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Tariff Authority for Major Ports

G No. 172

New Delhi,

12 July 2010

NOTIFICATION

In exercise of the powers conferred by Section 49 of the Major Port Trusts Act, 1963 (38 of 1963), the Tariff Authority for Major Ports hereby disposes of the proposal received from the Cochin Port Trust for fixation of way leave charges for TV and telephone cable lines in the port area as in the Order appended hereto.

(**Rani Jadhav**)
Chairperson

Tariff Authority for Major Ports
Case No. TAMP/11/2008 - COPT

Cochin Port Trust

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Applicant

ORDER

(Passed on this 16th day of June 2010)

This case relates to the proposal received from the Cochin Port Trust (COPT) for fixation of charges for way leave for TV and telephone cable lines.

2.1. The COPT has made the following main points in its proposal:

- (i). The Scale of Rates approved by the Authority in January 2007 does not prescribe separate way leave charges for laying TV cables. In view of that, the way leave charges for laying TV cables was collected at the rates prescribed for laying oil pipelines.
- (ii). M/s.SR Cable Vision, one of the cable operators functioning in Willingdon Island has filed writ petitions against COPT in the Hon'ble High Court of Kerala challenging the collection of way leave charges for cables lying in Willingdon Island.
- (iii). The Hon'ble High Court of Kerala, in its common Judgment dated 19 June 2007, has disposed of the Writ Petitions and has directed the COPT to decide a uniform tariff in accordance with the section 49 and 50 of the Major Port Trusts (MPT) Act 1963 for all type of services in connection with cable TV network.
- (iv). Corporation of Cochin collects Rs.3,500/- (approximately) per kilometer or part thereof per annum as rent from the cable TV and telephone operators for using the land / corporation area for laying their cables. In response to our query to substantiate the basis considered for proposing the way leave charges, the port has clarified that the rate charged by Corporation of Cochin was obtained verbally.

2.2. The COPT has, accordingly, proposed the following rates and conditions as rent for laying TV cables and telephone cables:

No.	Description	Unit of measurement	Rs.
1.	For cable TV lines	Per kilometer or part thereof per annum	4000/-
2.	For telephone cables lines	Per kilometer or part thereof per annum	5000/-

Notes:

- (i). An automatic annual escalation of 2% will be applicable on this rate at the beginning of every financial year.
- (ii). The proposed rates will be applicable with retrospective effect and the existing operators are required to pay the proposed rates from the date on which an agreement is entered into with COPT.

3.1. This Authority through various orders has held that way leave charges have to be prescribed at par with the lease rent applicable for the respective land of the major ports. It is not clear from the proposal whether the port has complied with the Government guidelines on land policy for arriving at the proposed way leave charges. The port was advised to indicate the relaxation, if any, required in the guidelines. Since the Port Trusts have the flexibility to operate the rate at the ceiling level, the COPT was also requested to examine whether this provision can be applied in the case in reference.

3.2. The COPT has not furnished any concrete reply on the points made by this Authority. The COPT vide its letter dated 10 April 2008 on our request has forwarded a copy each of the Writ Petitions filed by S&R Cable Vision challenging the way leave charges collected by the port and a copy of the Judgement passed by the High Court of Kerala disposing the Writ Petitions. The relevant directions contained in the High Court Order is brought out hereinunder:

- (i). The authority of the Cochin Port Trust to fix rates for cable TV network under Sections 49 and 50 is upheld.
- (ii). The Cochin Port Trust is directed to fix tariff in accordance with Section 49 for all types of service in connection with cable TV network and demand the same from the petitioner and other operators. W.Ps. are accordingly disposed of directing the Cochin Port Trust Board to decide tariff rates as directed above under Sections 49 and 50 in their next meeting.
- (iii). In view of petitioner's allegation that Cochin Port Trust is giving free facility to other operators, there will be direction to the Cochin Port Trust to prescribe uniform tariff to every cable TV operator so that every one has a level playing field.

4. In accordance with the consultative procedure prescribed, the proposal of COPT was forwarded to the user organisations as well as users forwarded by the COPT seeking their comments. The comments received from users/ user organisations were forwarded to COPT as feedback information. The COPT has furnished its remarks on the comments made by the users / user organizations subsequent to our advice at the joint hearing.

5.1. A joint hearing in this case was held on 20 June 2009 at the COPT premises. At the joint hearing, COPT and the concerned users / user associations have made their submissions.

5.2. At the joint hearing, the COPT was advised to examine the issues raised by M/s.Bharat Sanchar Nigam Limited, M/s.Bharati Airtel Limited, and M/s.Asianet Satellite Communications (P) Limited and furnish its comments. The COPT vide its letter dated 9 November 2009 has furnished its reply to the comments of the user organisations.

6. The proceedings relating to the consultation in this case are available on records at the office of this Authority. An excerpt of the comments received and arguments made by the concerned parties will be sent separately to the relevant parties. These details will also be made available at our website <http://tariffauthority.gov.in>.

7. Based on the information collected during the processing of this case, the following position emerges:

- (i). The Hon'ble High Court of Kerala in its Order dated 19 June 2007 held that all facilities available through port land and on properties of Port Trust are subject to provisions prescribed under Sections 49 and 50 of the Major Port Trusts (MPT) Act 1963. The High Court of Kerala has upheld that the port is entitled to collect the charges from TV cable operators as per the statutory provisions prescribed in Sections 49 and 50 of the Major Port Trusts (MPT) Act 1963. Thus, there is no doubt on the competency of the port to levy charges from TV cable operators. The matter before this Authority is thus confined to determine the quantum of way leave charge for TV cable lines for its uniform application. The Order dated 19 June 2007 pronounced by Hon'ble High Court of Kerala deals with the TV cables only and it does not mention about telephone cables. The COPT in its proposal has, however, included way leave charges for telephone cables also.
- (ii). The port has proposed to charge way leave fee of Rs.4000/- per kilometer per annum for TV cable lines which is Rs.500 higher than the charges reportedly collected by Cochin Municipal Corporation from TV cable operators in the nearby area.

This Authority through various orders has held that way leave charges has to be prescribed at par with the lease rent applicable for the respective land of the major ports.

In the instant case, the approval sought by the COPT for levy of way leave charges is for TV cable lines which are drawn above the land surface and mainly through the electric poles. As rightly stated by one of the cable operators, they do not physically occupy any part of the port's land. That being so, applying market value of land for fixing the way leave charges for overhead TV cables may not be fully relevant. If the market value of land is applied, then the rate would work out higher than the rate proposed by the port.

Since the proposal of the port is only to collect a fee for granting permission to the TV cable operators for laying overhead cables in the port area, it may not be possible to determine charges for TV cable lines with reference to any cost.

The port has reported that the Cochin Corporation operating near the port area approximately charges Rs.3500/- per kilometer per annum as rent from cable TV operators. Though the port has not substantiated it with any documentary evidence, the TV cable operators consulted in this case have not contradicted the figure of Rs.3500/- per kilometer per annum reported by the port. Recognising that the Cochin Municipal Corporation would obviously have larger area under its jurisdiction and that too, adjacent to the port area, the rate collected by the Cochin Municipal Corporation is benchmarked to prescribe the way leave charges for TV cable lines in the Cochin Port Trust areas.

Considering the fact that this is only a miscellaneous tariff item, the additional income from tariff approved may not be significant.

- (iii). M/s.Asianet Satellite Communications Limited (ASCL) have pointed out that the port collects pole charges from them. It is relevant to mention that the pre-revised Scale of Rates approved by this Authority in January 2007 and the recently revised Scale of Rates approved by this Authority on 23 February 2010 do not prescribe any such tariff item. Their argument is levy of charges for poles and again, way leave for overhead cable is a double jeopardy.

M/s.Asianet Satellite Communications Limited have also informed that they have filed a Writ Petition with reference to levy of Rs.3500/- proposed to be collected by the Cochin Municipal Corporation and that the High Court has stayed such levy. This Authority does not like to go into such individual litigations filed by the TV operators. The way leave charges prescribed by this Authority is for uniform application by the port. If the port decides to levy charges for poles and way leave charges together, it can do so only as per the final decision of the High Court in the case filed by M/s.Asianet Satellite Communications Limited.

Some of the TV cable operators have sought exemption from the levy of the way leave charges citing that they offer concession to port employees in the TV cable subscription charges. The arguments made by the users are not tenable, as the current exercise undertaken by the Authority is to prescribe a uniform rate for overhead TV cables. It is noteworthy that the rate fixed by this Authority are ceiling level.

- (iv). As regards the proposal of the port for levy of way leave charges on telephone cable lines, there has been strong objections from both M/s.Bharati Sanchar Nigam Limited (BSNL) and M/s.Bharati Airtel Limited. M/s.Bharati Airtel Limited has stated that they are governed by the India Telegraph Act, 1985 and have license to lay such lines. They have further submitted that license granted to them permits to lay underground cables and that the Government of Kerala has exempted them from payment of way leave charge for the next fifteen years. Both BSNL and M/s.Bharati Airtel Limited have submitted that they do not pay such a rental charge anywhere else in the country. BSNL has also refuted the claim made by the port in the proposal about imposition of such levy by Cochin Municipal Corporation. The COPT has neither clarified nor contradicted the submissions made by the BSNL and M/s.Bharati Airtel Limited. There is no doubt that the port is entitled to levy way leave charge for cables drawn within the port area. But in the instant case since BSNL and M/s.Bharati Airtel Limited claim that

they are governed by Indian Telegraphs Act and about existence of separate license Agreement with the Government and also that they do not pay such rental any where else in the country, the legal issue arising in their case need to be frontally addressed by the port before the tariff arrangement proposed is considered. The port is directed to examine the issues raised by the BSNL and M/s.Bharati Airtel Limited and then submit a separate proposal, if necessary.

- (v). The COPT has sought annual escalation in the proposed way leave charges at 2%. The Government guidelines of March 2004 on land policy prescribes annual escalation of 2% in lease rental. Such annual escalation will apply where the lease rent are fixed following the land policy guidelines. In the instant case, market value of land is not considered for fixation of the charge and hence the question of allowing annual escalation does not arise.
- (vi). The COPT in the initial proposal had sought approval of the rates retrospectively from the date on which the operators entered into the agreement with the port. Subsequently, the COPT vide its letter dated 9 November 2009 has informed that the port has implemented the proposed way leave charges on an ad hoc basis w.e.f. 29 February 2008 based on its circular dated 30th June 2008. The implementation of the proposed rate on adhoc basis by the COPT is not in line with the tariff guidelines. As per clause 2.17.4 of the tariff guidelines, final rate fixed by the Authority will ordinarily have only prospective effect.
- (vii). The tariff guidelines stipulate a tariff validity cycle of 3 years. It is found appropriate to review this tariff item along with the next review of other tariff items prescribed in its Scale of Rates of the Cochin Port Trust. The validity of the way leave charge for TV cable lines is therefore prescribed till 31 March 2012 to make it co-terminus with the validity of the revised Scale of Rates of the Cochin Port Trust which was notified on 7 April 2010.

8. In the result, and for the reasons given above, and based on collective application of mind, this Authority amends the Scale of Rates of COPT by inserting Schedule 6.16. under Chapter VI - Miscellaneous Charges as follows:

“6.16. Way leave charges for TV cable lines

SI. No.	Description	Unit of measurement	Rs.
1.	For TV cable lines	Per kilometer or part thereof per annum	3500/-

(Rani Jadhav)
Chairperson

SUMMARY OF THE COMMENTS RECEIVED FROM THE PORT USERS / DIFFERENT USER ORGANISATIONS AND ARGUMENTS MADE IN THIS CASE DURING THE JOINT HEARING BEFORE THE AUTHORITY

F. No.TAMP/11/2008-COPT - Proposal from the Cochin Port Trust seeking approval for the proposed way leave charges for TV and telephone cables.

The summary of comments received from users / user organisations are tabulated below:

Sl. No	Comments of user / user organisation
(1).	M/s. Bharat Sanchar Nigam Limited (BSNL)
(i).	Almost all the U/G cables of OF cables laid in Cochin Port Trust land have been laid by the erstwhile DOT/P&T, a Government of India Department. At present BSNL, a 100% Government of India Enterprise, is maintaining the U/G cables and OF cables in the port land to cater to the telecommunication needs of various establishments in Willingdon Island in the best efforts to bring in the latest state-of-the art technology to its esteemed customers. Vital institutions such as Indian Navy, Customs and Central Excise, etc. are the major customers in addition to Cochin Port Trust.
(ii).	Being a 100% Government company, it is paying only road reinstatement charges to the road authorities as per the rates fixed by the Chief Engineer, PWD, at the time of initial laying of cables. Further, no payment is being made as annual rent to any agency including Cochin Corporation refuting the claims made in the proposal.
(iii).	Moreover, we are governed by the rules of the Department of Telecom and BSNL and all policy decisions including payment of the demanded rent has to be taken by the Secretary, DOT/BSNL. As such, it may not be able to accede to the demand made by the port.
(iv).	Hence, it is requested that the proposal of COPT charge rent for BSNL cables may be dropped.
(2).	M/s.S & R Cable Vision
	It agrees with the proposal of the COPT for levy of the way leave charges @ Rs.4,000/- per kilometer or part thereof per annum.
(3).	M/s.Asianet Satellite Communications Limited
(i).	We are using only the electric poles belonging to the port trust for drawing our cables for giving Cable TV connection for which we are paying pole rental at the rate of Rs.120/- per pole per year for the 566 number of poles used by us.
(ii).	We are not using any property or land belonging to the port trust other than the electric poles for which permission was granted to us by an agreement and pole rentals are paid by us.
(iii).	The electric poles are already erected in the land for the purpose of supply of electricity to the staff quarters and other establishments in the port trust land, much before we were granted permission through the same poles and no additional land or space is required for drawal of cable through the same poles. But, still we are paying pole rental at the above rate which is an additional income for the port trust.
(iv).	Electric poles belonging to the Kerala State Electricity Board (KSEB) is also used elsewhere in the state and the rate charged by the KSEB for the poles in the urban area is only Rs.108/- per pole per year and Rs.54 in the rural area per pole per year. We are not paying any other charge to any other authority for the above.
(v).	In the case of other Cable TV operators or even in our case it is only when we seek permission to erect independent GI or bamboo poles, higher rates or rates for the use of land is charged. But in such case the poles are erected by the Cable Operator himself in the land and it is used exclusively for his use only.

(vi).	The statement regarding the rates being collected by the Cochin Corporation at the rate of Rs.3,500/- applies only to such operators who got permission to erect independent poles in the roads exclusively for their use. There was a proposal for charging us also but we have filed a Writ Petition No.4254/08 before the High Court and the Court has stayed such proposal since we are using only electricity poles in Cochin.
(vii).	Our case cannot be compared with the laying of pipeline since in that case the land of port trust is exclusively used for that purpose but in our case the cable is drawn through the electric poles which are already in existence and which is for supply of electrical energy and no additional cost or inconvenience is caused by such act and we are also paying pole rental for that. Even if we were not drawing the cables, the poles have to be there for supply of electrical energy.
(viii).	There is no comparison between us and SR Cable Vision. What we understand is that, the operator had unauthorizedly drawn cables through some of the poles belonging to the port trust without permission and without making any payment even toward pole rental, for giving connection to the railway quarters situated at the extreme Mattanchery halt boundary of the land of the port trust. That apart the quality of transmission and advanced technology maintained by us in the transmission of signals cannot be compared with SR Cable Vision. We are providing digital transmission and other facilities like internet which are far superior and no other Cable operator in Cochin is providing digital signal and internet.
(ix).	Without prejudice to the above, it is also brought to the kind notice of this Authority that we are providing quality Cable TV signal to all the employees of the Cochin Port Trust who are staying in the quarters. When we are charging subscription charges at the rate of Rs.175/- inclusive of tax outside the port trust land, we have given a concessional rate of Rs.150/- inclusive of tax for the employees of the port trust and there are about 350 such connections and on that count alone we are sacrificing more than one lakh rupees per year.
(x).	We gave the above concession on the assumption that no other charges will be imposed on us for drawing cables. This is also a valid ground to exempt us, in comparison with the other cable TV operator, if the port trust is going ahead with the matter.
(xi).	Uniform rates apply only to similarly situated persons and the other cable TV operator is not similarly situated with us for the above reasons and hence they cannot claim uniformity with us. Even if the proposed rate is made applicable, the distance we use is only around 10 to 15 kms. and the amount per annum on that count at the proposed rate will come only to Rs.60,000/- and the concession given by us on the assumption that no further charges will be imposed on us is more than a lakh. This is also a valid reason to exempt the charges.
(xii).	The proposal to charge the rates from the date of agreement will only benefit SR Cable Vision since for a long time they were using the facility unauthorizedly and without any agreement and without payment of any money and he will not be liable to pay any amount when there was no agreement while the operator who was abiding law and paying the amount as per the valid agreement will have to pay with retrospective effect.
(xiii).	There is no provision in the Act for charging the proposed rates to us. The proposed charges are burdensome and will cause hardship. The proposal may be waived in our case.
(4).	Indian Chamber of Commerce and Industry
	No specific comments to offer.
(5).	M/s.Bharti Airtel Limited
(i).	Bharti Airtel Limited is governed by India Telegraph Act, 1885, have requested for permission for building up digital telecom infrastructure in the Cochin Port Trust.
(ii).	The proposal was to lay Optical Fibre (OF) Cable network of length 16716 mts. of which 10445 mts. is completed. Now, we have requested for installation of 1.2km of OF Cable by HDD method for which the permission is still awaited from Cochin Port Trust.

(iii).	During the period of previous project installation, the way leave charges have been waived by Chairman and in lieu we have given 2 mBits bandwidth to Cochin Port Trust IT Centre for unlimited usage / download free of cost though the provision is really in excess as there was reduction of project volume by 2/3 rd and we have full filled our commitment.
(iv).	In this connection we wish to draw your attention to the provision of way lease Clause No.14 of license condition where in Government of India has already notified confirming the requisite power upon the License for the purpose of placing telegraph lines under part III of the Indian Telegraph Act 1885. In view of the explanation given above, and the powers entrusted with us in our license, we suggest that the proposal for enforcing way leave charges should be dropped.

2.1. A joint hearing in this case was held on 20 June 2009 at the Cochin Port Trust (COPT) premises. At the joint hearing, COPT and the concerned users/ user associations have made the following submissions:

Cochin Port Trust

- (i). Explained the salient points of the proposal.
- (ii). The proposed rates are in line with those charged by the Municipal Corporation in the areas of their jurisdiction.

M/s. Bharati Airtel Limited

- (i). We are not charged anywhere else. The License granted to us permits levying of underground cables.
- (ii). Government of Kerela has exempted us from payment of way leave for the next 15 years.
- (iii). Cochin Corporation has recently introduced.

M/s. Bharat Sanchar Nigam Limited

- (i). We are a Government undertaking and don't pay such charges anywhere else in the country.

M/s. S & R Cable Vision

- (i). We agree to the proposed rates.

M/s. Asianet Satellite Communications (P) Limited

- (i). We already pay for use of electric poles. Our case is different from that of S & R Cable. We cannot be subjected to the proposed rate.

2.2. At the joint hearing, the COPT was advised to examine the issues raised by M/s.Bharat Sanchar Nigam Limited, M/s.Bharati Airtel Limited, and M/s.Asianet Satellite Communications (P) Limited and furnish its comments. The COPT vide its letter dated 9 November 2009 has furnished its reply which are summarised below:

(i). **Reply to comments made by M/s.BSNL.**

COPT has implemented the proposed way leave charges for TV and telephone cables on an ad hock basis w.e.f. 29 February 2008 vide its circular dated 30th June 2008 and it is applicable to all operators who are using Port properties for their purposes irrespective of whether it is Government or Non Government organisations. Port has so far not collected Way leave charges as per the circular mentioned above from M/s. BSNL.

(ii). **Reply to Comments of M/s. Asianet Satellite Communications.**

As mentioned in their letter to TAMP, they have not remitted any pole rent or the new way leave charges proposed to the Port from the implementation date of 29th February 2008 till today.

(iii). **Reply to Comments by M/s. Bharati Airtel Limited**

M/s.Bharati Airtel has also not remitted any pole rent or the Way leave charges proposed to the port from the implementation of rate by the port i.e. from 29th February 2008 till today.
