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IN THE HIGH COURT OF DELHI AT NEW DELHI

Reserved on: 15.09.2017

Pronounced on: 20.09.2017

+ LPA 592/2017, CAV 809/2017, CM Nos.33165-33166/2017

VODAFONE INDIA LTD & ORS

..... Appellants

Through: Mr.P. Chidambram, Mr.Neeraj
Kishan Kaul, Sr. Advocates with Ms. Manjul
Bajpai, Dr.Shashwat Bajpai, Ms.Akriti Shashank,
Mr.Sharad Agrawal, Advocates

versus

TELECOM REGULATORY

AUTHORITY OF INDIA

..... Respondent

Through: Mr. Tushar Mehta, ASG with
Mr.Kirtiman, Mr.Prateek Dhanda, Mr. Waize Ali
Noor, Mr.Vikram Aditya Singh and Mr.Adit
Khurana, Advs. for TRAI
Mr. Ramji Srinivasan, Mr. Sandeep Sethi, Sr.
Advs. with Mr. Biju Raman, Mr.Raghav Shankar,
Mr.Jayant Malik, Mr.Tushar Bhardwaj, Mr.Vishnu
Sharma, Mr.Nakul Nayak, Advs. for Applicant in
CM No.33997/2017

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MR. JUSTICE SUNIL GAUR

MR. JUSTICE S. RAVINDRA BHAT

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Facts

1. Vodafone India Limited ("Vodafone" or "appellant") appeals the decision of a learned Single Judge of this court, dated 04.09.2017 dismissing its Writ Petition (Civil) No. 6388/ 2017 preferred against the Telecom Regulatory Authority of India ("TRAI" or "respondent").
2. Vodafone is a company registered under the Companies Act, 1956 and a telecom service provider holding Telecom Licenses/Unified Access Service Licenses since 1994-95 to establish, maintain and operate telecommunication services in various service areas in India. The facts are that TRAI issued a Consultation Paper on Review of Interconnection Usage Charges (IUC) dated 05.08.2016, proposing to fix, *inter alia*, Mobile Termination Charges (MTC), inviting comments /inputs on, *inter alia*, the appropriate approach for prescribing domestic termination charge (viz. mobile termination charge and fixed termination charge) for maximization of consumer welfare (i.e. adequate choice, affordable tariff and good quality of service), adoption of more efficient technologies and overall growth of the telecommunication services sector in the country.
3. In the Consultation Paper, TRAI provided a brief description of various components of IUC, the framework of IUC in India, the need for the review of IUC etc. TRAI, in the paper, also mooted the question as to whether keeping in view the overall growth of the telecommunication sector in the country, the cost oriented approach or the Bill and Keep (BAK) approach was the most suitable for fixing MTC. The TRAI also asked for comments on the appropriate method for estimating mobile termination cost, i.e. LRIC+, LRIC, pure LRIC or any other method.

4. On 12.10.2016, Vodafone wrote to TRAI, seeking cost data of all operators as in its opinion that was done on similar previous occasions and also requested TRAI to share the cost model with all the operators. It was stated in the said letter that that in the 2015 exercise, the TRAI had initiated the data collection exercise on 30.04.2014 and had issued the consultation paper on 19.11.2014, whereas in the present exercise, no such cost data was sought from the service providers, and instead a consultation paper was directly issued. In its letter, Vodafone urged TRAI to seek the cost data of all operators as was done in the previous exercises and further requested TRAI to share the cost model transparently with all the operators.

5. By its letter dated 15.12.2016, TRAI asked for the data for the present consultation exercise, requiring the access Service Providers/Vodafone to provide information regarding Subscribers, Traffic and Coverage, Network Design, Capital Costs and Operating Costs. Vodafone, in response, by letter dated 23.12.2016 while commenting on the cost data sought by TRAI highlighted that it was necessary to understand the TRAI's proposed and existing costing models and therefore requested TRAI to provide the IUC costing models, in excel sheets along with all assumptions so that the it could furnish its comments on the various components of the costing models. TRAI, in response, by its letter of 29.12.2016 stated that the information was sought for computation of mobile termination charge with the help of various methods and that a brief description of which was given in the consultation paper dated 05.08.2016 and that the costing method used in the previous review exercise conducted in 2014-15 was explained in the Telecommunications Interconnection Usage Charges (11th Amendment) Regulation 2015.

6. After this, a series of letters were exchanged between Vodafone and TRAI, with the former repeatedly requesting for costing models of IUC in order to enable them to provide comments on the consultation paper and the TRAI reiterating that the model for IUC computations have already been indicated in the consultation paper. On 28.03.2017, TRAI issued an Order under section 12 (1) of the TRAI ACT, 1997 calling upon Vodafone to furnish the information sought by the TRAI under its earlier letters dated 15.12.2016 and 27.01.2017. To this, Vodafone submitted the information sought by letter dated 31.03.2017 and once again reiterated its request seeking the cost models from TRAI.

7. It appears thereafter that TRAI issued a Public Notice dated 24.05.2017 for holding the Open House Discussions on 15.06.2017. By subsequent letters, Vodafone submitted its own cost model along with assumptions/formulae for consideration of TRAI, based on their actual data for the quarter ended December 2016 and stated that this presented a true and fair cost per incoming minute i.e. MTC on Vodafone's network.

8. In the meeting held on 15.06.2017 between the TRAI and the CEOs of the Telecom Service Providers, it was decided that detailed discussions on various methods of determination of MTC would be held, in a workshop to be hosted by the TRAI and a meeting was called on 23.06.2017 to finalize the detailed schedule for such workshop. After the said meeting was held on 23.06.2017, Vodafone reiterated its request to TRAI for sharing its cost model with the relevant excel sheets and assumptions for comments and asked for a second workshop to be conducted by the TRAI for the said purpose. By letter dated 06.07.2017, the TRAI scheduled the second workshop to be held on 18.07.2017 and by another letter dated 10.07.2017,

TRAI fixed 20.07.2017 as the date of the Open House Discussions. It appears that even after the workshop and Open House Discussions were held and Service Providers were allowed to make representations, TRAI refused to share details of the cost model with Vodafone.

9. In this factual background Vodafone filed W.P. (Civil) No.6388/2017 before this court. The writ petition sought a direction to TRAI to disclose the information requested by it. The main contention on which Vodafone based its claim was Section 11 (4) of the TRAI Act and the judgment of the Supreme Court in *Cellular Operators Association of India & Others v Telecom Regulatory Authority of India & Others* 2016 (7) SCC 703 (hereafter called “*Cellular Operators case*”). The learned Single Judge, on 04.09.2017 dismissed the writ petition. That decision has been appealed against, before this court.

10. The Single Judge discussed Vodafone’s grievance, and, after noting the authorities cited before him, recorded his conclusions, *inter alia*, as follows:

“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 & Others v Telecom Regulatory Authority of India & 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.*

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."

Contentions

11. Learned senior counsel for the appellant, Mr. P. Chidambaram contends that the Single Judge wrongly dismissed Vodafone's claim and erroneously overlooked that TRAI's withholding of critical information is illegal, arbitrary and in violation of the mandate of transparency required under the TRAI Act, 1997 (hereafter "the Act"). Reliance in this respect was placed on Section 11(4) of the Act, which reads:

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

Mr. Chidambaram also placed reliance on the duty of the public authority to make all relevant information available to the stakeholders while formulating policies that affect the larger public interest. To this effect, he placed reliance on Section 4(1) of the Right to Information Act, 2005, which reads:

"Section 4- Obligations of public authorities

(1) Every public authority shall-

(c) publish all relevant facts while formulating important policies or announcing the decisions which affect public;

(d) provide reasons for its administrative or quasi judicial decisions to affected persons.”

12. Significant reliance is also placed on the decision of the Supreme Court in Cellular Operators case. The relevant extracts of that decision are as follows-

“We find that, subject to certain well defined exceptions, it would be a healthy functioning of our democracy if all subordinate legislation were to be "transparent" in the manner pointed out above. Since it is beyond the scope of this judgment to deal with subordinate legislation generally, and in particular with statutes which provide for Rule making and Regulation making without any added requirement of transparency, we would exhort Parliament to take up this issue and frame a legislation along the lines of the U.S. Administrative Procedure Act (with certain well defined exceptions) by which all subordinate legislation is subject to a transparent process by which due consultations with all stakeholders are held, and the Rule or Regulation making power is exercised after due consideration of all stakeholders' submissions, together with an explanatory memorandum which broadly takes into account what they have said and the reasons for agreeing or disagreeing with them. Not only would such legislation reduce arbitrariness in subordinate legislation making, but it would also conduce to openness in governance. It would also ensure the redressal, partial or otherwise, of grievances of the concerned stakeholders prior to the making of subordinate legislation. This would obviate, in many cases, the need for persons to approach courts to strike down subordinate legislation on the ground of such legislation being manifestly arbitrary or unreasonable.

13. On the requirement of “consultation” with service providers and the meaning and import of that term, Mr. Chidambaram relied on the decision in

Ram Tawakya Singh v. State of Bihar, (2013) 16 SCC 206, which in relevant part reads:

“29. The word “consultation” used in Sections 10(2) and 12(1) of the BSU Act and Sections 11(2) and 14(1) of the PU Act is of crucial importance. 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.

30. In order for two minds to be able to confer and produce a mutual impact, it is essential that each must have for its consideration fully and identical facts, which can at once constitute both the source and foundation of the final decision. Such a consultation may take place at a conference table or through correspondence. The form is not material but the substance is important. If there is more than one person to be consulted, all the persons to be consulted should know the subject with reference to which they are consulted. Each one should know the views of the other on the subject. There should be meeting of minds between the parties involved in the process of consultation on the material facts and points involved. The consultor cannot keep one consultee in dark about the views of the other consultee. Consultation is not complete or effective before the parties thereto make their respective points of view known to the other and discuss and examine the relative merit of their views.”

14. Placing reliance on this decision it is contended that earlier, the position of law was such that there was emphasis on the process of consultation alone. However, with this decision, the emphasis has now

shifted to the content of the process of consultation. To similar effect, reliance is also placed on the decision in West Bengal Electricity Regulatory Commission v. CESC Ltd., (2002) 8 SCC 715, which states:

“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 negated 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 inconvenience, even if such inconvenience does in fact exist. In our opinion, the 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 the consumers.”

It is therefore argued that the process of consultation that TRAI is mandated to adopt necessarily involves disclosure and sharing of all relevant information that would be a pre-requisite to effective consultation.

15. Vodafone emphasizes upon the difference between the cost model and the methodology for arriving at the cost. It is contended that in order for the appellant to be able to comment on the discussion paper, it is imperative that TRAI disclose the “model”; whereas, it has only disclosed the “methodology” for computing the mobile termination charges. It is contended that LRIC, LRIC+, FAC etc. are not cost models, but are rather methodologies. By disclosing these methodologies, TRAI invited comments

from the service providers. However, Vodafone submits, till such time that TRAI does not disclose the model, there would be insufficient information and therefore it would be impossible for the appellant to effectively comment on the discussion paper, thereby vitiating the consultation process.

16. Learned senior counsel submitted that there can be meaningful consultation effectuating the transparency norm, mandated by statute, if the TRAI shares the relevant model with the assumptions. It was submitted that the consequences of a flawed decision, in the form of unviable cost model in the final regulations, would only result in erosion of any element of profit, which can result in expensive litigation and eventual loss to consumers. Instead, sharing the relevant particulars would have the effect of preventing any future harm as TRAI would not lose anything in the process.

17. It is argued that Vodafone's principal grievance is with respect to the non-disclosure of the model. By way of analogy, learned senior counsel stated that the methodology was like a theorem, whereas the model was an algorithm or formulae which consisted of all the relevant assumptions being made. Disclosing the model would involve disclosing these assumptions as well as all relevant excel sheets and data involved. It is highlighted that in 2011, when TRAI was informed during Open House Discussions that some service providers had developed the cost model(s) for calculation of IUC, then by its letter dated 25.05.2011, TRAI had provided an opportunity to the service providers to submit their cost models (including data) to be put up on the TRAI's website for counter comments. TRAI had also stated that the data is confidential and the service providers may send their model in two formats-the first should contain all the algorithms, formulae, assumptions and justifications etc. along with excel sheets for arriving at the results to be

hosted on the website and the second format marked as “confidential” to include actual data for calculating IUC along with excel sheets. That thereafter two interactive sessions were held on a copy of representations of the appellant on the cost model was shared by TRAI with all service providers for their comments. TRAI had also invited Vodafone to discuss their cost model on 29.06.2011. This showed that that TRAI acknowledged the difference between model and methodology in previous instances and had disclosed information regarding the model to service providers.

18. Mr. Chidambaram drew this court’s attention to the practice followed by telecom regulators in United Kingdom, Norway and Portugal and highlighted that in all these jurisdictions, for fixing mobile call termination charges, the cost models were disclosed to the service providers and the same were then discussed at workshops conducted by the regulator. In all such cases, the telecom regulator had shared the cost models and in some cases, put them up on its website for public consultation. It is highlighted that the reason disclosing the cost model becomes imperative for fixing of mobile termination charges is that one small error or one deviation in a single input can make a significant difference to the outcome or the output cost. Finally, it is stated by the learned counsel that it is not the appellant’s claim that it should have some sort of veto in respect of the regulations that TRAI ultimately comes up with, but that merely, sufficient information should be made available to it in order to make the consultation process effective and to ensure transparency in subordinate legislation formulation.

19. For the TRAI, learned Additional Solicitor General (ASG) Mr. Tushar Mehta argued that incontrovertibly, TRAI has the right to formulate the tariff structure and to that end, enjoys necessary discretion in

deciding the relevant policies. It is highlighted that all the arguments advanced before this Court, were also advanced before and brought to the notice of TRAI, which has considered the representations of Vodafone and in its wisdom has decided to disclose the information that it deemed to be appropriate. It is contended that all service providers, consumer associations, NGOs etc. were given notice of the Open House Discussions and the first workshop conducted by the TRAI. Thereafter, after consideration of representations received, TRAI also decided to conduct a second workshop. It is therefore contended that the procedure adopted by TRAI was fair, reasonable and involved adequate participation of the stakeholders and accordingly, fulfilled the mandate of transparency required under Section 11(4) of the Act, as well as Article 14 of the Constitution.

20. It is contended that what Vodafone essentially claims is that after all consultation, there has to be a draft regulation placed before it for its concurrence, a procedure that is unknown to law. Moreover, the technicalities with respect to the adequacy of information disclosed are to be considered solely by the statutory authority tasked with the job of doing so and the Court in its writ jurisdiction under Article 226 cannot consider these questions. It is also argued that the TRAI while formulating regulations is also required to publish an explanatory memorandum wherein it is obligated to disclose the relevant discussions and representations received, along with its reasons for adopting/not adopting the representations/suggestions and the rationale for the regulations adopted. Therefore, till such time that TRAI actually frames and publishes the regulations along with the explanatory memorandum, the appellant cannot be heard to complain of any unreasonableness or illegality in the consultative process adopted by TRAI,

or contend a violation of the transparency requirement under Section 11 of the Act. To that extent, contends learned ASG, the appellant's claim is premature and does not warrant the exercise of this Court's limited scope of judicial review under Article 226.

Analysis and Findings

21. Vodafone's leitmotif, in its appeal, is that the Single Judge wrongly interpreted the "transparency" fiat to TRAI, enacted in Section 11 (4) of the TRAI Act. In support, it relies mainly on the judgment in the Cellular Operators case. The Supreme Court had, in that decision, commended the transparency norm as a good practice for use in executive statutory rule or regulation making exercises. It was held that:

"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,--

(a) by holding due consultations with all stake- holders with the airport;

(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.”

22. This issue in this appeal is the scope of the expression “transparency” in the functioning of TRAI, at the stage of framing regulations. The Single Judge, after noticing the judgments cited, particularly the Cellular Operators’ case held that regulation making is essentially a legislative exercise and that importing principles of natural justice would not be warranted for such function.

23. This court notices that in the Cellular Operators’ case, the Supreme Court had made extensive observations on the need to enact general legislation controlling executive and delegated legislation procedures, on the lines of the Administrative Procedure Act, 1946, enacted by US Congress. The law, § 553 (1976 ed.), dealing with rulemaking, requires in subsection (b) that *“notice of proposed rule making shall be published in the Federal*

Register...," and describes the contents of that notice, and goes on to require in subsection (c) that, after the notice, the agency

"shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose."

24. In an important decision, *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519 (1978) the US Supreme Court overruled a circuit court's judgment that had set aside an agency's regulations, after consultations, holding that effective consultations with the necessary data were not held. The Supreme Court held that:

"this sort of review fundamentally misconceives the nature of the standard for judicial review of an agency rule. The court below uncritically assumed that additional procedures will automatically result in a more adequate record because it will give interested parties more of an opportunity to participate in and contribute to the proceedings. But informal rulemaking need not be based solely on the transcript of a hearing held before an agency. Indeed, the agency need not even hold a formal hearing. (See 5 U.S.C. § 553(c) (1976 ed.)). Thus, the adequacy of the "record" in this type of proceeding is not correlated directly to the type of procedural devices employed, but rather turns on whether the agency has followed the statutory mandate of the Administrative Procedure Act or other relevant statutes. If the agency is compelled to support the rule, which it ultimately adopts with the type of record produced only after a full adjudicatory hearing, it simply will have no choice but to conduct a full adjudicatory hearing prior to promulgating every rule. In sum, this sort of unwarranted judicial examination of perceived procedural shortcomings of a

rulemaking proceeding can do nothing but seriously interfere with that process prescribed by Congress.”

25. In a later decision, *Brad Bennett, et al., v. Michael Spear et al* 520 US 154 (1997), an agency opinion which stated that use of a river affected fish species was sought to be challenged, in judicial review, on the ground that the opinion adversely affected the plaintiffs. The Supreme Court indicated the standard of judicial review, emphasizing that the question of intervening and holding the regulatory agency to account, for violation of procedure in rule making or decision-making would arise at a particular stage. It was held that:

“As a general matter, two conditions must be Satisfied for agency action to be "final": First, the action must mark the "consummation" of the agency's decision making process, Chicago & Southern Air Lines, Inc. v. Waterman S. S. Corp., 333 US 103, 113 (1948)--it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which "rights or obligations have been determined," or from which "legal consequences will flow," Port of Boston Marine Terminal Assn. v. Rederiaktiebolaget Transatlantic, 400 US 62, 71 (1970). It is uncontested that the first requirement is met here; and the second is met because, as we have discussed above, the Biological Opinion and accompanying Incidental Take Statement alter the legal regime to which the action agency is subject, authorizing it to take the endangered species if (but only if) it complies with the prescribed conditions. In this crucial respect the present case is different from the cases upon which the Government relies, Franklin v. Massachusetts, 505 U. S. 788 (1992), and Dalton v. Specter, 511 U. S., at 462 (1994). In the former case, the agency action in question was the Secretary of Commerce's presentation to the President of a report tabulating the results of the decennial census; our holding that this did not constitute "final agency action" was premised on the observation that the report carried "no direct

consequences" and served "more like a tentative recommendation than a final and binding determination." (505 U. S., at 798). And in the latter case, the agency action in question was submission to the President of base closure recommendations by the Secretary of Defense and the Defense Base Closure and Realignment Commission; our holding that this was not "final agency action" followed from the fact that the recommendations were in no way binding on the President, who had absolute discretion to accept or reject them."

26. This court is of opinion that there is a paradigm shift in regard to the scope of consultation and adoption of transparency norms in executive decision-making. The classic view expressed in *Union of India v Cynamide India Ltd* (1987) 2 SCC 720 and *M.R.F. Ltd v State of Kerala* (1998) 8 SCC 227 that natural justice need not precede rule or regulation making, may not be of universal application. Increasingly, decision making for the purpose of delegated legislation, may involve consideration of complex factors, necessitating extensive consultations with stakeholders. These processes typically can be in town planning laws, pricing and tariff fixation, where concerned executive bodies may interact with those likely to be interested or affected and hold consultations, etc.

27. The question here is whether the nature of interactions held and disclosure of materials to Vodafone is of such character as to negate the idea of meaningful consultation. This complaint is in relation to withholding of data such as the models for computation, and only disclosing the methodology for computing the mobile termination charges. Vodafone also cites instances in the past, when such disclosures were made and alludes to procedures mandatorily requiring disclosure of such models, in the norms applicable in Norway, Portugal, UK, etc.

28. The record in this case, shows that TRAI has been in correspondence with Vodafone, continuously in the past. Apparently it also corresponded with other telecom service providers, similarly.

29. The circumstances of this case are that TRAI published its Consultation Paper on Review of Interconnection Usage Charges (IUC) dated 05.08.2016, proposing to fix, inter alia, Mobile Termination Charges (MTC), inviting comments /inputs on, inter alia, the appropriate approach for prescribing domestic termination charge (viz. mobile termination charge and fixed termination charge) for maximization of consumer welfare (i.e. adequate choice, affordable tariff and good quality of service), adoption of more efficient technologies and overall growth of the Indian telecommunication services sector. On 15.12.2016, data was elicited from all interested operators. This was again reiterated in January, 2017. The data was regarding Subscribers, Traffic and Coverage, Network Design, Capital Costs and Operating Costs. Vodafone started insisting for disclosure of the cost model with its various assumptions, saying that this would enable more effective response. The TRAI, in the meanwhile, after giving due notice, held Open House Discussions with all telecom operators, in June, 2017. It also conducted a workshop. All this was part of the consultation exercise, apart from the information it sought and was provided on more than one occasion.

30. Vodafone's argument that the transparency norm embodied in Section 11 (4) of the TRAI Act obliges the authority to disclose the "model" on the basis of a past instance of such data sharing, or that similar disclosures are made and that omission to disclose that material, is contrary to law, in the opinion of this court, is not merited. As observed by the US Supreme Court

in *Vermont Yankee Nuclear Power Corporation* (supra) the agency, i.e. TRAI if so mandated, “*simply will have no choice but to conduct a full adjudicatory hearing prior to promulgating every rule*”- an untenability of procedure that would destroy the efficacy of delegated legislation, by expert bodies. Granted, there are provisions in laws – such as the TRAI Act and the Airport Economic Regulatory Authority of India Act, 2008, which require transparency in the manner of regulatory decision-making. As held in the *Cellular Operators* case, the definition of transparency in the latter enactment can serve as a good guide, for adoption by TRAI.

31. What are the elements commended by the Supreme Court in its judgments? They are firstly, “*due consultations with all stake- holders*”, secondly “*allowing all stake-holders to make their submissions to the authority*” and lastly “*by making all decisions of the authority fully documented and explained.*” In this case, the circumstances disclose that the process of consultations went on for over 8-9 months, when responses, at two stages were sought from all telecom companies. The second element, i.e. permitting stake holders to make submissions, too, was followed: one open house and two workshops were apparently organized. During these interactions, the comments, suggestions and concerns of the stakeholders were noted. The TRAI is now engaged in the last limb, i.e. decision making. The TRAI issues an explanatory memorandum also accompanying its regulations. These memoranda generally explain the object of the regulations and also briefly outline the concerns expressed by stakeholders, the need for such regulations, why they replace existing norms, etc. It is noteworthy, however, that these memoranda accompany the regulations. The TRAI Act does not mandate that draft regulations are to be issued, to elicit further comments, or responses. The lack of a specific mandate to that effect and the circumstance

that all that could be elicited from the stakeholders, was obtained and further that they were given opportunities to voice their comments and concerns, means that the TRAI in effect, did what was required of it by Section 11 (4). Any further intrusion by its process of finalizing regulations, in judicial review – whether on account of real or perceived *lacunae* in its non-disclosure of what is termed as essential models, would directly impinge on TRAI's essential and core regulation making functioning. The court would then usher an unknown chain of events where data or "model" sharing can lead to further comments, critiquing of methods, demands for consultation, further hearings etc. This would benumb TRAI's mandate of effective regulation of the telecom sector. The danger of judicial review interdicts in an ongoing law-making exercise by a regulator such as the TRAI is that absent facial or manifest omission of transparency, there are no discernible standards that can be enforced under Article 226, without in effect carrying out a premature "merits" review. That, we are clear, is forbidden to the courts in judicial review.

32. In view of the above findings, this court is of the opinion that there is no error in the Single Judge's findings that the TRAI's inaction to accede to Vodafone's demand, or refusal to share the models, demanded of it, are not in violation of the transparency mandate under Section 11 (4) of the TRAI Act. The appeal has to accordingly fail and is therefore, dismissed, without order on costs.

S. RAVINDRA BHAT, J

SUNIL GAUR, J

SEPTEMBER 20, 2017