

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

Dated 25th July, 2008

Petition No.113(C) of 2007

M/s Total Telefilms Pvt.Ltd.
1206-07, 12th Floor, New Delhi House
Barakhamba Road
New Delhi

.....Petitioner

Versus

Tata Sky Ltd. (DTH Licensee)
Okhla Industrial Area
Phase-III, Plot No.264
Behind Modi Mills, Delhi

.....Respondent

BEFORE:

HON'BLE MR.JUSTICE ARUN KUMAR, CHAIRPERSON

For Petitioner : Mr.Sunder Khatri, Advocate

For Respondent No.1 : Mr.Ramji Srinivasan, Senior Advocate with
Mr.Harsh Kaushik, Advocate

ORDER

The petitioner is a Broadcaster and has only one channel which is a news channel. As per petitioner's letter dated 16th March, 2006 annexed as Annexure P-1 to the petition, the petitioner's channel called TOTAL TV is

popular in Delhi(NCR), Haryana and Punjab. The respondent is providing DTH (Direct-to-Home) Service. The DTH Service provider receives signals of channels from various broadcasters and transmits them in an encrypted form through the satellite to the consumers who receive the signals at their premises through Dish Antenna. The signals thereafter are decrypted by a Set-Top Box (STB) provided to the consumer.

The case of the petitioner is that it wants the respondent to carry its channel on its Dish TV platform which the respondent is refusing to do. The petitioner has approached this Tribunal seeking a direction to the respondent to include petitioner's channel, namely, TOTAL TV on its DTH platform on permanent basis.

As per the case set-up by the petitioner, in view of Regulation 3.2 of the Telecommunication (Broadcasting & Cable Services) Interconnection Regulations 2004, the respondent cannot refuse to carry the petitioner's channel. It is a case of violation of the said Regulation on the part of the respondent according to the petitioner. Regulation 3.2 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.”

From this the petitioner seeks to contend that a DTH operator like the respondent is bound to carry all the channels which the broadcasters ask him to do on its DTH platform. According to the petitioner it has only one channel whereas the respondent is carrying several channels of some of the broadcasters. Therefore it is stated that the argument of respondent based on transponder constraint is untenable. This shows that the respondent is not acting in a non-discriminatory manner. Further, it is argued on behalf of the petitioner that the reasons disclosed by the respondent for not carrying petitioner's channel are irrelevant, extraneous and untenable. Therefore, according to the learned counsel for petitioner a direction is liable to be issued to the respondent to carry the petitioner's channel. The case is sought to be built on the basis that the petitioner has a single channel which is a Free-to-Air channel and, therefore, all the more reason that the respondent should not refuse to carry it on its DTH platform.

In reply the learned counsel for respondent submits that the petitioner is misreading Regulation 3.2 which only contains provision for "must provide" i.e. broadcaster must provide its channels to the various operators mentioned in the said Regulation on a non-discriminatory basis. There is no corresponding obligation under the said Regulation which may be called "must carry" i.e. there is no obligation for the service providers to carry channels offered by broadcasters. Secondly, it is submitted that the respondent has an all India viewership and it has to decide what channels it has to carry on its DTH platform based on the choices of its consumers. According to the learned counsel India is a multi-lingual society where regionalism is also quite common. The respondent has to cater to channels in all languages and for all the regions. There is a capacity limitation based on transponder capacity which does not permit the respondent to carry each and every channel. Presently, there are more 300 channels available in India and it is not possible for a DTH Operator to carry all of them. Therefore, the DTH operator has to exercise discretion in selecting channels based on consumer preference.

It is also submitted on behalf of the respondent that the petitioner's channel is area specific and as per petitioner's own saying it is confined to the Delhi(NCR), Haryana and Punjab. Thus, it does not have an all India

base whereas the respondent has an all India presence. It is also submitted on behalf of the respondent that admittedly the petitioner's channel is being transmitted by DD Direct and Dish TV and cable operators. It is not necessary that the petitioner's channel should be on every platform.

I have considered the rival contentions. So far as reliance on Regulation 3.2 by the petitioner is concerned, my attention has been drawn to a judgment of this Tribunal dated 31.03.2007 in Petition No.189(C) of 2006, Tata Sky Limited Vs. Zee Turner Limited & Others wherein this Tribunal has held that Regulation 3.2 contains provision for must provide i.e. broadcaster must provide in a non-discriminatory manner its channels to the service providers, like MSOs etc. The said Regulation does not contain any provision in the nature of "must carry" i.e. that the service providers including DTH operators must carry channels offered by broadcasters. In this connection reliance has also been placed by the counsel for petitioner on Clause 7.6 of the License granted by the Ministry of Information & Broadcasting, Government of India in favour of the DTH Operators. The said Clause reads as under:-

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

This clause has also been considered in the said judgment of this Tribunal where we declined to accept the interpretation being put forth by the learned counsel for the petitioner now before me. Reading the said Clause, I reiterate that at best it can be said that the licensor has to provide access to various content providers/channels on a non-discriminatory basis but that does not mean that it has to carry all the channels of all the broadcasters. That will be asking for something impossible. Clause 7.6 does not use the word "must carry". While on this issue, one has also to take into account the technical aspect i.e. transponder capacity constraints and limitation arising from the fact that it is physically not possible to carry all more than 300 channels which today are available. Tomorrow the number of channels may go up further. If the gates are opened for inclusion of all channels on DTH platforms as and when a broadcaster approaches the DTH operators, there will be no limit and every channel will have to be accepted because there is to be non-discrimination. Such an unreasonable interpretation of Clause 7.6 cannot be accepted.

The learned counsel for the respondent submitted that the respondent has also to keep in view the fact that how many channels in a particular category are on its platform. Suppose the DTH platform of the respondent already has sufficient number of News channels why should it keep on

adding News channels to its platform. Ultimately the DTH operator is in business and it has to keep commercial aspect in view while deciding what channels to carry and what not to carry, especially when there is a wide choice. Popularity of channels and their regional and all India base are relevant considerations for deciding what to take and what to leave. Admittedly the petitioner's channel is a Hindi channel and its viewership is confined to Delhi(NCR), Haryana and Punjab and it does not have an all India base. The respondent already has several popular News channels having all India base like Aaj Tak, Star News, NDTV India, India TV etc. on its platform.

The respondent has pointed in its counter affidavit that the Telecom Regulatory Authority of India (TRAI) floated a Consultation Paper dated 2nd March, 2007 on DTH to consider this very issue. In its recommendations the TRAI relied upon the judgment of the TDSAT referred to above and observed as under:-

In view of the increasing number of channels permitted under the up-linking and down-linking guidelines and capacity constraints of DTH service providers, it is quite clear that it is not possible for a DTH platform to carry all the channels permitted under the up-linking and down-linking guidelines. Since, only some of the channels permitted under the up-linking and down-linking guidelines can be carried on a DTH platform, the DTH service provider has to exercise choice of the channels to be carried.

The Authority is of the view that the market forces and competition will ensure that the DTH platforms will select the channels in a non-discriminatory manner so as to maximize satisfaction for the viewers. The commercial terms will be accordingly determined by the DTH service provider. The DTH platform has to carry the popular content of competing broadcasters also so as to ensure non-discriminatory and transparent treatment. If a DTH platform is not sensitive to its subscribers in terms of content and price, the subscribers have the choice of subscribing to other DTH operators, cable operators or IPTV.

It follows from the above discussion that as per existing factual as well as legal position based on regulations the petitioner is not entitled to any relief. Neither there is anything in the Regulation nor in the license of the DTH operator which compels the respondent to carry the petitioner's channel. The petitioner cannot build a case on the basis of the plea that it is not getting any window for relaying its channel because as pointed out earlier the petitioner's channel is already on DD Direct, Dish TV and further the cable operators are free to carry petitioner's channel wherever the subscribers want the same.

For all these reasons this petition has no merit and is dismissed. No costs.



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(Arun Kumar)
Chairperson