

**TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL**

**NEW DELHI**

**DATED 30<sup>th</sup> May, 2011**

**Petition No.429 (C) OF 2010**

Sky Vision Cable Network ... Petitioner

Vs.

Silver Line Broadband Services Pvt. Ltd. ... Respondents

**Petition No. 430 (C) OF 2010**

Vision Network. ... Petitioner

Vs.

Silver Line Broadband Services Pvt. Ltd. ... Respondent

**Petition No.431 (C) OF 2010**

Subhash Nagar Consumers Co-operative Stores Ltd. ... Petitioner

Vs.

Silver Line Broadband Services Pvt. Ltd. ... Respondent

**Petition No. 432 (C) OF 2010**

New National Cable TV Network. ... Petitioner

Vs.

Silver Line Broadband Services Pvt. Ltd. ... Respondent

**Petition No. 433 (C) OF 2010**

SCN Broadband Services ... Petitioner  
Vs.  
Silver Line Broadband Services Pvt. 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 the Petitioner : Mr. Atul Sharma, Advocate  
For the Respondent : Ms. Neha Jain, Advocate

**ORDER**

These five petitions being interrelated were taken up for hearing together and are being disposed of by this common judgment.

2. The respondent is a Multi Service Operator working on both CAS and Non CAS areas in the town of the Kolkata and/or in the vicinity thereof. We are, however, concerned in this petition with Non CAS area.

3. The respondent herein filed three petitions before this Tribunal, which were marked as Petition No. 156(C) of 2008, Petition No. 157 (C) of 2008 and

Petition No. 158 (C) of 2008 against MSM Discovery Private Ltd., Zee Turner Ltd. and ESPN Software Private Ltd. respectively for a direction upon them to grant supply of signals of their channels to its network.

4. The respondents in those proceedings contended that the petitioner retransmits the signals received from various broadcasters. It used to receive supply of signals from Cable Com and was having a subscriber base of 25000, spread over 40 to 45 Kms. area of Kolkata Metropolitan District and Howrah. The respondent contended that the petitioner's subscriber base is approximately 2000. Zee Turner Ltd., however, relying on a survey purported to have been conducted by it, stated that the petitioner has more than 25000 subscribers.

5. A joint survey was directed to be undertaken. Correctness of the said joint survey was open to question.

6. This tribunal by a judgment and order dated 20.5.2010 held:-

*“24. The respondents, therefore, are required to make out a case for refusal to grant supply of signals in respect of their respective channels. The Regulator recognizes only the default on the part of the distributor. We may further notice that the paragraph 14 of the Explanatory Memorandum appended to the 2003 Regulations also speak of piracy as one of the grounds. A default clause may be*

*attracted when a distributor takes recourse to piracy as it would not be paying the amount for retransmission of the signals of the channels of the broadcaster to the number of consumers to which it was otherwise bound. In this case we noticed hereto before that no case has been made out for refusing relief to the petitioner on the ground of default. The only question which survives for our consideration is as to what should be the subscriber base. On the one hand the petitioner contends that even the subscriber base of Star had steadily decreased in respect whereof information used to be furnished to the broadcaster and in fact the number of subscriber had come down to 2075 (3720 in August, 2007). The relevant portion of the letter dated 8<sup>th</sup> Aug, 2007 is as under:*

*“Reference to the discussion held between you and the undersigned, we are providing you with a copy of our Subscriber Listing Report of 3720 subscribers for the month of July, 2007 which please find enclosed.*

*We request you to kindly raise your monthly invoice accordingly and oblige.”*

7. Yet again the petitioner stated :

<i>Sl. No.</i>	<i>Name of the Operator</i>	<i>Address</i>	<i>Area of Operator</i>	<i>Sub. base</i>
1.	<i>New National Cable Network</i>	<i>Shanpur(North),Shibtala Dasnagar Howrah-711105.</i>	<i>Das Nagar Howrah</i>	<i>600</i>
2.	<i>Vision Network</i>	<i>15 G.b. Lane, Post Rajpur, Kol-149</i>	<i>Banstala Bosepukaur, Barendrapara</i>	<i>300</i>
3.	<i>S.N. Cable Link</i>	<i>19 H/2, Harish Neogi Road, Kolkata 67</i>	<i>Ultadanga</i>	<i>125</i>

4.	Sky Vision Network	2, Kabi Nabin, Sen Road Kolkata-28	Dum Dum	150
5.	SCN Broadband services	63m Sahid Colony, Ashwini Dutta Road, Panihati, Kol-114	Sodepur, Panihati	600
6.	Subhas Nagar Consumer Co-Operative Stores	77 Subhas Nagar Road, Kolkata-65	Dum Dum Cantonment	300
				2075

25. The petitioner once again mentioned the figure of 2075 as the subscriber base. It is on the aforementioned premise, the subscriber base should be determined. By an interim order dated 1<sup>st</sup> May, 2009 this Tribunal directed supply of signals with a subscriber base of 7500. We have noticed heretofore, according to ZEE the petitioner had about 25000 subscribers whereas according to petitioner it has only about 3000 subscribers. The petitioner admittedly had entered into an agreement with Star for 15000 subscribers. Even if we assume that there has been a steady decrease in the subscriber base, the same in our estimates should not exceed by 5000. We, furthermore, are of the opinion that the figure of 25000 subscriber base as contended by Zee relying on or on the basis of the purported service report or the channel mapping. We, therefore, are of the opinion that subject to the direction, that a joint survey should be conducted so as to the parties hereto can arrive at a negotiated subscriber base, we direct that for the time being the respondents shall enter into agreements with the petitioner on a subscriber base of 10000. The petitioner, however, must make payments of the monthly subscription fee to the broadcaster on a regular basis.”

8. A Review Application was filed being R.A. No. 7 of 2010 by the respondent herein, which by an order dated 28.5.2010, was dismissed.

9. The respondent on the aforementioned premise increased the subscriber base of each of the local cable operators though which only it is said to have been supplying signals to the subscribers.

10. One of the LCOs S N Cable Link came to this tribunal questioning the said increase in the subscriber base unilaterally by filing a petition against the respondent.

11. The said petition was registered as Petition No. 357 (C) of 2010 by order dated 14.11.2010. The said petition was allowed, directing:

*“ A bare perusal of the aforementioned provision would clearly go to show that the subscriber base declared by a local cable operator or a Multi Services Operator shall not be varied save and except in the manner laid down therein.*

*One of the ingredients of the aforementioned provision is existence of an exceptional circumstances which warrants increase or decrease in the subscriber base. However, the increase and decrease in the subscriber base can be effected only when all the conditions precedents provided for therein are fulfilled namely :-*

- i) *Assignment of Reasons; and*
- ii) *Furnishing of evidence including local survey.*

*The impugned letter of the respondent evidently postulated a change in the conditions of the agreement. It was issued only on one ground namely Order passed by this Tribunal dated 20.5.2010. An Order passed by a court of law ipso facto cannot be a ground for effecting change in the subscriber base in a situation of the present nature. The Order was passed by this Tribunal in a matter between the respondent and M/s. Zee Turner Ltd. The petitioner was not a party thereto. There is nothing to show that it would be bound by the said order.*

14. *Mr. Bhagat, however, would contend that this Tribunal relied upon some survey purported to have been conducted by the broadcaster.*

*The impugned letter has not been issued relying on or on the basis of the said survey. The said order dated 20<sup>th</sup> May, 2010 was passed inter-alia keeping in view the fact that the respondent had entered into an agreement with 'Star' for 15,000 subscribers. It was on amongst other reason that an order was passed for the time being subject to the result of a joint survey. The said order dated 20<sup>th</sup> May 2010, therefore, was not binding on the petitioner.*

15. *The order of this Tribunal was meant to be acted upon by the parties thereto and not by a 3<sup>rd</sup> party to the lis and who had entered into a separate agreement with the respondent.*

16. *We, therefore, are of the opinion that the action on the part of the respondent cannot be said to be valid or legal.*

*It is, therefore, set aside.*

*17. This petition is allowed and it is directed that the petitioner shall continue to pay the subscription fee in terms of the agreement dated 05.05.2006 unless and until a case is made out for invocation of Clause 10.1 of the Regulations.”*

12. The petitioners herein being the other five LCOs of the said respondent have filed these petitions aggrieved by and dissatisfied with the unilateral increase in the subscriber base, which are in the following terms:

<b><u>Petition No.</u></b>	<b><u>Subscriber Base</u></b>
429 (C) of 2010	600
430 (C) of 2010	300
431 (C) of 2010	300
432 (C) of 2010	600
433 (C) of 2010	600

13. In these cases, however, one of us (Shri. G. D. Gaiha, Member) directed conduct of a survey by a Local Commissioner in the area of the operation of Silver Line Broadband Services Pvt. Ltd.

14. We are informed that the said survey had been conducted.

15. By an order dated 21.01.2011 the following issues were framed. The parties in support of their respective cases have adduced oral evidences.

16. We may notice the relevant portion of the statements of Shri. Uttam Mukharjee, the proprietor of Skyvision Cable Network in his cross- examination.

*“Q: Do you know that respondent had filed cases against various broadcasters?”*

*A: I have no knowledge.*

*Q: Do you know that broadcasters have done some survey?*

*A: Yes, I came to know that a survey has been conducted, however, I have not been informed.*

*Q: What was your connectivity when the survey was done?*

*A: I do not have any knowledge.*

*It is incorrect to suggest that I am telling false subscriber base and that the actual subscriber base is much higher than declared.*

*It is incorrect to suggest that I have more connectivity and I am paying less to the respondent.*

*Q: I put it to you that your connectivity is 2292 and not 150 as declared by you?*

*A: No. It is impossible.*

*Q: Why have you approached this Hon'ble Tribunal?*

*A: We have approached this Hon'ble Tribunal to seek justice as we are not in a position to pay for the number of points demanded by the respondent as per their notice as we don't have that much of subscriber base.*

*Q: After receiving notice from the respondent, have you requested them for joint survey?*

*A: Yes, we requested respondent for the joint survey even before receiving the notice and also after receipt of the notice from the respondent.*

*Q: What is the area of your operation?*

*A: Nager Bazar, South Dum Dum.*

*Q: You mean to say that your area of operation is no where else besides Nager Bazar, South Dum Dum?*

*A: Yes, I operate only at Nager Bazar, South Dum Dum."*

17. The respondent in support of its case examined one Apoorba Banerjee one of its directors. He, although, admittedly issued notices purported to be under Regulation 4.1 dated 15.11.2010 and public notice dated 23.11.2010, on the premise that on a purported survey conducted by M/s. Zee TV, although the petitioner had declared a subscriber base of 600, which should in terms of the said survey should be 2292.

18. We may place on record the judgment portion of the said notice under Clause of the Regulation 4.1 being dated 15.11.2010.

*“This is in continuation of the earlier communications to you, it is again requested to kindly make the payment of subscription on the subscriber base disclosed by ZEE TV and filed in TDSAT, according to which your subscriber base is 2292. Whereas you have been making payments on the basis of your subscriber 600 as declared by you. This shows that you have under-declared your subscriber base and this has caused a loss to the company in terms of finance and goodwill. In view of this position we request you to make payments with immediate effect on the basis of subscriber base as per the above said survey. Further take note that the increased subscriber base is required to be paid for the balance of subscription charges with effect from May 2010. The difference of the amount may kindly be paid within 7 days from the receipt of this letter.”*

19. Despite the categorical stand taken by the respondent in the aforementioned notice Shri Banarjee in answer to a question as to whether the notice was issued on the basis of the said survey replied:

*“Q: Is it correct that the notice dated 15.11.2010 sent to the petitioners by you is based upon this survey?”*

*A: Yes, but it is also upon the information collected from the market sources as the petitioners have under declared their subscriber base.”*

20. Mr. Sharma, the learned counsel appearing behalf of the petitioner would

contend that in fact the subscriber base of the petitioner was only 150 and not 600.

21. The learned counsel in this connection has our drawn our attention to the agreement entered into and by between the parties which are in the following terms:

*“4. Register of subscribers :*

- I. The Cable Operator shall maintain an upto date register of subscribers showing the list of names and addresses of the subscribers and other information as required by the Company and shall provide a copy of the said list quarterly to the Company and also whenever so required by the Company.*
- II. Amendments by way of additions/alterations/deletions shall be made by the Cable Operator in the register on an on going basis and a copy of the updated list shall be furnished to the Company once in every three months. .*
- III. The Company shall, however, have the right to verify the said list at any point of time and shall arrange for billing the Cable Operator on the basis of particulars recorded in the list and/or furnished to and/or ascertained by the Company in course of verification of the list or any other manner.”*

22. It was contended that the respondent without undertaking the process of the verification of the register vis -a- vis any other evidence could not have issued the impugned notice.

23 Ms. Neha Jain, the learned counsel appearing on behalf of the respondent, on the other hand, would urge that the petitioner being guilty of under-declaration of its connectivity and it having not disputed the contents of the aforementioned notice under Regulation 4.1 as also the public notice, cannot be heard to say that its subscriber base is only 150.

24. The parties, ex-facie, are bound by the agreement entered into by them. The order of this tribunal in the case of the respondent against MSM Discovery Pvt. Ltd. & another, being dated 20.05.2010, for all intent and purport was adhoc in nature. The petitioner was to accept the same by entering into an agreement with broadcasters. If it thought that the order of this Tribunal is not possible to be acted upon, it could have refused to enter into any agreement with the said broadcaster.

25. If it has entered into an agreement with broadcasters pursuant to the aforementioned order of this Tribunal, it could have only insisted for a joint survey for the purpose of determination of its universe so as to arrive at a negotiated subscriber base.

26. It, however, having not done the same so far, in our considered opinion, cannot contend that the subscriber base of petitioner herein should be increased,

in support of which no evidence has been adduced. In the light of the provisions contained in the 2<sup>nd</sup> proviso appended to clause 10.2 of the Regulations, the parties hereto should have for all intent and purport insisted on production of the report of the learned Local Commissioner so as to enable this Tribunal to consider the effect thereof as envisaged under Order XXVI Rule 10 of Code of Civil Procedure, 1908. Moreover, any survey undertaken by and between the parties hereto would not be binding upon the broadcasters.

27. We, therefore, are of the opinion that the impugned notices cannot be held to be sustainable. They are set aside accordingly, subject to the determination of the subscriber base in the joint survey which is to be undertaken by and between the respondent and the broadcasters.

28. However, after the judgment was reserved; a report of the learned Local Commissioner in the case of Silver Line Broadband has been produced from a perusal whereof it appears that the subscriber base of the said Cable Operator is said to be only 'more or less 165 points'. We have not relied upon the said report in view of the fact that the respondent was not given an opportunity of filing objection to the said report.

29. Ms. Neha Jain, however, would submit that the broadcasters, despite requests, have not come forward to carry out a joint survey.

30. Even assuming that to be so, the remedy of the respondent lies in filing appropriate application/petition before this Tribunal showing the latches on the part of the broadcasters but the petitioners herein cannot suffer therefor by paying extra subscription charges levied on wholly legally impermissible ground.

31. These petitions, therefore, are allowed.

32. However, in facts and circumstances of this case, there shall be no order as to costs.

.....  
**(S.B. Sinha)**  
**Chairperson**

.....  
**(G.D. Gaiha)**  
**Member**

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

rkc/as