

TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL

NEW DELHI

DATED 27TH AUGUST, 2004

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APPEAL No.3(C) OF 2004

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IndusInd Media and Communications Limited

....Appellant

Vs.

Telecom Regulatory Authority of India & Others

.....Respondents

and

Appeal No.4(C) of 2004

Hathway Cable & Datacom Private Limited

....Appellant

Vs.

Telecom Regulatory Authority of India & Others

.....Respondents

-

BEFORE:

HON'BLE MR. JUSTICE D.P. WADHWA,

CHAIRPERSON

MR. VINOD VAISH, MEMBER

APPEAL No.3(C) OF 2004

- For Appellant- **IndusInd Media and Communications Limited** : Mr.C.S.Vaidyanathan,Senior Advocate with Mr.Manjul Bajpai, Advocate
- For Respondent No.1-**Telecom Regulatory Authority of India** : Mr.Meet Malhotra with Mr.Raghvinder Singh,Advocates
- For Respondents No.2-**Taj Television(India)Pvt. Ltd. (Ten Sports)** : Mr.S.Ganesh and Mr.Man Mohan, Senior Advocates with Mr.Shailendra Singh and Mr. Pravin Bahadur, Advocates
- Respondents No.3 - **Cable Distributor Network** : Mr.S.Ganesh and Mr.Man Mohan, Senior Advocates with Mr.Shailendra Singh and Mr. Pravin Bahadur, Advocates

Appeal No.4(C) of 2004

- For Appellant : Ms.Indu Malhotra,
– **Hathway Cable & Datacom Pvt.Ltd.** Mr.Arun Kathpalia’
Mr.Shuva Mandal,
Mr.Dheeraj Nair,
Ms.Nandini Somaya,
Ms.Ruchi Khurana,Advocate
- For Respondent : Mr. Meet Malhotra with
No.1-TRAI Mr. Raghvinder Singh,Advocates
- For Respondent : Mr.S.Ganesh and Mr.Man Mohan,
No.2 – Taj Senior Advocates with
Television (India) Mr.Shailendra Singh,
Ltd.,Mumbai Mr. Pravin Bahadur, Advocates
- For : Mr.S.Ganesh and Mr.Man Mohan,

Respondent No.3 – Cable Distributor Network	Senior Advocates with Mr.Shailendra Singh, Mr. Pravin Bahadur, Advocates
For Respondent No.4 – Taj Television Limited, Dubai	: None

TRAI's Press release No.13 of 2004 – Explained the term “charges” – Grievance relates to sub clause (2) of Clause 2 of the Telecommunication (Broadcasting and Cable) Services Tariff Order, 2004 – TRAI defined ‘charges’ to mean – charges/tariff rates payable by one party to the other by virtue of formal/informal agreement prevalent on 26.12.2003 – Counsel for the appellant content that TRAI could not defreeze charges in the shape of a press release – TRAI contended that the press note issued was for clarification – Number of subscribers increases and the revenue also increases – Due to freeze in charges – MSO not bound to pay the extra revenue – Held - TRAI's interpretation correct – Challenge to question No.2 fails – Petition dismissed – No order as to costs.

ORDER

Since a common question arises in both these appeals, they are disposed of by this order.

The issue that pertains is as to the validity of question No.2 in the Press Release No.13 of 2004 dated 19th February, 2004 by Telecom Regulatory Authority of India (TRAI). In answer to this question No.2, TRAI had tried to explain the term “charges” in its Telecommunication (Broadcasting and Cable) Service Tariff Order 2004 issued on 15.01.2004.

When Appeal No.3(C) of 2004 came up before us on the question of grant of interim order, we passed the following order on 12.03.2004 which gives insight into the issues involved in both the appeals:-

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"ORDER

On 12.3.2004 I passed the following order:

Admit. Mr. Meet Malhotra, Advocate accepts notice on behalf of the Telecom Regulatory Authority of India and Mr. Akhil Sibal, Advocate for the Broadcasters i.e. respondent Nos. 2 and 3 Reply may be filed within two weeks. Rejoinder within one week thereafter. To be listed on 7th April, 2004.

Meanwhile on petitioner's paying Rs.17.00 lakhs to the respondents 2/3 which is almost double of the amount already being paid for getting signals from the respondents 2 and 3 the signals may be restored with immediate effect to the petitioners in the circles Mumbai, Baroda, Nasik, Belgam, Nagpur, Bangalore. This amount shall be paid by Monday i.e. 15.3.2004 On the statement of Mr. Vaidy anathan I record that the amount is double of what was paid earlier for the month of February.

Apart from that petitioner shall give an undertaking that in case this Tribunal finds that any further amount is payable the same shall be paid with interest as deemed fit. Mr. Akhil Sibal states that signals in Delhi circle to the petitioner have not been stopped.

The petitioner shall pay to the respondents 2 and 3 such amount of compensation or otherwise within such period with such rate of interest as may be ordered by the Tribunal. The undertaking is recorded and accepted.

Detailed order shall be given on Monday, the 15th March, 2004. The interim order shall, however, be given effect to immediately".

I have heard the learned counsel for the parties on the question of issue of interim orders. Appellant Indus Media and Communications Ltd., MSO (Multi Service Operator) under the provisions of the Cable Television Networks (Regulation) Act, 1995 (for short 'Cable Act') has filed this appeal under Section 14 of the Telecom Regulatory Authority of India Act, 1997 (for short "TRAI Act").

By notification issued under proviso to clause (k) of sub-section (1) of Section 2 of the TRAI Act Central Government on 9th January, 2004 notified the broadcasting and cable services to be telecommunication services. Telecom Regulatory Authority of India (TRAI) under the TRAI Act was entrusted with certain additional functions under the TRAI Act in the said notification. In the Order issued on the same date the TRAI under the powers so conferred issued the Telecommunication (Broadcasting and Cable) Service Tariff Order 2004. The notification issuing this tariff order is dated 15th January, 2004. The Tariff Order reads as under:-

**“THE TELECOMMUNICATION (BROADCASTING AND CABLE)
SERVICES TARIFF ORDER 2004**

[1 of 2004]

Section I

Title, Extent and Commencement

1. Short title, extent and commencement:
 - i. This Order shall be called “The Telecommunication (Broadcasting and Cable) Services Tariff Order 2004”.
 - ii. The Order shall cover tariffs for all Telecommunication (Broadcasting and Cable) Services throughout the territory of India as also those originating in India or outside India and terminating in India.
 - iii. The Order shall come into force on the date of its notification in the Official Gazette.

Section II

Tariff

2. The charges payable by
 - (a) Cable subscribers to cable operator;
 - (b) Cable operators to Multi Service Operators/Broadcasters (including their authorised distribution agencies); and
 - (c) Multi Service Operators to Broadcasters (including their authorised distribution agencies) prevalent as on 26th December 2003 shall be the ceiling with respect to both free-to-air and pay channels, both for CAS and non-CAS areas until final determination by Telecom Regulatory Authority of India on the various issues concerning these charges.

Section III

3. Explanatory Memorandum

Annex A to this Order contains an Explanatory Memorandum for the issue of this Order.

Section IV

4. Interpretation

In case of dispute regarding interpretation of any of the provisions of this Order, the decision of the Authority shall be final and binding.”

The explanatory memorandum was attached to the tariff order wherein reference was made of order of the Delhi High Court which had directed the continuance of CAS (Conditional Access Service) in Delhi on a trial basis, initially for a period of three months after which the High Court was to issue appropriate directions taking into account the feed back of the three months period. It was in accordance with this order of the High Court which is dated 26th December, 2003

that the ceiling rates were fixed in the tariff order as those prevailing on 26th December, 2003. On 10th March, 2004 TRAI issued the Telecommunication (Broadcasting and Cable) Services Tariff (First Amendment) Order 2004. This order is as under:

**“The Telecommunication (Broadcasting and Cable) Services Tariff
(First Amendment) Order, 2004
(3 of 2004)**

**Section I
Title, Extent and Commencement**

1.Short title, extent and commencement:

i. This Order shall be called "The Telecommunication (Broadcasting and Cable) Services Tariff (First Amendment) Order 2004".

ii. Except Chennai Metropolitan Area where interim stay has been granted by Madras High Court in writ petition numbers 4863, 4890, 4936 and 4919 of 2004, the Order shall cover tariffs for all Telecommunication (Broadcasting and Cable) Services throughout the territory of India as also those originating in India or outside India and terminating in India.

iii. The Order shall come into force on the date of its notification in the Official Gazette.

**Section II
Tariff**

2. Clause 2 of Section II of The Telecommunication (Broadcasting and Cable) Services Tariff Order, 2004, shall be substituted by the following:

"2. The charges payable by

(a) Cable subscribers to cable operator;

(b) Cable operators to Multi Service Operators/Broadcasters (including their authorised distribution agencies); and

(c) Multi Service Operators to Broadcasters (including their authorised distribution agencies)

prevalent as on 26th December 2003 shall be the ceiling until final determination by Telecom Regulatory Authority of India on the various issues concerning these charges."

Section III

3. Explanatory Memorandum

Annex A to this Order contains an Explanatory Memorandum for the issue of this Order."

As I read the Tariff Order issued on 15th January, 2004 or the First Amendment to it on 10th March, 2004 I do not find any difficulty in understanding sub clause (2) of Clause 2 which fixes the charges payable which were prevalent as on 26th December, 2003. Before me is the appellant, a Multi Service Operator, and respondents Nos. 2 and 3, the broadcasters. Grievance of the appellant is to the Press Release No.13 of 2004 dated 19th February, 2004 issued by TRAI where TRAI has tried to explain the meaning of the word 'charges'. This is question No.2 which is answered by the TRA as under:

“Q.No.2: What is meant by word ‘charges’ mentioned in the Tariff Order?”

Ans: ‘Charges’ mean and include the charges/tariff rates payable by one party to the other by virtue of the formal/informal Agreement prevalent on 26th December 2003. The principle applicable in the formal/informal Agreement prevalent on 26th December, 2003 should be applied for determining the scope of the term ‘charges’. For instance,

- if under the Agreement applicable as on 26th December, 2003 specified the total amount as rate or charge per subscriber, multiplied by the subscriber base, the ceiling applies to the per subscriber charge and not to the subscriber base.
- if earlier the amount paid varied on certain limited occasions linked to the likely change in the subscribers base for a specified short period, such a practice could still continue. However, the charge per subscriber in such cases should not be more than those applicable on 26th December 2003”.

My attention was also drawn to question No.5 in this press Release and the answer of the TRAI to that is as under:

“Q.No5: Will the TRAI intervene, in case the subject matter of dispute between two service providers relates to “the number of subscribers?”.

“The remedy in this case would lie in

- a civil court;
- Telecom Disputes Settlement and Appellate Tribunal (TDSAT), under section 14 of the TRAI Act”.

Mr. Vaidyanathan expressed surprise as to how TRAI could say that remedy under the TRAI Act would also lie in a Civil Court when this Act specifically bars jurisdiction of Civil Courts. But that is not the issue before me. It is upto TRAI how it reads the TRAI Act.

It is the contention of the appellant that when the Tariff Order freezes the charges prevailing as on 26.12.03 how could the clarification in the shape of Press Release, TRAI defreeze the charges. I have yet to see the

records of TRAI before issue of Tariff Order and what led it to issue the Press Release or as to who authorized the Press Release. Prima facie, however, I have not been able to get the clear answer to that as to what was the necessity for the TRAI to issue the Press Release explaining charges after the Tariff Order had been issued. In fact if that was so then there should have been discussion in the minutes recorded by the TRAI before issue of the Tariff Order. Clause (4) of the Tariff Order dated 15th January, 2004 states that in case of dispute regarding interpretation of any of the provisions of the Order, the decision of the Authority shall be final and binding, has no meaning. Giving a meaning to the word 'charges' after the issue of Tariff Order, TRAI could not have traveled beyond its own brief which in fact amounted to amendment of the Tariff Order. TRAI could not have amended the Tariff Order merely by issue of Press Release.

Mr. Vaidyanathan also questioned the jurisdiction of TRAI to issue the First Amendment Order which, he said, amounted to amending the Government Notification suspending CAS in all the four Metros. This is another issue which does not arise before me at present.

With reference to the Mumbai area Mr. Vaidyanathan pointed out that broadcasters i.e. Respondent Nos. 2 and 3 have been issuing their invoices for Ten Sports for Rs.2,37,950/- and which amount had always been paid by the petitioner. One of such invoice issued by the 3rd respondent is dated 10th December, 2003 and pertains to the month of November, 2003. Mr. Vaidyanathan says that in February this year the amount was Rs.3,50,000/- payable by the appellant to respondents 2 and 3. It is not the case of the respondents 2 and 3 that appellant is in arrears. Mr. Vaidyanathan said that no change has been pointed out by the broadcasters and no notice was issued to the appellant by the broadcasters and suddenly signals have been stopped causing great deal of inconvenience and harassment not only to the appellant but to the consumers all around. It is, however, contended by Mr. Akhil Sibal, learned counsel for the broadcasters that issue raised is one of pure contractual obligations when broadcaster was within its right to stop giving signals to the appellant who could only sue for damages, if any, suffered by him. Appellant is having signals from the respondents 2 and 3 in the circles of Delhi, Mumbai, Baroda, Nasik, Belgam, Nagpur, Bangalore. Admittedly, there is no written agreement regarding the Mumbai circle though it is stated that written agreement has been executed for Baroda circle and there was also written agreement for Delhi circle which has since expired but contractual relations are continuing under those very terms. I have looked into the written agreement entered by the respondents 2 and 3 with the appellant with respect to Baroda circle, but I do not find any clause under which respondent Nos. 2 and 3 could unilaterally terminate the agreement without notice to the appellant. It has not been pointed out as to which clause or terms of the agreement has been breached by the MSO. To me it appears, though prima facie, that MSO has certainly certain rights under the agreement as service provided by the broadcasters have to be passed on to the consumers, a fact well known to both the parties. It is true that the dispute is basically between the appellant an MSO and the second and third respondent as broadcasters, but there is certainly a third party i.e. the consumer whose interest is involved and both these parties knew that it is the consumer who views the television through the service provided by the MSO and it is he who is going to suffer for any

disconnection of the signals. Moreover, charges are fixed depending upon the number of subscribers which means the consumers, which are charged by the broadcaster. Even if for the sake of arguments it is presumed that MSO is an agent of the broadcaster, his agency could not be terminated inasmuch as in an agreement like this agent has interest in the agreement. Both the MSO and broadcasters are to go by the terms of the agreement whether it is in writing or oral. Mr. Akhil Sibal said that appellant has more subscriber than disclosed but then nothing has been pointed out as to how many subscribers the appellant has and when this fact of having more subscribers than disclosed came to the knowledge of the broadcaster. Mr. Sibal pointed out to a circular issued by the petitioner, giving charges for advertisement effective from January 1, 2004. He said in this circular number of households in Mumbai is mentioned 6,18,000 while earlier the figure given by the appellant to the broadcaster was far less. Mr. Vaidyanathan says this circular has nothing to do with the actual number of subscribers inasmuch as the number of households could have been inflated to get more advertisement. Interestingly he said that in Baroda circle the number of households shown in the circular is 3,52,850 but in the agreement which was entered into between the parties after this date (February 1, 2004) the figure of household is given as 5,000. I could not get any answer to this from Mr. Sibal. It is also a moot question if the broadcaster to acquire certain rights, has paid substantial amounts, could he recover the same from the MSO outside the terms of the agreement. All these questions will have to be argued in depth before me after the pleadings are complete, records are produced and arguments heard. Normally, the court does not issue any injunction in the form of mandatory injunction but circumstances may arise where such a course is necessitated. The present is such a case where rights of the subscribers are in jeopardy. While giving the interim order on 12.3.2004 I have tried to safeguard the interest of the broadcaster in case the appeal is decided against the appellant. These are, therefore, my reasons to issue the interim order.

Sd/-

.....J

(D.P. Wadhwa)
Chairperson

We have heard now the final arguments. The prayers in Appeal No.3(C) of 2004 are as under:-

- (a) hold the impugned clarifications dated 19.02.2004 to the Tariff Order dated 15.01.2004 as ultra vires the TRAI Act and/or otherwise illegal;

- (b) direct Ten Sports to forthwith activate the Smart Card and commence providing telecast service/ programmes/ channels/ signals to the Appellant and not to deactivate the same until the final disposal of the Appeal;
- (c) direct Ten Sports to accept the charges as prevalent as on 26.12.2003;
- (d) direct TRAI to implement its Tariff Order dated 15.01.2004 in letter and spirit holding that "charges" include both subscriber base and per subscriber amount for computation of "charges";
- (e) direct TRAI not to make any changes, amendment in the regime established by the Tariff Order dated 15.01.2004, until the TRAI has fully carried out the due process of consultations as commenced in its Consultation Note dated 15.01.2004;"

In Appeal No. 4(C) of 2004, prayers are as under:-

- "a. Quash and set aside the Impugned Decision being the Press Release No.13/2004 dated February 19, 2004 issued by the Respondent No.1;
- b. Direct the Respondent No.3 that in view of the Prayer (a), the Respondent No.3 shall be injuncted from increasing the aggregate charges levied by it on the Appellant for distributing the satellite television signals for the Ten Sports Channel on the cable television network of the Appellant;
- c. The Respondent No.1 be directed to issue a consultation note with respect to the meaning of the word 'charges' as appearing in the Tariff Order dated January 15, 2004 and hear the Appellant and other MSOs/LCOs in respect of such Consultation Note and thereafter pass a decision on the meaning of the world 'charges' as appearing in the Tariff Order dated January 15, 2004.

- d. The Respondent No.1 be directed to place on record with the Hon'ble Tribunal and provide the Appellant with all material on the basis of which it has arrived at the Impugned Decision.
- e. Pass such other/further Orders as this Hon'ble Tribunal may deem fit and appropriate in the facts and circumstances of the present case."

It will be seen that main stress is on the Press Note issued by TRAI on 19.02.2004. There is no challenge to tariff order dated 15.01.2004.

A great deal of arguments have been addressed on whether the Press Note could be issued amending the Tariff Order which is a statutory document. The contention of TRAI is that it is a usual practice in Government Department to issue clarification and that the Press Note had the approval of the TRAI i.e. including Chairman and all the Members constituting TRAI. Let us examine as to what is meant by answer to question No.2. The Tariff Order dated 15.01.2004 freezes charges payable by subscribers to cable operators; that of cable operators to multi-service operators (MSO/Broadcasters); and MSO to Broadcasters, which charges were payable as on 26.12.2003. Appellants which are MSOs in both these appeals contend that under the tariff order "charges" payable by them to broadcasters get frozen irrespective of the increase in the subscribers base. What they say is that even when number of subscribers increase and they get more "charges" MSOs are not bound to pay the increased collection of charges to broadcasters. Similar would be argument for cable operators vis-à-vis MSOs. No doubt when the subscribers base existing as on 26.12.2003 increases, MSOs get more amount by way of increase in "charges" Appellants do not say that when cable operators get more subscribers they in turn have not to pay extra collection of charges on account of increased subscribers but today their contention is even if they get more amount from the cable operators, they are not bound to pass on the same to the broadcasters and that whatever amount was payable by them on 26.12.2003, they

are bound to pay only that amount and no more. They say that irrespective of increase of subscribers which constitute the subscribers base the amount payable by them on the basis of subscribers base as on 26.12.2003 is only to be paid. What the Press Note says is that if the number of subscribers increase and so does the subscribers base, the amount of charges have to be increased accordingly though the charges payable by any subscriber shall remain frozen as they were on 26.12.2003. That to our mind is the correct interpretation of the term "charges" as given in Tariff Order dated 15.01.2004, otherwise MSOs will get enriched and they will not have to pass on any portion of extra amounts so collected by them to broadcasters. Any other interpretation would be unfair to the broadcasters. We would agree with the appellants that answer to question No.2 in the Press Release in effect amounts to adding an explanation to the term "charges" as used in the Tariff Order. That would amount to amending the Tariff Order which is not permissible. By giving answer to question No.2, TRAI is certainly adding explanation to Section (2) of the Tariff Order which deals with tariff. TRAI should have come up with the amendment if an explanation was to be added. But in the circumstances of the present case, we do not think even that was required as there could not be any other interpretation to the word "charges". Subscribers base has to have reference to the number of subscribers. It is as simple as that in spite of the long drawn arguments by the learned counsel of the parties. Mr. Manmohan, learned counsel for Respondent No.3 has given a very telling illustration in support of his submissions to which the appellants had no answer. He said if in a particular area like Dwarka in Delhi which is being developed by the Delhi Development Authority, there were on 26.12.2003, 300 subscribers but on further allotment of flats, subscribers increased to 3000, how could it be said that MSO would pay, even after the addition of the subscribers, with subscribers base limited to 300 while MSO would be collecting subscription from 3000 subscribers, he queried? Answer to this by the Appellants is that it is a hypothetical situation. May be, but it is a good illustration to test the arguments of the appellants that irrespective of the increase in the subscribers' base, no further charges are payable to

broadcasters. As we read the Tariff Order dated 15.01.2004, in our view the scope and intent of the word "Charges" is quite explicit and has to be understood in its ordinary and practical sense. We, therefore, do not think it necessary to record detailed arguments addressed by the learned counsels for the parties. A simple point has been made to look so complicated.

Challenge to answer to question No.2, therefore, fails though on a different ground.

In Appeal No.3(C) of 2004, we have recorded that the agreed amount of charges payable by the appellant to Respondents No.2 and 3 shall be Rs.3,50,000/- though earlier it was Rs.2,37,950/-. In case the amount of Rs.3,50,000/- was agreed on the basis of increase in the number of subscribers that amount shall be binding till there is any further increase in the number of subscribers. However, in case this amount was only ad-hoc, and as on 26.12.2003 the amount was Rs. 2,37,950/- on the basis of subscribers' base on that day, that amount will hold the field as payable by the appellants to the Respondents No. 2 and 3. By interim order dated 12.03.2004, we had directed the appellant to pay to the respondents No.2 and 3 an amount of Rs.17 lakhs. This amount shall be adjusted by the Respondents No.2 and 3 for any amounts due from the appellant. In that view of the matter, signals shall be continued to be provided by Respondents No.2 and 3 subject to however, that charges are being regularly paid by the appellants as per the agreement and in terms of the explanation of "charges" to the tariff order dated 15.01.2004. No other issues arises in this appeal and none has been pressed.

In Appeal No.4(C) of 2004, no interim order had been passed and the only issue pressed was regarding the meaning to the word "charges" in the tariff order dated 15.02.2004 which has been explained in our order.

Both these appeals stand disposed of accordingly. Parties to bear their own costs.

.....**J**
(D.P. Wadhwa)
Chairperson

.....
(Vinod Vaish)
Member