

TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL
NEW DELHI

Dated 20th April, 2006

Appeal No.5(C) 2006

Set Discovery Pvt. Ltd.
Interface, Building No.7,
New Malad Link Road
Malad (West)
Mumbai – 400 064

...Appellant

Versus

Telecom Regulatory Authority of India
A-2/14, Safdarjung Enclave,
New Delhi.

...Respondent

BEFORE:

HON'BLE MR. JUSTICE N. SANTOSH HEGDE
CHAIRPERSON

MR. VINOD VAISH, MEMBER
LT. GEN.(Retd) D.P. SEHGAL, MEMBER

For Appellant : Mr. Ashok Desai, Senior Advocate
With Mr. Gopal Jain

For Respondent : Mr. Meet Malhotra with
Mr. Raghvinder Singh, Advocates

ORDER

1. In this petition filed under Section 14B of the Telecom Regulatory Authority of India Act, 1997 (hereinafter referred to as "TRAI Act") the Appellant is challenging an order of the Respondent/Telecom Regulatory Authority of India (hereinafter referred to as "Authority") dated 7th March, 2006 whereby the Authority acting under sub-section (2) of Section 11 of

the TRAI Act, read with Notification dated 9th January, 2004 issued by the Central Government notified an order called "The Telecom Regulatory Authority of India (Broadcasting and Cable) Services (Second) Tariff (Fourth Amendment) Order, 2006 (2 of 2006)". By the said order the Authority as an interim measure directed the freezing of subscription payable by the commercial cable subscribers at the rate applicable as on 6th March, 2006 excluding tax. By this order the broadcasters like the appellant are prevented from enhancing the subscription payable by commercial signal receivers until a final tariff is fixed by the Authority.

2. The Appellant contends that under the provisions of the TRAI Act, the Authority does not have the power of making any interim order because the said Act does not specifically empower the authority to do so. Alternatively, it is contended that assuming such a power is traceable to any of the provisions of the Act, even then such power cannot be exercised without giving an opportunity to the affected parties like the appellant and hearing them on the necessity to make an interim order.

3. It is nextly contended that the Authority has committed discrimination between the appellant and The Federation of Hotel and Restaurants Association of India which represents a section of the commercial signal receivers by considering latter's representation as to the making of an interim order while broadcasters like the appellant who are directly affected by such interim order were not heard in the matter. It is also pointed out by the learned counsel for the appellant that the Authority has failed to comply with the mandatory requirement of sub-section (4) of Section 11 of the TRAI Act which mandates the Authority to ensure transparency while exercising its powers under the TRAI Act and discharging its functions.

4. On behalf of the Authority it was contended that a written order of freezing of the tariff was necessitated because of the order of this Tribunal made in Petition No.32 (C) of 2005 dated 17th January, 2006 in the case of Hotel Association of India and Others Vs. Set Discovery Pvt. Ltd. and Others wherein this Tribunal had held that the Authority should consider the necessity of making a separate tariff for commercial purposes in order to bring about greater degree of clarity and to avoid any conflict and disputes arising in that regard. It is further contended that taking into consideration the object of fixing of tariff by the Authority from time to time and the public interest involved in such fixation of tariff, it

became necessary to make the interim order because the process of regulating and fixing the final tariff very often consumes time which would affect the ultimate user of the signal in the cable sector if in the meantime the Broadcaster is permitted to enhance the subscription.

5. In regard to the allegation of the appellant that it was not heard on behalf of the Authority, it is contended by the Respondent that since the impugned order is only an interim order and the final order would be made only after consultation with all concerned including the appellant the non-hearing of the appellant at this stage would not in any manner affect the validity of the impugned order. It is also pointed out that pursuant to the said order certain meetings were called on 16th March, 2006 to which the appellant has also been invited and in the future proceedings of consultation which was to commence in the first week of April, 2006 the stand of the appellant would be considered. It was also pointed out that as per "The Telecommunication (Broadcasting & Cable Service) Interconnection Regulation 2004", since a written agreement between the parties for a stipulated period was mandatory, the appellant would have entered into such agreements with effect from 1st January, 2006 on an agreed rate which would be applicable for the period of the agreement and since the freeze of the tariff is made at a rate prevailing on 6th March, 2006, in reality the appellant will not be affected by the freeze order since for the current year the appellant could not have increased the tariff in view of the agreed terms. It is also submitted on behalf of the Authority that the fresh tariff will be finalized at an early date.

6. In regard to the alleged discrimination between the Hotel and Restaurants Association and the appellant, it is submitted that the said Association was not invited for consultation by the Authority but a representation made by the said Association was taken note of while making the impugned order. Therefore, such consideration of the representation by itself does not amount to any discrimination.

7. Shri Ashok Desai, the learned senior counsel for the appellant in support of his contention that the Authority had no statutory power to make an interim order under Section 11(2) of the Act placed reliance on various sections of Chapter-III of the TRAI Act. In support of this contention, he relied on a judgment of the Hon'ble Supreme court of India in the case of **Morgan Stanley Mutual Fund Vs. Kartick Das - (1994) 4 SCC page 225.**

Emphasizing on his argument of violation of principles of natural justice, he contended that the provisions of the TRAI Act itself contemplate a process of consultation under Section 11(4) which is applicable even in the process of fixing tariffs and failure to do so has amounted to violation of principles of natural justice. He contended if principle of natural justice is not followed in a proceeding which has civil consequences then such proceedings are ab intio void. In support of this contention, he has placed reliance on the judgment of the Hon'ble Supreme Court of India in the case of **M.S. Gill Vs. Election Commission – 1978 (1) SCR 272** and **Swadeshi Cotton Mills Vs. Union of India - 1981(2) SCR 533**.

He also contended that hearing only one party which is affected by the interim order would certainly amount to discrimination and assuming that the Authority had any power to make an interim order even then the impugned order cannot be sustained because the Authority chose to hear and consider the representation of only one party and not of the appellant. Therefore, the learned counsel submitted that the impugned order is liable to be set aside.

8. Shri Meet Malhotra, learned counsel appearing for the Authority submitted that there was an immediate need for fixing of the tariff for payment of subscription by the commercial operators, especially because of the order of this Tribunal in Petition No.32(C) of 2005 and if the broadcasters like the appellant were to be permitted to increase the subscription rate in the meanwhile same would virtually affect the ultimate consumers of the signals and any amount collected in excess from such consumers could never be recoverable after the final tariff is fixed. He, therefore, contended that there was a need to put a freeze on the increase in the subscription during the pendency of fixing the final tariff. He also submitted that the Authority is in the process of fixing the tariff after consultation with all concerned and since the impugned order has only frozen the rate which was prevalent on 6th March, 2006 no great hardship would be caused to the appellant.

9. He also submitted that power of Regulation conferred on the Authority in Chapter-III of the TRAI Act is an integrated power which envisages among other things fixation of tariff from time to time. Hence, power to make interim order in aid of the final tariff should be inferred taking into consideration the object and purposes of the TRAI Act. He contended that at any rate there is no specific bar in the statute prohibiting the Authority from making interim order wherever public interest is involved. He also placed reliance on the judgment of

the Hon'ble Supreme Court in the case of **Clariant International Ltd. and Another Vs. Securities and Exchange Board of India (AIR 2004 SCC 4236)** as well as the judgment of the Hon'ble Supreme Court in **Civil Appeal No.6745 of 2003**.

10. He lastly contended that in regard to tariff fixation proceedings, principles of natural justice do not apply because the same is subordinate legislation as held in **Union of India Vs. Cynamide India Ltd. (AIR 1987 SC 1802)**.

11. From the pleadings of the parties as well as from the arguments addressed on behalf of them, following points arise for our consideration:

- (i) Whether the Authority has the power to pass interim orders, in particular, under Section 11(2) of the Act;
- (ii) Whether the Authority was required to act in accordance with the mandatory requirement of Section 11(4) of the Act;
- (iii) Whether the impugned order of the Authority is in violation of principles of natural justice, if so, is it null, void and non est;
- (iv) Has the Authority acted arbitrarily in hearing only one party and not the appellant;
- (v) Whether the impugned order of the Authority is contrary to the judgment of this Tribunal made in Petition No.32(C) of 2005 dated 17th January, 2006.

Re: (i) Whether the Authority has the power to pass interim orders in particular under Section 11(2) of the Act;

12. It is the argument of the counsel for the appellant that the Authority has absolutely no power to make any interim order especially under Section 11(2) of the Act. In support of this contention it is submitted that a perusal of the relevant sections, namely; Sections 11, 12 and 13 shows the absence of any such power vested with the Authority to make any interim order. It is the contention of the learned senior counsel for the appellant that in the absence of such specific power, the Authority could not have made the impugned order which admittedly is in the nature of an interim order. In support of this contention, strong reliance is placed on a judgment of the Hon'ble Supreme Court of India in the case of **Morgan Stanley(supra)** where the Hon'ble Supreme Court after examining the provisions of Consumer Protection Act came to the conclusion that under the said Act the Commission did not have the power (as the law stood then) to grant any interim relief. It is in that process

based on the language of the relevant section the Apex Court held that the Commission could not have granted an interim order. The learned counsel for the respondent countered the above argument of lack of jurisdiction by contending that the respondent like the present one, being a regulatory body discharges multifarious functions, hence, its various functions cannot be compartmentalized and judged or examined in isolation in a strait jacket approach. The learned counsel for the respondent submitted that provisions of the TRAI Act do not impose any pre-conditions or limitations on the power of the Authority while fixing tariff. He submitted that when the Authority has been clothed with the power of fixation of tariff, it should be inferred that all ancillary powers are necessarily inherent with the power of fixing the tariff. It is in this context he submitted the impugned order freezing the tariff pending final tariff determination is an ancillary and necessary requirement to the effective exercise of power under Section 11(2) of the TRAI Act. He also submitted that in absence of such interim order there would have been unwarranted, unjustified and unregulated rate increase, effect of which would have been not only on the hotels but also on other institutions like educational, hospitals and small businesses etc. Thus, in the absence of any exclusion of the ancillary power under the Act, it should be necessarily concluded that the Authority has the incidental power of making an interim order in the aid of making an effective final order. The learned counsel placed strong reliance on the judgment of the Hon'ble Supreme Court in the case of **Clariant International (supra)**. He also placed reliance on a judgment of the Madras High Court in the case of **Edulla Saheb Mohamed Ghouse Vs. Madras State Wakf Board (AIR 1966 Madras 441)**, wherein the Hon'ble High Court had observed:-

"It is obvious that when a court has the authority to make an order, it must have the power to carry it out in effect; otherwise it will be useless to make it....."

13. Relying on the above observation of the Hon'ble High Court, the learned counsel submitted that if the freeze had not been ordered by the Authority, various broadcasters would have increased the subscription indiscriminately resulting into a chaotic situation in the commercial cable sector. In such an event it would have been extremely difficult for the Authority to put the clock back and rectify such problem by merely making a final tariff fixation order. Therefore, the learned counsel submitted that taking into consideration the object and provisions of the Act and in the absence of any exclusion of such ancillary power it

should be held that the Authority has the necessary power to make an interim order, more so when the Authority is in the process of fixing the tariff for the commercial service providers.

14. A perusal of the judgment of the Hon'ble Supreme Court in **Morgan Stanley (supra)** indicates that the Supreme Court in that case analysed the provisions of the Consumer Protection Act (as it stood then) and after noticing the language of Section 14 of the said Act, the Apex Court came to the conclusion that the Commission in that case did not have the power to grant any interim relief and that it could only grant a final relief. It is from the language of the said section and in the context of that Act the Apex Court came to the conclusion that power of Commission was restricted to granting a final relief only. Bearing in mind the view expressed by the Apex Court, in the case of Morgan Stanley (supra) if we examine the provisions, in Chapter-III of the TRAI Act we notice that there is a lot of difference in the two Acts and also in the functions of Consumer Commission vis-à-vis TRAI. The Authority is conferred with various functions as also the obligation of discharging certain duties which includes the fixing of tariff. For the above purpose the Authority has also been conferred with the power to call for information, conduct investigation etc. in discharge of which function as contended by the learned counsel for the respondent may in a given case Authority might have to make certain interim orders with a view to aid the final order it is likely to make. We also notice that the Authority also exercises certain legislative functions apart from other administrative functions which makes the power of the Authority an integrated power, therefore, unlike the provisions of the Consumer Protection Act under the TRAI Act the Authority would obviously have much wider power than that is conferred on the Commission under the Consumer Protection Act. A careful perusal of the provisions of Chapter-III of TRAI Act and the context of the said Act in our opinion clearly indicates that its power is not confined to making of only a final order as was the case in Consumer Protection Act (as the law stood then) but is much wider. Therefore, it is reasonable to infer that the Authority has the power of making an interim order wherever the facts of the case require it to do so, more so in the absence of any specific exclusionary provision. At this stage it may be worthwhile to note the fact that the Authority is a Regulator empowered with the obligation of making Regulations in the cable sector. The Hon'ble Supreme Court in UP Cooperative CU Federations Vs. UP Sugar Mills Association – AIR (2004) SC 3697 has defined the power of regulation to mean “ ‘regulate’ means to control or to adjust by a rule or to subject to governing principles. It is a word of broad impact having wide meaning

comprehending all facets not only specifically enumerated in the Act, **but also embraces within its fold the powers incidental to the regulation envisaged in good faith and its meaning has to be ascertained in the context in which it is being used and the purpose of the statute.**” (emphasis supplied)

15. In K. Ramanathan Vs. State of Tamil Nadu & Another – (1985) 2 SCC 116, the Apex Court held that the word regulation cannot have any rigid or inflexible meaning so as to exclude prohibition. It is a word of broad import, having a broad meaning **and is very comprehensive in scope.** It was further held that the power to regulate carries with it full power over the thing subject to regulation **and in absence of restrictive words, the power must be regarded as plenary over the entire subject.**

16. From the above it is clear that when the statute confers a power of regulation in an Authority such power must be regarded as plenary capable of comprehending all facets and comprehensive in scope. In the absence of any exclusionary provision in our opinion such power also contains the incidental power of making interim orders if the subject under consideration requires the same. For the reasons stated hereinabove, therefore, we hold that the contention of the appellant that the respondent Authority has no power of making interim order cannot be accepted.

Re: (ii) Whether the Authority was required to act in accordance with the mandatory requirement of Section 11(4) of the Act;

17. It is no doubt true that under Section 11(4) of the TRAI Act there is a mandate to the Authority to ensure transparency while exercising its power and discharging its functions. Apart from the plain language of the said sub-section this Tribunal in **Appeal No.5 of 2005 in the case of VSNL Vs. TRAI dated 28th April, 2005**, has held that transparency was mandatory and the Authority is bound by the principles of natural justice, breach of the same results in setting aside such orders which are contrary to sub-section (4) of Section 11. But it has to be noted that that was a case where a final order was made by the Authority without hearing the affected parties and not a case of an interim order. In our opinion requirement of Section 11(4) of TRAI Act does not ipso facto apply to interim orders to be made by the Authority. In a given case if the circumstances so require the Authority can also make an ex

parte interim order. But that is not the rule but is an exception. Normally, the Authority is expected to hear the parties even when an interim order is made but in an exceptional circumstance it may have to make an ex parte order also.

18. However, when the Authority makes an interim order it must bear in mind the cardinal principles like:-

- (a) Existence of prima facie case
- (b) Balance of convenience
- (c) Irreparable damage;
- (d) Need to hear the party concerned;
- (e) Good faith;

19. In the instant case the Authority has stated in its reply affidavit as well as in the Explanatory Note in support of the impugned order that it is necessary to protect the interests of commercial cable sector by freezing the tariff at the rate prevailing on 1st March, 2006. This opinion found in the Explanatory Note has further been explained in the reply affidavit filed by the Authority wherein it is stated that if the freeze order is not to be passed, there could be a chaotic escalation in the subscription rates affecting the general public which could be irreversible. The Authority has further stated that since the final tariff is likely to be passed at an early date the interest of the appellant is also taken note of and it is on the basis of that comparative analysis that the Authority has come to the conclusion that there is a need for making an interim order without hearing the appellant. Therefore, application of the mandatory requirement of Section 11(4) in our opinion does not apply in the instant case.

Re: (iii) Whether the impugned order of the Authority is in violation of principles of natural justice, if so, is it null, void and non est;

20. This point refers to the effect of violation of principles of natural justice. It arises from the fact that the appellant has not been heard in the matter while the impugned order was made. We have already come to the conclusion while discussing Point No.(ii) hereinabove, the need to ensure transparency as contemplated in Section 11(4) of the TRAI Act by the Authority is not always a requirement when a interim order is being made. The learned senior counsel appearing for the appellant, however, contended that if there is a violation of

principles of natural justice even in the making of an interim order same will be a non est order. He placed reliance on two judgments of the Supreme Court in the case of **Swadeshi Cotton Mills (supra)** and **M.S. Gill (supra)**. A perusal of the above two judgments, of course, indicates that if there has been violation of principles of natural justice, consequential order would be void ab initio but then the facts of those cases indicate that orders impugned therein were final orders. We have already held that in regard to interim orders the application of principles of natural justice depends on the fact of each case and does not apply universally and in cases where there is a likelihood of frustration of the final order even ex parte orders can be made and reasons for making such orders if good will certainly absolve the maker of the order from the allegation of violation of natural justice. In our opinion, in the instant case, the freeze order is made on such factual basis and in public interest as such the argument of violation of principles of natural justice cannot be countenanced.

Re: (iv) Has the Authority acted arbitrarily in hearing only one party and not the appellant?

21. In regard to this issue the learned counsel for the appellant pointed out from the impugned order that the Authority has heard the Association of Hotels while not giving an opportunity to the Appellant of presenting its case before making the interim order. This according to the learned counsel for the Authority amounts to arbitrariness. The Authority in response to this argument has submitted that it did not invite the Hoteliers' Association for consultation but a representation received by them was taken note of, not clandestinely but making reference to it in the impugned order. It is also submitted that the Authority has not tried to discriminate between the parties and the reason for making the freeze order was based primarily on a possibility of there being an indiscriminate post-haste increase in the subscription rate of the commercial cable operators. We do not think the Authority has committed any act of discrimination because it only looked into a representation of the Association of Hotels as a cause of action for making an interim order and not as a basis for making the interim order. Appellant will have its opportunity of presenting its case in a full dress hearing when the consultation process is taken up before making the final order. Though, Authority could have given a preliminary opportunity to the appellant the said lacuna

by itself cannot be treated as fatal so as to make the impugned order void. While considering such objections to the impugned order this Tribunal will have to take a pragmatic view otherwise entire process of finalizing the tariff would be if not frustrated at least cause delay in the process which is not in public interest.

Re: (v) Whether the impugned order of the Authority is contrary to the judgment of this Tribunal made in Petition No.32(C) of 2005 dated 17th January, 2006.

22. During the course of the arguments it was also pointed out that the order impugned is contrary to the direction issued by this Tribunal in Petition No.32(C) of 2005 dated 17th January, 2006. Having perused the said order of this Tribunal we notice that this Tribunal has only recommended to the Authority the need to classify the commercial cable operators differently from the domestic cable operators and fix a different tariff if need be. It has not given any other direction regarding fixing of the tariff. Therefore, we do not think the contention that the impugned order is contrary to the direction in Petition No.32(C) of 2005 is correct. The learned senior counsel for the appellant also pointed out that there has been undue haste in making the impugned order and unexplained gap between the date of the order of this Tribunal and making of the impugned order. We do not think it is necessary for us to deal at length in regard to this submission because factually we could not find any such unseemingly haste on the part of the Authority in making the impugned order.

23. We would now like to take into consideration the question whether by the impugned order the appellant will be put to any irreparable loss. While considering this question, we may take note of the "The Register of Interconnect Agreements (Broadcasting and Cable Services) Regulation 2004" which came into force w.e.f. 01.01.2005 according to which all agreements between the service providers will have to be in writing and will have to be registered with the notified authority. In the agreement, parties will have to negotiate and settle the rate of subscription, therefore, for the year 2006 the appellant would have entered into such agreement with a negotiated subscription rate which will be protected till 6th March, 2006. That rate cannot be changed by the impugned order. It is only in regard to the agreements that are likely to be signed after 6th March, 2006 that the appellant will not be in a position to impose a higher rate. In our opinion such situation of having a separate rate in

regard to agreement signed after 6th March, 2006 and a higher rate in regard to agreements signed upto 6th March, 2006 is not a possible situation because such dual pricing will be contrary to the non-arbitrary clause in the "The Telecommunication (Broadcasting & Cable Service) Interconnection Regulation 2004". Therefore, looking from any angle we are of the opinion that the impugned order does not really affect the appellant this year. The learned counsel appearing for the appellant, however, contended that because of the stay order granted in Petition No.32(C) of 2005, appellant could not increase the rate of subscription to the commercial cable operators for the year 2006 till the stay got dissolved on 17.01.2006 when trial order was made in that petition. If really the stay was the reason which prevented the appellants from seeking an enhanced subscription for the year 2006, then nothing prevented them from enhancing the subscription after that order of this Tribunal. But the appellant did not choose to do the same till the date of the freeze order and has now chosen to make a complaint of violation of its right because of the impugned interim order. We do not think in the factual background narrated by us hereinabove appellant would suffer any irreparable loss bearing in mind the fact that the Authority is already seized of the matter and is likely to complete the process of fixing the tariff at an early date.

24. For the reasons stated hereinabove, we find no reason to interfere in this Appeal, hence, the same is dismissed.

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

.....
(Vinod Vaish)
Member

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