

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

Dated 18th July, 2011

Petition No. 395 (C) of 2010

Eswara Communications (S Channel) ... Petitioner

Vs.

Maa Television Network Ltd. ... 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 Petitioner : Mr. Sharath Sampath, Advocate

For Respondent : Mr. Rajagopala Rao, Advocate

J U D G E M E N T

S. B. Sinha

The petitioner is a multiservice operator. The respondent is a broadcaster and is engaged in the business of broadcasting services in respect of its products being 'Maa TV', 'Maa Music' etc. The petitioner retransmits Free to Air channels. It, however, also retransmits two pay channels known as 'B4U' and 'Vissa TV'.

2. This petition has been filed by the petitioner on or about 16th November, 2010 for a direction upon the respondent to supply decoders in

respect of the 'MAA TV' channels to its network wherefor a request was made by a letter dated 22.06.2010. It reads as under :-

"We started cable network in the name and style of Eswara Communications ('S' Channel) at Vijayawada. We are M.S.O. and having cable operation with connections in Vijayawada and surrounding places. We are also installed upto date equipment to telecast programmes through cable to my customers.

The management of the MAA T.V. converted the channel on pay channel for which D-Coder is required to telecast viewers our customers were requested us to provide MAA T.V. programmes. We are ready to deposit necessary amount to supplying D-Coders.

Therefore, we request to kindly provide D-Coders us as early as possible."

3. The petitioner, on the premise that the said request had not been responded to, went to the office of the respondent at Hyderabad and served another letter on or about 27.07.2010, the receipt whereof, however, is denied and disputed.

4. It, however, is evident that the petitioner neither with its letter dated 22.06.2010 nor with that of 27.07.2010 furnished any particulars, as is required under Clause 3.2 read with Clause 9.2 of the Telecommunication (Broadcasting and Cable Services) Interconnection Regulations, 2004 as amended from time to time ('the Regulations').

5. This Tribunal in this petition, by an order dated 22.11.2010 directed the petitioner to furnish Subscriber Line Reports to the respondent, which according to it was compiled with by furnishing a letter addressed to the latter on 28th November 2010 naming 9 cable operators operating in different areas as also 69 direct connectivities in the area of Krishnalanka, totalling the subscriber base of 1119.

The respondent in its reply inter alia contended :-

1. The petitioner is not a Multi Service Operator
2. It did not have any proper infrastructure.
3. It did not retransmit the signals of any pay channel.
4. No SLR has been supplied by the petitioner as per order of this Tribunal and only a list of Cable Operators has been furnished, which is vague and incomplete.
5. The letter of request was not in compliance with in accordance with 'Interconnect Regulations' being not accompanied by relevant documents, no action could be directed to be taken on the basis thereof.
6. The petitioner does not provide even any 'Free to Air' channel.

6. In its rejoinder, the petitioner, however, disputed the said allegations inter alia contending :-

1. The petitioner retransmits more than 100 FTAs.

2. Despite the fact that it has a headend, the respondent had not inspected the same.
3. It is an MSO having proper infrastructure.
4. It has been re-transmitting signals of two pay channels namely, 'B4U Movies' and 'Vissa TV'.

In support of the said allegations, the agreement dated 15.12.2010 entered by the petitioner into with 'B4U Movies' and the agreement dated 01.01.2011 entered into with 'Vissa TV' were annexed.

7. By an order dated 02.02.2011, this Tribunal framed the following issues :-

- “i) Whether the petitioner has the requisite infrastructure including headend to act as a MSO so as to enable it to obtain decoders from the respondent?”*
- ii) Whether the petitioner has complied with the mandatory requirement in terms of Clause 9.2 of the Interconnect Regulations, 2006 as amended from time to time?”*
- iii) Whether the petitioner has complied with the requirements for obtaining decoders from the respondent in terms of 3.2 of the Regulations?”*

8. Before, however, advertng to the rival contentions, we may notice that learned counsel appearing on behalf of the respondent made a statement before us on 17.02.2011 that the representative of the respondent had

visited the headend of the petitioner but the same was not found to be satisfactory, whereas learned counsel for the petitioner contended that no such inspection has been carried out.

9. By reason of the said order, this Tribunal directed the petitioner to make a declaration that it was not a defaulter and furthermore directed the respondent to visit the headend of the petitioner and verify its subscriber base within two weeks. The petitioner was also directed to furnish additional requisite informations, if required by the respondent, by 17th March, 2011.

10. Pursuant to or in furtherance of the said direction, the petitioner furnished the telephone numbers and addresses of ten cable operators to the respondent on or about 25.02.2011.

The respondent, however, despite the same sought for further informations from the petitioner in respect of the following :-

- “1. *Subscriber Line Report (SLR List)*
2. *Network Details with Photos*
3. *No. of other Free To Air (FTA) and Pay channels*
4. *Copies of Invoices of existing pay channels*
5. *Track Record of Pay channels*
6. *Service Tax details*
7. *POL Tax & Entertainment tax details*
8. *Certificate of Incorporation of firm*
9. *Address proof*
10. *Details of other operators in the area*
11. *Income Tax returns for the last three (3) years.*
12. *Cyber Root Map.”*

11. Yet again, by a letter dated 14.03.2011, the petitioner furnished the following documents :-

1. A copy of the SLR List which had been furnished, that is, the details of the LCOs.
2. The photographs of its headend.
3. The list of channels including the pay channels
4. The agreements (In the proposal sheets of 'B4U' and 'Vissa' agreements, it was stated that subscription fee for those pay channels have already been paid. One payment has been done to the pay channels and the second payment due dates are way off.)
5. The Service Tax details in three sheets showing that its turnover is still below 8 Lacs.
6. Entertainment Tax Treasury Challan upto November, 2010.
7. A statement that the payments of Entertainment Tax are made through cheques.
8. A declaration that the network is a proprietary concern.
9. A postal registration certificate as Annexure V.

12. Despite the same, however, again the details of the subscribers of the LCOs were asked by respondent by a letter dated 24thMarch, 2011 as also copies of the invoices of the existing 'pay channels', track record of 'pay channels', Income Tax Returns having not been provided, a copy of the PAN Card was asked for.

13. The petitioner, by its letter dated 28th March, 2011 sent the following documents :-

- “1. Subscriber Line Report with Names & Address details of our Subscribers.*
- 2. Invoices/Correspondence with existing Pay channels.*
- 3. Track record of Pay channels-No track record...We are sending the copies of the cheques sent to them.*
- 4. PAN CARD. Scanned copy of the PAN Card is being sent to you.”*

14. By an order dated 29.03.2011, this Tribunal noticed :-

“It appears that the parties have been exchanging correspondence for the purpose of seeking and supplying informations in terms of our order dated 17.2.2011. It appears that whereas the petitioner has, by a letter dated 25.2.2011, furnished the addresses and phone numbers of the Local Cable Operators, the respondent is insisting on the subscriber details. However, such subscriber details, in our opinion, would not be necessary to be supplied in the event the petitioner has direct connectivity.”

15. Parties also filed their additional affidavits.

16. The short question that arises for consideration is as to whether in the facts and circumstances of this case, the petitioner has made out any case for a direction upon the respondent to supply decoders of its channels.

17. The relevant paragraphs of Clause 3.2 of the Regulations framed by the TRAI read 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, headends in the sky operator; [HITS Operators and 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

.....

“Explanation 1

The applicant distributors of TV channels intending to get signal feed from any multi-system operator other than the presently-affiliated multi system operator, or from any agent/ any other intermediary of the broadcaster/multi system operator, or directly from broadcasters shall produce along with their request for services, a copy of the latest monthly invoice showing the dues, if any, from the presently-affiliated multi system operator, or from any agent/ any other intermediary of the broadcaster/multi

system operator who collects the payment for providing TV channel signals.”

.....

18. In terms of the aforementioned provision, a broadcaster is statutorily obligated to supply signals of its channels on demand of a distributor of T.V. channels subject to the fulfillment of the conditions laid down therein.

19. It is true that the petitioner in its letters dated 22.06.2010 and 27.07.2010 (even assuming that the same had been received) did not furnish any details. It, however, also appears that the respondent at least despite receiving the letter dated 22.06.2010, did not respond thereto within a period of 60 days as is provided under Clause 3.5 of the Regulations. It had also not asked for any other or further details.

20. We have noticed heretobefore the events which have taken place subsequently.

21. We have also noticed heretobefore that several orders have been passed by this Tribunal during pendency of this petition namely the correspondences, furnishing of various documents, passing of orders from time to time and compliance/non-compliance thereof.

22. One of the preliminary objections of Mr. Rajagopala Rao is that the petitioner had not furnished the requisite details in its request dated 22.06.2010. We think in the facts of the present case and keeping in view the fact that the respondent itself had asked for several documents, inspected the head ends etc. during pendency of the petition, we, in the peculiar facts and circumstances of the case, should take into consideration the subsequent events for the purpose of disposing of the petition on merit rather than dismissing the same on the ground that the petitioner had not furnished the requisite details to the respondent.

23. Mr Rajagopala Rao would contend that the petitioner was also bound to furnish the details of the subscribers of the local cable operators. We do not think that being a Multi Service Operator, it was required to do so in terms of Clause 9.2 of the Regulations, which reads thus :-

“9.2 In non-addressable systems, while executing an interconnection agreement for the first time between a multi system operator and a broadcaster, the multi system operator shall furnish a list of the cable operators who will be getting signals from its network along with their subscriber base. The parties to the agreement shall take into account the subscriber base of cable operators connected to the multi system operator while negotiating the subscriber base of the multi system operator. For the consumers proposed to be directly served by the multi system operator, the procedure as laid down in sub-clause 9.1 of this regulation shall be followed.”

24. In terms of the said Regulations, therefore, what is necessary is merely to furnish the details of the local cable operators. In this case the petitioner has furnished the telephone numbers and addresses of the local cable operators. It has also furnished the addresses of its own subscribers who are 89 in number.

The said informations furnished by the petitioner were sufficient in law.

25. Our attention, however, has been drawn to the definition of 'Subscriber Base' by Mr. Rajagopala Rao to contend that the details of the subscribers must be furnished.

Clause 2 (p) of the Regulations reads as under :-

- “2.(p) **“subscriber base”** means the number of subscribers -*
- (i) as agreed to by two service providers in a non-addressable system on the basis of which payments are made by one service provider to the other, or*
 - (ii) as reflected by the Subscriber Management System, where addressable systems are employed.”*

26. From a bare perusal of the aforementioned provision, it is evident that subscriber base is determined on the basis of the agreement entered into by a multi service operator and an LCO or the broadcaster and a multi service operator. It is never the 'Universe' of any LCO or MSO.

27. If all the subscribers of a LCO or a MSO were to be taken into consideration, no question of any agreement being entered into for the said purpose would arise.

28. We, therefore, are of the opinion that in terms of the Regulations, it was necessary for the petitioner to furnish the details of the subscribers of the LCOs. It, however, does not mean that the broadcasters will be bound by the declaration made by the MSOs so far as the subscriber base of the LCOs are concerned. They would be at liberty to verify the same.

29. For the aforementioned purpose only, it is entitled to make verification on the basis of the details of the LCOs furnished by the MSO as also the direct subscribers.

30. The respondent has inspected the headend of the petitioner only on 20th May, 2011 as has been admitted by Mr. K. Shiva Adinarayan, the Senior General Manager (Corporate Services) of the respondent in his cross-examination. This was done despite this Tribunal's order dated 02.02.2011, 17.02.2011 and 18.04.2011. We must, also record our dissatisfaction that a statement was made before us that the head end of the petitioner, upon inspection was found to be not satisfactory.

31. The respondent's witness had also no personal knowledge of the different steps taken by the parties in the matter. He had never taken part

in any negotiation. He did not, himself inspect the premise where the Headend of the petitioner was situated.

32. Even in relation to the inspection of the headend, it appears that a new story has been made out by him that the representative of the respondent had gone to the headend of the petitioner, but no cooperation was rendered from its side. It was a sheer afterthought to fill up the lacunae in the case of the respondent in this behalf.

33. The respondent's witness did not say that the equipments installed in the headend of the petitioner did not conform to the standards laid down by BIS.

34. It, furthermore, stands established that the petitioner retransmits a large number of FTA channels and two pay channels, which by itself is sufficient to show that it is in possession of a head end.

35. In that view of the matter, the capacity of the petitioner to retransmit signals of the channels of the Broadcasters cannot be disputed.

36. The only question which survives for consideration is as to what should be the subscriber base?

37. Mr. Rajagopala Rao, in our opinion, has rightly drawn our attention to the agreement entered into by and between the petitioner and 'VISSA channel', from a perusal whereof it appears that it pays a sum of Rs.55,000/- per month to the said broadcaster.

38. The connectivity in respect of the said channel would work out to be 5000, the rate of the channel being Rs.11/-. Earlier, the petitioner had been paying for the connectivity of 2250.

39. So far as the said channel is concerned, the areas involved are :-

1. Kankipadu
2. Gannavaram
3. Ibrahimpatan
4. Adivennatam, as was stated by respondent's witness, Shri Adinarayana.

We have, however, seen the agreement from a perusal whereof it appears that the town of Vijaywada also comes within its area of operation.

40. The petitioner has placed before us the fibre route map, from a perusal whereof it appears that it has laid cables on the West from Golapudi village to the far end of the Vijayawada town on the east, and Lujudivu village in the North to the last village Krishnalanka on the south abutting the Krishna river.

41. Even in the entire town of Vijaywada it has laid its cable. Evidently therefor, the areas of operation, within which petitioner intends to operate and/or operate for the time are very large ones. The petitioner does not say that its area of operation, so far as the channels of the respondent are concerned, shall be less than its present area of operation. If, for the said areas, the petitioner can afford to declare a subscriber base of 5000 for Vissa channel, we fail to understand as to on what basis it had shown its subscriber base to be a little more than 1200, so far as the respondent is concerned.

42. We, therefore, are of the opinion that one of the channels of the respondent, namely 'Maa TV' being popular and the rate of subscription being lower than the subscription rate of 'VISSA' channel namely Rs.8/- only vis-à-vis Rs.11/-, the subscriber base for the aforementioned channel should be about 7500. The said figure has been determined by us on an ad-hoc basis.

43. We, however, make it clear that the parties shall enter into negotiations and arrive at a subscriber base within the meaning of the provisions of Clause 2 (p) of the Regulations wherefor the respondent would be entitled to peruse all documents within the power and possession of the petitioner being evidences in relation thereto including survey, if any.

44. We, furthermore, clarify that so as to enable the petitioner to obtain supply of signals of the channels of the respondent vis-a-vis the other channels on reasonable terms and on a non-discriminatory basis, the respondent would apply the same percentage of viewership on the basis whereof it supplies signals to other MSOs in the town of Vijayawada who, we are informed at the bar, is about four.

45. The interim arrangement shall be valid for a period of six months within which time, we are of the opinion, that parties must arrive at a consensus with regard to subscriber base in which event, this Order shall be substituted by the agreement arrived at by and between the parties herein.

46. This petition is allowed with the aforementioned observations and directions with no order as to costs.

..... J
(S.B. Sinha)
Chairperson

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(G. D. Gaiha)
Member

.....
(P.K. Rastogi)
Member

rkc