TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL
NEW DELHI

Dated 28th JULY 2011

Petition No.25 (C) of 2010
(MA.No.278 of 2010)

Indusind Media and Communications Ltd. ...Petitioner
Vs.
Star Den Media Services Pvt. Ltd. & Ors. ...Respondents

Petition No. 54(C) OF 2006
(M.A.Nos.23 & 26 of 2006 and M.A.No.98 of 2007, M.A.Nos.5, 29 & 30 of 2010)

Indusind Media and Communications Ltd. ...Petitioner
Vs
Star India Pvt. Ltd. & Anr. ...Respondents

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.C.S.Vaidyanathan,Senior Advocate Mr.Manjul Bajpai,Advocate Mr. Arun Kathpalia, Advocate Mr. Ashish Yadav, Advocate
For Respondent Star Den Media Services Pvt. Ltd.	:	Mr. Mr.Prateek Kumar,Advocate Mr.Gaurav Juneja,Advocate
For Respondent- Star India Pvt. Ltd.	:	Mr.Prateek Kumar,Advocate Mr.Gaurav Juneja,Advocate Mr.Zeyanul |Haque,Advocate Ms.Garima Sharma,Advocate Mr.Saurabh Srivastava,Advocate
For Respondent TRAI	:	Mr.Saket Singh, Advocate

For Respondents Zee Turner Ltd./Taj Television	:	Mr.Maninder Singh,Senior Advocate Mrs. Prathiba M. Singh, Advocate Mr.Vadivelu Deenadayalan,Advocate Mr.Ravi Bhardwaj,Advocate
For Respondent ESPN	:	Mr.N. Ganpathy,Advocate
For Respondent MSM Discovery	:	Mr.Amit Sibal, Advocate Mr. Amitesh Chandra Mishra, Advocate
For Respondent Neo Sports		Mr.Vikram Mehta,Advocate Mr.Abhinav Agnihotri,Advocate

JUDGMENT

P.K.Rastogi, Member for self and Mr. G. D. Gaiha, Member

The Petitioner has filed the present Petition challenging, inter alia, various terms and conditions of the Subscription Agreement provided by Star Den Media Services Private Limited (Star Den) to IndusInd Media & Communications Limited (IMCL) for 2009 saying that these were unreasonable and contrary to various provisions of the Interconnection Regulations of TRAI, particularly second proviso to Clause 3.2 of the Telecommunication (Broadcasting and Cable Services Interconnection) Regulation 2004 dated 10.12.2004 (as amended).

2. The Petitioner is a Multi Service Operator (MSO) engaged in the business of Cable and TV Services. The Respondent No. 1 is a distributor of Respondent No 2. and is a content aggregator engaged

in the business of supplying broadcasting services. The Respondent No. 2 has appointed Respondent No. 1 as its distributor and is content owner.

3. According to the petitioner, it has been providing cable services in the cities of Ahmedabad, Vadodra, Nasik, Nagpur, Mumbai, Delhi, Bangalore (including Siticable) and Old and New Belgaum etc. progressively since 1995. It has been receiving and re-transmitting STAR DEN signals from the inception of STAR providing signals in these and other cities. Various Agreements have been executed between the Parties from time to time, the last being the Subscription Agreement dated 22.10.2009 for the year 2009 for U. P. Service Area.

Several terms of this Agreement are unreasonable and are being impugned by way of the present petition. Earlier also IMCL had challenged unreasonable terms in the Agreement with Star Respondent No. 2 herein in Petition No. 54 (c) of 2006, which is pending consideration of this Tribunal.

4. The petitioner submitted that in accordance with the requirement of regulations 13 of the Telecommunication (Broadcasting and Cable Services) Interconnection (3rd Amendment) Regulation, 2006 (10 of 2006) Star India Pvt. Ltd. submitted its RIO to TRAI under cover of its letter dated 27.12.2006. The said RIO was forwarded by TRAI to the

Petitioner herein for its comments. Subsequently, a meeting was held between the representatives of Star and IMCL with respect to certain commercial terms. Vide its letter bearing No. F. No. 11-4 / 2006 BC&S dated 23.02.2007, TRAI informed Star stating inter alia, that:

(a) That IMCL's comments were sought on Star's RIO, which have been received.

(b) That Star's RIO has been examined by TRAI.

(c) That certain clauses of the RIO appear to be objectionable and may need to be amended / deleted.

Star provided its comments to TRAI's said letter dated 23.02.2007, under cover of its letter dated 01.03.2007. Subsequently, under cover of its letter dated 05.03.2007, IMCL provided its comments / clarifications on TRAI's tentative views of 23.02.2007.

5. The petitioner further submits that on 16.03.2007 the parties signed a Subscription Agreement for the period from 01.01.2007 to 31.12.2007 for Mumbai. In its letter of 15.03.2007, Star clarified that it shall comply with the applicable laws, regulations and notifications as laid down by the competent authority as amended from time to time, in respect of the subject matter of the said Subscription Agreement. Subsequently, on 25.04.2007, TRAI informed Star stating, inter alia, that after carefully examining the RIO, the comments and

clarification received from Star and IMCL, the TRAI had come to the conclusion that certain clauses of Star's RIO were in violation of clause 3.2 of the Telecommunication (Broadcasting and Cable Services) Interconnection Regulation 2004 as amended from time to time. In view thereof, Star was advised to make certain amendments in its RIO and furnish the revised RIO within 15 days thereof. The said letter dated 25.04.2007 of TRAI to Star was challenged by Star before this Tribunal in Appeal No. 6 (C) of 2007.

6. Vide its letter dated 25.01.2008, Star India Pvt. Ltd. wrote to IMCL stating, inter alia, that Star India Pvt. Ltd. had appointed Star Den Media Services Pvt. Ltd. (Star Den) to distribute the channels across networks. The Subscription Agreement for 2008 was executed between Star Den Media Services Pvt. Ltd. and IMCL for the period between 01.02.2008 to 31.12.2008.

7. Subsequently on 19.08.2008, the above mentioned Appeal No. 6 (C) of 2007 was disposed off in view of the submissions made by Star India that it did not want to pursue the said Appeal for the reasons that Star India Pvt. Ltd. was no longer in the business of distribution of channels and that the said business have been passed on to Star Den Media Services Pvt. Ltd. It was also submitted that if at all there was any grievance which Star Den Media Services Pvt. Ltd. may have, it

was free to pursue the same. Further the Agreement which Star India Pvt. Ltd. entered with IMCL had come to an end on 31.12.2007.

8. According to the petitioner Star did not implement the contents of TRAI's said letter dated 25.04.2007. Thereafter, IMCL and Star Den Media Services Pvt. Ltd. signed a Subscription Agreement for the period between 01.01.2009 to 31.12.2009 for Delhi Service Area, which continues to be operational presently.

IMCL and Star Den Media Services Pvt. Ltd. signed a Memorandum of Understanding on 01.04.2009 with respect to certain commercial terms relating to its Subscription Agreement with Star Den for the year 2009; apart from a distribution arrangement between Star Den and a group Company of IMCL. Star Den Media Services Pvt. Ltd. and IMCL signed a Subscription Agreement for the period between 01.01.2009 to 31.12.2009 for U.P. Service Area on 22.10.2009.

9. However, STAR and its distributor have not rectified its agreement even the new agreement contains several terms and conditions which are unreasonable and arbitrary. In fact some of the clauses which even TRAI found unreasonable continue to find place in the agreement in one form or the other. Though, some of these clauses in effect are also impugned in the pending petition No. 54 (c)

of 2006, however, the present petition has been filed impugning the terms of the fresh agreement. Various clauses of new subscription agreement which are considered illegal by the petitioner are 12(c)(ii), 6(e) and 6(b), default of distributor systems and subscribers, 7(f), 6(f), 6(s), clause 1(c) of Schedule II, clause 1(g) of schedule II,6(R), 7(f) and 7(h).

10. Under the aforesaid facts and circumstances, the Petitioner requested, interalia, for the following relief :

(a) Hold the said Clauses as, inter alia, unreasonable, unfair, contrary to various provisions of the Interconnection Regulation of TRAI particularly second proviso to Clause 3.2 of the Telecommunication (Broadcasting and Cable Services Interconnection) Regulation 2004 dated 10.12.2004 (as amended) as well as Tariff Orders (as amended) of TRAI and further hold that the said Clauses tantamount to and constitute, inter alia, a denial of request to provide signals to IMCL by STAR DEN and direct STAR DEN to delete / modify the said Clauses so that these do not violate the said provisions and are not unreasonable.

(b) Direct TRAI to issue detailed guidelines with respect to fair, reasonable and non-discriminatory terms for the future Agreements.

11. The respondent, on the other hand, denied that any terms and conditions of the subscription agreement for the year 2009 were unreasonable and contrary to TRAI's Regulations or Tariff orders. All clauses of the subscription agreement are uniformly applicable to those who enter into agreements with the respondent. Further thousands of operators have executed the same agreements without any objections of whatever nature. The petitioner had entered into subscription agreements for the years 2008 and 2009 with the respondent without any demur for its head-ends located in various cities and has received signals and is reaping benefits under those agreements. Proviso to clause 3.2 could be agitated by a distributor of TV channels 'only' if it feels that it has been has been discriminated on terms of getting TV signals "compared" to a similarly based distributor of TV channel.

12. The respondent further submitted that the petitioner ought not be allowed to refer and rely on pleadings in Petition No. 54(c) of 2006 since the respondent no. 1 was neither a party said pleadings nor has any copy of the said pleadings been supplied to the answering

respondent no. 1. The same in any case were irrelevant to the present proceedings. The present petition challenges various clauses of the 2009 subscription agreement, which are already expired on 31.12.2009 and presently signals are being provided in terms of clause 8 of the TRAI's Interconnect Regulations.

13. Regarding the letter of TRAI dated 25.04.2007, the respondent submitted that the TRAI could not have attempted to decide a dispute between two service providers in the absence of any enabling provisions under the TRAI Act. The said communication dated 25.04.2007 has not been issued under any provision of the TRAI Act. Further, the same also does not seem to have been notified in the official Gazette. Furthermore, the TRAI has apparently allowed stringent clauses to be retained in RIOs/agreements for other broadcasters. As such, the same cannot be relied upon. Further, subsequent to the said communication, the TRAI has amended its interconnect regulations numerous time and has interalia issued new regulations for condition access system and quality of service, which go on to show that the TRAI has itself deviated from its initial stand suggested by the petitioner.

14. An application was filed by the respondent Star Den Media Services Pvt. Ltd. stating that the clauses of its Subscription

Agreement under challenge before this Tribunal in the instant case were similar to that of other broadcasters like Zee Turner Limited, MSM Discovery Pvt. Ltd., ESPN – STAR Sports and requested that these broadcasters/content aggregator may also be impleaded as necessary and proper parties. This Tribunal vide its Order dated 10.08.2010 allowed this application and these three Respondents were impleaded as a party in the present proceedings.

15. M/s Zee Turner Ltd. has filed a response in respect of certain clauses of the subscription agreement of the Respondent No. 1 which were similar to the clauses appearing in the Subscription Agreement of the Applicant and Intervener. The main issue on which this applicant wanted to intervene is transmission of signals to digital equipment of the petitioner. The intervenor submitted that :

(a) The impleaded Respondent by way of abovementioned clauses has merely stipulated that under this particular agreement for non-CAS areas, the signals of its channels can be retransmitted only by way of permitted distribution system i.e. through analog mode only. In the event, the Petitioner is desirous of retransmitting signals under a different distribution technology i.e. through addressable digital platform in non-CAS areas, then it is required to

approach the answering Respondent/ Applicant for execution of appropriate agreement, which has been prescribed by TRAI, under clause 13.2B of the Telecommunication (Broadcasting and Cable Services) Interconnection (Fifth Amendment) Regulations, 2009 dt. 17.03.2009.

(b) The Petitioner, admittedly, has deployed the set top boxes in its operational areas which are SMS disabled i.e. having no subscriber management system in place to ensure the true / actual count of the subscriber receiving the channels of the broadcasters, being the most fundamental and essential feature of a system claiming itself to be an addressable mechanism.

(c) It is deliberately not providing the Subscriber Management System (SMS) and encryption i.e. addressable distribution technologies so as to ensure that it is not required to pay for all its subscribers who are receiving signals through set top box and thereby continue to grossly under-declare and not disclose the exact number of subscribers to the Broadcasters for the purpose of payment of subscription fee.

(d) It is submitted that by contending that digital technologies (without addressability) increase the receipt of higher

number of channels which may be 500 channels or more, the petitioner is indulging in increasing its carriage and placement revenue from availability of increased bandwidth without any obligation to pay the broadcasters on the basis of actual number of subscribers receiving signals through set top box and thereby depriving the broadcasters of their legitimate subscription fee entitlements on the basis of actual number of subscribers receiving their signals. Thus, by demanding the signals in non-CAS areas on the basis of analog agreement for delivery through non-addressable digital mode, the Petitioner though falsely claiming but is factually deliberately not implementing addressability so as to ensure that his pay out to Broadcasters / Aggregators remain bare minimum.

(e) The petitioner cannot demand signals for distribution of channels through digital non-addressable distribution system under the analog subscription agreement.

(f) TRAI does not recognize the distribution of channels through digital non-addressable distribution system as is clear from the clause 29 of the Explanatory Memorandum to the Telecommunication (Broadcasting and Cable Services) Interconnection (Fifth Amendment) Regulations,

2009 dt. 17.03.09. It has been categorically stipulated by TRAI that in non-CAS areas only two modes of distribution systems / services are recognized i.e. analog (without encryption) and digital (with encryption).

16. M/s MSM Discovery Pvt. Ltd., the impleaded respondent submitted that the terms and conditions set out in the affiliation agreement of the respondent are not unreasonable. It submitted that:

(a) Clause 9 of The Telecommunication (Broadcasting and Cable Services) Interconnection (Third Amendment) Regulation, 2006 dated 04.09.2006 provides for procedure of finalizing subscriber base at the time of first agreement. That the clause specifically talks about subscriber base of the signal seeker. In this regard it is humbly submitted that the details submitted by an applicant should be correct and verifiable.

(b) Even clause 10 of the Interconnect Regulations dated 04.09.2006 recognizes the need of transparency in commercial dealings, which is why a service provider seeking a change in the subscriber base during validity of agreement is required to provide adequate reasons alongwith evidence including local survey for the proposed change.

(c) Clause 12 of the Interconnect Regulations dated 04.09.2006 provides for the submission of a monthly subscriber

base statement. It casts an obligation on the Multi System Operator to furnish to the broadcaster the updated list of cable operators along with their subscriber base on a monthly basis.

17. M/s ESPN Software India Private Limited, another impleaded respondent filed its reply and submitted that :

> "(a) The ESPN Subscription Agreement provides for 'Term' as under:
>
> "This Agreement is for a fixed period of 12 months and shall be effective from _____ upto _____. It is agreed between the Parties that upon the expiry of the above_ said Minimum Term this Agreement shall come to an end. Thereafter, if the parties agree to extend the term, a fresh agreement shall he executed upon such agreed terms and conditions."
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> The above term cannot be said to be unreasonable viewed from any angle. Moreover, ESPN follows the procedure for renewal as set out in the Regulations of TRAI. It is nobody's case that ESPN does not follow the renewal procedure prescribed by TRAI.
>
> (b) The Petitioner has challenged the definition of `distribution system' as defined in the Subscription Agreement of Respondent No.1. The relevant similar clause contained in the Applicant's Subscription Agreement reads as under:
>
> "AREA(s) to be served by Affiliate:_____ (Excluding hotels, Offices & Other Commercial Establishments, Bars, Restaurants, Pubs, Guest Houses, Hospitals, Cinema Halls/Theatres, Public Viewing Areas, Stadium, Clubs and the like for which a separate agreement shall be required)"
>
> The impleaded Respondent by way of above mentioned clause has merely stipulated the area(s) in which the signals of its channels can be retransmitted by the

Affiliate. It excludes from its purview hotels, bars and other public viewing areas. The Affiliate can seek permission of ESPN to distribute the ESPN services to these public viewing areas upon requisite authorization from ESPN and subject to payment of commercial subscription rates as prescribed by the TRAI.

(c) Schedule II, Sub Clause (C) regarding Affiliate joining any new LCO - the said Clause is not present in the ESPN Agreement.

(d) Sub Clause (G) - Merger of Affiliates - the said Clause is not present in the ESPN Agreement.

(e) Clause (B) : for any deterioration or breaks in the reception of the channels - this specific clause is not present in the ESPN Agreement

(f) Clause (E) : Affiliate to give a preferred placement of channels of Star Den channels. No such specific clause is present in the ESPN agreement.

(g) Clause (F) : Affiliate to prevent unauthorized viewing of Star Den channels and curb piracy by taking written approval of Star Den. A for prevention of piracy is present in the ESPN agreement.

ESPN is justified in ensuring protection of its re-broadcast rights from piracy which would erode its revenue model.

(h) Clause (R) : Affiliate to keep accurate and complete records of billing of Star Den and all other matters which pertain to its business and its LCOs. Similar Clause being Clause [8.3J is present in the ESPN agreement as under:

"The Affiliate shall also keep / maintain accurate and complete records and accounts of billings, list of Subscribers, and all other matters which pertain to Sub-operators / Subscribers and all such records and accounts shall be available for inspection and audit by Licensor or its representatives on reasonable notice to Affiliate, during normal business hours during the term of this Agreement and for two years after its termination."

By no stretch of imagination can it be said that the above clause is unreasonable.

(i) Clause (S) : Affiliate to act as a Principal to engage such person who have an appropriate network for running the Cable operations. The Clause 3 (h) in the ESPN Subscription Agreement requires the Affiliate to have proper net worth.

"(v) It has the appropriate net worth, good and paying subscriber/ base, necessary infrastructure including office, support staff and equipment for running the cable operations smoothly and efficiently and discharging its entire obligations under this Agreement."

The above clause cannot be said to be unreasonable.

(j) Representations and warranties of the Affiliate Clause F: Affiliate not to modify the Subscriber base unilaterally. Similar Clause being Clause 8 (f) is present in the ESPN agreement as under:

"It shall not misuse the Service and shall not conceal / misrepresent about the number of Sub - operators, Sub Affiliates / Cable Operators and the number of their respective Subscribers connected to its Distribution System (s)."

The above clause cannot be said to be unreasonable.

(k) Clause H : Affiliate undertakes that it shall obtain requisite licenses from the music societies and/or concerned authorities in India if required and shall be liable to pay any license fee and royalty in relation to such licenses. Similar Clause not present in the ESPN Agreement.

(l) Termination Clause: Sub Clause (C) Point No. II: In event of failure on part of the affiliate to provide the names, address, areas served and subscriber numbers of

> the sub operators/ cable operators and also the subscriber numbers directly serviced by the affiliate. The Clause 8.4 in the ESPN Agreement reads as under :
>
> "It is hereby clarified that if the Affiliate fails to submit accurate monthly subscriber base statements as mentioned herein above, the discount offered by the Licensor is liable to be withdrawn and in such an event the total subscription fees shall be payable by the Affiliate."
>
> The Clause is not unreasonable."

18. We find that most of the clauses of the agreement of ESPN are not similar to Star Den Media Services Pvt. Ltd. and agreement of ESPN is not being questioned by the petitioner. Therefore, we have not discussed the reasonableness of the clauses of the ESPN. In fact, the case of ESPN (although in respect of its DTH operators) was decided in Petition No. 159(c) of 2010 and Petition No. 112(c) of 2010.

19. Regarding MSM Discovery Pvt. Ltd.'s reply, the main issue raised by the impleaded respondent is about the need of having detailed information about the subscribers. It insists that the details submitted by the petitioner should be correct and verifiable. For finalization of the subscriber base between the broadcaster and the MSO, it is necessary that the information is available for all the subscribers in a transparent manner.

20. As far as M/s Zee Turner is concerned, its main emphasis has been on whether the petitioner has the right to receive signals on its digital equipments. According to it, there is no provision where the signals should be supplied to the digital equipment of the petitioner. If signals are to be supplied in digital mode for the digital equipment, system should be addressable and once the digital equipment addressability is available, the broadcaster will not have any objection to supply the same in terms of clause 13.2(B) of the Interconnection Regulations.

21. For the sake of convenience, we are taking up the impugned clauses of the agreement for the period 2009-2010 and the grounds of objection by the petitioner and our finding for each clause separately.

Clause 12 (c) (ii)

22. Clause 12(c)(ii) of the agreement between the petitioner and the respondent relates to the termination clause where the Affiliate is obliged to provide the names, complete addresses, areas served and subscriber numbers of the sub-operators/link operators/ cable operators and also the subscriber numbers directly serviced by it. In case of failure on the part of the petitioner, the respondent shall have the right to disconnect the distribution of signals and terminate this Agreement subject to Applicable Laws after giving appropriate notice.

23. The impugned clause is reproduced below :

(c) Notwithstanding the provisions of Clause (b) above, STAR DEN shall have the right to disconnect / deactivate the distribution of signals to the Subscribed Channels and Terminate this Agreement subject to Applicable Laws after giving appropriate notice, if required under Applicable Laws, and/or take any other action as may be appropriate, upon the occurrence of any of the following:

<u>12 (c) (ii):</u> "In the event of failure on the part of the Affiliate to provide the names, complete addresses, areas served and subscriber numbers of the sub-operators/link operators/ cable operators and also the subscriber numbers directly serviced by the Affiliate".

24. The petitioner's objection is on the following grounds :

(i) in non-CAS areas, an MSO does not know the exact Subscriber base of its Local Cable Operators / Franchisees etc. The subscription amount and Subscriber base between the MSO and the LCO is negotiated

(ii) that once a Subscriber base has been negotiated for a given period like one year in the present case there cannot be any scope for any change in the Subscription fee / Subscriber base during the term of the Agreement otherwise the sanctity of the Agreement will be lost inasmuch as it is well known fact of the industry that churn takes place on a daily basis and therefore any such right to increase the subscriber base vested in a broadcaster is open to continued misuse.

25. We may notice that the Telecom Regulatory Authority of India vide its letter dated 25.04.2007 to Star India has mentioned that :

> "(6) (a) Clause 5 of the said Reference Interconnect Offer should be amended in view of the fact that determination of subscriber base is covered by the Telecommunication (Broadcasting and Cable Services) Interconnection Regulation 2004 as amended by the Telecommunication (Broadcasting and Cable Services) Interconnection (Third Amendment) Regulation, 2006 dated the 4th September, 2006.
>
> (b) This clause should be amended to make it clear that Subscriber details are not to be asked in view of the fact that in non-addressable regime where subscriber base is negotiated as provided in the Interconnect Regulation, the information such as the names and addresses of the actual subscribers has no relevance.
>
> In view of the above, this clause may be amended as under:-
>
> (a) In the first paragraph of clause 5 of the said Reference Interconnect Offer for the words "based on the actual number of subscribers provided by the affiliate", the words "in accordance with the Telecommunication (Broadcasting and Cable Services) Interconnection Regulation, 2004 (as amended from time to time)" should be substituted.
>
> (b) In the third paragraph of clause 5, the words "along with their details" should be omitted."

and the same has also been reiterated by TRAI with reference to Petition No. 25(C) of 2010.

26. We may notice the Regulation 12 of the Telecommunication (Broadcasting and Cable Services) Interconnection Regulation, 2004, as amended:

> "12.1 In non-addressable systems, the multi system operators shall furnish the updated list of cable operators along with their subscriber base to the broadcasters on a monthly basis."

This particular Regulation casts obligation on the part of the affiliate that updated list of cable operators have to be supplied by the MSO to the broadcaster, which should include the particulars of area of operation as well as subscriber base.

Under the Regulation, the 'subscriber base' has been defined as:

> "(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"

Clause 9 of the Interconnect Regulation prescribe procedures for finalising subscriber base at the time of Ist agreement between the Multi System Operator and Cable operator as well as agreement between MSO and Broadcaster. We may read the relevant clauses as:

> "First agreement between Multi System Operator and Cable Operator
>
> 9.1 In non-addressable systems, while executing an interconnection agreement for the first time between a multi

system operator and a cable operator, the parties to the agreement shall take into account the subscriber base of the cable operator on the basis of the Subscriber Line Report (SLR) where such SLR exists. Where such SLR does not exist, this shall be negotiated on the basis of the evidence provided by the two parties on the subscriber base, including the subscriber base of similarly placed cable operators and local survey.

Explanation

The Subscriber Line Report (SLR) is only an indicative basis for arriving at the subscriber base and the subscriber base as mutually agreed by the two parties could be more than or less than the number indicated by the SLR.

First agreement between Multi System Operator and Broadcaster

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."

We may notice the definition of "Subscriber Line Report" :

(q) "subscriber line report" or "SLR" means a monthly statement wherein, in a non-addressable system, a multi system operator and a cable operator agree upon the subscriber base for that month.

27. Thus the obligation of the affiliate is to provide the names, addresses and area served by the local cable operators alongwith their subscriber base, i.e. the negotiated number of subscribers. There is no obligation on the part of the affiliate to provide the exact number of

subscribers of cable operator. Similarly, the petitioner has the obligation to give the negotiated number of subscribers directly served by the affiliate and not the number of all the subscribers. We are of the opinion that the clause is not in accordance with the requirement of the regulation. It is necessary that the "subscriber number" requires to be substituted by the phrase "subscriber base" wherever it appears in the impugned clause, subject, of course, of the right of the broadcaster to verify the subscriber base in accordance with the applicable law.

Clause 6(b)

28. Clause 6(b) relates to the responsibility for the contents, duration or transmission of the Subscribed Channels. The said impugned clause is reproduced below :

> **"The Affiliate acknowledges and accepts that STAR DEN has no control over and is not responsible for the contents, duration or transmission of the Subscribed Channels. STAR DEN shall not be liable to compensate Affiliate or any other party for any breaks in reception or deterioration in reception of the Subscribed Channels, or deviation from any program schedule previously provided to Affiliate by STAR DEN or as may be published by the Service Providers. STAR DEN shall also not be liable in any manner to Affiliate or any third party as regards to any program content or alleged violations of any third party's rights, any law or any broadcast standards and practice guidelines, program codes or censorship guidelines contained in any Applicable Law STAR DEN**

shall also not be liable / responsible in any manner whatsoever or to any third party as regards to any programmer content (including but not limited to repeat telecast or show(s) / programme(s), etc.)"

29. The petitioner's objection are on following grounds :

(i) The Clause is unreasonable on the face of it. IMCL has no authority or control over the contents of STAR i.e. Respondent No. 2.

(ii) It has no privity with the owners / distributors of the content. It has no locus standi on the matter of contract, which is the responsibility of the broadcaster.

(iii) IMCL is only an intermediary who carries the signals of STAR/ STAR DEN to the end consumer. It may also be submitted that STAR is the provider of the contents. The content is a product belonging to STAR and therefore, responsibility for showing / telecasting the said content including Licenses required for the same ought to be the responsibility of STAR / STAR DEN alone.

30. According to the respondent it is merely an aggregator of the TV channels and is not involved in transmission/retransmission of signals and cannot be said to be responsible for the transmission of the same. As a content aggregator it is only responsible for the distribution of the channels and as such it does not have any control over the content, distribution or transmission of these channels and it solely vests with the respective broadcasters. On the other hand, the petitioner

contends that it is only an intermediary who carries the signals of respondents to the end consumer and it has no authority or control over the contents of respondent. It has no privity with the owners / distributors of the content. Fixing up the responsibility about the content and quality of the channels is totally unreasonable.

31. We are of the view that the broadcaster or the content aggregator is responsible for the content and the quality of the channels to the affiliates. The respondent cannot run from their responsibility and liability with respect to any programme or content. If there is any violation of the law and standard guidelines issued by the government, it is the liability of the content provider and not the affiliate. Further,

(i) The broadcaster is the owner of Copyright

(ii) It being owner of the Copyright and having entered into a contract, with the content aggregator, the quality of transmission is its burden.

(iii) Even otherwise the matter relating to quality of transmission is governed by a Regulations framed by the TRAI.

(iv) The Clause appears to be a one sided one and thus violative of the level playing field of the parties, which otherwise may be held to be arbitrary and thus discriminatory in nature.

Therefore, we hold that the respondent no. 1 and 2 alone are responsible for legality of the content and compliance of all laws and regulations and not the petitioner. The impugned clause is, therefore, totally unreasonable.

Clause 6(e)

32. Clause 6(e) of the agreement imposes obligation on the Affiliate to give preferred channel placement to all the Subscribed Channels in relation to the competitor's channels. The impugned clause reads as :

> **"The Affiliate shall give preferred channel placement to all the Subscribed Channels in relation to the competitor's channels. The Affiliate shall place the Subscribed Channels on the band and frequency listed in Applicable Annexure(s), as applicable. Further, STAR DEN may at its sole discretion, request the Affiliate to interchange the Subscribed Channels within the bands and frequencies listed in Applicable Annexure(s), and the Affiliate shall be under an obligation to adhere to such requests. It is expressly agreed that one of the prime considerations that STAR DEN has agreed to enter into the Agreement and grant the rights herein to the Affiliate to distribute the Subscribed Channels is based on the representation and assurance that the Subscribed Channels shall be given the placement on the band and frequency as specified herein. If the Affiliate fails to adhere to its obligations mentioned herein, it shall be deemed to be in breach of this Agreement, and STAR DEN shall be entitled to terminate the Agreement and disconnect / disconnect / deactivate the Subscribed Channels in addition to any other legal or equitable remedies available to it. In case the Affiliate has executed any separate agreement / document for placement of any of the Subscribed Channels, the same shall override the terms of this Subscription agreement for placement of such channels."**

33. The petitioner submits its objection on the following grounds :

(i) channel placement is a subject matter of separate arrangement / agreement and a separate consideration is paid for the same by the Broadcaster to IMCL / MSO, in order to popularize Broadcaster's channels so as to maximize on advertising revenues.

(ii) this clause is an attempt to hold out the threat of refusing signals as a means of forcing the Petitioner to place Channels of a given Broadcaster in a particular manner, without payment of a separate consideration therefor under this Agreement.

According to the petitioner, the Distribution System belongs to it and channel placement is in its own prerogative and as per established industry practice channel placement is a subject matter of separate arrangement / agreement and a separate amount of consideration is to be paid for the same by the Broadcaster to the petitioner and/or MSO for placing their channels on desired frequencies. If all Broadcasters decide to put the placement of their channels as a precondition of giving signals on the desired frequency then it would be impossible for the MSO to comply with such condition.

34. The respondent contends that the impugned clause 6(e) about the placement of respondent's channel is reasonable one. This has

been put with a view to see that respondent's channels are not in a disadvantageous position vis-à-vis competing channels. According to it, there are instances where operators who are unable to pay subscription fees undertake to the respondent to place channels on certain agreed frequencies and in turn the respondent charge less subscription fees. In such case the there is no need for separate placement agreement. Further, it is not mandatory to have a separate subscription and placement agreement and there is no prohibition in the regulations to have a single document keeping in view the issue of placement of channels.

The respondent further contended that unlike subscription fees which is based on area of operation and subscriber base, carriage fee demanded by the petitioner is unregulated and without any basis.

35. The views of the TRAI were also taken into consideration. TRAI has submitted that:

> "(11) Placement of channels and subscription of channels are two distinct issues, which need not be covered in the same agreement. It would be unreasonable to link the subscription of channels with the issue of placement of channels.
>
> Accordingly, sub-clause (i) of clause 10 of the said Reference Interconnect Offer should be amended so as to provide that a separate agreement as mutually agreed, may be executed, regarding the band and frequency at which the Star Channels would be placed".

36. We are of the opinion that if subscription agreement and placement of channel are put in one agreement it will be difficult in many cases to implement such clauses where the broadcaster and / or content aggregator insists on a particular frequency. The subscription agreement as per regulation is based on area of operation of the MSO and subscriber base. Clause 3.1 and 3.2 of the Regulation requires the broadcasters to provide the connection to the MSOs on a non-discriminatory basis. The broadcasters may refuse the supply of signals to the MSO on the ground that MSO has not agreed to place their channels on a particular frequency. Explanation 2 to Regulation 3.2 itself provide that the stipulation of placement frequency amounts to imposition of unreasonable terms. The said explanation reads as under :

> "Explanation 2. The stipulation of "placement frequency" or "package/ tier" by the broadcaster from whom the signals have been sought by a distributor of TV channels, as a "pre-condition" for making available signals of the requested channel(s) shall also amount to imposition of unreasonable terms."

The Clause in question appears to be totally a one side one and takes away the bargaining power of a distributor of a TV channels with the other broadcasters.

Placement of channels is essentially a matter of contract and thus it cannot, in absence of any independent covenant, which having

regard to the Regulatory Regime may be held to be impermissible in law, cannot take away the right of a distributor to enter into a contract of a distributor vis-à-vis the other broadcasters. Therefore, we hold that clause 6(e) is not in accordance with the regulations.

Clause 6 (f)

37. Clause 6 (f) relates to piracy of signals. The relevant clause is reproduced below :

Clause 6(f)

"The Affiliate shall take all necessary action to prevent any unauthorized access to the Subscribed Channels in the Area and shall regularly obtain and provide to STAR DEN updated piracy reports. The Affiliate, after taking written approval from STAR DEN, will, at its own cost, take appropriate remedial actions to curb piracy in the Area. In the event the Affiliate fails to curb piracy, then STAR DEN shall be entitled to terminate the Agreement and disconnect/deactivate the Subscribed Channels in addition to any other legal or equitable remedies available to it."

38. The petitioner's objection to this clause is on the following grounds:

(i) With respect to piracy i.e. some Cable Operator operating outside the Authorized Area, it is submitted that such a requirement of Piracy Report is again irrelevant because IMCL would be operating in the whole of the City and therefore, IMCL

would be entitled to enter each and every Area within the City and therefore, IMCL would be entitled to enter each and every area within the agreed service area, and therefore, any Cable Operator being authorized by IMCL to enter new Areas within the City limits cannot be a case of piracy.

(ii) In the event, in a given area if a cable operator attempts to operate outside the agreed service area limits, then in a such a case, such fact can be brought to the notice of STAR as and when it comes to the knowledge of IMCL.

(iii) The requirement of such an “updated piracy report” is irrelevant.

(iv) It is practically not possible for IMCL to prepare such a report and also that IMCL cannot be asked to take on the role of policing.

In the event a cable operator attempts to operate outside the given Area, such information can be brought to the notice of respondent whenever it comes to its knowledge. It is practically not possible for petitioner to prepare such a report and also it should not be asked to take the role of policing. Further, it cannot be held responsible / liable for the acts of third parties.

39. The respondent's contention is that the clause is reasonable one as the operators as well as the broadcasters have to work closely to fight piracy. If the broadcaster and the content aggregator do not stop piracy, the LCO are likely to pirate the signals provided by the broadcaster. The purpose of clause 6(f) is to stop the LCOs or affiliates to transmit the signals to the unauthorised territory. The request for furnishing the piracy report by no stretch of imagination can be deemed to constitute denial of request.

40. The respondent further contends that the TRAI itself has recognized such need of such clauses in order to curb piracy and to safeguard intellectual property rights. As such, it has incorporated similar terms in its Standard Technical and Commercial Interconnection Agreement (CAS), which was notified by TRAI in is Regulations dated 24.08.2006. The petitioner itself has executed these CAS agreements with the respondent as well. Relevant clauses of TRAI's CAS agreement as contained in the regulations dated 24.08.2006 are as under:

> 4.4.7 The Affiliate shall take all necessary actions to prevent any unauthorized access to the Subscribed Channels in the Area and shall obtain and provide to Broadcaster regularly updated piracy reports at least once every quarter. The Affiliate shall take appropriate remedial actions to curb piracy in the Area.
>
> 4.4.8 The Affiliate undertakes that it shall not either itself, or through others acting on its instructions, copy, store or

otherwise reproduce any part of the Subscribed Channels. The Affiliate further undertakes that it shall not copy or store programmes for resale or deal in any copied programmes and shall immediately notify the Broadcaster of any unauthorised copying, storage or use of any part of the Subscribed Channels and shall fully cooperate with all requests by Broadcaster to take such steps as are reasonable and appropriate to cause such activities to cease. It is understood that this does not apply to subscribers having STBs in their houses which have the capacity to record and playback programmes.

4.9.4 The Affiliate agrees that upon discovering or coming to Notice of any actual or impending infringement or unauthorised use by or through the subscribers of the Channel Marks or any other intellectual property rights or ownership rights relating to the Subscribed Channels, the Affiliate shall immediately report to Broadcaster with full details.

4.11 ANTI-PIRACY OBLIGATIONS

4.11 The Affiliate shall, at its own expense, take all necessary steps to prevent and stop unauthorised or illegal use of the Subscribed Channels or signals thereof as described below.

41. We are of the opinion that it is in the interest of the broadcaster as well as its affiliates to curb the piracy. Therefore, the affiliate is obliged to take all necessary action to prevent unauthorized access to the channels of the respondent. If any act of piracy comes to the knowledge of the petitioner, it is his duty to inform the respondent immediately. The petitioner should take all the possible actions within its means to curb piracy. While we agree with part of the clause regarding its objectives, but to say that “In the event the Affiliate fails to curb piracy, then STAR DEN shall be entitled to terminate the Agreement and disconnect/ deactivate the Subscribed Channels in

addition to any other legal or equitable remedies available to it." is not in accordance with regulation. However, the respondent can have the same clauses as in the case of CAS area.

Clause 6 (s) (vi)

42. This clause is regarding copyright of the content. The relevant clause reads as :

> **"Such person / entity shall neither itself nor otherwise authorize others to copy, tape, record or otherwise reproduce any part of the Service, without STAR DEN's prior written authorization. It shall not copy, tape, or record any programs or re-sale or sub-license and shall immediately notify the STAR DEN of any unauthorized copying / taping / recording or use of any part of the Channels and shall fully co-operate with all request by the STAR DEN to take such steps as are reasonable and appropriate to cause such activities to cease. It shall not distribute or exhibit or authorize, license or permit the distribution or execution of, the Service by any means or device now known or hereafter deviced, other than throughout the distribution systems listed in the Agreement in accordance with the terms of this Agreement and shall not without STAR DEN's prior written consent, add any distribution systems to this Agreement or distribute the Service via any distribution system or medium not covered by this Agreement."**

43. Regarding copyright, the petitioner contends that it cannot be held responsible / liable for the acts of third parties and therefore cannot be a ground for termination / deactivation.

On the other hand, the respondent contended that the purpose was to protect the Broadcaster's copyright. Such protection is well recognized by copyright laws. Broadcaster expecting the same cannot be termed as unreasonable.

44. We are of the opinion that the transfer of copyright can be subject matter of negative covenant in as much as the manner in which the distribution system would work can be a subject matter of a contract.

Clause 6(r)

45. Clause 6(r) puts obligation on the affiliate to keep accurate and complete records and accounts of billings of the Subscribers and all other matters, which pertain to its business and its LCO's. The said clause of the agreement is reproduced below :

> **"The Affiliate shall keep accurate and complete records and accounts of billings of the Subscribers and all other matters, which pertain to its business and its LCO's. These records shall be made available to STAR DEN and, or, its representatives, on reasonable notice to the Affiliate, during the term of the Agreement and for two years after the termination or expiry of the Agreement. The Affiliate undertakes to provide all assistance to STAR DEN for any such inspection, audit or survey, including but not limited to accompanying STAR DEN's representative to visit the Subscribers' residence, providing all records and documents pertaining to billing of Subscribers and the**

like. Neither STAR DEN's acceptance of any information or payment nor STAR DEN's inspection or audit of the Affiliate's records or accounts will prevent STAR DEN from later disputing the accuracy or completeness of any payment made or any information supplied. The Affiliate further undertakes to furnish and submit to STAR DEN any and all documents as may be required by STAR DEN from the Affiliate from time to time."

46. The petitioner's objections are on the grounds that :

(i) There is no reason for IMCL to provide any such records to STAR DEN. The only relevant document in the context of the present Agreement is IMCL's Agreements with its Franchisees.

(ii) IMCL does not have access to records of the LCOs and it cannot vouch for their correctness.

(iii) It can result in disclosure of confidential information relating to IMCL's business and policies.

(iv) Further, it is incomprehensible as to how STAR DEN's acceptance of any information or payment or inspection or audit will not prevent STAR DEN from the later disputing the accuracy of information etc.

47. The respondent submits that the said clause is necessary for ensuring that the petitioner discloses the correct subscriber base to the broadcaster and also to curb gross under-declaration of the

subscriber base and piracy of signals. The detailed data of the business of the MSO will help the broadcaster to analyse any unauthorised revenue and further furnishing of such information of the MSO to the broadcaster, the broadcaster would be in a position to show if any illegal practice is followed by the MSO or not. This also brings transparency in their activities. The respondent further contended that TRAI in its Standard Technical and Commercial Interconnection Agreement (CAS) has incorporated similar clauses, which are reproduced below :

> 4.10 SUBSCRIBER RECORDS, ACCESS & AUDIT RIGHTS
>
> 4.10.1 The Affiliate shall keep accurate, complete and up to date records of every subscriber's details, details of the location of every set top box, Smart Card, records and accounts of billings including historical billing data, type of subscribers, sublicenses and all relevant matters ("Subscriber Records"). The Affiliate shall ensure that its SMS and billing software allows for monitoring and printing historical data relating to subscriber activation and/or deactivation, going back to at least 12 months at any point of time.

48. According to the TRAI what is required is the information such as names and addresses of the actual subscribers which are directly serviced by the MSO and similarly information about the list of cable operators, link operators with whom it has agreement alongwith their respective subscribers base has to be provided to the broadcasters.

49. The respondent has mentioned that in CAS a detailed information with regard to the MSO are to be given to the broadcaster. It is seen from the record that Standard Technical and Commercial Interconnection Agreement has been prescribed by TRAI only for CAS area. There is no such provision for the non CAS area.

Therefore, we are of the view that the information sought by the broadcaster and the respondent is related to the commercial confidential information of the petitioner and asking for such information is not reasonable. However, the broadcaster may seek such information as is required under the regulations.

Clause 7 (f)

50. Clause 7 (f) This particular clause puts obligation on the part of the affiliate that it has to certify and confirm that it has the declared Subscriber Base. Further it shall not challenge the respondent's request to increase Subscriber Base for channel(s) subscribed under promotional offer to the same Subscriber Base for Bouquet 1 channels. We may peruse the clause :

> **"The Affiliate expressly represents, warrants, certifies and confirms that it has the declared Subscriber Base and it shall not unilaterally, in any manner and for any reason whatsoever, alter, modify and / or challenge such declared Subscriber Base mentioned in applicable**

Annexure to this Agreement. The Affiliate further expressly represents, warrants, certifies and undertakes that it shall not challenge STAR DEN's request increase Subscriber Base for channel(s) subscribed under promotional offer to the same Subscriber Base for Bouquet 1 channels."

51. The petitioner objects to the clause on following grounds :

(i) It is contrary to the basis of the agreement, which is negotiated subscriber base and it restricts IMCL from expanding its business even within the agreed territory.

(ii) It is an admitted fact that churn takes place on a daily basis in this industry and therefore, the existing Subscriber base i.e. actual Subscriber base / paid Subscriber base keeps increasing and decreasing on a daily basis and it is not in the control of IMCL.

52. We have analyzed the relevant provisions and are of the view that in non-CAS area existence of such clause seems very unreasonable and totally against the regulation prescribed in this regard. What can be asked by the broadcaster is only the details of the cable operators and their subscriber base.

The only restriction on the MSO is about the area of operation. In this industry in a given area of operation the cable operator will have to inform the MSO before leaving as well after joining the MSO. The obligation on the part of the MSO is to inform the respondent for such cable operators either leaving or joining the system of the MSO within same area of operation. Similarly, the subscribers who are directly connected to the MSO will be joining and / or leaving on daily basis and the restriction on the part of the petitioner not to make any changes either in the subscription or subscriber of the cable operator is totally unreasonable. However, undertaking to be given by the petitioner that it shall not challenge Star's request to increase the subscriber base for channels subscribed under promotional offer to some subscriber base for Bouquet – I channels seems one sided and totally unreasonable.

Definition of Distribution System :

53. The petitioner has questioned Schedule – I of the interconnect agreement between petitioner and the respondent. The Petitioner is having objection for the definition of Distribution System and Subscribers. We reproduce the relevant portions below :

> **"Distribution system shall mean the local ground cable distribution system owned or controlled and used by the Affiliate to distribute the Subscribed Channels in the Area and includes all local ground cable distribution system**

owned or controlled and used by the LCO's as on the date of this Agreement and which Affiliate represents to STAR DEN are as detailed in Annexure F. It specifically excludes distribution through Digital Cable Television networks, Conditional Access System, Direct-To-Hone (Ku Band), Headends-in-the-Sky, Multipoint Microwave Distribution System/ Multi-channel Multi-point Distribution System ("MMDS"), Digital Terrestrial Transmission, Direct-To-Home ('C' Band), Broadband, IPTV, Terrestrial Transmission, or any other medium or technology or device now known and/or invented or that may be invented, and the use of which is permitted by STAR DEN, in the future."

54. The petitioner's objections are on the following grounds:

(i) To use advanced technologies is a right vested in IMCL and any restriction thereon is unreasonable.

(ii) Digital technologies increase the transmission/ retransmission of higher number of channels i.e. upto 500 channels with much better and similar quality, which is admittedly in larger public interest.

(iii) IMCL has already implemented digital technology in its Mumbai and Delhi Networks.

(iv) By STAR DEN restricting IMCL from using digital technology is effectively denying its services to IMCL's existing customers having Set-top Boxes.

55. The main objection of the petitioner in the definition of distribution system in schedule-I of the interconnect agreement relates to exclusion of digital TV cable TV system from the definition of distribution system. The petitioner contention is that there is no prohibition on use of digital technology to facilitate the receiving of higher number of channels and the quality of reception improves for the subscribers.

56. The respondent's contention is that the petitioner is not commissioning the addressable distribution technologies to avoid its pay out to the broadcaster and aggregator.

57. According to the respondent it enters into different agreements for different technologies as different technologies are used for different platforms and the separate agreements have to be entered into. The permitted distribution under the existing agreement provides the operator to carry the channel through cable to consumers of analog mode. On digital method the signals are to be carried to consumer through set top boxes. This system allows MSO the medium to track the number of homes which view all channels by tracking the STBs. In this system the broadcaster can verify the list of subscribers provided to it by MSOs by tracking the STBs through MSO's SMS. Supplying of the digital signals to the petitioner would result in increase of subscriber base due to better quality. Therefore, there will

be the requirement of separate renegotiation for the subscribers numbers. The petitioner is seeking unfair advantage for non- digital platform i.e. intimating the lesser subscriber base and in turn seek supply digital signals to a large number of consumers thereby promoting under declaration.

58. The broadcasters have contended that MSO has no legal right to demand supply on a digital platform in non-CAS area. Our attention has been drawn to Clause 29 of the Explanatory Memorandum to the Telecommunication (Broadcasting and Cable Services) Interconnection (Fifth Amendment) Regulations, 2009, issued by TRAI on 17th March 2009. It reads as under :

> "29. The Authority has decided to not to lay down specific regulations in respect of hybrid cable networks in non-CAS areas which provide both types of service, i.e., analogue (without encryption) and digital (with encryption) services, as the interconnection regulations take care of addressable as well as non-addressable systems. Finer details can be worked out by the parties through commercial negotiations."

59. For analyzing the issue under consideration, it would not be out of the place to mention that there are two systems, i.e. addressable and non-addressable. In addressable system, the subscriber will have choice to select a channel which he wants to view and supplier of the signal will be able to know exactly which channel is being viewed by which subscriber. In non-addressable system neither the subscriber

have any choice nor the supplier of the signal will know the viewership as signal will be going to all the subscribers in a bunch.

60. Further, signals are distributed in analogue mode or digital mode. The digital mode of signal can be addressable or non-addressable. If digital signals are supplied in addressable mode, the signals are to be encrypted. If addressability is not required, encryption is not necessary. In a hybrid system if analogue and digital services both are without encryption i.e. non-addressable, no special agreement is required to be entered between the broadcaster and the distributor. Any special negotiation may be necessary, if the hybrid system is having a mix of non-addressable analogue services and addressable digital services.

61. We would like to quote few paras from TRAI recommendations on Implementation of Digital Addressable Cable TV Systems in India dated 05.08.2010.

> "4. Nature and Characteristics of the Cable TV Market:
>
> Cable TV systems can be analogue, hybrid or digital.
>
> a) Analogue Cable TV System
>
> 1.49 The stakeholders in the analogue cable TV system are broadcasters, MSOs, LCOs and the consumers. The broadcaster supplies content, mostly in the form of bouquets of channels, to MSOs. The MSO collects the content (channels) from different broadcasters and after repackaging, gives it to the LCO for

onward distribution to the consumer. The signal an LCO gets is a single bouquet of analogue channels belonging to different broadcasters.

1.50 The composition of the bouquet that reaches the consumer is determined by the MSO; it reflects the MSO's perception of what the consumers in the LCO's domain want to watch. An MSO supplies signals to many LCOs. Though it is technically possible for an MSO to offer different feeds for different LCOs, there are practical limitations on the number of such feeds.

1.51 Even if a feed is customised for a particular LCO, the bouquet of channels carried by this LCO cannot fully match the choice of TV channels of each subscriber. At best, a typical consumer can expect to watch a choice of channels broadly corresponding to the socio-cultural background of the LCO domain in which he is residing. However, he cannot make specific choices to suit his age, education, profession, language, or interests. In fact, choice of channels would vary from subscriber to subscriber. As a result, any particular subscriber in the analogue system may be paying for channels that he does not watch and may also be denied the viewing of specific channels of his choice.

1.52 The signal compiled by the MSO/LCO reaches the consumer's TV receiver set where different channels are selected by the tuner of the TV set. The tuner of a TV set has a limited capacity of channel selection. This ultimately limits the number of TV channels a viewer can watch through his TV. The design of the TV tuner matches the TV standard adopted by a country. In India, the PAL B and PAL G systems have been adopted for the VHF and UHF bands respectively. A TV channel in the VHF band (30-300 MHz) requires a bandwidth of 7 MHz whereas in the UHF band (300 to 3000 MHz) it requires a bandwidth of 8 MHz. The PAL frequency chart for India is given in Annexure I.

1.53 As detailed in Annexure I, in all 101 channels can be accommodated. Taking into consideration terrestrial FM Radio and TV transmission as well, theoretically, the analogue cable system can have a capacity of 95-96 channels. However, given the quality and type of the cables, modulators, RF amplifiers etc. deployed in the network, the channel carrying capacity of the analogue cable system practically gets limited to around 85-90 channels only.

b) Hybrid Cable TV System

1.54 In many parts of India, a hybrid model is employed. In this model, some channels are carried in analogue form and the remaining capacity is used to carry digitally modulated channels. The combined signal is sent on the same cable.

1.55 In digital TV, compression techniques are employed for storage and distribution/transmission of content. These techniques capitalise on the redundancy of information in intra and inter-picture frames, the movement predictions of picture elements/objects and the limitations of the human eye and ear to compress the channel's bandwidth requirement. This achieves the dual objective of a near-normal viewing experience to the consumer and a remarkably reduced bandwidth (spectrum) requirement. The bandwidth requirement of a digital channel depends upon the complexity of content of the channel. Greater movement and finer visual details require more bandwidth. As a rough estimate, 4 to 12 digital channels can be accommodated in the bandwidth of a single analogue channel, depending of course upon the modulation technique employed and the nature of content as explained above.

1.56 In the hybrid model, the capacity of the system increases so that around 30-50 analogue channels (FTA channels) and 250-400 digital channels (pay/local channels) can be carried. In the notified CAS areas and many voluntarily digitized areas, this model is being used. **Where pay content is encrypted, only authorised subscribers can have access to the content. In notified CAS areas, the pay content is encrypted whereas in the case of voluntarily digitized areas, it is distributed without encryption.** This is because addressability is mandatory in notified CAS areas whereas it is not so in voluntarily digitized areas. As explained above, digitization uses compression techniques to alleviate capacity constraints, creating more space for TV channels, value added services and broadband. However, it is addressability that provides choice to the consumer, promotes transparency in business transactions and checks signal piracy.

1.57 To view only FTA channels, a subscriber does not require a Set Top Box (STB). The cable is directly connected to the RF port of the TV receiver set. The TV tuner then takes up the analogue content, channel by channel. However, digital channels cannot be decoded by the TV tuner. For those subscribers who subscribe to pay channels also, the cable from the LCO is connected to a

Set Top Box. A loop cable from this STB is connected to the RF port of the TV for viewing the analogue channels, while the digital channels are decoded by the STB and then viewed through the Audio/Video port of the TV receiver set.

1.58 **The advantage of the hybrid model is that the viewers have a better choice as more channels can be made available to them. The biggest disadvantage is that the system lacks addressability i.e. the subscriber base is still not auditable/verifiable. Transactions between service providers are, as in the analogue system, on negotiation basis and inter-operator disputes are just as likely to occur.**

c) Digital Addressable Cable TV System

1.59 In this model, all the channels, whether FTA or Pay, are delivered in the addressable-digital form only. This is akin to the DTH model. Not only is content carried in digital form, all content, whether pay or FTA, is also encrypted. The subscriber necessarily requires a Set Top Box (STB), duly authorized by the service provider (MSO), to view the TV channels. The same STB can also be used for the reception of other value added services and interactive services such as broadband."

1.60 This model further enhances the channel carrying capacity of the system over the hybrid model. In this model, all FTA channels are also carried in digital format making room for more channels. The decoded content from the STB can be viewed through the Audio/Video port of the TV receiver set."

62. Regulation 3.2 of the Telecommunication (Broadcasting and Cable Services) Interconnection Regulation 2004 makes it obligatory on the part of the broadcaster to provide its channels on non-discriminatory basis to all the distributors of the TV channels. It does not mention anywhere whether the signals should be provided on digital or analog mode. There is no specific mention about the

technologies to be used, therefore, signal seeker is at liberty to ask for signals in any form.

According to TRAI the distinction sought to be made between non addressable analog transmission and non addressable digital transaction is unreasonable because in both the scenario the subscriber base has to be negotiated. Moreover, migration to digital distribution systems by multi system operators would be hampered if every time they have to renegotiate the subscription agreement with the broadcaster even when there is no addressability. Therefore, clause 3 of the said Reference Interconnect Offer should be amended as under:

> "In clause 3 of the said Reference Interconnect Offer, for the words "digital cable television network" the words "addressable digital cable television network" should be substituted."

63. The requirement of Reference Interconnect Offer for non-addressable system whether analogue or digital are provided in clause 13.1 and 13.2 of the Telecommunication (Broadcasting and Cable Services) Interconnection Regulation 2004, as amended from time to time. We may have a look the provisions, which are reproduced below:

> "Reference Interconnect Offer for non-addressable system:

> 13.1 All broadcasters shall submit within 90 days of issue of this Regulation, copies of their Reference Interconnect Offers (RIO) describing, inter-alia, the technical and ommercial conditions for interconnection for non-addressable systems to the Authority. The same shall be published by the broadcasters and a copy shall also be put up on their websites after the terms and conditions of the draft reference interconnect offer are submitted to the Authority. The reference interconnect offer so published by the broadcaster shall form the basis for all interconnection agreements to be executed thereafter.
>
> 13.2 A published reference interconnect offer may undergo any change only after prior intimation to the Authority. Interconnection agreements shall be entered into by all broadcasters based on the reference interconnect offers so published, provided, however, that by mutual agreement, the parties concerned may modify and/or add to the terms and conditions stipulated in the published reference interconnect offer for entering into an individualised agreement."

However, for addressable system, there are various provision under the interconnect regulations. These regulations create obligations on the broadcaster in terms of Regulation 13.2 A and 13.2 B.

64. In Petition No.288(C) of 2006 (M/s Ortel Communications Limited Vs. Ushodaya Enterprises Limited & Anr), the petitioner's request was to supply the signals to the petitioner in the digital mode. In that petition, we had given direction to the respondent to supply signals to the petitioner in the digital mode as per prayer of the petitioner. The relevant portion of the said order dated 01.03.2007 is as follows:

> "Now it is to be considered whether petitioner can insist on supply of signals in digital mode alone. We find that the efforts

> throughout the country is to encourage the CAS system and the petitioner is promoting the same. As an measure of encouragement of the CAS system and keeping in view that another agent by the name Variety Entertainment Pvt. Ltd. has come up in the state who will provide signals in the analogue mode, we direct the respondent to supply signals to the petitioner in the digital mode as per prayer of the petitioner and the petitioner will pay as per the number of subscribers registered with it under the Subscribers Management System (SMS). The supply of signals should commence within one week.
>
> This petition is accordingly disposed of."

65. The definition of 'distribution system' as provided by the respondent specifically excludes distribution through digital cable television networks. The para reads as "It specifically excludes distribution through digital cable television networks". We are of the opinion that as long as the network is non-addressable, it does not matter whether the network is digital or analogue. Therefore, we hold that the definition of 'distribution system' should be amended as under:

> "In clause 3 of the said Reference Interconnect Offer, for the words "digital cable television network" the words "addressable digital cable television network" should be substituted."

Definition of the subscriber:

66. Schedule I of the interconnection agreement between the parties contains the definition of the subscribers. It reads as under :

> **"Subscribers shall mean each connection in a private residential household or a private residential multi-dwelling unit served by the Distribution System and receiving the Subscribed Channels from the Affiliate. In respect of each location with multiple dwelling, each dwelling receiving the Subscribed Channels shall be one Subscriber.**
>
> **Notwithstanding the above, a Subscriber shall also mean and include any individual dwelling having multiple television sets and being charged for each television set separately by the Affiliate. In respect of each television set, each television set shall be deemed to be an individual Subscriber.**

67. The petitioner has objected to the definition of subscriber on the following grounds :

(i) The said definition is patently unreasonable.

(ii) The definition of 'Subscribers' can and ought to only mean negotiated Subscriber base between IMCL and STAR DEN.

68. According to the respondent definition of subscribers is a reasonable definition. The respondent aims at promoting transparency and addressability in the broadcasting sector. The said clause aims to

combat rampant under-declaration of subscribers by operators that is plaguing this industry.

69. The first portion of this definition reads as below :

> **"shall mean each connection in a private residential household or a private residential multi-dwelling unit served by the Distribution System and receiving the Subscribed Channels from the Affiliate. In respect of each location with multiple dwelling, each dwelling receiving the Subscribed Channels shall be one Subscriber."**

70. We are of the opinion that there cannot be any objection for this portion. However, second portion which reads as below requires elaboration:

> **"Notwithstanding the above, a Subscriber shall also mean and include any individual dwelling having multiple television sets and being charged for each television set separately by the Affiliate. In respect of each television set, each television set shall be deemed to be an individual Subscriber."**

71. In non-CAS area what is relevant is subscriber base and not so much subscriber number. However, the number of subscriber becomes relevant to arrive at the negotiated subscriber base. The broadcaster is interested in knowing the total number TV sets getting signals from the broadcasters, if these are being charged separately. In our view, there cannot be any objection for the definition prescribed by the broadcaster.

Clause 1(c)

72. Clause 1(c) of Schedule II of the subscription agreement prohibits the affiliates to add any LCO or the subscriber without the prior written consent of the respondent. The impugned clause is reproduced below :

> **"If during the Term, the Affiliate authorizes / joins the Distribution System of any LCO's or joins any Subscriber other than that detailed in Applicable Annexure F, without STAR DEN's prior written consent and without amending the Applicable Annexure revising the Subscription Fee payable on account of joining of new LCO's/Subscribers, the Affiliate shall deemed to have unauthorized access to the signals of the Subscribed Channels and STAR DEN shall have the right to terminate the Agreement and / or disconnect the signals of the Subscribed Channels in addition to any other legal or equitable remedies available to it."**

73. The petitioner has objected to this clause on the following grounds:

> "Clause 1 (c) seek to prohibit IMCL to join any new subscribers or extend its area of operation by merging new Operators etc., without prior written permission of STAR. IMCL will be entitled to operate in the whole of the City and thus, it is fully entitled to expand its business and any restriction on its expansion of business is unreasonable."

74. According to the respondent, if any LCO or subscriber joins the network of the petitioner, Annexure 'F' will have to be amended and

the subscription fees should be revised. This clause is incorporated to put an obligation on the affiliate to give proportionate growth to the respondent on account of any new LCO joining the petitioner's network and in no way prohibits the petitioner to expand its business. The clause merely places an obligation on operator being recognized by which the petitioner makes commensurate payments to the respondent.

75. Clause 10.2 of the Telecommunication (Broadcasting and Cable Services) Interconnection Regulation 2004 has made specific provision for change of subscriber base during the pendency of the agreement. The relevant clause reads as under :

> "Between Multi System Operator and Broadcaster
>
> 10.2 In non-addressable systems, the subscriber base agreed upon by the parties at the time of execution of the interconnection agreement between a multi system operator and a broadcaster shall remain fixed during the course of the agreement except in exceptional circumstances that warrant an increase or decrease in the subscriber base. In such an eventuality, it is for the service provider seeking a change in the subscriber base to provide reasons and accompanying evidence including local survey for the proposed change.
>
> Provided that this sub-clause shall not apply to changes in the subscriber base of a multi system operator on account of any cable operator joining or leaving the multi system operator.
>
> Provided further that any change in the subscriber base of a multi system operator, which is the basis of payment to a broadcaster, on account of any cable operator joining or leaving the network of the multi system operator shall be equal to the

subscriber base of the cable operator, joining or leaving the network."

76. Therefore, the relevant clause takes care of the concerned of the respondent. There is no need for the respondent to make a provision mentioned as 1(c) of the subscription agreement. In authorized area of operation, the subscribers will be joining and leaving the affiliate during the currency of the agreement and no change is permissible due to this aspect in terms of clause 10.2 of the Regulations. However, if any cable operator joins or leaves the network, the subscription amount may be adjusted in terms of the proviso 2 of clause 10.2. Therefore, we are of the opinion that the impugned clause is unnecessary.

Clause 1(g) of Schedule II

77. We may reproduce the said clause :

"In the event any independent Affiliate of STAR DEN (who is or was taking signals directly from STAR DEN), joins/merges with the Affiliate and no longer continues to take signals of any of the Subscribed Channels from STAR DEN, then the monthly Subscription Fees payable by the Affiliate shall be increased by the minimum of the same amount, which the (erstwhile) Affiliate was liable to pay to STAR DEN prior to such joining. Further, the Affiliate shall also be responsible to pay the outstanding Subscription Fees of such (erstwhile) affiliate. This shall also apply in case of those independent affiliates, whose signals may have been deactivated / disconnected by STAR DEN. For the avoidance of doubt it is hereby clarified that in the event STAR DEN disconnects signals to

such any independent affiliate then the Affiliate shall not provide signals to such independent affiliate without prior written approval of STAR DEN".

78. The petitioner has objected to this clause on the ground that it is unreasonable because IMCL has no privity of contract with these third parties and cannot undertake to clear their liabilities.

79. According to the respondent this clause is reasonable and has been inserted so as to ensure that operator who enter into agreements with the respondent do not end up accumulating huge outstanding and then hoping to other MSO for signals of the respondent's channels. This clause aims to promote transparency and honest business practice. Further, the petitioner should not have illegitimate gains at the expense of the respondent. This is so because if any operator joins the distribution system of the petitioner after the signing of the agreement and the petitioner would have increased subscriber base then to what was agreed to between the parties at the time of signing of the agreement and would be earning more revenue without paying the broadcaster the due subscription fees based on the increased subscriber base.

80. The respondent further contended that if the petitioner was not willing to clear its dues of the defaulter operator, the petitioner is best

advised not to provide signals to such entities who committed defaults in payment.

81. The situation where the operators are defaulters of the MSO has already been covered by Explanation of clause 3.2 of the Telecommunication (Broadcasting and Cable Services) Interconnection Regulation 2004. It reads as follows :

> "Explanation
>
> 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."

This particular clause of the regulation also takes care of this situation where the operators are defaulters to any MSO. We are of the view that the obligation of petitioner will be to take a copy of the latest monthly invoice showing the dues, if any, from the presently-affiliated multi system operator, or the broadcaster. The petitioner should see that the dues of the present MSO should be cleared before the signals are provided to the operator by the petitioner.

Clause 7(h)

82. This clause reads as under :

> **"The Affiliate further undertakes and warrants that it shall obtain the requisite licenses from the music societies and/or, concerned authorities in India, if required, and shall be liable to pay any license fee and royalty in relation to such licenses."**

83. The petitioner objects to this clause on the grounds that :

(i) IMCL has no authority or control over the contents of STAR. It has no privity with the owners / distributors of the content.

(ii) STAR is fully responsible for its content and STAR alone is responsible for the legality of its content and for compliance with all the laws and regulations with respect to the said content.

84. According to the respondent, the said clause only stipulates if (i.e. in the event) music societies require an operator to procure any licence then it shall be the obligation of the operator to procure such licence and pay appropriate fees/ royalty. The clause only seems to ensure that an operator should not pass on the obligation which may be cast upon it by music societies.

85. According to the petitioner it is only an intermediary who carries the signals of the respondent to the end consumer and respondent is

the provider of the content and the product and it has no authority or control over the contents. Respondent is fully responsible for its content and it alone is responsible for the legality of its content and for compliance with all the laws and regulations with respect to the said content. It is the responsibility of the respondent for showing / telecasting the said content including Licenses required for the same.

86. The TRAI is of the view that :

> "(13) It would be unreasonable to ask the affiliate to obtain necessary licenses from music societies and pay royalties when it is the responsibility of the broadcaster to obtain all licenses and permissions for the content being broadcast by them and to make all payments for such content.
>
> Therefore, sub-clause (k) of clause 10 of the said Reference Interconnect Offer may be omitted."

87. We perfectly agree with the views of the TRAI that the responsibility to obtain all licenses and permission for the content lies with the broadcaster. However, there may be situations where the distributor may require permission to further distribute the signals. Therefore, affiliate should seek necessary permission, if required i.e. required in law and not otherwise.

88. These petitions are partially allowed in terms of the aforementioned observations and directions.

In the facts and circumstances of the case, there shall be no order as to costs.

……
(G. D. Gaiha)
Member

……
(P.K. Rastogi)
Member

/NC/