

TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL

NEW DELHI

DATED 26TH SEPTEMBER, 2011

Petition No.227 (C) of 2011

Nirman & Associates Pvt. Ltd. ...Petitioner

Vs.

ESPN Software India Pvt. Ltd. ...Respondent

BEFORE:

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

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

For Petitioner : Mr. Navin Chawla, Advocate
Mr. Tejveer Singh Bhatia, Advocate

For Respondent : Mr. N. Ganpathy, Advocate

JUDGEMENT

S.B.SINHA

The petitioner is a Multi System Operator. It operates principally in the town of Guwahati.

The Respondent is a broadcaster of a Sports channel.

2. A subscription agreement was entered into by and between the parties hereto on or about 16.9.2009.

A notice in terms of Clause 4.1 and also a public notice under Clause 4.3 of the Telecommunications (Broadcasting & Cable Services)

Interconnection Regulations 2004 (the Regulations) were issued on or about 14.9.2009.

3. The petitioner filed a petition before this Tribunal, which was marked as Petition No. 229 (C) of 2009.

By a judgment and order dated 16.12.2010, the said petition was dismissed. It was, however, observed:-

“We, therefore, are of the opinion that the interest of justice would be subserved if the parties are directed to enter into a fresh agreement with effect from the date it has expired on an increased subscriber base as on 31.3.2010”.

4. Despite dismissal of the said petition, however, supply of signals to the petitioner’s network by the respondent continued.

Another notice under Clause 4.1 and a public notice under Clause 4.3 of the Regulations were issued on or about 5.6.2010 by the respondent whereupon another Petition was filed before this Tribunal by the petitioner which was marked as Petition No. 187 (C) of 2010.

The said petition was allowed by an order dated 16.12.2010 holding as under:-

“38. This petition has been filed on 14.6.2010. The disconnection appears to have been caused despite an interim order. It is in that premise a mandatory order was passed.

We have noticed the conduct of the parties in detail for the simple reason that the agreement has expired and the parties, therefore, are required to renew their agreement.

The period of three months envisaged under Clause 8 of the Regulations also expired in September, 2010. We may place on record that no material has been brought on record that the petitioner has started negotiation from April, 2010 and in that view of the matter the proviso appended to Clause 8.2 may not have any application but then petitioner had been enjoying an order of injunction and we have, for the reasons stated hereinbefore, have found that the notices issued by the 1st respondent are unsustainable in law.

39. *We, therefore, direct the parties to enter into negotiation afresh on the basis of the SLRs submitted by the petitioner, in the light of the observation made in Petition No. 229(c) of 2009 and the subscriber base disclosed by it as also the changed situation at the ground level.*

We may also place on record the submission made by Mr. Ganpathy that the parties have to negotiate to enter into a new agreement.”

5. Admittedly despite the said directions of this Tribunal, the parties were not able to enter into any agreement in view of their differences on the subscriber base of the petitioner.

On the aforementioned premise, this petition has been filed praying inter-alia for the following reliefs:-

“A. Direct the respondent to enter into a subscription agreement, and renew the subscription agreement between the parties for the areas of Guwahati on reasonable and non-discriminatory basis.

B. Declare that the action of the respondent is not renewing the subscription agreement with the petitioner is un-reasonable and contrary to the TRAI Regulations.

C. Direct the respondent to provide signals to the petitioner and also sign a separate subscription agreement for the areas of Tinsukia, Dibrugarh, Nalbari and Jorhat, Barpta, Dhubri, Diphu, Golaghat, Haikkandi, Karimgang, Kokrajher, Mongoldoi, Nagaon, North Lakhimpur, Silchar, Sivasagar and Tezpur as requested by the petitioner on reasonable and non-discriminatory basis.

D. Declare that the action of the respondents in refusing signals to the petitioner for the areas requested by the petitioner is in violation of the TRAI Regulations.”

6. We may place on record that the petitioner had also prayed for a direction upon the respondent to supply signals for certain other areas but it is admitted that in relation thereto a separate petition has been filed by the petitioner.

We, in this case, thus, are concerned only with prayers A and B aforementioned.

7. It has been brought on record that in the earlier proceedings, a local Commissioner was appointed. Whereas the petitioner contended that it had a subscriber base of 2099, according to the local Commissioner, the subscriber base of the petitioner, as appearing from the record of Petition No. 229 (C) of 2009, was about 4000 (estimated figure of subscriber base being 4036).

But Mr. Ganpathy, the learned counsel appearing on behalf of the respondent would submit that the subscriber base of the petitioner is much more than 4000.

8. In Petition No. 187 (C) of 2010 it has been noticed as under:-

“The SLRs, which were furnished to the respondent, show the number of subscribers which have come to the fold of the petitioner at 3217. The said informations were furnished. The latest information was furnished only after 30th June.

It is, however, correct that list of operators has been furnished - one as on 31st March, 2010 showing the subscriber number of 3830, one as on 30th April, 2010 being 3502, one on between 1st May to 27th May, 2010 being 3552, on between 28th May to 31st May, 2010 - 3302, on between 1st June to 4th June, 2010 - 3477 and lastly on between 5th June to 30th June - 3217.”

In Petition No. 227 (C) of 2011, this Tribunal directed as under:-

“23. The channel of the respondent is a sports channel. The petitioner itself has disclosed that there has been some increase in its number of subscribers. The

respondent, therefore, was within its right to issue the notice under Regulations 4.1 of the Regulations and the public notice in terms of the Regulation 4.3 thereof.

“24. We, therefore, are of the opinion that the interest of justice would be subserved if the parties are directed to enter into a fresh agreement with effect from the date it has expired on an increased subscriber base as on 31.3.2010”.

In Petition No. 187 (C) of 2010, however, it was directed :-

“39. We, therefore, direct the parties to enter into negotiation afresh on the basis of the SLRs submitted by the petitioner, in the light of the observation made in Petition No. 229(c) of 2009 and the subscriber base disclosed by it as also the changed situation at the ground level.

We may also place on record the submission made by Mr. Ganpathy that the parties have to negotiate to enter into a new agreement.”

9. This Tribunal took notice of the fact that although three months' period as envisaged under Clause 8.1 of the Regulations had expired in September, 2010, but the respondent had been continuing supply of signals to the network of the petitioner in terms of the interim injunction passed in the matter.

10. Indisputably the parties had met on several occasions. It is also not in dispute that the petitioner has regularly been supplying SLR to the respondent, although the contents thereof are being denied and

disputed by the respondent on the ground that the same have been prepared at the instance of the petitioner only.

11. Mr. Navin Chawla, learned counsel appearing on behalf of the petitioner would contend:-

- i) The respondent in its communications and/ or during negotiations never assigned any reason for not relying upon the SLRs furnished by the petitioner and thus, it must be directed to enter into an agreement on the subscriber base disclosed therein.
- ii) Respondent in its e-mail dated 21.2.2011, having not denied or disputed the contents of the said SLR, it cannot now be permitted to deny or dispute the same on the ground of being doubtful or otherwise.
- iii) Perusal of the evidence brought on record, would show that although the petitioner's witness Shri Rana Saidur Zaman stated that 08 cable operators had joined the petitioner's network but they left the same and he having not been cross-examined in relation thereto, the SLRs furnished by the petitioner must be held to be correct.
- iv) Even the respondent in its e-mail dated 27.2.2011 relating to the On Screen Display (OSD) while stating "Your Service agreement has been expired – plz sign fresh agreement immediately cannot be taken off immediately without

obtaining any legal opinion” did not assign any reason as to why the SLRs of the petitioners are wrong.

- v) In the minutes of meeting of 14.3.2011, as communicated in terms of the respondent’s letter dated 11.3.2011 only, it contended that the revised subscriber base should be 9690 in stead and in place of 3605 in reply whereto the petitioner by its e-mail dated 22.3.2011 stated that the same was totally baseless and fictitious and in that view of the matter the same must be held to be unjust, unfair and discriminatory. It was also asserted therein that the petitioner in fact had been providing 100 per cent declarations, although the respondent in its letter dated 22.3.2011 denied or disputed the said fact.
- (vi) The declared subscriber base of the petitioner of 9690 as contended by the respondent has not been backed by any proof or document nor any reason having been assigned in support thereof in the reply, no reliance can be placed thereupon.
- (vii) The contention of the respondent that the total viewership in the town of Guwahati being 1,32,000 and the petitioner’s share being 15% thereof, being 19900 and its subscriber base, therefore, should be worked out at 9690, cannot be held to be either fair or just. If the SLRs filed by the petitioner are pending scrutiny, the respondent could not have asked it to enter into an agreement on that basis.

- (viii) Perusal of the various documents and in particular the letters dated 25.3.2011 and 26.3.2011 would show that having regard to the 'On Screen Display' scrolled by the respondent, the viewership had gone down.
- (ix) Without conducting any survey by an independent person or a joint survey; there is absolutely no reason as why the SLRs as disclosed by the petitioner may not be considered to be proper.
- (x) The contention of the respondent in its reply that 08 cable operators had joined the network of the petitioner should not be accepted as the affidavits of the LCOs annexed thereto have not been proved, in view of the fact that neither the said persons were examined nor CDs produced by the respondent have been proved. Even the original affidavits affirmed by the deponents thereof have not been filed nor the CDs were produced before this Tribunal, although copies thereof were supplied to the petitioner.
- (xi) The case of the respondent, itself being that in the town of Guwahati there are only two MSOs and the total SLR of the other MSO, i.e, Assam Cable Communication being 22655, the petitioner's share being 15% thereof, the subscriber base of the petitioner would be around 3000 only.
- (xii) Although the petitioner alongwith the evidence of the witness has filed SLRs, from the cross-examination of Mr. Zaman it would appear that he was not cross examined

thereon and thus the contentions raised by the said witness must be accepted to be correct.

- (xiii) Page 17 of the Affidavit of Mr. Dipanjal Sharma, containing the statements with regard to the SLR of the petitioner, having not been verified, cannot be said to be admissible in evidence.
- (xiv) So far as the CDs filed by the respondent are concerned, the same having not been proved in terms of Section 65 A and Section 65 B of the Indian Evidence Act, no reliance can be placed thereupon.
- (xv) The regulations framed by the TRAI do not contemplate that the market share of the MSO thereof can be taken into consideration for the purpose of determining the SLR at the time of renewal of the agreement as envisaged under Clause 11.2 thereof. On the other hand, the Regulations contemplate that the broadcasters at the time of renewal of the agreement must carry out a balancing job, having regard to the provisions contained in Clause 8.1 read with Clause 11.2 of the Regulations and no figure can be arrived at on the basis of any hypothesis on the part of the broadcaster nor it can be allowed to rely upon the purported joining of 08 cable operators having not proved the same.

12. Mr. Ganpathy, learned counsel appearing on the behalf of the respondent, on the other hand, would contend:-

- (i) It is not correct to contend that the witness of the petitioner was not cross-examined on the SLRs of the petitioner.
- (ii) In any event, a mere perusal of the SLRs filed by the petitioner itself would categorically go to show that they were manufactured at its office, as not only the date(s) and place(s) have been mentioned in each of the SLRs either on either left side or right side of the letters but even most of them contained identical language.
- (iii) Even if the contents of the said letter are accepted, it would appear that although allegedly by reason of the OSD, either the subscribes have left or threatened to leave their network, from a comparison of the figures contained in the said SLRs prior to and after the World Cup Cricket Match, it would appear that there have been no substantial change in the viewership of the channel.
- (iv) It is curious to notice that although during the period of World Cup Cricket Match, i.e., between 19.2.2011 to 02.4.2011, the viewership was expected to go up, the petitioner has constantly shown a downwards trend in the viewership during the said period, which would clearly demonstrate that the SLRs are manufactured ones.

- (v) From the cross-examination of Mr. Zaman, it would appear that although one P S digital network, a cable operator migrated, it's name appears in the SLR from which it is evident that petitioner's statement cannot be relied upon.
- (vi) There exists a large number of documents to show that although migration of LCOs from the network of the Assam Cable Communication (ACC) to Nirman have been accepted, according to Mr. Zaman neither any NOC had been taken nor the intimation thereof had been communicated to the respondent.
- (vii) It would, therefore, appear that SLRs are wholly unreliable, having been cooked up. The SLRs submitted by the LCOs would also show that the figures have been maintained around 3000 during the entire period but the SLRs of those LCOs who have migrated to the petitioner's network being 6075 was not shown.

In this case, the principal dispute between the parties revolves around the subscriber base of the petitioner.

The parties were to give effect to the judgment of this Tribunal.

13. We may notice some events which took place after the passing of the said judgment.

14. Perusal of various letters issued by the respondent and in particular the letter dated 23.8.2010 issued to the petitioner herein would show that according to it several discrepancies were found in the SLR submitted by the petitioner.

Two charts have been annexed thereto, from a perusal whereof it would appear that according to the respondent the subscriber base disclosed by the petitioner so far as old operators are concerned should be 1470 in stead and in place of 520 and so far as new operators are concerned, the subscriber base is 2050.

15. We may notice the said letter:-

“August 23, 2010

*Nirman & Associates Pvt. Ltd.
Suraj Complex, 1st Floor, South Sarania Road
Ulubari Chariali,
District-Kamrup
Guwahati-781007.*

Kind Attn: Mr. Rana Saidur Zaman

Sub: Payment for additional subscribers

Dear Mr. Zaman,

We are in receipt of your SLR for July, 2010 on 3rd August, 2010 and have noted the contents thereof. As per yourself the total subs sums upto 3195. Before the 75% hike ordered by Hon’ble TDSAT you were paying us for 2060 subscribers but after the Hon’ble TDSAT’s order to give a 75% hike on the existing payout, since March, 2010 onwards you have started paying for 3604 subscribers. While verifying your SLR we have noted various discrepancies. We would also like to

highlight the fact that the subscribers declared by you for the below mentioned operators does not tally with the records available with us.

S. N.	Network Name	Address	Name of Operator	Subscriber base	Actual Subscriber base
1.	M/s Classic Channel	Paltan Bazar, Guwahati - 781001	Mrs. Juneina Ahmed	115	200
2.	M/s Samim Ahmed	Ulubari, Guwahati-781007	Mr. Samim Ahmed	40	100
3.	M/s Rainbow Cable TV Network	Beltola, Guwahati	Mr. Ajit Kar	65	120
4.	Sky View Cable Network	Baisistha Chariali, Guwahati	Mr. Mukut Sarma	90	300
5.	M/s Rohini Cable	Baisistha, Guwahati	Mr. Rohini ch. Hujuri	35	100
6.	M/s Channel Den	Rehabari, Guwahati	Mr. Umananda Sah & Mr. Nandlal Gupta	100	500
7.	M/s Apollo Satellite TV Network	Manipuribas ti Guwahati	Mr. Prasenjit Basak	75	150
8.	M/s Friends Cable Link	Hatigaon, Guwahati	Md. Said Haji Yasin Hussain	70	100
Total				520	1470

The total subscribers declared by you for the aforementioned operators is only 520 whereas as per our records the total subscribers for the aforementioned operators sums upto 1470. There is a difference of 950 subscribers.

Moreover the following operators have joined your network but the same has not been intimated to us by you till date. The total subscribers of the below mentioned operators stands at 2050. Details are furnished below:-

S.No.	AFFILIATE	AREA	SUBS
1.	<i>P.N. Vision</i>	<i>Bishnupur part</i>	<i>300</i>
2.	<i>DJD Communication</i>	<i>Kalapahar part</i>	<i>150</i>
3.	<i>Biswadarshan Cable N/W</i>	<i>Birubari</i>	<i>100</i>
4.	<i>Satellite Culture Cable N/W</i>	<i>Nr. DGP Office</i>	<i>100</i>
5.	<i>Golden Cable Network</i>	<i>Rehabari</i>	<i>100</i>
6.	<i>Kishore Cable N/W</i>	<i>2 No. Gate</i>	<i>100</i>
7.	<i>Jupiter</i>	<i>Kahilipara</i>	<i>100</i>
8.	<i>Global Gaze</i>	<i>Hedayatpur</i>	<i>250</i>
9.	<i>Nizorapar Cable T.V.</i>	<i>Birubari</i>	<i>100</i>
10.	<i>D.C. Cable</i>	<i>Rihabari, Milanpur</i>	<i>150</i>
11.	<i>Jupiter</i>	<i>Kahilipara</i>	<i>100</i>
12.	<i>Girin</i>	<i>Kumarpara</i>	<i>400</i>
13.	<i>Samarjit Singh</i>	<i>Manipuri Basti</i>	<i>100</i>
TOTAL			2050

Based on the above submissions you are requested to make additional payment for 3000 subscribers with immediate effect.

Thanking you,

Yours sincerely

Sd/-

Soumit Shankar Das

Senior Manager-Finance & Accounts”

The said letter was sent under ‘Speed Post’ and, thus, presumably was received by the petitioner. Yet again on or about 15.11.2010, the respondent issued a letter to the petitioner showing migration of some LCOs from other network to that of the petitioner contending that its subscriber base was 1570 so far as old operators

are concerned and 1950 so far as the new operators are concerned. The said letter was also sent under 'Speed Post'.

16. The petitioner, however, by its letter dated 17.2.2011 *inter-alia* contended that the respondent had been running 'On Screen Display' showing "Your Service agreement has expired – plz sign fresh agreement immediately".

According to the petitioner the said OSD was being scrolled so as to ruin its business purported to be at instance of Mr. Sanjeev Narayan of Assam Cable Communications and Dolly Cable Network. The petitioner contends that the said OSD was being displayed on the eve of the ICC World Cup in support whereof however, no evidence has been adduced.

It was urged:-

"Therefore we request you to send your company representative as early as possible to the undersigned's office with prior appointment at a convenient date & time for execution of renewal/fresh subscription agreement on negotiated subscriber-base and non-discriminatory terms & conditions."

17. Yet again another e-mail dated 22.2.2011 was issued by Shri Zaman conveying his thanks for postponing the discussions owing to illness of his son.

The respondent, however, by its e-mail of the same date contended that it would be difficult to take an immediate decision on

the petitioner's request to remove the scroll as his case involves legal opinion.

18. It appears that the petitioner in a long email sent to the respondent on 21.2.2011 stated as under:-

"The service contract in between our company M/s Nirman & Associates Pvt. Ltd & M/s ESPN Software India Pvt. Ltd. was expired on 7th June, 2010. Nevertheless it was only the undersigned who desperately wanted to execution of fresh/renewal agreement with effect from the date it has expired and the undersigned is also kindly requested you to produce the copy of the mail/letter after 16th Dec, 2010. Whenever, we have denied or delayed for the renewal of the agreement on pretext of the matter being subjudice in TDSAT.

As per your alleged email para 3rd:-

We have already cleared our stand by the aforesaid para No.1 & 2. Nevertheless the undersigned request you kindly to go through the order of the Hon'ble TDSAT against Petition No.229 (C) of 2009 (M.A. No. 89 of 2010) i.e:-

A. 24. We, therefore are of the opinion that the interest of justice would be subserved if the parties are directed to enter into a fresh agreement with effect from the date it has expired on an increased subscriber base as on 31.3.2010.

25. This order shall, however, be subject to any negotiations which may be arrived at by and between the parties.

And also the order against petition No. i.e. 187 (C) of 2010 dated 16th Dec, 2010 i.e.

B. We, therefore direct the parties to enter into negotiation afresh on the basis of the SLRs submitted by the petitioner, in the light of the observation made in Petition No.229 (C) of 2009 and the subscriber base disclosed by it as also the changed situation at the ground level."

19. The petitioner was asked to visit its Calcutta office by the respondent vide an email dated 26.3.2011. However for one reason or the other the same did not materialize. The respondent by an e-mail dated 9.5.2011 asked the petitioner to confirm a date of meeting. The petitioner, however, requested the respondent to fix a meeting on 1.4.2011 and not on 28.3.2011.

A meeting appears to have taken place on 14.3.2011.

20. Several other correspondences also passed between the parties.

It however appears that respondent has provided an analysis of SLRs of the petitioner with a view to show that during the World Cup Cricket meet, the viewership has apparently gone down.

21. However, on a perusal thereof, it would appear that there had been no drastic change. The viewership had gone down in a few cases, whereas in most of the cases the same viewership had been shown.

22. We have noticed the said correspondences at some details to show that the parties are at logger heads with regard to the subscriber base. It was expected that having regard to our earlier order passed in Petition No. 187 of 2010 an agreement would be entered into by the parties hereto upon holding meeting(s).

23. The respondent in this case had been making genuine efforts to arrive at a settlement. The endeavour on the part of the petitioner in

this behalf although cannot be said to be not in consonance with the expectation of the Tribunal but the very fact that the respondent had sent an authorized officer even to the airport to meet the representative of the petitioner, goes to show that it had all along been ready and willing to enter into an agreement on reasonable commercial terms.

24. The controversy between the parties centers round the subscriber base of the petitioner. The orders of this Tribunal passed in Petition No. 229 (C) of 2010 and 187 (C) of 2010, although are of the same date; whereas in the former the words ‘increased subscriber base’ have been mentioned, in the later the words “the subscriber base disclosed by it as also the changed situation at the ground level”, have been mentioned.

Both the directions are required to be read harmoniously having regard to the fact that the basic fact situation involved in both the matters was the same.

25. Ordinarily an agreement has to be entered into keeping in view the ground realities as also the requirements of law.

The field being governed by regulatory regime, the same shall prevail over a contract entered into by and between the parties.

26. Whereas Clause 9.1 of the regulations provides for the statutory requirements at the time of entering into the agreement at the first

instance; Clauses 11 and 12 thereof govern the finalization of subscriber base at the time of renewal of the agreement.

27. Whatever be the case, SLR submitted by an MSO plays an important role.

The period for which the agreement had been entered into by and between the parties thereto is over.

The petitioner has been enjoying the benefit of supply of signal in terms of the Interim Orders passed by this Tribunal.

28. In Petition No.229 (C) of 2010, this Tribunal for all and intent purport has recorded a finding that there has been an increase in the subscriber base of the petitioner which was required to be taken into consideration. But what would be its actual subscriber base was to be determined having regard to the changed situation at the ground level.

The increase/changed situation at the ground level, thus, by applying any test must be determined keeping in view the SLRs furnished by the operator. The question, which however, arises is as to whether the same is prima facie reliable.

29. Mr. Ganpathy, in our opinion, may be right in contending that there is a possibility of the 'subscriber base' of the LCOs prepared by and/or at the instance of the petitioner itself.

It is of some significance to notice that basically two sets of proforma have been used in most of the SLRs furnished by the

petitioner. In one of the sets, the date and place have been mentioned on the left side of the foot of the page, whereas in some others, they were mentioned on the right side.

30. The language used in some of the SLRs is the same, in so far as after the word 'I', the words 'on behalf of the operator' have followed by the word 'is'. Such a grammatical mistake in the letters of the operators would be uncommon.

Moreover, the note appended to the said letters contains almost identical languages contending that the subscribers have either migrated or threatened to migrate to Assam Cable Communication/DTH operator.

31. It now stands admitted that principally two MSOs are operating in the town of Guwahati. Some DTH operators might also be operating but keeping in view the fact that there has been migration to a large extent by the LCOs from the network of one MSO, i.e., ACC, it is wholly unlikely that they would immediately be joining some DTH operators. A LCO even otherwise would not join a DTH operator; some of his subscribers may do. In the aforementioned situation, it is difficult to conceive that the subscriber base of the petitioner shall remain the same. The respondent has brought on record a large number of documents to show that many operators have left the other big MSOs operating in the town of Guwahati, namely, ACC or the concerns attached/connected to it.

32. We, therefore, have reasons to believe that the SLRs furnished by the petitioner to the respondent being not correct cannot be relied upon.

33. Moreover, if the petitioner's revenue had received almost the same throughout the relevant period, the same must have been shown in its books of accounts.

The petitioner must also be maintaining other registers and documents to show of how much amount it had been receiving from its LCOs and how much it had been paying to the other broadcasters.

34. It may be placed on record that in the previous cases attention of this Tribunal was not drawn to the various deficiencies and discrepancies in the SLR.

35. Clause 12 of the Regulations postulates that SLRs must be based on ground realities as the same is required to be filed on a monthly basis. SLRs cannot just be an eye wash.

We, furthermore notice that there has been a substantial discrepancy between the SLRs and the survey reports. According to the respondent upon migration from ACC, 6075 subscribers joined the network of the petitioner. It has, however, not been able to show that the subscriber base of the petitioner would be above 9000 as contented by it.

36. It is, however, difficult to accept the submission of Mr. Ganpathy that it itself was indicative of the fact that number of subscribers of the petitioner would be 9680. It may or may not be. The respondent has not pleaded or established that all the LCOs upon migration from ACC have joined the network of the petitioner. Ordinarily they would but then may or may not with same number of subscribers as some of the ACC subscribers may switch over to DTH operators also.

37. Moreover, the respondent has not been able to prove the CD; the requirements of Section 65 A and 65B of the Indian Evidence Act having not been complied with.

38. It is difficult to accept the submission of Mr. Ganpathy that having regard to the provisions of Information Technology, 2000, a CD will not come within the purview of the definition of 'Electronic Records.'

39. Having considered the matter, we are of the opinion that CD will come within the purview of the definition of the term 'Electronic Records.'

40. So far as the OSD is concerned, we are also unable to agree with Mr. Ganpathy that it was issued in terms of the Tariff Order.

41. Clause 4.3 of the Regulations provide for such OSD. However, publication of a notice in the newspaper is imperative in character.

42. We, therefore, are of the opinion that in the present facts and circumstances of the case, the subscriber base of the petitioner should be determined not only by holding a joint survey but also upon a scrutiny of the book of accounts of the petitioner by an independent Commissioner.

43. We would request the learned District Judge Guwahati to appoint an Advocate who may, in his opinion, would be competent to undertake the job, on such remuneration as he deems fit and proper.

The parties shall pay and bear the costs and fees of the learned Commissioner in equal proportion.

44. The learned Commissioner may be requested to submit his report as expeditiously as possible but preferably within a period of two months from the date of service of writ up his appointment.

45. The parties hereto and in particular the petitioner must render all cooperation with the learned Commissioner.

46. The petitioner shall, subject to the agreement between the parties, pay subscription charges on the basis of a subscriber base of 6500 for the month of April, 2011 onwards.

The deficit payment shall be cleared in three equal installments.

47. Let the matter appear before this Tribunal on 05.01.2012 “for order”.

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

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

HKC/26.9.11