

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

DATED 3rd JULY, 2007

Appeal No.1(C) of 2007

M/s NEO Sports Broadcast Pvt. Ltd. ...Appellant

Versus

Telecom Regulatory Authority of India ...Respondent

BEFORE:

**HON'BLE MR. JUSTICE ARUN KUMAR, CHAIRPERSON
LT.GEN. D.P. SEHGAL(RETD.), MEMBER**

For Appellant : Mr. A.S.P.I. Cheno, Senior Advocate with
Mr.Gopal Jain, Ms.Kanika Agnihotri and
Ms.Mridul Sharma, Advocates

For Respondent : Mr.Meet Malhotra with Mr.Ravi S.S.
Chauhan and Mr.B.K.Roy, Advocates

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ORDER

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1. M/s NEO Sports Broadcast Pvt Ltd. has filed this Appeal u/s 14B of the TRAI Act, 1997 against Telecom Regulatory Authority of India (TRAI) for setting aside the impugned direction dated 11.01.2007 issued by TRAI u/s 13 of the Telecom Regulatory Authority of India Act (hereinafter called 'the Act') and also for setting aside the tariff order dated 31.07.2006 (No. 5/06) being the Telecom (Broadcasting & Cable) Services Second Tariff Order.

2. The appellant takes stand that it has a bouquet of two channels, NEO Sports and NEO Sports Plus, which are basically cricket-centric. The respondent had fixed for each of these two channels a-la-carte price of Rs.49.50 but for the bouquet, comprising both the channels, a price of Rs.58.50 was fixed. The respondent TRAI has vide the impugned direction, reduced price of the appellant's bouquet of channels from Rs. 58.50 to Rs. 37.25. According to appellant, the

reduction has been done without taking into account the fundamental difference between the cricket centric channels of the appellant and other sports channels.

3. The appellant also states that the impugned direction cannot be sustained in law because :-

(a) The impugned order is passed under Section 13 of the Act. Whereas the TRAI cannot fix tariffs u/s 13 of the Act. Under Section 13, the TRAI can only give a direction in respect of matters prescribed under Section 11(1)(b) of the Act;

(b) The impugned direction is in violation of settled principles of natural justice and fairness as it has been made without giving adequate and fair opportunity to the appellant;

(c) It is contrary to the mandatory requirement of Section 11(4) of the Act, by which the respondent is required to ensure transparency in exercising its powers.

4. On merits the appellant has argued that the respondent has failed to disclose any factors or methodology on the basis of which it has reduced the price of appellant's channels from Rs.58.50 to Rs.37.25. To support its case, the appellant has quoted the current price of ESPN Star Sports channel which is Rs.42.50, much higher than the price fixed by the Regulator in case of appellant's channels.

5. We heard the appeal both on grounds of its sustainability of the impugned order under Section 13 of the TRAI Act and also on merits of the case.

Sustainability

6. The impugned direction has been issued u/s 13 of the TRAI Act. Section 13 is reproduced as under:-

“The Authority may, for the discharge of its functions under sub-section (1) of section 11, issue such directions from time to time to the service providers, as it may consider necessary:

[Provided that no direction under sub-section (4) of section 12 or under this section shall be issued except on the matters specified in clause (b) of sub-section (1) of section 11.]”

For ease of understanding this, Sections 12(4) and 11(1)(b) are reproduced as under :-

“Section 12(4). *The Authority shall have the power to issue such directions to service providers as it may consider necessary for proper functioning by service providers.*

Section 11(1)(b). *The Authority shall discharge the following functions, namely:-*

- (i) ensure compliance of terms and conditions of licence;*
- (ii) notwithstanding anything contained in the terms and conditions of the licence granted before the commencement of the Telecom Regulatory Authority of India(Amendment) Act, 2000, fix the terms and conditions of inter-connectivity between the service providers;*
- (iii) ensure technical compatibility and effective inter-connection between different service providers;*
- (iv) regulate arrangement amongst service providers of sharing their revenue derived from providing telecommunication services;*
- (v) lay-down the standards of quality of service to be provided by the service providers and ensure the quality of service and conduct the periodical survey of such service provided by the service providers so as to protect interest of the consumers of telecommunication service;*
- (vi) lay-down and ensure the time period for providing local and long distance circuits of telecommunication between different service providers;*
- (vii) maintain register of interconnect agreements and of all such other matters as may be provided in the regulations;*
- (viii) keep register maintained under clause (vii) open for inspection to any member of public on payment of such fee and compliance of such other requirement as may be provided in the regulations;*
- (ix) ensure effective compliance of universal service obligations.”*

7. A mere reading of above Sections of the Act makes it very clear that no direction can be issued by TRAI under Section 13 of the Act except on matters specified under Clause 11(1)(b).

The respondent had vide Gazette Notification dated 01.10.2004 issued a Tariff Order u/s 11(1) (b)(ii), (iii), (iv) and 11(2). This exercise was basically tariff fixation which as per the Act was correctly done in exercise of powers vested in TRAI under Section 11(2) of the Act. Subsequently, TRAI issued notification dated 31.07.2006 exercising its powers under the same Sections as in the main tariff order whereby it amended its original tariff order by incorporating additional clause 3B as under :-

“In determining the similarity of rates of similar channels referred to in the provisos below clause 3 above the following factors shall be taken into account:-

- (i) the genre and language of the new pay or converted Free to Air to pay channel;*
- (ii) the range of price ascribed to the channel of similar genre and language in the price of a bouquet(s) and prices of bouquet(s) that existed as on 28.12.2003; and*
- (iii) the range of prices of othe individual channel of similar genre and language as existing in the cities where CAS is in existence.”*

8. In the above amendment to original Tariff Order the respondent has basically introduced factors to be taken into account for determining the rates of similar channels or channels similarly placed. This had to be done because original Tariff Order froze the prices of channels as existing on 26.12.2003. A need was felt to fix prices of channels introduced later as is in the instant case and also for free to air channels to be converted into pay channels after 26.12.2004.

9. The submission on behalf of the appellant is that a reference to the impugned order will show that it is an exercise in price fixation and Section 13 of the Act under which order purports to have been passed does not confer any such power on the Regulator. Power to fix tariff is contained only in Section 11(2). The order is, however, not under Section 11(2) of the Act. On merits it was submitted that even if it was assumed that the order was passed under Section 11(2) of the Act, the same is bad on account of the fact that it has been passed without following Regulator's self-evolved procedure before passing the order. Secondly, it was submitted that the

Regulator failed to appreciate that the appellant's channels were cricket centric and, therefore, had a distinct identity which justified special price. Lastly, it was submitted on behalf of the appellant that the impugned direction was bad on account of failure of the Regulator to disclose methodology and data taken into consideration while passing the same.

10. The learned counsel for the respondent tried to explain the position while conceding that mention of Section 13 in the impugned order was not correct. According to him the preface of the impugned order refers to Tariff Order dated 01.10.2004 and the amending Order dated 31.07.2006. The principal Tariff Order dated 01.10.2004 was the source for the impugned order and, therefore, the impugned order could not be said to be a fresh exercise of fixation of tariff. Moreover, for individual channel the TRAI could not be expected to go into the gamut of entire procedure before tariff fixation every time. The Explanatory Memorandums to the principal Tariff Order envisage that the Authority will have the power to review information regarding channels introduced after 26th December, 2003, the date of freeze of tariff of channels. Intervention by the TRAI in such cases of introduction of new channels is also permitted, if found necessary. The principal Tariff Order also provides that the rates for channels introduced after 26.12.2003 would be similar to the rates of similar channels as prevalent on the said date. The amendment of the Tariff Order dated 31.07.2006 merely seeks to clarify the meaning of similarity of channels and gives yardstick for determining the same. Thus, according to the learned counsel for respondent, the exercise undertaken by the TRAI was in accordance with the Tariff Orders and could not be challenged on any ground.

11. The appellant's channels were launched subsequent to the two Tariff Orders on 01.10.2006 and 01.11.2006. According to the learned counsel for respondent, the Authority was entitled to consider the price fixed by the appellant in the light of the Tariff Orders and intervene on the price front if necessary. It is the case of respondent that the impugned order is a mere intervention. The Authority's right to intervene was accepted by the appellant when in

its reply dated 20.10.2006 the appellant stated that “no intervention is called for by the Authority”. These words found in the reply of the appellant show that the appellant was conscious of the fact that the Authority was considering intervention. No objection was raised about the power to intervene.

12. It was also argued that the impugned order cannot be sustained under Section 11(2) of the Act. For an order under Section 11(2) certain procedure has to be followed which has not been done in the present case. The learned counsel for appellants concedes that since the matter involved only two channels a full-fledged exercise which includes public hearings etc. was not required yet at least the appellant should have been made aware of the case it had to meet so that the appellant could effectively represent before the Authority. It is a serious exercise of power involving serious consequence for the appellant. The reply of the respondent in this regard is that this was a mere intervention and not an exercise of tariff fixation under Section 11(2) of the Act. Power to intervene is envisaged in the principal Tariff Order dated 01.10.2004. The exercise became necessary in view of the fact the appellant’s channels were introduced after the Tariff Order and, therefore, prices of individual channels had to be considered by the Authority and if intervention was necessary the same was to follow. In the present case the prices fixed by the appellant for its new channels were found to be high about which a complaint was also received which was brought to the notice of the appellant. The appellant filed its reply treating this to be an exercise by way of an intervention and the impugned order followed. Therefore, the respondent is not invoking Section 11(2) for justifying the impugned order. Coming to the objection regarding the procedure followed by the TRAI, we find it to be reasonable in cases of individual channels when the only question was of price for the channels. The appellant filed a detailed reply which the respondent submits it had considered before passing the impugned order. The appellant had been told about the objection of its price being very high. The respondent further submits that it had taken into consideration other material which for reasons of commercial confidentiality could not be disclosed to the appellant. In these circumstances we

are of the view that broadly the procedure followed by the Authority in the facts and circumstances of the case cannot be faulted.

Next is the claim of the appellant that its channels are cricket-centric and, therefore, have a special identity and should have been treated as such instead of being treated as a Sports Channel in general. According to the appellant its channel NEO Sports is totally for cricket while its other channel NEO Sports Plus is a general Sports Channel. The appellant has priced both the channels equally. This in our view destroys the argument of the appellant about its channel having a distinct identity. The appellant has itself equated the two channels when one of them is totally cricket-centric and the other is not so.

13. The respondent on this point clarified that sports channel is sports channel and there are other sports channels also which are cricket-centric. The respondent's submission is that there may be times when live cricket is on and some times when it not on. Therefore, the cricket-centricity cannot be assured 24 hours all through 365 days in a year. According to the respondent the content and type of sports can vary from time to time. There is time when viewers are keen to watch tennis or football world cup. We do not accept the contention of the appellant for treating its channels as a specialised sports channels. We feel that the broad classification of genre and sports channel has to be interpreted based on the content of the channel and similarity worked out with such meaning/interpretation. The appellant's case therefore does not have much strength on this issue.

14. With the background of the above facts, it is the submission of the learned counsel for the respondent that the mere mention of the word "direction" and of Section 13 of the Act in the impugned order does not take away the fact that the order challenged by the appellant is one made under the power of intervention left with the TRAI under the relevant provisions of the statute and the principal Tariff Order dated 01.10.2004 and the Explanatory Memorandums.

15. The learned counsel for the appellant conceded the legal proposition that a mere mention of a wrong provision need not invalidate an order which is otherwise valid. If there is power, wrong mention of source of power, does not nullify the order. He, however, submitted that the present case is not that type. Here the impugned order mentions Section 13 twice. In the affidavit filed in response to the present petition the same thing has been repeated. Therefore, according to him this cannot be said to be a case of wrong mention of provisions.

16. We have noted the rival contentions on the point. We, however, need not express final opinion on it in view of the fact that we propose to remand the case to the TRAI for a different reason.

17. The next point about the fixation of price brought about by appellant is that it was not given due hearing for deciding the price of its channels by the respondent. According to the appellant the price was fixed in an arbitrary and unilateral manner by the respondent. The respondent however stated that a letter was written to the appellant asking for details of the methodology it adopted for fixation of price of its channels. In the reply of the appellant this aspect was not dealt with. No information was forthcoming. Therefore, the respondent had to rely on material of other similar channels and interconnect agreements and viewership to arrive at the price of appellant's channels. He said that it was done after a detailed exercise and deliberations taking into account all the factors as per the Tariff Order. It was submitted on behalf of appellant that there was a proper procedure laid down for fixation of price where consultation process had to be followed which was not done. The respondent however submitted that this process was followed for initial fixation of the prices when the principal Tariff Order was issued. Mr. Malhotra stated that no detailed consultation process can be undertaken for fixing price of individual channels as and when they are introduced. These have to be fixed as per the norms keeping in mind the prices of other similar channels and content

thereof. He said that this exercise was correctly done. We feel that the respondent's stand is justified in the facts of the case and there was no need for detailed consultation process. Had the appellant given detailed work-sheet based on which it decided the price of Rs. 58.50, the respondent could have taken those facts into account, while reducing the price. This data however was not available since it was not provided by the appellant.

18. The appellants defaulted in not giving this data of fixation of price or factors which weighed in favour of its decision of arriving at price of Rs. 58.50 for its bouquet.

19. The appellant however states that the range of prices of sports channels varies from Rs. 10 for Zee Sports to Rs. 14 for Ten Sports to Rs, 42.50 for ESPN. The appellant's point is that the respondent has not kept in mind these prices and fixation of price of Rs. 37.25 for its bouquet is arbitrary. The appellant's contention is that its channels are wholly cricket-centric and content-wise deserved more prices than the price of ESPN Sports channel. The appellant further stated that the respondent had complained to it about high price of its channels and asked for some clarifications vide letter dated 09.10.2006 which was replied on 20.10.2006. Mr. Chenoy, the senior counsel for the appellant argued that the appellant has submitted six points for consideration by the respondent which were completely ignored and after 80 days from that date, this impugned direction was issued which itself is legally untenable. The respondent's answer is that it has done a detailed exercise taking into account the prices of various sports channels viewership, number of interconnect agreements and then only arrived at this price of Rs.37.25. The learned counsel for the respondent could not answer as to why the price of individual channel was not fixed and the respondent fixed only the price of bouquet.

20. In the end we feel that the manner in which both parties have conducted themselves leaves something to be desired. The appellant did not submit its details as to how it fixed the prices of its channels when asked by the respondent and the respondent while fixing the price for the

bouquet failed to fix prices of individual channels and also failed to give the basis as to how it arrived at the price of Rs.37.25.

21. Without setting aside the impugned direction, we remand this matter back to the TRAI to reconsider the matter in the light of observations contained in this order and to pass a fresh order/direction. For this purpose -

- (a) The appellant must submit to the respondent details for fixing the rates of their channels at Rs.49.50 and Rs.58.50 for the bouquet immediately on issue of this order; preferably within two weeks;
- (b) The respondent must take into consideration appellant's justification of price fixation as also the other data available to it pertaining to other channels; and
- (c) Issue a fresh direction fixing the price of these two channels and bouquet of NEO Sports. While fixing such prices, TRAI must give basis of its fixation of prices.
- (d) The above exercise must be completed in 60 days' time.

22. The Appeal is disposed of with above directions.

.....**J**
(Arun Kumar)
Chairperson

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(D.P. Sehgal)
Member