TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL
NEW DELHI

DATED 31st MARCH, 2007

PETITION No.189(C) OF 2006
(M.A.Nos.90,100 & 116, 135 of 2006)

Tata Sky Limited
3rd Floor, Bombay Dyeing,
A.O. Building,
Pandurang Budhkar Marg,
Worli, Mumbai – 400 025
… Petitioner

Versus

1. Zee Turner Limited,
5th Floor, Radisson Plaza,
National Highway-8
New Delhi – 110 037 …Respondent 1

2 Zee Telefilms Limited,
135, Continental Bldg.,
Dr. Anne Besant Road,
Worli, Mumbai – 400 018 …Respondent 2

3. Turner International India Pvt.Ltd.,
S-2 Level, Block-F,
International Trade Tower,
Nehru Place,
New Delhi-110019 …Respondent 3

4. ASC Enterprises Limited,
J-27, South Extension-I,
New Delhi-110 049. …Respondent 4

BEFORE:

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

For Petitioner : Mr.Ramji Srinivasan,
Mr.Prashant Kumar Mishra,
Ms.Mandakini Singh,Advocates

For : Mr.Maninder Singh,

Respondent Nos.1,2&4 : Mr.Yoginder Handoo, Mr.Nitin Aggarwal,Advocates

For Respondent No.3 : Mr.Navin Chawla, Mr.Janmejay Rai,Advocates

ORDER

The petitioner has been licensed by the Ministry of Information & Broadcasting, Government of India to establish and provide Direct-to-Home (DTH) Service to subscribers across India. The licence is dated 24th March, 2006. In order to operate its DTH Service, the petitioner has to obtain rights for channels from the broadcasters owning the channels. Some broadcasters appoint distributors for their channels. In such an event the DTH operator has to approach the distributor. Respondent 2 M/s. Zee Telefilms and respondent 3 M/s. Turner International Inc. own various T.V. channels developed by them. Respondents 2 and 3 also enjoy right to distribute in India some channels which belong to others. Respondents 2 and 3 have appointed respondent 1 as their agent in India for some of their channels. For remaining channels under their umbrella, they deal themselves directly. It is an undisputed fact that respondent 1 does not have distribution rights for all the channels under the umbrella of respondent 2 or respondent 3.

It is the case of the petitioner that it had approached respondent 1 for providing signals of channels belonging to respondents 2 and 3 for which respondent 1 had distribution rights for purposes of inclusion in its DTH service. Further it is the case of the petitioner that neither respondent 1 nor its principals, respondent 2 and respondent 3 were providing signals, of the channels to the petitioner for which respondent 1 had the rights of distribution inspite of various efforts made for this purpose by the petitioner. This according to petitioner amounts to violation of relevant provisions of the Regulations made in this behalf. It is the case of the petitioner that negotiations with respondent 1 were for 19 channels included by it in its bouquet 1 and bouquet 2 for which respondent 1 had fixed the consolidated rate of Rs.83.85 per subscriber per month. The petitioner approached this Tribunal with following prayers:

"(a) declare the Respondents herein as defaulters in terms of Government of India Order dated 1.6.2005, having refused access of their channels on a non-discriminatory basis to the Petitioner as laid down in the applicable Regulations of TRAI;

(b) direct the Respondents to discharge their statutory obligations under the Interconnection Regulation of TRA dated 10.12.2004 to provide signals of its channels to the Petitioner on reasonable terms and conditions which are found to be fair, non-discriminatory and reasonable by this Hon'ble Tribunal;

(c) …….

(d) …….

(e) ……."

The stand of respondent 1 in response to the above prayers of the petitioner is that petitioner never approached the respondent for purposes of obtaining distribution rights of the channels for which respondent 1 was authorized in accordance with regulations and therefore, the petition was not maintainable. On merits respondent 1 has set up a case that it has authority/distribution rights for 32 channels belonging to the respondents 2 and 3. The 32 channels have been placed by respondent 1 in 5 bouquets and if the petitioner was interested in taking the channels from respondent 1, it had to take all the 32 channels comprised in 5 bouquets and the petitioner could not pick and choose so as to take a lesser number of channels. While supporting their respective stands, the learned counsel for the parties have raised several issues which we will endeavour to deal with henceforth.

First we would like to dispose of the objection raised by respondent 1 that the petitioner never approached respondent 1 for obtaining the rights of the various channels under the agency of respondent 1 in accordance with the Regulations. Therefore, this petition is not maintainable. This plea appears to have been raised as an afterthought because while dealing with the main issue about the number of channels being negotiated between the parties we will have occasion to refer to correspondence and e-mails exchanged by the parties which would show that such an objection was never taken by the respondent and in fact, both the parties were actually negotiating about the number of channels. Having gone ahead with the negotiations regarding the main issue as to which channels were to be subject matter of the arrangement for a

considerably long time, it does lie with the respondent to raise this issue at this stage. Moreover, we find this objection to be totally misconceived. This can be demonstrated from the fact that the respondent has taken the date of 8th July, 2006 letter of petitioner to the respondent as the starting point for a request for providing channels. A reference to this letter shows that it only recounts the history of events and the various requests made earlier by the petitioner to the respondents for providing distribution rights of their channels to the petitioner. The grievance made out by the petitioner in the said letter is that the respondent 1was delaying the question of providing rights of its channels to the petitioner. In fact, in para 12 of the letter the petitioner says:

"12. Your actions so far tantamount to Denial of Request for Broadcasting signals.

Further the following paras of the said letter are clearly indicative of the position. It is stated as under:

"13. To delay matters, we were unexpectedly informed at the meeting on the 13th June, 2006, that some Zee Channels would be negotiated separately by Mr. Himanshu Mody and he would contact us with terms the following day. Till date, we have not received any constructive proposal from Mr. Himanshu Mody, who purportedly represents some Zee channels.

14. Further, we have received no assurance from you that the only limited written offer made by you on the 26th April, 2006 is non-discriminatory vis-à-vis the terms already contracted by you with Dish TV to whom you have been providing signals over the last 3 years.

15. We are also not sure about your right to represent some other channels, such as Cartoon Network, CNBC, HBO etc., which you were requested to clarify. CNBC for example, up until last month had been negotiating directly with Tata Sky.

16. In the circumstances, we would like to reiterate that the process of our follow up with you for broadcast content has not resulted to any meaningful response. It has also not resulted in any constructive"

Finally, in the concluding para of the said letter the petitioner had to say this :

> "17. In the above circumstances, we are constrained to note that unless we receive any meaningful response immediately, your actions would leave us with no option, but to pursue other remedies that may be available to us."

This shows that the letter dated 8th July, 2006 of the petitioner was virtually a final notice from the petitioner to the respondent alleging dilatory tactics on the part of the respondent 1 in dealing with the request of the petitioner for supply of signals. The request had been pending with respondent 1 for long. In response to the said letter, respondent 1 stated vide its letter dated 17th July, 2006 addressed to the petitioner(Annexure R1/4):

> "We have always sincerely desired to continue with the said process."
> ".....it is stated that contrary to your perception sufficient progress has been made at our end in considering your proposal. We have always sincerely desired to continue with the said process towards its finalization for a mutually negotiated settlement....."

In the said reply, no objection about failure to make a demand as per Regulation has been taken. Rather the stand is that proposal of petitioner (Tata Sky) for channels was being negotiated and a settlement was expected. In the end the letter says that the respondent was looking forward to finalise a negotiated settlement as expeditiously as possible.

This exchange of letters leaves no scope for the argument that no formal request for channels had been made by petitioner to respondent. We may add that apart from the above correspondence, various other e-mails have been exchanged between the petitioner and respondents, which are on record, to show that stage for request for channels had passed as the parties had reached the next stage of settling terms of the arrangement which was going to be.

This objection regarding petitioner not having made a request for supply of signals as per regulation was for the first time made in the short reply filed by respondent No.1 before the Tribunal in the present proceedings on 24th July, 2006.

Looking at this issue from another point of view, we find no substance in the point raised by respondent 1. Assuming that a formal request for supply of signals as per Regulation had not been made by the petitioner to respondent 1, when the parties are negotiating on this very issue for a long time without any such objection, the objection loses all its force. Thus, it clear to us that this objection has been raised only as an afterthought in a bid not to let the petition

proceed before this Tribunal. We deprecate such a malafide attempt on the part of respondent 1. The objection stands rejected.

The next question is about the number of channels which were being negotiated by the parties. According to petitioner at the relevant time when negotiations were going on, it was believed that respondent No.1 was authorised only for about 19 channels. Zee Turner never disclosed the exact number of channels inspite of being asked about it several times. On the other hand, the case of the respondent is that the parties were negotiating for 32 channels for which Zee Turner was authorized and the petitioner has to take all the 32 channels comprising 5 bouquets in view of the judgment of this Tribunal dated 14th July, 2006 in ***A.S.C. Vs. Star.*** Thus, there is total divergence in the stand of the parties on this question. Fortunately, there is evidence available on record in the shape of some e-mail messages exchanged between the parties and which are not disputed by the counsel for the parties. These e-mail messages throw light on this controversy and in our view, render valuable assistance for deciding the issue. It is often said "men may lie, but documents do not". How very apt and relevant is this saying for our present purpose.

Before we refer to the e-mails we would like to point out that in these e-mails following names occur:

Himanshu Mody,
Anshuman Misra and
Lesley.

Mr. Himanshu Mody is the spokesman of Zee Telefilms, respondent 2 while Anshuman Misra is the Managing Director of respondent 3 and represents the said respondent as well as respondent 1 as he is also spokesman of respondent 1, being its Director. Sometimes he has represented Zee Turner in the e-mails. The first e-mail in point of time is of 26th April, 2006 from Anshuman Misra to petitioner in which on behalf of Zee Turner(respondent 1), he is making an offer to Tata. The subject of the letter is stated to be Zee Turner channels. He writes to Lesley of Tata Sky referring to the exploratory meeting regarding carriage of "Zee Turner channels" on Tata Sky DTH platform. Then he goes on to give an offer which includes quotation for all Zee Turner channels at the rate of Rs.83.85 per subscriber per month. The rate Rs.83.85 is admittedly the rate for 19 Zee Turner channels comprising bouquet 1 and bouquet 2.

This is as per respondent 1's own document which is a list filed by it as Annexure R1/24. Thus, the offer of respondent 1 is for 19 Zee Turner channels at the rate of Rs.83.85. There are more e-mails exchanged between the parties. Even at this stage Tata Sky had indicated to Mr. Anshuman Misra, representing Zee Turner, respondent 1, vide Tata Sky's e-mail dated 17.05.2006, copy of which is on record, stating that Tata Sky is not in a position to take all Zee Turner channels due to limitation of its satellite capacity. It is also stated in this e-mail that the cable rate of Rs.83.85 was the rate for combination of two bouquets and the rate was a bit high and therefore, not fair. This is followed by another set of e-mails dated 16th June, 2006 and 20th June, 2006, copies whereof have been placed on record by the respondent 1. Noting that Tata Sky, the petitioner, was interested in some channels other than those which were under authority with Zee Turner, is an e-mail from Mr. Himanshu Mody of Zee Telefilms, respondent 2, sent on 16th June, 2006 to Ms. Lesley of Tata Sky which runs as under:

"Dear Lesley,

Hope India is treating you well.

I believe your talks with Zee Turner are progressing for carriage of their channels on Tata Sky platform

I actually wanted to discuss with you carriage of channels that Zee Turner is not in dialogue with you.

Let me know if sometime next week is good time to meet and discuss this.

In response Lesley sends e-mail to Himanshu Mody on 19th June, 2006 stating "……can you confirm what channels you have authority to negotiation for, we are trying to get it straight in our minds".

Himanshu Mody responds to this on 20th June, 2006 stating:

"I will discuss channels that are not part of the Zee Turner bouquet 1 or 2 these are channels like Zee Sports, etc Music and Punjabi, Zee southern channels, some of the premium channels that as of now are available on Dish TV only".

These e-mails make it absolutely clear that Zee Turner, was discussing only bouquets 1 and 2 which it was authorized for, at the rate of Rs.83.85 per subscriber per month. Both Misra and Mody use the words "Zee Turner channels" in these e-mails. For Zee Turner channels

Misra quotes the rate Rs.83.85 per subscriber per month. Mody specifically refers to Zee Turner channels as Bouquets 1 and 2. Both these read together make it clear that Zee Turner channels under negotiations were its Bouquets 1 and 2. At that stage exact number of channels in bouquets 1 and 2 was not being spelled out inspite of request from petitioner. It is also not their case that the rate Rs.83.85 is for all the 32 channels. Rather according to them Rs.83.85 is the rate of 19 channels under bouquet 1 and bouquet 2. It is important to note that inspite of Lesley of Tata Sky, specifically asking for details of channels, there is no response from Mody. Another aspect which we want to emphasize here is that during the course of hearing we repeatedly asked the counsel appearing for respondents, if there is any documentary evidence to show that Zee Turner had offered 32 channels comprising 5 bouquets to the petitioner at any time before the TDSAT judgment dated 14th July, 2006 in Petition No.136 (C) of 2006 ***ASC Enterprises Ltd.*** vs.***Star India Private Ltd.***. The learned counsel was frank enough to state that there was none. The parties have placed before us a bulky record but there is nothing therein which supports this argument being advanced by counsel for respondents that Zee Turner was offering 32 channels to the petitioner during negotiations prior to the judgment of this Tribunal dated 14th July, 2006. There is complete silence as to when 19 channels of respondent 1 became 32. It appears that respondents got wiser after the TDSAT judgment, believing that on its basis the DTH operator could be asked to take all the channels which the broadcaster had to offer. Reason for us to think so is that in the short reply filed in these proceedings on 24th July, 2006, the respondent 1 for the first time stated that it was authorized to provide signals of 32 channels at a rate of Rs.149.85 excluding taxes. The sequence of events clearly shows that after the said judgment of this Tribunal of 14 July 2006 the respondents for the first time started saying that they were authorized for 32 channels as they wanted to thrust all the 32 channels on the petitioner.

The respondent tried to build an argument that petitioner was interested in all the 5 bouquets of respondent 1 on the basis that petitioner had asked for 3 channels which were not part of bouquet 1 and bouquet 2 and which were part of the other bouquet of respondent 1 i.e. bouquet 3, bouquet 4 and bouquet 5. This argument does not stand scrutiny when examined closely. At the relevant time, the respondent had not, inspite of being asked for it, disclosed that it had 3 other bouquets and the 3 other channels being asked for by the petitioner formed part

thereof. Secondly, it will be recalled that in the e-mails quoted above, Mr. Himanshu Mody of Zee Telefilms, i.e. respondent 2, was asking the petitioner to approach him for these 3 channels because in one of the e-mails he has said that he would discuss channels other than those which were part of Zee Turner bouquet 1 and 2. From this, it is clear that the respondent 1 was at the relevant time not authorized for the other 3 channels. The respondent 1 has not disclosed when he came to be authorized to deal with the rest of the channels which were now forming part of its bouquets 3, 4 and 5. These bouquets appear to have been added to the bandwagon of respondent 1 subsequent to the filing of present petition and in order to thrust them on the petitioner placing reliance on the TDSAT judgment dated 14th July, 2006.

From the facts disclosed above, it is clear to us that respondent 1 was at the relevant time authorized only for bouquets 1 and 2 which comprised 19 channels only. It is further clear that the parties were negotiating only for 19 channels and the subsequent stand of respondent 1 about 32 channels being offered to petitioner during negotiations is an afterthought and totally incorrect. The documents on record do not support this stand. Rather the documents make it clear that the parties were negotiating only for 19 channels for which even the rate was quoted at Rs.83.85. It is admitted case of the respondent that this rate of Rs.83.85 is the rate for its 19 channels comprising bouquets 1 and 2 only. We, thus, reject the argument of the respondent 1 that 32 channels were being negotiated between the parties prior to the stage of filing of the petition. We hear for the first time after filing of this petition that Zee Turner was authorised for 32 channels. They do not say since when. We hold that this stand of respondent 1 is totally false and we reject the same.

The learned counsel for respondent 1 argued that if today respondent 1 had 32 channels to offer, petitioner has to take them all. He submitted that the cause of action of the petitioner should be taken as on today when respondent 1 has 32 channels. Therefore, petitioner must take all. We are unable to agree. The cause of action on the basis of which the petitioner/plaintiff comes to court is a bundle of facts as exist on the date of filing of the petition/plaint. The cause of action cannot remain floating. It is a different matter that at the time of giving final relief, court may mould the relief by taking subsequent events into account, but that is a separate matter altogether. Cause of action is always based on the facts existing on the date of institution of a petition. Learned counsel for respondent cited a judgment of the Supreme Court in ***Om Parkash***

vs. ***Union of India*** [2006 (6) SCC 207] to support his argument. The following observations contained in the said judgment throw light on the issue:

> "It is settled law that "cause of action" consists of a bundle of facts, which give cause to enforce the legal inquiry for redress in a court of law. In other words, it is a bundle of facts, which taken with the law applicable to them, gives the plaintiff a right to claim relief against the defendant . It must include some act done by the defendant since in the absence of such an act no cause of action would possibly accrue or would arise. [See South East Asia Shipping Co.Ltd. v. Nav Bharat Enterprises (P) Ltd.]"

In our view reliance by the respondent on the said judgment is a result of misreading of the judgment. The judgment rather supports the proposition stated by us here. It is common sense. You cannot expect a petitioner to plead in his petition something which is yet to happen. He can plead only facts which exist on the day of filing the petition.

Next it was argued that in view of the judgment of this Tribunal dated 14th July, 2006, referred to hereinbefore, the petitioner has to take all the channels which the respondent has to offer. It is further stated that the said judgment is binding on this Tribunal. So far as this aspect is concerned, we may state that while deciding this case we are not deviating from the said judgment of this Tribunal. Therefore, we need not go into the question as to whether the said judgment is binding or not. In the facts before the Tribunal at the stage of the said judgment M/s. Star India, the respondent had two bouquets only. The petitioner wanted to take only one out of them. This Tribunal held that the DTH operator had to take all, that is, both bouquets which were offered by the broadcaster. In the present case the petitioner says he negotiated for two bouquets of Zee Turner. He is willing to take both bouquets 1 and 2 which were offered during negotiations. Therefore, this is not a case of any pick and choose. On facts, we have found that the other 3 bouquets i.e. bouquets 3, 4 and 5 have been added by the respondent 1 (making a total of 32 channels) subsequent to the filing of the petition and, therefore, we cannot permit respondent 1 to load the same on the petitioner. A broadcaster may keep on adding to its channels since nothing prevents it from doing so. But that does not mean that the DTH operator will have to take all subsequent additions. Today Zee Turner claims to have 32 channels. We have held that it had only 19 channels at the time of negotiations with petitioner and rest of the channels appear to have been acquired by respondent 1 after filing of this petition. If we hold

that petitioner must take all 32 channels, what happens tomorrow if respondent may acquire 32 more channels. Accepting respondent's plea will mean that petitioner will have to take those additional 32 channels also. While deciding the present case, there is no conflict with the decision of this Tribunal dated 14th July, 2006 in ***A.S.C. Vs. Star***.

While deciding the said case (***A.S.C. Vs. Star)*** the question of transponder capacity was not before this Tribunal and, therefore, there was no occasion to consider the same. For deciding the present case also the question of transponder capacity is not very material because undisputedly, the petitioner has some spare capacity at present. But it does not want to take all the channels of respondent 1 and exhaust its limited capacity. It is relevant and important that a DTH operator may not like to take all the channels of a particular broadcaster and exhaust its transponder capacity by taking unwanted channels. After all, the DTH operator is in business and it has to watch its business interest. These are commercial aspects which will have to be considered and adjudicated in an appropriate case. There is another aspect to this. If a DTH operator has to take all, including channels which are not in its commercial interest, it will have to pay to the broadcaster by way of charges for such channels. His expenses will increase which he will naturally pass on to the consumer. So ultimately the consumer will be the sufferer. We have only mentioned this aspect. It does not need to be decided in this case. The Telecom Regulatory Authority of India (for short "TRAI) is alive to this issue and wants to take it up as is evident from the Consultation Paper issued by it on 02.03.2007. Telecommunication including broadcasting are evolving areas where development is fast paced. Emerging issues need consideration expeditiously, if we have to keep consumer interest uppermost in our minds.

The learned counsel for the respondents advanced another argument in support of his contention that the petitioner must take all the 32 channels of the respondent No.1. For this he made a reference to Regulation 3.2 contained in TRAI notification dated 10th December, 2004. The regulation is reproduced as under:

> "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 a 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."

It is submitted that this regulation casts a duty on every broadcaster to provide on request signals of its TV channels on non-discriminatory terms to distributors of TV channels. This means that a broadcaster is required to provide all the TV channels which it has, to distributors on non-discriminatory terms.

This regulation does not directly help the respondents in as much as this is a reverse case where the broadcaster wants to give all his 32 channels to a distributor who does not want to take all his 32channels. The intention behind this regulation appears to be that the broadcasters should make available all that they have to every DTH Operator/MSO/Cable Operator who makes a request for the same in a non-discriminatory manner. This means that if a DTH operator gets all the channels on its platform, the consumer will be able to get what he wants from one source and he need not go to more than one DTH operator. The question, however, is Can a distributor pick and choose what he wants? The use of the words 'on request' may suggest that a seeker of channels may be in position to make a choice about what he wants from a particular broadcaster and he will get whatever he requests for. We leave this question open for decision in an appropriate case. It is a serious issue. In the present case the petitioner is willing to take all that respondent 1 had at the relevant time and all for which the parties negotiated for.

It appears to us that reference to the 'must provide' provision contained in Regulation 3.2 was made by the learned counsel for respondent in order to build an argument for a 'must carry' provision which he wants to read in clause 7.6 of the DTH Licence granted in favour of the petitioner by the Ministry of Information & Broadcasting, Government of India. Clause 7.6 provides:

> "the Licensor shall provide access to various content providers/channels on a non-discriminatory basis".

On the basis of this clause it is contented that the Licensee has to carry all the channels of a broadcaster on non-discriminatory basis. This according to learned counsel for respondent means that a distributor or a DTH operator like the petitioner must carry all the channels of a broadcaster. It is not disputed that there is no specific provision in the Regulations for 'must carry' concept. We are unable to read a 'must carry' provision in clause 7.6. A plain reading of clause 7.6 suggests that the obligation is cast on a Licensee to provide access to various content providers/channels on a non-discriminatory basis. As per this clause, therefore, the Licensee is not the seeker of channels. The broadcasters or the content providers have to approach the Licensee for providing access on its platform for their channels and then the Licensee is required to do so on a non-discriminatory basis. This clause also does not say that a Licensee must carry all the channels of a particular content provider. Therefore, we are unable to see how an argument that a Licensee must carry all the channels of a broadcaster can be, advanced on the basis of the provision contained in clause 7.6 of the Licence. Further, it must be noted that the interpretation suggested by the learned counsel for the respondent in clause 7.6 of the Licence is totally irrational because it overlooks the fact that it will choke the DTH operator if it has to carry all the channels of every broadcaster. A DTH operator naturally will provide access to every broadcaster because every broadcaster is supposed to have some popular channels which a DTH operator is likely to include on its platform. If a DTH operator has to take all the channels of every broadcaster, it may not be physically possible to do so. Moreover, if every channel has to be taken it means that it will have to be paid for. This will increase the cost for the DTH operator. Ultimately, the cost will get passed on to the consumer. If DTH becomes expensive consumers will keep away from it. It will not be able to compete with CAS or cable. Thus, such an interpretation of clause 7.6 may be anti consumer.

The learned counsel for respondent tried to buttress his argument about the 'must carry' provision which he wants to read in clause 7.6, by stating that even according to the TRAI, clause 7.6 of the License contains 'must carry' provision. We are unable to accept this submission because in the first instance TRAI does not say so. TRAI has simply reproduced clause 7.6 without giving its own interpretation for it. In fact, in the affidavit filed by the TRAI in these proceedings it is stated as under:

> "The Interconnection Regulation of December, 2004 do not have any provision for compulsory carriage (also refer to 'must carry' provision) by any operator including DTH operators of any channels by the broadcasters".

We have held that the parties negotiated only for bouquets 1 and 2 having 19 channels at a price of Rs.83.85. The petitioner is willing to take them all. Therefore, the concepts 'must provide' and 'must carry' do not really arise in this case. Secondly, even if the TRAI was to say specifically what the learned counsel for respondent is suggesting, such an interpretation will not be binding on us. This entire argument is totally irrelevant besides being misconceived.

At this stage we would like to place on record that DTH is an emerging alternative to Cable TV. It is modern technology. In order to compete with cable it has to operate on a level playing field as far as possible. Competition has to be encouraged because it is in consumer interest. The words 'popular content' become relevant and important in this context. The judgment of TDSAT in ***ASC*** *vs.* ***Star*** (supra) takes strength from these words contained in the Regulations. Therefore, it will need consideration in an appropriate case as to how far we can ignore these words by accepting an interpretation advanced by the learned counsel for the respondent that DTH operator must carry the entire content or bundle of channels which a broadcaster has on its DTH platform. When it comes to them, the respondents do not follow this. Respondent 4 is a DTH operator within the umbrella of the respondents Zee group. It was pointed out to us that the said respondent discontinued a particular single channel only on the ground that it had no capacity to carry it even though it is supposed to be a popular channel.

A DTH operator has all India operation while the operation of Cable TV is generally localised. The DTH operator being all India operator has to cater to viewers taste all over the country, keeping in view diversity of the language, diversity in viewership habits and tastes. This is not the case with a Cable Operator. As it is a DTH operator will have to carry so many extra channels to cater to a variety of viewers all over the country. Efforts should, therefore, be to give a level playing field to a DTH operator as far as possible so that he can compete with other mediums.

Lastly, the learned counsel for petitioner raised the question of a proper pricing of the TV channels by the broadcasters. He referred to the observations of this Tribunal in the judgment

dated 14th July, 2006 in ***ASC v.Star*** (supra) where this Tribunal put it on the TRAI to come out with price regulation for DTH. However, this has not happened so far. The TRAI came out with price regulation for the Conditional Access System (CAS) which has been enforced with effect from 1st January, 2007 in some parts of the country. Yet, for DTH it has not been able to do so, so far. This means the broadcasters are left free to fix price for their channels. Of course, use of the words non-discriminatory terms in Regulation 3.2 referred to above, suggests that the broadcaster has to charge the same price for its channels from every distributor, yet practice has shown that the broadcasters do not disclose their agreements with other distributors on the plea of secrecy for commercial terms. The learned counsel for petitioner submitted that he has served interrogatories on the respondents for answering certain relevant questions but the respondents did not respond to the same. They have kept the information about rates they are charging from other distributor to themselves. The learned counsel for petitioner also suggested that since DTH is fully addressable system, the broadcaster should fix their prices keeping this fact in mind. It is common knowledge as projected by the industry itself that in Cable, the declaration of subscribers is only about 20 per cent of the actual number of subscribers. As compared to this in DTH, the counsel suggests, the declaration would be 100 per cent. Therefore, according to the learned counsel, the DTH operator should get the channels from the broadcaster at 20% of the rates declared by them. Today the position is that this Tribunal has already requested the TRAI to come out with price regulation in this area. Price fixation should be done by the TRAI. In the judgment dated 14th July 2006 this Tribunal had fixed a norm in the interim till price fixation is done by TRAI, that broadcaster will charge the DTH operator 50% of its listed price for cable platform. For the present we would like to continue with the said norm and we reiterate that the TRAI should come out with price fixation and regulation in this behalf as early as possible. Price regulation is a must for protecting consumer interest. Delay on the part of the TRAI in carrying out this job is prejudicial to the DTH operators while it suits the broadcasters.

As a result of the above discussion, this petition is allowed and we direct the respondents to provide signals for 19 channels forming part of bouquets 1 and 2 of respondent 1 to petitioner. We further direct respondent 1 to provide these signals to the petitioner on reasonable and non-discriminatory terms which should include charges @ 50% of declared list price of

respondent 1 for these 19 channels. We also declare that respondents have defaulted in providing signals to the petitioner on non-discriminatory basis.

……..J
(Arun Kumar)
Chairperson

…….
(Vinod Vaish)
Member

…….
(D.P.Sehgal)
Member