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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ W.P.(C) 6388/2017 & CM Nos. 26428/2017 & 28403/2017

VODAFONE INDIA LTD. AND ORS. ..... Petitioner

Through Mr Vikas Singh, Senior Advocate with Ms Manjul Bajpai, Dr Shashwat Bajpai, Mr Jagjeet Singh Sahni and Ms Akriti Shashank, Advocates.

versus

TELECOM REGULATORY AUTHORITY OF INDIA ..... Respondent

Through: Mr Kirtiman Singh and Mr Prateek, Advocates for TRAI.
Mr A. M. Singhvi, Senior Advocate with Mr K. R. Sasiprabhu, Mr Raghav Shankar, Mr Biju P. Raman, Advocates for applicant in CM Appln. No.28403/2017.

CORAM:
HON'BLE MR. JUSTICE VIBHU BAKHRU

<u>O R D E R</u>

% **04.09.2017**

<u>VIBHU BAKHRU, J</u>

1. The petitioners have filed the present petition, *inter alia,* praying as under:-

"(a) Call for the records of the case;

(b) Issue an appropriate Writ, order and / or direction including an order, direction or writ in the nature of mandamus under Articles 226 / 227 of the Constitution directing the Respondent TRAI to forthwith provide to / share with the Petitioners the cost model proposed to be used in deciding / determining IUC and particularly MTC / issuance of the IUC Regulation;

(c) Direct TRAI not to proceed with the present consultation process and / or issue any Regulation, pursuant to its Consultation Paper dated 05.08.2016, without first providing / sharing the proposed cost models to the Petitioners and without first considering and examining the Petitioners comments / inputs thereon and further to provide reasons for disagreement thereto, if any;

(d) pass ad-interim / interim / ex-parte order(s) in respect of the above payers; and"

2. The petitioners have been granted Unified Access Services / Unified Licences under Section 4 of the Indian Telegraph Act, 1885 for establishing and maintaining telecommunication services in various service areas. In terms of the unified licence, the petitioners are obliged to interconnect with other telecom service providers at Point of Interconnection (POI) subject to compliance of prevailing regulations and directions issued by Telecom Regulatory Authority of India (TRAI). The Unified Licence further provides that the charges for accessing other networks for inter-networks calls would conform to the orders/regulations/guidelines issued by the TRAI / licensor from time to time. Article 27.5 of the Unified Licence, *inter alia,* provides that "*the charges for accessing other networks for inter-network calls shall be based on mutual agreements between the service providers conforming to the Orders/IUC Regulations/Guidelines issued by the TRAI from time to time*".

3. In terms of the Telecom Regulatory Authority of India Act, 1997 (hereafter 'the Act'), the TRAI is empowered to fix the terms and conditions of inter-connectivity including Mobile Termination Charges (MTC). Mobile Termination Charges are charges payable by the service provider whose subscriber originates the call to the access provider in whose network the call terminates. Thus, fixing of MTC is of vital importance to the business of the petitioners.

4. In terms of Section 11(1)(b)(ii) of the Act, TRAI is charged with the function to fix the terms and conditions of interconnectivity between service providers and also to regulate the arrangement amongst service provider for sharing the revenue derived from providing telecom services. The relevant clauses of Section 11(b) of the Act are set out below:-

> "11. Functions of Authority
>
> (1) Notwithstanding anything contained in the Indian Telegraph Act, 1885, the functions of the Authority shall to be –
>
> (a) xxxx xxxx xxxx
>
> (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, the 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;..."

5. Section 11(4) of the TRAI Act expressly provides that "*the Authority [TRAI] shall ensure transparency while exercising its powers and discharging its functions*".

6. The Interconnection usage charges as currently payable are in terms of the Telecommunication Interconnection Usage Charges (11th Amendment) Regulation, 2015 notified by TRAI.

7. The TRAI in exercise of its powers and functions under the Act is currently in the process of reviewing the interconnection usage charges. In this regard, TRAI had issued a consultation paper and all stakeholders were requested to furnish their comments by 05.09.2016 and counter comments by 19.09.2016.

8. The grievance of the petitioner is that it has made repeated request to TRAI for providing cost models that contain the assumption inputs parameters and actual data cost and the formula for determination of MTC, however, the same has been denied to the petitioner. According to the petitioners, it is imperative that service providers are provided the cost model to analyse and examine the detailed cost data model in order to make a meaningful contribution for determination of the MTC. The petitioners state that it is necessary that the cost model (which is a series of interlinked excel sheets containing various assumptions and actual cost data) be provided to the petitioners as they, as stakeholders, have a right to know the

following :-

> "i. whether all relevant heads of costs – capital expenditure (Capex) and operational expenditure (Opex) have been included in the model or not;
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> ii. Whether the correct costs have been applied by TRAI - for Base Tranceiver Station (BTS), Base Station Controller (BSC), Mobile Switching Centre (MSC), backhaul, spectrum, etc.;
>
> iii. What the rate and formula for depreciation, cost of capital, etc.;
>
> iv. What is the growth in subscribers and traffic that has been taken by TRAI;
>
> v. What are the coverage and capacity requirements that have been taken by TRAI;
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> vi. What is the mix of technologies that has been taken by TRAI;
>
> vii. What is the network design, traffic routing parameters, etc.;
>
> viii. On what basis have the costs been allocated to termination of voice calls;
>
> Ix. What is the proportion taken for incoming and outgoing traffic;
>
> X. What proportion has been taken for on-net and off-net calls;
>
> xl. Whether license fee and spectrum usage charges payable to the licensor have been included by TRAI."

9. Mr Neeraj Kishan Kaul, learned Senior Advocate appearing for the petitioners was heard at length on 31.08.2017. He had submitted that in

terms of Section 11(4) of the Act was enjoined to act in a transparent manner. He referred to the decision of the Supreme Court in ***Cellular Operators Association of India and Others v. Telecom Regulatory Authority of India and Others: (2016) 7 Supreme Court Cases 703*** and drew the attention of this Court to the following paragraphs of the said judgement::-

> "80. Section 11(4) of the Act requires that the Authority shall ensure transparency while exercising its powers and discharging its functions. "Transparency" has not been defined anywhere in the Act. However, we find, in a later Parliamentary Enactment, namely, the Airports Economic Regulatory Authority of India Act, 2008, that Section 13 deals with the functions of the Airports Economic Regulatory Authority, (which is an Authority which has legislative and administrative functions).
>
> "Transparency" is defined, by sub-section (4), as follows:-
>
> **The Airports Economic Regulatory Authority of India Act, 2008**
>
> "**13. Functions of Authority.- (1)-(3) * * ***
>
> (4) The Authority shall ensure transparency while exercising its powers and discharging its functions, inter alia,—
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> (a) by holding due consultations with all stake-holders with the airport;
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> (b) by allowing all stake-holders to make their submissions to the authority; and
>
> (c) by making all decisions of the authority fully documented and explained."

81. This definition of "transparency" provides a good working test of 'transparency' referred to in Section 11(4) of the TRAI Act.

82. In fact, a judgment of the Court of Appeal in England, being Regina v. North and East Devon Health Authority, Ex parte Coughlan, [2001] QB 213, puts the meaning of "consultation" rather well as follows:-

"108. It is common ground that, whether or not consultation of interested parties and the public is a legal requirement, if it is embarked upon it must be carried out properly. To be proper, consultation must be undertaken at a time when proposals are still at a formative stage; it must include sufficient reasons for particular proposals to allow those consulted to give intelligent consideration and an intelligent response; adequate time must be given for this purpose; and the product of consultation must be conscientiously taken into account when the ultimate decision is taken."

10. He submitted that consultation was an integral part of transparency and in order to have a meaningful consultation, the petitioners were entitled to the cost sheets and another data as requested by them. He also referred to the decision of the Supreme Court in ***Ram Tawakya Singh v State of Bihar***: ***2013 (16) SCC 206*** in support of his contention that process of consultation involve deliberation and for a meaningful deliberation and inputs from the petitioner, the petitioner must have the cost sheets.

11. Mr Kaul also submitted that best practices adopted in other countries require disclosure of the information as sought by the petitioners. He further submitted that in certain instances in South Africa, the service providers were able to point out an obvious error in the worksheet and thus, were able

to ensure that the same was rectified before the interconnected charges were finally announced. He further submitted that since the TRAI is not sharing the final model, the petitioners would have no opportunity to point out any errors and seek rectification thereof. He submits that it would be most apposite that if the entire cost model is with data is shared with everybody in order for the petitioners to provide meaningful inputs.

12. It is settled law that a mandamus would be issued to only to enforce a legal right. In ***Calcutta Gas Company (Proprietary) Ltd. v. State of West Bengal and Ors.*: *AIR 1962 SC 1044***. Justice K. Subba Rao, speaking for the Constitution Bench of the Supreme Court had observed as under:

> "The article in terms does not describe the classes of persons entitled to apply thereunder; but it is implicit in the exercise of the extraordinary jurisdiction that the relief asked for mustbe one to enforce a legal right. In *The State of Orissa v. Madan Gopal Rungta*:[1952] 1 SCR 28, this Court has ruled that the existence of the right is the foundation of the exercise of jurisdiction of the court under Article 226 of the Constitution."

13. Thus, first and foremost question to be addressed is whether the petitioners have any right to seek the information as sought by them. Concededly, the exercise to review the regulations which is being conducted by TRAI is a legislative exercise and not a judicial or an administrative proceeding. Therefore, the right of the petitioners for information and the models proposed to be adopted by TRAI must be considered in the said context.

14. Concededly, the petitioners have no statutory right to the information

sought by them and their case rests on the provisions of Section 11(4) of the TRAI Act. Thus, the limited issue to be considered is whether the denial of cost model and other data at this stage falls foul of TRAI's duty to maintain transparency.

15. In the present case, TRAI issued the consultation paper on "Review of Interconnection Usage Charges" on 05.08.2016. All stakeholders were requested to furnish their written comments by 05.09.2016 and counter comments by 19.09.2016 to the Advisor (Broadband and Policy Analysis), TRAI. In response to the said consultation paper, the petitioner requested for deferment of the consultation process till April 2017. The Cellular Operators Association of India (COAI) also requested for extension of timelines for responding to TRAI's consultation paper till 05.01.2017.

16. The last date for submission of comments and counter comments were initially extended up to 26.09.2016 and 10.10.2016 and were further extended to 07.10.2016 and 31.10.2016 on the request of COAI. The petitioner submitted its comments to TRAI's consultation paper on 17.10.2016. Similarly, TRAI received comments from the petitioner and 22 other stakeholders, which were uploaded on TRAI's website on 18.10.2016. Thereafter, the petitioner submitted its counter comments on 31.10.2016. On 15.12.2016, TRAI sought information in respect of wireless access networks from access service providers. Subsequently, on 27.01.2017, TRAI sought further information regarding traffic during different hours of the day, from access service providers. The petitioner furnished such information on 31.03.2017 and 24.05.2017. It is stated that TRAI held a workshop with Access Service Providers on review of the interconnect usage charges on

18.07.2017 and also had Open House Discussions on 20.07.2017.

17. It is apparent from the above that TRAI has held consultations with all stakeholders in a transparent manner. The mandate that TRAI shall ensure transparency while exercising its powers and discharging its functions has to be read in the context of the functions being performed and / or powers being exercised by TRAI. In terms of Section 11(1) (a) and (b), TRAI also performs certain recommendatory and regulatory functions.

18. The extent participation of stakeholders would differ in different functions. In the present case, TRAI is in the process of making a subordinate legislation and, therefore, the question whether TRAI has acted in a transparent manner, must be considered in that context of TRAI undertaking a legislative exercise.

19. It is settled that the principles of natural justice (such as affording a hearing to the affected parties) is not a necessary adjunct to legislative functions. (See: ***Union of India v. Cynamide India Ltd. : (1987) 2 SCC 720*** and ***M.R.F. Ltd. v. State of Kerala: (1998) 8 SCC 227***).

20. The petitioner, essentially, seeks a preview of the regulations proposed to be framed in order to present its comments. It was earnestly contended by Mr. Kaul that this would be the most apposite course to adopt and has been adopted world over. He submitted that the best practices world over ought to be adopted by TRAI too and there could be no possible harm if such course is adopted in this case too. Undoubtedly, Mr Kaul may be right in his contention that the course proposed by the petitioner may be a better one; however, the same is a matter for TRAI to consider and cannot

be a matter of adjudication in these proceedings. As stated earlier, these proceedings are limited to examining whether any legal or constitutional right of the petitioner has been infringed.

21. Certain legislations provide for previous publication of rules/byelaws and in terms of Section 23 of the General Clauses Act, 1897, the Authority having power to make rules or byelaws is required to publish a draft of the proposed rules or byelaws. Section 36 of the Act - which empowers the TRAI to make regulations to carry out the purposes of the Act - does not contain any such requirement of previous publication or placing draft regulations in public domain for inviting objections and suggestions. Thus, it is not necessary that TRAI present a set of draft regulations for comments by the stakeholders and hear them before proceeding further.

22. The expression "transparency" in legislative action must signify an open and transparent legislative exercise, which in this case has been fully complied with. All stakeholders have been informed that the TRAI had initiated a review of the Interconnection Usage Charges. TRAI has issued a consultation paper and has invited comments and views from all stakeholders. The views / comments received from all stakeholders have also been put in public domain for counter comments. TRAI is now proceeding further to frame the regulations based on the comments/views received and material gathered.

23. Indisputably, consultation is a necessary facet of transparency (as held by the Supreme Court in ***Cellular Operators Association of India and Others v. Telecom Regulatory Authority of India and Others***), however

the extent and the manner of such consultation depends on the function being performed. The requirement and scope of consultation in the context of an administrative action is materially different from that in the context of a legislative action.

24. The requirement of consultation has been interpreted by the Supreme Court in several decisions in the context of the statute providing for such requirement. In ***Hindustan Zinc Ltd. vs A.P. State Electricity Board*** : ***(1991) 3 SCC 299***, the Supreme Court considered a challenge to a revision of a tariff for electricity, which was effected without consulting the Consultative Council. The Court held that the advice Consultative Council was at best only persuasive and thus the revision of tariff without seeking the advice of Consultative Council could not be rendered invalid. In ***Naraindas Indurkhya vs State of M.P.*** : (***1974) 4 SCC 788*** it was held that failure to consult the Chairman of the Board before prescribing textbooks, as required under the M.P. Madhyamik Siksha Adhiniyam Act, 1973, was *null and void*.

25. In ***Chandramouleshwar Prasad vs Patna High Court*** : (***1969) 3 SCC 56***, the Supreme Court set aside a notification appointing the petitioner therein as the officiating District & Sessions Judge as it concluded that such appointment was without consultation with the High Court and thus violative of Article 233 (1) of the Constitution of India. In ***Shamsher Singh vs State of Punjab*** : ***(1974) 2 SCC***, the Court had observed that consultation with the Chief Justice of India as required under Article 222 (1) of the Constitution of India would be mandatory and "in practice the last word in such a sensitive subject must belong to the Chief Justice of India".

26. The Supreme Court in the case of ***Indian Administrative Services (S.C.S.) Assn vs Union of India*** : ***1993 (Suppl.) (1) SCC 730*** considered various decisions and concluded that :-

> "No hard and fast rule could be laid, no useful purpose would be served by formulating words or definitions nor would it be appropriate to lay down the manner in which consultation must take place. It is for the court to determine in each case in the light of its facts and circumstances whether the action is "after consultation"; "was in fact consulted" or was it a "sufficient consultation"."

In that case, the Supreme Court considered Section 3 (1) of the All India Services Act, 1951, which provided that the Central Government may, after consultation with the Government of the States concerned makes rules for the regulations of recruitment and the conditions of service of persons appointed to All India Service. In the aforesaid context, the Supreme Court observed as under:-

> "Where any action is legislative in character, the consultation envisages like one under Section 3(1) of the Act, that the Central Government is to intimate to the State Governments concerned of the proposed action in general outlines and on receiving the objections or suggestions, the Central Government or Legislature is free to evolve its policy decision, make appropriate legislation with necessary additions or modification or omit the proposed one in draft bill or rules."

27. In ***Ram Tawakya Singh v State of Bihar*** - which was relied upon by Mr Kaul for the canvassing the manner in which the word consultation should be understood - the Supreme Court considered the requirement of

consultation in the context of section 10(2) of the Bihar State Universities Act, which required that the *Vice-Chancellor shall be appointed by the Chancellor in consultation with the State Government*. In the said context, the court observed as under:

> " The word 'consult' implies a conference of two or more persons or impact of two or more minds in respect of a topic/subject. Consultation is a process which requires meeting of minds between the parties involved in the process of consultation on the material facts and points to evolve a correct or at least satisfactory solutions. Consultation may be between an uninformed person and an expert or between two experts. In either case, the final decision is with the consultor, but he will not be generally ignoring the advice of the consultee except for good reasons."

28. Clearly, there can be no fixed formula for the manner in which consultation is required to take place. Administrative acts may require deliberation between the two parties and a higher level of interaction. However, the same would not hold true in case of a legislative exercise. Thus, the level of consultation as considered mandatory in ***Ram Tawakia Singh*** (Supra) or in ***Shamsher Singh*** (Supra) may not apposite in a legislative exercise.

29. Thus, this court is of the view, that TRAI has conformed to the requirement of transparency as mandated under section 11(4) of the Act and did not fall foul of the said provision in declining the petitioner's request for disclosure of cost model at this stage.

30. Needless to mention all rights and contentions of the petitioner to

challenge the regulations, once notified, are reserved and nothing stated there in shall preclude the petitioner from challenging the regulations on such grounds as may be advised.

31. The petition is dismissed for the reasons stated above. No order as to costs.

32. Order *dasti* under signature of Court Master.

VIBHU BAKHRU, J

SEPTEMBER 04, 2014
RK