

Telecom Regulatory Authority of India
Mahanagar Doorsanchar Bhavan
Jawaharlal Nehru Marg, Next to Zakir Hussain College,
New Delhi – 110 002

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Dated the 14th August, 2008

DIRECTION

Subject: Direction under section 13, read with sub-clauses (i) and (iii) of clause (b) of sub-section (1) of section 11 of the Telecom Regulatory Authority of India Act, 1997 on opening of allotted codes.

F.No.409-9/2008-FN.– Whereas the Telecom Regulatory Authority of India [hereinafter referred to as the Authority] established under sub-section (1) of section 3 of the Telecom Regulatory Authority of India Act, 1997 (24 of 1997) [hereinafter referred to as the TRAI Act, 1997] has been entrusted with discharge of certain functions, *inter alia*, to ensure compliance of terms and conditions of licence, protect the interest of service providers and consumers of the telecom sector, ensure technical compatibility and effective interconnection between different service providers;

2. And whereas Bharat Sanchar Nigam Ltd. (hereinafter referred to as BSNL) being a licensee, is required under terms and conditions of its licence to comply with the terms and conditions of its Licence Agreement and also orders, directions and instructions issued and regulations made by the Authority under the TRAI Act, 1997 and also instructions as are issued by the Government of India in the Department of Telecommunications being the Licensor;

3. And whereas---

(a) the Licensor has been allotting from time to time additional MSC codes to the service providers and asking all the telecom service providers to take necessary action for opening of the codes in their network immediately;

(b) the Authority had also issued a Direction No:101-1/2005-MN dated the 6th January , 2005 (annexed as Annexure-I to this Direction) under section 13 of the Telecom Regulatory Authority of India Act, 1997 on opening of allotted codes and directed all service providers that when the codes are allotted by the Department of Telecommunications (herein after referred to as Licensor) to a service provider, these codes should be immediately (not exceeding ten days) opened by all interconnected service providers in their network and compliance may be reported by all service providers within a week;

4. And whereas, the Authority *vide* its letter dated the 10th June, 2008 (annexed as Annexure-II to this Direction), on being brought to its notice that (a) there is some uncertainty among service providers on whether any change is required in the mutually negotiated interconnection agreements/ arrangement in view of the amendment in the UASL license condition for permitting cross technology with reference to opening of levels allotted for cross technology, (b) some service providers are not opening MSC levels allotted by the Department of Telecommunications to other service providers under the mutual agreements in force before amendment to the license conditions were made for permitting cross technology, advised all service providers to open all such codes immediately so that customers are not inconvenienced and appropriate Quality of Service is maintained and also requested them to send, by the 20th June 2008, the compliance of its Direction No:101-1/2005-MN dated the 6th January , 2005;

5. And whereas the Authority after examination issued a clarification on the 14th July, 2008(annexed as Annexure-III to this Direction), stating therein,-

(a) that the Department of Telecommunications has issued letter No. 16-2/2007-ASIII/Vol III/124 dated the 24th March, 2008 for opening of MSC codes allotted to various service providers;

(b) that the allotment of MSC codes by the Department of Telecommunications covers range of networks without mentioning pre or post amendment networks and the Department of Telecommunications has asked all the service providers to open these codes immediately;

(c) that the services do not make any distinction of technology;

(d) that the Authority is, therefore, of the view that since all the service providers have existing interconnection arrangement/agreements with each other and Points of Interconnection (POI) have already been established for exchanging traffic, the existing interconnection need to be used for exchange of traffic in accordance with interconnection arrangement/agreements or any amendment thereto, if required, for networks established as a result of permission for use of both CDMA and GSM technologies;

(e) that the operators need to ensure that customers are not inconvenienced under any circumstances and appropriate Quality of Service is maintained;

(f) that it should be ensured that the compliance, including timeframe, is consistent with the existing law, licence terms and conditions and relevant regulations/directions;

6. And whereas the Authority, *vide* its letter F.No.409-9/2008-FN dated the 4th August, 2008 (annexed as Annexure-IV to this Direction), directed that its Direction No. 101-1/2005-MN dated the 6th January 2005 must be complied with in respect of all MSC Codes allotted by the Department of Telecommunications in particular *vide* letter No. 16-2/2007-AS-III/Vol.III/121 dated the 24th March, 2008 and send compliance within seven days of the date of issue of the said letter;

7. And whereas it has been noticed by the Authority that despite the Direction No:101-1/2005-MN dated the 6th January, 2005 the clarification and the subsequent communications by the Authority, as referred to in paragraphs 5 and 6 above, BSNL has not sent the compliance of opening the MSC codes;

8. And whereas, without prejudice to any action for non-compliance of the Direction of the Authority referred to in the preceding paragraphs, the Authority had examined the issues, apprehended by certain service providers, arising from opening of the codes and such issues have been found devoid of merit and are also reiterated as under:-

(a) that the interconnection of new GSM network of one service provider to service providers' existing GSM and fixed line network entails commercial consideration, which inevitably have to be negotiated between said service provider and other service providers is not tenable as the Department of Telecommunications instruction dated the 24th March, 2008 for opening of allotted codes and TRAI's Direction dated the 6th January, 2005 are not subordinate to or conditioned by the negotiations between the service providers;

(b) that in the interconnection matters the mutuality of interest is sought to be given incentive and issue at hand is no exception is not found to be tenable as Hon'ble TDSAT has held that in some specified matters the mutually negotiated arrangement need to be in compliance with orders/ directions/ regulations of TRAI, and also in view of clause 17.6 of the Basic Service licence conditions which requires that the terms and conditions of Interconnection including standard interfaces, points of Interconnection and technical aspects will be as mutually agreed between the service providers subject to compliance of prevailing regulations, directions and determinations issued by TRAI under TRAI Act, 1997. The said clause 17.6 read as under:

"17.6 The terms and conditions of Interconnection including standard interfaces, points of Interconnection and technical aspects will be as mutually agreed between the service providers subject to compliance of prevailing regulations, directions and determinations issued by TRAI under TRAI Act, 1997. ";

(c) that the contention that new POIs will have to be created once GSM network of an existing service provider is established is not tenable as Licensor has issued instruction to all service providers for opening the codes and once instruction has been issued by the Department of Telecommunications then there is no reason for any service provider to contravene the instruction issued by the Licensor;

(d) that the contention that existing POI between service providers' network and CDMA network of existing other service provider are congested and require augmentation of capacity is not tenable as augmentation of the capacity is a continuous process and both the service providers are required to augment the capacity to meet the Quality of Service parameters as laid down by the Authority in the Regulations on Quality of Service of Basic and Cellular Mobile Telephone Services, 2005 (11 of 2005) and thus opening of codes and augmentation of capacity are independent activities;

(e) that the permission to set up GSM network is by virtue of amendment of the licence of an existing service provider and, therefore, necessitates change in the interconnect agreement between the parties is not tenable because –

(i) clause 12 of the Licence Agreement confers absolute right upon the licensor to modify the terms and conditions of Licence and clause 12.1 of the Licence Agreement reads as under:-

"12.1 The LICENCOR reserves the right to modify at any time the terms and conditions of the LICENCE, if in the opinion of the LICENCOR it is necessary or expedient to do so in public interest or in the interest of the security of the State or for the proper conduct of SERVICE. The decision of the LICENCOR shall be final in this regard";

(ii) amendment to the licence condition of M/s Reliance Communications Ltd. provides for permission for use of GSM technology in addition to CDMA technology and the relevant amendment in the licence reads as under :-

"18.1 (A) One time non-refundable prescribed fee of Rs._____ has been paid by the licensee for use of GSM technology in addition to CDMA technology.";

(iii) the amendment to the licence does not increase the scope of the licence or authorized/ licensed M/s Reliance Communications Ltd. to provide any other new service;

(iv) the validity period of the licence also remains the same;

(f) that the contention that there are specific clauses in their agreement which stipulate that in the event of change in the licence of either parties, the parties will, in good faith, discuss the changes required to be made to the interconnection agreement is not tenable as there is a clear instruction/ direction from the Licensor/ TRAI for opening the codes and service providers cannot violate the instructions of the Licensor on the said ground;

(g) that clause 2.2 of UASL licence allows service providers to offer all types of access services and the services cover collection, carriage, transmission and delivery of voice and/or non-voice messages over licensee's network in the designated service area and the amendment to the licence conditions of a service provider do not expand the scope of the licence;

(h) that the Authority has observed that most of the service providers have common Points of Interconnection for interconnection to traffic to and from full mobility, limited mobility and wireline services and revenue for different services may be segregated on the basis of the call data record;

(i) that sub-clause (iii) of clause 33 of the Licence Agreements permits sharing of switch by the Licencee for providing other licenced services;

(j) that since the Authority had already given clarification that the existing point of interconnection need to be used for exchange of traffic for networks established as a result of permission for use of both CDMA and GSM technologies, the interconnection arrangement/agreements or any amendment thereto, if required, must be in compliance with orders/ directions/ regulations of TRAI and arrangement/agreements or any amendment thereto cannot negate the orders/ directions/ regulations of TRAI/ Licensor for immediate opening of the codes;

(k) that the Licensor has allotted additional MSC codes to the service providers on the 24th March, 2008 and asked all the telecom service providers to take necessary action for opening of the codes in their network immediately;

(l) that non-compliance of the Department of Telecommunications' instructions and Direction No. No:101-1/2005-MN dated the 6th January, 2005 of the Authority, has,-

(i) resulted in the overall policy framework being developed by the Government and the Authority for improving the availability of telecommunication service across the country and creating

competition and availability of choice to the consumer being adversely affected;

(ii) adversely affected the discharge of the functions by the Authority under the Telecom Regulatory Authority of India Act, 1997 (24 of 1997), in particular, to ensure compliance of terms and conditions of licence under sub-clause (i) of clause (b) of sub-section (1) of section 11 of the said Act and ensure technical compatibility and effective inter-connection between different service providers under sub-clause (iii) of clause (b) of sub-section (1) of section 11 of the said Act;

(iii) adversely affected the interests of service providers and consumers of telecom sector, and the growth in the telecom sector, being the objects for which the Telecom Regulatory Authority of India Act, 1997 (24 of 1997) had been enacted;

9. And whereas, BSNL has failed to comply with the Department of Telecommunication's instructions dated the 24th March, 2008 and the Authority's Direction No:101-1/2005-MN dated the 6th January, 2005 despite being issued letters on the 14th July, 2008 and 04th August, 2008 (annexed as Annexure IV to this Direction) by the Authority;

10. And whereas the terms and conditions of licence of BSNL, being the licensee in various service areas, *inter alia*, provides that the Licensee shall be bound by the terms and conditions of the said Licence Agreement as well as by such orders/directions/regulations of TRAI as per provisions of the TRAI Act, 1997 as amended from time to time and instructions as are issued by the Licensor/TRAI and provisions contained in sub-clause (i) of clause (b) of sub-section (1) of section 11 of the TRAI Act, 1997, require the Authority to ensure compliance of terms and conditions of licence and BSNL, being the service provider, has *prima facie* contravened the terms and conditions of licence;

11. And whereas as per section 29 of the Telecom Regulatory Authority of India Act, 1997 (24 of 1997), if a person violates Directions of the Authority, such person shall be punishable with fine which may extend to one lakh rupees and in case of second or subsequent offence with fine which may extend to two lakh rupees and in the case of continuing contravention with additional fine which may extend to two lakh rupees for every day during which the default continues;

12. Now, therefore, in exercise of the powers conferred upon the Authority under section 13, read with sub-clauses (i) and (iii) of clause (b) of sub-section (1) of section 11 of the Telecom Regulatory Authority of India Act, 1997, in order to ensure compliance of terms and conditions of licence, regulate the telecommunication services, ensure effective interconnection between different service providers, to protect interest of consumers of telecom services, orderly

growth of telecom sector and to ensure compliance of terms and conditions of the licence and compliance of TRAI's Direction No:101-1/2005-MN dated the 6th January , 2005 and for the reasons mentioned in the foregoing paragraphs, the Authority hereby directs BSNL to.-

(a) open all the MSC codes allotted by the Department of Telecommunications to all service providers and allow flow of traffic on the existing points of interconnection to and from BSNL's network for all opened MSC codes immediately; and

(b) report the compliance of sub-paragraph (a) above within seven days of the date of issue of this Direction that is latest by the 21st August, 2008,

(c) failing which action as per law for contravention of the Direction/terms and conditions of licence shall be taken by the Authority.

(Lav Gupta)
Pr. Advisor (FN)

To

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