circuits of higher capacities were artificially getting inflated.

21. Further, during the discussions with the stakeholders, they also informed that unlike earlier (i.e. in the Year 2007, when the charges were approved) presently the requirement of circuits of higher capacities is more than the circuits of lower capacity. In view of the above anomaly in the present costing and charging structure, a model is being proposed with a DXC and other accessories for providing circuits of 10G/STM 64 only and using a rational factor to arrive at the cost of circuits of different other capacities. During the discussions with the service providers, it was informed that the present ration prevailing in the market for domestic leased circuits charges of STM-64 to STM-16 or STM-16 to STM-4 or STM-4 to STM-1 is 2.5 to 2.6. One OCLS has also submitted that the factor of conversion from high capacity to lower capacity is 2.6. Therefore, for estimating access facilitation charges for the lower capacities i.e. STM-16, STM-4 and STM-1, a factor of 2.6 has been used.

22. TRAI has observed that work done for access facilitation at cable landing station is the same for all cable landing stations. Therefore, it may not be required to estimate the cost based charges separately for each cable landing stations. The only variation could be due to space and electricity charges if the cable landing stations are located at two different cities, which may be a small portion of total costs. In case of access facilitation at Meet Me Room (MMR) the difference could also be because of length of optical fiber link between CLS and MMR.

23. In these calculations, current cost as obtained from OCLS of each CAPEX item for providing access facilitation at 10 G/STM-64 level has been calculated to ensure directly attributable cost towards access for 10 G/ STM-64 level. To calculate the cost for provision of one 10 G/ STM-64 level, the cost of fully loaded DXC i.e. loaded with 10 G/ STM-64 cards in all slots in protected mode was estimated using data of the respective OCLSs. Similarly, on the basis of the data submitted by the OCLSs the cost of fully loaded DWDM in protected mode was calculated to get the cost of transporting one 10 G channel from OCLS to MMR.

24. The cost of passive network elements i.e. ODF, fiber patch cord, inter floor cabling and tray work have been appropriately apportioned for provisioning of one 10 G, on the basis of cost data submitted by OCLSs for respective passive elements.

25. For the access facilitation at alternate co-location the OCLSs have also submitted the cost of link between their CLS and MMR. During the discussions, OCLSs have submitted that this link is not only used for providing access facilitation but also used for their internal use. It was further observed that the 40 channel DWDM is being used at both ends of the connectivity, therefore, to calculate the cost of one 10 G link between MMR and CLS the cost provided by the respective OCLSs has been divided by 40. 10% of cost of CAPEX item has also been allowed as a project management cost as submitted by OCLSs."

The details of the various factors which were considered for the purposes of annual recovery of capital cost are given. It can be seen that the various factors taken into consideration like life of network element, method of depreciation, pre-tax WACC and life of link optical fibre between CLS and MMR was largely in conformity with the comments of the stakeholders detailed therein.

[In response to the consultation paper, most of the stakeholders have submitted that life of the network equipment may be taken as 10 years. They have also preferred Straight Line Method (SLM) to workout depreciation of each year. Comments of the stakeholders on pre-tax Weighted Average Cost of Capital (WACC) and method of depreciation are as follows:

Table-5

Comments of the stakeholders on pre-tax WACC

and method of depreciation

S.No .	Stakeholder	WACC	Depreciation and useful life
1	AT&T	-	SLM
2	BSNL	14-15%	SLM @ 10%
3	Bharti Airtel	At least 20%	SLM @ 10% for network elements and SLM @ 5% for building
4	Cable & Wireless	15%	SLM @ 10%
5	Equant	15%	SLM @ 10%
6	Idea Cellular	SBI prime lending rate	10%
7	Infotel Broadband	13%	SLM @ 8% (life of the network-12 years, Submarine cable-15 years)
8	Reliance Comm.	13-15%	SLM @ 10%
9	Spectra ISP Networks	As per market conditions	SLM
10	Tata Communications	23.9%	Element wise depreciation
11	Vodafone India Ltd	19%	SLM @ 10% (life of network - 5 years, building - 20 years)
12	ACTO, BT, Pacific Internet, Telstra Comm	As per market conditions	SLM @ 10%
13	ISPAI	As per market conditions	SLM
14	Consumer Protection Association	-	SLM

Keeping in view the response submitted by the stakeholders, pre-tax WACC and method of depreciation used in other costing exercise and TRAI's internal analysis, following has been used for estimating annualized capital cost:

(i) Life of network element (except optical fiber) = 10 years

(ii) Life of link of optical fiber between CLS and MMR = 18 years

(iii) Method of depreciation = Straight Line Method (SLM) (iv) Pre-tax WACC = 15%

Estimate of the utilisation factor should be 70%.

[29. On the basis of discussions with OCLSSs and other stakeholders and also taking into account the data submitted by them for various cable landing stations, the utilization factor of 70% has been taken into account.]

The OPEX is taken as 30% of CAPEX and the description of the various items has been given therein. In para-30-31 it has been noted that there was large variation in the electricity consumption and of operational cost submitted by the two petitioner OCLSSs.

[30. TRAI has examined the operational cost submitted by OCLSSs for various cable landing stations. There was a large variation in operational cost between OCLSSs and also among the various cable landing stations of same OCLS. One of the OCLSSs has taken full infrastructure cost including land, building, fixtures etc. as CAPEX items and calculated annualized cost for estimating operational cost. This whole operational cost was attributed to a very small designed capacity, resulting in inflated operational cost per circuit. Another OCLS, while calculating the rental per sq.ft. per month for the equipped racks has taken into calculation the space earmarked for future expansion and has loaded it on the present equipped racks. This has resulted in an inflated operational cost per circuit.]

31. Further, there is a large variation in the electricity component of operational cost submitted by the two OCLSSs. The electricity consumption data submitted by the two OCLSSs varies from 2 KVA to 6 KVA per rack for different transmission equipment i.e. DWDM, DXC. One of the OCLS has used per unit cost of electricity as Rs. 15 along with power factor of 0.85. Stakeholders are requested to comment specially on the power requirement of the transmission equipment i.e. DWDM, DXC equipped with different capacities, supplied by different equipment manufacturers.

32. TRAI also observed that the two OCLs, while apportioning the cost of items like external fit outs, internal fit outs, security service charges, manpower etc for AFC, have allocated the complete cost of these items for very large equipment floor i.e. 1600 sq.ft. for only 6 to 8 racks, whereas an area of around 1600 sq. ft can accommodate about 100 racks. This has lead to a disproportionate component of space charges in

the OPEX. Therefore, in view of the large variation in the cost data submitted by the two OCLs, for space and electricity charges which constitute the major portion of the operating cost, TRAI has used 30% of capital cost of network element at CLS (as listed in Table 1 excluding project management cost) and 30% of capital cost of network element at MMR for the calculation (as listed in Tables 2(a) and 2(c) excluding project management cost) to estimate operational cost which also include annualised cost for space and infrastructure available at cable landing station. For item listed in Table 2(b) i.e. link between CLS and MMR the AMC as 2% of capital cost of the link has been allowed. However after receiving comments of the stakeholders, calculations relating to operating cost will be revisited. The provision of 30% of CAPEX as OPEX includes following items:

Table 6

Sl.No.	Description
i	AMC of equipments
ii	Space charges
iii	Electricity charges (Racks, building etc)
iv	External fit outs (transformers, DG sets, HT panels, LT panels, cables, air conditioner)
v	Internal fit outs (UPS, battery, internal electrical panel, precision AC, power distribution units, fire alarm and access control and cabling)
vi	Manpower cost
vii	Security services charges
viii	O&M charges for external and internal fit outs
ix	Insurance charges and property tax
x	Administration charges
xi	IT charges
xii	Network Management System cost

Details of the estimation of access facilitation charges for CLS and MMR and the entire working with actual figures have been given.

[33. After considering all the factors as mentioned in the above paras, estimation of access facilitation charges for 10G/ STM-64 at CLS and MMR are as follows:

Table 7(a)

Calculation of Access Facilitation Charges (in Rs.)
for one 10 G/ STM-64 (in protected mode) at CLS

Sl.No	Description	OCLS-1	OCLS-2
(a)	Average Annualized CAPEX (Annualisation of item (v) of Table-3) (c) (d) (e) (f)	1,60,773	1,76,099
(b)	Average Annualised Project Management cost (Annualisation of item (vi) of Table-3)	16,077	17,610
(c)	Average Annualized CAPEX taking 70% utilization into consideration $\{(a) \div (70\%) + (b)\}$	2,45,753	2,69,180
(d)	OPEX per annum @ 30% of CAPEX (30% of item (v) of Table-3)	2,64,284	2,89,478
(e)	Total Annual charges per annum $\{(c) + (d)\}$	5,10,037	5,58,657
(f)	Annual charges per annum (Including Licence Fee @ 8%) $\{(e) \div (1-0.08)\}$	5,54,388	6,07,236

Table 7(b)

Calculation of Access Facilitation Charges (in Rs.) for
one 10 G/ STM-64 (in protected mode) at Alternate Co-location

Sl.No	Description	OCLS-1	OCLS-2
(a)	Average Annualized CAPEX of item (vi) of Table-4(a)	3,28,748	3,24,081
(b)	Average Annualized CAPEX of item (i) of Table- 4(b)	21,847	90,330
(c)	Average Annualized CAPEX of item (vi) of Table-4(c)	3,28,748	3,24,081
(d)	Total of Average Annualised Project Management cost [Annualisation of {item (vii) of Table-4(a) + item(vii) of Table-4 (c)}]	65,750	64,816
(e)	Total Average Annualized CAPEX $\{(a) + (b) + (c) + (d)\}$	7,45,093	8,03,309
(f)	Total of Average Annualized CAPEX (taking 70% utilization into consideration) $[\{(a+b+c) \div 70\% \} + (d)]$	10,36,240	11,19,806

Sl.No	Description	OCLS-1	OCLS-2
(g)	OPEX per annum @ 30% of CAPEX {item (vi) of Table-4(a) + item(vi) of Table-4 (c)}*30%	10,80,816	10,65,473
(h)	AMC @2% for optical fiber link between CLS and MMR {item (i) of Table-4(b) *2%}	2,600	10,750
(i)	Total OPEX (g+h)	10,83,416	10,76,223
(j)	Total Annual charges per annum {(f) + (i)}	21,19,656	21,96,029
(k)	Annual charges per annum (Including Licence Fee @ 8%) {(j) ÷ (1-0.08)}	23,03,974	23,86,988

313. It is submitted that on the basis of cost data and comments received from Tata Communications Ltd and Bharti, TRAI estimated the charges and issued the above consultation paper for further comments and counter comments of stakeholders. The consultation paper identifies the various network elements, cost of each network element, costing methodology etc in detail and gives out the actual worked out figures of costs. The costing methodology adopted by the authority to arrive at the charges specified were very clearly explained in the consultation paper with the help of detailed explanations, tables and algorithm given in each table.

314. It is submitted that in their response to the said consultation paper, most of the stakeholders were in agreement with the costing methodology adopted by TRAI. However, petitioner TCL submitted that Access facilitation charges should have been estimated as per the network architecture employed by them and TRAI should not have taken different network design for calculations. It also indicated few cost elements have not been considered in the calculation of such charges. Similarly some other OCLS submitted that the costing data and methodology applied is not very clearly understood and there were items which have not been considered in arriving at the cost. They wanted cost elements that form a part of arriving at Access facilitation charges as submitted by them earlier should have been considered fully.

315. TRAI has further submitted that on 08.11.2012, the Bharti Airtel Ltd., had filed an appeal being Appeal No.22 of 2012 before the TDSAT challenging the validity of the amendment regulation dated 19. 10. 2012 which was dismissed as withdrawn on 08. 11. 2012. A copy of the order of learned TDSAT, dated

08.11.2012 is annexed as Annexure-B.

316. Considering the comments given by the various stakeholders and in order to give a fair opportunity to OCLSS a meeting was held in which cost data, costing methodology used by TRAI was discussed in detail. It is submitted that based on the discussion held in the above meetings and submission of stakeholders in response to the consultation paper, Access facilitation charges both at cable landing stations and alternate location were re-estimated taking into consideration the inputs given by the petitioner including network design and the cost data. Almost all components of costs, inter alia including life of equipments and optical fibre, OPEX, consideration of standby equipments, Capex Elements, project management cost, weighted average cost of capital, space required to block for future expansion, company overhead, rate of dollar, taxes in equipment sector on which petitioner raised the point was taken into account in the revised calculations that were done which eventually found an expression in the regulation of 21.12.2012.

317. It is submitted that items 3, 4, 5, 8, 10, 13 and 14 were issues that were accepted in principle and applied by the authority. Issue at item 7 has also been accepted as the same has been considered under OPEX. Issue at item number 6 was based on a wrong understanding of the petitioners which was explained to them. It is pertinent to note that at item 10 the petitioner has noted in the minutes of meeting that TRAI had explained the working methodology for calculating the capital cost of the ECI and DWDM equipment and that TCL is ok with the workings of the same. The other issue concerning taxes has been considered an accepted in principle and applied by the authority. It is important to note that in this meeting no issues regarding utilization factor of 70% was discussed which meant that the petitioners were in agreement with the same. It is submitted that this meeting was a final meeting to address all the grievances of the Petitioner. The Petitioner raised certain grievances which have to be taken as the grievances which they chose to press.

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318. It is pertinent to point out one of the crucial aspects raised by the petitioner on the issue that whether charges for access and co-location be different for different cable landing stations or should be uniform. In this context it is submitted that the petitioner agreed at para 5 of the minutes, that if the authority desires to unify the rates of various cable landing stations then the Fort, Mumbai rates for the rental/power may be taken for all stations as reference. It is submitted that the rates at Fort Mumbai are the highest and the authority has considered this to be the benchmark for estimation of the charges in its final regulation.

319. It is further submitted that on 21.12.2016, the authority issued the International Telecommunication Cable Landing Stations Access Facilitation Charges And Co-Location Charges Regulations, 2012 (27 of 2012). In the said regulation it has been provided in regulation 3 that for every unit capacity provided on or after the 1st day of January, 2013, the owner of cable Landing Station shall charge on or after the 1st day of January, 2013, the Access facilitation charges as specified in schedule -I of these regulations. From the said date the annual operation and maintenance charges for capacity and annual operation and maintenance charges at alternate location for capacity shall be charged in accordance with schedule -II. Similarly, for co-location charges regulation 4 provides that the co-location charges as specified in schedule III of the regulations shall be taken note of on or after the first day of January 2013. Regulation 5 states that the authority may from time to time review and modify the access facilitation charges and co-location charges.

320. It is submitted that the petitioner as well as the other owners of cable landing stations are fully aware of the costing methodology adopted by TRAI which has been explained in the multiple rounds of consultative process adopted by TRAI including personal hearings and which has been accepted by the Petitioner in the minutes of the meeting. Comparison of the final estimates/charges in the Regulation and factors considered with the estimates in the Consultation paper will show that there has been a re-estimation after taking into account the various grievances of the Petitioners and reasons have been given. The data used for estimation is the data given by the two Petitioner OCLs.

[6. Stakeholders have generally agreed to the costing methodology adopted by TRAI. However, M/s. Tata Communications has submitted that Access Facilitation Charges should have been estimated as per the network architecture employed by Tata

Communications Ltd. and TRAI should not have taken different network design for the calculations. M/s. Tata Communications have also indicated few cost elements which according to them have not been considered in the calculation of such charges. Similarly, M/s. Bharti Airtel Ltd. have also submitted that costing data and methodology applied to arrive at proposed charges by TRAI are not very clearly understood and there are items which have not been considered in arriving at the cost. They have submitted that the cost elements that form a part of arriving at Access Facilitation Charges as submitted by them in their earlier submissions should be considered fully.

7. To provide fair opportunity to these service providers and understand their point of view meetings with M/s. Tata and M/s. Bharti Airtel were held on 29.11.2012 and 04.12.2012 respectively. In the meetings cost data, costing methodology used by TRAI was discussed in detail.

8. Based on the discussion held in the above meetings and submission of stakeholders in response to the consultation paper, Access Facilitation Charges both at Cable Landing Stations and alternate location have been re-estimated with the cost data submitted by these two service providers. Subsequent paragraphs give a detail explanation on the costing methodology adopted to arrive at the revised charges given in the regulations.]

321. The estimation of Access facilitation charges have been explained in paragraphs 9 to 40 of the explanatory memorandum to the regulations along with figures and tables under the following sub-headings:

(i) Network elements considered: Paras 9-11 at page 636 - 638. PARA 11 records that the authority has considered the submissions of the two petitioners and has decided to include the costs related to DXC both at CLS and alternate locations as desired by them.

[9. After several discussions with the OCLSS and also taking into consideration the submissions made by various stakeholders, TRAI identified network elements required for estimating access facilitation charges at cable landing station and alternate location and indicated in the Figure-1 and Figure-2 of the consultation paper dated 19.10.2012.

10. In response to the consultation paper a large number of the service providers have reiterated that for providing access facilitation at Cable Landing station DXC (Digital Cross Connect) equipments is not required. According to them the cost of DXC equipment at CLS is borne by the consortium. They also submitted that similarly requirement of DXC after DWDM at alternate location is not required. Hence they suggested that DXC and its related costs should be excluded from the calculations. They have also submitted that all types of interfaces needed by the ITEs for access facilitation are provided by the consortium. On the other hand, M/s. TCL and M/s. Bharti Airtel were of the view that Access Facilitation Charges should be estimated as per the architecture design adopted by them and should not be based on any other model. As per them, DXC is an integral part of their network design and therefore costs related to DXC needs to be included in the estimation.

11. The Authority has considered the above submissions and has decided to include the costs related to DXC both at CLS and alternate locations.]

(ii) Capex Items used for provisioning of a AFC at CLS and alternate location: Paras 12-13 at pages 638 - 639. In para-13 it is noted that after considering the submission made by petitioner TCL certain CAPEX elements have been included and the table given at page 639 has been revised to include those items. The table at page 639 may be compared with the table in the consultation paper at page 504.

[12. CAPEX items used for providing access facilitation at cable landing station and alternate location were listed in Table 1 and Tables 2(a), 2(b) and 2(c), of the consultation paper respectively.

13. On the CAPEX items considered in the consultation paper, M/s. TCL was of the view that costs incurred for manpower for Installation, Network Management System (NMS) and test equipments both at CLS and alternate location have not been considered by TRAI in the calculations. Considering the submission made by M/s TCL, the above CAPEX elements as suggested by M/s TCL have been now included. The revised Tables of CAPEX items used for providing access facilitation at cable landing station and alternate location are listed below in Table-A and Tables-B, respectively.

Table A
CAPEX items used for access facilitation at CLS

Sl.No.	Description
(i)	ODF (Optical Distribution Frame)
(ii)	Digital Cross Connect (DXC)
(iii)	Fiber Patch Cords
(iv)	Inter Floor cabling and tray work
(v)	Manpower towards installation
(vi)	NMS
(vii)	Test Instruments
(viii)	Project Management cost

Table B(i)
CAPEX items used for access facilitation at alternate co-
location
(At CLS Access Section)

Sl.No.	Description
i	ODF (Optical Distribution Frame)
ii	Digital Cross Connection
iii	DWDM Equipment
iv	Fiber Patch Cords
v	Inter Floor cabling and tray work
vi	Manpower towards installation
vii	NMS
viii	Test Instruments
ix	Project Management cost

Table B(ii)
CAPEX items used for access facilitation at alternate co-
location
(Link between CLS Access Section and MMR)

Sl.No.	Description
i	Fiber between CLS and MMR

Table-B(iii)

CAPEX items used for access facilitation at alternate co-location

(At MMR Section)

Sl.No.	Description
i	ODF (Optical Distribution Frame)
ii	Digital Cross Connection
iii	DWDM Equipment
iv	Fiber Patch Cords
v	Inter Floor cabling and tray work
vi	Manpower towards installation
vii	NMS
viii	Test Instruments
ix	Project Management cost

(iii) Cost data used for the Capex Items: Paras 14 - 15 show that the authority which had earlier in the consultation paper taken the cost of fully loaded DXC (640 G) that is loaded with only 10 G/STM - 64 cards in all slots in protected mode so as to calculate the cost for provision of one 10 G/STM 64 was revised after taking into consideration the suggestions of the two petitioners. It is noticed that as per the discussions with the two petitioners and demand projection for various interfaces and capacity of DXC used by them, the network design has been modified to 60 G capacity ensuring availability of all interfaces that is STM - 1, STM 4, STM 16 and STM 64. Accordingly the re-estimation was done. Paras 16-18 further record the various submissions made by the two Petitioner OCLSS and revised calculations being made. Thereafter, PARA 19 gives the actual capital cost for 60 G (in protected mode) used for access facilitation.

[14. In the consultation paper, cost for each CAPEX item for providing one STM64 (10G) was derived from the costs submitted by both OCLSSs. As per the data submitted by them for their CLSSs at Mumbai, one OCLS is using a DXC with 640 G capacity, while the other OCLS is using 4 DXCs with 120 G capacity each for providing access facilitation. Therefore, in the consultation paper, in order to calculate the cost for provision of one 10 G/ STM-64, the cost of fully loaded DXC i.e. loaded with only 10 G/ STM-64 cards in all slots in protected mode was taken.

15. In their comments, both M/s Bharti Airtel and TCL submitted that though it is feasible to equip the DXC with all 10 G interfaces, keeping in view the existing demand of the sector, the DXC are normally equipped with different interfaces i.e. STM-1, STM4, STM16 and STM-64 in varying numbers. They suggested that design capacity should be taken on the basis of market projections and while designing this capacity TRAI should ensure that all interface i.e. STM-1, STM4, STM16 and STM-64 are available in the equipment. TRAI has considered their submission and discussed different combinations for provisioning of interfaces in DXC with them. As per the discussions with them and demand projection for various interfaces and capacity of DXC used by them, the network design has been modified for 60 G capacity ensuring availability of all interfaces i.e. STM-1, STM4, STM16 and STM-64 and AFC both at CLS and alternate location has been re estimated. However, while estimating the AFC at alternate location, the DXC used at CLS access section has been loaded with STM-64 (10G) cards only for delivering 60 G capacity in protection mode. Following Table (Table-C) provides DXC configuration taken for 60 G capacity in protection mode.

Table-C
DXC configuration for 60-G Capacity

Sl.No.	Interface	Total No. of Interfaces	No. of Interfaces available (in protection mode) at sale	Equivalent Capacity in Gbps
(i)	STM-1	128	64	10
(ii)	STM-4	32	16	10
(iii)	STM-16	32	08	20
(iv)	STM-64	16	02	20
Total				60

16. For the access facilitation at alternate location, the costs submitted by OCLSS for fibre link and DWDM have been also apportioned for carrying 60 G capacity. Similarly the cost of passive network elements i.e. ODF, fiber patch cord, inter floor cabling and tray work have been appropriately apportioned for provisioning of 60G, on the basis of cost data submitted by these OCLSS for respective passive elements.

17. M/s TCL has submitted that the TRAI has taken cost from Purchase Order(PO) submitted by them which

does not include taxes paid to various agencies by TCL. Accordingly, in the revised calculations, Taxes @ 18% have been taken into account. M/s TCL has also submitted that the project management cost, which was allowed by TRAI as 10% of CAPEX items, should be based on actual costs. As per the data submitted by M/s TCL their project management cost was around 6% of the CAPEX. The other OCLS viz. M/s Bharti Airtel in its calculation has taken project management cost as 10% of CAPEX items. Therefore, TRAI has taken project management cost @ 10% of CAPEX.

18. Both the OCLSs had provided the costs of the equipments in US Dollars. In the consultation paper, conversion rate used was Rs.50 for 1 US Dollar. On the basis of submissions by the service providers and the period of Purchase Orders submitted by the OCLSs, the conversion rate has been revised upward from Rs. 50 to Rs. 52.

19. The apportioned capital cost for 60 G (in protection mode) for each CAPEX item for OCLS-1 and OCLS-2, for access facilitation at CLS is given in the following Table-D. Keeping in view the commercial sensitivity of data, details of items and names of the OCLSs have not been provided.

Table-D

Apportioned Capital Cost for 60G (in protected mode)
used for Access Facilitation (in Rs.)

Sl.No	Description	OCLS-1	OCLS-2
(i)	Apportioned Capital Cost for 60 G (in protected mode) used for Access Facilitation at CLS	1,34,31,961	1,03,47,315
(ii) (a)	Apportioned Capital Cost for 60-G (in protected mode) used for Access Facilitation at Alternate location (For both CLS Access and MMR Section)	3,58,16,799	3,06,08,722
(ii) (b)	Apportioned Capital Cost for Optical Fiber Link between CLS and MMR	7,80,000	32,25,000

(iv) Annual recovery of capital cost: Paras 20 - 23 at pages 642 - 643 gives detailed reasoning with regard to the various para- meters that have been used for estimating annualised capital cost and the acceptance of some of the suggestions made

by the petitioner OCLSS regarding life of optical fibre link.

[20. Following parameters have been used for estimating annualized capital cost in the consultation paper:

(i) Life of network element (except optical fiber) = 10 years

(ii) Life of link of optical fiber between CLS and MMR = 18 years

(iii) Method of depreciation = Straight Line Method (SLM)

(iv) Pre-tax WACC = 15%

21. In response to the consultation paper, most of the stakeholders agreed on value of Pre-tax WACC and Straight Line Method (SLM) to workout depreciation for each year. However, M/s TCL submitted that Pre tax WACC has to be taken at 23.9% while M/s Bharti has suggested to use WACC as 20% as against 15%. TRAI has analyzed the Accounting Separation Report of various telecom service providers and found that pre-tax WACC @ 15% is reasonable.

22. Regarding life of the equipment, M/s TCL has submitted that it should be taken as 5 years instead of 10 years. However, most of the stakeholders including M/s Bharti Airtel have supported for 10 years as life of equipment. Similarly, regarding life of Optical Fiber, M/s TCL submitted that this should be taken as 15 years instead of 18 years.

23. In its various other earlier regulations like IUC, Port Charges etc., wherein transmission equipments are also used, in order to calculate the depreciation of the different network elements on a uniform basis, TRAI has used Straight Line Method (SLM) adopting an average asset life of 10 years. Therefore, in these calculations also, the Authority has decided to continue with the assumption of Life of the equipment as 10 years. However, keeping in view the submissions of these two OCLSS, life of Optical Fiber link has been revised as 15 years from 18 years.]

(v) Operational Cost: In the consultation paper OPEX had been taken as 30% of CAPEX. However accepting the requests of the two Petitioner OCLSS the actual value of the OPEX has been estimated on the basis of the data submitted by both of them and re-estimation has been done.

[24. In the consultation paper TRAI has taken operational cost as 30% of capital cost of network element.

25. M/s Bharti Airtel has submitted that OPEX is the cost of variable factors and is based on market dynamics. Therefore, it cannot be a fixed percentage of the CAPEX. M/s TCL has also submitted that the linkage between CAPEX and OPEX is not linear. Both of the service providers requested that rather than using a fixed %, actual operating costs should be used.

26. Therefore, in the revised calculations, actual value of OPEX has been estimated on the basis of data submitted by the two OCLS. One of the OCLS has submitted market prevailing rental and annualized cost of external fit out and internal fit-out for Mumbai. On the basis of its data, TRAI had earlier in the consultation paper, estimated the space charges for calculating the co-location charges. Therefore, same estimated space charge for Mumbai has been now used as space charges in these revised calculations for OPEX for that OCLS. The other OCLS has submitted the Cost of land, building and other fixture for their data center wherein it is providing Access facilitation in place of prevailing market rent for the space. For estimating space charges for this OCLS, RoCE of 15% has been provided for the cost of land (book value) as submitted by the OCLS. Cost of building has been annualized by taking 20 years life of building. For estimating annual cost of other capital expenditure for fit-out etc, life has been taken as 10 years. On both item Pre Tax WACC of 15% has been taken.

27. M/s Bharti has submitted that AMC for equipment and optical fibre should be 4% and 3%. Accordingly, AMC of equipment and Optical fiber has been revised as 4% and 3% of capital costs respectively. As per accounting Separation report submitted by service providers, employee cost for private telecom service providers varies from 0.92% to 3.11% of Gross block. Therefore, Manpower Cost has been taken as 2% of CAPEX.

28. Summary of various OPEX items taken and annual OPEX in the revised calculations are given in Table-E and Table-F, respectively:

Table-E
OPEX ITEMS

Sl.No.	Description
(i)	AMC of equipments @ 4%
(ii)	AMC of Optical Fiber @ 3%
(iii)	Space Charges/Sq.ft./Annum for Mumbai (Including External fit outs (transformers, DG sets, HT panels, LT panels, cables, air conditioner), Internal fit outs (UPS, battery, internal electrical panel, precision AC, power distribution units, fire alarm and access control and cabling), Security services charges) @ for OCLS-1 Rs. 8636 and for OCLS-2 Rs.9926.
(iv)	Electricity Charges @ Rs. 15.64 Per unit
(v)	Manpower Cost @ 2% of CAPEX
(vi)	Miscellaneous (Corporate Overhead, IT etc) @ 10% of OPEX

Table-F
OPEX for 60G used for Access Facilitation (in Rs.)

Sl.No	Description	OCLS-1	OCLS-2
(i)	OPEX for 60G used for Access Facilitation at CLS	19,93,789	25,01,028
(ii)	OPEX for 60 G used for Access Facilitation at Alternate location (For both CLS Access and MMR Section)	69,69,511	78,30,337

(vi) Utilization: As seen above from the minutes of the meeting that no objection with regard to 70% utilisation factor being taken into account in the estimation of charges in consultation paper had been taken. Accordingly, the authority has given its reasoning stating the utilisation factor of 70% to be reasonable especially in light of the fact that the network design has been revised to provision of 60 G capacity with combination of all interfaces as suggested by the two Petitioner OCLSs and not on 640 G as was there in the consultation paper.

[29. Utilization factor of 70% was taken into account in the estimation of charges in consultation paper. In their comments to the consultation paper, most of the stakeholders have supported the utilization factor of 70% and mentioned that it is in-line with the best international regulatory practices. Moreover in the revised calculations, the network design has been revised for provision of 60G capacity with combination of all interfaces as suggested by the two OCLSs. Therefore the Authority is of the view that the utilisation factor of 70% is reasonable.]

(vii) Calculation of Access facilitation charges: The authority has given the calculation of access facilitation charges at cable landing station and at alternate location after re-estimating the charges. In para-31 the authority notices that the work done to provide access facilitation at cable landing station is same for all cable landing stations. The only variation would be with regard to space and electricity charges. Hence, as agreed by the OCLS the authority in its calculations has used space and electricity charges for Mumbai which are the highest amongst various locations.

[30. Estimation of access facilitation charges for 60G at CLS and MMR are as follows:

Table-G
Calculation of Access Facilitation Charges (in Rs.)
for 60 G (in protected mode) at CLS

Sl.No	Description	OCLS-1	OCLS-2
(1)	Average Annualized CAPEX (Annualised value of apportioned capital cost indicated in item (i) of Table-D)	24,51,333	18,88,385
(b)	OPEX per annum (Item (i) of Table-F)	19,93,789	25,01,028
(c)	Total Annual charges per annum { (a) + (b) }	44,45,122	43,89,413
(d)	Total Annual charges per annum with utilisation @ 70% { (c) ÷ 70% }	63,50,174	62,70,589
(e)	Annual charges per annum (Including Licence Fee @ 8%) { (d) ÷ (1-0.08) }	69,02,363	68,15,858

Table-H

Calculation of Access Facilitation Charges (in Rs.) for
60 G(in protected mode) at Alternate location

Sl.No	Description	OCLS-1	OCLS-2
(1)	Average Annualized CAPEX {(Annualised value of apportioned capital cost indicated in item (ii)(a) of Table-D) + (Annualised value of apportioned capital cost indicated in item (ii)(b) of Table-D)}	66,50,966	60,59,092
(b)	OPEX per annum (Item (ii) of Table-F)	69,69,511	78,30,337
(c)	Total Annual charges per annum {(a)+(b)}	1,36,20,477	1,38,89,429
(d)	Total Annual charges per annum with utilisation @ 70% {(c) ÷ 70%}	1,94,57,824	1,98,42,042
(e)	Annual charges per annum (Including Licence Fee @ 8%) {(d) ÷ (1-0.08)}	2,11,49,808	2,15,67,437

31. TRAI is of the opinion that work done to provide access facilitation at a cable landing station is same for all cable landing stations. Therefore, it is not required to estimate the cost based charges separately for each cable landing stations. The only variation could be due to space and electricity charges if the cable landing stations are located in two different cities. Therefore, in its calculations, TRAI has used space and electricity charges for Mumbai, which are the highest among various locations. During the consultation process also, stakeholders were generally of the view that determination of Access Facilitation charges, one for CLS and other one for alternate location (MMR) would be adequate. As these charges are ceiling charges, the Authority is of the opinion that higher of the costs of the two OCLSs, calculated separately for CLS and MMR may be taken for prescribing these charges.]

(viii) Access facilitation charges for various capacities i.e. STM-1, STM - 4, STM - 16 or STM - 64: The authority has discussed in detail as to why a conversion factor of 2.6 instead of a factor of 4 as stated by the two Petitioner OCLSs should be

employed for estimating access facilitation charges for lower capacities. It is submitted that keeping in mind the interests of the two OCLSS the charges of various capacity interfaces has been calculated so that total cost is recovered from the interfaces for which the DXC has been configured. It is to be noted that this factor of 2.6 or 4 is irrelevant for the purposes of calculating the total cost. The said factors would not have any impact on the recovery of the total cost which is the prime objective of the two OCLSSs. But at the same time it will ensure availability of higher capacity to our country and hence high speed broadband to the public at large.

[See Paras 32 - 34 at pages 647 - 649.]

32. In the consultation paper, for estimating access facilitation charge for lower capacities i.e. STM-1, STM-4 and STM-16 from 10 G/STM-64 capacity, a conversion factor of 2.6 has been used keeping in view two important factors in mind : (a) scale of economy for higher capacities (b) prevailing market factor in domestic leased circuit. Most of the stakeholders favored using the factor of 2.6. However, the two OCLSSs were of the view that using a factor of 4 is more appropriate. They were also of the view that irrespective of the conversion factor taken into account for the calculations, the charges determined should be such that they are able to recover their total cost for providing various capacity interfaces. Therefore, keeping the submissions of the two OCLSSs in view, in the revised estimated charges, the charges of various capacity interfaces has been calculated so that total cost is recovered from the interfaces for which DXC has been configured.

Total Cost of 60 G

= [(No of STM-1 Interfaces) *(AFC of one STM-1 Interface)] + [(No. of STM-4 Interfaces) * (AFC of one STM 4 Interface)] + [(No. of STM-16 Interface) * (AFC of one STM 16 Interface)] + [(No. of STM-64 Interface) * (AFC of one STM 64 Interfaces)]

33. TRAI is of the opinion that if the higher factor of 4 as proposed by OCLSSs is used for calculation, then price of STM-1 will be very low and price of STM 64 will be on higher side and this will also not provide advantage of scale of economy for higher capacities. Therefore, keeping in view the prevalent conversion factor in the market which is also generally agreeable to most of the stakeholders, TRAI has used factor of 2.6 in place of 4, ensuring that the cost incurred is recovered. Accordingly, AFC for

various interfaces has been calculated using following formula:

Total Cost of 60 G

= [{(No of STM-1 Interfaces) * (AFC of one STM-1 Interface)} + {(No. of STM-4 Interfaces) * (2.6) * (AFC of one STM-1 Interface)} + {(No. of STM- 16 Interface) * (2.6*2.6) * (AFC of one STM-1 Interface)} + {(No. of STM- 64 Interface)* (2.6*2.6*2.6)* (AFC of one STM-1 Interfaces)}]

34. Accordingly, the charges for various interfaces comes out to be as given in Table-I and Table-J.

Table-I

Access Facilitation Charges per annum (in Rs.) at
Cable Landing Station

Sl.No	Capacity	Charges per unit Interface		
		OCLS-1	OCLS-2	Ceiling Prescribed
(a)	STM-1	35,427	34,983	36,000
(b)	STM-4 {(a) * 2.6}	92,111	90,956	93,000
(c)	STM-16 {(b) * 2.6}	2,39,488	2,36,487	2,40,000
(d)	STM-64 {(c) * 2.6}	6,22,669	6,14,866	6,25,000

Table-J

Access Facilitation Charges per annum (in Rs.) at
Alternate location (Meet Me Room)

Sl.No	Capacity	Charges per unit Interface		
		OCLS-1	OCLS-2	Ceiling Prescribed
(a)	STM-1	1,08,554	1,10,698	1,11,000
(b)	STM-4 {(a) * 2.6}	2,82,241	2,87,814	2,88,000
(c)	STM-16 {(b) * 2.6}	7,33,826	7,48,316	7,50,000
(d)	STM-64 {(c) * 2.6}	19,07,946	19,45,621	19,50,000

322. It is further submitted that on 24.01.2013, the petitioner TCL preferred a writ petition being WP no. 1875 of 2013 praying that the regulation of 2007, its amendment of 2012 and the latest regulation of 21. 12. 2012 be quashed. The

Hon'ble single judge was pleased to issue notice and granted an ex parte interim stay of the regulations on 24.01.2013. Thereafter, M/s. Bharti Airtel Ltd also filed a similar writ petition being W.P.No.3652 of 2013 which has been tagged along with the writ petition of TCL. It is pertinent to note that Bharti Airtel Ltd had preferred a writ petition before Hon'ble High Court of Delhi being WP 605 of 2003 and the same was dismissed as withdrawn, vide order dated 01.02.2013.

323. On the authority that TRAI has the power to frame the impugned regulations under the provisions of the TRAI Act, 1997, it is the contention of the petitioner that it is on the basis of an amendment to the license agreement of the ILDO that the respondent authority traces its power to frame the impugned regulations. The power to frame such regulations cannot be conferred to the authority through the license terms and conditions. The source of power has to be traced to any provision of the TRAI act rather than, as admitted by the authority, to any provision of the license held by the petitioner. In support of this argument the petitioner has referred to various clauses in the recommendations dated 16. 12. 2005, consultation paper dated 13.04.2007 and in the explanatory memorandum to the regulation, dated 07.06.2007. By referring to the various paras in these three documents, the petitioner has contended that the amended clause 2.2 (C) of the ILDO license which came into being after the recommendation of the authority was accepted by the licensor, was done to enable TRAI to bring out regulations to ensure efficient, transparent and non-discriminatory access to essential facilities at the cable landing stations. The petitioner has strenuously contended that from the various passages contained in the above three documents it is clear that the authority had a clear understanding that it did not have the power to frame regulations on the subject matter of cable landing stations and that it wanted an amendment to the license terms and conditions so that the authority may be enabled to issue requisite regulations.

324. TRAI has submitted that it is the categorical stand of the authority which is clearly reflected in the counter affidavit as well as in the reply to the rejoinder affidavit filed by the authority that the power to frame regulations is clearly traceable to the provisions of the TRAI act. In addition, it has been contended by the authority that the licensor as well as the license terms recognise that the authority has the power to frame the regulations under the provisions of the TRAI act. Reliance placed by the petitioner on various paras contained in the recommendations dated 16.12.2005, consultation paper dated 13.04.2007 and in the explanatory memorandum to the regulation dated 07.06.2007 is completely

baseless and demonstrates complete lack of understanding of the documents. The petitioner has chosen to read the passages selectively and out of context without appreciating the facts and circumstances which led to the framing of the recommendations and thereafter the regulations. The baseless and prejudicial argument forwarded by the petitioner is also due to the fact that the petitioner has chosen not to read certain important documents like letter dated 07.12.2006 of the Authority to the Licensor and despite and has ignored to refer to the same. As such, the respondent is constrained to submit that the contention of the petitioner is highly misleading and is aimed towards prejudicing this Hon'ble court.

325. According to TRAI, a perusal of the historical background and the list of dates mentioned hereinabove would reveal that till 2001 the ILD sector was in the hands of only one entity being the Videsh Sanchar Nigam Limited (VSNL). It was upon recommendations of the authority that the licensor chose to open the ILD sector to increase the competition in the sector. Accordingly, the government issued the broad guidelines for issue of license for ILD service in India after which several licenses were issued including that of the two petitioners. One of the terms of the license being clause 2.2 (b) read as follows:

'equal access to bottleneck facilities for international bandwidth owned by national and international bandwidth providers shall be permitted for a period of five years from the date of issue of the guidelines for grant of license for ILD service or three years from the date of issue of first license for ILD service whichever is earlier, on the terms and conditions to be mutually agreed.'

Hence, it is submitted that the license recognized CLS to be a Bottleneck facility mandating the licensee to give equal access. Secondly, the grant of equal access to bottleneck facility was hedged by a sunset clause. It was expected that after opening the sector and issuing ILDO licenses to multiple licensees there would be enough competition in 5 years from the date of issuance of guidelines and the CLS will cease to be a bottleneck facility. Another feature was that the terms and conditions for such agreements had to be mutually agreed between parties.

326. After expiry of three years from the date of issuance of the license that is when the sunset clause came to an end it was expected that enough competition would have been achieved after the ILD sector was opened up in the year 2002. However the authority received several representations which indicated that the CLS facility continues to be a bottleneck facility

signifying that there was a need for some sort of regulatory intervention to ensure that competition in the sector is increased and level playing field is established amongst the various licensees. Accordingly, a consultation paper was issued dated 06. 06. 2005 to discuss measures to promote competition in the international private leased circuits in India. The consultation paper lists out the various reasons for the CLS to be a bottleneck facility. Thus, one of the questions that was there in the consultation paper was whether the cable landing station has ceased to be a bottleneck facility or not and what are the different options for increasing the competition in the IPL C segment?

327. Meanwhile, the DoT had reduced the entry fee for ILD license to Rs. 2.5 crores from 25 crores and had also reduced the licence fee to 6% from 15%. This step was taken to ensure that more players can come in the ILD sector which would lead to increase in competition. Another development that took place was that the authority prescribed the tariff charges for the IPL C circuits so as to ensure that there is level playing field and interests of both the consumers and the service providers are protected. This was again a step towards ensuring competition and establishment of level playing field in the ILD sector. However, during the consultation process initiated vide a consultation paper dated 06.06.2005 which was exploring the different regulatory interventions that can be employed for the purposes of facilitating further competition in the sector, it emerged that there are various reasons for the CLS facility to continue to be a bottleneck facility. It has been discussed in various paras as to what are the reasons due to which the cable landing station continues to be a bottleneck facility and for lack of competition in the sector despite the fact that the ILD sector had been opened up in the year 2002 and several licenses had been issued to various service providers. The effect of clause 2.2 (b) in the license terms and conditions which talked about equal access to bottleneck facilities to be provided and on terms and conditions which were to be mutually agreed was examined at length. The authority has categorically discussed the effect of the license term being clause 2.2(b), which states as follows:

"4.1.3 The first ILD license was issued in February 2002 and therefore, the new ILDOs were entitled for equal ease of access to bottleneck facilities at cable landing station of the incumbent operator up to February 2005. As per the license, the terms and conditions of such access were to be mutually agreed between the parties concerned. However, it is observed that there is no standard/published access facilitation agreement, which the new service providers

can make use of for availing of access to international cable capacity. In these circumstances there has been a scope for delay in provisioning of access to the capacity acquired by the competing operators from incumbent and other carriers. Also as the terms and conditions of such access are to be mutually agreed between the parties concerned, the regulator is not in a position to intervene in such matters.'

Thus, it has been clearly observed that due to the fact that the terms and conditions of such access were to be mutually agreed between the parties concerned, the regulator is not in a position to intervene in matters where there has been a delay in provisioning of access to the capacity acquired by the competing operators from incumbent and other carriers. It is also observed herein that as there is no standard/published access facilitation agreement and the terms and conditions are mutually agreed, the authority is not in a position to intervene if there is some delay in provisioning of the access. Hence, clearly the prescription that the terms and conditions between the concerned parties shall be agreed upon mutually was not working in ensuring that the cable landing station facility ceases to be a bottleneck facility and competition is enhanced.

328. It is further submitted that the authority further discusses the issues, regarding bottleneck facility. Thereafter, the authority examines the working of clause 2.2 (b) of the license which prescribed terms and conditions between the concerned parties to be fixed through mutual agreement. The authority observes at para-4.4.5 that:

"4.4.5 The comments of the Indian ILDOs that do not currently own such cable stations shows that the control by the owner of CLS is not exercised in a reasonable and non-discriminatory manner. The two main ILDOs, Bharti and VSNL, contend that this should be the subject of a mutual agreement with their competitors, but this is neither supported by the current experience of the Indian competitors nor considered as a likely outcome going by the experience in other countries. Otherwise also without the explicit provision in the license to this effect it is not possible to have any efficient regulatory intervention.'

329. In other words, the authority recognises that due to the fact that the terms and conditions between the concerned parties had to be finalised through mutual agreement, there was no scope of regulatory intervention by the authority to prescribe the terms by framing a Regulation under the provisions of the TRAI Act, 1997. If the authority while exercising its

powers under the TRAI act framed any regulation to prescribe the terms and conditions for such agreements or charges for the grant of various access by the OCLS, then such a regulation would in all likelihood be in conflict with the express terms and conditions of the license. The authority further observes as follows:

"..... This requires that the access to submarine cable capacity and landing facilities at a CLS be open and non-discriminatory, both commercially and physically. The terms and conditions for such access including the charges should be finalised under regulatory supervision and the operators should be required to publish the terms and conditions as to how other ILDOs can access the cable capacity as well as landing facility commercially. An enabling provision in the ILDO license is required for this."

330. The above shows that the authority felt that the terms and conditions of the agreement that is entered between the OCLS and the seeker cannot be left to mutual agreement and there is a requirement for the authority to prescribe such terms and conditions and to mandate the OCLS to publish the said terms and conditions. However, any regulation framed by the authority to mandate this under the provisions of the TRAI act would be in potential conflict with the existing term and condition of the license which mandated terms and conditions to be finalised through mutual agreement. Hence, an amendment to the terms and conditions is required to enable a situation of no conflict between the terms of license and that of the Regulation framed by TRAI under the TRAI Act. Similarly, the authority observes that,

".....Therefore, access to the international capacity as well as landing facilities needs to be mandated and the terms and conditions of such access to be fair, transparent and non-discriminatory. For this the regulator is required to fix the cost-based access charges as well as lay down the broad principles underlying the terms and conditions."

In Para 4.5.4, the authority discusses Clause 2.2(b) and thereafter, at Para 4.5.5, observes that,

"..... Based on the past experience, the clause 2.2 (b) which states that equal access should be "permitted" and not "required to be provided", and that it should be subject to a sunset condition and terms and conditions to be mutually agreed, does not appear to be effective."

331. Thus, TRAI has submitted that the authority after examining the effect of the existing license condition being clause 2.2 (b) which mandated the terms and conditions of the agreement between the owner of the cable landing station and the seeker to be mutually agreed came to the conclusion that the said clause was ineffective in removing the bottleneck at the CLS and in ensuring increase in competition. It also observed that the terms and conditions need to be finalised under regulatory supervision and the same should also be published. The authority also felt that the regulator is required to fix the cost based charges as well as lay down the broad principles underlying the terms and conditions. In other words, there was a need for a positive regulatory intervention to take care of these aspects so as to ensure that the access to cable landing station is easier and it ceases to be a bottleneck facility.

332. It is further submitted that however, any regulatory intervention by framing regulation in exercise of powers of the authority under the TRAI act would potentially be in conflict with the existing term and condition of the license which prescribed the terms and conditions to be fixed through mutual agreement. As such, the authority felt that there is a need for an amendment of the existing license term and condition being clause 2.2 (b) in such a fashion that any regulatory intervention by the authority through a regulation framed by it under the provisions of the TRAI act is not in conflict with the terms and conditions of the license. It is in this context that the authority has used the expression 'to enable TRAI to bring out regulations'.

333. On the observation made by the authority that, 'For this purpose enabling provision is required in the ILDO license agreement, whereupon the requisite regulation including the cost based charges can be framed up by the regulator....', it is submitted that by stating the above, the authority is not contending that the amendment in the license terms and condition would grant the power to the authority to frame the regulation. Read in the context in which this observation appears as stated hereinabove, it would only mean that the amended term and condition of the license would be such that any regulation which is framed by the authority in exercise of its powers under the TRAI act to prescribe the terms and conditions that will govern the agreement between the OCLS and the seeker will not be in conflict with the terms and conditions of the license. Hence, if the amended term and condition of the license is such that it acknowledges regulatory intervention for fixing the terms and conditions of the agreement, publication of such terms and conditions and prescribing of such charges then any regulation framed by the authority in exercise of its powers under the TRAI

act will not stand in conflict with the said terms and conditions of the license. It is in that sense that the amended term and condition of the license would enable the regulator to intervene by exercising its powers under the TRAI act. Such a regulatory intervention prescribing the terms and conditions through regulation would have been directly in conflict with the unamended license term which prescribed terms to be fixed through mutual agreement.

334. TRAI has further submitted that the petitioner has deliberately not referred to a particular letter of the authority to the licensor dated 07.12.2006 which is a part of the record. This letter makes it abundantly clear that the authority recommended for changes in the terms and conditions of the license in advance so that the terms and conditions of the agreement that are finalised by the authority in exercise of its powers under the TRAI act is not in conflict with the terms and conditions of the license. When the respondent authority brought the same on record in the vacate stay application as well as in its counter affidavit in the writ petition, the petitioner became aware of the same but has deliberately chosen not to refer to the same while making its submissions before the Hon'ble court as well as in its written submissions to state that the authority was deriving powers from the terms and conditions of the license for framing the impugned regulations. It is submitted that the petitioner being a responsible person ought to have been fair in bringing this letter to the notice of this Hon'ble court at the first instance and in any case it ought to have referred and made proper submissions after the respondent authority had brought the same on record. Letter dated 07.12.2006 is of grave importance for the following reason:

a) the authority had made its recommendations to the government vide its recommendations dated 16. 12. 2005. The relevant portion of the recommendations provided as follows:

"4.6 Recommendation:

4.6.1. The authority therefore, recommends that equal access to bottleneck facility at the cable Landing stations (CLS), including landing facilities for submarine cables by licensed operators on the basis of nondiscrimination, without any sunset clause, should be mandated.

4.6.2. The ILD owning the cable Landing Station should also be mandated to publish, with prior approval of the regulator, the terms and conditions for all such access provision. Regulator may also determine and specify cost-based access charges through its regulation.

4.6.3. Clause 2.2 (b) of ILD service license should be suitably amended for this purpose and the existing time limits mentioned therein may be deleted."

b) The DoT issued a letter dated 23. 11. 2006 where it stated that it has accepted the following two recommendations:

1. Introduction of resale in IPL C segment.

2. Access to essential facilities including landing facilities for submarine cables at cable Landing stations.

The letter then stated that "it is requested that the detailed terms and conditions in respect of these two recommendations may please be submitted to DoT. Relevant clauses of the license agreement shall be suitably amended upon receipt of the detail of terms and conditions from TRAI."

It is thus clear that the DOT specifically asked for the text of the terms and condition in relation to the above two recommendations that were accepted by it so that it can carry out suitable amendment in the license agreement.

c) The TRAI vide its letter dated 7. 12. 2006 pointed out that it would be imperative for the licensor to make necessary amendments in the ILD license specifically in clauses 2.2 (c), 17.5 and 17.10 so as to give effect to the recommendations. The suggested text of the amended clauses was given in an Annexure enclosed with the letter.

However, PARA 4 of this letter of the authority stated that "... As the consequence of these amendments, the TRAI would finalise the terms and conditions for such access in accordance with the power conferred upon it under section 11 (1) (b) of the TRAI act, 1997. The key objective to seek said amendments in advance is to ensure that terms and conditions as finalised by the TRAI are in harmony with the terms and conditions of the license agreement."

d) Based on this letter and the suggested text of the amendments given by the authority at the request of the licensor, necessary amendments were carried out in the license agreement by the licensor after accepting the suggested text of the authority of the license terms in toto except for adding the word DoT."

The new clause 2.2 (c) reads as follows:

"equal access to bottleneck facilities at the cable Landing stations (CLS) including landing facilities for submarine cable for licensed operators on the basis of non-discrimination shall be mandatory. The terms and conditions for such access provision shall be published with prior approval of the TRAI, by the licensee owning the cable Landing Station. The charges for such access provision shall be governed by the regulations/orders as may be made by the TRAI/DoT from time to time".

It is submitted that the impugned regulations are not in conflict with the terms and conditions of the amended license term 2.2 (c).

335. It is submitted that when the various passages appearing in the recommendations dated 16.12.2005 are read as a whole along with the letter dated 7.12.2006, it would become amply clear that,

a) the authority was always aware, consistently held the position and emphatically reiterates that it has the power to frame impugned regulations under the provisions of the TRAI act and it does not derive the power to frame the impugned Regulations from the License Terms and conditions of ILDO License.

b) the authority had concluded in its recommendations dated 16.12.2005 that in order to ensure that the cable landing station ceases to be a bottleneck facility and that there is enough competition in the sector there is a need to supervise and approve the standard terms and conditions of the agreement which would be entered into between the OCLS and the seeker, mandate that these terms and conditions are published and that the access charges may be prescribed by the authority.

c) The authority recognised that the unamended term and condition of the license being clause 2.2 (c) which prescribed for the terms and conditions to be finalised through mutual agreement was highly ineffective. However, unless it is amended to provide for the provisions mentioned above, the authority would not be able to frame a regulation under the TRAI act and intervene in the matter as the same would be directly in conflict with the unamended clause in the license.

d) Hence, the authority recommended for the amendment of the license term in the manner suggested

by it which was accepted by the licensor so as to ensure that any regulation made by it prescribing the terms and conditions in exercise of its powers under the TRAI act would be in harmony with the terms and conditions of the license agreement.

e) it is submitted that the various passages referred to and relied upon by the petitioner which have been selectively chosen and read out of context to develop their argument, needs to be understood in the manner as stated above by reading the entire documents as a whole along with the letter of 07.12.2006 of the Authority."

336. Another aspect that assumes significance in the context of the present submissions is the fact that the Hon'ble TDSAT in Appeal No. 11 of 2002 along with Appeal no.12 of 2002 vide judgment dated 27.04.2005 reiterated the principle laid down by the Division Bench of the Hon'ble Delhi High Court in Writ Petition No.6543 of 1999 and Writ Petition No.6483 of 1999 (MTNL Vs. TRAI) decided on 17.01.2000 (AIR 2000 Delhi 208) and in para 24 cited the following part of para 31 of the aforesaid judgment of the Hon'ble High Court.

"..... It is for the Government to decide what are to be the terms and conditions of a license to a service provider. The Authority cannot either directly or indirectly vary the terms and conditions, which are laid down by the Government in a license to a service provider. What it cannot do directly, it cannot do indirectly".

The Learned TDSAT in sub-para 4 of para 32 of its aforesaid judgment also held as under:

"..... The observations of the Division Bench therefore are equally valid with reference to the Amended Act."

Against the same, the authority had preferred an appeal before the Hon'ble Supreme Court being Civil Appeals no. 3298 and 4529 of 2005. Subsequently a number of matters were clubbed together and the Hon'ble Supreme Court has framed several issues to dispose of those appeals. One of the issues which is pending consideration of the Hon'ble Supreme Court is:

"Whether in the event of any inconsistency between the terms and conditions of the licenses issued under section 4 of the Telegraph act, 1885 and the provisions of the telecom regulatory authority of India act, 1997 (for short "the TRAI act"), the provisions of the TRAI act would prevail in view of the purpose and object for which the TRAI act has been

passed i.e. for ensuring rapid development of telecommunications in the country incorporating the most modern technology and, at the same time, protecting the interests of the consumers and the service providers?'

Thus, on 16.12.2005 when the authority made its recommendations to the licensor, it was aware that any regulation framed by it under the provisions of the TRAI act providing for approval/supervision of the terms and conditions of the agreement entered between the parties would stand in conflict with the license terms which specifically provides for terms to be fixed through mutual agreement. This would lead to the regulation being challenged on this ground by the parties concerned after relying on the judgment of the Hon'ble TDSAT. Hence, the authority before framing any regulation under provisions of the TRAI Act made suitable recommendations to the licensor, to amend the license terms and conditions in such a manner that any regulation framed by the authority was not in conflict with those license terms but on the contrary, were in harmony with each other.

337. It is submitted that there is no challenge to the Regulations framed on the ground that they are in conflict with the terms and conditions of License. In fact, in the instant case the Petitioners have not challenged the impugned Regulations on the ground that they are in conflict with the terms and conditions of License.

338. It is submitted that the passages referred to by the Petitioner in the Consultation Paper and regulation of 2007 are also on the same lines as mentioned in the Recommendations dated 16.12.2005. They are in the same context and have to be understood in the same fashion as submitted herein above with regard to passages in the Recommendation. Accordingly, the Authority is not repeating the arguments to justify those passages.

339. It is submitted that the petitioner in its Written submissions has contended that TRAI's understanding that the amended clause would enable it to frame regulations and as such it has no power, admittedly, under the Act is consistently reflected in the passages of recommendation, consultation paper and Regulation of 2007. As the power to frame Regulations is derived from the License terms, the Regulations are illegal. Confronted with this, TRAI has improved upon its stand and has tried to argue contrary to this in its Affidavits. The Petitioner has placed reliance on several Judgments that the stand taken in those documents cannot be improved upon by the Affidavits.

340. TRAI has submitted that it has been explained in detail above that the Petitioner is reading selective passages from those documents and reading them out of context to develop a very misleading argument. It has also deliberately chosen to ignore a letter dated 07.12.2006 of the Petitioner to the Licensor which is a contemporaneous document and a part of the transaction where recommendations were made, accepted by the Licensor, terms were finalized and amendment of the license was carried out.

341. Non-reference to this letter whether deliberate or not has led to the misleading contention of the Petitioner. The Respondent has elaborately dealt with the issue of what the passages actually meant when they are read as a whole, along with the stand of the Authority in its letter dated 07.12.2006 and the background of the pending matter in the Hon'ble Supreme Court. Thus, the argument of the Petitioner is flawed. As such, when such a stand is taken by the Authority in its Affidavits, they cannot be viewed as an improvement or departure from the position in the documents relied by the Petitioner. The Respondent has neither departed nor improved on the observations mentioned in the various documents but have reiterated the stand. In light of this, there is no merit in this argument of the Petitioner and the Judgments relied upon for such purpose are clearly inapplicable in the facts of the present case.

342. The contention of the petitioner in the writ petition that the licensor did not agree with the recommendation of the authority that it can prescribe charges for the cable landing stations through regulations while carrying out the amendment to the license terms and conditions, leading to an amended clause 2.2 (c), is completely baseless and misleading. It is submitted that the licensor had accepted not only the recommendation of the authority to amend the license terms and conditions but had also accepted the suggested text of the license term in toto except for adding the word DoT in amended clause 2.2(c).

343. The petitioner has laid emphasis on the fact that the new clause 2.2(c) as was recommended by the authority and incorporated by the licensor in the license terms and conditions shows that the licensor did not agree with the recommendation of the authority that it can prescribe charges for the cable landing stations through regulation. This contention is primarily based on the fact that the word "govern" is used in the said license term which was not there in the Recommendation. Such a contention is completely contrary to the various

documents on record. As stated above, the licensor accepted the recommendations of the authority, requested the authority to frame the exact term and condition that needs to be incorporated into the license and upon such term being given by the authority it was incorporated in the license by the licensor without any modification except for adding the word DoT. Thus the authority which framed the license term while using the word 'govern' used it in its widest sense which would include prescribing charges through regulation as was recommended by it and accepted by the Licensor.

344. TRAI has further submitted that the petitioner has accepted in its Rejoinder, the dictionary meaning of the word "govern" as to "control, influence, or regulate..." It means that the word "regulate" has got the same meaning as the word govern". In its recent judgment dated 6.12.2013 in **BSNL Vs TRAI [2014 (3) SCC 222]**, the Hon'ble Supreme Court while dealing with the power of Authority to regulate and the Jurisdiction of Hon'ble TDSAT has dealt with the term "Regulate" in paras 81-87 of its judgment and emphasised on its widest amplitude. The respondent wishes to rely and refer to the said judgment. It has mentioned the judgments in case of **V.S. Rice & Oil Mills v State of AP AIR 1964 AXC 1781** wherein it observed,

"The word regulate is wide enough to confer power on the State to regulate either by increasing the rate, or decreasing the rate, the test being what is it that is necessary or expedient to be done to maintain, increase, or secure supply of the essential articles in question and to arrange for its equitable distribution and its availability at fair prices."

It is further held in para 88 that:

"It is thus evident that the term 'regulate' is elastic enough to include the power to issue directions or to make regulations and the mere fact that the expression "as may be provided in the regulations" appearing in clauses (vii) and (viii) of Section 11(1)(b) has not been used in other clauses of that sub-section does not mean that the regulations cannot be framed under Section 36(1) on the subjects specified in clauses (i) to (vi) of Section 11(1)(b). In fact, by framing regulations under Section 36, the Authority can facilitate the exercise of functions under various clauses of Section 11(1)(b) including clauses (i) to (vi)."

The Hon'ble Supreme court in its judgment has elaborately dealt with the wide import of the term 'regulate' citing various

judgments where the term has been defined in an elastic manner to comprehend all facets and not only specifically enumerated in the Act. Relevant paras from the judgment are given as follows,

"84. In *Jiyajeerao Cotton Mills Ltd. v. M.P. Electricity Board* 1989 Supp (2) SCC 52, the validity of the orders providing for higher charges/tariff for electricity consumed beyond legally fixed limit was upheld in view of Section 22(b) of the Electricity Act, which permits the State Government to issue an appropriate order for regulating the supply, distribution and consumption of electricity. It was held that the Court while interpreting the expression "regulate" must necessarily keep in view the object to be achieved and the mischief sought to be remedied. The necessity for issuing the orders arose out of the scarcity of electricity available to the Board for supplying to its customers and, therefore, in this background the demand for higher charges/tariff was held to be a part of a regulatory measure.

85. In *Deepak Theatre v. State of Punjab* 1992 Supp (1) SCC 684, this Court upheld classification of seats and fixation of rates of admission according to the paying capacity of a cinegoer by observing that the same is an integral part of the power to make regulation and fixation of rates of admission became a legitimate ancillary or incidental power in furtherance of the regulation under the Act.

86. The term 'regulation' was also interpreted in *Quarry Owners' Association v. State of Bihar* (2000) 8 SCC 655 in the context of the provisions contained in the Mines and Minerals (Regulation Development) Act, 1957 and it was held: "Returning to the present case we find that the words "regulation of mines and mineral development" are incorporated both in the Preamble and the Statement of Objects and Reasons of this Act. Before that we find that the Preamble of our Constitution in unequivocal words expresses to secure for our citizens social, economic and political justice. It is in this background and in the context of the provisions of the Act, we have to give the meaning of the word "regulation". The word "regulation" may have a different meaning in a different context but considering it in relation to the economic and social activities including the development and excavation of mines, ecological and environmental factors including States' contribution in developing, manning and controlling such activities, including parting with its wealth, viz.,

the minerals, the fixation of the rate of royalties would also be included within its meaning.”

87. Reference in this connection can also be made to the judgment in U.P. Coop. Cane Unions Federation v. West U.P. Sugar Mills Association (2004) 5 SCC 430. In that case, the Court interpreted the word ‘regulation’ appearing in U.P. Sugarcane (Regulation of Supply and Purchase) Act, 1953 and observed:

“Regulate” means to control or to adjust by rule or to subject to governing principles. It is a word of broad impact having wide meaning comprehending all facets not only specifically enumerated in the Act, but also embraces within its fold the powers incidental to the regulation envisaged in good faith and its meaning has to be ascertained in the context in which it has been used and the purpose of the statute.”

Thus, it is abundantly clear that the licensor had accepted the recommendation given by the authority and had also accepted the suggested text of the amended term of the license as given by the authority. Hence a reading of the amended clause 2.2 (c) of the license would mean that if the authority frames suitable regulations prescribing the access charges then the same would not be in conflict with the terms and conditions of the license.

345. As regards the power to frame regulations under the TRAI Act, it is submitted that it is clearly traceable to section 36(1) of the Act. The power to make regulations under this provision is wide and pervasive and the exercise of this power is only subject to the fact that it should be consistent with the Act and the rules framed under section 35. Besides this, there is no other limitation on the exercise of power by the authority under section 36(1). The authority has the power to frame regulations to carry out the purposes of the act which is not controlled or limited by section 36(2) or sections 11, 12 and 13 of the act.

346. It is submitted that in numerous matters before the Tribunal, under section 14 of the TRAI Act and before the various high Courts, questions were raised as to what is the scope of section 36 of the act which deals with the power of the authority to make regulations. The other major question which arose was whether the regulation made under section 36 is a subordinate legislation regarding which the tribunal created under the TRAI act will not have the jurisdiction to test the validity of.

347. Various decisions rendered by the Tribunal as well as the Delhi High Court came up for consideration before the Hon'ble Supreme Court in **BSNL v. TRAI [2014 (3) SCC 222]**, wherein, it has been held that the regulation that is framed under section 36 (1) of the act by the authority is a subordinate legislation, the validity of which cannot be questioned and decided by the learned tribunal, TDSAT constituted under section 14 of the act. Regarding the scope of section 36, the Hon'ble Supreme Court has discussed the issue at length. The relevant paragraphs of the judgment are as follows:

"73. Shri R.F. Nariman, learned Solicitor General argued that the power vested in TRAI to make regulations for carrying out the purposes of the TRAI act is very wide and is not controlled by section 36 (2), which provides for framing of regulations on specified matters. He submitted that if power is conferred upon a statutory authority to make subordinate legislation in general terms, the particularisation of the topics is merely illustrative and does not limit the scope of the general power. The learned Solicitor General further argued that for carrying out the purposes of the TRAI act, TRAI can make regulations on various matters specified in other sections including sections 8(1), 8(4), 11(1)(b), 12(4) and 13. He submitted that the regulations made under sections 36 (1) and (2) are in the nature of subordinate legislation and are required to be laid before each house of Parliament in terms of section 37 and Parliament can approve, modify or annul the same. The further submitted that a restrictive interpretation of section 36 (1) with reference to clauses (a), (b) and (d) of section 36 (2) will make the provision otiose and the court should not adopt that course.

75. Shri.C.S. Vaidyanathan, learned senior counsel appearing for the appellants in C.As. Nos.6049/2005, 802/2006, 4523/2006 and 5184/2010 argued that Section 36(1) should be construed consistent with other provisions of the TRAI Act and regulations cannot be made on the matters covered by other provisions. He referred to Section 11(2) and argued that the power conferred upon the TRAI to issue an order fixing the rates at which the telecommunication services are to be provided within and outside India including the rates at which messages are required to be transmitted to any country outside India and the power vested in TRAI under Section 12(4) and 13 to issue directions to the service providers cannot be controlled by making regulations under Section

36(1). Shri Vaidyanathan emphasised that if Parliament has conferred power upon TRAI under Section 11(2) to notify the rates by a transparent method, the power under Section 36(1) cannot be used for framing regulation on that topic. The learned senior Counsel referred to Section 62 of the Electricity Act, 2003, which, according to him, is in pari materia to Section 11(2) and argued that in view of para 15 of the judgment in PTC India Limited v. Central Electricity Regulatory Commission, regulations cannot be framed on the subject specified in that section.

80. After the Amendment of 2000, TRAI can either suo motu or on a request from the licensor make recommendations on the subjects enumerated in Section 11(1) (a) (i) to (viii). Under Section 11 (1) (b), TRAI is required to perform, nine functions enumerated in sub-clauses (i) to (ix) thereof. In these clauses, different terms like "ensure" "fix" "regulate" and "lay down" have been used. The use of the term "ensure" implies that TRAI can issue directions on the particular subject. For effective discharge of functions under various clauses of Section 11 (1) (b), TRAI can frame appropriate regulation. The term "regulate" contained in sub-clause (iv) shows that for facilitating arrangement amongst service providers for sharing their revenue derived from providing telecommunication services, TRAI can either issue directions or make regulations.

88. It is thus evident that the term "regulate" is elastic enough to include the power to issue directions or to make regulations and the mere fact that the expression "as may be provided in the regulations" appearing in clauses (vii) and (viii) of Section 11 (1) (b) has not been used in other clauses of that sub-section does not mean that the regulation cannot be framed under Section 36(1) on the subjects specified in sub-clauses (i) to (vi) of Section 11 (1) (b). In fact, by framing regulations under Section 36, TRAI can facilitate the exercise of functions under various clauses of Section 11 (1) (b) including sub-clauses (i) to (vi).

89. We may now advert to Section 36. Under sub-section (1) thereof TRAI can make regulations to carry out the purposes of the TRAI Act specified in various provisions of the TRAI Act including Section 11, 12 and 13. The exercise of power under Section 36 (1) is hedged with the condition that the regulation must be consistent with the TRAI Act and the rules made there under. There is no other restriction on the power of

TRAI to make regulations. In terms of Section 37, the regulations are required to be laid before Parliament which can wither approve, modify or annul the same. Section 36(2), which begins with the words "without prejudice to the generality of the power under sub-section (1)" specifies various topics in which regulations can be made by TRAI. Three of these topics relate to meetings of TRAI, the procedure to be followed at such meetings, the transaction of business at the meetings and the register to be maintained by TRAI. The remaining two specified in clauses (e) and (f) of Section 36 (2) are directly referable to Section 11 (1) (b)(viii) and 11(1)(c).there are substantive functions of TRAI. However, there is nothing in the language of Section 36(2) from which it can be inferred that the provisions contained therein control the exercise of power by TRAI under Section 36 (1) or that Section 36 (2) restricts the scope of Section 36 (1).

90. It is settled law that the powers conferred upon an authority/body to make subordinate legislation in general terms, the particularisation of topics is merely illustrative and does not limit the scope of general power.....

98..... In terms of section 12 (4), TRA I can issue such directions to service providers, as it may consider necessary, for proper functioning by service providers. Section 13 lays down that TRA I may for discharge of its functions under section 11 (1), issue such directions to the service providers, as it may consider necessary. The scope of this provision is limited by the proviso, which lays down that no direction under section 12 (4) or section 13 shall be issued except on matters specified in section 11 (1) (b). It is thus clear that in discharge of its functions, TRAI can issue directions to the service providers. The TRAI act speaks of many players like the licensors and users, who do not come within the ambit of the term "service provider". If TRAI has to discharge its functions qua the licensors or users, then it will have to use powers under provisions other than sections 12 (4) and 13. Therefore, in exercise of power under section 36 (1), TRAI can make regulations which may empower it to issue directions of general character applicable to service providers and others and it cannot be said that by making regulations under section 36 (1) TRAI has encroached upon the field occupied by sections 12 (4) and 13 of the TRAI Act.

99..... This means that the power to make regulations under section 36 is non-delegable. The

reason for excluding section 36 from the purview of section 33 is simple. The power under section 36 is legislative as opposed to administrative. By virtue of section 37, the regulations made under the TRAI act are placed on a par with the rules which can be framed by the Central government under section 35 and being in the nature of subordinate legislations, the rules and regulations have to be laid before the houses of Parliament which can annul or modify the same. Thus, the regulations framed by TRAI can be made ineffective or modified by Parliament and no other body.

100. In view of the above discussion and the propositions laid down in the judgement is referred to in the preceding paragraphs, we hold that the power vested in TRAI under section 36 (1) to make regulations is wide and pervasive. The exercise of this power is only subject to the provisions of the TRAI Act and the rules framed under section 35 thereof. There is no other limitation on the exercise of power by TRAI under section 36 (1). It is not controlled Ltd I section 36 (2) or sections 11, 12 and 13."

348. It is submitted by TRAI that upon perusal of the above-mentioned paragraphs of the judgement of the Hon'ble Supreme Court would show that:

a) the power to frame regulations is clearly vested in the authority under section 36 (1) of the TRAI Act.

b) the power to frame such regulations under section 36 (1) is wide and pervasive.

c) the power that is conferred upon the authority under section 36 (1) to make subordinate legislation is in general terms. The particularisation of any topics under section 36 (2) is merely illustrative and does not limit the scope of the general power.

d) the authority has to discharge its functions qua the licensor or users and is not limited only to exercising its functions with regard to service providers. If TRAI has to discharge its functions qua the licensor or users then it will have to use powers under provisions other than sections 12 (4) and 13 under which directions are given. Therefore, in exercise of power under section 36 (1), TRAI can make regulations which may empower it to issue directions of general character applicable to service providers and others.

e) the authority can frame regulations under section 36 which would facilitate the exercise of functions under various clauses of section 11 (1) (b) including sub-clauses (i) to (vi). The power to frame regulations on the subject matter was under section 11 (1)(b) is not confined only to those sub-clauses where it has been stated that the function can be discharged by making regulations.

f) it has been made abundantly clear that there is no limitation on the exercise of power by the authority to frame regulations under section 36 (1). It is not controlled or limited by section 36 (2) or sections 11, 12 and 13.

g) TRAI can make regulations to carry out the purposes of the TRAI act which can be ascertained from the various provisions of the TRAI act including sections 11, 12 and 13. There is no restriction on the power of TRAI to make regulations except that the regulations must be consistent with the TRAI act and the rules made thereunder.

h) the fact that the regulations are required to be laid before Parliament which can approve, modify or annul the same is sufficient check on the exercise of power of TRAI.

349. It is submitted that the power to frame regulations under section 36(1) of the authority is a substantive power. The exercise of this power by the authority is not restricted or controlled by any particularization of the topics under section 36 (2) or for that matter by sections 11, 12 and 13 which deal with the functions of the authority. The authority has the power to frame regulations on any issue under the act. In other words, by framing regulations under section 36 (1) the authority is not required to search for another topic or provision in the act to justify the making of a regulation. The power to frame regulations under section 36 is substantive in nature and is not dependent on any other provision or particular topic under the act to justify the framing of any regulation.

350. The only limitation/restriction on the power of TRAI to make regulations is that the said regulations must be made so as to carry out the purposes of the TRAI act. To ascertain the purpose of the act, the authority can look into the preamble as well as the various provisions of the act. However, the authority is not required to trace the power to frame the regulation by referring to a particular provision or topic under

the act. The power substantively resides in Section 36(1) of the Act.

351. The further limitation for the exercise of such power is that the regulations must be consistent with the TRAI act and the rules made thereunder. In other words, the regulation that is made should not be in direct conflict with the content of any rule which has been made under section 35 of the TRAI act. The regulation should also not be inconsistent with any of the provisions of the TRAI act. Thus, it follows that if the authority frames a regulation in exercise of its power under section 36(1) to carry out a particular purpose of the act which is clearly ascertained from the preamble of the act and/or from the various provisions of the act, then such a regulation should not be inconsistent with any rule framed under section 35 of the TRAI act or with any provision of the TRAI act.

352. It is the contention of the respondent that the authority has exercised its substantive power to frame the impugned regulations under section 36 (1) of the TRAI act to carry out the purposes of the act which is clearly ascertainable from the preamble of the act. Further, the provisions of the impugned regulations are not inconsistent with any existing rule made under section 35 of the TRAI act. It is also the contention of the respondent that the provisions of the impugned regulations are not inconsistent with any of the provisions of the TRAI act.

353. TRAI has contended that there is a presumption of constitutionality in favour of a subordinate legislation. It is equally well established that the petitioner who is alleging that there is lack of jurisdiction in framing the impugned regulation has to discharge the burden of establishing that the impugned regulations are inconsistent with the provisions of the act. The principles on which the validity of a delegated legislation can be tested has also been laid down in various Supreme Court judgments. In this context, TRAI has relied on the following decisions,

(i) In *Hinsa Virodhak Sangh v. Mirzapur Moti Kuresh Jamat*, (2008) 5 SCC 33, at page 48:

"39. We have recently held in *Govt. of A.P. v. P. Laxmi Devi*¹⁰, that the court should exercise judicial restraint while judging the constitutional validity of statutes. In our opinion, the same principle also applies when judging the constitutional validity of delegated legislation and here also there should be

judicial restraint. There is a presumption in favour of the constitutionality of statutes as well as delegated legislation, and it is only when there is a clear violation of a constitutional provision (or of the parent statute, in the case of delegated legislation) beyond reasonable doubt that the court should declare it to be unconstitutional

(ii) In *Supreme Court Employees' Welfare Assn. v. Union of India*, (1989) 4 SCC 187, at page 239 :

"99. There is indeed a higher degree of presumption of constitutionality in favour of subordinate legislation than in respect of administrative orders. This is especially the case where rules are made by virtue of constitutional conferment of power. Rules made directly under the Constitution may have in a certain sense greater legislative efficacy than rules made under a statute; within the field demarcated by the Constitution, the former can, if so provided, operate retrospectively. These rules are, of course, as in the case of all statutory instruments, controlled by the Constitution and the laws: see *K. Nagaraj v. State of A.P.*, *Raj Kumar v. Union of India* and *B.S. Vadera v. Union of India*.

100. Where the validity of a subordinate legislation (whether made directly under the Constitution or a statute) is in question, the court has to consider the nature, objects and scheme of the instrument as a whole, and, on the basis of that examination, it has to consider what exactly was the area over which, and the purpose for which, power has been delegated by the governing law.

(iii) In *State of T.N. v. P. Krishnamurthy*, (2006) 4 SCC 517, at page 528:

"15. There is a presumption in favour of constitutionality or validity of a subordinate legislation and the burden is upon him who attacks it to show that it is invalid. It is also well recognised that a subordinate legislation can be challenged under any of the following grounds:

(a) Lack of legislative competence to make the subordinate legislation.

(b) Violation of fundamental rights guaranteed under the Constitution of India.

(c) Violation of any provision of the Constitution of India.

(d) Failure to conform to the statute under which

it is made or exceeding the limits of authority conferred by the enabling Act.

(e) Repugnancy to the laws of the land, that is, any enactment.

(f) Manifest arbitrariness/unreasonableness (to an extent where the court might well say that the legislature never intended to give authority to make such rules).

16. The court considering the validity of a subordinate legislation, will have to consider the nature, object and scheme of the enabling Act, and also the area over which power has been delegated under the Act and then decide whether the subordinate legislation conforms to the parent statute. Where a rule is directly inconsistent with a mandatory provision of the statute, then, of course, the task of the court is simple and easy. But where the contention is that the inconsistency or non-conformity of the rule is not with reference to any specific provision of the enabling Act, but with the object and scheme of the parent Act, the court should proceed with caution before declaring invalidity.

354. In the instant case, the petitioner has failed to discharge the burden of establishing that the impugned regulations are inconsistent with the provisions of the act or inconsistent with the rules. The only contention that is advanced is that the regulations cannot be framed under section 36 (1) by ascertaining the purposes of the act from the preamble. It is the contention of the petitioner that the regulation must be framed with regard to a particular provision in the act otherwise a regulation cannot be made under section 36(1). The petitioner has contended by referring to a judgments of the Hon'ble Supreme Court to contend that every regulation that is framed under the TRAI act must have a peg to hang. In this connection it is submitted that:

"a) section 36 (1) is itself a substantive provision which confers the power on the authority to frame regulations. The exercise of the substantive power is not dependent upon any other provision of the act.

b) if the contention of the petitioner were to be accepted then it would mean that in order to exercise the power under section 36 (1) the authority will necessarily have to depend and seek power from any particularisation of a topic or provision under the act so as to justify the framing of a regulation. This with great respect would be against the ratio of the

judgement of the Hon'ble Supreme Court referred to above especially para 88,89 and 100 of the BSNL v. TRAI (2014) 3 SCC 222.

c) The Hon'ble Supreme Court has categorically held in its judgement that the power to frame regulations under section 36(1) is not controlled or limited by any particularisation of topic under section 36 (2) or by sections 11, 12 and 13. In other words, the authority can frame regulations on any subject to carry out the purposes of the TRAI act. In doing so, the only limitation is that the regulation should not be inconsistent with the TRAI act or any rule made thereunder. This in effect means, that the authority can frame regulation on any subject matter which may not be particularised or may not be traced to any specific provision under the act but if for carrying the purposes of the act it is necessary for the authority to frame a regulation, then there is no limitation on the exercise of such power. The only restriction is that such a regulation should not be inconsistent with the act or with the rules framed thereunder.

d) It has also been made abundantly clear that the exercise of the power to frame regulation under section 36 (1) is subject to further check or restriction which is exercised by the Parliament. Under section 37, the regulations framed by the authority have to be laid before both houses of Parliament which has the power to approve, modify or annul the said regulations. Hence, there are enough checks and balances and guidelines for the exercise of the power of the authority to frame regulations under section 36 (1).

e) It is submitted that as per the decision of the Hon'ble Supreme Court in BSNL v. TRAI, 2014(3) SCC 222, it is abundantly clear that the authority has the power to frame regulation on any subject matter whether particularised in the form of a topic or is a part of any provision of the act or not, till the time the said regulation is made to carry out the purposes of the act and is not inconsistent with the act or the rules made thereunder. In other words, the authority can frame a regulation under section 36 (1) to carry out the purposes of the act which is ascertainable from the preamble of the act, on a subject matter which is not specifically listed under the provisions of the act till the time it is not inconsistent with the act or the rules made thereunder. Hence, as contended by the petitioner for the purposes of making a regulation under section 36 (1) the authority need

not search for another provision under the act to depend on so as to justify the framing of the regulation. There is no statutory peg required to hang a particular regulation in order to justify the same when one considers Section 36(1) and its language under the TRAI Act, 1997.

f) Petitioner has referred to and relied upon two judgements of the Hon'ble Supreme Court for the proposition that rules and regulations must have a statutory peg on which to hang, if there is no statutory peg the rules and regulations which are sought to be enacted without such a peg will have no foothold and will become still-born. The judgements relied upon are:

(i) V. Sudheer v. Bar Council of India, AIR 1999 SC 1167, Para 20

(ii) Indian Council for Legal Aid v. Bar Council of India, AIR 1995 SC 691, pr. 12.

355. With regard to the above two judgements, it is submitted that the same are clearly distinguishable and inapplicable in the facts and circumstances of the present case. In both the cases the scope of section 49 (1) of the Advocate's Act, 1961 was considered and the question was whether the rules framed by the bar Council of India was within the competence of the bar Council of India and were ultra vires its rulemaking powers under the act or not.

356. The functions of the bar Council of India are given under section 7 of the act. The question therefore that fell for consideration of the Hon'ble Supreme Court was whether the rules in question had been framed by the bar Council of India under section 49(1) for the purposes of discharging its functions under section 7. Thus, clearly from the language of section 49 (1), it is clear that the bar Council of India could not make rules with regard to any subject matter which was not categorically listed under section 7 of the act. It is in this context, that the Hon'ble Supreme Court at Para 20 of V.Sudheer's case, supra, has stated that the rules framed by the bar Council must have a statutory peg on which to hang. The second judgement relied upon by the petitioner is also on similar lines and the question was whether the rules framed under section 49 were ultra vires section 7 of the act which listed out the functions of the bar Council.

357. TRAI has submitted that the judgements are clearly distinguishable and inapplicable in the facts and circumstances of the present case. In the instant case, section 36 (1) is not worded in the same manner as section 49 of the Advocate's Act.

In fact a comparison of the two provisions would show that section 49 is highly restrictive and is not wide and pervasive as section 36 (1) as has been declared by the Hon'ble Supreme Court in its judgement while dealing with section 36 (1). Unlike section 49 of the Advocate's Act, section 36 (1) of the TRA I act does not limit the applicability of the provision that is to frame regulations to any particular topic or provision under the act. The only thing that is mandated is that the authority can frame regulations to carry out the purposes of the act and that such a regulation framed should not be inconsistent with the act or the rules made thereunder.

358. With regard to a decision relied upon by the petitioner in **MTNL v. TRAI, AIR 2000 Del 208**, it is submitted that the Hon'ble Supreme Court illustrated various situations under which the authority cannot frame regulations. However, the bottom line remains that the authority can frame regulations which should be consistent with the provisions of the act. By relying on this paragraph of the judgment the petitioner has contended that where the act provides for TRAI to discharge its functions in a particular fashion example by rendering advice to the government, there the authority cannot exercise its power to issue regulations on that subject matter.

359. In this connection, it is submitted that firstly, the judgment relied upon was a judgment which was rendered when the TRAI act had not been amended and the functions of the authority which included recommendatory and regulatory functions were all clubbed together. It was only through the amendment to the TRAI act in the year 2000 that the recommendatory and the regulatory functions were bifurcated. Hence, the judgment has to be considered keeping in mind that it decided the issues when the provision of the act had not been amended.

360. Secondly, it is submitted that the said judgment of the Delhi High Court has been noticed by the Hon'ble Supreme Court in **BSNL v. TRAI, 2014(3) SCC 222**, wherein on the issue of whether TDSAT would have the jurisdiction to entertain the challenge to the regulations framed by TRAI under section 36 of the TRAI act, the judgment of the Hon'ble Delhi High Court has been reversed.

361. It is further submitted that the judgment of the Delhi High Court is no longer good law in light of the judgment of the Hon'ble Supreme Court in BSNL case as the Hon'ble Supreme Court has held that the power to frame regulations under section 36 of the TRAI act is not limited or controlled by section 36 (2) or by sections 11, which contains recommendatory powers under section 11 (1) (a), regulatory functions under section 11(1)(b)

and tariff fixation functions under section 11(2), Section 12 and 13. Hence, the authority has the power to frame regulations on any subject matter to carry out the purposes of the act with the restriction that the regulation should not be inconsistent with the act or the rules made thereunder.

362. It is also submitted that the Hon'ble Supreme Court has noticed the argument made at PARA 75 of the BSNL case wherein the specific argument which was made was that section 36 (1) should be construed consistent with other provisions of the TRAI act and regulations cannot be made on the matters covered by other provisions. In this context, section 11(2) and sections 12 (4) and 13 were referred to as examples. The Hon'ble Supreme Court at paragraph 98 has dealt with this contention and rejected the same.

363. Applying the above stated principles to the facts of the present case it is submitted that the power to frame impugned regulations can be traced to section 36(1), which is a substantive provision in itself. The impugned regulations have been framed by the authority to carry out the purposes of the act which are clearly ascertainable from the preamble of the Act. It is further submitted that the regulations are not inconsistent with the act or with any rules framed thereunder. The preamble of the TRAI act provides as follows:

"An Act to provide for the establishment of the [Telecom Regulatory Authority of India and the Telecom Disputes Settlement and Appellate Tribunal to regulate the telecommunications services, adjudicate disputes, dispose of appeals and to protect the interests of service providers and consumers of the telecom sector, to promote and ensure orderly growth of the telecom sector] and for matters connected therewith or incidental thereto".

364. The relevant aspects from the preamble that needs to be considered are, "regulate", "the telecommunications services", "to protect the interests of service providers" and "consumers of telecom sector", "to promote and ensure orderly growth of the telecom sector". In the instant case, the authority has framed regulations which essentially aim to ensure that there is equal access at the cable landing stations which is nothing but a bottleneck facility. That this equal access must be given on fair - transparent and non-discriminatory terms on a mandatory basis. Thirdly the regulations ensure that the access is given by charging cost based charges which have been specified by the authority. Keeping this background of the impugned regulations in mind, each term or phrase enumerated above in the preamble may be tested.

a) Regulate through the impugned regulations the authority is ensuring that the cable landing station ceases to be a bottleneck facility. Since 2002 when the ILD sector was opened up there has been a regulatory intervention by the authority at various stages which have been detailed in section one of the submissions. The entire objective of the Regulatory intervention at various stages was to ensure that equal access at the cable landing station is ensured on fair, transparent and non-discriminatory terms and that the sector marches towards a situation where the CLS is no longer a bottleneck. In the regulation of 2007 the authority prescribed that the terms and conditions of the agreement between the OCLS and the seeker would be determined by the OCLS but the same would be approved by the authority. The authority undertook elaborate consultation and thereafter came to the conclusion that the cost based charges need to be fixed by the authority. This led to the amendment to the 2007 regulation on 19. 10. 2012. Thereafter the authority again issued a consultation paper wherein taking into consideration the cost data of the two petitioner OCLS it estimated the various charges and put the methodology as well as the estimates for consultation. After elaborate consultation on the estimates and the methodology involved, the final regulation prescribing charges were issued on 21. 12. 2012.

b) It is clear from the contents of the three impugned regulations that the authority is seeking to regulate the various issues that emerge with regard to cable landing stations. It is evident from the judgement in BSNL case that the word regulate would include prescribing charges.

c) There can be no doubt that the owner of the cable landing station is providing telecommunication service as it is an ILDO operator who is operating the cable landing station under a license obtained under section 4 of the Telegraph act, 1885 which simply means that the equipment employed and installed by the OCLS at the cable landing station is nothing but a Telegraph under section 3 (1AA) of the act. This means that the equipment is capable or used for transmission or reception of signs, signals, etc. As such, the OCLS is carrying out a telecommunication service under section 2(1)(K) under the TRA I act.

d) The impugned regulations are aimed towards ensuring that the other ILDO operators who do not own cable landing station but are a service provider as they are also licensees under the Telegraph act,

their interests are protected. The interests of the service providers who do not own cable landing station seek access from a service provider who is owning the cable landing station are sought to be protected through the impugned regulations by ensuring that there is equal access on fair, transparent and non-discriminatory terms provided by the OCLS on a mandatory basis and upon payment of cost based charges specified by the authority. It is pertinent to note that the owner of the cable landing station being a licensee under the Telegraph act also qualifies as a service provider under section 2(1)(J) of the TRAI act.

e) As discussed above in the present submissions, the high access charges which are charged by the OCLS from the seeker ILDO operator is directly proportional to the higher charges paid by the end consumer for seeking the broadband service. By ensuring that the charges are cost based the authority is ensuring that the broadband services become affordable which in turn protects the interests of the consumer.

f) finally, the entire exercise since 2002 of the authority has been to ensure that the ILDO sector opens up and there is enough competition in the sector. It is the objective of the authority that through proper regulatory interventions the cable landing station ceases to become a bottleneck facility which would ensure development and orderly growth of the telecom sector in the area of broadband service. Affordable rates of broadband service and good quality of service would ensure higher degree of expansion in the area of broadband service and higher degree of rural penetration of the said service. This would ensure an orderly growth of the telecom sector.

Thus it can be seen that the impugned regulations are intending to further the purposes of the act. There is no rule in existence which has been framed under section 35 on the subject matter of cable landing station that would make the impugned regulations inconsistent.

365. It is further submitted that the cable landing station is a licensed activity carried out by a licensee under the Telegraph act who is a service provider for the purposes of the TRAI act. This service provider is providing telecommunication service at the cable landing station. The services provided by the owners of the cable landing station are required to be regulated which includes prescribing charges so as to protect the interests of the other service providers and the consumers under the act. It is submitted that there is no provision under

the act which has been pointed out by the petitioner to demonstrate that the said regulations are inconsistent with those provisions of the act.

366. There is no provision under the act which directly restricts the authority from framing regulation on the subject matter of cable landing station. It is submitted that owing to the fact that the cable landing station is a licensed activity where telecommunication services are provided by a service provider, the said subject matter is squarely a subject matter that falls under the purview of the TRAI act regarding which the authority has the power to frame regulations to carry out the purposes of the act as enshrined in the preamble of the TRAI act. It may be noted that the Authority has framed tariffs for IPLC in the year 2005 which are in force. The Authority had framed Recommendations of 16.12.2005 on CLS which were accepted and license terms of ILDO license were amended. The Petitioner had neither challenged those recommendations nor have they challenged the License terms. This clearly means that the Petitioner has accepted as has been accepted by other Licensees and the Licensor that CLS activity squarely falls as a subject matter under the TRAI Act.

367. It may be pointed out that in the BSNL judgment, the Hon'ble Supreme Court has held that the power of framing regulation is not limited or controlled by section 11, 12 and 13 of the TRAI act. Further the purposes of the act can also be ascertained from various provisions of the act. In this context it is relevant to point out that section 11(1)(a), which deals with the recommendatory functions of the authority clearly provides in subsection (iv) that the authority can make recommendations on measures to facilitate competition and promote efficiency in the operation of telecommunication services so as to facilitate growth in such services. It is submitted that one of the objectives or purposes of the act is to ensure that there is orderly growth in the telecom sector which in turn would mean that there should be increase in competition, increase in efficiency and quality of service in the provisioning of the telecommunication service and that the services are provided at affordable rates so that there is growth in the sector. It is submitted that the purpose which is sought to be achieved and furthered by the impugned regulations can also be traced to sub-clause (iv) of section 11(1)(a) of the TRAI act. It is also submitted that the purposes of the act can be ascertained from the preamble and other provisions of the act. Preamble can be used for the purposes of ascertaining the purposes of the act. Reference can be made to

(i) Secretary, Ministry of Chemicals and Fertilizers, Govt. of India v. Cipla Ltd. and Ors., (2003) 7 SCC 1.

(ii) Sanjeev Coke Manufacturing Co. v. M/s Bharat Coking Coal Ltd., (1983) 1 SCC 147.

368. Assuming but not conceding that the above contention that the power of the authority to frame regulations is clearly traceable to section 36(1) of the TRAI act and it being a substantive provision there is no need to refer to any other provision of the act to justify the framing of the regulation is not acceptable, then it is submitted that the power to frame the regulation is clearly traceable to section 36(1) read with section 11(1)(b)(i) to (iv) of the TRAI Act.

369. As regards power to frame impugned regulations, under Section 36 r/w. Section 11(1)(b)(i), it is submitted that the power to frame the impugned regulations is clearly traceable to section 36 (1) read with section 11(1)(b)(i) of the TRA I act. Section 11 (1)(b)(i) provides as follows:

"11. Functions of Authority.- (1) Notwithstanding anything contained in the Indian Telegraph Act, 1885, the functions of the Authority shall be to-(a)

(b) discharge the following functions, namely:

(i) ensure compliance of terms and conditions of licence;

370. Prima facie, a contention is made that due to the word ensure appearing in the said subclause it follows that the power of the authority under this sub clause is to issue directions so as to make the service provider comply with the terms and conditions of the license. It is usually contended that the authority does not have the power to frame a regulation to ensure compliance of terms and conditions of the license by a service provider.

371. It is submitted that the scope of the power to frame regulations under section 36 read with section 11(1)(b) has been dealt with by the Hon'ble Supreme Court in the BSNL judgement. The Hon'ble court notices in paragraph 80 of the said judgement that the use of the term "ensure" implies that TRA I can issue directions on the particular subject. Thereafter the Hon'ble court at Paras 81 - 87 discusses the scope and ambit of the terms "regulate" and "regulation". After examining various judgements on these two terms the Hon'ble Supreme Court in para-88 has concluded that the authority can frame regulations under various clauses of section 11(1)(b) including subclauses (i) to

(vi). Hence, it is abundantly clear that the authority can frame a regulation in exercise of its powers under section 36 read with section 11(1)(b)(i) to ensure compliance of terms and conditions of licence. The relevant paragraphs of the BSNL judgement, **(2014) 3 SCC 222** are quoted below:

"80. After the Amendment of 2000, TRAI can either suo motu or on a request from the licensor make recommendations on the subjects enumerated in Section 11(1) (a) (i) to (viii). Under Section 11 (1) (b), TRAI is required to perform, nine functions enumerated in sub-clauses (i) to (ix) thereof. In these clauses, different terms like "ensure" "fix" "regulate" and "lay down" have been used. The use of the term "ensure" implies that TRAI can issue directions on the particular subject. For effective discharge of functions under various clauses of Section 11 (1) (b), TRAI can frame appropriate regulation. The term "regulate" contained in sub-clause (iv) shows that for facilitating arrangement amongst service providers for sharing their revenue derived from providing telecommunication services, TRAI can either issue directions or make regulations. Page 279.

88. It is thus evident that the term "regulate" is elastic enough to include the power to issue directions or to make regulations and the mere fact that the expression "as may be provided in the regulations" appearing in clauses (vii) and (viii) of Section 11 (1) (b) has not been used in other clauses of that sub-section does not mean that the regulation cannot be framed under Section 36(1) on the subjects specified in sub-clauses (i) to (vi) of Section 11 (1) (b). In fact, by framing regulations under Section 36, TRAI can facilitate the exercise of functions under various clauses of Section 11 (1) (b) including sub-clauses (i) to (vi)."

372. It is further submitted that a bare perusal of the license term and condition would show that the owner of the cable landing station is a licensee who is mandated to provide equal access to bottleneck facilities at the cable landing station on the basis of non-discrimination. This equal access on non-discriminatory basis had to be provided by the OCLS to the other ILDO licensees who are the seekers on mandatory basis. Thus the requirement of the license was that the OCLS will not deny access to any seeker and will not discriminate between various seekers including itself as an ILD service provider providing services to end users. It was required that the OCLS

will provide equal access and that it is mandatory for it to provide such access to the seeker on a non-discriminatory basis.

373. The second requirement was that in order to ensure that there is fair and transparent terms and conditions of agreement that is entered into between the owner of the cable landing station and the seeker, it was mandated that the OCLS will frame its terms and conditions and will get it approved from the authority after which it shall publish the same. As has been detailed hereinabove, the circumstances under which the present license term and condition was amended would reveal that the present clause sought to ensure that access to the cable landing station is not delayed or denied by the owner of the cable landing station due to high charges or other non-price constraints, secondly the terms and conditions that were entered after mutual agreement between the parties were not published earlier which used to make it difficult for a new entrant/seeker to know what are the standard terms and conditions of the agreement. Also, the terms and conditions used to be not fair and reasonable. Hence, the amended term of the license mandated that equal access to all seekers shall be given on a non-discriminatory basis and it would be mandatory. Secondly the terms and conditions of the OCLS shall be approved by the TRAI and then would be published. Thirdly, the charges for such access provision shall be governed by the regulations/orders as may be made by the TRAI/ DoT from time to time.

374. It is submitted that the 2007 regulation was framed by the authority to ensure compliance of the terms and conditions of this particular clause. A perusal of the 2007 regulation would show that there was a mandatory provision wherein the OCLS had to frame his terms and conditions of agreement in the form of a Reference Interconnect Offer (RIO) including the charges which it was required to submit to the authority for approval. The authority was supposed to approve the said terms and conditions including the charges submitted within 60 days after which the OCLS was mandated to publish the same. See 2007 Regulation - Regulation 3 at pages 250-251. By doing so, the authority was ensuring that equal access to the bottleneck facility on a non-discriminatory basis is given by the OCLS. Once the terms and conditions of the agreement and charges are approved and thereafter published there is no scope for the OCLS to discriminate between various seekers and deny equal access. As such the framing of the 2007 regulation can be squarely traced to section 36 read with section 11(1)(b)(i) of the TRAI Act. Accordingly, the challenge of the petitioner to the validity of the 2007 regulation must fail. It is abundantly clear that the authority had the power to frame the said regulation to ensure the compliance of terms and conditions of the license by the petitioner.

375. It is submitted that after the 2007 regulation had come into force and the RIO of the petitioner and others were approved by the authority, the said terms of the approved RIOs and the charges contained therein were up for review in 2010. During this time a number of representations were received by the authority stating that the cost of equipments at the cable landing station had come down and utilization had gone up and as such the charges that were being charged by the OCLS for granting access were no longer cost based. The authority also took note of the fact that while framing the 2007 regulation as is evident from the explanatory memorandum attached to it, the authority had rejected the argument of various stakeholders that the term and conditions contained in the RIO and the charges contained therein should be put up for consultation before they are approved by the authority.

376. Another aspect that the authority had considered at that point of time was that it did not want to prescribe the cost based charges itself but wanted as a first step that the OCLS may fix the terms and conditions including the charges itself and give it to the authority for approval. It was expected as has been recorded in the explanatory memorandum that the OCLS would not charge in an arbitrary and discriminatory manner. However, on the basis of the various representations received stating that charges are now not cost based, the authority yielded to the demand of various stakeholders that there should be broad-based consultation. This led to a pre-consultative stage leading to a consultation paper and a very exhaustive and a detailed consultation process was undertaken.

377. On the basis of the various comments and counter comments received during the consultation process the authority deliberated on the same and came to the conclusion that the charges raised by the various OCLS need to be reviewed and it was also felt that as approval of each and every CLSS RIO takes a lot of time and the work done by the various CLS is the same, it would be only prudent that the authority prescribes the charges. Thus, the authority by prescribing the charges which are cost-based and which have been arrived at after extensive consultation process has only made sure that equal access to the bottleneck facility at the cable landing station is not denied to a seeker and that the same is mandatorily provided to the seeker on terms that are non-discriminatory. Prescription of cost based charges brings fairness, reasonableness and transparency in the transactions of the OCLS with the seekers and ensures that the OCLS grant equal access to the bottleneck facility at the cable landing station without discriminating between the various service providers and without charging exorbitantly or differentially between them. Thus the amendment

to the 2007 regulation stating that the authority shall specify the charges and the 21. 12. 2012 regulation which prescribed the charges for various access are nothing but regulations that are ensuring compliance of the term and condition of the license by the OCLS especially clause 2.2(c). The prescribed charges in the regulations make the entire functioning of the OCLS transparent, fair and reasonable and leaves no scope for it to deny equal access to a seeker and discriminate between them. In light of this it is submitted that the power to frame the impugned regulations is clearly traceable to section 36 read with Section 11(1)(b)(i) of the TRAI Act.

378. It is submitted that both the OCLS and the seeker ILDO are licensees under the Telegraph act, 1885 and as such they are service providers under section 2(1)(j) of the TRAI Act. It is also abundantly clear that the seeker ILDO gets into an agreement with the owner of the cable landing station to seek access to the equipment of the owner of the cable landing station so as to connect its own equipment with the equipment of the OCLS. This would facilitate transmission and reception of signs, signals, etc. which is carried by the seeker ILDO to the customer/server in the foreign country through the bandwidth in the submarine cable. Hence there is an arrangement both commercial as well as technical between the seeker ILDO and the OCLS.

379. It is submitted that the arrangement that is entered into between the service providers being the OCLS and the seeker ILDO is for the purposes of providing telecommunication services. In this regard, it is submitted that the license has been granted to the owner of the cable landing station under the provisions of section 4 of the Indian Telegraph Act, 1885. The building has got equipment, the usage of which has to be regulated under a specific license granted under the Telegraph Act. The equipment which is used is squarely covered under section 3(1AA) of the Telegraph Act. It is submitted that the petitioner is a licensee and has been granted license to establish, maintain or work a telegraph within any part of India. The word 'telegraph' has been defined under section 3 (1AA) of the said Act and reads as under :-

"(1AA) 'telegraph' means any appliance, instrument, material or apparatus used or capable of use for transmission or reception of signs, signals, writing, images and sounds or intelligence of any nature by wire, visual or other electro-magnetic emissions, radio waves or Hertzian waves, galvanic, electric or magnetic means."

Explanation - 'Radio waves' or 'Hertzian waves' means electromagnetic waves of frequencies lower than 3,000 gigacycles per second propagated in space without artificial guide.

Further, Section 2(1)(k) of the TRAI Act defines 'telecommunication service'. The equipment used by the owners of the cable landing station and the service provided by them gets squarely covered under these definitions. It is thus, unfortunate that Petitioners are arguing that this is the case of sharing of infrastructure and not telecommunication services.

380. While providing this telecommunication service to the other service providers, the owners of the cable landing station is levying certain charges. The regulations just ensure that these charges are justified and cost-based. This would also enable service providers who procure this facility from cable landing station to offer services to their customers at lower rates. Therefore, the revenue that is earned by the owner of the cable landing station needs to be regulated. It is pertinent to note that the customer seeks a broadband service from the access provider who charges the customer for providing such services. The information, data, voice etc. is carried by the access provider and handed over to the national long distance operator to carry the same beyond its service area. The NLDO is paid a portion of the charges that the access provider charges from the customer. Thereafter the NLDO hands over the information, data, voice et cetera to the ILDO operator for which certain portion of the charges that are taken from the customer are paid to the ILDO operator for the work done by it. The ILDO operator intern pays a certain portion to the cable landing station owner as access charges so as to carry the call through the cable landing station equipment to the international bandwidth in the submarine cable which would then take it to the customer/server abroad. Hence, there is a sharing of the revenue which is derived from providing telecommunication services between the various service providers. The charges are part of Revenue on which license fee is paid.

381. The Petitioner has contended that Section 11(1)(b)(iv) is always understood in terms of voice telephony and there is an interconnection Regulation that governs this. The Petitioner has also given certain examples to establish its argument. The said provision is therefore not applicable in the case of CLS. In this connection, it is submitted that the argument of the Petitioner advocates adoption of a very narrow and pedantic approach in interpreting the said clause and wishes to restrict the scope of the provision by referring to a Regulation. It is submitted that the regulation referred to is for a particular purpose and deals with a situation of how revenue earned from providing services to a customer has to be apportioned between various service providers on the basis of minutes of usage has to be determined. This is just one situation in which the provision is worked and applied. Such an application does not restrict the scope of the provision. Further, the provision does

not speak of applicability in certain specific cases. Hence, the Parliament has left the scope of the provision wide and pervasive. Hence, in a given situation if the requirements of the provision are met i.e. telecommunication services are provided by service providers and revenue is derived from such service then the Authority can regulate the commercial and technical arrangement between the various service providers involved and deal with sharing of the revenue. It is pertinent that the said provision has been resorted to in many areas where the revenue arrangements are on monthly or yearly basis and not on a minute usage basis as in the Regulation relied upon by the Petitioner, like port charges. It is also pertinent to note that the Authority also regulates Broadcasting Services where also this provision has been used to frame Regulations.

382. It is unfortunate that the Petitioner has contended that CLS is not a telecommunication service. As stated hereinabove the CLS activity is a licensed activity. The CLS is not merely a building which is leased out. It has equipments which qualify as Telegraph under Section 3(1AA) of the Telegraph Act. The equipment is capable of transmission and reception of signals, signs, etc. The OCLS grants access and connects its equipment with the equipment of the seeker. This allows signals to pass through. This service qualifies as Telecommunication service under Section 2(1)(k) of the Act.

383. The Petitioner has further argued that the Authority makes an order for telecommunication services under Section 11(2) and hence, it could have issued an order under Section 11(2) to prescribe the charges. It is submitted that this argument is completely flawed. For the telecommunication services provided to the customers or class of customers i.e. end users the Authority prescribes the tariffs under Section 11(2). In the instant case, the relationship between two service providers and charges amongst them is being regulated. It is not tariff to be paid by the end user. What the end user would pay to its access provider for the broadband service or for internal leased circuit would be the subject matter of Section 11(2) of the Act.

384. During the entire consultation process, the Petitioner kept arguing that they want to provide good quality of service meeting Service Level Agreements (SLAs) and, therefore, they require number of telecommunication network elements and their cost should be recovered. Hence, the Petitioner can not now not take the argument that it is not a telecommunication service. In the consultation process the Writ Petitioners have contended that telecommunication network elements used by them in providing access facilitation to telecom service providers should be taken into consideration. Writ Petitioners are operating cable landing stations under the International Long Distance Service license issued under section 4 of Indian

Telegraph Act. Therefore, any service provided through this cable landing station is telecommunication services. This demonstrates that the Writ Petitioners shall go to any extent to further their commercial interest, even to the extent of saying that Cable Landing Station is not a telecommunication service.

385. On infrastructure sharing, the petitioners have vehemently argued that the CLS facility and the activity that is carried out over there is nothing but infrastructure sharing and such sharing of infrastructure is not a subject matter of the TRAI Act. Hence the authority has got no power to frame regulations on the subject matter. In this connection, it is submission of TRAI that,

(i) The petitioner in the entire writ petition and in the written submissions has not demonstrated as to how the cable landing station constitutes an infrastructure sharing facility and what does the petitioner actually mean by an infrastructure sharing facility. The petitioner without elaborating on these issues has merely relied on certain documents and presentations of the authority and its officers to support its argument that the CLS facility is merely an infrastructure sharing facility.

(ii) It is submitted that the cable landing station facility is not merely a building but houses equipments which qualify as Telegraph under Section 3 (1AA) of the Telegraph act. The equipments housed at the CLS are connected with the equipments of the seeker ILDOs. This leads to transmission or reception of signals and signs, etc. through the equipments installed therein. It is an admitted position that the cable landing station can be owned and operated by only a licensee under section 4 of the Telegraph act. The activity that is carried out at the cable landing station is a licensed activity. The owner of the cable landing station as well as the seeker are ILDO licensees. Hence they are service providers under section 2(1)(j) of the TRAI act and are involved in telecommunication services under section 2(1)(k) of the TRAI act. Hence, there can be no iota of doubt that the licensed activity carried out at the cable landing station is a subject matter of regulation under the jurisdiction of the Authority.

(iii) It is also pertinent to note that all the various equipments that are involved in telecommunication services are nothing but infrastructures. For example, the access providers use the infrastructure of the National Long Distance Operator (NLDO) operators which carry their calls outside their service areas. The NLDOs are not having direct customers. In that sense, if the argument of

the petitioner is to be accepted then it would mean that the equipment of the NLDO is an infrastructure which is being shared with the access provider and hence would not be the subject matter of regulation by the authority.

(iv) Similar is the case of PORTS which are used by the service providers to carry the calls to and fro between the service providers. BSNL had got the largest number of ports all over India. The petitioners when they started their operations till today are using the ports of BSNL. The charges for the ports are regulated by the authority and the petitioners have supported the reduction of the charges of the ports done by the authority from time to time through Regulations. If the argument of the petitioner is to be accepted then the ports are nothing but infrastructure of BSNL which is being shared with the petitioners and other service providers and cannot be the subject matter of regulation by the authority. Hence the entire argument of the petitioner is fallacious and is liable to be rejected.

(v) The petitioner in its written submissions has relied upon various documents and presentations of the authority and its officers to demonstrate that the authority has always considered the cable landing station facility to be an infrastructure sharing facility. It is submitted that the various documents and presentations are being read by the petitioner out of context. In none of the documents referred to, the authority has stated that the cable landing station which is a licensed activity where telecommunication services are being carried out is outside the purview of regulation by the authority under the TRAI act.

(vi) The authority therefore wishes to state the context and relevance of the various documents that have been referred to by the petitioner in its written submissions.

a) The first document referred to is the consultation paper leading to the recommendations of 16.12.2005 and the consultation paper dated 13.04.2007 wherein in some paragraphs there is a reference to the cable landing station as infrastructure. However, the reliance on this is completely meaningless as the authority has made recommendations with regard to the bottleneck facility at cable landing station to the government of India which has been accepted. Thereafter the authority has framed regulations of 2007 which have been worked upon by the petitioners for more than six years. It is submitted that mere reference to cable landing station at some places as

infrastructure does not make it a facility where no telecommunication service is being provided by the service provider under a license which cannot be controlled by the authority.

b) The petitioner has referred to certain paragraphs of a presentation regarding workshop on infrastructure sharing dated 31. 08. 2010 at Bangkok, Thailand. From the passages extracted by the petitioner in its written submissions it only emerges that there should be regulatory intervention to ensure sharing of infrastructure at the cable landing station. It is submitted that this has been the consistent stand of the authority as is evident from the various documents that as the formation of a consortium to establish a submarine cable is a very complex and long drawn process it would not be easy for an ILDO licensee to establish a cable landing station without a cable. Further it is not economically feasible and prudent to have duplication of resources. Hence for the purposes of enhancing competition it is necessary that the various ILDOs get equal access to the bottleneck facility at the cable landing station. It is in this context that the CLS is referred to as an infrastructure. By this the CLS does not cease to be a license activity where telecommunication services are carried out by service providers.

c) The petitioner has also referred to the consultation paper dated 14. 01. 2011 on telecommunications infrastructure policy and the recommendations on telecommunication infrastructure policy dated 12. 04. 2011 to show that the authority has categorically stated that the cable landing station is nothing but an infrastructure element. It is submitted that the authority has noticed in the recommendations that once a decision of setting up of CLS and its location is finalised, there is great deal of uncertainty in terms of the various approvals that have to be obtained from the government agencies. It is in that context that the authority has recommended that the cable landing station should be treated as an infrastructure for which the uncertainty that is there in getting the approvals is removed at the earliest by the government agencies and there is an early decision on approval. This would help and facilitate easy setting up of the cable landing station. It is in that context that the authority has recommended that there should be a single window system for providing clearance to the operators intending to establish cable landing station which should be established by

the DoT. Similar is the situation vis-a-vis the various presentations by officers of the authority that have been referred to by the petitioner in its written submissions.

d) It is submitted that the reliance on these various documents to establish that the authority always thought the cable landing station to be an infrastructure sharing facility and hence it cannot be a subject matter of regulation by the authority under the provisions of the TRA I act is completely baseless and misleading. As stated above any equipment that is involved in telecommunication services can be referred to as infrastructure. The test is that if at a particular infrastructure where telecommunication services are provided by service providers and it is a licensed activity then it would become the subject matter of regulation under the provisions of the TRAI act. In fact, there is one category of operator who are called infrastructure provider (IP-1) who do not even have license under Indian Telegraph Act. They need only a registration. They can build passive telecom Infrastructure but do not fall under TRAI Act.

386. As regards the power to frame impugned regulations, under Section 36 r/w. Rule 11(1)(b)(ii) and (iii), it is submitted that the power to frame regulations is clearly traceable to section 36(1) read with section 11(1)(b)(ii) and (iii) of the TRAI act. The relevant provisions read as follows:

"11. Functions of Authority.- (1) Notwithstanding anything contained in the Indian Telegraph Act, 1885, the functions of the Authority shall be to- (a).....

(b) discharge the following functions, namely:

(i)

(ii) notwithstanding anything contained in the terms and conditions of the licence granted before the commencement of the Telecom Regulatory Authority of India (Amendment) Act, 2000, fix the terms and conditions of inter-connectivity between the service providers;

(iii) ensure technical compatibility and effective inter-connection between different service providers;"

387. It is submitted that the power to frame the regulations can be traced to sub-clauses (ii) and (iii) of Section 11(1)(b) of the TRAI Act. The crucial word used in these two provisions is "interconnection". The petitioner has contended that as far as cable landing station is concerned there is only access which is not the same as interconnection. The petitioner has relied on

the definition of interconnection in the various regulations framed by TRAI to show that there is some sort of mutuality and reciprocity between the service providers wherein the network; equipment of one service provider is connected with the networks and equipment of the other service provider so that the customers of both the service providers can be connected.

388. It is submitted that the petitioner is relying upon the definition of interconnection appearing in a regulation framed by the authority called the Telecommunication Interconnection Usage Charges Regulation, 2003 where interconnection is defined as:

"interconnection" means the commercial and technical arrangements under which service providers connect their equipment, networks and services to enable their customers to have access to the customers, services and networks of other service providers."

Relying on this definition, the petitioner has contended that in the instant case cable landing station owner does not have any customers and hence there is no question of its customers having access to the customers, services and networks of the other seeker ILDO. Hence there is no interconnection. Under the license terms also interconnection has not been defined and it is stated that interconnection is as defined by the TRAI vide its regulations issued in this respect.

389. In this connection, it is submitted that the word interconnection in the Act is not defined. Meaning of such a word cannot be understood and its entire amplitude be determined by definition made in a regulation. The definition of interconnection given by the authority in certain regulations are relevant for the purposes of those particular regulations. The word used in the act has to be understood in its widest amplitude and cannot be given a restricted meaning that too on the basis of definition given in a regulation. Even otherwise, it is the contention of the respondent that the definition relied upon by the petitioner would support the case of the respondent as submitted hereinbelow. Further it would be wrong to understand the term interconnection always in the context of mutuality and reciprocity, in other words, two-way traffic as there are numerous examples where there is interconnection with only one-way traffic.

390. It is submitted that the Writ Petitioner is unnecessarily attempting to create confusion by arguing that the word access and interconnection are separate and different. The license agreement signed by Writ Petitioner does not distinguish between the word access and interconnection. Clause 17.9 of ILD License at page 91 WP clearly uses the word "access" or "Interconnection" and reads as under:

"The charges for access or interconnection with other networks shall be based on mutual agreements between the service providers subject to restrictions issued from time to time by TRA I under TRA I act, 1997."

391. Interconnection is the lifeline of telecommunications. Interconnection allows subscribers, services and networks of one service provider to be accessed by subscribers, services and networks of the other service providers. In a broader sense the term interconnection refers to the commercial and technical arrangement under which service providers connect their equipment, networks and services to enable their customers to have access to the customers, services and networks of other service providers. Without interconnection, a customer cannot call subscribers on other networks or access Internet content located on another network. As mentioned here that Interconnection is used to access the services and it can also be said that without accessing one's network interconnection is not possible. That's why interconnection and access are used interchangeably. The World Trade Organization defines interconnection as:

"Linking with suppliers providing public telecommunications transport networks or services in order to allow the users of one supplier to communicate with users of another supplier and to access services provided by another supplier, where specific commitments are undertaken."

As per ITU Telecommunications Regulation Handbook, there are various forms of Interconnection:

- (i) -One-way and two-way interconnection
- (ii) -Unbundling, facilities sharing and co-location
- (iii) -Asymmetric interconnection regulation.

392. There are various examples of one way interconnection. For example, prior to 1996, local exchange carriers in the United States were prohibited from offering long-distance services. Long-distance carriers such as AT&T, Sprint and MCI obtained access from these local exchange carriers, to offer

long-distance services to customers on the local exchange network. Payment for one-way interconnection is always from the interconnecting operator (in the example in Figure, the long-distance carrier) to the interconnection provider (the local exchange carrier).

393. In India also International Long Distance Operators (ILDO) and National Long Distance Operators (NLDO) are interconnected with Access Service Providers. However, these ILDOs or NLDOs are not having any subscribers, they are only providing long distance services to the subscribers pertaining to access providers. The petitioner started then national long distance operation in the year 2002. It could run its operation only by accessing the customers of the access provider through then network and if such interconnection/access was not permitted by the licensor/TRAI, the petitioner could not have commenced its operation of accessing long-distance traffic of the access providers and for terminating its traffic to the network of the access provider. TRAI also prescribed the carriage charges for carrying the call which has been accepted and acted upon by the petitioner.

394. It is pertinent to note that the carriage charges that have been prescribed for the NLDO operators has been prescribed in the very same regulation which is relied upon by the petitioner for the purposes of understanding the term interconnection. If the petitioners contention is to be accepted then it would mean that the NLDO operator who does not have any customers but only carries the traffic from the access provider to places outside the service area of the access provider is not entering into any interconnection with the access providers and hence cannot be governed by the Interconnection Usage Charges Regulation. It is submitted that the petitioner who has an NLDO license also has been working under the interconnection usage charges regulation and has been getting paid the carriage fees in accordance with the regulations. Thus it is very clear that firstly the petitioner is misconstruing the definition given in the interconnection usage charges regulation of the term interconnection and is trying to read the same in a very narrow and pedantic manner. Secondly, being an NLDO operator the petitioner has acted under the very same regulation and has by conduct accepted a different interpretation of interconnection from the one that it is espousing now. It is submitted that the petitioner cannot adopt dual standards where for the purposes of taking benefits as an NLDO it reads the very same definition of interconnection in one particular way and for the purposes of its arguments against the regulation concerning CLS it adopts a different interpretation of the term interconnection.

395. It is submitted that the correct way of interpreting the definition of interconnection appearing in the interconnection usage charges regulation, 2003 and other connected regulations is that the customer of one service provider should have access to either the customers and/ or services and/ or networks of the other service provider. Otherwise the situation concerning the NLDO can never be a part of the interconnection usage charges regulation as the NLDO does not have customers of its own but is only carrying the calls of the access provider with whom it has interconnected. In other words, the customers of the access provider are having access to the network and equipment only of the other service provider being the NLDO. It is submitted that this is the correct way of interpreting the term interconnection appearing in the regulations and not in the restrictive way that the petitioner has tried to espouse.

396. It is also the contention of the respondent that the term interconnection appearing in the TRAI act which has not been defined under the act has to be understood as having a wide amplitude and not narrowly. The meaning of the term cannot also be restricted by referring to the definitions given in various regulations, even though the definition existing in the interconnection usage charges regulation support the case of the respondent. It is submitted that under the scope of the act any connection between two service providers which allows telecommunication service to take effect would qualify as interconnection.

397. A reference to the block diagram given by the respondent would show that the broadband services are taken by the customer from the access provider. The access provider hands over the data etc. to the NLDO operator to carry it beyond the service area of the access provider. For this purpose, there is an interconnection between the access provider and the NLDO operator which is duly recognised under the interconnection usage charges regulation. However, it is important to note that the customer of the access provider has gained access to the network and services of the NLDO operator but not to the customers of NLDO operator because the NLDO operator does not have any customers of its own. Further, the NLDO operator hands over the data to the ILDO operator again through an interconnection which is duly recognised but here again only network and services of the NLDO is interconnected with the network and services of the ILDO operator and there are no customers of both of them.

398. At the cable landing station, admittedly the owner of the cable landing station has installed equipments and there are equipments of the seeker ILDO also installed therein. Both the equipments of the OCLS as well as that of the seeker qualifies as Telegraph under the Telegraph act as they are capable of transmission or reception of signs and signals. Both of them owing to the fact that they are licensees under the Telegraph act qualify as service providers under the TRAI act. Consequently, the service that is provided by the OCLS qualifies as telecommunication service under the TRAI act. It is also an admitted position that the equipment of the OCLS is connected with the equipment of the ILDO seeker. It is this connection between the equipment of both the OCLS and the ILDO seeker that allows transmission or reception of signs and signals from the cable landing station to abroad and from abroad through the cable landing station to the customer via the ILDO, the NLDO and the access provider. It is also an admitted position that for connecting equipment of the seeker with the equipment of the cable landing station owner there is an access charge which is paid. Thus there is a commercial and a technical arrangement between two service providers being the OCLS and the seeker. In light of this, it is submitted that the connection of equipments that take place at the cable landing station between the equipments of the OCLS and that of the seeker is nothing but an interconnection between the two service providers with regard to their services, networks and equipment which facilitates telecommunication services.

399. Thus, it is submitted that the word interconnection appearing in section 11 of the TRAI act must be given its widest meaning. Even under the definition given in the various regulations, the present activity that is carried out at the cable landing station would qualify as interconnection. Interconnection is a wide term which includes access. Without access to somebody's equipment there cannot be interconnection. Hence the terms are interchangeable.

400. The petitioner has emphasized that TRAI has sought an amendment of the TRAI act and has proposed that under section 11 (1) (b) (ii) and elsewhere along with the word interconnection, the word access should also be incorporated. The petitioner contends that such a proposal made by the authority only shows that the authority never had the power to regulate access and hence the impugned regulations are without jurisdiction. In this connection it is submitted that as stated above the word interconnection is of the widest amplitude and would include access. There are innumerable examples which would show that the word interconnection cannot be understood only in the way the petitioner has understood. Like the petitioner herein certain

service providers have always made an argument of convenience that particular situation regarding which the authority is regulating or intends to regulate is nothing but access and not interconnection thereby depriving the authority any powers to frame such regulations.

401. The authority in its wisdom felt that it would be rather prudent to specifically state that which is necessarily implied in the concept of interconnection and as such include the word access along with interconnection in the provisions of the TRAI Act. Such a proposal made by the authority is only to ensure abundant clarity and is not an evidence of the fact that access is not a part of interconnection and that the authority never considered access to be a part of interconnection.

402. It is submitted that the authority has only made a proposal to the Ministry in this regard along with various other amendments to the TRAI Act. To the best of the information of the authority it is not known at what stage these proposals are lying. Till date the Parliament has not dealt with any amendment bill and hence no decision has been taken till date by the Parliament. Hence, till the time the Parliament takes some final decision on it the proposal that has been made has got no legal sanctity and therefore cannot be relied upon by the petitioner. The proposal of the authority will not be an aid in interpreting the various provisions of the Act. Hence reliance placed by the petitioner on this draft proposal for an amendment is completely misplaced and ought to be rejected.

403. It would be relevant to note that prior to the formulation of the 2007 Regulation, the Petitioner itself had written a letter dated 15.02.2007. In this letter the Petitioner has itself asked the Authority to clarify the position in terms of the License and the Regulations and facilitate the entering into the agreements with the seeker ILDO. Significantly, the Petitioner has not distinguished between the term access and interconnection but has used it interchangeably. Hence, building an argument that the two terms access and interconnection are separate terms is an afterthought. A copy of letter dated 15.02.2007 of the Petitioner written to TRAI is annexed as ANNEXURE- C.

404. In response to the submission that respondent didn't put CLS charges in the other interconnection regulations like Reference Interconnect Offer regulation issued in 2002 and Interconnection Usage Charges Regulations issued in 2003. It is submitted that telecom sector is dynamic and requirement changes

with the time. TRAI issued one of the interconnection charges i.e. Port Charges regulations in 1999, Interconnection Usage Charges were issued in 2003 which is basically for per minute voice charges, SMS charges regulations in 2012 etc. Toll free number i.e. 1800xxxxxxx initially was captive to one service provider, TRAI issued Intelligent Network services regulations in 2006 so that now toll free number can work across multiple operators. This clearly shows that only one regulation cannot cover all aspects of the interconnection and cannot be sufficient to cater to all future requirements of the interconnection. If it is so then it will defeat the very purpose of making the regulator in the country. TRAI as a regulator keeps watch on the development of the telecom sector and issues various regulations including regulations on interconnection as and when required. In this case charges are in the form of annual payment and limited to very specific purpose of interconnection between owner of the cable landing stations and seeker ITEs (ILDOs and ISPs with international gateway permission) which is obviously different from per minute usage charges that has been prescribed in the IUC regulations of 2003 and its subsequent amendments.

405. Transparency is provided under Section 11(4) of the TRAI Act, 1997 that "The Authority shall ensure transparency while exercising its powers and functions." As such, it is mandated that the Authority shall be transparent while exercising its powers and functions. The word transparency has neither been defined under the Act nor in any Rules nor in any Regulations. The Authority while framing its Regulations or recommendations or Tariff Order has adhered to the principle of transparency by ensuring that its various dispensations are formulated after adhering to an open and elaborate participative consultation process where view of various stakeholders are openly exchanged amongst themselves and with the Authority.

406. It has been contended by the petitioner that the entire exercise of framing of the impugned regulations was carried out in a non-transparent manner which is violative of section 11 (4) of the TRAI act. It is submitted that the word transparency appearing in section 11 (4) has not been defined in the act. Its scope and contours, methods of ensuring transparency and its limits have not been statutorily laid down. The authority in its wisdom has over a period of time developed various methods to ensure that its decision-making process involves and it's decision is based on an elaborate participative consultation process. Depending on the nature of the issue on which consultation is initiated the authority devices its method for the consultation process.

407. The authority in the past, has come out with pre-consultation paper followed by a consultation paper which is formulated on the basis of the comments received at the pre-consultation stage and which raises the issues for consultation. It requests the various stakeholders to give their comments and counter comments on the issues of consultation which are put on the website unless they are confidential. The authority depending on the nature of the issue may hold an open house discussion and/or give private hearings to the stakeholders or proceed to decide the issues on the basis of the comments and counter comments in writing received by it. Thereafter, the authority deliberates internally and formulates its regulation, recommendation or tariff order as the case may be. With the regulation or the tariff order there is an explanatory memorandum which adequately brings out the primary reasons for coming out with a dispensation. Thus the entire process is worked out in a transparent manner.

408. However, there is no set pattern for consultation which has to be necessarily followed in each case. There are issues for which the authority may not come out with a pre-consultation paper and proceeds straightaway with the consultation paper. There are cases where the authority puts the draft regulation or tariff order or amendments thereto for consultation and takes the decision after receiving comments for the same. Similarly there is no hard and fast rule that there has to be an open house discussion. In a given circumstance as in the present case the issues that are put on consultation can be decided on the basis of the comments and counter comments received from the stakeholders and any clarifications etc. can be carried out by holding meetings with the concerned officers of the authority who are collecting information for the purposes of the authority to form a regulation. Open house discussions are primarily adverted to where broadbased stakeholders are involved for the issue under consultation for example tariff issues which are directly concerning the consumers. In such circumstances, it is necessary to have an open house discussion which are widely advertised for the consumers to participate and give their views. However for issues as in the present case where limited stakeholders as the petitioner and the other ILDO licensees are the primary persons who are concerned regarding the fixing of the charges, it is not mandatory to hold open house discussion and the issues can be resolved by having private meetings with the stakeholders which was done in the present case.

409. The respondent has submitted that the entire exercise of formulation of the present impugned regulations has involved

multiple stages of participative consultation process. Each and every component of cost has been listed out, the inputs regarding the same have been taken from the petitioner and other stakeholders, the methodology of costing has been discussed and explained, the cost data submitted by the petitioner has been relied upon, the workings have been explained through various charts and algorithms and all this has formed part of the consultation paper and the pre-consultation stages before reaching the decision. The Petitioners have given elaborate presentations and there issues or grievances have been discussed at length and addressed by the Authority. The elaborate consultative process adhered to by the authority in the present case has been detailed elaborately in the counter affidavit which also gives a chart showing the various stages of consultation. The Petitioner relied on the List of Dates set out in Section I of the present submissions. It is therefore wrong to suggest that the decision-making process adhered to by the authority during the formulation of the impugned regulations is violative of section 11 (4) of the Act.

410. Perusal of the events that are stated in the list of dates and events in section 1 of the written submissions as well as the chart giving the chronology of events to show the transparent method adopted by the authority while formulating its regulations is contained at pages 332 - 335 of the respondent's typeset would show that at each stage the comments and counter comments of the stakeholders were invited and were put on the website except for the confidential information if there was some confidential information. The authority has also allowed the various stakeholders to make presentations and give their comments, etc. in writing. At the instance of the stakeholders the authority has also arranged for a meeting between the officers of the petitioner company and the officers of the authority so that various grievances of the petitioners may be addressed. The petitioner has taken advantage of this consultation process and has given its views to the authority at all stages. Thus it cannot be contended that the entire process of decision-making adopted by the authority is non-transparent. TRAI has contended that :

a) before formulation of the 2007 regulation the authority had issued a consultation paper dated 13. 04. 2007 wherein the views of the authority and the information that it had on certain issues had been stated in detail, the need to have a regulatory intervention in the area of cable landing station was also detailed. It is pertinent to note that the entire draft regulation that the authority was proposing to issue was put up for consultation. Thereafter questions for consultation were framed and the

stakeholders were invited to give their comments and counter comments. Such comments after being received, were put on the website. After receiving the various comments and counter comments Open House Discussion was held on 14th May 2007 in Delhi with the stakeholders wherein stakeholders had expressed their views on various aspects of the subject. The authority deliberated upon all the comments, counter comments, views received during Open House Discussion and has then formulated the impugned 2007 regulation.

The said regulation contains an explanatory memorandum which gives detailed reasons on various aspects regarding the regulation. The authority addresses the comments and counter comments of the various stakeholders on various issues and then gives brief reasons as to why it has decided on that particular issue in a particular manner. For example, after considering the views of the various stakeholders who were demanding that the rates which are given by the OCLS must be subjected to broad-based consultation before they were approved by the authority was rejected with reasons by the authority. Thus, the 2007 regulation was framed after extensive consultation and the final regulation that was framed has an explanatory memorandum which gives sufficient reasons on the issues concerning the regulation.

b) When the authority received various representations stating that there is a need for fixing cost based charges and that the 2007 approval system is ineffective, then the authority first proceeded to issue a pre-consultation paper by writing a letter to various stakeholders dated 22. 06. 2011 inviting them to give their views, data, costing methodology, various costing elements, etc. the various stakeholders including the petitioner submitted their cost data et cetera as well as gave their detailed comments and counter comments on the various issues that were raised through eight questions in the said pre-consultative paper.

c) On the basis of the inputs received in the pre-consultation paper, the authority framed the consultation paper dated 22. 03. 2012 which formulated 10 questions for consultation. The said consultation paper contained detailed explanations on various issues, trace the history behind the ILD sector, discuss the need for prescribing the charges, discussed the concerns of the various stakeholders, the technical aspects concerning the cable landing station, the various approaches for determination of

the various charges and then formulated the questions for consultation. The said consultation paper also contained various diagrams and tables to explain the various issues that were being raised. Again the comments and counter comments of the various stakeholders were invited and the same were put on the website.

d) Based on the elaborate comments and counter comments that were received, the petitioner gave a presentation at the office of the authority and a meeting was held on 30. 08. 2012. Thereafter certain other information was asked by the authority from the petitioner and others. This is self-evident from the various documents annexed in the WP as well as in the Annexures attached with the counter affidavit.

e) The authority took a decision on question 10 and question 1 of the consultation paper dated 22. 03. 2012 and decided to carry out an amendment to the regulation of 2007 with a notification dated 19. 10. 2012. The said amendment has an explanatory memorandum which gives the background that led to the amendment being carried out and at PARA 6 and 7 of the said explanatory memorandum gives a detail regarding the consultation process and the comments and counter comments that were received has been noticed at page 524 WP. The explanatory memorandum then proceeds to give detailed reasons on various issues that led to the decision of the authority to amend the 2007 regulation and incorporate a provision stating that the authority prescribe charges.

f) With regard to the remaining issues that were there in the consultation paper of 22. 03. 2012, the authority took out a consultation paper on 19. 10. 2012 based on the information received during the consultation with regard to the consultation paper dated 22. 03. 2012 in which it gave the actual estimations of the various charges and explained the costing methodology with various tables, algorithm and diagrams. In this consultation paper, it has been categorically stated that the authority has taken the cost data supplied by the two petitioner OCLS and has given detailed explanations as to the method and manner in which it has reached the various estimations of the charges. Finally, the issues for consultation have been framed in which the methodology adopted by the authority as well as the estimations reached by it have been put up for consultation and comments and counter comments have been invited on the same.

g) The comments and counter comments that were

received have been put on the website of TRAI for the knowledge of one and all. Thereafter the petitioner has been given opportunities to give their presentations and meeting has been held with them

h) The petitioner drew the minutes of meeting that was held on 29. 11. 2012 and sent it to the authority vide letter dated 04. 12. 2012. The minutes of the meeting that were drawn by the petitioner itself shows that numerous issues about which the petitioner was concerned was raised and discussed in the meeting.

i) The authority after taking into consideration the various grievances and suggestions made by the petitioners agreed to most of the suggestions in principle and incorporated the views of the petitioner in its final regulation dated 21.12.2012. A perusal of the regulation dated 21.12.2012 and the estimations of the charges made therein on the basis of the various elements of costs et cetera would show that there had been a departure from the estimations made in the consultation paper. The said departure has been explained in great detail in section 5 of the written submissions. For the present purpose it is sufficient to state that the authority had adopted the various suggestions given by the petitioner in the meeting held between the officers of the petitioner with the officers of the authority. Based on the inputs received therein the authority had re-estimated its various costs.

j) The explanatory memorandum gives detailed explanation with regard to each grievance of the petitioner and the method and manner in which it has been addressed in the impugned regulation dated 21.12.2012. Most of the grievances had been addressed by accepting the suggestions given by the petitioner. It is due to this reason that the estimation of the various charges as given in the 21.12.2012 regulation is more than double than the estimation given in the consultation paper dated 19.10.2012. The entire costing exercise which was done to arrive at cost based charges have taken into consideration the various issues raised by the petitioner and has largely accepted them. The data which has been accepted by the authority for the purposes of calculations are the ones that were supplied by the two petitioner OCLS. The explanatory memorandum gives detailed reasons with regard to all the aspects that have been looked into for the purposes of fixation of the charges. Under such circumstances it is clear that an elaborate consultative process was undertaken by

the authority with complete openness and transparency. Therefore the contention of the petitioner that the impugned regulations suffer due to non-transparency is baseless and fallacious contention which ought to be rejected.

k) A contention has been raised by the petitioner that during the process of formulating the amendment regulation dated 19.10.2012 as well as while formulating the regulation dated 21.12.2012, the authority has not held an open house discussion which is a customary practice of the authority and hence there is a violation of section 11 (4) of the TRAI act. In this connection, as has already been submitted hereinabove there is no set pattern which has been statutorily mandated or mandated through any rule or regulation that the authority has to follow for the purposes of ensuring transparency through a consultation process. The authority has decided to have consultation process the contours of which are decided by the authority depending on the subject matter involved. Normally, the open house discussions are adhered to in cases where the subject matter is such that it directly involves the interests of various stakeholders but in particular the consumers for example in fixation of tariffs. In the instant case, the issue that was involved was with regard to prescription of charges which concerns a very specific area of cable landing station and concerns the various stakeholders which are involved with the cable landing station activity. Under such circumstances the consultation which is held with the stakeholders were directly concerned with the cable landing station is a sufficient exercise for the purposes of determination of charges. The comments and counter comments that have been received and exchanged between the various stakeholders were thereafter followed by specific presentations and meetings with the stakeholders and in particular the two petitioners herein. Thus, for the purposes of an effective consultation so as to gain the views of the affected stakeholders and to formulate its views with regard to the charges, the consultation process that was employed was sufficient to discharge the obligation of transparency. Holding an open house discussion is not a statutorily mandated procedure. The statute mandates that there should be transparency and in the instant case there has been a mandatory compliance with the requirement of transparency while formulating the impugned regulations. Thus the contention of the petitioner that non-holding of the open house discussion renders

the entire process non-transparent is untenable.

1) Another contention that has been raised is that the petitioner had asked for a meeting with the authority but the meeting that was held was between the officers and that of the authority. This is not proper because the authority is the final decision-making authority with regard to formulation of the regulation and thus the meeting cannot be held by officers of the authority.

In this connection, it is submitted that the entire exercise of framing of a regulation is a legislative exercise. The regulation has been framed by the authority. During the process of consultation so as to enable the authority to formulate its view and issue the regulation, the authority through its officers is seeking various information as well as comments and counter comments on various issues that arise with regard to the subject matter on which the regulation is being framed. The meeting etc. that is held is only in the process of collection of information, data and to understand the various grievances if any of the concerned stakeholder. It is similar to the various bodies collecting information for the Legislature body to consider and frame a particular legislation.

In the instant case as is evident from the record, that the meeting dated 29. 11. 2012 that was held between the officers of the petitioner and the officers of the authority was one where all the issues with which the petitioner was concerned were raised and addressed. The result of this meeting was that most of the suggestions that were given by the petitioner were accepted by the authority which led to the re-estimation of the charges in the regulation dated 21. 12. 2012. As such, the petitioner cannot have any grievance with regard to the procedure adopted by the authority in formulation of the regulation.

m) It is further submitted that unless it is specifically provided there is no requirement to provide for hearing while forming a regulation which is a subordinate legislation and is a legislative exercise. It is held in :

State of T.N. v. P. Krishnamurthy, (2006) 4 SCC 517, at page 530, that:

22. There is no dispute that making of Rule 38-A is a legislative act and not an administrative act. It is no doubt true that an act which is legislative in

character, as contrasted from an executive act or a judicial/quasi-judicial function, does not oblige the observance of rules of natural justice. In *Rameshchandra Kachardas Porwal v. State of Maharashtra*, this Court observed: (SCC p. 741, para 17)

"We are here not concerned with the exercise of a judicial or quasi-judicial function where the very nature of the function involves the application of the rules of natural justice, or of an administrative function affecting the rights of persons, wherefore, a duty to act fairly. We are concerned with legislative activity; we are concerned with the making of a legislative instrument, the declaration by notification of the Government that a certain place shall be a principal market yard for a market area, upon which declaration certain statutory provisions at once spring into action and certain consequences prescribed by statute follow forthwith. The making of the declaration, in the context, is certainly an act legislative in character and does not oblige the observance of the rules of natural justice."

In the instant case, the requirement is of transparency, which can be discharged through various means as detailed herein above.

411. It is the contention of the petitioner that the impugned regulations violate article 19 (1) (g) of the Constitution of India and that there is no justification to restrict this right available to the respondent under article 19 (6) of the Constitution of India. In other words, the reasonable restriction that can be imposed upon the right of the petitioner can only be done if such a reasonable restriction is carried under article 19 (6) by law and in the interest of general public.

412. In this connection it is submitted that firstly the activity of establishing and running a cable landing station is a licensed activity and the petitioner is duty bound to carry out its business with regard to the cable landing station in accordance with the terms and conditions of the license. The said terms and conditions of the license prescribe stringent conditions with regard to the method and manner in which the business can be carried out. It is provided in various terms of the ILDO license that the licensee would be bound by such regulations that are framed by the authority from time to time. Thus the business that is carried out by the petitioner at the cable landing station is a license activity subject to the terms and conditions of the license as well as the various

conditions/restrictions that may be imposed through regulations made by the authority.

413. In the instant case, the authority has framed the regulations to ensure that there is compliance with the terms and conditions of the license by the petitioner. The license prescribes that there shall be equal access to the bottleneck facility at the cable landing station which shall be provided by the petitioner mandatorily on a non-discriminatory basis. The said license term also prescribes that the charges for such access shall be governed by the regulations made by the authority from time to time. As has been submitted hereinabove the authority has framed the regulations under the TRAI act to ensure compliance with the terms and conditions of this license term by the petitioner. The authority has also exercised its power under various other clauses of section 11(1)(b) of the TRAI act.

414. It is submitted that while providing services concerning a license activity, which is considered to be a bottleneck facility and where the licensor as well as the regulator are trying to ensure effective competition so that the broadband services that are available to the end consumer becomes affordable, the petitioner cannot have an absolute right to do business in the manner in which it wishes to. In other words, while granting access to the cable landing station the petitioner cannot charge an exorbitant charge for granting such access. These charges are required to be cost-based as they are concerning a regulated activity. Thus, the petitioner cannot feel aggrieved that its fundamental right under article 19 (1) (g) under the Constitution of India has got violated because the authority has prescribed cost based charges which affects its overall revenue.

415. It is submitted that the cable landing station is a licensed activity. The petitioner has signed the ILDO license and has thereby agreed to the terms and conditions of the license. Such terms of the license have not been challenged and hence the petitioner is bound by the same. It is the license term itself that mandates that the method and manner in which the petitioner would be doing business is regulated. It mandates that the petitioner shall give equal access on non-discriminatory basis mandatorily to any seeker. The charges for the same cannot be exorbitant but have to be fair, reasonable and cost based. It is only under such circumstances that the objective of the licensor that the cable landing station facility would no longer be a bottleneck facility would be achieved. Hence, after signing the license the petitioner had

agreed to be bound by such license terms which prescribes cost based charges to be charged by it for its "business activity under Regulations of TRAI.

416. It is submitted that the regulated license activity at the cable landing station states that the charges that have to be cost based would be prescribed by the authority through its regulations under the TRA I act. The authority by framing the regulation and prescribing cost based charges under the provisions of the TRA I act has ensured that the petitioner complies with the terms and conditions of the license and that it charges fair, reasonable and cost based charges for granting access to the seekers. The regulations are therefore in conformity with the license terms and conditions as well as the provisions of the TRA I act. Under such circumstances, there is no violation of article 19 (1) (g) of the Constitution of India.

417. It is further submitted that the regulations that are framed by the authority under section 36 of the TRAI act are nothing but subordinate legislation which qualify as law for the purposes of article 19 (6). This law imposes reasonable restrictions on the business activity carried out by the petitioner at the cable landing station inasmuch as it prescribes cost based charges and various other terms and conditions that regulate the activity at the CLS through its impugned regulations.

418. As has been stated hereinabove in section 1 of the written submissions under the sub topic of public interest, the imposition of higher access charges by the owners of the cable landing station including the petitioner is directly proportional to the higher charges that the consumer has to pay for the broadband services that it takes from the access provider. As the same has been explained in detail hereinabove, the arguments regarding the same are not repeated. Thus it is clear, that the regulation of the access charges by ensuring that the charges are cost-based is aimed towards protecting the interests of general public and ensuring that in the era of information explosion the general public in India is not left behind due to the fact that the broadband services are not affordable. Regulation of the access charges facilitates broadband penetration in India especially into the rural sector which is in conformity with the avowed objectives of the national telecom policy of 2012. Hence it is submitted that there is no violation of the petitioner's right under article 19 (1) (g) of the Constitution of India and in any case the regulations which are subordinate legislation by prescribing cost based charges are only ensuring the protection of the interests of the general public and hence qualify as reasonable restrictions under article 19 (6) of the Constitution of India.

419. An argument has been made by the petitioner that the Hon'ble Division Bench, vide its order dated 25.06.2013 has already decided that there is no question of public interest involved in the instant case. The Hon'ble division bench had dismissed the writ appeal of the respondent and remanded the matter back to the learned single judge to dispose the same on merits. The petitioner has contended that as the issue regarding whether there was public interest involved in the formation of the regulations has been categorically rejected by the learned division bench and as the said decision has reached finality, hence the same contention cannot be raised by the respondent during the final hearing of the writ petition by the learned single judge as it is barred by principles of Res Judicata.

420. In this connection, it is submitted that firstly the respondent had preferred a writ appeal on the ground that its vacate stay application was not being heard and disposed of by the learned single judge who has proceeded to hear the matter on merits. Due to the reason that an ex parte stay order is in operation and continuing against a subordinate legislation and there has been no adjudication on the issue of whether there should be a stay or not, there is a need that the vacate stay application may be decided first. The Hon'ble division bench had taken note of the fact that the hearing before the learned single judge had already proceeded and was at an advanced stage and therefore there is no merit in the writ appeal which is accordingly dismissed and it was directed that the parties move the concerned court for hearing of the writ petitions.

421. It was during the course of arguments made before the Hon'ble Division Bench to persuade this court to vacate the ex parte stay against the regulations that a contention was made that continuance of a stay order would affect the public interest as the regulations were prescribing cost based charges. The Hon'ble division bench felt that as hearing before the Ld. Single Judge is at an advanced stage, the parties must conclude the hearing. The Hon'ble court had not decided any issue arising in the writ petition finally in such a manner that the same issue cannot be raised when the writ petition was being finally heard. Thus the contention of the petitioner is completely misplaced. The findings of the Hon'ble division bench will not bind/restrict the learned single judge in deciding the main issues that arise in the writ petition on merits due to principles of res judicata. It is submitted that the application of the principle of res judicata is completely misplaced in the facts and circumstances of the present case.

422. To strengthen its arguments, the petitioner has relied upon three judgements. In *UPSRTC v. State of UP*, (2005) 1 SCC 444, wherein the petitioner has relied on para-11 of the judgement which states that res judicata applies also as between two stages in the same litigation to this extent that a court, whether the trial court or a higher court having at an earlier stage decided a matter in one way will not allow the parties to re-agitate the matter again at a subsequent stage of the same proceedings. It is submitted that a perusal of this principle would show that the respondent would be barred from raising a similar interim issue which was there before the Hon'ble division bench. Here, the learned single judge is not deciding another similar interim application but is deciding the entire matter on merits. Hence, this judgement has got no application. Also on facts PARA 12 of the judgement would show that the facts of that case are materially different.

423. In *Bhanu Kumar Jain v. Archana Kumar*, (2005) 1 SCC 787, the facts on which the Hon'ble Supreme Court had decided are again materially different from the present proceedings. In para-17 of the judgement it is pointed out that both the respondents had filed application for setting aside the ex parte decree before the learned trial judge, preferred appeal against the judgement dismissing the same as also filed a revision application against the order which set the suit for ex parte hearing. The said applications and appeal had been dismissed. Even a special leave petition filed was dismissed as withdrawn. In that view of the matter it is not permissible for the respondents now to contend that it was open to respondent to re-agitate the matter before the High Court. Thus clearly, the issue again revolved around preferring a proceeding which had been finally decided. Applying this to the present case, it would only mean that the principle of res-judicata has been wrongly applied by the petitioner to the facts of the present case as no issue has been finally decided that would bar the Ld. Single judge from hearing the case on merits.

424. Similarly, the reliance placed by the petitioner on the judgement of the Hon'ble Supreme Court in ***Dila v. State of UP*, (2002) 7 SCC 450** would only lead to the conclusion that as the earlier interim stage proceeding which was dealt by the Hon'ble division bench cannot be re-agitated in a similar subsequent proceeding. It is therefore submitted that the principles of Res- judicata has got no application to the present proceedings.

425. An issue as an afterthought which has been raised by the petitioner during the course of arguments in rejoinder before the Hon'ble court is that the issues which are sought to be addressed by the authority through the various regulations

are the subject matter of the competition act and hence the authority does not have the jurisdiction to look into the issue. It is submitted at the outset that this issue is being raised for the first time during the course of the hearing of the arguments in rejoinder and has not been agitated by the petitioner during the consultation process or during the proceedings before this Hon'ble court.

426. In any case, it is submitted that the cable landing station is a licensed activity and the petitioner holds an ILDO license for the purposes of establishing and carrying out the business activity at the cable landing station. Being a licensed activity the petitioner is bound by the terms and conditions of the license which provide that the petitioner has to mandatorily grant equal access to the bottleneck facility at the cable landing station to any seeker on a non-discriminatory basis. It is further provided that the charges for such access shall be governed by the charges specified by the authority from time to time. Detailed arguments already been made hereinabove on the question of how the ILD sector was opened up and various steps were taken by the licensor as well as by the authority to ensure that there is increase of competition in the ILD sector are relied upon.

427. The cable landing station is considered to be a bottleneck facility and hence is a subject matter of regulation so that over a period of time there are enough players with level playing field that the bottleneck facility ceases to be one and the customers get the broadband facility at affordable prices. The authority under the act is required to insure that the interests of the various service providers as well as that of the consumers is protected and that there is an orderly growth of the telecom sector. The present regulations aims towards ensuring that the cable landing station is a place where equal access is granted and the charges that are charged by the OCLS for such purpose are cost based charges. This would ensure introduction of many players into the sector leading to affordable prices for the consumer. It will ensure an orderly growth of the sector. Thus the regulations that have been framed by the authority are completely in conformity with the provisions of the TRA I act and are in conformity with the terms and conditions of the ILDO license issued by the licensor. As such, the contention of the petitioner that the subject matter dealt with by the authority under the provisions of the TRA I act by framing regulations is outside the purview of the TRA I act and is a subject matter of the competition act is fallacious and not applicable in the facts of the present case.

428. At the outset it is submitted that the Petitioner has

resorted to misleading and prejudicial arguments all throughout the hearing of the matter. In the entire proceeding the Petitioner has been reluctant in explaining the real functioning of the CLS. The Petitioner has in the Rejoinder questioned the Block Diagram that was submitted in the Court to assist the Hon'ble Court in dealing with the concept of CLS and its working. The Petitioner then filed two block diagrams of its own. Out of this it referred to only one in its affidavit as well as in the Written Submissions. The Authority wishes to categorically state that the Block diagram submitted by the Petitioner and relied on in the Written Submission is absolutely misleading and contrary to the presentations and submissions made by the Petitioner before the Authority. The affidavit thus filed by the Petitioner is contrary to their own record, presentations and submissions made before the Authority during the Consultation process. The submissions made by the Petitioner on this account are, false and a deliberate attempt to mislead this Hon'ble Court.

429. It is wrong to say that statutory regulator has resorted to making culpable false and misleading assertions with deliberate intent. It is also wrong to say that respondent TRAI in a desperate attempt to justify its patently erroneous, calculation of costs and resorted to making patently false statements and allegations. All the allegations made by petitioner are wrong and denied. The respondent is constrained to submit that the contention of the petitioner is highly misleading and is aimed towards prejudicing this Hon'ble court.

430. TRAI has contended that petitioner's stand is contrary to submission made by them before TRAI during the consultation process on the working of the CLS. The Petitioner is basically trying to prove that the chart handed over by TRAI is wrong and the chart handed over by them to the Court presents the correct picture of the access to cable landing stations.

431. It is submitted that the charts presented by the petitioner is contrary to the presentation/ submission given by them to TRAI and Chart handed over by TRAI represents true picture of cable landing stations. The charts are given for assisting the court to get a better understanding of the whole issue involved and impact of this essential facility on the broadband penetration of the country. However, before analyzing these charts there is a need to understand the network element involved for provisioning of access facilitation.

432. The access facilitation to seekers is provided at two places (a) at cable landing station itself or (b) at the alternate co-location when there is no space available at cable landing station. Network elements involved to provide access

facilitation at cable landing stations and alternate locations are shown in Figure 1 at page 219 and Figure 2 at page 220 of Annexure typed set of papers with counter-affidavit of TRAI. When access facilitation is provided at cable landing station, the major network element is the Digital Cross Connect (DXC). Some peripheral element i.e. connector etc. which is called ODF is also required along with DXC but cost of these peripheral element is very small compared to the cost of Digital Cross Connect (DXC). Therefore, for providing interconnection at cable landing station all cost i.e. CAPEX and OPEX associated with the Digital Cross Connect along with ODF etc. should be recovered through number of interfaces provided by the DXC. TRAI in its cost calculation ensured that cost of network elements are recovered through interfaces available.

433. In case of access facilitation at alternate location DXC at both ends i.e. at cable landing station and alternate location, DWDM (used for transporting data from one location to another location) at both ends and optical fiber to carry data from one location to another location are the major components and, therefore, cost of all these network elements should be recovered through the interfaces provided by the DXC placed at alternate location. TRAI in its cost calculation for this scenario also ensured that cost of network elements are recovered through interfaces available. Before proceeding further there is a need to know what is DXC ? However, the said Optical fiber can transmit data at very high speed between two locations. In case of SDH (relevant for the case), the transmission speeds are measured in terms of STM-1 (155 Mega bits per second), STM-4 i.e. 155 Mbps X 4, STM-16 i.e. 155 Mbps X 16 and STM-64 i.e. 155 Mbps X 64 (10 Giga bits per second). These are bit streams at various levels. From the submarine cables data comes generally at higher bit streams level. However, seekers may require various bit streams which may be of lower range as well. DXC is an equipment that allows higher level bit streams to be rearranged and interconnected among lower level bit streams and vice-versa.

434. Table indicating 'Telecom equipments owned by OCLS' in the chart handed over by TRAI, is nothing but a DXC and its peripheral as explained above. TRAI has shown in the block diagram that this DXC is not only used for providing access facilitation to the seekers but also used for providing access to itself as an ILDO. However, petitioner has contested that they are not using this Digital Cross Connect (DXC) for their own purpose and it is exclusively for Access facilitation and they are taking access directly from telecom equipment owned by consortium. This is contrary to their submissions made to TRAI at various stages of consultation.

435. TRAI has relied on the presentation given by petitioner and submitted to TRAI on 07.01.2011 for all of their cable landing stations. For all the cable landing stations for both access facilitation at cable landing station and access facilitation at alternate location they have shared Digital Cross Connect between providing access facilitation to itself and other seekers. Relevant sheet showing block diagram only for one CLS of the Presentation (Sheets for other CLSs also depicts similar block diagram) sent by petitioner on 07.01.2011 is annexed as Annexure E (Page 6-7 of Typed Set of WS of Respondent). Block named as 'DXC' of the Block Diagram at Annexure E (Page No.7 of Typed Set of WS of Respondent) clearly indicates that they are sharing DXC for access facilitation and for their own use. It is mentioned within the block that out of 64 x 10G, they are using 4 x 10 G for access facilitation. Petitioner has also apportioned cost in the same ratio. This is what has been shown exactly by TRAI in its chart handed over to the Court. This was again stated by the petitioner by its submission dated 24.08.2012. Relevant para is as follows:

"Tata Communications wishes to emphasize that it, itself deploys DXC in between CLS and ITMC for providing capacity to its own customers and there is no discrimination on this account whatsoever between the capacity for Tata Communications customer's and for AFA purpose. This has been resorted to ensure sound technical design of capacity extension from CLS with requisite features needed for sound maintenance of capacity post it's commissioning."

Therefore, to put it simply the stand of the petitioner all along as is evident from the above paragraph and the presentation discussed above is as follows:

a) All interconnection is being provided at ITMC (name of the Floor of Building where Interconnection is provided) which includes interconnection to its own ILDO as well as other seekers;

b) A common shared DXC has been used for Access facilitation as is clearly indicated by the petitioner in the presentation that out of 64x 10G of DXC they are using 4 x 10 G for access facilitation and rest for their own use;

c) Therefore, what follows that the chart disputed by petitioner is nothing but a prejudicial argument which is contrary to their own submission before the Authority. This indicates a desperate attempt by the petitioner who is a responsible body to mislead this Hon'ble Court by making statements which are patently false and against their own record;

d) It is, therefore, submitted that the block diagram submitted by the Authority is the correct and true representation of the working of the cable landing station and not that of the petitioner.

436. It is further submitted that petitioner has also contested the chart submitted by TRAI for the alternate co-location with the same reason and handed over a similar chart in the Court showing that DXC is also not shared in case of access facilitation at alternate location. The copy of chart handed over by petitioner in Hon'ble Court is placed at Annexure F. It is important to mention that petitioner has handed over this chart in the Court but later neither submitted along with the affidavit nor with the written submission. In both the cases they have relied only on the chart contesting of providing access facilitation at cable landing station. Petitioners are well aware that submitting chart will expose the petitioner's attempt to mislead the Court. As explained above, that in case of access facilitation at alternate location all the bandwidth is transported to alternate location for providing access facilitation as no space is available at the cable landing station. Now if petitioner is providing access facilitation to its own ILDO at cable landing station and to other seekers at alternate location then it means that it is clearly creating non-level playing field by increasing their cost as access facilitation charges for alternate location is very high since this includes cost of DWDMs and optical fiber cable. This is also violation of non-discrimination clause of the regulations and license conditions. And if they are providing Interconnection to their own customer also at Alternate location then there cannot be any other case except sharing of Optical fiber and DWDM. It will appeal to reason to argue by the petitioner that they have separate Optical fiber and DWDM for their own use.

437. It is further submitted that Network element taken for calculating access facilitation charges has been clearly mentioned in the consultation paper and the Regulations. All network elements, their cost and costing methodology were discussed a number of times with the petitioner and they have admitted in the last meeting before issuing the impugned regulations that "TRAI has explained the working methodology for calculating the capital cost of the ECI and DWDM equipment. TCL is ok with working for the same.....". Here, ECI equipment basically refers to the DXC which has been explained above. Therefore, it is evident from the above that fully knowing the fact that TRAI has submitted the correct block diagram clearly indicating the correct position of sharing of Digital Cross Connect by petitioner for itself and for other seekers. However, it is unfortunate that petitioners are disputing the chart at

this stage submitted by TRAI in the Court. The respondent is constrained to submit that the contention of the petitioner is highly misleading and is aimed towards prejudicing this Hon'ble court.

438. It is further submitted that if costing methodology used by TRAI is examined and understood properly there will be no difference in the access facilitation charges irrespective of block diagram as cost of an interface has been calculated by dividing cost of equipment with total interfaces feasible in the equipment. That means whether equipment is being shared between its own ILDO and seeker or it is exclusively used for seeker it does not make any difference as far as cost per interface is concerned.

439. It is submitted that TRAI has used a DXC of 640 G that means if it is fully loaded having all streams of 10 G then it can maximum cross connect 32 bit streams of 10 G (STM-64) coming from consortium side to 32 stream of 10 G (STM-64) towards access facilitation side. If it is used in protection mode (redundancy for each stream) then its capacity is reduced to maximum of 16 stream of 10 G for each side. That is to say 640 G DXC can provide access facilitation up to a maximum capacity of 160 G (16 X 10 G) in protection mode. Both the petitioners submitted that though it is feasible to equip the DXC with all 10 G interfaces, keeping in view the existing demand of the sector, the DXC are normally equipped with different interfaces i.e. STM-1, STM-4, STM-16 and STM-64 in varying numbers. Therefore, only 60 Gbps capacity is used for calculation. And further 70% utilization factor was used for cost recovery that means if the petitioners are able to sell 42 G (70% of 60 G) they will be able to recover the cost of DXC having maximum capacity of 160 G in protection mode.

440. It is submitted that petitioner is unnecessarily attempting to mislead the Court by quoting/ estimating various figures of the revenue. As explained in various paras of the submission that this is a costing exercise wherein TRAI has ensured total cost recovery which included 15% return on capital employed by the petitioner, depreciation and their full operational cost. Petitioners are well aware of the fact that revenue and cost are two different things and these two should not be mixed. Petitioners are making the case that their present revenue of Rs.25 crores would be reduced to Rs.2.5 crores. But nowhere petitioner has indicated the revenue which is actually required for recovering their cost to provide the access facilitation. Therefore, they are only showing their loss meaning by difference of revenue realization with existing

charges and revenue realization after new cost based charges. This revenue loss has no meaning whatsoever for the present case. It is submitted that the Petitioner cannot have a grievance for fixation of cost based charges.

441. It is further submitted that petitioner in its number of affidavits has nowhere demonstrated to the Court that what is the cost incurred by them for cable landing station, what cost is being recovered through consortium, what cost is being recovered for their own use and what cost has to be recovered from the seekers and how much cost has already been recovered by the petitioner corresponding to each cable landing stations, since its commencement. Petitioner is unnecessarily confusing the Court by giving some figure of operational cost not even clearly indicating that what part of this cost is being recovered through consortium and how much cost has to be recovered for its own uses. Therefore, giving this kind of data has no meaning whatsoever. As clearly explained in the various paras that TRAI has already considered all the relevant costs provided by petitioners in the exercise for finalizing the access facilitation charges.

442. In place of providing actual cost to the Court petitioner is unnecessarily trying to mislead the Court by stating sometime that cable landing station comprised minor component of total cost of a cable system, sometime relying on the cost of cable landing station as per respondent and sometime denying the same cost. But in any case not assisting the Court to provide actual cost of cable landing station. The relevant paras are quoted as follows:

"Cable Landing Station comprise, minor component of the total cost of a cable system. As already stated in the Writ Petition, the submarine cable comprises three parts, the wet portion, Cable Landing Station and backhaul facility. According to the Respondent the cost of Cable Landing Station is within the range of Rs. 20 crores to Rs. 50 crores, (refer Recommendation dated 16 December 2005) which seen in the context of the total cost of the submarine cable system is insignificant....."

Extracts of para 15 of reply to the sur-rejoinder,

"..... It is denied that the cost of setting up a CLS is in the range of Rs.20 to 50 crores is the Petitioner's contention as it is a figure of the Respondent itself..... .."

443. It is further submitted that petitioners themselves are incumbent service provider for providing International Private Leased Circuits (IPLC) as well as access facilitation. However, it is surprising to note that instead of placing on record before the Court the actual rate offered by them for IPLC circuits they are relying on the some report published by Tele Geography without specifically indicating the full facts or annexing the full report. Since it was not clear whether those are monthly charges or annual charges TRAI has assumed them as Annual Charges and tried to compare the IPLC rates with access facilitation charges. This has no bearing whatsoever in framing the regulations as was clearly explained above that this is a cost based exercise and not an exercise wherein access facilitation charges are fixed as percentage of bandwidth charges and this is bound to happen if all the facts and figures are not put with full details by any party. It is further submitted that a number of discounts are offered by the service providers on the basis of volume etc. on the charges as published by Tele Geography from time to time. Therefore, it has no meaning whatsoever since full exercise is cost based and charges are not fixed as a percentage of applicable bandwidth charges. It is further submitted that petitioner is misleading the Court that TRAI asserted the access facilitation charges are 56% of the total bandwidth cost when they are fully aware that these are the submissions of the stakeholders. By not informing the present IPLC rate to the court petitioners are ensuring that Court is not able to compare the present IPLC rate vis-à-vis the access facilitation charges. In nowhere in their submission petitioners have placed a table clearly indicating the present IPLC rate versus access facilitation charges offered by them in the country. Petitioners are unnecessarily confusing the Court by putting one table or chart from one corner and other charts and tables from other corner.

444. It is further submitted that petitioners are providing various examples of international practices on the subject without submitting relevant document. It is difficult to comment on those reports without understanding full context. TRAI has taken all the relevant document available including international practices before finalizing these regulations. It is further emphasized that this is a costing exercise wherein full cost recovery of petitioner is being ensured.

445. It is further submitted that it is not clear that why M/s. Tata Communications Ltd. is hesitating in submitting their investment in the cable landing station and the submarine cable in which they are member of the consortium. M/s. Tata has made the comparison of investment in new cable (EIG) versus CLS build cost for which neither they are member of the consortium nor they are owner of the cable landing station (page 36 of Index to additional typed set of documents). Tata is also explaining the position of BSNL in the EIG cable without being member of consortium and without knowing full facts. The relevant para 7.4 of written submission of petitioner is quoted as follows:

"..... .. The logic of the dominant and incumbent being given the option to build CLS is also incorrect in the case of BSNL which should have built the CLS for Europe India Gateway (EIG) cable or should have opted for a Second CLS, but chose not to do so as it wanted to avoid the cost of building the CLS..... .."

446. It is submitted that M/s.Tata is not able to produce any case in which one more cable landing station has been installed in India after commissioning of the submarine cables. M/s. Tata is bringing daily new facts showing some international practices without putting full context before the Court. It is very difficult to comment on any of the submissions without knowing full context and facts.

447. It is submitted that this court while exercising its powers of judicial review is concerned with the decision-making process and not with the decision itself. This Hon'ble court while exercising its constitutional power to adjudicate upon the instant matter while exercising its writ jurisdiction would be examining the decision-making process on the basis of well established principles of arbitrariness, unreasonableness and illegality. It is also well established principle that the Hon'ble High Court while exercising its jurisdiction remains conscious of the fact that the decision in question is that of an expert statutory body which is not to be supplanted or supplemented by the decision of this Hon'ble court. Further, the exercise of price fixation or costing is a complex exercise having several interlinked and intricate factors which is the subject matter of an expert body. In this context, the following judgements may be seen:

(i) In Uttar Pradesh Power Corporation Limited v. National Thermal Power Corporation Limited, (2011) 12 SCC 400, at page 403:

"8. We have heard the learned counsel appearing for the parties on the subject of determination of

tariff. The issues were with regard to necessary ingredients of cost to be considered for the purpose of determination of tariff to be charged by the power plants of the respondent in the matter of sale of electricity to different State Electricity Boards. The issues involved are also with regard to calculation of interest forming part of the tariff.

9. For the purpose of determining tariff for generation and sale of electricity by the generating stations of the respondent, cost can be broadly divided into fix charges and energy charges. It also contains the amount of interest paid on the capital employed as the capital employed in all electricity generating power plants is very huge. The issues with regard to determination of interest as well as capital are some of the most important issues which were decided by the Tribunal.

12. Looking to the observations made by this Court to the effect that the Central Commission constituted under Section 3 of the Act is an expert body which has been entrusted with the task of determination of tariff and as determination of tariff involves highly technical procedure requiring not only working knowledge of law but also of engineering, finance, commerce, economics and management, this Court was firmly of the view that the issues with regard to determination of tariff should be left to the said expert body and ordinarily the High Court and even this Court should not interfere with the determination of tariff.

13. Looking to the aforestated legal position and in view of the technical aspect involved in the impugned order with regard to determination of tariff, which we prima facie find to have been determined in a just and proper manner, we are of the view that the conclusion arrived at by the Tribunal in the impugned orders do not appear to be unreasonable or unjustified and therefore, in our opinion the impugned orders require no interference by this Court and, therefore, all these appeals are dismissed with no order as to costs.

(ii) In Transmission Corporation of Andhra Pradesh Limited v. Sai Renewable Power Private Limited, (2011) 11 SCC 34, at page 57:

"39. We do not consider it appropriate to go into the merit or demerit of determination of tariff rates in the appeals. Determination of tariff is a function assigned legislatively to a competent forum/authority. Whether it is by exercise of legislative or subordinate legislative power or a policy decision, if the Act so requires, but it generally falls in the domain of legislative activity and the courts refrain from adverting into this arena.

40. We have to further examine the legality of this issue in the light of the findings that we have recorded on the issues in relation to jurisdiction of the Regulatory Commission to determine/review the tariff. The jurisdiction of this Court is limited in this aspect. This Court has consistently taken the view that it would not be proper for the Court to examine the fixation of tariff rates or its revision as these matters are policy matters outside the preview of judicial intervention. The only explanation for judicial intervention in tariff fixation/revision is where the person aggrieved can show that the tariff fixation was illegal, arbitrary or ultra vires the Act. It would be termed as illegal if statutorily prescribed procedure is not followed or it is so perverse and arbitrary that it hurts the judicial conscience of the court making it necessary for the court to intervene. Even in these cases the scope of jurisdiction is a very limited one.

448. The petitioner has challenged the amendment carried out to the 2007 regulation by the authority vide notification dated 19.10.2012 on multiple counts. It was contended that the proviso to sub regulation 4 which has been added to regulation 10 through the amendment gives the power to the authority to specify access facilitation charges which would be common to all cable landing stations. This is arbitrary and irrational as each cable landing station has its own unique features and therefore there cannot be a common uniform charge that would govern all the cable landing stations. It is further submitted that the authority can specify charges to be paid by a class or classes of eligible Indian international telecommunication entity for which there is no guiding principle to guide discretion. It is further submitted that there is nothing in the amendment to indicate what happens to regulation 3 under the 2007 regulation in which the approval has been granted to the RIO rates given by the petitioner. Lastly it is submitted by the petitioner that the only reason that is contained in the explanatory memorandum to the amendment is contained in PARA 10 at page 526 of the amendment regulation which states that the common charges are being prescribed because the approval of the rates takes a lot

of time. According to the petitioner this is not a reason for amending regulation which has been in force and which was working properly under the 2007 regulation. Before proceeding to address these arguments the amendment to regulation 10 that was made by adding a sub regulation 4 along with the proviso after sub regulation 3 of regulation 10 provides as follows:

“(4) The Access Facilitation Charges referred to in sub regulation (1) and sub regulation (2) shall be such as had been included in the cable landing station - reference interconnect offer published under sub regulation (4) of regulation 3:

Provided that the authority may specify Access Facilitation Charges which shall be payable by a class or classes of Eligible Indian International Telecommunication Entity and in such case the approval of the access facilitation charges, as specified in part II of the schedule, by the authority shall not be required to be obtained under these regulations.

449. A bare perusal of the proviso shows that the authority can specify the access facilitation charges and if it does so then in that case there is no need to seek any approval as was required under regulation 3 of the 2007 regulation. It is also pertinent to note that at the time when the regulation was amended on 19. 10. 2012 the revised charges submitted by the existing OCLS was pending consideration of the authority as well as the RIO was submitted by the new owners of cable landing station. Hence, if rates were going to be specified then it would have governed the old as well as the new OCLS and no prejudice would have been caused to any one of them as the revised rates of the existing OCLS were also pending consideration for approval. There was no need to obtain approval for the pending revised rates as well as for the new CLS.

450. It is further submitted that the entire argument about the rates being specified which are payable by a class or classes of eligible Indian international telecommunication entity is arbitrary as there are no guiding principles to guide the authority to decide as to who are these classes and why different rates should apply to them is completely fallacious. In this connection it is submitted that the entire submission is baseless and misleading for the reason that the classification which is contemplated in the proviso is with regard to those people who shall be paying the access facilitation charges that is the seekers. The 2007 regulation defines “eligible Indian international telecommunication entity as a person who is holding a license under the ILDO license and also a person who

is an Internet service provider holding a valid international gateway permission or license. Hence there are two distinct types of or classes of seekers of access to the cable landing station: one being the ILDO licensees and the other being the Internet service providers. In other words, the government being the licensor itself recognises two different class of persons under two different license regime being the ILDO license regime and the international gateway license regime for Internet service provider. The way both of them work is also different under their license terms. Hence the authority has recognised the two classes that already exist for prescribing different rates if needed. Thus there is nothing irrational in the amended provision.

451. Another argument which was taken which is at best a prejudicial argument is that there is no discussion in the explanatory memorandum to the amendment regulation with regard to the 10 questions that were framed in the 22.03.2012 consultation paper. In other words there has been a summary disposal of the various issues that were raised in the consultation paper without assigning any reasons. Hence the amendment regulation is arbitrary on the face of it. It is submitted that the consultation paper dated 22.03.2012 had raised 10 issues and the comments and counter comments had been received by the authority on the said issues. The authority decided question 10 and question 1 (c) to come to the conclusion that there is a need to carry out an amendment to the 2007 regulation so that the authority can prescribe the charges within the regulation. Regarding the other issues the consultation was further carried by issuing another consultation paper on 19.10.2012 itself in which the estimation of the various charges were made and the methodology adopted as well as the estimations were put up for further consultation. Hence under no circumstances, it can be said that all the issues that were raised in the consultation paper dated 22.03.2012 had been summarily disposed of by the authority. This is amply clear from the consultation paper dated 19.10.2012 which states that the charges have been estimated in continuation of the consultation process. The same is also evident from 21.12.2012 regulation where charges have been framed.

452. A challenge has been made to the said amendment regulation on the basis that there was no open house discussion held and hence the requirements of transparency under section 11 (4) has not been complied with. Detailed arguments with regard to transparency and the scope of section 11 (4) has been made under a separate sub-heading regarding transparency. However it is sufficient to state here that the open house discussion is nothing but a meeting where all stakeholders come and express their views. The OHD is not a process which has to be

mandatorily followed as it has not been specified either under the act or any rule or regulation. The authority depending on the subject matter which is involved chooses to hold an open house discussion or at times decides only on the basis of the comments and counter comments that are received in response to the consultation paper which is put on the website. It is also pertinent to note that in the present subject matter the issue is concerning charges to be framed on the basis of cost data of petitioners which would govern the relationship between service provider. A number of meetings were held with the petitioner. Hence on the basis of the fact that no open house discussion was held it cannot be argued that the requirements of transparency were not met.

453. It is an admitted position that there was a pre-consultation paper in the form of a letter dated 22.06.2011 that was issued by the authority to all stakeholders seeking their views on eight questions. The comments and counter comments received led to the formulation of the consultation paper dated 22.03.2013 in which 10 questions were raised. The comments and counter comments with regard to this consultation paper were received and were put on the website. In this context, the consultation paper dated 22.03.2012 may be referred to. It is based on the comments and counter comments received that the authority decided to issue the amendment regulation and then issued another consultation paper dated 19.10.2012 along with estimated charges to decide the remaining issues of the consultation paper dated 22.03.2012. Thus the entire exercise and the decision-making process has been fair, reasonable and transparent.

454. One of the main contentions of the petitioner has been that each cable landing station has its own unique features thus making the cost of establishing and running a cable landing station would vary from place to place. By the impugned regulations the authority is intending to prescribe one common charge that would govern uniformly all the cable landing stations. This prima facie is arbitrary and irrational. It is further submitted that the explanatory memorandum to the amendment is completely devoid of reasons and the only reason that emerges is that the approval of the rates under the 2007 regulation takes considerable amount of time. According to the petitioner this is no justification to carry out an amendment so as to specify charges by the authority. Before proceeding further the respondent authority wishes to refer to PARA 10 and 11 of the explanatory memorandum to the amendment regulation at page 526 WP which states as follows:

"10. The Authority noted that the number of

submarine cable systems landing in India have now increased to 15 from the earlier 10 nos. as in 2007 and these numbers are further likely to increase. Further, it has also been noted that out of present 15 nos. of Cable Landing stations for various cable systems, 12 nos. of Cable Landing Stations for various cable systems are owned by two OCLSs. As per the present provision of the regulation owner of cable landing station is required to submit the CLS-RIO including charges mentioned in Part-II of the schedule before the date of coming into existence cable landing station. The charges submitted by owner of the cable landing station are required to be further discussed with them and after getting complete details from the OCLS these charges are required to be approved by the Authority in 60 days. Since the process of approval of the charges involve scrutiny by TRAI of costing elements considered, costs and costing methodology employed by OCLS and final approval by TRAI, it takes more time and provides competitive advantage to the owner of cable landing station as OCLS is also integrated operator owning bandwidth in submarine cable system. The Authority further noted that though the work done in providing Access Facilitation is same irrespective of specific cable landing station, the Access Facilitation and Co-location charges varies between different operators based on their network configuration and costing methodology.

11. In view of the above, the Authority has decided to amend the regulations making suitable provisions for specifying Access Facilitation Charges, Co-location Charges and other related charges like Cancellation Charges and Restoration Charges."

455. It is submitted that the petitioner is reading certain portions of paragraph 10 to state that the only reason that has been given by the authority is that the approval of the RIO takes time and hence there is the need to provide uniform charges. Such an interpretation is completely misplaced and this is due to the fact that a certain portion of the paragraph is being read selectively and out of context. It is submitted that paragraph 10 encapsulates many reasons and has to be viewed in the context of the events that have taken place subsequent to the 2007 regulation coming into force and the rates of the OCLS being approved.

456. It is further submitted that on numerous trips were taken by the licensor as well as the regulator to open up the ILD sector and insure growth of competition. Steps were taken to ensure that the CLS ceases to be a bottleneck facility. The 2007

regulation was also a step two words ensuring this objective. Under the 2007 regulation the authority had categorically decided in the explanatory memorandum that it is declining to specify the charges itself but wants to allow the OCLS as a first step to come out with the cost based charges itself which shall be approved by it. It was expected that the OCLS would come out with a non-discriminatory and non-arbitrary charges. The authority had also rejected the contention of various stakeholders that the charges in the RIO should be approved by the authority after broadbased consultation with all the stakeholders.

457. As per the 2007 regulation after three years of the approval of the rates in the RIO which had been done by the authority, the revision of the same had to be done so as to make the rates aligned with the current costs and utilisation pattern. Accordingly the revised RIOs were submitted by various OCLS. However, the authority received several representations stating that the costs at the cable landing station have gone down considerably and the utilisation has gone up exponentially but the access charges have not been reduced which means that the rates are no longer cost based and need to be reviewed. There was a widespread demand of a broadbase consultation and move against the procedure adopted by the authority to approve the rates without consulting the other stakeholders. Accordingly on 22. 06. 2011 the authority decided to issue a letter to all stakeholders and sought information from them on eight questions regarding the charges and the costs of various aspects at the cable landing station.

458. It is submitted that the fact that the rates had actually come down is evident from the fact that in the revised RIOs, the various OCLS had themselves accepted the fact that the cost of equipment has come down and utilisation has gone up and had hence proposed charges which were considerably lower than the charges that were approved in 2007. Once the broadbase consultation was employed, the authority found that the consultation with various stakeholders led to the petitioner themselves furnishing lower figures. For example, in their cost model petitioner has submitted 6 KVA power for both Dense Wavelength Division Multiplexing (DWDM) equipment and Digital Cross Connect (DXC) equipment. When these costs were opened for consultation with other stakeholders, petitioner themselves reduced the power required for DWDM and DXC equipment in the range of 1.8 KVA to 2.5 KVA. It is worth to mention here that power is one of highest component of total operational costs.

459. Based on the inputs received to the pre-consultation letter dated 22. 06. 2011 the authority formulated 10 questions in its consultation paper dated 22. 03. 2012. The consultation paper gives the reasons why the approval method under the 2007 regulation was not effective and that there is a need for charges to be fixed. Hence the authority framed the question one for consultation in which all the possible methods regarding charges were put up for consultation and it was asked which method should be adopted. Thus it is in this background that the reasoning given at Paras 8 - 10 of the explanatory memorandum to the amendment must be viewed.

460. It is submitted that the petitioner has relied upon a particular portion of PARA 10 which reads as follows,

"..... Since the process of approval of the charges involve scrutiny by TRAI of costing elements considered, costs and costing methodology employed by OCLS and final approval by TRAI, it takes more time.....".

This portion is relied to say that under the 2007 regulation the authority had given to itself 60 days for the purposes of approval of the RIO and it had approved at the earlier instance. Hence this reasoning is baseless on the face of it and further such difficulty being faced by a statutory authority may not be a justification for the purposes of going ahead and prescribing charges itself uniformly to all cable landing stations. In this context, it is submitted that PARA 10 gives many reasons as to why the final approval given by TRAI takes more time:

(i) The authority has noticed that since 2007 when there were only 10 submarine cable systems landing in India, there were 15 at the time of making of the amendment. Hence the numbers had increased.

(ii) Out of the 15 cable landing stations 12 are owned by the two petitioner OCLS.

(iii) It was found that the charges that are submitted by the owner of the cable landing station are required to be further discussed with them and after getting complete details from these OCLS the same have to be approved by the authority in 60 days. The authority has in the past faced grave difficulties as the OCLS prefer not to give the complete information or give inaccurate information which is discussed in a meeting and the authority has to direct them to furnish the complete information regarding the working for arriving at the various costs, the information regarding costing methodology employed by

them, the costing elements that have been considered. The difficulties faced by the authority with regard to various CLS of the Petitioner is self-evident at page 299 which are the minutes of the meeting held between the officers of the petitioner company and that of the authority. In the minutes a list of 12 items have been recorded on which information was sought from the petitioner OCLS as the same were found to be inadequate, incomplete or unclear. Thus with the increased number of cable landing stations which are in all likelihood going to increase even further such a method with regard to each cable system at the cable landing station is certainly a great time taking procedure.

(iv) The authority is noticed in PARA 10 that as per the present provision of the 2007 regulation the owner of the cable landing station has to submit its RIO before the date of coming into existence of the cable landing station so that the same is approved in time and published. However it was found that in the case of a new cable system known as SEACOM the petitioner had not submitted any RIO and continued to do business without any approved rates. This implies that the petitioner would use such a cable system at the cable landing station to capture as many customers as it could for itself through its own ILDO and after capturing sizeable number of customers it would then get the charges approved to give access to the other ILDO operators. This gives a definite competitive advantage.

(v) Under the 2007 regulation, there was no definite costing methodology that was mandated or any algorithm to calculate the access facilitation charges and co-location charges at the CLS. Thus while scrutinising the CLS RIO submitted by the various OCLS in 2007 the authority observed that the method of calculation of AFC and CLC varies for different OCLS, which yields variation in AFC and CLC for different CLS. This has also been observed in PARA 10 by the authority. Thus an OCLS employs different costing methodology with regard to its own cable landing stations at different places which leads to varying charges for the cable landing stations owned by it. Other OCLS also employ their own costing methodology which leads to charges which are at variance with the charges of the cable landing station of another OCLS.

(vi) The authority has observed that the work done in providing access facilitation is the same irrespective of the specific cable landing station. It

has been noticed elsewhere that it is only in relation to the rental and the electricity charges that there is some sort of variation amongst the various cable landing stations. In the 21. 12. 2012 regulation where charges have actually been specified the authority has taken the rental and electricity charges of Fort Mumbai which are the highest amongst all the cable landing stations. It is submitted that the petitioner has not been able to demonstrate as to how the work done at various cable landing stations that are owned by it is different.

(vii) The authority has recognised that the owners of the cable landing station are also providing services to end users as ILDO operators. Hence in the case of new cable systems as in the case of SEACOM or even existing OCLS if there is any delay in approval to the RIO rates or revised rates then the seekers are bound to suffer as they would be paying higher charges till the time the new charges or the revised charges are approved. As there is vertical integration the owners of the cable landing station shall have a definite competitive advantage."

461. It is submitted that the entire exercise done by the authority is for the purposes of determining cost based charges. The petitioners or for that matter any OCLS cannot have a grievance or cannot feel prejudiced with regard to fixation of cost based charges. The authority has clearly brought out the difficulties in the approval mechanism under the 2007 regulation. This coupled with the fact that there has been a demand by the various stakeholders that the charges should be cost-based and should be fixed by the authority so that level playing field is restored and the cable landing station ceases to be a bottleneck facility provide a complete justification for the amendment regulation which allows the authority to prescribe the uniform charges.

462. The petitioner has challenged the charges which have been arrived at and prescribed under the regulation of the authority dated 21.12.2012 on multiple counts. The petitioner alleged that there was no ground for the authority to prescribe a common charge for all cable landing stations in India. The petitioner also challenged the method and manner of calculating the charges after taking into consideration certain factors. The petitioner alleges that certain relevant considerations were not taken into account by the respondent authority while prescribing the charges. Before proceeding to address the specific issues of challenge with regard to the method and manner in which the

charges have been arrived at and prescribed, it is pertinent to keep in mind the following aspects:

a) As has been stated hereinabove in section 1 of the submissions, the authority had issued the 2007 regulations which stated that as a first Step the OCLS will frame the terms and conditions as well as the charges for the cable landing station which shall be submitted to the authority for its approval. It was expected that the OCLS would submit cost based charges and would also not adhere to arbitrary and unreasonable methods in prescribing those charges or applying the same. At that point of time, the authority had refrained from prescribing the charges itself and felt that it would be prudent if it is left for the OCLS to prescribe its own charges and other terms and conditions which shall be approved by the authority. The authority had also rejected the contention of the various stakeholders that the charges that are prescribed by the OCLS in its reference interconnect offer must be put up for consultation and then approved. Thus, the charges that were submitted by the OCLS in the reference interconnect offer were approved by the authority without having any consultation on the same.

b) It is an admitted position that the various reference interconnect offers that were submitted had been approved. After three years of the approval of the terms of the reference interconnect offer the authority had asked the OCLS to submit their revised rates so as to align them with the prevalent costs and utilisation pattern. The petitioner had submitted revised RIO on 18. 11. 2010 and thereafter also gave a presentation on the same.

c) It is relevant to note that during the pendency of these revised RIO, the authority had received several representations stating that the costs have actually come down and utilisation has grown exponentially but the charges of access at the CLS has not come down. In other words, the charges ceased to be cost-based resulting in the CLS to continue as a bottleneck facility. There was a demand that there should be a broad base consultation with regard to the charges.

d) Realising the fact that the approval of the rates in the reference interconnect offer is not put up for consultation and there is a possibility that the same may not be cost-based even after approval as the views of different parties have not been taken, the authority issued a pre-consultation paper in which

it asked all stakeholders to comment on eight questions vide letter dated 22. 06. 2011. It is relevant to note that the petitioner submitted its response giving various cost data and claimed confidentiality with regard to the information supplied vide its letter dated 16. 08. 2011.

e) Thus the authority had the cost data supplied by the various stakeholders including that of the petitioner in response to the letter being a pre-consultation paper dated 22. 06. 2011 and also had the data as contained in the revised reference interconnect offer submitted by the petitioner and other OCLS.

f) The authority after examining the responses issued a consultation paper dated 22. 03. 2012 and framed 10 questions for consideration which included questions of cost methodology, the various components that have to be taken into consideration for prescribing the charges, etc. the various stakeholders submitted their comments and counter comments on the said consultation paper.

g) After deliberating on the comments and counter comments, the authority decided question 10 and question 1 in the consultation paper to come to the conclusion that the authority would prescribe the charges and thereafter issued the amendment to the 2007 regulation dated 19. 10. 2012.

h) Based on the information and the cost data that was available with the authority, in order to decide the remaining questions that were raised in the consultation paper dated 22. 03. 2012, the authority decided to make certain actual estimates on the basis of certain methods adopted by it and issued another consultation paper.

It is extremely important to note that while making these estimates, the authority relied upon the cost data of the two petitioner OCLS. It is also clearly mentioned in the consultation paper dated 19. 10. 2012 that the estimates as well as the method adopted in calculating the estimates are subject matter of consultation. The said consultation paper took each factor that was required to be considered for example CAPEX and detailed what aspects are being taken into consideration under CAPEX and how the estimation is being done. The costing methodology adopted by the authority to arrive at the charges specified were very clearly explained in the consultation paper with the help of detailed

explanations, tables and algorithm given in each table.

i) It is submitted that in their response to the said consultation paper, most of the stakeholders were in agreement with the costing methodology adopted by TRAI. However, petitioner TCL submitted that Access facilitation charges should have been estimated as per the network architecture employed by them and TRAI should not have taken different network design for calculations. It also indicated few cost elements have not been considered in the calculation of such charges. Similarly some other OCLS submitted that the costing data and methodology applied is not very clearly understood and there were items which have not been considered in arriving at the cost. They wanted cost elements that form a part of arriving at Access facilitation charges as submitted by them earlier should have been considered fully.

j) Considering the comments given by the various stakeholders and in order to give a fair opportunity to OCLSS a meeting was held in which cost data, costing methodology used by TRAI was discussed in detail. The petitioners had also given a presentation on that date. It is submitted that based on the discussion held in the above meetings and submission of stakeholders in response to the consultation paper, Access facilitation charges both at cable landing stations and alternate location were re-estimated taking into consideration the inputs given by the petitioner including network design and the cost data. Almost all components of costs, inter alia including life of equipments and optical fibre, OPEX, consideration of standby equipments, Capex Elements, project management cost, weighted average cost of capital, space required to block for future expansion, company overhead, rate of dollar, taxes in equipment sector on which petitioner raised the point was taken into account in the revised calculations that were done which eventually found an expression in the regulation of 21. 12. 2012.

It is pertinent to note that in response to the consultation paper dated 19. 10. 2012 the petitioner had given several comments and counter comments raising various objections. The petitioner had also asked for a meeting wherein it could give a presentation and discuss the various grievances that it had. At the request of the petitioners a meeting was held with them in which they gave a presentation and discussed all the grievances that they had.

Thereafter, they had drawn up the minutes of meeting in which they have pointed out their grievances.

It is pertinent to note that the petitioners had raised several grievances in their comments and counter comments. Eventually at their request there was a meeting held in which they based all their grievances which they were really aggrieved about and pressed the same. All these grievances that were finally raised were addressed in the meeting and have been recorded in the form of the minutes of meeting. Therefore, it may not be open for the petitioner to now contend that some of the grievances which were a part of their comments and counter comments have not been addressed by the authority. The minutes of the meeting clearly reflect that the petitioner pressed its grievances and the same were addressed.

k) It is submitted that most of the grievances that were raised in the meeting as is evident from the minutes of the meeting which was drawn up by the petitioner itself had been addressed and in principle agreement with most of those grievances had been accorded. Thereafter, the authority while issuing the final regulation prescribing charges dated 21. 12. 2012 has re-estimated the charges on the basis of the inputs given by the petitioner which is clearly reflected from the explanatory memorandum attached with the regulation.

l) In light of this, it is surprising that the petitioner would have any grievance with regard to the decision-making process and on the issue of transparency.

m) It is submitted that in order to appreciate the submissions of the respondent authority with regard to the challenge of the petitioner to the various components of costs, methodology, etc. in the regulation dated 21.12.2012, it would be worthwhile to keep in mind the estimation that had been done in the consultation paper dated 19. 10. 2012, the manner in which the grievances had been addressed which has been recorded in the minutes of meeting dated 04. 12.2012 and the final estimation is done as reflected in the explanatory memorandum of the regulation dated 21.12.2012. It is submitted that keeping these three relevant documents in mind would greatly assist in understanding the approach of the authority and would also assist this Hon'ble court in appreciating that the decision-making process had been fair, reasonable and transparent."

463. As regards costing methodology, in the consultation paper dated 19.10.2012, the authority after explaining in great detail through tables and algorithms the various components that have been taken into consideration for the purposes of calculation and the estimated costs based on the cost data supplied by the two petitioner OCLS has framed question 1 in the consultation paper at page 518 asking stakeholders to comment on any other proposal on cost data and costing methodology employed. After considering the comments of stakeholders TRAI has used fully Allocated Costing methodology the meaning by all the costs i.e. capital expenditure and operational expenditure for providing interconnection to be recovered through the number of interfaces available in the equipments. Now for recovery of capital expenditure two things are important. One is return on capital employed and other is depreciation which together is termed as annual recovery of capital cost. TRAI has clearly mentioned in the para 20 of impugned regulations dated 21.12.2012 the life of network element for calculating depreciation and pre-tax WACC for calculating return on capital employed. Annualized cost for 60 G which comes out after adding depreciation and return on capital employed for both the OCLSS is indicated in the Table D of para 19 of the regulations. The list of various network elements considered for calculating depreciation and return on capital employed is also mentioned at Table A and B at para 13. Apart from capital cost the various components of operational cost is also mentioned in Table E and F of the regulations. The total cost i.e. depreciation + return on capital employed + operational cost has been divided by number of feasible interfaces as discussed with the petitioners. Number of feasible interfaces are also provided in Table C.

464. The petitioner had admittedly raised certain grievances with regard to the costing methodology not being clear. This grievance was specifically raised in the meeting and the presentation was also given on this issue. The minutes of meeting drawn by the petitioner itself records at PARA 10 of the minutes, page 243 of the respondent's typeset along with the counter affidavit, that TRA I had explained the working methodology for calculating the capital cost of the ECI and DWDM equipment. TCL is ok with the working for the same. This clearly demonstrates that the working methodology which had been employed by the authority as reflected in the consultation paper and about which the petitioner had queries, had been explained in detail in the meeting and the officers of the petitioner were in agreement with the costing methodology employed. It is only thereafter, that the costing methodology has been put into effect in the final regulation.

465. There were certain other grievances with regard to the methodology and it was pointed out that the authority must take into consideration the sum paid towards taxes and logistics. The authority had agreed to take this into consideration and has actually proceeded to re-estimate the actual estimations after taking into consideration this aspect. Under these circumstances, the entire contention of the petitioner with regard to the costing methodology applied by the authority in reaching the actual estimations is completely unfounded. It also reflects the desperate attempt on behalf of the petitioner. The costing methodology used by TRAI includes return on capital employed @ 15% per annum on capital employed by the petitioners depreciation and operational cost. Therefore, charges prescribed by TRAI ensure reasonable return on their investment.

466. As regards elements of cost, CAPEX and OPEX, in the consultation paper various elements of cost that would be considered for the purposes of estimations were identified for CAPEX ITEMS at page 504 and the apportioned capital cost for one 10 G/ STM 64 used for access facilitation at CLS for each of these items was given for each of the two OCLS at page 507. The elements of costs that would be considered for the purposes of OPEX was listed out at page 511 and it was stated that the cost of these items shall be calculated on the basis of taking it to be 30% of CAPEX. Thus, after taking into consideration the estimations reached at page 507 along with the OPEX cost the final estimation for the purposes of consultation was given in an itemised manner at page 512.

467. In the final regulation dated 21.12.2012 the list of Items that have been taken into consideration is provided at page 639 which includes certain more items than what was there in the consultation paper at page 504. The items that have been increased include manpower towards installation, NMS and test instruments. It is submitted that these items were increased for the purposes of calculation of CAPEX at the instance of the petitioner in the meeting and the minutes of the meeting would reveal at item 7 at page 242 that these issues were raised and the authority in principle agreed to it and applied while re-estimating the charges.

468. It is further submitted that in the minutes of meeting it is recorded at item 4 and 8 that the OPEX should not be taken as 30% of CAPEX but should be taken as per actuals. It is submitted that the authority agreed to take the OPEX cost as per actual and re-estimated the charges accordingly.

469. A contention has been raised that in the consultation paper at page 507, 508 and 512 the actual breakup of the cost of the items that were being considered for CAPEX had been worked out and the final charges that were estimated for consultation at page 512 gave the itemised breakup of CAPEX and OPEX. However in the regulation no such itemised breakup of cost has been given and a combined rate have been given at page 642, page 645 for OPEX and at page 646 the actual calculation of AFC has been determined. But as the itemised breakup of the various items of CAPEX And OPEX have not been given and their costs have not been shown hence it is difficult to make an assessment as to how the final figures at page 646 regarding AFC were reached.

470. In this connection it is submitted that in the consultation paper the OPEX were taken as 30% of CAPEX. But in the minutes of the meeting at item 4 it is noted that the petitioners wanted that the OPEX items must be taken as per actuals. This meant that the actual figure of the items under OPEX elements that have been listed out at page 645 had to be taken from the cost data submitted by both the OCLSSs. It is submitted that the cost data which were submitted by both the OCLS in the form of the revised RIO and the data that was given at the time of the pre-consultation paper stage have been considered. The OCLS had claimed confidentiality with regard to the data supplied to the authority. This is evident from the letters annexed at pages 310 of the writ petition. The authority also has noticed this at page 642 of the regulation at PARA 19. It is stated therein that keeping in view the commercial sensitivity of data, details of items and names of the OCLSSs have not been provided.

471. Thus the breakup of the items along with the cost of each item even though was provided in the consultation paper was not provided in the regulation because the actual data was being considered for OPEX items in the regulation which had not been done while framing the consultation paper. As the cost data that had been supplied was considered to be confidential and was stated to be so/ claimed as confidential by the OCLS, the authority deemed it fit not to reveal the details of the items along with their costs and names of the OCLS. The Authority gave reasons for doing so. It is submitted that in light of this it is unfortunate that the petitioner has raised the contention of non-transparency with regard to the details and breakup of the costs when the authority has not revealed honouring their own claim that the data may be treated as confidential.

472. On the taxes and logistics, the petitioners were aggrieved that in the consultation paper the authority in its

working had missed to consider the sum paid towards taxes and logistics. This grievance was specifically raised in the meeting and the minutes of meeting at item 10 at page 243 show that this grievance was raised. It is submitted that the authority considered this demand and agreed to include the sum paid towards taxes and logistics towards making final estimations. The authority has recorded at para-17 of the explanatory memorandum at page 641 that it is taking taxes at 18% in the revised calculations. Thus the grievance of the petitioner had been addressed and the decision had been taken accordingly.

473. It is incorrect on the part of the Petitioner to aver that for the purpose of taxes and logistics the Respondent has assumed a lower figure on the applicable statutory duties and taxes. The figures furnished by respondent are annexed as Annexure R-14 at page 330 of Respondent Type Set with the Counter Affidavit. As is evident that these figures are ranging from 23.51% to 24.26% and also includes charges other than statutory duty i.e. contingency (3%), logistics (4 to 6%), custom clearance charges (2.53 to 2.58%). The respondent in its calculations has appropriately considered taxes @ 18%.

474. On the project management cost, the minutes of the meeting at page 242 at item 8 records that the petitioners wanted that the project management cost may be taken as per actuals. The authority agreed to the suggestion and has taken the project management cost to be 10% of the CAPEX items. It has been noticed at para-17 of the explanatory memorandum to the regulation at page 641 that TCL had also submitted that the project management cost which was allowed by TRA I as 10% of CAPEX items, should be based on actual costs. It was noticed that as per the data submitted by TCL the project management cost was around 6 percent of the CAPEX whereas the project management cost of the other petitioner Bharti was 10% of the CAPEX ITEMS. The authority took the higher of the two rates available and decided that the project management cost would be at 10% of CAPEX.

475. It is submitted that even this exercise where higher of the two options have been adopted by the authority has been objected to by the petitioner stating that the said adoption of 10% as the project management cost is arbitrary and non-transparent. It is submitted that the petitioner itself has admitted at page 214 of the written submissions that the 6% figure that is appearing in the explanatory memorandum and which has been attributed to the petitioner was given by it in its RIO for approval in September 2012. As such, the grievances raised by the petitioner are completely baseless and fallacious.

476. On the foreign exchange rate, it is submitted that in the minutes of the meeting at item 13 page 244, it is recorded that the petitioner had requested that the rate of dollar should be based on the most recent rate of the dollar in the market. The authority agreed with the suggestion and the rate of dollar as Rs. 52 instead of Rs. 50 as it had taken in the consultation paper. The said change has been recorded duly at paragraph 18 of the regulation. It is submitted that the authority agreed with the suggestion of the petitioner and increased the rate of dollar for the purposes of calculations. The grievance was therefore addressed.

477. On life of equipments and WACC, it is submitted that in the consultation paper under the heading of annual recovery of capital cost the authority has discussed the life of the network element excluding optical fibre and taken its life to be 10 years. The life of link of optical fibre between CLS and MMR was taken as 18 years. The pre-tax WACC was taken as 15% and the method of depreciation was taken as straight-line method. From page 509 of the consultation paper it is evident that the comments of various stakeholders on these four issues have been discussed and then these figures had been finalized for the purposes of consultation.

478. It is evident from the minutes of meeting at page 241 item 2, 3 and 9 that the petitioner had raised grievances with regard to 3 of the items. The petitioner had requested that the WACC should be at 23.9% and not 15% . It had also stated that the life of the equipment which is taken as 10 years should be at five years and that the life of the fibre which is taken as 18 years should be at 15 years . The authority considered these suggestions and agreed with the latter while rejecting the other two.

479. It is submitted that the authority considered these three suggestions and has recorded its reasoning at Paras 20 - 23 at pages 642 - 643. It has given the reasoning as to why it is rejecting the suggestion of the petitioner that the life of equipment should be treated as five years instead of 10 years on the ground that most of the stakeholders including the other petitioner OCLS Bharti have supported 10 years as life of equipment. Further, the authority recorded that in various other regulations it had use the straight-line method and adopted an average asset life of 10 years and hence the adoption of life of equipment as 10 years is reasonable. However, it accepted the submissions of the two OCLS that the life of optical fibre link should be revised and hence it took 15 years as the life instead of 18 years as in the consultation paper . The authority also

gave reasons for adopting WACC at 15% instead of 20% as suggested by Bharti or 23.9% as suggested by TCL and gave reasons for the same in para-21. The authority recorded that it has analysed the accounting separation report of various telecom service providers and found that the pre-tax WACC at 15% is reasonable. In light of all this, it is abundantly clear that the authority has addressed all the grievances of the petitioner and has incorporated reason for acceptance or rejection of the same in the explanatory memorandum. Thus the entire process is fair and reasonable and transparent.

480. On exclusion of standby equipment, it is submitted that in the consultation paper at page 502 para-15 the authority has noticed that TRAI had a number of discussions with the OCLSSs on the issue of including DXC in the model for providing access facilitation at cable landing and proposed that one DXC in the model for access facilitation at CLS should be considered. The petitioners had advanced its grievance that as some of them have already installed a standby equipment, hence the cost of that also to be taken into consideration. It is submitted that this grievance was raised in the meeting as is evident at page 242 items 6. It is the stand of the authority that the said grievance was based on a wrong understanding of the petitioner and this was adequately explained to them during the meeting itself. It was explained that the capacity has been determined under protection mode which would take care of their grievance. Hence, there is no merit in the said contention. Para No.23 of the Consultation Paper dated 19.10.2012 and Para No. 15 of Regulations dated 21.12.2012 clearly explains that in the cost based calculations protection mode has been used. The relevant paras are reproduced below:-

".....to calculate the cost for provision of one 10G/STM-64 leve, the cost of fully loaded DXC i.e. loaded with 10 G/STM-64 cards in all slots in protected mode was estimated using data of the respective OCLSSs. Similarly on the basis of the data submitted by the OCLSSs the cost of fully loaded DWDM in protected mode was calculated to get the cost of transporting one 10 G channel from OCLS to MMR."

".....following table (Table C) provides DXC configuration taken for 60 G capacity in protection mode."

481. As regards build capacity, in the consultation paper dated 19. 10. 2012, it was observed that different CLSSs were having varying capacity for the DXC. In Mumbai, one OCLS was using a DXC having capacity of 640G while the other OCLS was using 4 DXC with a capacity of 120 G for the purpose of

providing access facilitation. Further cost of each CAPEX item for providing one 10 G/STM 64 was derived from the cost submitted by both the petitioner OCLSs. Therefore, in the consultation paper, in order to calculate the cost for provision of one 10 G/ STM 64, the cost of fully loaded DXC i.e. loaded with only 10 G/STM 64 cards in all slots in protected mode was taken. During the consultation process, both the petitioners had a grievance with regard to this approach. It is evident from the minutes of meeting from item 1 at page 240.

482. It is submitted that in the explanatory memorandum to the regulation, the authority discussed the concerns of the two OCLS and taking into consideration their suggestion decided to review the design capacity of fully loaded DXC that is having capacity of 640 G. The authority in paragraph 15 at page 640 considered the suggestion given by the two OCLS that the design capacity should be taken on the basis of market projections and while designing the capacity TRA I should ensure that all interfaces that is STM 1, STM 4, STM 16 and STM 64 are available in the equipment and not only STM 64. The authority considered the submission and discussed different combinations of provisioning of interfaces in DXC with the two OCLS. As per the discussions with them and demand projection for various interfaces and capacity of DXC used by them, the network design was modified for capacity of only 60 G with ensuring that there is availability of all interfaces that is STM 1, STM 4, STM 16 and STM 64. After such modification and reducing the built-up capacity to 60 G after taking into consideration the submissions and concerns of the two OCLS, the AFC both at CLS and alternate location had been re-estimated.

483. Thus, it is abundantly clear that the high-capacity of 640 G which was taken into consideration of the DXC equipment for the purposes of determining AFC in the consultation paper was revised to a capacity of 60 G in the regulation. Further, earlier in the consultation paper the entire 640 G capacity was loaded only with 10 G/S TM 64 cards but in the regulation the reduced capacity of 60 G was considered along with ensuring availability of all interfaces that is STM 1 to STM 64. This change was done only after considering the objections and the suggestions given by the two OCLS during the consultation process. It is therefore quite strange that even after considering of their objection and re-estimating the charges the petitioner has a grievance with regard to the authority taking the built-up capacity of the DXC as 60 G.

484. It is submitted that the authority has considered the objections and has modified estimation of the charges after taking into consideration the objections of the two OCLS. The

authority has also recorded reasons for doing so. Under such circumstances the decision-making process on this issue was fair, reasonable and transparent. It would be relevant to reiterate the technical aspects concerning DXC (DIGITAL CROSS CONNECT). Optical fiber can transmit data at very high speed between two locations. In case of SDH (relevant for the case), the transmission speeds are measured in terms of STM-1 (155 Mega bits per second), STM-4 i.e. 155 Mbps X 4, STM-16 i.e. 155 Mbps X 16 and STM-64 i.e. 155 Mbps X 64 (10 Giga bits per second). These are bit streams at various levels. From the submarine cables data comes generally at higher bit streams level. However, seekers may require various bit streams which may be of lower range as well. DXC is an equipment that allows higher level bit streams to be rearranged and interconnected among lower level bit streams and vice-versa.

485. It is submitted that TRAI has used a DXC of 640 G that means if it is fully loaded having all streams of 10 G then it can maximum cross connect 32 bit streams of 10 G (STM-64) coming from consortium side to 32 stream of 10 G (STM-64) towards access facilitation side. If it is used in protection mode (redundancy for each stream) then its capacity is reduced to maximum of 16 stream of 10 G for each side. That is to say 640 G DXC can provide access facilitation up to a maximum capacity of 160 G (16 X 10 G) in protection mode. Both the petitioners submitted that though it is feasible to equip the DXC with all 10 G interfaces, keeping in view the existing demand of the sector, the DXC are normally equipped with different interfaces i.e. STM-1, STM-4, STM-16 and STM-64 in varying numbers. Therefore, only 60 Gbps capacity is used for calculation and further 70% utilization factor was used for cost recovery that means if the petitioners are able to sell 42 G (70% of 60 G) they will be able to recover the cost of DXC having maximum capacity of 160 G in protection mode.

486. On the capacity utilisation of 70%, it is submitted that for the purposes of estimation of access facilitation charges the authority had taken a capacity utilisation factor of 70% in the consultation paper at page 510 para-29. After taking into consideration the various comments that were received from the stakeholders on this issue during the consultation process, the authority came to the conclusion that the utilisation factor of 70% was in line with the Best International regulatory practices. Further most of the stakeholders had supported this utilisation factor of 70% in their comments during the consultation process. Most importantly, the authority took into consideration the fact that the network design has been revised to provision of 60 G capacity with combination of all interfaces as suggested by the two OCLs. As the built-up capacity which was being considered itself had been revised and reduced from

640 G capacity as taken in the consultation paper to 60 G capacity, the utilisation factor of 70% is reasonable. Thus the authority gave cogent reasons for taking the capacity utilisation factor of 70% for the purposes of estimation of the charges. Thus, the grievance of the petitioner with regard to both the built-up capacity of 60 G being taken by the authority and the utilisation factor of 70% being taken as arbitrary and irrational is completely unfounded.

487. It is further submitted that the petitioner was at pains to argue before the Hon'ble court and has also devoted a considerable portion of the written submissions trying to justify that it had objected to the authority against the usage of the utilisation factor of 70% and that the authority has paid no heed to it. In this connection, it is submitted that when the officers of the petitioner company came to the office of the authority to give a presentation and had an elaborate discussion on each and every grievance that they had then at that meeting no grievance with regard to usage of a capacity utilisation factor of 70% was taken by the petitioner. It is submitted that the meeting was meant to discuss all the grievances that the petitioner had whether the same were raised in writing while giving the comments and counter comments to the consultation paper or not. The meeting was therefore meant to clear all the doubts that the petitioner had and to understand the various grievances and the suggestions forwarded by them. It means that all the issues that were raised by the petitioner in the meeting were really the core issues which were troubling the petitioner. Raising no grievance in such a meeting with regard to the adoption of a capacity utilisation factor of 70% only shows that the petitioner had no grievance with regard to the said factor and had given up the issue as is evident from the minutes dated 04.12.12 sent by them. The petitioner cannot now be permitted to raise the objection regarding adoption of the utilization factor of 70%.

488. In this connection attention is invited to the judgment dated 28th November, 2005 of Hon'ble TDSAT in case of Appeal No.10 of 2005. In the case, VSNL (now Tata communications Ltd) filed an appeal challenging the International Private Leased Circuits (IPLC half circuits) Tariff Order of TRAI dated 8th October, 2005 (Telecommunication Tariff (39th amendment) order, 2005) whereby TRAI had fixed ceiling tariffs for what are known as IPLC half circuits. Vide para 13.3 of the judgment, the TDSAT had observed

"During arguments we had occasion to see the papers submitted by TRAI which clearly brought out the position that the inspection team had unearthed

certain information which had earlier not been given by VSNL. Also the figure of E-1s indicating capacity utilized was entirely based on the information given by VSNL. Also VSNL itself had indicated that 30% of capacity was unutilized. While we do appreciate VSNL argument that for efficient and reliable IPLC service some provision has to be made to provided for restoration / redundancy, we see considerable merit in TRAI's argument that with only 70% capacity being utilized, the remaining 30% un-utilized capacity would suffice for meeting the requirement of redundancy."

The Hon'ble TDSAT concluded vide para 21 of the judgment that,

"For the reason stated above, we find no merit in this appeal and find no reason to interfere with the impugned notification. Hence, we dismiss this appeal and direct that the notification in question be brought into effect immediately by TRAI so that the benefit of the notification to the consumer is not delayed further. Appeal dismissed with cost computed at Rs. 50,000/-." See pages 336-385 at page 370 of Respondent's Type set with the counter affidavit.

489. On the conversion factor of 2.6, it is submitted that after making the estimations regarding access facilitation charges for one 10 G/STM 64 in protected mode at CLS and at alternate location at page 512 of the consultation paper, the authority proceeded to give the calculations for the access facilitation charges at cable landing station and co-location for lower capacities that is STM 1, STM 4 or STM 16. For this purpose a conversion factor of 2.6 was used for estimating access facilitation charges. The conversion factor of 2.6 was only meant to determine the access facilitation charges for lower capacities from 10 G/STM 64 capacity and not for the purposes of determination of costs. This conversion factor of 2.6 has nothing to do with the determination of costs but is a factor which concerns the recovery of cost by the OCLS. The authority has recorded the reasons for adoption of 2.6 factor of conversion at para-20 and 21 at page 505 - 506 of the consultation paper.

490. The petitioner has raised several grievances with regard to the adoption of the conversion factor of 2.6 instead of using the conversion factor of 4 in determining the access facilitation charges for various capacities. The authority considered the various objections and then finally concluded that the adoption of a conversion factor of 2.6 is reasonable and gave reasons for such adoption in the explanatory memorandum to the regulation dated 21.12.2012.

491. It is submitted that the issues relating to usage of conversion factor of 2.6, submission of Petitioner regarding conversion factor during the consultation process and explanation as to how the charges of various capacity interfaces has been calculated so that total cost is recovered from the interfaces for which DXC has been configured, have been clearly explained in the explanatory memorandum to the regulations dated 21.12.2012. The relevant Paras - 32 and 33 of the said regulations at page ticks 647- 649 read as under :

"32. In the consultation paper, for estimating access facilitation charge for lower capacities i.e. STM-1, STM-4 and STM-16 from 10 G/ STM-64 capacity, a conversion factor of 2.6 has been used keeping in view two important factors in mind : (a) scale of economy for higher capacities (b) prevailing market factor in domestic leased circuit. Most of the stakeholders favored using the factor of 2.6. However, the two OCLSs were of the view that using a factor of 4 is more appropriate. They were also of the view that irrespective of the conversion factor taken into account for the calculations, the charges determined should be such that they are able to recover their total cost for providing various capacity interfaces.

Therefore, keeping the submissions of the two OCLSs in view, in the revised estimated charges, the charges of various capacity interfaces has been calculated so that total cost is recovered from the interfaces for which DXC has been configured.

Total Cost of 60 G = [{"(No of STM-1 Interfaces) * (AFC of one STM-1 Interface)} + {(No. of STM-4 Interfaces) * (AFC of one STM 4 Interface)} + {(No. of STM-16 Interface) * (AFC of one STM 16 Interface) + {(No. of STM-64 Interface)* (AFC of one STM 64 Interfaces)}}]

33. TRAI is of the opinion that if the higher factor of 4 as proposed by OCLSs is used for calculation, then price of STM-1 will be very low and price of STM 64 will be on higher side and this will also not provide advantage of scale of economy for higher capacities. Therefore, keeping in view the prevalent conversion factor in the market which is also generally agreeable to most of the stakeholders, TRAI has used factor of 2.6 in place of 4, ensuring that the cost incurred is recovered.

Accordingly, AFC for various interfaces has been calculated using following formula:

Total Cost of 60 G = [{(No of STM-1 Interfaces) * (AFC of one STM-1 Interface)} + {(No. of STM-4 Interfaces) * (2.6) * (AFC of one STM-1 Interface)} + {(No. of STM-16 Interface) * (2.6*2.6) * (AFC of one STM-1 Interface)} + {(No. of STM-64 Interface) * (2.6*2.6*2.6) * (AFC of one STM-1 Interfaces)}]”

492. From the above explanation it is very clear that conversion factor does not play any role in the determination of the costs but is related to and concerned with the total cost recovery of the petitioner. In fact, Petitioner itself informed in one of the submission that there is a prevalent factor of 2.6 based on prices of domestic Leased Circuit and used the same factor of 2.6 for conversion of higher capacities into lower capacities. Respondent Authority in its impugned regulations has ensured full recovery of cost of petitioner. Factor of 2.6 is only ensuring parity with present domestic leased tariff for various capacities. It has been noticed at para-21 at page 505 of the consultation paper that,

“..... during the discussions with the service providers, it was informed that the present ratio prevailing in the market for domestic leased circuits charges of STM 64 to STM 16 or STM 16 to STM 4 or STM 4 to STM 1 is 2.5 to 2.6. One OCLS has also submitted that the factor of conversion from high capacity to lower capacity is 2.6....”

It is submitted that this particular OCLS is the petitioner itself. Hence, there is no reason for the petitioner to object to this conversion factor of 2.6.

493. The petitioner has raised a grievance that while approving the RIO of the petitioner after the same was submitted in pursuance to the 2007 regulation, a meeting was held with the officers of the petitioner company to discuss the method and manner in which they had determined the charges in their RIO on 08.08.2007 at page 298- 299. In that particular meeting there was an observation made that ‘...It appears that there is no benefit of scale of economy in case of higher capacity that is STM 4, STM 16.’ Comparing this observation with the observation made at para-33 of the explanatory memorandum it is contended by the petitioner that there is contradiction in the stand of the authority and there is no justifiable reason for such a departure.

494. It is submitted that the contentions made by the petitioner quoting the observations of the Respondent in the meeting dated 08.08.2007 are totally misconceived, resulting from improper understanding. The observations made in the meeting dated 08.08.2007 were not the conclusions/decision but an observation on the basis of cost details produced by the petitioner in that meeting. The Petitioner was asked to rework on the costing details of all four CLS-RIOs submitted by them in the light of observations made in the meeting and was also asked to send explanation to all queries raised by TRAI.

495. On the uniform charges, the petitioners have vehemently contended that there cannot be one uniform charge that will govern all cable landing stations as each cable landing station has got its own uniqueness. In this context, it is submitted that the petitioner has not been able to demonstrate as to how the work done at various cable landing stations owned by it is different. Further, there can't be any justification against fixation of cost based charges by the authority as it can't be the case of the petitioner that it does not wish to give the access at cost based rates. The respondent Authority also wishes to state that in the section concerning challenge to the amendment dated 19. 10. 2012 hereinabove the authority has given detailed arguments with regard to the decision of the authority to amend the 2007 regulation so that it could prescribe the charges which would be applicable in all cable landing stations. The respondent wishes to rely on paragraphs 1.7 to 1.16 of that section to support the submissions made herein below.

496. In the consultation paper dated 19. 10. 2012 the authority has stated that the TRAI has observed that work done for access facilitation at cable landing station is the same for all cable landing stations. Therefore, it may not be required to estimate the cost based charges separately for each cable landing stations. The only variation would be due to space and electricity charges if the cable landing stations are located at two different cities, which may be a small portion of total costs. In case of access facilitation at meet me room (MMR) the difference could also be because of length of optical fibre link between CLS and MMR.

497. The petitioner had raised a grievance with regard to the prescription of uniform Charges for all cable landing stations. Accordingly in the meeting this issue was raised by the officers of the petitioner and after much deliberation the officers agreed. It is mentioned at PARA 5 page 242 of the respondent type set to the counter affidavit of the minutes of the meeting that,

".... As already submitted the AFC and co-location will vary from location to location depending on the rental/power/manpower cost contributing two words O&M. The difference in the same is evident on the working of TRA I in the co-lo charges of Mumbai and Chennai. As discussed, if a authority desires to unify these rates then, the Fort, Mumbai rates for the rental/power may be taken for all stations as reference."

498. It is submitted that this suggestion given by the petitioner was accepted by the authority and accordingly during the estimation of the charges in the regulation dated 21. 12. 2012, the authority has considered the rental/power charges of Fort, Mumbai as the benchmark. The authority has accordingly given the reasons at para-31 at page 646 - 647 stating that,

"TRA I is of the opinion that were done to provide access facilitation at cable landing station is same for all cable landing stations. Therefore, it is not required to estimate the cost based charges separately for each cable landing stations. The only variation could be due to space and electricity charges if the cable landing stations located in two different cities. Therefore, in its calculations, TRA I has used space and electricity charges for Mumbai, which are the highest amongst various locations. During the consultation process also, stakeholders were generally of the view that determination of access facilitation charges, one for CLS and other for alternate location (MMR) would be adequate. As these charges are ceiling charges, the authority is of the opinion that higher of the costs of the two OCLSs, calculated separately for CLS and MMR may be taken for prescribing these charges."

Thus in light of this there is no merit in the contention of the petitioner that there should not be any uniform Charges for all the cable landing stations. It is in fact surprising that after discussing this issue in great detail in a meeting with the authority's officials and giving a suggestion that the rates for rental/power that are applicable to the cable landing station at Fort, Mumbai should be taken as the benchmark for the purposes of fixing uniform Charges and the authority has accepted the suggestion, that the petitioner has still chosen to challenge the prescription of uniform Charges.

499. In light of the submissions made hereinabove, it is abundantly clear that the entire process in the decision-making was fair, reasonable and transparent. The entire exercise of prescribing the charges started off by having a pre-consultation paper which led to the consultation paper dated 22.03.2012. This led to an amendment being made to the 2007 regulation dated 19.10.2012 after deciding question 10 and question 1 of the consultation paper dated 22.03.2012. On the remaining issues that were there in the consultation paper of 22.03.2012, the authority proceeded to issue another consultation paper dated 19.10.2012 in which the authority gave the estimations of the various charges based on the inputs that were received during the consultation process. In the said consultation, the costing methodology adopted by the authority as well as the estimates that were reached for the various charges were all put up for consultation. Thereafter comments and counter comments were received and meetings were held with the petitioners. The entire re-estimation was done on the basis of the cost data given by the two petitioners. All the grievances raised by the petitioner were discussed thoroughly in a meeting where the petitioners had given a presentation also. The petitioner had drawn the minutes of meeting dated 04.12.2012.

500. As is evident from the submissions made hereinabove, most of the grievances of the petitioner raised in the meeting which are itemised in the minutes of the meeting, were considered and accepted in principle. Accordingly, the authority proceeded to re-estimate the charges on the basis of the suggestions given by the petitioner. The authority has addressed all the grievances of the petitioner and has given cogent reasons for both acceptance and rejection of the same in the explanatory memorandum.

501. It is submitted that the entire exercise that was undertaken was to arrive at the cost based charges. For this, the components of costs were discussed and the number of components was increased after hearing the grievances of the petitioners. Extensive meetings were done to address the grievances and understand the suggestions of the petitioner. Most of the suggestions were accepted leading to re-estimation of the charges. For this entire exercise the cost data supplied by the two OCLS were considered. Thus, the resultant charges reflect the true picture of what the cost based charges ought to be. The only grievances that the petitioner would have is that the charges are lower than the charges that they were charging earlier. But this is only because the authority has now undertaken the exercise of prescribing the cost based charges. Hence, the petitioner's contention that the cost based charges arrived at by the authority are arbitrary, irrational and

unreasonable is devoid of merit.

502. The petitioner has also contended that the authority amended the 2007 regulation on 19.10.2012 and on the same day issued a consultation paper wherein estimates of various charges were given. Thereafter, the authority within two months of the consultation paper of 19.10.2012, issued the regulation dated 21.12.2012. According to the petitioner, the entire exercise was conducted in utter haste and the decision was predetermined. In this context it is submitted that the entire argument is completely misleading and fallacious. As stated above, the exercise for prescribing of charges started with the pre-consultation paper that was in the form of a letter issued on 22.06.2011. This led to the formulation of the consultation paper of 22.03.2013. The inputs that were received during consultation led to the amendment of the 2007 regulation and the consultation paper of 19.10.2012 which charges had been estimated. Thereafter after two months of consultation the final regulation of 21.12.2012 came into existence. Thus, the entire exercise of prescribing cost based charges went through an elaborate consultation process and the final regulation of 21.12.2012 came almost after 18 months of exercise since June 2011.

503. The petitioners also contended that there was lack of transparency in the issuance of the regulation dated 21. 12. 2012 as there was no open house discussion held before issuance of the regulation. The respondent wishes to submit that the arguments with regard to the open house discussion has already been dealt with elaborately hereinabove and hence the respondent does not wish to repeat the same. Suffice it to say, that there is no set procedure laid down for carrying out the consultation process either in the act, rules or regulations. The authority has evolved its own process of consultation with the prime objective in mind that there should be an open exchange of views between the various stakeholders as well as the authority. The open house discussion is a meeting where various stakeholders exchange their views.

504. However in the present case as the subject matter involves prescription of charges that regulate the relationship between various service providers, the holding of an open house discussion may not be necessary. The exchange of views through comments and counter comments and thereafter the presentations and meetings held with the authority by the stakeholders is sufficient for the purposes of the authority to deliberate and reach a decision. As stated above, the regulation has been formulated after following an extensive consultation process,

presentations and meetings with the OCLS and hence the requirement of transparency is completely met.

505. It is pertinent to note that the present regulation dated 21. 12. 2012 is an independent regulation which has been framed in exercise of powers under section 36 read with various provisions of section 11(1)(b) of the TRA I act. This regulation has to be read harmoniously with the 2007 regulation and the amendment carried out on 19. 10. 2012. Reading the three regulations together it only emerges that after the prescription of the rates under the 2012 regulation, the rates that had been approved earlier under the 2007 regulation would cease to operate. It is provided in sub-clause 3 to regulation 3 that,

"for every unit capacity provided before the commencement of these regulations, for which the annual access facilitation charges are payable by the eligible Indian international telecommunication entity to the owner of cable landing station, the charges specified in schedule 1 shall apply from the next date of payment falling on or after the 1st day of January, 2013."

It is thus evident that the RIO rates that were applicable and had been approved under the 2007 regulation would come to an end from the next date of payment falling on as per the agreement entered into between the OCLS and the seeker or after 1st Jan 2013 as the case may be, after which the rates specified in the regulation shall apply.

506. It is further submitted that with regard to various other terms and conditions the 2007 regulation would continue to be in force. It is only with regard to the charges, that the RIO rates that had been approved under the 2007 regulation would cease to apply once the next due date under the agreement arrives. From such date the scheduled rates under the 2012 regulation shall govern the area of charges between the parties. Thus the 2007 regulation, amendment to the 2007 regulation and the 2012 regulation prescribing the charges have to be read together as there is no conflict between them.

507. On the submission, with regard to W.P.No.3652 of 2013, preferred by Bharti Airtel LTD, it is submitted that in addition to the submissions made hereinabove, which are applicable in the case of the writ petition filed by Bharti Airtel Ltd., The respondent wishes to make certain additional submissions which are specific to the case of the writ petitioner Bharti Airtel Ltd. The respondent wishes to bring to the notice of this Hon'ble court a letter dated 21.09.2006 issued by Bharti Airtel to the Chairman TRAI on the subject titled 'Open access of

submarine cable landing station of one operator by another operator.' A copy of the letter dated 21.09.2006 of Bharti Airtel to TRAI is annexed with the respondent's typeset along with the counter affidavit in W.P.No. 3652 of 2013 at page 1. In the said letter, the petitioner has noticed that,

"while, formerly as well as informally, all the ILD operators are in discussions to get interconnects to other party's cable systems but still there are not many such arrangements reached so far, due to lack of interest shown by the cable station owners in their business interests priorities over open access environments to the customers, leading to a long drawn negotiation process."

508. The petitioner has further observed that the recommendations made by the authority to bring out amendment in the license terms and conditions was given nine months back however the same is yet to be implemented so far. Thereafter noticing the benefits of an open access policy in which one. Operator can access the cable system managed by other operator, the following requests were made to the authority by the petitioner:

"a) the procedure of "mandatory access of CLS of one operator by another operator" may be expedited at the earliest.

b) as already indicated in its recommendations, a regulation on cost-based access charges, which is transparent, non-discriminatory and fair, shall be issued at the earliest."

509. It is submitted that the petitioner Bharti had requested the authority to frame a regulation that would ensure equal access to be granted to the seeker by the OCLS mandatorily and also prescribe cost-based access charges. This was the stand of the petitioner Bharti when they were not incumbent in the cable landing stations in India but was a seeker. However, after it became an owner of four cable landing stations in India and became the largest owner of cable landing station after Tata, it has taken a stand that the authority does not have the power to frame regulations on the subject matter of cable landing station including prescribing cost based charges. Thus, the petitioner Bharti has taken contradictory stands and as Shifted its stand on the basis of convenience so as to further its own commercial interests. For the reasons stated above, it is prayed that this Hon'ble Court may be pleased to dismiss both the writ petitions.

510. Reliance Communication Ltd., (R.Com) has filed a written submission and submitted that R.Com owns and operates two landing stations on the FALCON cable system, one in Mumbai and one in Trivandrum. R.Com also owns a private cable system FEA, through its subsidiary. The private cable however lands in the landing station owned and operated by erstwhile VSNL, now TATA, the petitioner. R.Com also owns significant amount of capacity on other consortium cable systems. Thus, RCOM is an OCLS and also a Seeker, as defined by TRAI. Reliance Communication having offered its comments to the consultation process as called for by TRAI while inviting views/objections of all stakeholders. This position is admitted by the Petitioners. Reliance Communications is not a mere seeker/subscriber/ILD Operator but is also a owner of Cable Landing Stations (OCLS). The challenge to the regulation if upheld/set-aside would certainly affect Reliance as an OCLS.

511. At the outset, it is submitted that Reliance as an OCLS provides interconnectivity only to Sri Lanka and Maldives through its station at Trivandrum, and to Middle East and upto Egypt through its CLS at Mumbai. While the major content Internet Provider/Hosts, voice and business destinations are located in USA and/or Europe, the traffic in respect of which is handled exclusively by Tata and Airtel, the revenues earned by Reliance as an OCLS are far lesser than those by Tata and Airtel. By virtue of the present regulation under challenge, the Access Facilitation Charges and Co-Location charges equally affect the revenues of Reliance. Despite this, in the interest of ultimate consumer and availability of information technology at low cost, Reliance Communications support the need for Regulation and fixation of FC and Co-Location charges.

512. The Petitioners contend that the comments of the stakeholders are vital to the framing of a regulation in view of the mandate under Sec.11 (4) of the Act, that the non-consideration of the same is against transparency the Petitioners are aggrieved persons and have the locus-standi to approach this Hon'ble Court. It is equally pertinent that other stakeholders who have also contributed to consultation process in terms of Sec. 11 (4) of the Act also have necessary locus-standi to approach this Hon'ble Court when such Regulations are challenged and could have an adverse impact on the stakeholder. The challenge in the Writ Petitions being a challenge not only involving TRAI's power to impose such regulations but also the regulations themselves and Reliance having actual and constructive notice of the proceedings before this Hon'ble Court, it certainly has the locus-standi to be heard - not just as an Intervenor but also as a necessary party. It should not be made to wait for the outcome of the litigation and the impact thereof on its prospects. In the unlikely event of TRAI rolling

back the regulation, the mandate of transparency provided under Sec.11 (4) of the Act would be vitiated. On this ground also Reliance ought to be impleaded as Party Respondent.

513. On the maintainability of the writ petitions, the entire cause of action for approaching this Hon'ble Court is the absence of Judicial Member in the TDSAT. The entire challenge to the Regulation appears to be only to lend a cause of action to approach this Hon'ble Court and mixed issues of law and fact more particularly on technical, financial and industry related interpretations ought to be only before the Forum so constituted for the purpose by the statute itself. While the recent judgment in the case of BSNL by the Apex Court, may permit an action to be maintained before the Writ Court in the event of a challenge to the Constitutional Validity of regulations framed by the Authority, it is respectfully submitted that the effect of such a judgment is not retrospective to afford maintainability of an action instituted prior to such a judgment. More so, when even according to Petitioner in W.P.No.3652/2013, who at first approached the Hon'ble Delhi High Court to agitate the very same issue on the ground that the TDSAT was dysfunctional and accordingly approached the Delhi High Court when it was also open at that point in time itself to have approached this Hon'ble Court, if, indeed, the purpose of the litigation was to challenge the regulation as framed by TRAI. To sum-up, an action before the Writ Court, despite having an alternative efficacious alternative remedy -TDSAT has since become functional pending the Writ Petition - cannot thereafter be sustainable due to a subsequent pronouncement of the Apex Court that Regulations framed by TRAI are under challenge and therefore the jurisdiction of the High Court under Article-226 is attracted. Hence the Writ Petition cannot be sustained since the core issue sought to be agitated in the Writ Petition involves tariff fixation-Access Facilitation Charges-A function, which would be within the domain of the TDSAT.

514. On CLS - owned and operated by the petitioners, Reliance Communication Ltd., has submitted that the access facilitation is a technical term. CLS of the Petitioners is an Essential/Bottle-neck facility and not a passive infrastructure facility. The OCLS provides the interconnection between the Submarine Cable Network and the domestic (seeker's) network through its own network or systems, consisting of DCX (Digital Cross Connects), DWDM equipment (Dense Wave Division Multiplexer system), ADM (Add-Drop-Multiplexers) and any other equipment required depending upon the interconnect interface, data rates and design of the cable system or landing station. The OCLS provides an interconnection between the landed subsea cable networks and the Seekers Network in order to enable bi-

directional exchange of traffic. The OCLS systems will do the necessary conversions of interfaces, including optical to copper / electrical, multimode optics to Single-mode optics etc or vice versa as necessary or as applicable. The OCLS provides the interconnection between the subsea network and. Seekers Network through telecommunication equipment. The Petitioners themselves have admitted the use of active telecom or network equipment and the list is provided to TRAI for arriving at the AFC. The OCLS does not allow access directly to the Optical Spectrum or set of optical wavelengths carried by the submarine cable system. The OCLS does not provide physical access to the subsea cable system to the Seeker. The seeker can never directly connect with the Subsea cable to send or receive traffic using optical or electrical signaling. Otherwise, signals with various technical parameters from different seekers would have caused interference, imbalance and any other undesirable effects, leading to collapse on failure of the network belonging to and operated by the Cable Owner. The Block Diagram provided by TATA also confirm the use of network elements by the OCLS to interconnect the Subsea network to the Seekers networks. Similarly, the responses from Bharti Airtel and TATA to TRAI's consultation paper on the matter also confirm the same. The subsea cable always terminates into the subsea cable operators line termination equipment (SLTE) or other Wet Plant Equipment, which is funded and operated by the Cable Owner (Private or Consortium). The seeker can connect to this Wet Plant Equipment or SLTE through the OCLS network, equipment or other systems, directly within the building, or via a terrestrial network at another location (MMR - Meet Me Room, or Virtual Colocation Facility).

515. The Reliance Communication Ltd., has further submitted that TRAI has in its consultation papers, dated 22.3.2012 at Page-114 of Typed set of papers filed by Reliance at Page-129 defines Access Facilitation means Access or an inter-communication as the case may be, to the essential facility (including landing facilities for sub-marine cable) at Cable Landing Stations. Access Facilitation is a legacy technical term used in telecom, however, also being referred to as Inter-connect, Cross-connect or other names in different countries. It should not be taken with its dictionary meaning.

516. It is further submitted that admittedly, accordingly to TCL at Page 3 of affidavit in support of the Writ Petition, a CLS is all about inter-connectivity and not mere 'access facilitation' with dictionary meaning. It is interesting to note that TCL - Petitioner in W.P.No.1875/2013 submitted documents to TRAI supporting the costing and participated in the consultation processes. They also got the Reference Interconnect Offers

(RIOs) approved by TRAI. Despite this, they are now challenging the TRAI's powers to reduce AFC even though they followed the Regulations in the past. As per the judgment of the Hon'ble Supreme Court in the BSNL case, the powers under Sect.11 of the Act are only illustrative and not exhaustive. Therefore, the distinction between inter-connectivity and access facility is purely academic.

517. On monopolistic hold over CLS., it is also submitted that the manner in which the Petitioners in the Writ Petition are seeking to monopolize their hold over the CLS is exemplified by the following,

a) BSNL, A Government Company calls for global tenders every year for providing bandwidth. A chart of the rates quoted by different Service Providers including the Petitioners is attached. A look at these figures would clearly show that the Petitioners by virtue of being the owners of the Cable Landing Stations are able to submit the lowest quote as they do not incur any Access Facilitation Charge (AFC) as compared to other Service Providers like Reliance Communications. This fact would highlight not only the monopoly which the Petitioners want to exercise without any interruption but also the absence of level playing field for the Service Providers, especially in the case of petitioners who are owning the Cable Landing Stations through which 80% to 90% of bandwidth traffic passes through.

b) Submarine cables cannot be moved just from one landing station to another. The design and implementation of Subsea cables is a highly specialized and complex topic. The Cables are laid after carrying out detailed design and link analysis, desktop and Marine Surveys, environmental impact analysis, and cable routes are chosen very selectively, to ensure security, maintainability of the cable etc and after obtaining several Regulatory Permissions.

c) The cable design takes care of several aspects to ensure sufficient 'optical link' margins till end of life of cable (typically 25 years). The initial cable design decides on the landing stations and branching units on the cable trunk routes for any future potential landings, and once the cable is laid and buried into the sea bed, it is practically impossible to add additional landings move the landed cable on the trunk routes. India is connected on the main or trunk routes on all cables landing in Tata and Bharti CLS. Adding another landing station or moving landed cable

to another landing station will also violate licenses, international and domestic permits (e.g. security, environment and several others), contracts and impact the cable operations and service disruptions for several weeks. It can also damage cables and the submerged active electronics on the sea bed.

d) Cost of laying the submarine cables is significantly high compared to the contribution from the OCLS. In fact, the Cable Owners also fund and operate the Wet Plant electronics i.e. termination equipment, and pay the OCLS for collocating the equipment."

518. It is necessary to appreciate that the CLS which are owned and controlled by the Petitioners are entirely on a different footing from other CLS which are owned by company like BSNL and Reliance Communications Ltd. In the case of CLS owned by the Petitioners, the sub-marine cables connected to the CLS of the Petitioners which carry maximum data to and from Content Providers and networks in the US and Europe. So far as other CLS owned by BSNL and Reliance are concerned, the sub-marine cables are only connected to countries in the Middle East, Maldives and Srilanka, which are low traffic destinations as primarily 'consumers' of Internet. Therefore, the argument that Cable Landing Stations can also be set-up by other Service Providers is unsustainable. It is therefore prayed that this Hon'ble Court may be pleased to dismiss the above Writ Petitions.

519. M/s. Association of Competitive Telecom Operators has filed a written statement and submitted that the Association of Competitive Telecom Operators (ACTO), are Indian companies licensed to provide National Long Distance (NLD), International Long Distance (ILD) and Internet Service Provider (ISP) services in India. The members of ACTO are: AT&T Global Network Services India Private Limited, BT Global Communications India Private Limited, Cable & Wireless Networks India Private Limited (now Vodafone south Ltd), Orange Business Services India Private Limited, Pacific Internet India Private Limited, Power Grid Corporation of India Limited, Railtel Corporation of India Limited, Telstra Telecommunications Private Limited, and Verizon Communications India Private Limited. These companies are classified as Indian International Telecommunication Entities (IITEs) under the definitions in the CLS Regulations of 2007. These companies provide these NLD, ILD and ISP services primarily to business customers in India, including both Indian and global multinational enterprises. These services are critical inputs for businesses in many sectors and play an important role in fuelling India's economic growth. ACTO members

compete to serve these customers not only with each other, but also with other NLD, ILD and ISP operators, including TCL and Bharti. TCL, for example, states on its website that it "leverages its global and pan-India network to deliver managed solutions to multi-national enterprises, service providers and Indian consumers." This competition benefits all customers, both business and consumer, retail by stimulating the provision of the innovative, affordable telecommunications and Internet services that Indian businesses and consumers require in today's Information Age.

520. International submarine cables carry virtually all international voice, data and Internet traffic under the oceans of the world and are the critical backbone transmission facilities for the global Internet and the world's international telecommunications services. As cable landing stations provide the landing points where international submarine cables connect to domestic networks, access to cable landing stations is an essential input for every telecommunications and Internet service that requires international connectivity. It is submitted that, unreasonably high rates for access to cable landing stations increase the operator's input costs for services that require international connectivity, raise end-user prices and reduce the competitiveness of other telecommunications operators including ACTO Members in providing these services.

521. This is the case for ACTO members, which must connect their domestic networks in India with international submarine cables to provide ILD and Internet services to their customers. ACTO members own bandwidth capacity on a number of submarine cables for which either TCL, Bharti (as consortium members), or both these entities, own and operate the only cable landing stations in India. In order to connect this international bandwidth capacity to their domestic networks in India, ACTO members are required to enter into agreements (Reference Interconnect Offers (RIO)) with TCL and Bharti on the basis of the Access Facilitation Charges and collocation charges set forth in these entities' Cable Landing Station Reference Interconnect Offers. ACTO members and their customers in India, therefore, are directly and adversely affected by the unreasonably high Access Facilitation Charges and collocation charges required to be paid under their current agreements with TCL and Bharti. These high charges increase ACTO members' prices to business and consumer customers for telecommunications and Internet services requiring international connectivity, thus impeding competition and limiting growth in the ILD and Internet markets in India.

522. ACTO members through their parents and affiliates are members of international submarine cable consortia that own submarine cables that land at the large majority of cable stations in India. As identified by the TRAI in 2012 as majority being owned and operated by TCL and Bharti as is seen in the TRAI Consultation Paper No. 08/2012, Access Facilitation Charges and Co-Location Charges at Cable Landing Stations, 22 March, 2012, Table 2.1 & 2.2 (listing seven cable landing stations in India owned by TCL and Bharti). An ACTO member (through their parent and affiliate) holds an ownership interest in at least one consortium cable landing at six of these cable stations. For over fifty years, telecommunications operators have entered into consortium arrangements to build and operate international submarine cables and the cable landing stations required to connect these cables to the consortium members' domestic networks. Because of the substantial costs of constructing these cables, and the relatively small proportion of the total capacity of a submarine cable that any individual operator may require, many international telecommunications operators throughout the world have constructed submarine cables and the associated landing stations by entering into consortium arrangements to share costs.

523. Submarine cable consortium arrangements, as set forth in Construction and Maintenance agreements (C&MA) entered into by the consortium members, provide for the sharing and reimbursement of the costs to build and operate the cable and its associated landing stations among the members of the consortium. Also, to the extent allowed by local law, these arrangements provide access to these cable landing stations to allow consortium members to access their capacity in the countries served by the cable. Costs are shared on a proportionate basis amongst the consortia members based on the amount of capacity that a consortium member owns on the cable (for undersea cable costs) and lands at the relevant cable station (for cable station costs). These consortium arrangements allow all members to obtain international bandwidth without each operator having to incur individually the substantial costs of constructing and operating submarine cables and the cable stations to land capacity in each country by reimbursing the same. The consortia also avoid the unnecessary duplication of infrastructure that would result from each member undertaking such construction by itself.

524. More than 50 cable consortia currently operate submarine cables crossing the world's oceans, including Europe India Gateway (EIG), Southern Africa-Western Africa and South

Africa-Far East (SAT3/WACS/SAFE), South East Asia-Middle East-Western Europe-3 (SMW3) and South East Asia-Middle East-Western Europe-4 (SMW4), which connect India with foreign destinations and are jointly owned by (among others) either or both TCL and Bharti, and in very few cases by one or more parents and affiliates of ACTO members. The only landing points for the latter consortium cables in India are cable stations owned and operated by TCL or Bharti, which were constructed or expanded to accommodate these cables based on the same or similar cost sharing principles as those described above. ACTO believes that the same or similar cost sharing principles also apply to the India-Middle East-Western Europe (IMEWE) system, which connects India with Western Europe and is jointly owned by (among others) TCL, and Bharti. Thus, other members of these consortia (which includes parents and affiliates of ACTO members), in addition to TCL and Bharti, have already paid their proportionate shares of the capital costs to construct or expand these TCL and Bharti cable stations to land these cables in India and have also paid their proportionate shares of the ongoing maintenance costs at these stations attributable to these cables.

525. The operation of these consortium cost sharing principles as they apply to cable landing stations is demonstrated by the portion of the Consortium Agreement (C&MA) that ACTO has submitted to the Court, which, because of the confidential nature of the agreement, has been redacted to omit the names of the parties. That Consortium Agreement (referred to here as the "Agreement"), which originally was submitted to the TRAI on a confidential basis as part of an Annex to a letter filed by ACTO member Cable & Wireless Networks India Private Limited in August 2011, identifies a cable station in India as a segment of the cable. The cable stations located in other countries are also identified as segments of the cable. The Agreement states that these segments comprise the required share of land, buildings, ducts, and conduits etc. for each cable station and landing point, in addition to the required share of common services and equipment at those and any necessary remote locations. Annex 9 The Agreement identifies the capital costs for these segments as being the costs to provide this land, buildings, services and equipment, including the costs for construction, the purchase of land, engineering, design, materials, procurement, installation, permits, customs duties, taxes, financial charges, supervision, billing activities, overheads and insurance-. Annex 10 The Agreement also provides for the sharing of these costs with other cables that land at these stations.

526. The Agreement similarly identifies operations and maintenance ("O&M") costs as costs reasonably incurred in the operation and maintenance of the parts of these facilities that are reasonably attributable to the cable. Annex 11 The Agreement includes a schedule on capital, and O&M cost sharing listing an approved capital amount and quarterly payment for each cable station, including the cable station in India. Annex 15 The Agreement requires the consortium member operating each cable station to provide adequate space, facilities and related services to allow other consortium members to access the cable station under the terms set forth in the agreement. Annex 14 As previously noted, the above capital and maintenance costs are shared / reimbursed among the consortium members Sanding capacity at the station according to the amount of capacity landed by each member.

527. The Agreement demonstrates the mutually beneficial nature of these consortium cost sharing arrangements, which apply to the cable stations serving this cable in other countries as well as in India. Annex 15 Consortium members pay their proportionate shares of the capital and O&M costs of the cable stations in other where they access capacity on the cable, just as they pay their proportionate shares of these cost of the cable stations in India where they access capacity Accordingly, the owner of the cable landing station in India is able to obtain these facilities in other countries on a cost-sharing / reimbursable basis rather than having to incur the substantial costs of constructing and operating an international cable and the associated cable landing stations by itself. Bharti and TCL also obtain similar benefits as members of the other consortium cables that land at their cable stations in India.

528. The TRAI recognised the benefits of sharing the substantial costs of constructing and operating cable landing stations among multiple cables when it began the cable station access consultation process in 2005. The TRAI stated in paragraph 4.1.4 of its recommendations:

"As setting up CLS is a very time consuming & capital-intensive process, it is not feasible for a new operator to set up a CLS for new cables and neither it makes economic sense to duplicate the expensive CLS infrastructure in the Country, when many cables can be landed on the same CLS. Therefore, multiple cables owned by different operators should be made to land on a common CLS for economic reasons by a mandate through terms and conditions of the license."

529. The Department of Telecommunications (DoT) and the TRAI also applied measures requiring both nondiscriminatory access to cable landing stations. . The DoT amended clause 2.2(c) of the ILD license to state: "Equal access to bottleneck facilities at the Cable Landing Stations (CLS) including landing facilities for submarine cables for licensed operators on the basis of non discrimination shall be mandatory." Access Facilitation charges "determined on the basis of the cost of the network elements involved in the provision of access." TRAI, International Telecommunication Access to Essential Facilities at Cable Landing Stations Regulations 2007, Section 10, Based on the TRAI's 2007 regulations, TCL and Bharti have published their Cable Landing Station - Reference Interconnect offers (RIO) on their websites and have entered into agreements with various ACTO members based on those offers. As per the 2007 regulations of TRAI, TCL and Bharti filed and secured approval for their RIOs from TRAI before publishing them on their website. Significantly, neither TCL and Bharti have objected to the regulation or the process of securing approvals for RIOs.

530. In the period from 2007 to 2012, there was a significant increase in capacity utilisation on submarine cable systems, and increased competition in the Indian market, leading to significant reductions in prices for international bandwidth in India. The table has been submitted to this Hon'ble Court, showing the drop in the charges over the past few years Notwithstanding these significant increases in capacity utilisation, and reductions in equipment costs, cable landing station access facilitation charges remained largely constant during this same period. As a result, cable landing station access facilitation charges accounted for an increasingly large share of the total charges for end to end international connectivity. In 2008, cable landing station access charges comprised approximately 12% of the total charges for international connectivity. By 2012, cable landing station access charges comprised over 50% of the total charges for international connectivity. The table has been submitted to this Hon'ble Court, showing the drop in the charges over the past few years In addition, it became evident by 2012 that cable landing station access charges in India far exceed those of comparable countries, although the same or similar equipment costs and work are involved. Notably, the TRAI Consultation Paper No. 08/2012 included data showing that India's access charges are often hundreds of times higher than the comparable charges paid in other Asian countries. TRAI Consultation Paper No. 08/2012, Access Facilitation Charges and Co-Location Charges at Cable Landing Stations, 22 March, 2012, Tables 3.1 and 3.2 (showing, for example, that TCL's access charges at the LVSB cable station for 10 Gbps. of bandwidth on the SMW4 cable are more than 500 times higher than the corresponding charge for 10 Gbps. of

bandwidth on the same SMW4 cable at the Tuas cable station in Singapore, and that Bharti's access charges at the Chennai cable station for 10 Gbps. of bandwidth on the SMW4 cable are more than 370 times higher than this corresponding charge in Singapore). These tables show that the highest annual charge to access 10 Gbps. of bandwidth at the listed cable stations in other Asian countries (less than US\$ 5000) is only 1.8% of the lowest annual charge to access this bandwidth at the listed cable landing stations in India owned by TCL and Bharti (US\$ 276,200).

531. In response to the TRAI Consultation Paper No.08/2012, the majority of the stakeholders stated that there was an urgent need to review these charges to ensure the continued growth of telecommunications services requiring international connectivity. AT&T Global Network Services India Private Limited, for example, stated that "[i]t simply is beyond anybody's imagination that a few meters of fiber cross-connect cable in a [cable landing station] should now account for fully half of the total end-to-end cost of [an international private line circuit] in India."

532. By regulating the cable station access charges in accordance with the costs of these facilities, the TRAI regulations issued on 21 December 2012 reduce these charges which substantially helped the majority of ILDOs and ISPs in competing effectively in the provision of the telecommunications and Internet services that require international connectivity, thus encouraging increased competition and market growth. This approach was also intended to fairly compensate the owners of cable landing stations. The Chairman of the TRAI stated in the preface to the consultation paper issued on 22 March 2012:

"Provision of access at cable landing station involves costs for which owners of the cable landing station need to be fairly compensated. Cost based access facilitation charges and collocation charges would compensate owners of cable landing stations for the costs incurred by them for providing access facilitation and other resources to other operators at cable landing stations. Lowering the cost of this essential input for ILD and ISP operators will also create a more level playing field and enhance competition in the ILD and ISP markets by reducing the artificial competitive advantage that TCL and Bharti obtain in those markets from high cable station access charges, which raise their ILD and ISP competitor's costs. Based on the global and

domestic experience with telecommunications liberalisation, this increased competition is likely to result in prices that will more closely following costs, which will lead to more choice, affordability and greater usage of services, and wider participation in the Internet and the web economy for businesses and consumers. As the World Bank has noted, promoting effective telecommunications competition "will stimulate new investment in additional bandwidth, increase demand for communications services through falling prices, and promote greater efficiency and innovation in the provision of infrastructure and services."

533. There is no basis to the claims by TCL and Bharti that ACTO members should be required to construct their own cable landing stations to land this capacity in India rather than obtain access at regulated rates to the cable stations owned and operated by TCL and Bharti. Counter Affidavit Filed by the Petitioner, 25 March, 2013, at 10 and Affidavit on Behalf of the Intervener, 5 February 2013, at 25 These arguments fail to recognise that in many instances ACTO members (through their parents and affiliates that are members of international sub-sea consortia) have already contributed to the construction and maintenance costs of these cable stations as members of the consortia that constructed and own the submarine cables that land at these stations. Similarly, Bharti's claims that it established cable landing stations "at huge capital cost" and "is entitled to enjoy returns on its investment" fail to acknowledge that almost all costs relating to the cable landing and access for the consortium cables that land in the cable stations owned by TCL and Bharti are shared with the consortium members.. Counter Affidavit Filed by the Petitioner, 25 March, 2013, and Affidavit on Behalf of the Petitioner, 5 February 2013, at 25. Thus, these costs are already reimbursed.

534. As shown above, consortium agreements routinely provide for the sharing of such costs among all the consortium members accessing capacity at the cable station. The TRAI thus stated in its Consultation Paper dated 13 April 2007, Chapt. 4, that "[a]ll the cost components from Beach Man Hole (BMH) up to Optical Distribution Frame (ODF)/Digital Distribution Frame (DDF) are paid for by the consortia." The only access costs not paid for by consortium members, and therefore that are properly recovered as access facilitation charges, are for a small amount of basic cabling and some equipment, plus the labor necessary for installation. To the extent that the cable station owners seek to include additional capital and O&M costs, they are seeking an

improper double recovery.

535. There also is no basis to the claims by TCL and Bharti in this proceeding that these cable station access arrangements are not interconnection. Section 2(a) of the 2007 regulations defines "Access Facilitation" as meaning "access or interconnection, as the case may be, to the essential facilities (including landing facilities for submarine cable) at cable landing station." Pursuant to these regulations, the TCL and Bharti have aligned with the said regulation and published (post approval from TRAI) Cable Landing Station-Reference interconnect Offers with terms, conditions and rates for cable station access arrangements, and have entered into agreements with ILD operators based on those offers as seen in. VSNL's (now TCL) Reference Interconnect Offer. Under these arrangements, the cable landing station owner interconnects the ILD operator's international bandwidth capacity on the submarine cable with cabling and equipment at the cable station provided by the cable station owner which are interconnected with backhaul circuits connecting the cable landing station with the ILD operator's domestic network facilities. . "Interconnection" means the linking of circuits or equipment. The Chambers Dictionary defines interconnection as "interconnect verb, tr & intr to connect (two things) or be connected together or with one another, interconnection noun" Through these interconnection arrangements at the cable station, the SLD operator may transmit traffic from its international bandwidth capacity on the submarine cable to its domestic network facilities, and vice versa.

536. The submissions of TCL and Bharti also make clear that these cable station access arrangements are interconnection arrangements as the name Reference Interconnect Offer (RIO) itself suggests. TCL and Bharti describe cable landing stations as "buildings, which contain the onshore end of the submarine cable, house the necessary equipment to interconnect and pass traffic to and from the submarine cable." Access facilitation thus requires interconnection between two service providers: the ILD operator with international bandwidth capacity on the submarine cable, and the cable station owner providing the cabling and equipment at the cable station.

537. Relying a decision of the Hon'ble Supreme Court in **Cellular Operators Association of India and Ors. v. Telecom Regulatory Authority of India and Ors.(2016 7 SCC 703)**, which deals with powers and functions of the TRAI and which covers the case of the Petitioner on several issues, inter-alia, transparency, scope of the regulation making power of TRAI,

legislative competence, balancing interest of all stake holders, etc. The judgment under reference relates to call drop regulations of 16 October 2015 issued by the Respondent TRAI, upheld by Delhi High Court and struck down by the Hon'ble Supreme Court on 11 May' 2016, holding that TRAI did not have the power to frame the said regulations, regulations manifestly arbitrary, violative of Fundamental Right to carry on business and transparency, under Section 11(4) of the TRAI Act. The Respondent TRAI has strenuously relied upon the case of **Bharat Sanchar Nigam Limited v. Telecom Regulatory Authority of India and Ors.** [(2014) 3 SCC 222J, reflected in its Written Submissions at paragraph 2.2 (page 78), paragraph 1.2 to 1.5 (pages 83 to 91), paragraph 1.22 (pages 94 to 96), paragraph 1.3 (page 106), that it has wide and untrammelled power to frame regulations.

538. The petitioners have further submitted that the above judgment has been considered and explained in the recent judgment by reference to a similar factual context. The Hon'ble Supreme Court held that apart from the legislative competence to frame regulations it has to be also seen whether it carries out the purposes of that Act, i.e. reflected in the preamble of protecting the interest of service provider and consumers and in this regard held that the impugned regulation is violative of the purpose of the Act in para 41 of the judgment (refer para 41).

539. The above findings apply on all fours in the present case, firstly the reduction in tariffs by virtue of the December, 2012 regulations is upto 93, which is most certainly violative of the purpose of the TRAI Act, 1997 as the interest of the Petitioner is not protected. Secondly, the impugned regulations seek to regulate access and prescribe tariffs for access to cable landing stations, which is not in conformity with the prescribed powers of the TRAI Act, in terms of Section 11 (1) (b) of the TRAI Act, 1997. There is no provision in Section 11(1)(b) which empowers TRAI to regulate access and prescribe tariffs for cable landing stations. It is for this reason that the Respondent TRAI has admitted that the powers to frame the impugned regulations is traced to an amendment to the International Long Distance Licence. (Refer page 7 to 13 of the Petitioner's Written Submissions).

540. Another aspect similar to the present case, is that there were two regulations relating to quality of service and the Hon'ble Supreme Court found the latter regulation prescribing a penalty to be arbitrary, on the ground that 'when there is compliance in terms of a pre-existing regulation,

further penalty is violative of Articles 14 and 19(1) (g) of the Constitution of India.

541. In the present case, there are three regulations which govern the field, dated 07 June 2007, dated 19 October 2012 and dated 21 December 2012. The first regulation of 2007 specifies that every CLS will offer its own cost based charges, upon approval by the TRAI, that costs vary across different CLSs, whereas the impugned regulations impugned regulations of 19 October 2012 and 21 December 2012, empowers the TRAI to specify uniform charges across different CLSs. Both sets of regulations continue to govern the field. The charges prescribed in the December 2012 regulations are upto 93 less than the earlier tariffs fixed in terms of the June 2007 regulations. In this regard, the Petitioner's has already in its Written Submissions under the sub heading "TWO PROCEDURES - LESS DRASTIC TO BE FOLLOWED" (page 164 of the Petitioner's Written Submissions) has already made the submission relying upon the case law in this regard that two existing procedures the one less onerous should be followed.

542. This is precisely what the Hon'ble Supreme Court has dealt with in the above finding that while penalising a service provider under the call drop Regulation, when the same service provider has complied with another regulation framed with reference to the same source of power will be manifestly arbitrary and rendered the call drop regulation to be violative of Article 14 and 19(1)(g) of the Constitution.

543. That the judgment under reference has for the first time dealt in extenso with the issue of transparency from paragraph 80 to 91, the Hon'ble Court observed that while consultations were held with stake holders, however, there is no discussion of reasoning dealing with the arguments put forward by stake holder. That thereafter the Hon'ble Court proceeded to discuss the manner and mode of the Principles of Natural Justice and transparency to be followed while making subordinate legislation, referring to procedures recommended by the Supreme Court itself in para 91. In the present case, the respondent TRAI has violated the requirement of transparency as laid down above in the following manner:-

"(a) There is no open house discussion or hearing required in terms of Section 3 r/w. section 11 (4) of the TRAI Act where the Chairman and other members are required to give a hearing

(b) An explanatory memorandum of each of the three impugned regulations is part of the said regulation

where the objects and reasons have to be provided, but no reasons are provided.

(c) As far as determination of costs are concerned there has been no explanation or reasoning provided by the Respondent TRAI and which the Petitioner has set out in extenso under the heading "DETERMINATION OF COSTS" from pages 182 to 228 of its Written Submission.

(d) The most fundamental issue on which there is no transparency as prescribed by the Court, is the drastic about turn in the approach to costing. The impugned regulation of 2007 proceed on the basis that costs are variable across CLSs and consequently access charges will also vary. However, the October 2012 and December 2012 regulations proceed on the basis that uniform charges will be prescribed, without explaining or giving any reasons as to how this departure from the existing regulation of June 2007 is arrived at. The only reason advanced is that the whole process of gathering data of costing elements is cumbersome and a work done is the same, the TRAI proceeds to prescribe uniform charges in para 10 of 19 October 2012 Regulation."

544. That the judgment of the Hon'ble Supreme Court is seminal, in as much as it lays down the law very clearly as far as the power and authority of TRAI to frame regulations, the manner in which regulations are arbitrary and also the fact that the parameters of transparency have been set out which while applied to the facts of the present case clearly require the impugned regulations to be set aside.

545. Mr.C.S.Vaidyanathan, learned Senior Counsel appearing for the petitioner in the WP No.1875 of 2013 further contended that,

"(a)The Petitioner has been prior to 2002 a government company in which the Central Government continues to hold about 26.12% of the shares, along with two Government Directors on the Board of Directors of the Petitioner Company. Owing to such large shareholding of the Government, with two nominees on the Board, the Petitioner Company is at the forefront in implementing Government's policies related to promotion of cloud based advanced telecommunication services, supporting the BPO sector by various hosted IT services, creating international connectivity infrastructure globally and catering extensively to public interest. The Respondent TRAI unfortunately has not given recognition to this vital

role of the Petitioner.

(b) The Petitioner has demonstrated not only factually but on the basis of the Respondent's own Regulations, numbering three, where there is a common definition of interconnection and in none of the Regulations has the Respondent construed access facilitation to CLS being interconnection. Detailed reasons furnished in the Written Submissions as well as in the present Submissions and which have not been dealt with by the Respondent, except for a passing reference saying that they are in a different context. The Petitioner has demonstrated from the Impugned Regulations themselves where it is said that terms used, but not defined will bear the same definition as used in other Regulations. There is no response of the Petitioner to his own Regulations, on the other hand rather than dealing with its own definitions, it relies upon a provision in the ILD License Agreement as well as on WTO / ITU definitions deliberately overlooking its own statutory definitions directly applicable to the present case.

(c) The obligation of Transparency under Section 11(4) is upon the Authority, who under Section 3 are the Chairperson and the Members. It is the admitted case of the Respondent that no hearing has been given by the Chairperson and the Members as required under the Act. It is the admitted case of the Respondent that hearing has been given only by the Officers of the Respondent and that too only in respect of the Consultation Papers dated 19.10.2012 leading to Impugned Regulations of 21.12.2012. In regard to the Impugned Regulations of 19.10.2012, no hearing has been given even by the Officers of the Respondent. Under Section 33 of the TRAI Act this regulation making power is non delegable.

(d) TRAI has not dealt with the fact that Issue Estoppel operates against the Respondent in respect of its refusing to disclose cost calculation and costing methodology. There is no answer to the fact that in terms of the Judgment of 20.04.2005 by the Hon'ble TDSAT in a similar case between the same parties it was required to disclose calculation of costs as well as costing methodology along with any Consultant's Reports relied by the Respondent, which judgment was upheld in Appeal by the Hon'ble Supreme Court. In spite of this Judgment binding upon the Respondent, it refuses to disclose cost calculations and costing methodology and there is no answer to it.

(e) The TRAI has continuously shifted its stand during the course of the present litigation, developed entirely new arguments in contradiction to the earlier ones. The Respondent is bound by the reasons given by it in the Explanatory Memorandum in the Impugned Regulations, which has specifically been made a part of the Impugned Regulations and such statutory reasons cannot be improved upon or retracted / detracted in any manner in terms of the law laid down by the Hon'ble Supreme Court.

(f) The Respondent has not dealt with the most important submission relating to the jurisdiction of the TRAI to specify uniform charges, namely that when the main provision under the 2007 Regulations, i.e. Regulation 10, 12, 14 and 16 provide for separate Access Facilitation Charges for every individual CLS, the proviso cannot detract from the main provision and there is therefore no authority vested in the TRAI to specify uniform charges. The proviso, inserted by amendment of October 2012 only empowers the TRAI to specify charges, but it cannot specify uniform charges for all CLSs as sought to be done through the Impugned Regulation of December 2012 as the main provision itself provides for individual charges for every CLS.

(g) The Respondent appears to be confused as the Consultation Paper of 22.03.2012 and its earlier Pre-consultation vide its letter of 22.06.2011 did not deal alone with charges to be framed it was a consultation process for the purposes of determining and ascertaining whether there was a need to regulate considering that enough competition had come into the market place. In fact detailed submissions have been made by the Petitioner in response to both the Pre-Consultation Paper and the Consultation Paper but none of the arguments made by the Petitioner in respect of there being no need to regulate the access to CLS has been examined, considered or responded to by the Respondent. This is also evident from the Explanatory Memorandum to the Impugned Regulations of 19th October, 2012 wherein the Respondent has not dealt with any of the contentions raised by the Petitioner which is clear case of violation of principles of natural justice and indicative of the lack of transparency on the part of the Respondent.

(h) The Respondent TRAI does not deal with the primary jurisdictional aspect of whether it can prescribe uniform charges rather deals with peripheral issues like why it takes more time. In fact, the time frame mandated in the regulation of 07.06.2007 is by

the Respondent TRAI itself. The time frame of category in nature is still in existence and therefore required to be complied with by the Respondent TRAI."

546. In reply to response to the submissions made by the Learned senior counsel for petitioners, Mr.R.Muthukumaraswamy, learned Senior Counsel appearing for the respondent (TRAI) in both W.P.'s , has further contended that,

(a) Two procedures Co-Existing-Less Harsh to be followed- The petitioner's contention that "the respondent has not dealt with their submission that in the event of the impugned regulations (first, of approval of charges under the Regulations dtd 07.06.2007 and second, of prescription of charges under the Regulations dtd 19.10.2012 and 21.12.2012) being held valid, the laid down law in this regard is that when two procedures co-exist, the one less harsh has to be followed" is completely misplaced and hence denied. The question of co-existence of regulations dtd 07.06.2007 (and its amendment regulations dtd.19.10.2012) and of the regulations dated 21.12.2012, does not arise. The regulations dtd 07.06.2007 prescribed charges on the basis of forbearance policy which was done away with its amendment dated 19.10.2012 that specified uniform charges for access to essential facilities. Therefore there is no possibility of any co-existence being in place of two different procedures/regulations for prescription of charges. Further, the regulations dtd 21.12.2012 specified facilitation and colocation charges for the first time. Hence the contention of the petitioner is completely misplaced.

(b) The Petitioner's contention that the judicial review of the Respondent's discharge of functions is specifically enabled under the TRAI Act and the nature and extent of judicial review in terms of Section 23 of the TRAI Act is akin to that of the Comptroller and Auditor General while conducting audit is based on misinterpretation of the provisions of TRAI Act, 1997 and deserve to be rejected straight away. In any case, the Authority is an independent expert statutory body which works within the powers and functions enumerated under TRAI Act, 1997. As such, the comparison which is sought to be made with the Comptroller and Auditor General owing to one of the provisions concerning audits and accounts is completely misplaced and misleading.

(c) It was contended by the petitioner that it is a fact that the then Attorney General had given a Opinion to the Respondent that it did not have the jurisdiction to issue to regulate access to infrastructure as in the present case and it is pursuant to such Opinion of the Ld. Attorney General that the Respondent proposed the amendment to the TRAI Act. In this context, the contention of the Petitioner is misplaced. To the best of our knowledge borne out of record, the TRAI did not seek any opinion from Ld. Attorney General of India with regard to its power to regulate access to infrastructure as contended.

(d) The petitioner has stated that there has been no response to this detailed pleading on facts and on law that there is res judicata at different stages of the same litigation and it is furthermore relevant that the judgment rendered by the Division Bench did not bear any caveat that these observations would not bind the Learned Single Judge. The said Judgment has attained finality and the arguments of public interest are, therefore, barred by res-judicata. (Further, in this context it is submitted that the Hon'ble Division Bench did not grant prayer for vacation of stay mainly on the ground that the writ petitions were already heard in part by the Ld. Single Judge and, therefore, directed the parties to go ahead with the hearing on the main writ petitions at the stage it was left before the learned single Judge. The Hon'ble Division Bench was not adjudicating on any issues finally on merits raised in the main Writ Petition while disposing of an interim application for vacation of stay. As such, the entire contention regarding Res-Judicata is misplaced.

(e) The contentions of the Petitioners are clearly and wholly without merit. The present writ petitions challenging the International Telecommunication Access to Essential Facilities at Cable Landing Stations Regulations (No. 5 of 2007) dated 07.06.2007 along with its Amendment regulations dated 19.10.2012 and International Telecommunication Cable Landing Stations Access facilitation Charges and Co-location Charges Regulations, 2012 (No.27 of 2012) dated 21.12.2012 deserves to be dismissed, to bring them into operation as expeditiously as possible so as to subserve larger public interest.

Heard the learned counsel appearing for the parties and perused the materials available on record.

547. Submarine cables are laid on the sea bed between land-based stations to carry telecommunication signals. They offer highly secure, greatly reliable and very high capacity telecommunication links between countries across the world. The transmission quality of a sub-marine cable is significantly better than a typical satellite media. Submarine cables are only a few inches thick and they carry only a few optical fibers. Yet they have transmission capacities of the order of terra bits per second (Tbps). However, a typical multi-terabit, trans-oceanic submarine cable system costs several hundred million dollars to construct.

548. There are 13 submarine cable systems, which connect India to the world. A submarine cable used for providing international telecommunication links stretches across many countries. In each country, it lands in a land based facility called Cable Landing Station (CLS). Thus, a typical submarine cable system consists of

- (i) A submarine cable in the sea-bed and
- (ii) Cable landing stations at land.

549. Underwater cables carry telecommunications traffic (voice and data) under bodies of water (e.g., lakes and seas). These cables carry about 95% of all intercontinental telecommunications traffic. International banking and finance transactions are highly dependent on underwater (also known as submarine) communications cables. Some military communications traffic is carried via underwater cables. Most underwater communications cables in service are fiber-optic cables.

550. New systems are almost always equipped with fiber-optic cables (rather than older technology coaxial cables). Underwater cable systems have expanded in recent years due to increased demand, changes in technology, and reduction in costs. This brief paper focuses on the gateway point to underwater cable systems, the cable landing station, including the fiber run from the station to shore where the fiber enters the water.

551. The longest underwater telecommunications cable systems connect continents. Shorter systems are laid along coastlines to avoid problems of sitting terrestrial systems. Alternative routes are often installed to increase system reliability. Underwater cables form the backbone of international voice and

data communications, which include portions of the Internet. International banking, finance, and commerce are highly dependent on these cables. Underwater cables also carry military communications traffic and signals from hydrophones (scientific research and ship guidance). When viewed as a system, these cables comprise a highly sophisticated and robust web of communications channels that has no single point of failure. Telecommunications traffic can be quickly rerouted over alternative channels to bypass failed components. Traffic flow would not be appreciably affected unless several cables or primary landing stations were incapacitated.

552. Thirteen submarine cables connect India to the world. Out of these thirteen submarine cable systems, seven cables are owned by consortia while the remaining cables are privately owned. In a consortium model, operators form a closed club to construct, operate and maintain a submarine cable system and thereby they secure more favorable terms for submarine cable capacity than non consortium members. Construction, operation and maintenance (O&M) and other terms of a sub-marine cable system are governed by a Construction and Maintenance Agreement (C&MA), entered among the consortium members. A typical consortium has the following operating mechanism:

(a) The members of consortium raise the funds for constructing the sub-marine cable system, which includes the laying of cable in the sea-bed and construction of cable landing stations on the shore ends.

(b) The members of the consortium build cable landing stations in their home countries and lay cable in the oceans/seas as per the terms of C&MA.

(c) In the consortium-owned cable systems, capacity of the submarine cables system is divided into Minimum Investment Units (MIU), which reflect each individual operator's cumulative stake in financing and operating the system.

(d) The consortium may offer international capacity on the submarine cable to other willing telecom operators (i) through an Indefeasible Right of Use (IRU), which gives the telecom operator an exclusive right to use a dedicated amount of capacity on the cable but with no rights to control or manage the cable and (ii) by leasing out the capacity to the telecom operator for a certain period.

553. The co-build model is where two or more operators build a cable, but each operator manages and markets the capacity individually. Under the hybrid model the cable is built by one or more operators but its management is delegated to a third-party. In private ownership model, the submarine cable is constructed and managed by a single entity who then sells the international capacity to the other telecom operators according to their own commercial objectives. The private/public partnership model involves a partnership between public and private sectors. The best example is the 'stakeholder' approach applied to constructing the Eastern Africa Submarine Cable System (EASSy).

554. A cable landing station is a location at which, :

- (a) The international submarine cable capacity is connectable to the backhaul circuit;
- (b) The international submarine cables are available on shore, for accessing international submarine cable capacity;

and such location includes buildings containing the onshore end of the submarine cable and equipment for connecting to backhaul circuits.

555. Cable landing stations are located in areas with a high level of industrial/economic activity such as Mumbai and Chennai, as well as in somewhat remote areas such as Tuticorin. Most are located at or near an oceanic shoreline. Connections to the facility include intercontinental fiber, domestic fiber/copper, and power. Telecommunications equipment is typically located in fire-suppression protected rooms, which are environmentally controlled.

556. The telecommunications portion of the dry plant typically includes the following components:

- a) Network protection equipment (NPE),
- b) Line terminal equipment (LTE),
- c) Wavelength termination equipment,
- d) Transmission line amplifiers,
- e) Circuitry for supervisory functions (cable performance, fault detection, and location), and
- f) Terrestrial city point-of-presence - a site with a collection of telecommunications equipment (usually modems,

digital leased lines, and multi-protocol routers).

557. At the cable landing station, terminal equipment (NPE, LTE) is installed and connected to the land-side (domestic) communications network. The intercontinental fiber is brought on-shore and is typically trenched or routed along ROWs (rights-of-way), such as along bridges and railways. Common threats to cable landing stations can take many forms from sabotage to external attack. Attacks can target the fiber, the switching/network control equipment, and/or the power equipment.

558. The primary protection against basic attacks lies in the self-healing ability of networks to reroute traffic around damaged nodes and paths. The primary form of protection against catastrophic attack lies, to a great extent, in the ability to recover from any attack, which may include the reconstruction or relocation of facilities. Localized damage to fiber-optic cable is relatively easy to repair, unless an entire area is contaminated or unreachable.

559. A submarine Cable Landing Station is a technical facility at which international submarine cables come onshore and terminate. Generally, these buildings, which contain the onshore end of the submarine fibre-optic cable, houses necessary equipment to interconnect and pass traffic to and from the submarine cable and are the point where the submarine cable capacity is connected to the domestic backhaul circuit. The building which is shown as a big box in the block diagram contains three types of equipments. The first set of equipments are the ones that are owned by the consortium itself. The second set of equipments are owned by the cable landing station owner and the third set comprises of the equipments of the seeker who is seeking interconnection. There are essentially three components of a cable landing station-

a) The first is the submarine cable system which comprises of the cable coming from the sea (the WET Portion),

b) The cable landing station which houses the equipments of the consortium, the equipments of the OCLS and the equipments of the seeker (THE CABLE LANDING STATION),

c) The third component comprises of the connections emanating from the seekers equipment which are then taken by the seeker who is an International Long Distance Operator (ILDO) licensee through the National Long Distance Operator (NLDO) and the access

provider to the eventual customer who can be an individual customer using broadband or an institutional customer like BPO, KPO etc (Backhaul Facility).

560. A very significant characteristic of the cable landing station is that generally the owner of the cable landing station is a member of the consortium which owns the submarine cable. As such the owner of the cable landing station owns a certain percentage of the bandwidth out of the total bandwidth carried in the submarine cable. Usually, the consortium members decide amongst themselves that one of the members would establish the cable landing station in the country to which it belongs. It is pertinent to note that in India all the owners of the CLS, which includes the petitioners, are the members of the consortia which owns the submarine cable landing at their CLS and are owners of certain percentage of the bandwidth in the submarine cable. It is also pertinent to note that the part of cost of establishing a cable landing station is reimbursed by the consortium members to the owner of the CLS. Hence, the cost of setting up the equipment of CLS is already fully re-imbursed to the owner of CLS by the consortia.

561. The international long distance operators provide Bearer services so that end-to-end services such as voice, data, fax, video and multimedia sector can be provided by the access providers to the customers. The ILDO operators who are holding a license but are not owners of the CLS are providing ILD service to their customers. A perusal of the block diagram would show that the end consumer who is either an individual or an institutional consumer like BPO, KPO et cetera seeks a broadband connection from its access provider.

562. Connectivity of End user to International Bandwidth: The access provider hands over the call, data et cetera to the national long distance operator (NLDO) who carries this beyond the service area of the access provider. The NLDO then hands over the call, data et cetera to the ILDO Operator. The equipment of this ILDO operator at the CLS is interconnected with the equipment of the owner of the CLS which allows the transmission of the calls, data, etc. to the international carrier to be taken to the customer abroad through the bandwidth of one of the consortium members which was purchased by the seeker ILDO operator. The ILDO operators who were not owners of the cable landing station seek access/interconnection to the equipment of the owner of the cable landing station. This is to

gain access to the bandwidth in the submarine cable that it had purchased through an agreement with one of the consortium members. If the charges at the cable landing station are higher, then even though the bandwidth charges may be lower and available at competitively lower rates, the seeker ILDO operator is not in a position to compete with the owner of the CLS who is providing end services to the consumer also. This results in the seeker ILDO operator to enter into an agreement with the owner of the cable landing station purchasing the bandwidth also that is owned by the owner of the cable landing station so as to get a competitive package which would enable it to provide services to its customers at competitive rates. Thus owing to higher access charges the owners of the CLS deny equal access to the seekers. This results in:

a) A lot of bandwidth owned by other consortium members in the submarine cable going unutilized even though they may be available at competitive rates,

b) It leads to thwarting of the competition and denies the seeker ILDO from developing attractive packages and providing the service to the end consumer at attractive and competitive rates,

c) It leads to the owner of the CLS gaining a competitive advantage and in securing higher profits for its business as it is able to not only get access charges for the CLS but is also able to sell its bandwidth owned by it in the submarine cable.

563. The Access to Facilities at submarine cable landing stations (CLS) is an essential input for many telecom services. The present day telecom market is increasingly becoming data-driven. The share of voice in the total revenue of telecom companies is steadily falling and simultaneously the share of data is increasing at a unsteady pace. The use of mobile broadband for various activities like browsing, e-commerce, video etc is causing an exponential rise in data consumption. In this era of information explosion it is of paramount importance that the consumers get access to broadband at lower rates and at higher speed. Affordable rates coupled with high-quality of broadband service would ensure effective and higher penetration of broadband service in the country. For the sustained increase in data usage, data exchange with the international bandwidth through the cable landing stations is essential as there are only a limited number of data centers in the country. Presently, the high cost of international bandwidth due to the high access facilitation charges and co-location charges in India, is acting as a big hindrance to the latent demand for data services that can bring numerous benefits to its huge population. One of the avowed objectives of the National Telecom Policy of 2012 is to

ensure broadband on demand and high rural penetration of broadband in India. On 01 July 2015, Digital India programme has been formally unveiled by the Hon'ble Prime Minister. The programme aims to build infrastructure and access, deliver services electronically and increase digital literacy. However, as per the State of the Broadband report of September 2015, India has an 18 per cent Internet user penetration and is ranked 136th, way below some of its neighboring countries like Bhutan and Sri Lanka. Also presently only a limited number of Data Centres are available in the country. Any unnecessary access restrictions, in any form, tend to limit an operator's competitive scope to provide international telecom services at an affordable rate.

564. The ILDO operators who seek access to the CLS are also capable of building their own CLSs. However, building of the CLS, which may not by itself be capital-intensive, would be meaningless if there is no submarine cable which would land there. As noticed above, the submarine cables are owned by consortium members and the formation of the consortium itself is a very complex and time taking project. It has also been stated above that one or two of the consortium members are authorized under the agreement by the consortium to build the CLS at its native country for which the part of cost of CLS is reimbursed by the consortium members. Hence, in effect the owner of the CLS would need to be a member of consortium which owns a submarine cable and which would land at that particular CLS. Thus, the seeker ILDO operator who does not own cable landing station has to necessarily access the bandwidth available to it through an agreement with one of the consortium members after gaining access to the CLS owned by the petitioner. If the charges for gaining access/interconnection to the equipment of the cable landing station owner at the CLS are not cost based and higher, then it would not be viable to the seeker. Further, the owner of the cable landing station can also cause non-price constraints such as delaying or denying access. It is in that sense that the cable landing station is a bottleneck facility.

565. Glossary of terms used with reference to a Cable Landing Station:

(a) 'Owner of cable landing station' means a service provider who owns and manages submarine cable landing station in India and has been granted license to provide international long distance service or internet service provider.

(b) 'Eligible Indian International telecommunication Entity' means an International Long Distance Operator, holding license to act as such,

and, who has been allowed under the license to seek access to the international submarine cable capacity in submarine cable system landing at the cable landing stations in India; or an Internet Service Provider (ISP), holding valid international gateway permission or license to act such, and, who has been allowed under the license to seek access to the international submarine cable capacity in submarine cable system landing at the cable landing stations in India.

(c) 'Access Facilitation' means access or interconnection, as the case may be, to the essential facilities (including landing facilities for submarine cable) at cable landing station.

(d) 'Co-location Facilities' means the facilities at a submarine cable landing station (including building space, power, environment services, security and site maintenance) which may be offered by the owner of cable landing station (OCLS) to the eligible Indian International Telecommunication Entity to facilitate access to the cable landing station of such owner (including installation of co-location equipment).

(e) 'Virtual Co-location' means a location of the eligible Indian International Telecommunication Entity, being outside the cable landing station, whether adjacent or at a distant from such station at which the eligible Indian International Telecommunication Entity may install its equipment so as to access the sub-marine cable capacity from the cable landing station.

(f) 'Backhaul circuit' means a domestic telecom circuit which connects a cable landing station to the infrastructure or equipment of the eligible Indian International Telecommunication Entity at its premises, also termed as point of presence (POP).

(g) 'Cable Landing Station-Reference Interconnect Offer (CLS-RIO)' means an offer made by the owner of cable landing station containing the terms and conditions of Access Facilitation and Co-location of equipment (including landing facilities for submarine cables at cable landing stations for connectable system of International submarine cable) published after the approval of TRAI.

(h) 'Access Facilitation Charges' means charges payable by the eligible Indian International Telecommunication Entity (ITE) to the owner of the cable landing station (OCLS) to interconnect or access the capacity acquired on Indefeasible Right of Use

basis or on short-term lease basis from an owner of the submarine cable capacity or a member of consortium owning submarine cable capacity.

(g) 'Co-location charges' means the charges payable by the eligible Indian International Telecommunication Entity (ITE) based on the type of facilities used, for the purpose of housing the equipment of such eligible Indian International Telecommunication Entity (ITE), at the premises of owner of cable landing station (OCLS) which provides the access to its cable landing station, and such charges include charges for providing space, power supply, accessing physical facilities, operation and maintenance of co-location site for the said purpose.

(h) 'Indefeasible Right of Use (IRU)' means the right to use the Reference Capacity, on long term lease for the period for which the submarine cable remains in effective use; acquired (including equipment, fibers or capacity) under an agreement entered into between the Capacity owner and an eligible Indian International Telecommunication Entity; in respect of which maintenance cost incurred becomes payable in any circumstances during the period of validity of the agreement.

566. VSNL, a Public Sector Enterprise, was incorporated in 1986 to cater to overseas communication services. It had Cable Landing Stations at Mumbai and Cochin and was solely responsible for providing international connectivity to consumers and telecom operators for various telecom and data services. It was the only International Long Distance Operator (ILDO) in the country. In the year 2001, TRAI recommended to the government for open competition in the International Long Distance (ILD) service as a first step towards opening up the ILD sector in India. The Government in 2002, accepting the Recommendations, decided to open the ILD Service without any restriction on the number of operators. Accordingly, the government issued broad guidelines for issue of license for ILD service in India. In the same year, Tata Communications Limited (TCL) took over VSNL and Bharti also got a ILD license from DoT.

567. ILD Guidelines of 2002, provided that the license shall be issued on a non-exclusive basis initially for a period of 20 years. There was one time entry fee of Rs.25 crore. Besides the entry fee, there was an annual license fee of 15% of the AGR. Provisions regarding interconnection agreements between the ILD service providers and the terms and conditions were provided for. Licenses are issued without any restriction on the number

of entrants for ILD service. The charges for access or interconnection with other networks shall be based on mutual agreements between the service providers subject to the restrictions issued from time to time by TRAI under TRAI Act, 1997.

568. The access to international cable capacity in India is a bottleneck presently, as India has limited number of landing stations. Currently, there are 16 CLS and 6 International Bandwidth providers in India as compared to 50 and 32 in USA in 2004. The high figures of USA are similar to that in UK, Germany and France and to S Korea to a lesser extent. The owner of the CLS is a consortium member and owns a certain percentage of the bandwidth in the submarine cable. The owner of the CLS, being an ILDO operator, also provides ILD services to the end-consumers. Hence, the owner of the CLS being owner of the bandwidth as well as a person who provides services to the end consumers, has a competitive advantage over the other ILDO operators who are not owners of the cable landing station. Control of international capacities, cable landing stations and associated facilities by only few operators can enable the owners to stall or delay entry of competitive operators. Problems can also be faced by operators who have acquired capacity in a cable system from other international carriers and wishing to access this capacity at the landing station of an ILDO.

569. The few CLS owners are denying access or delaying access to the other seeker ILDO operators by charging higher charges. The incumbent OCLS, being the owner of the bandwidth as well as being an ILD service provider catering to end users, has a competitive advantage over the seeker ILDO operators who are not owners of CLS. It's an established fact that laying a submarine cable after formation of a consortium is a capital intensive and time taking procedure due to various commercial as well as administrative constraints. Even though the establishment of a CLS may not be by itself be a capital intensive exercise, still without a cable landing at the CLS, the establishment of a CLS by an ILDO operator is meaningless. The fact that it is not economically prudent to duplicate the CLS facilities for every new cable, makes CLS a bottleneck facility in India.

570. In 2005, DoT in order to promote further development in the sector and increase competition issued the revised guidelines for issue of license for international long distance service, wherein the entry fee for ILD license was reduced to Rs.2.5 crores from Rs.25 crores and the annual license fee was reduced from 15% of the adjusted gross revenue to 6%. In terms

of the revised guidelines, the license agreement was modified w.e.f 01.01.2006. Currently the annual licence fee on ILD service is 7 per cent on the AGR. However, DoT has revised it to a uniform rate of 8 per cent on the AGR from the year 2013-2014. The substantial increase in ILD traffic due to ever-increasing use of telecom for both voice and data, will naturally amount to a corresponding increase in traffic at the Cable Landing Stations. This implies a much better and effective utilisation of the laid capacity in the underground submarine cables and provides economies of scale to the owners of the CLSs. This should translate into lower prices for the seeker of the bandwidth and finally translate into lower prices to the consumers. To summarise, DoT, in order to ensure increase in competition, opened the sector upon recommendations of TRAI, granted licenses and modified terms of license to facilitate further competition. Meanwhile, TRAI was simultaneously examining ways to further increase the competition. Through a consultation process in 2005, TRAI determined that:

- a) CLS continues to be a bottleneck facility.
- b) There is lack of competition which requires regulatory intervention.
- c) There cannot be a sunset clause* of 3/5 years as it existed earlier.
- d) There is a need to modify the terms and conditions of the license which said that terms and conditions of agreement shall be mutually agreed between the seeker and provider. This is because any attempt by TRAI, in exercise of its powers under the TRAI Act, to fix the terms and conditions between the OCLS and the seeker or fix charges for the access would be viewed as being in conflict with the existing term of license mandating mutually agreed terms. Hence, the existing term needed to be modified so that any future fixation of terms or charges by TRAI is not in conflict with the terms of the License.

571. In recognition of the critical nature of Cable Landing Stations (CLS) and the importance of ensuring competitive access to these facilities, the Government of India took action in 2005 to amend the relevant clauses in all ILD Licenses. Subsequently, on June 7, 2007, the TRAI issued regulations, "International Telecommunications Access to Essential facilities at Cable Landing Stations Regulations, 2007," to increase competition and reduce international bandwidth charges by mandating access to submarine cable landing stations. In this, besides other issues, it was specified that the OCLS has to seek approval of its Reference Interconnect Offer (RIO) from TRAI within a month of entering into an agreement with seeker (A seeker is an entity

which seeks access to bandwidth from an owner of a CLS).

572. In the year 2010, the Authority has received representations from a number of service providers and their associations requesting formal broad based consultation with all industry players on review of Access facilitation charges (AFC). They submitted that since the year 2007, when TRAI had issued its regulations, there has been a dramatic change in the international bandwidth market both in terms of a significant drop in the prices of IPLC as well as an exponential rise in capacity utilization of submarine cable systems. They further submitted that international capacity utilization at the major cable landing stations in India has also gone up by at least ten times since 2007. They argued that the increased capacity utilization should have translated in proportional reduction in Access Facilitation Charges and Operation and Maintenance (O&M) Charges, however, these charges have remained virtually unchanged since 2007. As a result, CLS facility continues to remain a bottleneck facility and, therefore, there is no effective competition possible in the sector for the ILDOs, who do not own cable landing stations. Some of the service providers represented to TRAI that the access facilitation charges and co-location charges at cable landing station need a review as the cost of telecom equipment has gone down while the capacity utilization of cable landing station has gone up over the previous three years.

573. In order to address divergent views and to protect the interests of service providers and consumers of telecom sector, TRAI initiated a consultation process on the issue. TRAI has requested all ILDOs to furnish information on prevalent regulatory practices in other countries for providing such Access, mechanism prevalent for these charges etc. After analyzing responses received from service providers and based on the inputs received in the pre-consultation stage, a Consultation Paper on 'Access Facilitation Charges and Co-location Charges at Cable Landing Stations' dated 22.03.2012 was issued.

574. Based on the inputs received in the consultation process, the Authority came out with an amendment to the 2007 regulations titled "International Telecommunication Access to Essential Facilities at Cable Landing Stations (Amendment) Regulations, 2012". Vide the said Amendment; a sub regulation 4 was introduced in regulation 10. It provided that "the Access facilitation charges referred to in sub regulation (1) and sub regulation (2) shall be such as had been included in the cable Landing Station reference interconnect offer published under sub

regulation (4) of regulation 3: provided that the authority may specify Access facilitation charges which shall be payable by a class or classes of eligible Indian International telecommunication entity and in such case the approval of the Access facilitation charges, as specified in part II of the schedule, by the authority shall not be required to be obtained under these regulations".

575. TRAI has initiated another consultation process on "Estimation of Access Facilitation Charges and Co-location Charges at Cable Landing Stations" in Oct 2012. A detailed meeting was also held with the owners of the CLSSs in order to give them a fair opportunity in which cost data and costing methodology used by TRAI was discussed in detail. Based on the discussion held in the above meeting and submission of stakeholders in response to the consultation paper, Access facilitation charges both at Cable Landing Stations and at alternate location were re-estimated taking into consideration the inputs provided including network design and the cost data. Almost all components of costs, inter alia including life of equipment and optical fibre, OPEX, consideration of standby equipment, CAPEX Elements, project management cost, weighted average cost of capital, space required to block for future expansion, company overhead, rate of dollar, taxes in equipment sector were taken into account in the revised calculations. These eventually found an expression in 'The International Telecommunication Cable Landing Stations Access Facilitation Charges and Co-Location Charges' Regulations dated 21.12.2012 where AFC and CLCs were specified.

576. The charges as prescribed in the Regulations dated 21.12.2012 were to be effective from 01.01.2013. However, petitioners filed above writ petitions before this court challenging all the regulations passed by the Authority regarding CLS. This Court passed an ex-parte order staying all the three following regulations :-

(i) International Telecommunication Access to Essential Facilities at Cable Landing Stations Regulations (no.5 of 2007) dated 07.06.2007.

(ii) Amendment to the above regulations dated 19.10.2012.

(iii) International Telecommunication Cable Landing Stations Access Facilitation Charges and Co-location Charges Regulations, 2012 (no.27 of 2012) dated 21.12.2012.

577. In numerous matters before the Hon'ble Tribunal, under section 14 of the TRAI Act and before the various high Courts, questions were raised as to what is the scope of section 36 of the act which deals with the power of the authority to make regulations. The other major question which arose was whether the regulation made under section 36 is a subordinate legislation regarding which the tribunal created under the TRAI act will not have the jurisdiction to test the validity of. Various decisions rendered by the Hon'ble Tribunal as well as the Hon'ble Delhi High Court came up for consideration before the Hon'ble Supreme Court in **BSNL v. TRAI, 2014 (3) SCC 222**. The Hon'ble Supreme Court has held that the regulation that is framed under section 36(1) of the act by the authority is a subordinate legislation, the validity of which cannot be questioned and decided by the learned tribunal, TDSAT constituted under section 14 of Act. Regarding the scope of section 36, the Hon'ble Supreme Court has discussed the issue at length. The relevant paragraphs are extracted in the foregoing paragraphs.

578. A perusal of the above-mentioned paragraphs of the judgement of the Hon'ble Supreme Court would show that:

a) the power to frame regulations is clearly vested in the authority under section 36 (1) of the TRAI Act.

b) the power to frame such regulations under section 36 (1) is wide and pervasive.

c) the power that is conferred upon the authority under section 36 (1) to make subordinate legislation is in general terms. The particularisation of any topics under section 36 (2) is merely illustrative and does not limit the scope of the general power.

d) the authority has to discharge its functions qua the licensor or users and is not limited only to exercising its functions with regard to service providers. If TRAI has to discharge its functions qua the licensor or users then it will have to use powers under provisions other than sections 12 (4) and 13 under which directions are given. Therefore, in exercise of power under section 36 (1), TRAI can make regulations which may empower it to issue directions of general character applicable to service providers and others.

e) the authority can frame regulations under section 36 which would facilitate the exercise of functions under various clauses of section 11 (1) (b) including sub-clauses (i) to (vi). The power to frame

regulations on the subject matter was under section 11 (1)(b) is not confined only to those sub-clauses where it has been stated that the function can be discharged by making regulations.

f) it has been made abundantly clear that there is no limitation on the exercise of power by the authority to frame regulations under section 36 (1). It is not controlled or limited by section 36 (2) or sections 11, 12 and 13.

g) TRAI can make regulations to carry out the purposes of the TRAI act which can be ascertained from the various provisions of the TRAI act including sections 11, 12 and 13. There is no restriction on the power of TRAI to make regulations except that the regulations must be consistent with the TRAI act and the rules made thereunder.

h) the fact that the regulations are required to be laid before Parliament which can approve, modify or annul the same is sufficient check on the exercise of power of TRAI.

579. It is well established that the petitioner who is alleging that there is lack of jurisdiction in framing the impugned regulation has to discharge the burden of establishing that the impugned regulations are inconsistent with the provisions of the act. The principles on which the validity of a delegated legislation can be tested has also been laid down in various Supreme Court judgments, viz.,

(i) *Hinsa Virodhak Sangh v. Mirzapur Moti Kuresh Jamat*, (2008) 5 SCC 33, at page 48

(ii) *Supreme Court Employees' Welfare Assn. v. Union of India*, (1989) 4 SCC 187, at page 239

(iii) *State of T.N. v. P. Krishnamurthy*, (2006) 4 SCC 517, at page 528

and the above decisions have already been discussed in the foregoing paragraphs.

580. In this case, the petitioners has failed to discharge the burden of establishing that the impugned regulations are inconsistent with the provisions of the act or are inconsistent with the rules. The only contention that is advanced is that the regulations cannot be framed under section 36 (1) by ascertaining the purposes of the act from the preamble. It is the contention of the petitioner that the regulation must be framed with regard to a particular provision in the act

otherwise a regulation cannot be made under section 36 (1). The petitioner has contended by referring to a judgments of the Hon'ble Supreme Court to contend that every regulation that is framed under the TRAI act must have a peg to hang.

581. The Hon'ble Supreme Court has categorically held in its judgement that the power to frame regulations under section 36 (1) is not controlled or limited by any particularisation of topic under section 36 (2) or by sections 11, 12 and 13. In other words, the authority can frame regulations on any subject to carry out the purposes of the TRAI act. In doing so, the only limitation is that the regulation should not be inconsistent with the TRAI act or any rule made thereunder. This in effect means, that the authority can frame regulation on any subject matter which may not be particularised or may not be traced to any specific provision under the act but if for carrying the purposes of the act it is necessary for the authority to frame a regulation, then there is no limitation on the exercise of such power. The only restriction is that such a regulation should not be inconsistent with the act or with the rules framed thereunder.

582. It has also been made abundantly clear that the exercise of the power to frame regulation under section 36 (1) is subject to further check or restriction which is exercised by the Parliament. Under section 37, the regulations framed by the authority have to be laid before both houses of Parliament which has the power to approve, modify or annul the said regulations. Hence, there are enough checks and balances and guidelines for the exercise of the power of the authority to frame regulations under section 36 (1).

583. The decision of the Hon'ble Supreme Court in **BSNL v. TRAI, 2014 (3) SCC 222**, it is abundantly clear that the authority has the power to frame regulation on any subject matter whether particularised in the form of a topic or is a part of any provision of the act or not, till the time the said regulation is made to carry out the purposes of the act and is not inconsistent with the act or the rules made thereunder. In other words, the authority can frame a regulation under section 36 (1) to carry out the purposes of the act which is ascertainable from the preamble of the act, on a subject matter which is not specifically listed under the provisions of the act till the time it is not inconsistent with the act or the rules made thereunder. Hence, as contended by the petitioner for the purposes of making a regulation under section 36 (1) the authority need not search for another provision under the act to depend on so as to justify the framing of the regulation. There is no statutory peg required to hang a particular regulation in order to justify the same when one considers Section 36(1) and its language under the TRAI Act, 1997.

584. Petitioners have referred to and relied upon two judgements of the Hon'ble Supreme Court for the proposition that

rules and regulations must have a statutory force. The judgements relied upon are:

(i) V. Sudheer v. Bar Council of India, AIR 1999 SC 1167, Para 20.

(ii) Indian Council for Legal Aid v. Bar Council of India, AIR 1995 SC 691, para 12.

585. The above judgements are clearly distinguishable and inapplicable in the facts and circumstances of the present cases. In both the cases the scope of section 49(1) of the Advocate's Act, 1961 was being considered and the question was whether the rules framed by the bar Council of India was within the competence of the bar Council of India and were ultra vires its rulemaking powers under the act or not.

"Section 49 (1) provided that: 'the bar Council of India may make rules for discharging its functions under this act and in particular, such rules may prescribe-

The functions of the bar Council of India are given under section 7 of the act. The question therefore that fell for consideration of the Hon'ble Supreme Court was whether the rules in question had been framed by the bar Council of India under section 49 (1) for the purposes of discharging its functions under section 7. Thus clearly from the language of section 49 (1) it is clear that the bar Council of India could not make rules with regard to any subject matter which was not categorically listed under section 7 of the act. It is in this context, that the Hon'ble Supreme Court at PARA 20 of V. Sudheer's case, supra, has stated that the rules framed by the bar Council must have a statutory peg on which to hang. The second judgement relied upon by the petitioner is also on similar lines and the question was whether the rules framed under section 49 were ultra vires section 7 of the act which listed out the functions of the bar Council."

586. The judgements are clearly distinguishable and inapplicable in the facts and circumstances of the present case. In the instant case, section 36 (1) is not worded in the same manner as section 49 of the advocate's act. In fact a comparison of the two provisions would show that section 49 is highly restrictive and is not wide and pervasive as section 36 (1) as has been declared by the Hon'ble Supreme Court in its judgement while dealing with section 36 (1). Unlike section 49 of the Advocate's act, section 36 (1) of the TRA I act does not limit the applicability of the provision that is to frame regulations to any particular topic or provision under the act. The only thing that is mandated is that the authority can frame

regulations to carry out the purposes of the act and that such a regulation framed should not be inconsistent with the act or the rules made thereunder.

587. The third case which has been relied upon by the petitioner is MTNL v. TRAI, AIR 2000 Del 208, paras 39-40. The petitioner has relied upon the observations made at PARA 40. It illustrates various situations under which the authority cannot frame regulations. However, the bottom line remains that the authority can frame regulations which should be consistent with the provisions of the act. By relying on this paragraph of the judgment the petitioner has contended that where the act provides for TRAI to discharge its functions in a particular fashion example by rendering advice to the government, there the authority cannot exercise its power to issue regulations on that subject matter. This judgement was rendered when the TRAI act had not been amended and the functions of the authority which included recommendatory and regulatory functions were all clubbed together. It was only through the amendment to the TRAI act in the year 2000 that the recommendatory and the regulatory functions were bifurcated. Hence, the judgment has to be considered keeping in mind that it decided the issues when the provision of the act had not been amended. The said judgment of the Hon'ble Delhi High Court has been noticed by the Hon'ble Supreme Court in BSNL v. TRAI, 2014(3) SCC 222, wherein on the issue of whether TDSAT would have the jurisdiction to entertain the challenge to the regulations framed by TRAI under section 36 of the TRAI act, the judgment of the Hon'ble Delhi High Court has been reversed. In BSNL case, as the Hon'ble Supreme Court has held that the power to frame regulations under section 36 of the TRAI act is not limited or controlled by section 36(2) or by sections 11 [which contains recommendatory powers under section 11(1)(a), regulatory functions under section 11(1)(b) and tariff fixation functions under section 11(2).], Section 12 and 13. Hence, the authority has the power to frame regulations on any subject matter to carry out the purposes of the act with the restriction that the regulation should not be inconsistent with the act or the rules made thereunder.

588. Applying the above stated principles to the facts of the present case, the power to frame impugned regulations can be traced to section 36 (1) which is a substantive provision in itself. The impugned regulations have been framed by the authority to carry out the purposes of the act which are clearly ascertainable from the preamble of the Act. It is further submitted that the regulations are not inconsistent with the act or with any rules framed thereunder.

589. The cable landing station is considered to be a bottleneck facility and hence is a subject matter of regulation so that over a period of time there are enough players with

level playing field that the bottleneck facility ceases to be one and the customers get the broadband facility at affordable prices. The authority under the act is required to insure that the interests of the various service providers as well as that of the consumers is protected and that there is an orderly growth of the telecom sector. The present regulations aims towards ensuring that the cable landing station is a place where equal access is granted and the charges that are charged by the OCLS for such purpose are cost based charges. This would ensure introduction of many players into the sector leading to affordable prices for the consumer. It will ensure an orderly growth of the sector. Thus the regulations that have been framed by the authority are completely in conformity with the provisions of the TRAI act and are in conformity with the terms and conditions of the ILDO license issued by the licensor and the contention of the petitioners that the subject matter dealt with by the authority under the provisions of the TRAI act by framing regulations is outside the purview of the TRAI act and is a subject matter of the competition act is fallacious and not applicable in the facts of the present case.

590. The petitioners themselves are incumbent service provider for providing International Private Leased Circuits (IPLC) as well as access facilitation. However, it is surprising to note that instead of placing on record before this Court the actual rate offered by them for IPLC circuits they are relying on the some report published by Tele Geography without specifically indicating the full facts or annexing the full report. Since it was not clear whether those are monthly charges or annual charges TRAI has assumed them as Annual Charges and tried to compare the IPLC rates with access facilitation charges. This has no bearing whatsoever in framing the regulations as was clearly explained above that this is a cost based exercise and not an exercise wherein access facilitation charges are fixed as percentage of bandwidth charges and this is bound to happen if all the facts and figures are not put with full details by any party. It is further submitted that a number of discounts are offered by the service providers on the basis of volume etc. on the charges as published by Tele Geography from time to time. Therefore, it has no meaning whatsoever since full exercise is cost based and charges are not fixed as a percentage of applicable bandwidth charges.

591. The exercise of price fixation or costing is a complex exercise having several interlinked and intricate factors which is the subject matter of an expert body and at the risk of repetition, this Court deems it fit to consider the following decisions,

(i) The Hon'ble Supreme Court in Uttar Pradesh Power Corporation Limited v. National Thermal Power Corporation

Limited, (2011) 12 SCC 400, at page 403:

"8. We have heard the learned counsel appearing for the parties on the subject of determination of tariff. The issues were with regard to necessary ingredients of cost to be considered for the purpose of determination of tariff to be charged by the power plants of the respondent in the matter of sale of electricity to different State Electricity Boards. The issues involved are also with regard to calculation of interest forming part of the tariff.

9. For the purpose of determining tariff for generation and sale of electricity by the generating stations of the respondent, cost can be broadly divided into fix charges and energy charges. It also contains the amount of interest paid on the capital employed as the capital employed in all electricity generating power plants is very huge. The issues with regard to determination of interest as well as capital are some of the most important issues which were decided by the Tribunal.

12. Looking to the observations made by this Court to the effect that the Central Commission constituted under Section 3 of the Act is an expert body which has been entrusted with the task of determination of tariff and as determination of tariff involves highly technical procedure requiring not only working knowledge of law but also of engineering, finance, commerce, economics and management, this Court was firmly of the view that the issues with regard to determination of tariff should be left to the said expert body and ordinarily the High Court and even this Court should not interfere with the determination of tariff.

13. Looking to the aforesaid legal position and in view of the technical aspect involved in the impugned order with regard to determination of tariff, which we prima facie find to have been determined in a just and proper manner, we are of the view that the conclusion arrived at by the Tribunal in the impugned orders do not appear to be unreasonable or unjustified and therefore, in our opinion the impugned orders require no interference by this Court and, therefore, all these appeals are dismissed with no order as to costs."

(ii) In Transmission Corporation of Andhra Pradesh Limited v. Sai Renewable Power Private Limited, (2011) 11 SCC 34, at Paragraph 39, the Hon'ble Apex Court, held as follows:

"39. We do not consider it appropriate to go into the merit or demerit of determination of tariff rates in the appeals. Determination of tariff is a function assigned legislatively to a competent forum/authority. Whether it is by exercise of legislative or subordinate legislative power or a policy decision, if the Act so requires, but it generally falls in the domain of legislative activity and the courts refrain from adverting into this arena.

40. We have to further examine the legality of this issue in the light of the findings that we have recorded on the issues in relation to jurisdiction of the Regulatory Commission to determine/review the tariff. The jurisdiction of this Court is limited in this aspect. This Court has consistently taken the view that it would not be proper for the Court to examine the fixation of tariff rates or its revision as these matters are policy matters outside the preview of judicial intervention. The only explanation for judicial intervention in tariff fixation/revision is where the person aggrieved can show that the tariff fixation was illegal, arbitrary or ultra vires the Act. It would be termed as illegal if statutorily prescribed procedure is not followed or it is so perverse and arbitrary that it hurts the judicial conscience of the court making it necessary for the court to intervene. Even in these cases the scope of jurisdiction is a very limited one."

592. For the foregoing conclusions arrived, this Court is of the considered view that the claim made by the petitioners, cannot be accepted.

593. Considering the submissions and decisions, the writ petitions are dismissed and the impleading miscellaneous petitions are allowed. No costs. Consequently, connected Miscellaneous Petitions are also closed.

-s/d-

Assistant Registrar(CSVII)

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Sub-Assistant Registrar

skm

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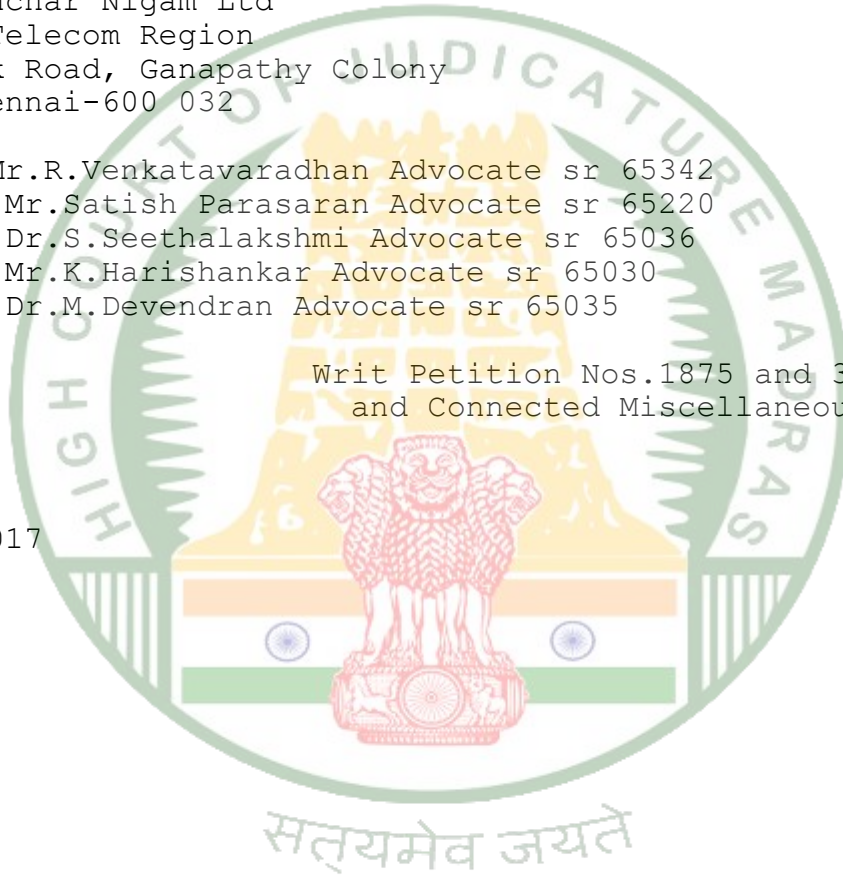
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Writ Petition Nos.1875 and 3652 of 2013
and Connected Miscellaneous Petitions

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