

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

DATED 21st October 2008

Petition No.141(C) of 2008

Ortel Communications Ltd. Petitioner

Vs.

Ushodaya Enterprises Ltd.& Ors. Respondents

BEFORE:

HON'BLE MR. JUSTICE ARUN KUMAR
HON'BLE DR. J. S. SARMA
HON'BLE MR. G. D. GAIHA

CHAIRPERSON
MEMBER
MEMBER

For Appellant

... Mr. Arun Kathpalia, Advocate with
Mr. Samir Sagar Vasishta, Advocate

For Respondents

... Mr. Jayant Mehta, Advocate

ORDER

By this petition, the Petitioner has prayed that 1st Respondent who is a broadcaster be directed to provide signals of ETV- Bangla channel to the Petitioner's network. For this purpose, the Petitioner has prayed that the Respondent must provide decoders to the Petitioner along with SIM card. The Petitioner claims to be a multi system operator (MSO). It is stated that it has started its operation at Rajarhat, a new township of West Bengal, for which it has registered itself under the Cable Television Networks (Regulation) Act 1995. The Petitioner also claims to have spent huge amounts in setting up of a state of art modern network, and that it is equipped with the requisite quality and standard of equipment as laid down. The Petitioner's contention is

that it has approached various broadcasters for the supply of signals and some of them like Star, ESPN, and Sony are already supplying signals to it. Likewise, the Petitioner approached 1st and 2nd Respondents on 27.9.2007 seeking signals of ETV-Bangla channel for its operations in the aforesaid area. It was followed up with a reminder sent on 22.10.2007, in response to which the Respondent, on 26.10.2007, sought certain information which was provided by the Petitioner on 27.10.2007. Although the petitioner had been pursuing the matter since then, and had sent a reminder on 24.12.2007, there was no response from the respondent. The petitioner's statement is that while it had started its services in December 2007, the viewers are deprived of the respondent's signals. on 31.12.2007, the Petitioner approached the Telecom Regulatory Authority of India (TRAI) but to no avail. On 14.4.2008, the 1st Respondent asked the Petitioner to approach its (respondent's) distributor, the 3rd Respondent, for signals. The 3rd Respondent however expressed its inability to provide the decoders on the ground that it has only the status of an MSO. After a long and unsuccessful journey of more than 10 months, and realising that the Respondent is not willing to supply the signals, the Petitioner has filed the present petition before this Tribunal on 15.7.2008.

2. Stating that the petition is not maintainable, the 1st and 2nd Respondents plead that the Petitioner is not an MSO, particularly in view of the amendment to the recommendations proposed by TRAI on 15.7.2008, and as such is not entitled to receive the signals. They further state a meeting was held on 21.8.2008, and since the Petitioner was not an MSO, it was asked to take signals from the 3rd Respondent who indicated willingness to provide signals.

3. During the course of the hearing, the counsel for the Petitioner confirmed that the Petitioner does not have any local cable operators affiliated to it in the area for which signals are

sought. At the same time, he maintains that the petitioner had laid an extensive network in the area and has complied with all the requirements for the supply of signals by the broadcaster and that only the commercial terms are to be negotiated which the Respondent is avoiding to do. The Petitioner has offered to pay, on an interim basis, for a subscriber base of 500 and has submitted that it is open for negotiating commercial terms with 1st Respondent.

4. The main issue in this case is whether the Petitioner, who admittedly does not have any local cable operators affiliated to it, is entitled to seek signals from the Respondent. The argument of the Counsel for Petitioner is that the term 'multi system operator' does not impose any obligation of having affiliated cable operators and that as an MSO, the Petitioner is free to transmit signals directly to consumers. He contends that the definition of the term "multi system operator" enables any 'person' to receive signals from a broadcaster and retransmit the same to consumers. He argues that it is not necessary for the person to retransmit the signals only to other cable operators, and that the definition given in the regulation covers those who retransmit the signals to the consumers directly as much as it covers those who supply the signals to one or more cable operators. In the light of this, the counsel for Petitioner contends that his client is a Multi System Operator and is entitled to receive signals from the Respondent.

5. The counsel for the Respondents, on the other hand, states that there is a significant and vital difference between an MSO and a cable operator. According to him, it is not correct to go only by the definition given in clause 2 (m) of the Telecommunications (Broadcasting and Cable Services) Interconnection Regulation 2004 (13 of 2004) dated 10.12.2004, but that it is very important to read this definition along with the definitions given in the other sub-clauses of the same regulation. In particular, he refers to clauses 2 (e), 2 (g), 2 (i), 2 (j) as well as clauses 3.2,

3.3, 3.4, 3.6, 4.1 and clause 5.2 read with schedules 1 and 2. He contends that these clauses contain a reference to the term 'multi system operator' in addition to, and in contradistinction with, the term 'cable operator', clearly bringing out the distinction between these two entities. He argues that when clause 2 (m) is read harmoniously with other provisions of the interconnection regulations, it would be clear that an MSO is a person who receive signals from a broadcaster and retransmits the same to a cable operator/s, and that any other interpretation would be unwarranted.

6. The term 'Multi System Operator' is not defined in the Cable Television Networks (Regulation) Act, 1995. This Act only defines the term 'cable operator'. As per section 2 (aa) of this Act, 'cable operator' means "*any person who provides cable service through a cable television network or otherwise controls or is responsible for the management and operation of a cable television network*". The Cable Television Networks Rules, 1994 also do not define the term 'multi-system operator'. We find the definition of this term in the Telecommunications (Broadcasting and Cable Services) Interconnection Regulation 2004 (13 of 2004) dated 10.12.2004.

Clause 2 (m) of the Regulation defines the term ' multi-system operator' as follows:

"Multi system operator" means "any person who receives a broadcasting service from a broadcaster and/or their authorised agencies and re-transmits the same to consumers and/or re-transmits the same to one or more cable operators and includes his/her authorised distribution agencies".

Clause 2 (e) of the Regulation 13 of 2004 defines the term 'broadcaster' as follows:

2(e) "broadcaster' means any person including an individual, group of persons, public or body corporate, firm or any organisation or body who/which is providing broadcasting service and includes his/her authorised distribution agencies".

Clause 2 (g) defines the term 'cable operator', which definition is the same as given in the Cable Television Networks (Regulation) Act, 1995.

Clause 2(i) adopts the definition of the term 'Cable television network' as given in section 2(c) of the Cable Television Networks (Regulation) Act, 1995 which is as follows:

2(i) "cable television network" means any system consisting of a set of closed transmission paths and associated signal generation, control and distribution equipment designed to provide cable service for reception by multiple subscribers".

Clause 2(J) of the Regulation 13 of 2004 defines the term 'distributor of TV channels' as follows:

2 (j) "distributor of TV channels' means any person including an individual, group of persons, public or body corporate, firm or any organisation or body re-transmitting TV channels through electromagnetic 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, multisystem operator, head ends in the sky operator".

Clause 3.2 of the Interconnection regulations (13 of 2004) reads as follows:

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, multisystem operator, head ends in the sky operator; multisystem operators shall also on request pre-transit 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."

7. We have carefully considered the contentions of both the counsels. The case in question is one of seeking of signals from a broadcaster. As indicated above, clause 3.2 of the

Interconnection Regulations 13 of 2004 states that every broadcaster shall provide on request signals of its TV channels to all distributors of TV channels, which may include, but be not limited to ... In other words, every distributor of TV channels has the right to request for and receives signals of TV channels from the broadcaster. A reading of clause 3.2 as well as clause 2 (j) makes it clear that any individual or group of individuals or a Body, whether corporate or otherwise, is entitled to seek and receives signals of TV channels from the broadcaster. So, firstly, It is not necessary that the seeker should be a multi system operator as is made clear in clause 2(j) cited supra. Besides, it is also not necessary that a multi system operator must necessarily retransmit the signals through the local cable operator/s. Clause 2 (m) clearly speaks of any *person* who retransmits the signals to consumers (emphasis supplied) and/or through one or more cable operators. In other words, it is perfectly admissible for an individual to seek and receive signals of TV channels from the broadcaster and retransmit the same directly to the consumers. The only stipulation is that he should be a cable operator, as defined under the Cable Act 1995, and be registered as such.

8. As for the contention of the Respondents that the various provisions in the Interconnection Regulation 13 of 2004 must be read harmoniously, we are unable to find the need/scope for the same in this particular case. The rule of harmonious construction arises in a case where there are two provisions which cannot be reconciled with each other. In *Bengal immunity co. Vs state of Bihar* (AIR 1955 SC 661), the Supreme Court had observed as follows:

"It is a cardinal rule of construction that when there are in a statute two provisions which are in conflict with each other such that both of them cannot stand, they should, if possible, be so interpreted that effect can be given to both and that a construction which renders either of them inoperative and useless should not be adopted except in the last resort. This is what is known as the rule of harmonious construction ..."

In the present case, we do not find any ambiguity between the various clauses of the Interconnection Regulation 13 of 2004. The case of the Respondents is that the Petitioner is not eligible to receive the signals from the broadcaster directly because it is not an MSO and their understanding is that an MSO has to necessarily retransmit the signals only to cable operators. They are conveniently overlooking the fact that the definition of an MSO includes a person who retransmits the signals directly to consumers. The other provisions of the Interconnection Regulation 13 of 2004 referred to by the counsel for Respondents do not support this view nor do they contain provisions which are contrary to the definition of an MSO.

9. For these reasons, we are unable to agree with the learned counsel for Respondents that only an MSO can seek signals from a broadcaster and an MSO would necessarily have to retransmit the signals to a cable operator.

10. During the course of arguments, the counsel for Respondents raised the issue whether the interpretation sought to be given by the Petitioner would not result in a situation where every local cable operator would seek signals directly from the broadcasters. It should be pointed out that this situation already exists. Not only do some local cable operators seek signals directly from the broadcasters but more importantly, this is what is done by the DTH operators and Head ends in the sky (HITS) operators. These entities receive signals directly from the broadcasters and retransmit the same to the consumers directly. They are covered under the term 'distributor of TV channels'. What is important is their ability to receive signals directly from the broadcaster and retransmit the same. DTH and HITS systems operate in an addressable mode. On the other hand, in a non-addressable system, if most local cable operators do not receive signals directly from the broadcasters but from an MSO, it is not because of any restriction in the Regulations or even technology but because of the investment involved in being able to

receive signals directly from a broadcaster in digital mode and converting them into analogue mode for retransmission to consumers. It is because of this inability to invest that most cable operators receive the signals from an intermediary viz., MSO in an analogue mode. It is evidently the reason why the term ' local cable operator', which is widely used commercially, does not find a place in the definitions. A practice, albeit common, necessitated by commercial considerations, need not and should not, in our view, become a legal requirement. We accordingly do not agree with the view that a multi system operator is one who receives signals from the broadcaster and retransmits the same to one or more local cable operators. What is important is the ability to receive signals of TV channels from the broadcaster and retransmit the same to the consumers directly or indirectly, including through local cable operators.

11. The counsel for Petitioner drew our attention to the recommendation said to have been made by the Telecom Regulatory Authority of India (TRAI) on 15.7.2008 to redefine the term multi-system operator (MSO) to mean any person who manages and operates a multisystem cable television network to provide cable television service to one/multiple local cable TV operator (s) or to any other distribution platform permitted and licensed by the government. Admittedly, this is only a recommendation supposed to have been made by TRAI and needless to say, requires examination and decision by the competent authority. Even as on today, let alone on the date of application of the Petitioner to the Respondent or even on the date of filing this petition, the definitions cited in para 6 above hold ground and only they can be the basis for consideration and decision in this case. We therefore hold that this contention of the Respondent is inadmissible. Outside the framework of this case, it appears to us that the proposal to redefine the term 'multi system operator', if true, would warrant a careful examination by the appropriate authority as it has the potential of mandating a hierarchy and bringing in rigidity in a scenario of evolving technology, and possibly adding to the costs.

12. The counsel for Respondents also argued that as per the Interconnection Regulations, it is open to a broadcaster to provide the signals even through an authorised agent. This is an unexceptionable argument. Clause 3.3 of the Interconnection Regulations (13 of 2004) states that a broadcaster or his/her authorised distribution agency would be free to provide signals of TV channels either directly or through a particular designated agent or any other intermediary. It is thus open to the Respondent to ask the Petitioner to receive signals through its designated agent. The only condition is that such agent must respond to the request in a reasonable time period failing which it is open to the applicant to approach the broadcaster to obtain signals directly. It is also necessary that such an agent must not also be another rival MSO, so that there is no conflict of interest. This aspect has been comprehensively decided by the Supreme Court in *Star India Pvt Ltd vs. Sea T.V. Network Ltd & Anr* (AIR 2007 SC 1538), where the Apex Court observed as follows:

“Firstly, we do not find any error in the judgment which has held that in providing signals to a distributor through an agent who is also in turn a distributor, is per se discriminatory... There is no difficulty for the commercial side. If the broadcaster appoints an agent on the commercial side to collect the statistics of the number of subscribers or for distribution of Decoders there is no dispute. On the commercial side when an agent is appointed by the broadcaster that agent need not be from the Operation Network. Such an agent normally is not a technical service provider. The difficulty arises when the broadcaster, as in the present case, appoints or enters into an agreement with a distributor, who in turn is an MSO and who in turn has his own business because in such a case such an agent-cum-distributor is also a competitor of the MSO who seeks signals from the broadcaster. We are living in a competitive world today. If under the Interconnection Regulations, an MSO is entitled to receive signals directly from a broadcaster, if directed to approach his competitor MSO then discrimination comes in. The reason is obvious. The exclusive agent of a broadcaster has his own subscriber base. His base is different from another MSO in the same territory. If that another MSO has to depend on the Feed to be provided by the exclusive agent of the broadcaster then the very object of the Interconnection Regulation stands defeated. We are satisfied that even technically the quality of signals receivable through the Decoders is different from the quality of signals receivable through cable feed.... It is important to note that under the Interconnection Regulations exclusivity of contracts stands

eliminated.....The object of Interconnection Regulation is to eliminate monopoly. ...the quality of the signals receivable by the Sea T.V. Network may not be the same as the quality of signals through Decoders. In this connection fudging of data (voice and picture) is possible. Even the speed of data-transmission to Sea T.V. Network could get affected. In such cases it is the subscribers of Sea T.V. Network who would be adversely affected. The picture quality would be affected”.

In this particular case, the allegation of the Petitioner that the 3rd Respondent, from whom the 1st Respondent has asked the Petitioner to receive signals, is another MSO operating in the same area is not denied. It is also clear from the pleading of the 1st and 2nd Respondents that the Petitioner was asked to approach the 3rd Respondent for receipt of signals, on the ground that the Petitioner was not an MSO and therefore ineligible to receive signals from the broadcaster. Since we have now held, as discussed above, that the Petitioner is an MSO and is entitled to receive signals directly from the broadcaster, this argument of the Respondents also fails.

13. In conclusion, we hold that the Petitioner in this case is entitled to seek and receive signals of TV channels from the Respondents and that the 1st and 2nd Respondents were wrong in denying the signals to the Petitioner on this ground. We accordingly direct the 1st Respondent to supply signals of its channels by entering into an agreement with the Petitioner, on such terms and conditions which are not unreasonable, at an early date, at any rate not later than four weeks from today.

14. The Petitioner had prayed for costs/damages to be awarded to it to make good the loss of business and growth due to the deliberate act of the respondent in not providing the decoders. The quantum of loss suffered has not been brought out either in the pleadings or in the course of arguments. We therefore do not agree with this plea. However, the 1st respondent is an established broadcaster and is expected to be aware of the legal position, particularly when the

matter has been settled not only by this Tribunal but also by the Apex Court. The delay and negative response of the Respondent vis-à-vis the Petitioner were totally avoidable and have resulted in wastage of time, energy and resources of all concerned. We therefore impose costs of Rs. 50,000 on the 1st Respondent to be paid to the Prime Minister's Relief Fund.

15. The petition is accordingly disposed of.

.....J
(ARUN KUMAR)
Chairperson

.....
(J.S. SARMA)
Member

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(G.D. GAIHA)
Member