

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

DATED 10th FEBRUARY 2006

**PETITION No.25(C) OF 2005
(M.A.No.225 of 2005)**

ASC Enterprises Ltd. & Anr. ... Petitioner No.1
J-27, South Extension Ltd., Part I
New Delhi-110 049.

New Era Entertainment Network Ltd. ... Petitioner No.2
B-10, Lawrence Road Industrial Area,
New Delhi-110 035.

Vs

MTV India Pvt. Ltd. ... Respondent No.1
36/B MTV House,
Dr. R.K.Shirodhkar Marg, Parel,
Mumbai – 400 034.

SET Discovery Pvt. Ltd., ... Respondent No.2
MUMBAI

BEFORE:

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

MR. VINOD VAISH, MEMBER

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

For Petitioners : Mr.Maninder Singh with
Mr.Yoginder Handoo,
Mr.Tejveer Singh Bhatia,Advocate

For Respondent – MTV : Dr.A.M.Singhvi,Senior Advocate with
Mrs.Pallavi S. Shroff,
Mr.Balaji Subramanian,Advocates

For Intervener/respondent – : Dr.A.M.Singhvi,Senior Advocate with
Set Discovery Mrs.Pallavi S. Shroff,
Mr.Balaji Subramanian,
Mr.Aditya Narain,Advocates

ORDER

Petitioner No.1, M/s ASC Enterprises is a licensed provider of Direct to Home (DTH) television services to consumers under a license granted by the Central Government (Ministry of Information and Broadcasting) on 16/7/ 2003. Petitioner No.2, M/s New Era Entertainment Network Ltd is stated to be a content aggregator for the DTH platform of Petitioner No.1.

2. Direct to Home (DTH) is a system whereby the DTH service provider receives the signals of various channels from the broadcasters and other channel providers and thereafter transmits them in an encrypted form wherever required through the satellite to the consumers who receive the signals at their premises through a dish antenna and are decoded/decrypted by a set-top-box attached to the TV set if necessary by making use of a viewing card which enables the customer to view the transmitted channels on TV. DTH is a mode of distribution of signals of television channels whereby signals are received at subscriber premises directly from the satellite in a digital mode and is gaining popularity internationally and is stated to have various advantages over the traditional Cable System. One characteristic feature of the system is that every subscriber gets a specific code and each subscriber is specifically accounted for through what is called a Subscriber Management System (SMS), a central monitoring facility, except for free to air DTH channels.

Petitioner No.1 is stated to be providing its DTH Services under the brand name “Dish TV”, offering a total of 85 channels.

3. Respondent No.1, M/s. MTV Pvt. Ltd., is a broadcaster of ‘MTV’ ‘Nickelodeon’ and VH-1 television channels in India. Out of these three channels Petitioner No.1 is already having the VH-1 channel from its authorized distributor. The present petition is for the other two channels namely “MTV” and “Nickelodeon”. It has been stated that the said broadcaster distributes these two channels through M/s SET Discovery Pvt. Ltd., Mumbai (Respondent No.2). The latter distributes a bunch of channels of various broadcasters under the banner / bouquet, ‘One Alliance’ which includes the above mentioned two channels of M/s. MTV Pvt. Ltd.

4. The petitioner is stated to have approached M/s. SET Discovery for getting the signals of ‘MTV’ and ‘Nickelodeon’ channels for transmission/distribution from its DTH platform. However these were not made available on reasonable and non-discriminatory terms as a result of which the petitioner approached Respondent No.1 as broadcaster for supply of the said signals

who gave the response that the request be referred to its distributor. The petitioner is aggrieved that despite the elapse of 30 days since the last communication sent by it to Respondent No.1 dated 3/1/05, it has failed to provide the signals of 'MTV' and Nickelodeon channels.

5. M/s SET DISCOVERY has claimed to be the agent of M/s MTV (Respondent No.1) for distribution of the signals of the channels 'MTV' and 'Nickelodeon' throughout India under an exclusive distribution agreement under their distribution entity 'One Alliance' which distributes channels of various other broadcasters. M/s SET DISCOVERY were impleaded as party respondent by our order dated 20/7/2005 in MA 134 of 2005 as it was considered that it was a proper and necessary party for adjudicating the dispute raised in the petition.

6. It is the case of petitioner No.1 that as a distributor of TV Channels it did try to have all the "One Alliance" channels on the DTH platform (in all there are eleven channels inclusive of the channels 'MTV' and 'Nickelodeon') however the terms imposed on it were unreasonable. Also Petitioner No.1 was asked to take the whole bouquet of eleven channels from SET DISCOVERY and not the two channels belonging to the broadcaster MTV (Respondent No.1) namely 'MTV' and 'Nickelodeon' because of which the petitioner was forced to approach Respondent No.1 again for the said two channels. According to the Petitioner, the statutory regulations unequivocally lay down that in the event of an agent failing to make available the signals of TV channels of a broadcaster to a distributor of TV channels on reasonable terms, the eventual responsibility would be of the broadcaster and he would be held liable for refusing to supply the signals and would be under an obligation to supply the signals directly. In the present case as put across to us by the petitioner, since the conditions sought to be imposed by Respondent No.2, were patently and per se arbitrary and unreasonable resulting in the apparent refusal to supply signals, the petitioner had to approach Respondent No.1 directly. On the failure of Respondent No.1 as well, in this regard, the present petition has been filed.

7. The following prayer has been made in the petition:

- (a) Directing the Respondent to forthwith discharge its statutory obligations under the provisions of Regulation 3 of the TRAI Regulations dated 10/12/2004 for providing signals of its channels MTV and Nickelodeon to the petitioner on equitable, reasonable and non-discriminatory terms and conditions.
- (b) Any further orders as this Hon'ble Tribunal deems fit and proper

in the facts and circumstances of the present case.

8. The grounds on which the petition is based are that Regulation 3.2 of the Interconnect Regulations clearly contemplates a request to be made from a Direct to Home (DTH) operator in his capacity of distributor of TV signals to a broadcaster for providing channels. It also mandates that the channels shall be provided on non-discriminatory basis to all operators including DTH operators. It is thus clear that once there is a licensed operator and a request is made by such operator to the broadcaster, there cannot be any refusal to provide the signals. The Regulations also mandate that if the broadcaster imposes any unreasonable terms, the same constitute a denial of the request. In the present case, Respondent No.1's distributor, namely Respondent No.2, had imposed unreasonable terms on Petitioner No.1 and Respondent No.1 has also failed to ensure that its distributor does not act contrary to the obligations provided in the regulations. More than 30 days have elapsed since the written requests were made for the said signals as the petitioner has been making requests since November 2004 to the Respondents either directly or through its distributors for availing its channels on the DTH platform. In response, the conditions imposed have been either unreasonable or there has been complete silence on the part of the Respondents, both of which constitute denial. The non-availability of the channels of Respondent No.1 on Dish TV DTH is against the public interest and is clearly prejudicial to the consumer's interest and their right to view these channels. The channels of Respondent No.1, "MTV" and "Nickelodeon" are stated to be available on DTH platforms in other countries and as such it is highly inappropriate and discriminatory on the part of Respondent, not to make available their channels on the Petitioner's Dish TV DTH platform operating in India.

9. Before we move ahead, it would be useful to take note of the Regulatory framework within which we would need to adjudicate on this matter.

The Central Government by way a notification dated 9/1/2004, has notified "Broadcasting Services" to be included within the purview of Telecommunication Services under the Telecom Regulatory Authority of India Act. The relevant portions of the Notification and order dated 09/1/2004 of the Central Government are as under:-

*"The Ministry of Communication and Information Technology
(Department of Telecommunication)*

Notification

New Delhi, the 9th January, 2004

S.O. 44(E) - In exercise of the powers conferred by the proviso to clause (k) of sub-section (1) of Section 2 of the Telecom Regulatory Authority of India Act, 1997 (24 of 1997), the Central Government hereby notifies the broadcasting services and cable services to be telecommunication service”.

Section 36 of the Act empowers the TRAI to make Regulations for carrying out the purposes of the Act. The relevant portion of Section 36 of the Act is as under:-

“36. Power to make regulations – (1) The Authority may by notification, make regulations consistent with this Act and the rules made thereunder to carry out the purposes of this Act.....”

In exercise of the powers conferred upon it under section 36, and paras (ii), (iii) and (iv) of clause (6) of sub section (1) of Section 11 of the Telecommunication Authority of India Act, 1997, TRAI on 10/12/2004 has notified “The Telecommunication (Broadcasting and Cable Services) Interconnection Regulation 2004” which covers the arrangements among service providers for interconnection and revenue share for all Telecommunication (Broadcasting and Cable) Services throughout the territory of India.

Clauses 3.1. 3.2. 3.4 and 3.6 of these Regulations provide as under:

“3.1 No broadcaster of TV channels shall engage in any practice or activity or enter into any understanding or arrangement, including exclusive contracts with any distributor of TV channels that prevents any other distributor of TV channels from obtaining such TV channels for distribution”.

“3.2 Every broadcaster shall provide on request signals of its TV channels on non-discriminatory terms to all distributors of TV channels, which may include, but be not limited to a cable operator, direct to home operator, multi system operator, head ends in the sky operator; Multi system operators shall also on request re-transmit signals received from a broadcaster, on a non-discriminatory basis to cable operators.

Provided that this provision shall not apply in the case of distributor of TV channels having defaulted in payment.

Provided further that any imposition of terms which are unreasonable shall be deemed to constitute a denial of request.

“3.4 Any agent or any other intermediary of a broadcaster/multi system

operator must respond to the request for providing signals of TV channel(s) in a reasonable time period but not exceeding thirty days of the request. If the request is denied, the applicant shall be free to approach the broadcaster/multi system operator to obtain signals directly for such channel(s)”

“3.6 Any person aggrieved of discrimination shall report to the concerned broadcaster or multi system operator, as the case may be. If the broadcaster or multi system operator does not respond in a satisfactory manner in a reasonable time period, but not exceeding thirty days, the aggrieved party can approach the appropriate forum”.

10. In its interim reply to the Petition, Respondent No.1 has stated that the Respondent company was always willing and ready and is still willing and ready to offer its channels, “MTV” and “Nickelodeon” on DTH platform of the Petitioners on equitable, reasonable and non-discriminatory terms; the Respondent company has never violated and/or acted contrary to the statutory obligations under the provisions of the Telecom Regulatory Authority of India Act, 1997 or any other related laws as alleged or otherwise.

At the initial stages of consideration of this petition it was also pointed out on behalf of the respondents that negotiations were still going on at the time of filing of this Petition namely on 07/3/2005 and that the Petitioner should have waited for 30 days from the last date of the communication sent on 21/2/2005 by the Respondent No.2, the distributor of Respondent No.1. On the first day of hearing it was stated that negotiations had reached an advanced stage. The petitioner has denied these contentions and has described the assertions of Respondent No.1 regarding negotiations having reached an advanced stage as a sham and a cover up of the impossible methodology adopted by Respondent No.1 to unlawfully delay the supply of signals to the petitioner.

11. Respondent No.1 has at the outset raised a number of objections questioning the jurisdiction of TDSAT to adjudicate on this matter.

One objection is that Respondent No.1 is not a service provider within the definition of service provider contemplated under the TRAI Act. If it is held that Respondent No.1 is not a service provider the present dispute would not be a dispute between two service providers and therefore not maintainable before this Tribunal. Further, it is stated that the Petitioner is a consumer who is purchasing content from Respondent No.1 and being a sole consumer such a petition is not maintainable in view of the provisions of Section 14(a) of the TRAI Act whereby only a group of consumers could

approach the TDSAT. Further, an objection was taken that DTH service is not a telecommunication service as defined under Section 2(k) of the TRAI Act nor is it covered within the extended scope of the definition of telecommunication service as defined in the notification of 09/2/2004.

The next objection is that the present dispute pertains to a purported restrictive trade practice and in view of the provisions of Section 14(a) (iii) of the Act, the jurisdiction of TDSAT is specifically excluded as such matters would come within the purview of the MRTP Commission.

It was also pointed out that the petitioners have suppressed that they have filed a complaint on identical grounds against SET DISCOVERY i.e. Respondent No.2 before the MRTP Commission and taken a specific plea that denial of signal amounts to restrictive trade practice, which case is still pending.

We take up for consideration each of these objections, questioning the jurisdiction of TDSAT.

In regard to the objection that the parties in this petition are not service providers as also the objection that the petition relates to alleged monopolistic, unfair and restrictive trade practice which is governed by the MRTP Act, both the respondents have stated that the above issues are currently sub judice in the Supreme Court in Civil Appeal No.5524 of 2005 in which Respondent No.2 has filed an application for intervention. We note that the said appeal is against the order of this Tribunal in Sea TV Network Ltd vs Star India (P) Ltd ((2005) 5 Comp LJ 462 (TDSAT)) decided on 24/8/2005. In the said order it was held in regard to the MRTP Act as follows:

“15.The petition in hand does not involve any complaint of monopolistic, restrictive or unfair trade practice. What is alleged in the petition is the violation of the various regulations, which control the trade in the cable sector which is involved in the present petition. From the language of section 10 of the MRTP Act, it is crystal clear that the Commission thereunder cannot adjudicate a dispute based on violation of a regulation made under the TRAI Act. Even if the regulation incidentally trenches on the subject of monopoly and restrictive trade practices, it cannot be said that the dispute is one, which could be adjudicated by the Commission under the MRTP Act. This is also clear from the nature of procedure to be followed by the two forums while entertaining a complaint or dispute. Under section 10 of the MRTP Act, the Commission is empowered to inquire into a complaint, while under section 14 of the TRAI Act - The Tribunal is empowered to adjudicate any dispute. In our opinion, there

is a vast difference between inquiring into a complaint and adjudicating a dispute. This view of ours is further supported by the fact that under the MRTP Act the Commission is only empowered to grant temporary injunctions during the pendency of the inquiry (see section 12A) and to award compensation for any loss or damage caused to the complainant (see section 12B); it is not authorized to grant wider reliefs like directions like the one sought in the above petition, which can only be done by the Tribunal which is empowered to adjudicate any dispute and pass such orders thereon as it thinks fit (see section 14A, sub-clause (iv)).

16. Therefore, in our opinion, it is very clear that the disputes arising out of the Regulations framed under the TRAI Act cannot be adjudicated upon, and relief granted under the MRTP Act, which could only be done by this Tribunal under section 14 read with section 14A of the TRAI Act.

17. We, however, make it clear that any dispute which is not based on rights and liabilities arising out of TRAI Act or the Regulations made thereunder and pertaining solely to a complaint of monopolistic trade practice, restrictive trade practice and unfair trade practice only cannot be tried by this Tribunal. In such view of the matter, we are of the considered opinion that since the dispute involved in the petition is not in nature of a complaint contemplated under section 10 of the MRTP Act, this Tribunal is not barred from entertaining the above petition”.

In the petition before us, the complaint is not of any monopolistic, restrictive or unfair trade practice. Clause 3.2 of the Interconnection Regulations, 2004, imposes a mandatory statutory obligation on each broadcaster to provide on request signals of its TV channels. Clause 3.4 lays down that the broadcaster must respond to the request with a reasonable time but not exceeding 30 days. Any person/distributor of TV channels who is denied his right to receive signals is a aggrieved person and is thus entitled to approach the TDSAT for relief. Further under Clause 3.3 it has been stipulated that it is the responsibility/duty of the broadcaster to ensure that his agent does not act in a manner which is not consistent with obligation placed under this regulation or is prejudicial to competition. The petition, therefore, has alleged violation of the various regulations and to that extent our determination in the Sea TV Network case cited above would hold good in this matter as well. As regards the matter pending before the MRTP Commission we were informed that by order dated 15/7/2005, it was allowed to be withdrawn with liberty to approach TDSAT.

In regard to the other question that the parties to the disputes are not

service providers, we would first take note of some of the relevant portions of the Interconnection Regulations, 2004 under Definitions, namely

“2(j) “distributor of TV channels” means any person including an individual, group of persons, public or body corporate, firm or any organization or body re-transmitting TV channels through electro-magnetic waves through cable or through space intended to be received by general public directly or indirectly. The person may include, but is not limited to a cable operator, direct to home operator, multi-system operator, headends in the sky operator.

2(k) “Direct to Home Operator” means an operator licensed by the Central Government to distribute multi channel TV programmes in KU Band by using a satellite system directly to subscribers premises without passing through intermediary such as cable operator or any other distributor of channels.

2(n) “service provider” means the Government as a service provider and includes a licensee as well as any broadcaster, multi-system operator, cable operator or distributor of TV channels.”

In this context, it would be relevant to extract below the finding in the Sea TV Network case which would be fully applicable in this present petition:

“25. Section 36 of the TRAI Act provides that TRAI may by notification make regulations consistent with the Act and Rules; in exercise of that power the TRAI has notified Telecommunications (Broadcasting and Cable) Service Interconnection Regulations, 2004 on 10.12.2004. In clause 2(n) of the said Regulation – service provider has been defined as to mean the Government and includes licensee as well as any broadcaster, multi-system operator, cable operator or distributor of channels. Therefore, taking note of the beginning words of the section 2 of the TRAI Act, i.e. ‘in this Act unless the context otherwise requires’ and the power of the Government under proviso to section 1(k) to include other services to be telecommunication service under which power a notification dated 9 January 2004 has been issued and taking note of the power of the TRAI to make regulations and the fact that these regulations have the force of law, and the regulations so made include a multi-system operator like petitioner of a cable operator as a service provider and bearing in mind the subject matter and the context in which the definition clause has been used in the TRAI Act and the object underlying the Act and principles, as laid down by the apex court in the cases cited above, we must hold that for the purpose of section 2(j) of

the TRAI Act apart from the Government as a service provider and the licensee, even broadcaster, multi-system operator, cable operator or distributors of TV channels will have to be construed to be service providers and if so construed, any dispute between them will be a dispute that has to be settled by this Tribunal under section 14 of the Act. Therefore, the contention of the respondents that the petitioner is not a service provider will have to be rejected. In this context, it may be of some use to note the nature of role played by the various players in the cable sector. At the top there is a broadcaster who broadcasts his TV channels through signals. This he can do by either supplying the signals through a designated agent or intermediary or can do the same by directly giving connection to the distributor or MSO who in turn would re-transmit the signals to the cable operators or the consumers, as the case may be. The ultimate consumer, i.e. the subscriber, who ultimately views the programme of the broadcaster. Therefore, even in common parlance, all these persons, viz., the broadcaster, the agent or intermediary, the distributor, the MSO and the cable operators, if they are involved in providing signals to the ultimate subscriber, will be providing service as contemplated in the objects and provisions of the TRAI Act. For all these reasons, we will have to negate the contention of the respondent that the petitioners is not a service provider, whose dispute could be entertained by this Tribunal.”

In the petition before us the respondent being a representative in India of the broadcaster of television signals and Petitioner No.1 being a distributor of TV channels, in the light of the reasoning given in the above cited case of Sea TV, both are to be very clearly regarded in our view, as service providers and TDSAT has the jurisdiction to adjudicate and settle the disputes like the one that has arisen in this petition.

12. Having concluded that this Tribunal has the jurisdiction to adjudicate on the present dispute, we now proceed to consider the grievance of the petitioner in regard to the failure of Respondent No.1 to provide signals of its channels ‘MTV’ and ‘Nickelodeon’ to the petitioner. The petitioner states that he first approached the distributor of Respondent No.1 for this purpose. However, the terms imposed by the distributor (Respondent No.2) were found by the petitioner to be unreasonable and discriminatory as a result of which he was compelled to approach Respondent No.1 by his letter of 27/ 12/2004. Attention of Respondent No.1 was drawn through this letter to the ‘must provide’ provision in the Regulations and also to the fact that the Petitioner has already been in touch with the authorized distributor

(Respondent No.2) on this issue. Our attention has also been drawn to letters dated 26/11/2004 and 4/12/2004 addressed by Petition No.1 (Signed by Shri Vikas Goel, Manager, Sales) addressed to Mr Sanjay Hiremeth of MTV Pvt. Ltd. (Respondent No.1) in which it is clearly brought out that the Petitioner is seeking channels of MTV and Nickelodeon for his Dish TV platform from Respondent No.1 and had requested the latter to facilitate the finalization of the distribution terms. There is one response dated 26/11/2004 which indicates that Respondent No.1 undertook to pursue the matter with 'One Alliance' i.e. Respondent No.2.

According to the Petitioner, Respondent No.2 has claimed to be the exclusive agent of Respondent No.1 for distribution of the signals of channels MTV and Nickelodeon throughout India under their distribution entity 'One Alliance' which distributes channels of various other broadcasters. The petitioner did try to negotiate the terms of distribution of all the channels with Respondent No.2, however conditions were imposed on him in regard to placement of channels and pricing and in regard to minimum guarantee which compelled the petitioner to directly approach Respondent No.1 as per its entitlement under the Interconnect Regulations of 10/12/2004. According to the petitioner while it may be open to a number of broadcasters to appoint one common entity as their agent/distributor, it would be completely contrary to the statutory scheme of the regulations dated 10/12/2004 to accept that it would be permissible for such an agent/distributor to compel a "distributor of TV channels" to necessarily subscribe and pay for channels of all the broadcasters of whom that entity is the common distribution agent.

In particular the petitioner states that his entire case is that he is entitled to negotiate and obtain the signals of TV channels of each broadcaster separately. If a group of broadcasters wish to appoint one common distributor for distribution of their respective signals, the petitioner cannot be compelled by such a distributor to take the channels of all the broadcasters from that common distributor. Petitioner has alleged that Respondent No.1 has violated the Interconnection Regulations, in particular Regulations 3.1, 3.2 and 3.3 and the Provisos therein which enjoin that "Imposition of terms which are unreasonable shall be deemed to constitute a denial of request" and "where the signals are provided through an agent or intermediary the broadcaster/ MSO should ensure that the agent/intermediary acts in a manner that is (a) consistent with the obligations placed under the regulation and (b) not prejudicial to competition.

13. Respondents No.1 and 2 have opposed the above contentions of the Petitioner and their arguments are almost identical.

According to the respondents it is very much in accordance with the industry paradigm for an agent or distributor to create a multi-broadcaster bouquet. Also, the petitioner has been indulging in the same practice himself however, he is seeking to block the same in the instant petition by alleging that it is against the Interconnect Regulations. Further it was stated that the DTH license of Petitioner No.1 stipulates in Clause 7.6 that “the licensee shall provide access to various content providers/channels on a non-discriminatory basis”, as such there is a “must carry provision” whereby the petitioner ought to accept and carry all the channels being offered under the ‘One Alliance’ package.

The respondents have also refuted the plea of the petitioner regarding the ‘discriminatory’ attitude of the Respondents vis a vis the Petitioners. It is pointed out that Petitioner No.1 being the sole operator of paid DTH service in India, it forms a class by itself and therefore no question of discrimination can arise at all. Also it is stated that the ‘One Alliance’ bouquets are being offered in the same manner to all operators and in fact Petitioners were offered better terms than those currently being offered to cable operators, hence there is no question of discrimination.

It was further stated that making available the sought signals in a bouquet of 11 channels does not make it unreasonable, perhaps if it was in a bouquet of 100 channels or so it could have been held as unreasonable. It was pointed out that the Petitioner is himself offering on his DTH platform multi-broadcaster bouquets to its consumers. Also respondent has placed on record information regarding various bouquets being offered by different broadcasters and their agents in the Cable Industry in India. Examples were given of 3 major bouquets in Indian Industry i.e. the Star bouquet, the One Alliance bouquet and the Zee Turner bouquet, which contain television channels owned by many Broadcasters and their affiliates and are all multi-broadcaster bouquets. It was pointed out that the Zee Turner bouquet with a total of 27 channels spread across 3 bouquets is the largest multi-broadcaster bouquet in the industry.

14. These contentions have been refuted by the petitioner in its rejoinder. The petitioner has reiterated that it is his legal right under the Regulations to demand the supply of signals of TV channels of a broadcaster and this right cannot be defeated by the appointment/designation of one common entity as the agent or intermediary who is working in that capacity for a group of broadcasters. The petitioner has again reiterated that it is only seeking the enforcement of its rights as per the provisions of “The Telecommunication (Broadcasting and Cable Services) Interconnection

Regulation 2004” (13 of 2004) (The Regulations) to obtain the signals of MTV and Nickelodeon channels as part of the bouquet of Respondent No.1 and without the common agent i.e. Respondent No.2 insisting for supply of the signals of the channels of other broadcasters as well. Also, as per the statutory regulations, in the event of failure by the agent/intermediary in discharging its obligations on the part of the broadcaster for supply of the signals, it is the solemn and unambiguous statutory obligation of the broadcaster to then provide the signals of its channels directly. Further, the petitioner, despite its continuous bonafide efforts, has failed to obtain the signals of the above mentioned two channels of respondent No.1. Thereby the respondent No.1 is under statutory obligation to provide the said signals to the petitioner for its DTH platform.

In answer to the argument that the Petitioner No.1 should in compliance with the stipulation in its DTH license provide access to all content providers/channels on a non-discriminatory basis, it has been stated in the rejoinder by Petitioner No.1 that it has never refused access to One Alliance bouquet of channels and in fact, in continuation of its bonafide conduct, it has been negotiating with the “One Alliance” for more than one year now. However, the unreasonable attitude of “One Alliance” both in respect of placement and price and its insistence for imposition of unreasonable, impermissible and discriminatory terms of minimum guarantee etc have compelled the petitioners to approach this Tribunal in accordance with the statutory regulations praying for only MTV & Nickelodeon channels directly from Respondent No.1.

In regard to the allegation that Petitioner No.1 is itself indulging in the practice of constituting multi-broadcaster bouquet, the stand of Petitioner No.1 is that it is a DTH distribution platform and as an independent corporate entity, it does not own any channel. According to Petitioner No.1, a repeated reference to the Zee channels as being owned by the petitioner is therefore misconceived. Also, since the Petitioner No.1 is a distributor of TV channels, as defined under the Statutory Regulations, of the signals of all those channels which it has been able to obtain by entering into arrangements/agreements, the reference to its offering of channels of various broadcasters in a bouquet is misconceived. A distributor of TV channels is obliged to carry and provide the signals of TV channels of all broadcasters with whom the petitioner is able to enter into arrangements/agreements on reasonable commercial terms. It admits that Dish TV DTH has created various “tiers” for its subscribers which is in-line with the prevalent practice of various DTH platforms operating all over the world. The attempt has been not to force the channels of all

broadcasters on the consumers but to instead create different “tiers” and allow the consumers to exercise a meaningful choice of having the desired “tiers”. Accordingly for customers having low disposal income, the basic tier has been created so as to provide them at least minimum number of channels of different genre (viz. News, Sports, entertainment & movie etc.). The petitioner has again highlighted that the Interconnect Regulations have very clearly laid down that if the Agent of a broadcaster denies to provide the signals of TV channels to any distributor seeking such channels, the person has to approach the concerned broadcaster and the broadcaster shall provide the signals on reasonable and non-discriminatory terms. In the present case, since One Alliance, the agents of MTV, the Respondent No.1 failed to provide the TV signals of two channels of respondent No.1 to the petitioner, the petitioner was compelled to approach the Respondent No.1. The appointment of an agent by a Broadcaster does not absolve a broadcaster of the statutory responsibility cast upon broadcaster by the Interconnect Regulations to provide the signals of TV channels to any distributor of TV channels who seeks the same.

The petitioners in their rejoinder have contested the assertion made by the respondent in their counter affidavit that the appointment of Respondent No.2 as the agent of Respondent No.1 is in accordance with the Telecommunication (Broadcasting & Cable Services) Interconnection Regulations 2004 According to the petitioners, the appointment of Respondent No.2 as the exclusive agent of Respondent No.1 is contrary to the Interconnect Regulations. Attention in this connection has been drawn to the judgment dated 24th August 2005 delivered by this Tribunal in Petition No.41(C) of 2005 (MA No.152 of 2005) – Sea TV Network Vs Star India Pvt Ltd. and Moon Network Pvt Ltd wherein it has been observed:

“.....Clause 3.1 of the Regulation reads thus:-

No broadcaster of TV channels shall engage in any practice or activity or enter into any understanding or arrangement, including exclusive contracts with any distributor of TV channels that prevents any other distributor of TV channels from obtaining such TV channels for distribution (emphasis supplied”.

This clause makes it mandatory for the broadcaster not to engage in any practice or activity of entering into any understanding or arrangement including exclusive contract with any distributor of the channels. This clause also prevents the broadcaster from engaging in any manner that prevents any other distributor of the TV channels from obtaining such

TV channels for distribution. The language of this clause is quite clear and mandatory. Keeping in mind the fact that the definition of distributor includes an MSO it is not open to a Broadcaster to appoint any distributor or MSO, an exclusive agent and if done it would run counter to the prohibition of exclusivity contemplated in clause 3.1 of the Regulation.....”

The petitioner has further contended in answer to the stand taken in this regard by the respondents in their counter affidavit that merely because the petitioner was negotiating for all the channels of One Alliance, the petitioner cannot be precluded from asserting its right provided under the Interconnect Regulations to demand the signals of a channel from the broadcaster directly in case of denial of the same by an agent. According to the petitioners it is settled legal position that there cannot be any estoppel against law. As such it is the legal right of the petitioner as provided in the Regulations that it can directly approach the broadcaster for the channels (MTV & Nickelodeon) as its exclusive agent had failed to provide these channels to the petitioners.

15. During the pendency of the matter before us, time was given to the parties on their request to take the process of dialogue and negotiations further on terms that would appear to be reasonable to both sides, however no agreement could be arrived at and the parties preferred to await adjudication on the matter by this Tribunal. Reservations were however expressed by the Respondents in regard to jurisdiction of TDSAT to decide this matter, Learned Senior Counsel of the Respondent, Dr. Abhishek Singhvi also requested that the Tribunal may also await the outcome of the decision of the Hon’ble Supreme Court in the Appeal filed against the order of this Tribunal in the Sea TV case. Taking into account all the circumstances and the fact that the Hon’ble Supreme Court had not stayed the order of this Tribunal in the Sea TV case, we considered it appropriate to hear the matter and give our decision.

16. We now take up for consideration whether the stand taken by the Respondents whereby petitioners were asked to take all the 11 channels of ‘One Alliance’ bouquet from Respondent No.2 for availing of the ‘MTV’ and ‘Nickelodeon’ channels of MTV belonging to Respondent No.1 and which formed part of the ‘One Alliance bouquet’, was in breach of the Interconnection Regulations.

17. According to the Petitioners the conduct of Respondent No.2 in creating a multi-broadcaster bouquet of 11 television channels and refusing to offer channels of a broadcaster on an individual, a la carte, basis amounts

to imposing unreasonable conditions for supply of signals which is a violation of Clause 3.2 of the Regulations. The petitioners have contended during the course of arguments that a bouquet of channels is permissible as long as all the channels in the bouquet are owned by the broadcaster, but a multi-broadcaster bouquet is impermissible.

18. The admitted facts in this case clearly indicate that Respondent No.2 acting as agent/intermediary of Respondent No.1 has in effect declined to provide signals of Respondent No.1 to the petitioner mainly on the plea that these signals can only be given as part of a bouquet of 11 channels and not otherwise and further that this was in accordance with the industry norm worldwide. Further we find that Clause 3.4 entitles the petitioners to approach Respondent No.1 for obtaining signals directly for the said channels.

The facts of the case indicate that petitioner did approach Respondent No.1 in this regard but did not succeed in getting the signals. It seems that Respondent No.1 also continued to take the line that Petitioner No.1 should accept the bouquet being offered by Respondent No.2.

19. We have heard learned counsels of both sides extensively on this matter. Learned Senior Counsel Dr. Abhishek Singhvi appeared for both Respondents 1 & 2 and justified the offering of a multi-broadcaster bouquet and stated that the entire industry functioned on the basis of multi-broadcaster bouquets and this should be accepted by the petitioners and this Tribunal should also uphold the validity of this arrangement. He also argued that there was no question of discrimination in this case as the Petitioner was the only DTH operator in the country seeking pay channels from broadcasters and that Respondent No.2 was offering the channels contained in the 'One Alliance' bouquet to all distributors and Cable operators without any exception. It was argued on behalf of the Respondents that the 'One Alliance' bouquet constituted an integrated package which could not be split up for purposes of distribution.

20. According to Shri Maninder Singh, learned counsel for the petitioner this approach and stand taken by Respondents 1 & 2 is clearly violative of the Interconnect Regulation Clauses 3.2, 3.3 and 3.4.

Learned counsel for the Respondents drew our attention to this Tribunal's decision in *M/s Mewar Channel vs Star India Pvt. Ltd* (Petition 11(c) of 2005 decided on 24/12/2005) wherein it has been observed by the Tribunal that bundling of channels has not been addressed in the Regulations and this goes to show that offering a multi-broadcaster bouquet and refusal to offer

individual channels would not be a violation of the Regulations. According to senior counsel this decision is binding on the Tribunal.

21. Extensive arguments were also put forward on behalf of the respondents to show how the commercial offers made on their behalf to the petitioners were very reasonable. On the other hand it was argued with equal vehemence on behalf of the petitioner that the terms offered were extremely unreasonable and therefore unacceptable.

22. We have gone through the pleadings and carefully considered the arguments. While it may be true that the bundling of channels has not been addressed in the Regulations, if we read the language of Clause 3.2 a duty has been cast on every broadcaster to provide signals on request, on non-discriminatory basis to all distributors of TV channels and clearly Petitioner No.1 as Direct to Home Operator comes in the category of distributor. Under Clause 3.3 a broadcaster like Respondent No.1 can provide the signals through a particular designated agent or intermediary. However a responsibility is cast on the broadcaster that when signals are provided through a agent or intermediary, the broadcaster is to ensure that the agent/ intermediary acts in a manner consistent with the obligations placed under the regulations and it should not be prejudicial to competition and a time limit has been provided for the agent to respond to the request of the distributor.

23. In the instant case the facts show that the agent of the broadcaster, namely, Respondent No.2 of the broadcaster insisted that the signals sought by the petitioner would be available if it accepts the signals of the entire bouquet of 11 channels i.e. of the 2 channels belong to Respondent No.1 as well as 9 other channels belong to other broadcasters. Since this was not acceptable to the petitioner he approached Respondent No.1 again but it could not succeed as it appears that Respondent No.1 was reluctant to de-link his channels from the bouquet of 'One Alliance'. We have carefully considered our observations in the Mewar Channel case referred to by the respondents. In that case we had only held that regulations seem to be silent on the question whether a cable operator could pick and choose any channels from the bouquet of a broadcaster and had held that for want of regulatory clarity in this regard he would be required to accept the entire bouquet of the broadcaster from the MSO/Broadcaster. That apart, in the case of Mewar Channel what was sought to be refused was the signals of a single broadcaster and not the signals of a multi-broadcaster bouquet. Therefore in our view the principles laid down in Mewar Channel case cannot be extended to the situation existing in the present case where an agent who is common to a

number of broadcasters is forcing the distributor to accept the channels of all the broadcasters.

24. For the reasons stated above we are of the opinion that an agent or a distributor of multi-broadcasters cannot compel the receiver of signals to compulsorily receive a multi-broadcaster bouquet. If a receiver of signals demands a bouquet of any single broadcaster of which the supplier of bouquet is an agent or distributor, he shall give such bouquet of a single broadcaster, if so desired by the receiver of the signals.

25. We do not find ourself in agreement with the Learned Counsel for the Petitioners that the order of this Tribunal in the Sea TV case would preclude the appointment of Respondent No.2 as an agent by Respondent No.1. Our understanding of the matter before us is that Respondent No.2 is not engaged in re-transmission of signals and is not performing the functions of distributor as defined in the Regulations and is only performing the function of an agent of Respondent No.1, apart from being agent of some other broadcasters.

26. We are also of the view that supply of signals to a DTH platform by a broadcaster / agent / intermediary needs to be distinguished from distribution of signals to an MSO. Whereas in the case of DTH system it is always possible through a centralized monitoring facility to know the identities of channels that have been transmitted and downlinked from the satellite, in the case of cable transmission such a centralised monitoring is presently not possible. We do not therefore see any technological constraints in making available the requisite signals to the Petitioners from the 'One Alliance Bouquet.'

We do not wish to go into the question that other Agents of Broadcasters managing a multi-broadcaster bouquet, including a sister company of Petitioner No.1 are also adopting the same approach and practice as Respondent No.2 as in our view two wrongs do not make one right. Besides, the exact facts and circumstances under which the other multi-broadcaster bouquets are being provided are presently not before us.

27. We are of the view that in the totality of the facts there has been a clear denial of signals on the part of Respondent No.1 to the petitioner and this constitutes violation of Clause 3.2 of the Regulations. We do not consider it necessary to go into the details of the terms offered by either side during the course of their negotiations in regard to the signals of the 'One Alliance bouquet'. The petitioner has given some figures regarding the rates of the

channels of Respondent No.1 when supplied to the Cable Television Network and has given some projections on how these could form the basis for the rates in relation to his DTH platform but we do not consider it necessary to go into these aspects. We consider it sufficient at this stage to conclude that Respondent No.1 has been in breach of Clauses 3.2 and 3.4 of the Regulations and we direct Respondent No.1 to enter into negotiations with the petitioners regarding the terms under which signals which have been requested by Respondent No.1 for his DTH platform can be made available by Respondent No.1 and we also direct that these terms should be reasonable and non-discriminatory. We give to the parties 30 days time for this purpose. In case the terms are considered inequitable and unreasonable or without any reasonable basis the parties would be free to approach the Tribunal for resolution of the dispute and relief, if any, in this regard. M.A.No.225 of 2005 also stands disposed of in view of our above order.

28. The petition is accordingly allowed with no order as to costs.

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(N. Santosh Hegde)
Chairperson

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(Vinod Vaish)
Member

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(D.P.Seohgal)
Member