

TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL

NEW DELHI

Dated 3.2.2011

Appeal No.11 (C)/2010

Sun Direct TV Pvt. Ltd.

... Appellant

Vs.

Telecom Regulatory Authority of India

... Respondent

BEFORE:

HON'BLE MR. JUSTICE S.B. SINHA, CHAIRPERSON

HON'BLE MR. G. D. GAIHA, MEMBER

HON'BLE MR.P.K. RASTOGI, MEMBER

For Appellant

: Mr.Gopal Jain, Advocate

Mr.Kaushik Mishra Advocate,.

For Respondent

: Mr.Saket Singh, Advocate

J U D G M E N T

S.B. Sinha

1. The appellant herein is a broadcaster.
2. It being aggrieved by and dissatisfied with a direction of forbearance in respect of the channels which are broadcast on HD Feed and/or HD channel as contained in the Tariff Order dated 21.7.2010 framed by Telecom Regulatory Authority of India (TRAI) has preferred this appeal.

The petitioner is a DTH operator. The question which arises is as to whether the order dated 21.7.2010 suffers from any illegality.

3. Before adverting to the aforementioned question, we may notice the factual background.
4. One of the DTH operators operating at the relevant point of time viz ASC Enterprise Ltd filed a petition before this Tribunal inter alia questioning the rate fixed by Star India Ltd on DTH platform vis-à-vis the analogue platform.

By a judgment and order dated 14.7.2006, while acknowledging that fixation of rate is the prerogative of TRAI, this Tribunal opined that to begin with 50% of rates charged on every platform be made applicable to DTH Platform. Similar opinion was expressed by this Tribunal in a petition filed by Tata Sky Ltd against Zee Turner Ltd. by a judgment and order dated 31.3.2007.

5. By reason of the Telecommunication (Broadcasting and Cable Services) Interconnection (4th Amendment) Regulations 2004 which came into force with effect from 3.9.2007 TRAI introduced Clause 13.2A.11, in the Telecommunication (Broadcasting and Cable Services) Interconnect Regulations 2004 which reads as under:-

13.2A.11 It shall be mandatory on the part of the broadcasters to offer pay channels on a-la-carte basis to direct to home operators and such offering of channels on a a-la-carte basis shall not prevent the broadcaster from offering such pay channels additionally in the form of bouquets.

Provided that no broadcaster shall, directly or indirectly, compel any direct to home operator to offer [any channel or channels or bouquet] or bouquets offered by the broadcaster to such operator in any package or scheme being offered by such direct to home operator to its direct to home subscribers.

6. Indisputably TRAI issued two press notes on 18.4.2008 providing for 50% of the rates offered by the Broadcasters on the non-CAS cable platform to be applicable to the DTH operators.

7. It is not in dispute that TRAI with a view to fix the rates payable by the DTH operators to the broadcasters issued various consultation papers; one of the issues raised therein being the rate required to be fixed for HD feed.

8. Sometime in May/June, 2010 ESPN Started HD feed in relation to FIFA World Cup and Wimbledon Championship. Prior thereto IPL Cricket matches were also shown on HD feed. Recently also the Doordarshan has shown the opening and closing ceremonies of Commonwealth Games on HD feed.

The petitioner and ESPN however could not enter into any agreement with regard to charges for broadcasting the said events on HD feed.

9. One of the other DTH operators TATA Sky filed a petition before this Tribunal. This Tribunal directed ESPN to make the said live events available on HD feed on certain conditions. The appellant on the premise that TRAI by that time did not fixe any rate in regard to the

HD feed filed a writ petition before the High Court of Madras, which by an order dated 26.6.2010 directed TRAI to fix the rates on or before 30th June,2010, stating:

“9. The learned Additional Solicitor General appearing for the 1st respondent, on instructions, submits that the fixation of rate is within the domain of TRAI and it has to fix the rate after consultation with the operators and therefore, they may require time to arrive at such a fair rate between the parties.

10. It is also submitted by the learned counsel for the 3rd respondent that one of the Operators viz., DISH TV has already offered a rate, but that rate is not acceptable to the petitioner and hence, a rate may be fixed by TRAI only.

11. In that view of the matter, the learned Additional Solicitor General appearing for the 1st respondent would submit that the 1st respondent is the competent authority to take a decision in respect of fixation of rate. He also informed that the consultation process of TRAI is in the advanced stage and a decision maybe taken on or before 30.06.2010 and the petitioner alongwith others may participate in the process and negotiate for the rate.

12. Under the above circumstances, the 1st respondent is directed to fix the rate on or before 30.06.2010 after affording an opportunity of hearing to the parties to the writ petition. Post the matter on 01.07.2010.”

10. By reason of an order dated 29th June, 2010, TRAI opined :-

“12. Considering the submissions made by the parties before the Authority on 23.6.2010 and all the attendant facts and circumstances of the matter as brought out above, the Authority, hereby directs M/s ESPN Software India Pvt. Ltd. to offer its HD

feed to M/s Sun Direct TV Pvt. Ltd. at maximum of ten times of it's a-la-carte or bouquet rates, as the case may be, as applicable for SD signals for the DTH platform. The above direction is purely an interim measure and without prejudice to the rights and contentions of both the parties in any proceedings before any Court or Tribunal. It is also without prejudice to any order or direction or judgment of any court or tribunal, including any order or direction or judgment of any court or tribunal on any proceeding pending before such court or tribunal."

11. TRAI, however, by reason of the impugned order dated 21st July, 2010 known as Telecommunication (Broadcasting and Cable) Services 4th Addressable System Tariff Order 2010 while purporting to fix rates for wholesale tariff, opined that no rate need be fixed for HD feed, stating as under:-

"G. Niche channels requiring specialized set top boxes:

44. In recent times, the market has witnessed the emergence of a number of niche channels such as HD and 3D TV channels that require special set top boxes. An issue that was posed for comments during consultation was whether tariff for niche channels requiring specialized set top boxes should be regulated.

45. In case of niche channels requiring specialized set top box e.g. HDTV channels, the stakeholders are generally of the view that such channels have recently appeared in the market and all equipment relating to HD programs including the set top box and TV set are relatively costly as compared to

standard definition TV sets etc. Therefore, no regulation is necessary.

46. The niche TV channels can only be viewed in an addressable environment and that too with the help of specialized set top boxes. These channels which have been recently introduced employ advanced technology and therefore, can be considered premium in nature. As these channels are viewed by an elite section, the Authority is of the view that there is no general public interest involved and the tariff dispensation for niche channels requiring specialized set top box TV channels should be left to market forces. The Authority will review the position at an appropriate time."

12. This appeal has been filed on 27th September, 2010 which is barred by limitation.

It is stated that a copy of the application for condonation of delay was handed over to this Tribunal but no such application is available on record.

13. Mr. Gopal Jain the learned counsel appearing on behalf of the petitioner would contend:-

- 1) Keeping in view the fact that the broadcasters exercise monopoly and it is essential that exploitations at their hand should be avoided, regulation of HD feed/ HD channel is the prime need.

- 2) In view of the stand taken by the TRAI itself in its order dated 29.6.2010, there was absolute no reason as to why the different stand would be taken by it in its tariff order dated 21.7.2010 particularly when there was no change in the circumstances.
- 3) TRAI committed a serious illegality in so far as it held that HD feed was for the elites of the country, inasmuch as the 'means test' could not have been applied in a case of this nature.
- 4) The impugned tariff order contains an error apparent on its face, as the entire reasonings of TRAI are faulty particularly having regard to the fact that it itself has proceeded on the basis that the rates in respect of HD feed ranges from 1.07 times to 500 times of the normal rates.
- 5) TRAI has failed to appreciate that keeping in view clause 13.2A.11 of the Regulations, HD feed also should have been offered on a la carte basis.
- 6) TRAI could in any view of the matter have fixed the rate on the cost plus basis.

7) The objection taken to the maintainability of this appeal by TRAI on the ground that it is barred by Limitation should not be accepted as sufficient cause has been made out for condonation of delay.

8) TRAI also cannot be said to be correct in its contention raised in its reply that the appellant having not responded to the consultation process, no appeal is maintainable as in terms of Section 14A of the TRAI Act, any person aggrieved by any order passed by TRAI can prefer an appeal before this Tribunal.

14. Mr. Saket Singh the learned counsel appearing on behalf of the Respondent on the other hand would urge :-

(i) It is incorrect to state that forbearance is not a part of the Regulations.

(ii) Having regard to the fact that this Tribunal has already heard appeals and in one of them, the petitioner was represented through its Association and furthermore having regard to the fact that it had filed an original petition before this Tribunal against ESPN, questioning the quantum of rate fixed by TRAI in its order dated 26th June 2010, it cannot be said that it was not aware that in the consultation process it

was required to take part and in that view of the matter it having approached this Tribunal with a pair of unclean hands, this appeal should be dismissed.

(iii) The appellant is not correct in contending that the observations of the TRAI in its order dated 29th June, 2010 is contrary to and inconsistent with the Tariff Order dated 21.7.2010 in as much as whereas the former order was passed having regard to the direction of the Madras High Court in relation to the dispute between the contesting parties thereto, the impugned tariff order has been framed after taking into consideration in details the stand taken by a large number of stakeholders.

(iv) There exists a difference between HD feed and HD channel in so far as HD channel are concerned only two broadcasters having been telecasting the same and, thus, it cannot be said that a large number of consumers have been viewing HD channels wherefor; not only a special type of set top box is required but also a special TV set is required to be procured.

(v) Keeping in view the limited number of viewership of HD channel on HD feed, the opinion of the TRAI cannot be said to be either illegal or otherwise bad in law.

15. TRAI was constituted in terms of the provisions of the Telecom Regulatory Authority of India, 1997 Act. It has different functions to perform in terms of Section 11(1)b of the Act.

16. Sub section 2 of Section 11 of the act reads as under:-

Powers and Functions of the Authority

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11. (2) Notwithstanding anything contained in the Indian Telegraph Act, 1885 (13 of 1885), the Authority may, from time to time, by order, notify in the Official Gazette the rates at which the telecommunication services within India and outside India shall be provided under this Act including the rates at which messages shall be transmitted to any country outside India:

Provided that the Authority may notify different rates for different persons or class of persons for similar telecommunication services and where different rates are fixed as aforesaid the Authority shall record the reasons therefor.

17. Indisputably by reason of the tariff order dated 21.7.2010, TRAI has merely fixed a ceiling of 35% over and above the rates fixed by the broadcasters for transmission of their channels in analogue mode. TRAI, thus, has not fixed any rate or tariff within the meaning of section 11(2) of the act.

18. Having regard to the fact no retail tariff has been fixed which would ultimately benefit the consumers, for all intent and purport TRAI

has not exercised its jurisdiction under Section 11(2) of the Act. It has been so held by this Tribunal in its judgment and order dated 16.12.2010 in Appeal No. 3 (C)/2010 and other connected matters.

This Tribunal furthermore in its judgment and order dated 16.12.2010 passed in Appeal No. 1 (C)/2010 and other analogous cases has also clearly held that so far as HD feed is concerned the same would not be governed by Regulation 3.2 of the Regulations as admittedly HD feed or HD channel had not been brought within the purview of the 2010 Tariff Order.

19. Is it incumbent upon the TRAI to regulate the tariff at instance of a DTH operator is the question?

The answer thereto in the facts and circumstances of this case must be rendered in the negative.

20. Section 11(2) of the Act provides for a rate. It is, therefore, incumbent on the part of TRAI to specify a specific sum payable by the user of the Telecommunication services which would include broadcasting services. Fixing of a ceiling does not tantamount to fixing of a rate. If the broadcasters had fixed an amount for transmission of its channel on HD feed, so far as the DTH operators are concerned they could take benefit of the ceiling of 35% thereof

only. If the Tariff Order was directed for HD feed, the same by itself would not have deter the broadcasters to fix a higher amount.

21. In a Situation of the present nature, where a new and different technology is being used by the broadcasters for the aforementioned purpose, in our opinion the TRAI was justified in prescribing forbearance for the time being. It can also fix a rate or tariff at several stages.

22. What would be affordable prices to viewers and subscribers would depend upon the fact situation obtaining in each case. Television on HD feed are watched by those who can afford to purchase specialized type of set-top boxes or a very costly TV set. They cannot prima facie be said to be falling within the category of viewers who require protection.

The requirements of big operators like DTH operators need not be in our considered opinion equated with the need of the general and end consumers.

23. This Tribunal in ASC Enterprise (supra) and Tata Sky (supra) itself stated that fixation of the tariff is the prerogative of TRAI. We do not see any reason, as at present advised, to differ from the said view.

24. We do not agree with the contention of Mr. Jain that Regulator must regulate in all situations. It may or may not do so.

How much the DTH Operators have to pay to the broadcasters, therefore, need not always be a relevant criteria.

HD feed is not normal feed. The normal feed is also available to the DTH Operators. Every broadcaster on a request made by a distributor of TV Channel subject to just exceptions is legally obligated to supply signals of its channel on reasonable terms and on a non-discriminatory basis.

Both the categories of feed cannot be equated. Charges fixed for one cannot be equated with other.

This aspect of the matter has been considered in Appeal No. 1 (C)/2010.

25. The petitioner was a party in the said matter. It independently had preferred an appeal.

Despite having knowledge, it did not take part in the consultation process.

It was sitting on the fence. If it intended that an effective consultation should take place, it should have supplied data and other necessary informations.

26. More significantly it did not approach this Tribunal promptly. Its appeal is barred by limitation. No application for condonation of delay is on record. We can safely presume that none was filed. Had the appellant handed over a copy thereof, it would have been on the record of the present petition. Even otherwise, an application for condonation of delay should be filed along with the Memo of Appeal.

There cannot be any cogent reason not to file the same in the Registry.

Therefore, there being nothing on record for this Tribunal to satisfy itself that the appellant has established existence of sufficient cause, no case has been made out for condonation of delay in preferring this appeal. Even otherwise there exists no sufficient material on record to condone the delay.

27. We are inclined to believe to that this appeal has been filed by way of an after thought.

28. For the reasons aforementioned this appeal is dismissed with costs.

Counsel's fee is assessed at Rs.1,00,000/-. We would request TRAI to consider the desirability of putting the said amount in its Consumer Awareness Fund.

(S.B. Sinha)
Chairperson

(G.D. Gaiha)
Member

(P.K. Rastogi)
Member

February 3, 2011
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