

**TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL**

**NEW DELHI**

**Dated 17.11.2011**

**Petition No.276 (C)/2009**

Variety Entertainment (P) Ltd.

.... Petitioner

vs.

Orissa TV Ltd & Anr.

.... Respondents

**BEFORE:**

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

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

For Petitioner : Mr.Balaji Srinivasan, Advocate  
Ms.Jai Kirti S. Jadeja, Advocate  
Mr.B.D. Vivek, Advocate  
Mr.Prabhat Ranjan, (Representative  
of the Petitioner Co.)

For Respondent No.1 : Mr.Kaushik Mishra, Advocate

Respondent No.2 : Mr.Virender Thakur, Advocate

## J U D G M E N T

### S.B. Sinha

The petitioner is a Multi Service Operator (MSO); whereas the respondent is a broadcaster within the meaning of the provisions of the Telecommunication (Broadcasting and Cable Services) Interconnection Regulations, 2004 (the Regulation) having been producing a channel known as `Tarang TV'.

By reason of this petition a prayer has been made for a direction upon the respondent no.1 to provide the petitioner signals of its channel Tarang TV on a non-discriminatory basis. The petitioner is said to have made a request for supply of the aforementioned signals on or about 25.9.2009 which was not responded to.

The respondent in its reply inter alia contended that the petitioner with a mala fide intention has sought to suppress its actual subscriber base. It is said to have also contradicted itself sofar as its area of operation is concerned inasmuch as, whereas

initially it had contended that it had its areas of operation in the towns of Cuttack, Bhubaneswar and Puri, at a later stage, it was stated that it had its operation in two towns and ultimately in the town of Bhubaneswar only.

According to the respondent, it in its communication dated 11.2.2010 pointed out various deficiencies in the said request.

The respondent furthermore contends that the petitioner is required to disclose its subscriber base in respect of a channel of similar genre, namely, ETV Oriya.

By reason of an order dated 12.4.2010, this Tribunal, having regard to the pleadings of the parties, framed the following issues :-

- (i) Whether the petitioner is entitled to supply of signals from the respondent ?
- (ii) If so, at what subscribers base?
- (iii) Whether the petitioner for obtaining supply of signals from the respondent had furnished the requisite informations in terms of the interconnect regulations?
- (iv) To what relief, if any, the petitioner is entitled to ?

Sofar as Issue no.1 is concerned, there is no dispute; the petitioner being a `distributor of TV Channels' within the meaning of the provisions of the Regulations.

Sofar as Issue no.3 is concerned, indisputably, during pendency of this petition, if not earlier, the informations required to be furnished to the respondent, have been furnished. In fact the witness of the petitioner has not been cross-examined on the aforementioned issue.

The only issue which survives for consideration relates to subscriber base of the petitioner.

The petitioner, indisputably, had sought for supply of signals of channels of various other broadcasters.

This Tribunal in several petitions filed by the petitioner had been directing supply of signals on interim basis. With the same end in view, the petitioner filed an application which was marked as MA No.165/2010, directing the respondents to provide signals of TV channels i.e. `Tarang TV' to the petitioner.

By an order dated 31.5.2010, the respondent No.1 was directed to provide signals on the same terms and conditions as was directed by this Tribunal in its order dated 8.12.2009 in the case of the petitioner against M/s Star Den Media Services Pvt. Ltd. being Petition No.177 (C)/2009 i.e. on a subscriber base of 4000. This Tribunal further directed holding of a joint survey.

For one reason or the other, joint survey could not be completed. However, in modification of the order dated 31.5.2010, this Tribunal directed the respondent to accept a sum of Rs.1.20 lakhs and activate the decoders in respect of its channel `Tarang`.

The matter relating to the mode and manner of holding joint survey as also the delay in conducting the same came up for consideration before this Tribunal from time to time.

By reason of an order dated 13.1.2011, upon taking into consideration the contentions of the parties, mainly, the stand of the respondent in insisting for house to house survey, the number of TVs in the said households as also participation of the employees of the respondent, this Tribunal directed that an independent

agency, namely, National Council for Applied and Economic Research should conduct the survey.

The same, however, did not materialize.

The petitioner filed an application for direction upon the respondent to conduct joint survey to the extent of determining the petitioner's subscriber base in terms of the SLR only.

The respondent also filed an application which was marked as MA No.177/2011 praying inter alia for a direction that the interim order dated 31.5.2010, be vacated or the petitioner be directed to pay the respondent, subscription fee on the basis of 10,000 subscribers every month pending final disposal of the matter.

The petitioner has also filed an application being M.A. No.7/2011 praying inter alia for a direction to place on record the subscription agreements executed with M/s Ortel Communication Pvt. Ltd as well as similarly placed MSOs in the city of Bhubaneswar for the period 2008-2009, 2009-2010 and 2010-2011.

We may furthermore place on record that the revised SLRs have been filed by the petitioner from time to time. On the said premise the parties have been directed to meet and negotiate.

The petitioner, it appears from the record of the case, had disclosed its subscriber base as also the rate of growth in the said meetings. From the Minutes of the Meeting dated 28.5.2011, it appears that the petitioner had disclosed a subscriber base of 10,545 and expressed its readiness and willingness to enter into an agreement with the respondent No.1 on the basis of the 30% thereof to which the respondent did not agree.

Thereafter only, the said application being MA No.177/2011 was filed by the respondents. The said application was directed to be heard alongwith the hearing of the petition.

Mr.Balaji Srinivasan, learned counsel appearing on behalf of the petitioner would contend that the respondent has diverse business interests being broadcasting interests, cable interests and distributorship interests and, thus, with a view to protect the same, it does not intend to supply signals of its channels to the petitioner.

It was furthermore contended that the respondent no.1 is a sister concern of respondent no.2.

Our attention in this behalf has been drawn to an advertisement made by Ortel Communications Ltd. in its website, which is to the following effect :-

“ORTEL Communications Ltd, A leader to provide Last mile services on Broad Band Cable Network. It is in the business of providing convergence related telecom and services to customers in India. Our first project is in the east coast state of Orissa, where we are building a state of the art Hybrid Fiber Co-axial (HFC) network capable of providing a gamut of telecom and broadcaster services. ORTEL also provides its corporate clients dedicated Leased Line Service.

ORTEL provide Cable TV service under the brand name of Sky View Home Cable, which is the dominant service provider in its market and the largest MSO with almost 80% market share. As a result of our long term agreement with the State Electricity Grid, we have a rare strength : legal rights of way for the network, which enables proper planning and standards.

ORTEL Communications Ltd. also provides you a Digital Set top Box using which a person can have a facility to view more than 100 Channels, and can also enjoy digital picture and sound clarity.

ORTEL was the first private sector company in India to be granted an ISP license by the Govt. of India on 6<sup>th</sup> November, 1998. We currently provide internet access through cable modem to customers in Bhubaneswar, Cuttack, Rourkela, Sambalpur, Puri, Paradeep & Khurda.

ORTEL produces and cablecast a local origination TV channel under the brand name of OTV. Already entrenched as the source of electronic media in its market. OTV also has the distinction of being one of the earliest Indian channels and only streaming video provider in Orissa, to be available on the web in the name of [www.orissatv.com](http://www.orissatv.com). We also have an Info Channel and two Education channel to provide education for students of Orissa."

Placing before us, various proceedings and orders passed by this Tribunal from time to time, Mr.Srinivasan would contend that the subscriber base of the petitioner should be determined inter alia on the premise :-

- (i) If respondents have taken over 80% of the market and the rest of it being 20% thereof is with the petitioner, having regard to the total TV viewership which is about 4 lakhs in the town of Broadcaster as also the growth of the petitioner, namely, from 7500 subscribers to 10540, subscribers base may be calculated on the basis of the number of agreement entered into by and between each of the LCOs and upon taking into consideration the payouts required to

be made by the petitioner to the broadcaster as also the statutory dues.

(ii) Having regard to the provisions of the Regulations framed by TRAI known as Broadcasting and Cable Services (2<sup>nd</sup> Tariff, 9<sup>th</sup> Amendment Order) 2008 issued on 26.12.2008, Bhubaneswar was declared as a 'B' class city and thus the maximum amount, which can be charged from a subscriber per month cannot exceed Rs.235/- p.m.

(iii) The petitioner being an MSO would be entitled to collect only a sum of Rs.153/- as the balance amount of Rs.82/- is to be retained by the franchises of the LCOs for its maintenance etc. Our attention in this behalf has been drawn to Note 4 which substituted the earlier one in Column No.II of the Table, for the words Rs.72/-. It reads as under :-

(a) in PART I, for the Table under the heading "Charges payable by a subscriber (referred to in sub-clause (a) of clause 3) to the cable operator or multi system operator transmitting or re-transmitting both

Free to Air channels and Pay channels in Non-CAS areas.", the following Table and footnote shall be substituted, namely: -

Serial number (1)	Number of pay channels and Free to Air channels to be transmitted or retransmitted through the cable television network. (2)		Maximum amount of charges payable by a subscriber per month for first television connection ( exclusive of all taxes) for Pay channels and Free to Air channels mentioned under column (2) (3)		
	Pay channels 2 (a)	Free to Air channels 2 (b)	X Class cities and erstwhile A Class cities* 3 (a)	Y Class cities excluding erstwhile A Class cities* 3 (b)	Z Class cities, towns and other habitations 3 ©
1.	Upto twenty pay channels	Minimum thirty Free to Air Channels	Not exceeding rupees one hundred and seventy one only.	Not exceeding rupees one hundred and fifty only.	Not exceeding rupees one hundred one hundred and thirty nine only.
2.	More than twenty and upto thirty pay channels	Minimum thirty Free to Air channels	Not exceeding rupees two hundred and fourteen only.	Not exceeding rupees one hundred and eighty two only.	Not exceeding rupees one hundred and seventy one only.
3	More than thirty and upto forty five pay channels	Minimum thirty Free to Air channels	Not exceeding rupees two hundred and fifty one only.	Not exceeding rupees two hundred and fourteen only.	Not exceeding rupees one hundred ninety eight only.
4.	More than forty five pay channels	Minimum thirty Free to Air channels	Not exceeding rupees two hundred	Not exceeding rupees two hundred	Not exceeding rupees two hundred

			and seventy eight only.	and thirty five only.	and hundred and fourteen only.
--	--	--	----------------------------------	--------------------------	--

\* Erstwhile A class cities as per Government of India, Ministry of Finance (Department of Expenditure)OM No.2 (21)/E II(B)/2004 dated 18.11.2004."

"(b) in PART II, under Column (2) of the Table, for the words "Rupees seventy seven", the words "Rupees eighty two" shall be substituted"

- (iv) From the said amount of Rs.153/- an amount of Rs.25/- is permitted to be retained by the MSO towards general maintenance of its network and, thus, it would be left with a sum of Rs.128/- only per subscriber per month as a result whereof total collection to be made by the petitioner would be Rs.12,80,000/- p.m.
- (v) According to the petitioner it has to make the following payments to the broadcasters.
- i. STAR Bouquet –I @ Rs. 50.08 per subscriber base, excluding taxes as applicable on an interim of 4000 Nos

- ii. SONY, SET MAX, AXN of MSM @ Rs. 55.11 per subscriber, excluding taxes as applicable on an interim of 5000 Nos.
- iii. ESPN, STAR SPORTS, STAR CRICKET of ESPN @ Rs. 77.23 per subscriber, excluding taxes as applicable on an interim of 2500 Nos.
- iv. Sun 18 channels @ Rs. 10.40 per subscriber, excluding taxes as applicable
- v. ZEE network channels @ Rs. 115.08 per subscriber, excluding taxes as applicable
- vi. ETV network channels- Rs 133.44 @ Rs. 11.12 per channel for 12 channels per subscriber, excluding taxes as applicable

S.No	Broadcaster Name	Tariff for Non-CAS Area In Rupees	For 10,000 subscriber base declared by the petitioner and the Corresponding payout of Petitioner in Rupees.
1.	STAR	50.08	500800
2.	MSM	55.11	551100
3.	ZEE Turner	115.08	1150800
4.	ESPN	77.23	772300
5.	NDTV	29.00	290000
6.	SAHARA	35.71	357100
7.	SUN 18	36.12	361200
8.	ETV Oriya	11.12	111200
9.	Tarang	10.70	1,07,000
	Total	420.15	42,01,500

MRP as per Tariff order dated 26-12-2008	Rs. 235.00	Rs. 23,50,000
Franchisee/ Cable Operator's Share as per tariff order dated 26-12-2008	Rs. 82.00	Rs. 8,20,000
Operational Cost of MSO	Rs. 25.00	Rs. 2,50,000
Balance amount left with MSO for payout of the respective pay	Rs. 128.00	Rs. 12,80,000

channels		
----------	--	--

Table below sets out no. of channels subscribed by VEPL.

S No	Broadcaster Name	No of pay channels of such Broadcasters that are being available on VEPL
1	STAR	9
2	MSM	3
3	Zee Turner	14
4	ESPN	3
5	NDTV	4
6	SAHARA	3
7	Sun 18	11
8	ETV Oriya	1
9	Tarang-OTV	1
	TOTAL	49

- (vi) The rate of 'O TV', according to the petitioner, having regard to the number of pay channels, the total amount available with the petitioner would be Rs.26,122/- and thus the subscriber base of the petitioner should be 2,441, in support whereof it is stated: -

"Total No. of pay channels : 49

Total Amount available being : Rs.12,80,000

Hence amount payable per : Rs.26,122

Channels would be

Hence total nos. of Subscriber on which  
Subscription Agreement with M/s OTV  
Should be signed  $(26122/10.70) = 2441''$

Mr.Mishra appearing on behalf of the respondent, on the other hand, urged :-

- (i) No valid request having been made by the petitioner, this petition is not maintainable.
- (ii) The conduct the petitioner being not above board, it should not be favoured with any equitable relief.
- (iii) It would not be correct to contend that the provisions of Tariff Order of 2004 can be invoked for the purpose of determination of the subscriber base of a 'distributor of TV channels'. According to the learned counsel the figure Rs.82/- is to be substituted for Rs.77/- only in a case where at least 30 numbers of Free to Air channels are transmitted through the cable TV network, although, the same is mandatory in terms of Note II appended thereto.

Our attention in this behalf has been drawn to paragraph 2 A of the Tariff 8<sup>th</sup> Amendment Order 2007 (III of 2007) issued on 4.10.2007 by Mr.Mishra to contend that the same would be applicable inasmuch as an amount of Rs.82/- can be charged as the maximum amount for the

subscriber only for Free to Air channels and in view of the fact that the petitioner can supply as many pay channels as it likes; the ceiling operates only with respect to the channels which were carried by the MSO as on 1.12.2007.

- (i) The proviso appended to Clause 2 of the said Order provides that the excess amount for addition of any channel can be recovered if it carries the same number of channel in its network after 1.12.2007, which is to the following effect :-

“Provided that if any new pay channel(s) that is/are launched after the 1<sup>st</sup> day of December, 2007 or any channel(s) that was/ were free to air channel on the 1<sup>st</sup> day of December, 2007 is/are converted to pay channel(s) subsequently, then the ceiling referred to as above can be exceeded, but only if the new channel(s) are provided on a stand alone basis, either individually or as part of new, separate bouquet(s). The extent to which the ceilings referred to above can be exceeded would be limited to the rates for the new channels. For the new pay channel(s) as well as the channel(s) that were free to air as on the 1<sup>st</sup> day of December, 2007 and have subsequently converted to pay channel(s) the rates must be similar to the rates of similar channels existing as on the 1<sup>st</sup> day of December, 2007 and/ or on the date of such launching of new channel or such conversion of free to air channel into a pay channel ;”

(ii) The petitioner would, thus, be able to recover the price of all pay channels irrespective of this ceiling and in that view of the matter it would not be correct to contend that subscriber base can be determined on the basis thereof.

(iii) The joint survey which was being conducted from first week of October, 2010 could not be carried forward as :-

(a) The survey sheets which were prepared on the basis whereof the respondent is said to have been asking for unnecessary details have not been produced. Joint survey, if it was to be carried on all the areas, would have taken a long time.

(b) In the four areas which was surveyed, the petitioner's subscriber base was found to be 1946 and, if survey was to be carried out in all the 35 areas, the universe of the petitioner would be much more than 10549.

(c) This Tribunal having been passing several interim orders in the cases of other broadcasters on the subscriber base of the petitioner ranging from 2000 to 2500, by way of ad-hoc measure including for ESPN Channel and having regard to the fact that ESPN is merely a sports channel and

the respondent is a popular regional channel, the subscriber base therefor must be fixed at 7000 or 8000 with a direction to carry out the joint survey which should be completed within a period of two months or so and for the said purpose even a Commissioner can be appointed for the purpose of monitoring.

(d) It is incorrect to contend that respondent no.2 is the holding company of respondent no.1 as respondent no.2 and has 4% share in the respondent no.1.

It is true that OML in its web page stated that it produces and cable cast the local regional channel under the brand name (respondent no.1) and it is the largest MSO with almost 80% of the share but such a puffing to some extent must be allowed and cannot be made the basis for fastening a liability on it.

It is also true that the petitioner in its MA has asked the respondent to disclose the inter se relations between the respondents. It furthermore appears that in the town of Bhubaneswar only 3 MSOs have been operating.

We are not in agreement with the back calculation made by the petitioner based on tariff order to arrive at the negotiated subscriber base between the petitioner and the respondent. There is no such provision in the Regulations. The only way to arrive at the subscriber base is to know the total subscriber number and the negotiated subscriber base based on viewership.

The petitioner in support of its case has examined Mr.Ch.Mani Kumar.

The respondent no.1, in turn has examined one Mr.Badri Narayan Samal.

Mr.Ch.Mani Kumar in his cross-examination categorically stated that the petitioner had currently been operating only in the town of Bhubaneswar. With reference to his statement in the affidavit that it had a existing network in Puri and Khurda Road is concerned in cross-examination, his categorical answer was that the petitioner has been operating in the town of Bhubaneswar only.

As regards the subscriber base, his evidence is to the following effect: -

"Q: What is your present subscriber base in Orissa?

A: As on date the petitioner is having subscriber base of approximately 800.

Q: What is the number of subscriber base found out during the joint survey with ESPN?

A: It is placed on record, 4476 as per the joint survey with ESPN.

Q: In view of the joint survey how do you state that the subscriber base is 800?

A: petitioner is operating in Bhubneshwar only and the subscriber base of 800 as stated above is the sub base on which petitioner would like to enter into agreement with the respondent.

Q: Is it correct to say that your subscriber base (SLR) is much more than 800

A: No.

Q: Where the number 4476 came in the joint survey with ESPN?

A: It was a joint survey done with ESPN.

Q: Do you have a subscriber base of 4476?

A: No.

Volunteer – The subscriber base of 4476 is the outcome of the Joint Survey done with ESPN.”

The said witness was cross-examined on 4.8.2010. As indicated heretofore that according to the petitioner, its present Universe has gone upto about 10,500.

Mr.Samal the witness examined on behalf of respondent no.1, although, in his evidence more or less reiterated the contentions of the respondent no.1 contained in its reply; according to him on a partial

survey of 27466 houses i.e. 21% of the cable homes, the number of subscribers of the petitioner was found to be 4665.

According to the said witness the population of the town of Bhubaneswar being 10 lakhs and the cable satellite homes as per the data available being 1,27,000, the petitioner's subscribers would be about 25,000. In his cross-examination, however, the said witness expressed his ignorance as to whether Ortel Communications was a rival of the petitioner in the town of Bhubaneswar.

He furthermore accepted that even the respondent in his letter dated 25.9.2009, which was referred to in paragraph 5 of the affidavit, has described its subscriber base only to be 1000, although, it had 20 cable operators/ link operators. He, however, accepted that the petitioner is a MSO operating in the town of Bhubaneswar.

Sofar as the statements made in paragraphs 13 and 14 of his affidavit relating to the figures mentioned hereinabove are concerned, he accepted that he had not filed any affidavit in support thereof.

In the aforementioned fact situation it is difficult to arrive at a correct figure of the subscribers of the petitioner.

The petitioner has been paying service tax to the concerned authorities showing a subscriber base of 10,562. The correctness of the said document is not in dispute. The number of channels which are being telecast by the petitioner has also been disclosed, namely, 92.

The respondent's site showing its advantageous position being Ex.PW-1/10 (page 170) is also not in dispute.

The respondent has raised a contention that the only channel which is comparable, being as popular and in the same language as the respondent's channel would be `ETV Oriya`.

We have also noticed heretofore that at one point of time, the respondent has categorically contended that the petitioner's subscriber base would be 10,000.

A `universe' of a MSO, it is well-known, although forms the basis of the subscriber base but the same cannot be equated with the negotiated subscriber base unless there exists a contract to the contrary as would appear from the definition of the term `Subscriber Base', contained in Clause 2 (p) of the Regulations.

Keeping in view the facts and circumstances of the case, we are of the opinion that the interest of justice would be sub-served if the

following direction is issued to parties viz: -

The petitioner shall disclose its subscriber base of 'ETV Oriya' to respondent which in turn shall disclose the subscriber base of its LCOs, wherefrom at least the percentage of viewership of the channels vis-à-vis the universe of the petitioner can be ascertained.

We are issuing this direction as both the parties have refused to divulge all the informations which are clearly in their power and possession.

Determination of a subscriber base, we understand is a delicate task but then what is necessary is holding of negotiations on free and frank basis, subject, of course to their respective commercial interest.

In this case both the parties have shares in the production of channels. They have also interest in running of the business of MSO.

Although, it is stated before us that the respondent no.2 has merely 4% share in the respondent no.1, but the site of the respondent no.1 speaks otherwise. The fact that somebody only exercises control over both the respondents being not in dispute and in any event the respondent no.2 having not controverted the same either in its reply nor

having examined any witness on its behalf in this matter, for the purpose of holding mutual negotiations, its authorized representatives and if possible the high authorities of both the parties hereto may take part therein. Such negotiations must be concluded within a period of two months and a final agreement should be arrived at within the said period.

The petitioner in the meantime pay to the respondent, the subscription fee on the basis of a subscriber base of 5000.

We may place on record that the petitioner has been directed to pay subscription fee to Star Den Media Service (P) Ltd. as also MSM Discovery Ltd. on the basis of a subscriber base of 4000 only, in Petition No. 177 (C)/ 2009 and Petition No.196 (C)/2009 vide order dated 15.9.2011.

This petition is disposed of with the aforementioned directions without any order as to costs.

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

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

**November 17, 2011**  
**`ns'**