

(Unofficial Translation)¹

Nepal Telecommunications Authority

Decision made by

1. Chairperson Prof. Dr. Dinesh Kumar Sharma
2. Member Mahesh Prasad Adhikari
3. Member Balaram Pradhanang
4. Member Bheshraj Kanel
5. Member Tulasi Bhatta

Date of petition registration: 2064.11.16 (28 February 2008)	
Petition registration number: 25	
Laxman Yadav, authorized on behalf of World Link Communication Pvt. Ltd., having its registered office at Ward No. 5, Lalitpur Sub-municipal Corporation, Lalitpur District-	Petitioner
Versus	
Nepal Doorsanchar Company Limited, Central Office, Kathmandu --1	Respondent
Date of petition registration: 2064.11.17 (29 February 2008)	
Petition registration number: 26	
Shris Karmacharya, authorized on behalf of Namche Networks Pvt. Ltd., having its registered office at Ward No.20, Kathmandu Municipal Corporation, Kathmandu District-----1	Petitioner
Versus	
Nepal Doorsanchar Company Limited, Central Office, Kathmandu --1	Respondent

¹ This is an unofficial translation version of the Judgments. If any idea or portion of this document is disputed the original Nepali version will prevail.

Date of petition registration: 2064.11.17 (29 February 2008)	
Petition registration number: 27	
Sudhir Kumar Paudel, authorized on behalf of ViaNet Communication Pvt. Ltd., having its registered office at Ward No. 3, Lalitpur Sub-municipal Corporation, Lalitpur District-----1	Petitioner
Versus	
Nepal Doorsanchar Company Limited, Central Office, Kathmandu --1	Respondent
Date of petition registration: 2064.11.17 (29 February 2008)	
Petition registration number: 28	
Madhu Kumar Amatya, authorized on behalf of Mercantile Communication Pvt. Ltd., having its registered office at Ward No. 1, Kathmandu Municipal Corporation, Kathmandu District-----1	
Versus	
Nepal Doorsanchar Company Limited, Central Office, Kathmandu --1	Respondent
Date of petition registration: 2064.11.17(29 February 2008)	
Petition registration number: 29	
Manish Kumar Singh, authorized on behalf of Himalayan Online Service Pvt. Ltd., having its registered office at Ward No. 29, Kathmandu Municipal Corporation, Kathmandu District-----1	Petitioner
Versus	
Nepal Doorsanchar Company Limited, Central Office, Kathmandu -1	Respondent

Subject: Petition for the Prevention of discriminatory treatment.

A brief description of the facts contained in the instant petition filed pursuant to Section 16 of the Telecommunications Act, 2053 (1997) and Rules 22 and 24 of the Telecommunication Rules, 2054 (1997) is as follows:

A petition filed by the WorldLink Communications Pvt. Ltd. on 2064.11.16 ((28 February 2008)) reads *inter alia* that the respondent Nepal Doorsanchar Company Limited (NDCL) has prepared to launch an Asymmetric Digital Subscriber Line (ADSL) soon for internet service where a proposal seeking tariffs approval for ADSL has already been put forward, which was known through various newspapers despite the fact that an application seeking settlement in accordance with Rules 22 and 24 of the Telecommunications Rules, 2054(1997) and Sections 16 and 47 of the Telecommunications Act, 2053 (1997) on a dispute arising from the acts of NDCL of charging to customers of its own internet service a tariff equal to local calls even for dialing across the nation, a discriminatory treatment to the petitioner who is also an NDCL customer in contravention of Section 42 (3) of the Act, relating to Code Division Multiple Access(CDMA)/Digital Subscriber Line(DSL) and Local Dialing, is under consideration of the Authority (File No. 11), and the petitioner has, therefore, prayed for holding up the ADSL tariff rates approval process until an arrangement is made ensuring no discriminatory treatment between and among the customers including the petitioner in extending services and case File No.11 is settled.

An order has been issued to assign the days for the presence of the petitioner pursuant to bye-law 4(2) of the Nepal Telecommunications Authority Procedural Bye-laws, 2059 (2002), issue the 15-day notice to the respondent NDCL pursuant to bye-law 8 (3) of the said Bye-laws and submit the petition for action after the submission of a statement of defense in writing within the time limit or after the expiry of the time limit for written defense.

The statement of defense in writing submitted by NDCL reads that there is no doubt that if the petitioner wants to receive services similar to those offered to common clients, the rates will be similar to that determined for the common clients; and that the demand of the petitioner to enjoy free of cost ADSL service would also be addressed later as per the company's rules and policies.

Upon hearing the pleadings made by the learned law practitioners who have appeared for their respective party, namely Advocate Mr. Satish Krishna Kharel for the petitioner, and Advocates Mr. Ram Kumar KC, Mr. Suraj Adhikari, Mr. Uttam Shrestha and Ms. Amita Dixit for the NDCL, and upon having studied the case file, it appears that the petitioner primarily submits that NDCL is operating telephone lines, CDMA etc., and also its own subsidiary internet services. A dispute that a client from any part of the country dialing up for the internet service offered through such Internet Service Unit is provided the facility of being charged only local call rates and not being subjected to trunk charges, amounting to be a discriminatory act against the petitioner, which is non-compatible

with the provisions of Section 42(3) of the Telecommunications Act 2053(1997), and that such a discrimination should be discontinued immediately making available all services and facilities to the petitioner as they are available to the respondent's own service providers, is still under consideration. In this course, members of Internet Service Providers' Association of Nepal including WorldLink Communications Pvt. Ltd. on 2064.11.16(28 February 2008) filed a petition for holding up the ADSL tariff rates approval process initiated by NDCL until an arrangement is made ensuring equality in treatment between and among the customers including the petitioner in extending services, and until the dispute under consideration is settled; and NDCL has submitted subsequently that it is no doubt that if the petitioner wants to receive services similar to those offered to common customers, the rates will be similar to that determined for the common customers and that the demand of the petitioner to enjoy ADSL service free of cost would be addressed later as per the company's rules and policies. NDCL also submitted its explanation on 2064.10.27(10 February 2008) relating to all related petitions (including File No. 11) that only four E-1s could be installed into the 1000 line capacity Remote Subscriber Unit (RSU) and only five percent of the total channel capacity pooled between RSU and host exchange could be offered to ISPs as every connection occupies a channel and separation of circuits for internet services through 120 channels available for 1000 lines to reduce adverse effect on voice traffic is needed. Whereas it counts 4 minutes and eight minutes for a call when a customer accesses to internet through Public Switched Telephone Network (PSTN) with 5xxx code and CDMA through dialing up #777, respectively, and it would be administered under the company policy decision whether it would be necessary for the company to provide the ADSL services in wholesale to the ISPs, allowing them to retail among their customers, like the NDCL.

The Telecommunications Act, 2053(1997) has been promulgated with a view to managing telecommunications market through competition from the private sector, founded on the results of economic liberalization policy adopted in Nepal. There is not doubt that the Government has, in pursuance of the Act, established the Nepal Telecommunications Authority as a statutory body in order to make the telecommunications services more reliable and widely accessible, to engage the private sector in the telecommunications services and to regulate and manage the same. The Act confers to the Authority various powers, which include powers to issue license, determine quality, benchmark the service standard, approve tariffs, monitor and inspect service, make coordination and manage for a healthy competition between and among telecommunications services and facilities and persons in it, develop and extend telecommunications services, safeguard the interests of the

consumers, and quasi-judicial powers to settle disputes related to telecommunications services between and among the licensed agencies/persons and between and among the licensed agencies/persons and customers. The dispute in question, therefore, attracts Rules 22 and 24 of the Telecommunications Rules, 2054(1997), and is found to be within the jurisdiction of the Authority.

Since two decades ago, most of the countries across the globe have been indulged in reducing and waiving their ownership in state owned telecommunications services and they have been able to create an encouraging atmosphere for private sector investment and invite foreign investment. Examples can be drawn from more than 100 countries where telecommunications services have been developed and extended by setting up independent regulatory bodies like the Authority for the purpose of creating an atmosphere for private sector investment. In order to strengthen competition, these bodies have been found engaged in evaluating market conditions on availability of service, overseeing the services being operated by dominant service provider particularly Incumbent Service Provider, making in-depth studies to ensure the non-existence of discrimination in the distribution of infrastructures developed to operate services of the Incumbent and, maintaining close vigilance over the policy adopted by service providers focusing on subsidy and predatory pricing of a service provider operating multi-telecommunications services and controlling anti-competition activities as such by acting on discouraging and punishable measures as needed. As an instance, the European Commission fined an amount of € 10.3 million against Wanadoo Company, an internet service provider (operated under full ownership of France Telecom), for providing services in a predatory pricing and causing loss to other competitors. (<http://news.bbc.co.uk/1/hi/business/3070925.stm>)

Even though the customers of internet service through dial-up system can receive a maximum of 56 kbps Symmetric Data Communication facility, in reality the facility of such a speed has not been available. It appears that the introduction of ADSL technology by NDCL, the Incumbent Service Provider, is intended to offer customers of internet services with greater speed on the background that most of ISPs provide to their customers internet services using wireless link. When ADSL technology is applied, an organization equipped with a PSTN network will be able to provide its customers telephone and broadband internet services at the same time through the landline telephone. An organization with a Backbone Optical Fibers Network can purchase internet bandwidth through optical network and extend it to the customers via ADSL at a cheaper cost. Organizations equipped with a PSTN and optical fibers can easily offer broadband internet services through ADSL. But for those customers who access the internet services through dial-up, it would not be possible to have

access to broadband internet through ADSL, unless their NDCL PSTN line is ADSL enabled. Even when they wish to, such ISPs would not be able to increase internet bandwidth for customers having access to the internet through dial-up system. PSTN network generally being with the Incumbent Service Provider, customers of ISPs using dial-up system for internet cannot avail broadband internet services and facilities via ADSL in the event that the organization possessing PSTN network denies ADSL access to the telephone lines of such customers . For this to happen, an agreement between the ISPs and PSTN system network operator is required, in order to make some space available in the place housing the Main Distribution Frame (MDF) of PSTN network, and in order to provide the customer's landline access to ADSL system of PSTN operator, at the request of ISP. A mutual understanding is deemed necessary between these two operators on financial agreement covering access to ADSL system.

Section 31 of the Telecommunications Act, 2053(1997) has ensured a licensed service provider the right to mutually connect the telecommunications system developed by him or her with the telecommunications system developed by other licensee and use it. The Act defines a telecommunications system as an instrument used or to be used in exchanging voice/data. Whereas it is beyond imagination that competition would exist with market monopoly and without presence of more than one service provider and as far as telecommunications is concerned, besides competition, if the Incumbent Service Provider denies to avail its means and resources to other competitors at a fair price, or, if the Dominant Service Provider refuses to share resources, it results in a slow pace of development as it will take a longer time for the new comers to develop a network of their own or a web of infrastructures throughout the country, the investment will go in vein as double investment will be required to develop the sector when single and existing investment would have been enough, and because tariffs levied to the costumers are determined in accordance with the amount invested, it will result in the services and facilities being costly. Moreover, incorporation of Sections 31 and 42(3) in the Act reflects legislature's special focus on the concept of sharing of existing infrastructure as adopted and implemented in developed countries, as a means to ease possible obstruction in competition. The Authority has a duty to ensure that such activities do not result in a negative impact on the telecommunications sector and the consumers. Similarly, the provision disallowing an incumbent service provider denying other service providers access to essential facilities contained in its network, while obliging the recipient to pay fees and tariffs for the facilities thus enjoyed, and also obliging service providers to make such facilities available to self and to others on an equal basis

is contained in Section 2 (2)(a) of the Telecommunications Regulation Reference Paper (TRRP) by the World Trade Organization (WTO), as given hereunder:

2.2 Interconnection to be ensured: Interconnection with a major supplier will be ensured at any technically feasible point in the network. Such interconnection is provided,

(a) under non-discriminatory terms, conditions (including technical standards and specifications) and rates and of a quality no less favorable than that provided for its own like services or for like services of non-affiliated service suppliers or for its subsidiaries or other affiliates;"

There is no doubt that NDCL is included within the definition of a Major Supplier as provided by WTO TRRP. In a situation where a person operating PSTN (land line) network under basic telecommunications services license and mobile telecommunications network under mobile telecommunications license allows inter-connectivity between PSTN network under basic telecommunications services license and mobile telecommunications network, allowing use of all infrastructures necessary for traffic incoming and outgoing free of cost, denial of or imposing of various conditions and fees upon similar inter-connectivity demand by other person will amount to be a discrimination against newcomers and competing companies and will result in inequality in competition between and among service providers of similar nature. In order to prevent such activities of inequality in competition, and to carry out tasks including maintaining balance in competition through justifiable distribution of essential facilities, regulatory bodies like the Authority are found to have been established. Prioritizing oneself and discriminating others in providing and enjoying essential facilities under its control in the capacity of Major Supplier (e.g., interconnection, E-1, lease line and the NDCL installed ADSL, presently seeking tariff approval) cannot be justified.

A decision made by the Pakistan Telecommunications Authority (PTA) on 3 August 2007 to settle a dispute between Pakistani ISPs and Pakistan Telecommunications Company Limited (PTCL) relating to PTCL's move to launch DSL has also been taken as a reference material in this dispute as well. The following matters are also mentioned in that decision:

"(iv) ISPs shall be allowed to bring their own fibers network adjacent to PTCL's cabinets

and install their own Optical Network Units (ONU) along side PTCL's cabinets. PTCL shall provide access of its secondary network to ISPs fibers network for delivering ISPs DSL services. The standard local loop sharing charges of PTCL shall apply;

- (v) Telecom operators are encouraged to build their own collocation space or rent an alternative space from any third party. In case, ISPs establish their own PoPs near PTCL exchanges, PTCL shall allow them to bring their copper cables inside PTCL's MDF for interconnect to PTCL's copper loop for delivering DSL services;
- (xii) PTCL is directed to develop a procedure in collaboration with ISPs for shifting of DSL costumers of their operators on PTCL's network and submit to DG (CA) of the Authority within 30 days of the issuance of this order/determination. PTCL shall not un-jumper existing nodes without written notice to the DSL operators;
(www.pta.gov.pk) No. 15-70/07 (CA)/PTA August 3, 2007)

The fact that the clients availing internet services by use of land line telephone, application of ADSL provides Internet Bandwidth Access at speed and bandwidth higher than dial-up internet has technically been verified and substantiated by successful experiments and tests and popularity abroad. As to whether ADSL should be considered under Basic-01 License, or under Internet/Email License for regulatory purposes, it is technically proved that ADSL does not provide any separate service but acts like lease line and E-1 link, and upon application of additional equipment to PSTN, provides broadband internet and other broadband services through the copper wire of the landline, it is established that ADSL technology relies on PSTN medium.

It is found that even today E-1 link through PSTN of NDCL is being provided to the private internet service providers and the recipients have been receiving it for operation of internet services. Also, no one except the NDCL is found to extend telephone services to the costumers using copper wire of PSTN. On the one hand, apart from the PSTN of NDCL, it does not appear that ADSL could be applied to other switching like CDMA/GSM and, on the other; there is no evidence to challenge the reality of the E-1 service being governed by basic license of NDCL having been made available to the ISPs. Similarly, in view of the fact that any act of restricting the right of consumers to select service provider of their choice is not justified, NDCL being the provider of PSTN land-line telephone service across the State of Nepal, and which has been as of today providing E-1 link to other ISPs, denial by NDCL to provide an access to ADSL cannot be justified. Therefore, it is held to

issue an order requiring the Nepal Doorsanchar Company Limited to extend ADSL technology service to the petitioners at the rate as may be agreed mutually, to submit before the Authority the agreed rate for the service determined mutually within 30 days of this order, and to refrain from denying access to ADSL to the petitioners, and to the internet service clients to the petitioners using land line telephone even if access as such is demanded before concluding an agreement determining service rate where the service rate to be fixed later would be applicable to compensate the service offered beforehand. The rest matters be dealt with as follows:

It is ordered that the concerned person be informed that such person may file an appeal in the Appellate Committee within 35 days if not being satisfied with the decision, and that the case file be safely retained and issue duplicate copies hereof to the concerned person making application for the same in accordance with rules.

Sd.

Tulasi Bhatta

Member

We concur with the above opinion.

Sd.

Prof. Dr. Dinesh Kumar Sharma

Chairperson

Sd.

Balaram Pradhanang

Member

Sd.

Mahesh Prasad Adhikari

Member

Sd.

Bheshraj Kanel

Member

Official preparing the decision as dictated by the Authority:

Kailash Prasad Neupane

Registrar

Deputy Director (Law)

Computer: Sundar Pyakurel

Done on Friday, the 13th day of the month of Baishakh of the year 2065 (25 April 2008).