

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

DATED 13TH MAY 2009

Appeal No. 10(C) of 2008

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M/s. ESPN Software India Private Limited Appellant

Vs

Telecom Regulatory Authority of India Respondent

BEFORE :

**HON'BLE MR. JUSTICE ARUN KUMAR, CHAIRPERSON
HON'BLE DR. J.S. SARMA, MEMBER
HON'BLE MR. G.D. GAIHA, MEMBER**

For Petitioner : Mr. Niraj Kishan Kaul, Sr. Advocate with
Mr. N. Ganpathy, Advocate

For Respondent : Mr. Rakesh Dwivedi, Sr. Advocate
Mr. Vikas Mehta, Advocate
Ms. Preetika Dwivedi, Advocate

ORDER

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The Appellant has preferred this Appeal against the direction no. 4-31/2008/ B&CS dated 24th June, 2008 issued by the Respondent, the Telecom Regulatory Authority of India (hereinafter referred to as the **Authority**). The Appellant is an exclusive distributor of ESPN, Star Sports and Star Cricket services in India. The Appellant claims that the Principals of the Appellant have acquired the exclusive rights to broadcast, in India, important national and international sporting events by investing heavily through competitive bids. It is claimed by the Appellant that the channel enjoys high popularity in India and is very well received by the cable viewing homes since its inception in the year 1995. The Respondent is Telecom Regulatory Authority of India (TRAI) constituted under the Telecom Regulatory

Authority of India Act, 1997, with powers to regulate 'telecom services' which term includes 'broadcasting services'.

2. The Appellant provides its channels to various Cable Operators, Multi System Operators and Direct to Home (DTH) operators. As per TRAI Regulations, the Appellant issued a Reference Interconnect Offer (RIO) for DTH operators on 15.5.2008, which included the terms of payment. These included a condition that DTH operators should agree to keep all the channels/services i.e. ESPN Star Sports and Star Cricket in the entry level pay tier. The above terms of the RIO were challenged by Tata Sky in a petition filed before the this Tribunal on the ground that the same was violative of Regulation 13.2A.11 of the Telecommunication (Broadcasting & Cable Services) Interconnection (Fourth Amendment) Regulation 2007. During the pendency of the Petition, ESPN wrote a letter dated 11.6.2008 to TRAI and informed it that it would withdraw the RIO and shall be filing a fresh RIO very shortly. The Respondent, vide its letter dated 19th June, 2008, wrote to the Appellant and advised it to file the fresh RIO by 23.6.2008 and also informed the Appellant that its existing RIO will be effective till a fresh RIO is filed. The Respondent further directed the Appellant vide its letter dated 24.6.2008 that the Appellant should, within 15 days, modify its RIO for DTH operators so as to:

- (i) offer to the Direct to Home (DTH) Operators the same bouquets which are being offered by M/s. ESPN Software India Pvt. Ltd., for non-CAS cable distribution, so that the norm laid down by the TDSAT is followed in letter and spirit;
- (ii) offer to the DTH operators the bouquets/channels at 50% of the rates at which such bouquets/channels are being offered for non-CAS cable distribution, i.e. non-addressable platform so as to comply with the above norm laid down by the TDSAT in letter and spirit;
- (iii) not to impose the condition that DTH operators agree to keep all the channel/services i.e. ESPN Star Sports and Star Cricket in the entry level pay tier; and
- (iv) submit to the Authority a report of compliance with the directions contained in items (i), (ii) and (iii) above, along with a copy of its modified Reference Interconnect Offer.

3. The Respondent issued a notice dated 1.7. 2008 to the Appellant to show cause as to why action should not be taken against it. Complying with the directions of the Respondent, the Appellant filed an amended RIO on 8.7.2008. The amended RIO included the following clause:

“The Company shall offer a discount of 50% on the price per Set Top Box per month to those DTH operator(s) who provide the Company’s channels (the Services) such wide coverage/viewership as was being provided by the DTH operators when the decisions dated July 14, 2006 and March 31, 2007 by the TDSAT respectively in ASC Enterprises case and in Tata Sky case came into force.”

4. The Appellant has contended that with a view to dispel any wrong notion about its RIO, it made a representation dated July 10, 2008. In this representation, the Appellant clearly mentioned that in ASC Enterprises case and the Tata Sky case, TDSAT had decided both the matters on merit based on facts and circumstances that existed at that time and presented before it. It was also pointed out that the two judgments were intended as a basis of advising and directing broadcasters to offer its channels to DTH operators @ 50% of its non-CAS rates. The Appellant also contended that, without prejudice to its rights, it had complied with the direction of the Authority and had filed a compliance report along with its revised RIO, which has also been posted on the website. In fact, its offer to DTH operators of a rate which is 50% of its non-CAS listed rates is exactly in consonance with TDSAT’s judgments and advisory/direction of TRAI.

5. The Appellant also contended that it was not a party to proceedings in the above two cases – ASC Enterprises and Tata Sky – and that the judgments passed therein were based on the facts and circumstances of those two cases only. The Appellant also claimed that its RIO stipulates that if it is treated like the Respondent in the above two matters, it shall offer 50% of its non-CAS listed rates to DTH operators. It is also contended by the Appellant that when the TDSAT delivered the said two judgments, the concept of an ‘add on pack’ did not exist and, therefore, there was no occasion for TDSAT to go into the question as to what should be the treatment/pricing for individual channels in the ‘add on packs’. The concept of ‘add on packs’ was introduced by a DTH operator for the first time on 1.6.2008, when ESPN channels were sought to be introduced as an ‘add on pack’. It is contended by the Appellant that the Respondent, in an arbitrary and irrational manner, brushed aside the submissions made by the Appellant and issued a show-cause notice dated 22.7.2008.

6. The present Appeal raises the following questions for determination:

- A. Whether is it appropriate for TRAI to issue the impugned direction requiring implementation of TRAI's interpretation of the decisions of TDSAT and ask the Appellant to comply with the norm laid down by TDSAT in its order dated 14th July, 2006 passed in Petition no. 136(C) of 2006 and judgment dated 31st March, 2007 in Petition no. 18(C) of 2006, when the Appellant was not a party in either of those two cases?
- B. Whether there is any legal infirmity in the amended RIO issued by the Appellant on July 8, 2008?

7. To determine and decide the above issues, it is necessary to go into the facts of the above two cases decided by this Tribunal. The directions therein were as follows:

A. In the order dated 14.07.2006 in the case of ASC Enterprises Ltd. Vs. Star India Pvt. Ltd [Petition NO. 136(C) of 2006], this Tribunal had directed that

“In view of the above, there is logic in the statement of the Petitioner that the rates laid down and being charged for the Cable TV platform cannot be made applicable to the DTH platform and we agree with this contention of the Petitioner. We have no basis to lay down the actual rates per channel which we feel is the prerogative of the TRAI. _ However, to begin with we feel that 50 per cent of the rates being charged for cable platform be made applicable to DTH platform.”

B. In the Tata Sky Case, this Tribunal held on 31.3.2007 that

“Today the position is that this Tribunal has already requested TRAI to come with price regulation in this area. Price fixation should be done by TRAI. In the judgment dated July 14, 2006 this Tribunal had fixed a norm in the interim till price fixation is done by TRAI, the 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 the price fixation and regulation in this behalf as early as possible.”

Thus, this Tribunal had directed the Respondent to fix prices on 14.7.2006 and then reiterated its direction on 31.3.2007 to do it as early as possible, since there was no basis available with it for fixing prices; and the price fixed by this Tribunal was purely on a provisional basis i.e. 50% of the rates being charged for cable platform.

8. We have heard the learned senior counsels for both parties, Mr. Niraj Kaul for the Appellant and Mr. Rakesh Dwivedi for the Respondent. The learned counsel for the Appellant pointed out the background for the direction of this Tribunal in the ASC Enterprises case and the Tata Sky case was different. The case of the Petitioner in the ASC Enterprises Ltd. Vs. Star India Pvt. Ltd [Petition no. 136(C) of 2006 dated 14.07.2006] was founded on the fact that there was under declaration by cable operators and, therefore, the subscriber base was a negotiated figure, which implies that the cable operator is paying to the broadcaster for much less number of subscribers, whereas in fact it is transmitting signals to a much larger number of subscribers and, therefore, the broadcaster is virtually losing a substantial part of the revenue. The contention of the petitioner was that the per subscriber rate, in case of a DTH system, should actually be much less, if it is to be worked out on actual number of subscribers. On the other hand, the petitioner therein had contended that in the DTH system, every consumer gets a viewing card with a specific code, which identifies that particular consumer. The Subscriber Management System ensures that there is no misuse of any box and, therefore, exact number of subscribers receiving particular channel is transparently known through the SMS system, which is a central monitoring facility. The petitioner in that case has contended that for a platform where 100% subscribers are paying the rate of subscription should be less than that of the cable platform. The petitioner in this case has cited the Clause 3.5 of the Regulations which provides as follows:

Clause 3.5 *“The volume related scheme to establish price differentials based on number of subscribers shall not amount to discrimination, if there is standard scheme equally applicable to all similarly based distributors of TV channel(s)”*

9. The counsel for Appellant pointed out that the inference to be drawn from the above arguments is that the broadcaster is entitled to offer volume related discounts to operators in a particular distribution platform while not offering the same discount to operators in a different distribution platform. He pointed out that Paragraph 16 of the Explanatory Memorandum to the Regulations states that Broadcasters and Multi System Operators can offer discounting schemes including volume or bulk discount, and that such discounts shall not be considered as anti-competitive if the same are consistently available to similarly based distributors of TV channels.

10. Stating that this was the background of this Tribunal's decision to permit 50% discount to DTH operators, the learned counsel for appellant pointed out that in the event of a reduction in viewership, the 50% rates are not sustainable commercially. The tariff indicated by this Tribunal in the two cases, *cited supra*, had taken into consideration the volume of the subscribers and, therefore, the basic tier viewership cannot be compared to the 'add on pack' viewership; it is comparing the incomparable. He argued that the arrangement envisaged in those judgments is, therefore, applicable only to the similarly placed situations. He also pointed out that this tribunal had also directed only an *ad hoc* arrangement as an interim measure till the Respondent fixed the tariff of pay channels on the DTH platform in different scenarios.

11. The learned counsel for Appellant also stated that in its meeting with representatives of the ESPN Star Sports on 28.3.2008, TRAI had categorically agreed that it had not, till then, issued any tariff order for DTH platform. It was also suggested by TRAI that both broadcasters and DTH operators should work in close cooperation with each other and in conformity with regulations and orders of TRAI and TDSAT, so as to ensure sectoral growth and consumer protection by maximizing competition among various delivery platforms.

12. The learned counsel for Respondent pointed out that the Appellant was aware that its initial RIO was faulty which is why the Appellant wrote to the Respondent on 11.6.2006 that it is withdrawing its RIO and would be filing a fresh RIO. The Respondent had, thereupon, issued a letter on 19.6.2008, in which a reference was made to the Telecommunication (Broadcasting & Cable Services) Interconnection Regulation 2004, as amended from time to time, which does not provide for a situation where an existing RIO is withdrawn, without simultaneously making available the fresh RIO. Accordingly, the counsel stated, the Respondent advised the Appellant on 19.6.2008 to file a fresh RIO, even as action, based upon the existing RIO, could be initiated to the extent it was in accordance with the Regulations. The learned counsel pointed out that on 21.6.2008, the Appellant expressed its inability to present a fresh RIO in the stipulated time, and desired that the previous RIO be effective till such time as a fresh RIO is filed by the Appellant. The Respondent issued the impugned direction of 24.6.2008, in which the Appellant was

directed to modify the RIO in para 12, for DTH platform, and offer the same bouquet(s) which were being offered by it for non-CAS cable distribution so that the norm laid down by the TDSAT is followed in letter and spirit, and also offer to DTH platform operators the bouquets/channels at 50% of rates at which such bouquets/channels are being offered for Non-CAS cable distribution.

13. The learned counsel for Respondent pointed out that so far, there appeared to be no inconsistency. However, the stipulation by the Appellant to the DTH operators to keep the ESPN, Star Sports and Star Cricket in the entry level tier to keep the viewership at the same level as that available in non-CAS cable distribution systems, was considered by the Respondent to be inconsistent with the decision of this Tribunal in the ASC Enterprises and Tata Sky cases.

14. The counsel for Respondent referred to the Telecom (Broadcasting & Cable Services) Interconnection (Fourth Amendment) Regulation 2007 (9 of 2007) dated 3.9.2007, and pointed out that Clause 13.2A.1 of this Regulation envisages that every broadcaster should intimate its RIO to DTH operators specifying inter-alia, the technical and commercial terms and conditions for interconnection. He also stated that Clause 13.3 of the Regulation confers powers upon the Respondent to issue directions to modify the RIO to protect the interests of the service providers or consumers and to direct the broadcaster to publish the said RIO, with the modifications as desired, within 15 days of the receipt of such directions.

15. The counsel for Respondent argued that the condition of viewership and add on package in the RIO of the Appellant was sought to be imposed on a graded subscriber base for the purpose of discount. The discount offered was 5% upto 5 lakh subscribers; 7.5% upto 10 lakh; 10% upto 15 lakh; 12.5% upto 20 lakh; and beyond that it was 15%. Later, another RIO was submitted on 15.5.2008 which provided two conditions for discount. Firstly, upto 25 lakh subscribers, the discount was less than 50% and the 50% discount was applied only where the subscriber base was more than 25 lakh. Secondly, a term was imposed that all the channels/ services would be placed in the entry level pay tier. While this RIO was withdrawn, the latest RIO now agrees to 50% of the price of non-CAS cable platform but imposes a

condition of “such wide coverage / viewership as was being provided by DTH operators where the decisions of this Tribunal were rendered” for all channels. The counsel for Respondent contended that this condition is vague as the DTH operator will have to ascertain the viewership of the broadcaster’s channels in the two cases in which judgments have been delivered by TDSAT on the date of judgment. In view of this vagueness, he stated, such a condition cannot be permitted. The counsel for Respondent further contended that that it in some form or the other, the Appellant insists on imposing upon the DTH operators the requirement of a particular quantum of viewership. The counsel states that this is contrary to the Regulation of 2007 which protects and preserves the entitlement of the DTH operators to repackage or soft bundle the channels obtained by it from the Broadcasters vide Regulations 13.2.A.11 and also prohibits the broadcasters from compelling the DTH operators to put their channels in a particular package or scheme. The counsel also contended that the broadcasters cannot compel the DTH operators to include all its channels either at the entry level tier or to give all of them a particular wide coverage / viewership.

16. The counsel for Respondent also contended that Regulation 13.2A.11 and 13.2A.13 have an underlying reason. The DTH operators have a limited transmission capacity. In the present stage of development and with the present capacity of transponders, it is not possible to transmit all channels of all broadcasters to subscribers at the entry level. In the case of DTH service, the regulations deal with pay channels and not free to air channels. Therefore, the capacity of the consumer /subscriber also becomes a relevant consideration. The bulk of the subscribers have a limited paying capacity. If all the approximately 250 channels being made available by all the 17 Broadcasters are included in the entry level package, then the package will become very expensive and would be beyond the reach of the subscriber. Therefore, as per necessity the DTH operator will have to make smaller packages after rebundling. The regulations are in the interest of consumers and also orderly growth of DTH service, as well as the competitiveness of DTH platform vis-à-vis Cable platform.

17. Responding to the contentions of the counsel for Respondent, the counsel for Appellant extended the argument that in regard to Regulation 13.2A.13, this Tribunal had already declared that this Regulation shall apply, irrespective of whether the entire bouquet is taken or whether some channels of the bouquet are opted for, on a-la-carte basis. It has also been held that this Regulation gives freedom to DTH operators to repackage the channels with the rider that payments shall be calculated on the basis of the subscribers' base for the channel which has the highest viewership in any package. If this principle is adopted for payment of channel in add on package on the basis of the viewership of basic tier, the Appellant has no problem of giving a discount of 50% to DTH operators and to follow the judgment of this Tribunal in toto.

18. We have carefully considered the arguments of both the learned counsels. As per clause 13.2A.11, it is mandatory on the part of the broadcaster to offer pay channels on a-la-carte basis to DTH operators and such offering shall not prevent the broadcaster from offering such pay channels additionally in the form of bouquets. It is further provided that the broadcaster shall directly or indirectly not compel any DTH operator to offer the entire bouquet or bouquets offered by the broadcaster to such operator in any package or scheme being offered by such DTH operator to its subscribers. This regulation does not appear to have been violated by the Appellant because there is no compulsion imposed by the Appellant to take the entire bouquet or bouquets. The fact that the RIO envisages the placement of all channels and services in the entry level tier because of attracting the viewership on the basis of the total subscriber base of the DTH operator and to offer a volume based discount as has been offered in the two cases decided by this Tribunal and referred to in the directions issued by the Respondent. It is to be examined, whether the Clause 13.2A.11 envisages any embargo on placement of channels in a particular tier. The plea of the Appellant is that the 50% price envisaged in the Tata Sky and ASC Enterprises cases is for the viewership of the channels on being placed in the Basic Service Tier. The main thrust of 13.2A.11 is that once the pay channels are obtained on a-la-carte basis by the DTH operator, the broadcaster cannot prevent the offering of such pay channel in the form of bouquets. In case the broadcaster obtains all the channels of a bouquet by paying a-la-carte rate for each channel, protection has been offered in Clause 13.2A.13. This clause mentions that in case the DTH operators packages the channels comprised in such opted bouquet in a manner resulting in different subscriber base for different channels comprised in such

opted bouquet, then, the payment, to the broadcaster for such entire opted bouquet by the DTH operator, shall be calculated on the basis of the subscriber base for the channel which has the higher subscriber base amongst the channels comprised in that bouquet. It is clear from this clause that the viewership is a very important consideration for tariff fixation for DTH operators. This was also decided by us in the case of Sun Direct TV Pvt. Ltd. Vs MSM Discovery Pvt. Ltd (62(C) of 2008). The petitioner in this case was entitled to receive channel/channels of his choice from the Respondent and position them in the manner of his choice but at the same time it is obliged to pay to the broadcaster as per Clause 13.2A.13.

19. The Regulation 13.2A.12 imposes limitations on rates for pay channels while Regulation 13.2A.13 provides protection to the broadcasters where the DTH operator repackages the bouquets obtained from the broadcasters and it requires that the broadcasters will be paid for the entire bouquet opted on the basis of the subscriber base for the channel which has the highest subscriber base amongst the channels in that bouquet. Since the Respondent has pleaded that this regulation has not been questioned by the Appellant, and, therefore, the Clause 13.3 empowers the Respondent to intervene by modifying the RIO submitted by the broadcasters, if it is against the regulations or if it is necessary so to do, in the interest of service provider or consumers or to promote and ensure orderly growth of broadcasting and cable sectors. The Respondent has pleaded that in view of this Regulation 13.3, the direction has been properly issued.

20. Having carefully considered various aspects, we must record our observation that the judgments in ASC case and Tata Sky case were issued in July, 2006 and March, 2007 respectively, i.e. more than 2-2½ years ago. The directions of this Tribunal in those orders were essentially meant to give a general indication as to how the tariff fixation should be approached. In the ASC Enterprises case, this Tribunal had clearly stated that this Tribunal had no basis to lay down the actual rates per channel, which is the prerogative of TRAI. It was only as an *ad hoc* measure that this Tribunal had indicated a broad figure of 50% in case of DTH platform. It was reasonable to expect that TRAI would thereupon fix the tariffs after due examination. We are informed that it was only recently that TRAI had initiated this exercise and circulated a consultation paper. We are further informed that the exercise is underway and a decision

is likely to be taken by the Authority shortly. In this regard, we direct the Authority to take into consideration the situation arising in cases where the 'add on packages' are involved. It is clear that this Tribunal's orders in the ASC Enterprise and Tata Sky Case had no relation to add on packages, which concept itself came up subsequently. We hold that the general principle of 50% tariff applies in the general situation and that too only as an interim measure, pending the determination by TRAI. We hold that this principle of 50% tariff should not be *mutatis mutandis* applied in the case of an 'add on package'. We leave the exact formulation to TRAI since the exercise is already underway. We direct all interested parties including the Appellant to present its case to the Respondent as part of the consultation process and that the same shall be given due consideration.

21. There remains the question whether the impugned direction itself should be pursued. We did not find any impropriety or irregularity in the direction issued by the Respondent. It had done so in the bona fide exercise of its powers and keeping in view the two judgements in the ASC Enterprises and Tata sky cases. As observed by us above, the directions in those two cases were keeping the general situation in mind and also as an interim measure. Nevertheless, In the light of our observation that the entire question of tariff for 'add on packages' should be re-considered, we feel it appropriate to direct the Respondent not to proceed further with any action in pursuance of the impugned direction. We would also like to make it clear that this should not be read as our endorsement of that portion of the amended RIO dealing with 'add on packages'. This is evidently a grey area. Considering that we have held that the 50% tariff is not necessarily applicable to the 'add on packages', we leave the question of 'add on packages' for negotiation between the respective parties but only till such time as TRAI issues a Regulation in this regard. Needless to state, we hope that the Authority will, having already initiated the exercise of fixing the DTH tariff, complete the same within the next 4 months.

22. The Appeal is disposed of accordingly. No costs.

.....J
(Arun Kumar)
Chairperson

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(J.S. Sarma)
Member

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(G.D. Gaiha)
Member