

**TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL
NEW DELHI**

Dated 17th January, 2006

**EA No.2 of 2005
in
Petition No.41(C) of 2005**

Sea T.V. Network Ltd.

Registered Office at:

148, Manas Nagar

Shahganj

Agra – 282 010

....Petitioner

Vs

Star India Pvt.Ltd.

205, Okhla Industrial Estate

Phase-III

New Delhi – 110 020 & ors.

....Respondents

BEFORE:

**HON'BLE MR.JUSTICE N. SANTOSH HEGDE,
CHAIRPERSON**

MR.VINOD VAISH, MEMBER

LT.GEN(RETD), D.P. SEHGAL, MEMBER

For Petitioner : Mr.Maninder Singh with
Mr.Navin Chawla,
Mr.Yoginder Handoo,
Mr.Tejevver Singh Bhatia, Advocates

For Respondents : Mr.Gopal Jain, Mr.Prateek Jalan,
Ms.Kanika Agnihotri,
Ms.Simran Brar, Advocates

ORDER

This is an application filed under Section 16 read with Section 19 of the Telecom Regulatory Authority of India Act, 1997 (TRAI Act) seeking directions to the Respondent No.1 to 7 to forthwith comply with the directions dated 24th August, 2005 issued by this Tribunal for providing signals of the Bouquet of TV channel of Star TV to the petitioner on reasonable and non-discriminatory terms.

On 24th August, 2005 in Petition 41(C) of 2005 this Tribunal while negating various objections raised by the Respondents had directed the Respondents herein to supply signals within a reasonable time at any rate not later than 4 weeks from the date of the order.

The petitioner complains that even though the said date has expired on 23rd September, 2005 the Respondent has not complied with the same.

The applicant also submitted that the order made and the directions issued by this Tribunal have been challenged by the Respondent and some others in Civil Appeal No.5524 of 2005 before the Hon'ble Supreme Court of India. It is submitted that the Apex Court while entertaining the appeal declined the prayer of the first Respondent for the grant of the stay of the impugned order of this Tribunal.

It is also contended that in spite of the refusal of the stay by the Supreme Court and in spite of knowing the fact that the order of this Tribunal is time bound Respondents are refusing to implement the directions of this Tribunal on one guise or the other. It is further submitted that under the provisions of the Act this Tribunal has the power to take steps to execute its orders, therefore, by way of this Application the applicants have sought for directions from this Tribunal for compliance of its orders dated 24th August, 2005.

The answering Respondent in this application has firstly contended that since the appeal against the order of this Tribunal is pending before the Hon'ble Supreme Court of India and was listed for hearing, this Tribunal should wait for the outcome of the final judgment of the Supreme Court in that appeal. It is also contended that in spite of the fact that the Supreme Court has fixed the appeal for final hearing the same is being adjourned on various dates only on account of the applicant seeking adjournment.

In the ordinary course, this Tribunal would not have taken any steps to over reach the judgment of the Apex Court, but we notice that the Apex Court itself in its order dated 19th September, 2005 has ordered that the execution proceedings should continue. In view of this order of the Apex Court and the order of this Tribunal being time bound, we think it appropriate to proceed with this execution proceedings rejecting the above contention of the first Respondent.

The learned counsel of the answering Respondent also contended that this petition for execution is not maintainable since there is no executable order, because the directions of this court to the extent possible on the part of the answering Respondent have been complied with, in as much as the said Respondent has called upon the applicant to come for negotiating and for settling the terms of the subscription agreement and said efforts having failed between the parties this execution petition is not maintainable.

It is contended that if the applicant is aggrieved by the terms proposed by the Respondent then separate petition challenging those terms have to be filed and the said Respondent cannot be compelled by the applicant to supply its bouquet of

signals without a subscription agreement between the parties by this execution petition on terms and conditions not acceptable to the Respondent.

We have carefully considered this argument of the Respondent and might have accepted the same if the cause of action for filing the present application was totally alien to the cause of action on which earlier petition was filed. But such is not the case on facts. In the earlier petition, signals by the answering Respondent were refused on the ground that it has an exclusive distributor, the 2nd Respondent namely, Moon Network Pvt. Ltd. and, therefore, the applicant should seek the connections by entering into an agreement with the said Moon Network Pvt. Ltd., which is also a Respondent in this application as also a Respondent in the main petition. This demand of the answering Respondent was challenged in the earlier petition by the applicant on the ground that under the Telecommunications (Broadcasting & Cable Services) Interconnection Regulations, 2004, a broadcaster has an obligation to provide on request signals of its channels on terms which are not unreasonable and also without discrimination and on 'must provide' basis. It was contended in that petition that to seek signals from a competing service provider would amount to an unreasonable term and would also amount to creating an exclusivity or monopoly on a particular service provider which is contrary to the provision of the said Regulations. In short, the ground of challenge in the earlier petition was that of refusal to give signals was unreasonable. In our opinion that unreasonableness will also continue in the present refusal though in a different form. Unreasonable has multi-facets. Imposing stringent conditions contrary to the business practices is also a facet of unreasonableness. Therefore, in our opinion the answering Respondent cannot defeat the directions of this Tribunal by refusing signals to the applicant on

different facet of unreasonableness and plead in this execution application that by offering signals on terms which are unreasonable it has complied with the directions of this Tribunal. It is the duty of the answering Respondent to obey the directions of this Tribunal in its true spirit and not resort to taking recourse to some technical compliance of the directions of this Tribunal thus, defeating the directions given by this Tribunal. This, of course, does not mean that this Tribunal is willing to accept the allegations of unreasonableness pleaded by the applicant on its face value without examining the same on facts. In this background, we think it is expedient to reject the second preliminary objection raised by the Respondent.

We will now consider whether the terms proposed by the first Respondent would amount to unreasonable terms so as to attract the provisions of the Regulation 3.1 and 3.2 of the above cited Regulations.

In this application the applicant has contended that as an MSO in the city of Agra it has a subscription base of 3000 and on that basis it has sought signals from the first Respondent at a rate on which the Respondent has been supplying such signals to other MSOs in the city of Agra. The applicant contends that apart from the actual subscription payable on the subscriber base, it is also ready and willing to pay the advance as is payable as per the business practice prevailing in the city of Agra with other taxes applicable. It is further contended that this proposal has been rejected by the first Respondent solely on the ground that the said M/s Moon Network Pvt.Ltd. has entered into an agreement with the first Respondent by offering a subscription of Rs.19,22,213/- per month for the city of Agra. Therefore, the applicant should also pay the same subscription irrespective of its subscription base. The applicant contends that in the cable industry, there are various players who stand

economically at different levels though they are on the same platform. In other words, it is contended that though the petitioner and Moon Network Pvt. Ltd. are both MSOs, economically they are not in the same level because M/s Moon Network has a much larger subscriber base and if the petitioner who has much smaller subscriber base is also asked to pay subscription equal to the one that is being paid by the Moon Network then such demand for subscription being unpayable to be paid by the applicant such demand would be unreasonable and applicant will be out of business thus creating a monopoly in the Moon Network. It was also contended by the Applicant that in the earlier Judgment of this Tribunal it was held that treating unequals as equals is unreasonable as per the applicable Regulations.

The applicant submits that in the cable sector subscription payable are agreed on different basis like through negotiated payment of lump sum or on the basis of actual subscriber base of the signals seeker and never on the basis of an agreed amount offered by a competing service provider.

We think there is a force in the contention of the learned counsel for the applicant. Regulation 3.1 of the above Regulations prohibits the broadcaster of the TV Channel from entering into an exclusive contact with any other service provider that prevents others from obtaining such TV channels for distribution. Therefore, there is a mandate against the broadcaster like Respondent No.1 not to create exclusivity or monopoly on any one service provider. Regulation 3.2 mandates a broadcaster to provide on request signals of its TV Channels on non-discriminatory terms to all distributors of TV channels which include MSO like the applicant herein. Therefore, a contract between two service providers like the applicant and the Respondent herein should be in conformity with the mandate of the Regulations 3.1

and 3.2. Therefore, demanding similar sum towards subscriber which one MSO has agreed to pay based on his large subscriber base from another MSO, who has much smaller subscriber base would amount to unreasonableness. Therefore, in a case where there is no agreed lump sum subscription amount between the parties, the parties will have to agree for subscription being paid on the subscriber base of the receiver of signals, otherwise it would amount to a denial of signals on unreasonable grounds.

Learned counsel for the Respondent No.1 contended that the said Respondent is willing to provide signals to petitioner on his subscriber base not for the entire city of Agra but to a restricted area in the city of Agra. It is noticed that the applicant has been supplying signals of the first Respondent and other broadcasters to its subscribers in different parts of the city of Agra. Therefore, now to compel the applicant to restrict its business to a part of Agra would only amount to facilitating the business of Moon Network Pvt. Ltd. and to the detriment of the applicants' interest which again in our opinion would only create monopoly on the Moon Network in areas where applicant is prevented from having subscribers which also would be contrary to the Regulations. We must note herein that the object of the Regulations is to bring competition in the trade which in turn brings the costs down and ultimate subscriber i.e. the viewer would get quality signals on a competitive price. This object will certainly get defeated if one big player is permitted to take a large territory at a fancy price and other smaller players are compelled to pay the same price even though they have smaller subscriber base.

Respondent then contends that applicant has much larger subscriber base than 3000. Both the parties in support of this contention have produced some material.

The applicant has produced one report of the Entertainment Officer which is original but not supported with an affidavit but signed by the officer concerned on every page while the first Respondent has also filed another report of the entertainment tax department which assesses a larger subscriber base of the applicant though without particulars for such conclusion.

In the absence of any methodology to be followed in arriving at a reasonable subscription base which ought to have been formulated by the regulator, this Tribunal is compelled to do an exercise to arrive at figure on the basis and material available on record. The difficulty in arriving at a reasonable subscriber base in our opinion cannot and should not make this Tribunal power less and thus encourage monopoly by default. Therefore, with a view to see that a reasonable subscriber base is arrived at on the basis and material on record and to see that the directions of this Tribunal are given effect to in law and spirit of the earlier order, we have decided to embark upon the following exercise following the principle of best available material on record.

It is stated by the applicant M/s Sea TV that it is providing signals to 21 cable operators having a total subscription base 3057 while Moon TV is providing signals to 160 cable operators with a subscriber base of 19,213. In addition there are 12 cable operators who are getting signals from Sea TV as well as M/s Moon TV with a subscriber base stated to be 1658. If this figure is added to the subscriber base of Sea TV and Moon Network, it could be inferred that the total subscriber base of Sea TV is $3057 + 1658 = 4715$ and that of Moon TV is $19213 + 1658 = 20871$. The relative proportion of the subscriber base between Sea TV and Moon TV is therefore, 4715:20817 or 1:4.4. The amount being paid by Moon Network to Star TV is stated to be Rs.19 lakhs per month. If the per subscriber rate applicable to Moon TV is to

be deduced on the basis and the same extended for M/s Sea TV the amount to be charged monthly for Sea TV would be $4.4 \times 19 = 4.32$ lakhs.

However, we find that Star has demanded Rs.19 lakhs from M/s Sea TV using the argument that M/s Sea TV has to match the terms of M/s Moon TV. In our view the charges to be levied should bear relationship with the subscriber base, as much M/s Sea TV Network should be required to pay around Rs.4.32 lakhs monthly to M/s Star TV at this stage. Assuming that some new subscribers would get added once Star TV signals are also made available to subscribers through Sea TV, we find that it would be reasonable to fix the amount at the rounded figure of Rs.5 lakhs monthly which would correspond to a subscription base of 5490 as against the existing reported base of 4715. This method of calculation in our view provides an equitable basis of charging and does not put the Respondent to any disadvantage.

Having arrived at the above subscriber base of the applicant and the subscription payable by it, we direct the applicant and the first Respondent to enter into an agreement on the said basis as required under the relevant Regulations. This shall be done within two weeks from the date of this order.

Even if any dispute arises between the parties in regard to other terms of the contract, it cannot be a ground for the first Respondent to deny signals on a subscriber base fixed at by us in this order provided the applicant pays the subscription and other fees/taxes on that basis. We make this clear to avoid any further delay in the applicant receiving signals. This direction, however, will not prohibit any of the parties from approaching this Tribunal if there is any dispute in regard to any other terms of the contract which are not dealt with in this order.

The application is allowed with cost computed at Rs.10,000/-.

.....**J**
(N. Santosh Hegde)
Chairperson

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(Vinod Vaish)
Member

.....
(D.P. Sehgal)
Member