TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL

NEW DELHI

DATED 27TH APRIL, 2012

Petition No.270 (C) of 2011

Neo Sports Broadcast Pvt. Ltd. … Petitioner

Vs.

Reliance Big TV Ltd. … Respondent

BEFORE:

HON'BLE MR. JUSTICE S.B. SINHA, CHAIRPERSON
HON'BLE MR.P.K. RASTOGI, MEMBER

For Petitioner : Mr. Vikram Mehta, Advocate

For Respondent : Mr. Navin Chawla, Advocate
Mr. Tushar Singh, Advocate

JUDGEMENT

S.B. SINHA

Petitioner is a broadcaster, whereas Respondent is a DTH operator. They entered into an Interconnect Agreement on or about 20th June, 2008, in terms whereof the Respondent was to pay the bouquet rates at the rate of 50% of the one fixed for the Non-CAS area, which came to be about Rs.19.37 exclusive of taxes. It furthermore

provided that in the event of there being any change in the legal position, the Petitioner may revise its rates, which would be accepted by the Respondent.

2. Admittedly on or about 26.12.2008, the Regulations allowed the broadcasters to increase their rate upto 7% w.e.f. 01.01.2009. Petitioner invoked the said order in terms whereof, the bouquet rate came to Rs. 20.73.

3. Inter-alia relying on or the basis of the SMS record submitted by the Respondent herein, the Petitioner used to raise invoices on the basis whereof, it was to make payments.

4. Petitioner has filed this petition on or about 31.03.2011, praying *inter-alia* for the following reliefs:-

> *"(a) Pass an Order directing the Respondent to pay an amount of Rs.62,785,250/- being the outstanding subscription amount; and*
>
> *(b) Pass an Order directing the Respondent to pay an amount Rs.5984697/- towards interest @18% p.a. on delayed payments; and*

(c) Pass an Order directing the Respondent to pay further interest @ 18% p.a. (being the interest on delayed payments) from the date of Petition till date of payment; and

(d) Pass any Order as this Hon'ble Tribunal may deem fit and proper in this case."

5. A part of the dispute between the parties hereto being the payability of subscription fees in terms of the said Interconnect Agreement, vis-à-vis the Tariff Order issued by the Telecom Regulatory Authority of India (TRAI) in July, 2010, admittedly is pending for consideration before the Supreme Court of India. This Tribunal by an order dated 14.12.2011 noticing the issues between the parties directed as under:-

"Having heard the learned counsel for the parties, I am of the opinion that if the claim of the Petitioner involved for the said period(s) and/or issues pending before the Supreme Court are directed to abide by the result of the Supreme Court, wherefor leave under Order II of Rule 2 of the Code of Civil Procedure is given and/or if appropriate observations are made, the same would not only subserve the interest of justice but also would not prejudice any party to this lis whatsoever."

6. We, therefore in this petition concedingly, are concerned with only the following three claims of the Petitioner, being:-

(i) A sum of Rs.3,90,859/- in so far as the same relates to claim of down gradation of the Respondent for the months of November and December, 2009.

(ii) A sum of Rs.10,39,0863/- towards increase in the charges by 7% as said to be provided for by the TRAI w.e.f. 01.01.2009 and as demanded by reason of the invoices issued in that behalf.

(iii) A sum of Rs.2,07,94,966/- whereby and whereunder the Petitioner purported to be relying on or on the basis of the decision of this Tribunal dated 13.5.2009 passed in Appeal No. 10 (c) of 2008 in stead and in place of 50% of the Non-CAS rates, raised bills at the rate of 100% as also 7% increase thereupon.

7. We may at the outset notice the relevant provisions of the Interconnect Agreement as contained in Annexure 'A' to the petition :-

"1. Channel Rate, payment Terms

A. The Affiliate shall pay NEO the subscription fee for the Channels at the following rates :

Channels Options to be subscribed by the Affiliate	*Rate(s) in Rs. Per month per Subscriber (exclusive of Taxes)*	*IRD Box and Viewing Card No.*	*Tier*
Bouquet 1 (consisting of NEO Cricket & NEO Sports)	*Rs.19.37/-*		*As per clause II(II)(IV)*

The above rates are exclusive of taxes and duties and the Affiliate shall be responsible to pay all taxes & duties (levied presently and/or in future) with respect to subscription of the Channels.

B. NEO is of the opinion that the rate to be charged from DTH Operators is fifty per cent of the prevailing cable rates, however in case of any change of opinion by NEO based upon the legal advise, changes in applicable law, regulation or any order passed by the Court or Tribunal or otherwise. NEO reserves the right to change the price in conformity with the applicable provisions of the law. The Affiliate agrees to pay the revised rates, as specified in para 1A above without raising any disputes."

8. The said agreement was amended w.e.f 01.9.2009, the relevant portions whereof read as under:-

"AND WHEREAS Reliance Big TV and Neo Sports have entered into an Interconnection Agreement for DTH Operators on June 20, 208 ("Interconnect Agreement") whereby Reliance Big TV was authorized to carry the Channel of the Neo Sports (Neo Cricket and Neo Sports) in order to distribute the same to its Customers/households/ Subscribers through its DTH Platform in the Territory of India;

1.6 Reliance Big TV agrees that the exclusive offer information on the Free view period is the property of Neo Sports and shall always be treated as strictly confidential. Reliance Big TV shall not disclose and shall ensure that none of its Employees, partners, officers, directors, shareholders, principals including any of agents subcontractors, disclose any exclusive offer information to any third parties except as required for execution of this AA. This provision is in addition to any other covenant or AA previously given by Neo Sports to Reliance Big TV and is applicable only for the Term of this AA or of the Promotional Scheme.

C. ***Commercials***

Commercials for the exclusive Promotional Scheme to Reliance Big TV shall be as follows :

1.1 Revenue sharing

The revenue generated during this exclusive offer will be shared equally between Neo Sports and Reliance Big TV on 50% basis on the amounts that are net of Taxes.

1.2 It is clarified that the monthly Licence Fee to NEO basis the above 50:50 revenue share will be paid as follows :-

- *Big TV Monthly Subscription – Rs.20/- per Subscriber per month plus applicable taxes*
- *Big TV Quarterly Subscription – Rs.19/- per Subscriber per month plus applicable taxes*
- *Big TV Half Yearly Subscription – Rs.18/- per Subscriber per month plus applicable taxes*
- *Big TV Yearly Subscription – Rs.16.67/- per Subscriber per month plus applicable taxes*

1.3 Subscribers Reports will specify Paid Subscribers under the above 4 schemes separately.

3. Save and except to the extent specified herein, all other terms/provisions of the Interconnect Agreement shall continue to remain in full force and effect and binding on the Parties. To the extent specified herein, the Interconnect Agreement shall stand modified and superseded by this AA with effect from September 1, 2009 till March 31, 2010.

It is hereby agreed that the scheme is being introduced for a specific/limited period and specific promotional purpose, after expiry of which the original terms and conditions of the Inter-connect Agreement will come into force and will prevail.

A. ***Promotional Scheme***

1.1 The Channels of the Neo Sports shall be offered in a bouquet.

1.2 The MRP for the bouquet during the Promotional Scheme for the exiting non-Neo Sports Subscribers

and for the new Subscribers and renewals by all existing Neo Subscribers shall b as follows :

- *Big TV Monthly Subscription – Rs.40/- per Subscriber per month plus applicable taxes*
- *Big TV Quarterly Subscription – Rs.114/- per Subscriber per quarter plus applicable taxes*
- *Big TV Half Yearly Subscription – Rs.215/- per Subscriber per six months plus applicable taxes*
- *Big TV Yearly Subscription – Rs.400/- per Subscriber per year plus applicable taxes"*

9. So far as the first issue is concerned, the invoices for the months of November, 2010 and December, 2010 were raised on the basis of the information furnished by the Respondent itself for a sum of Rs.6,557,709/- and an amount of Rs.27,47,603/- being the outstanding brought forward; totaling a sum of Rs.34,028,312/-.

So far as the invoice for the month of December 2010 is concerned, the total amount payable thereunder was a sum of Rs.84,93,603/- and the outstandings as on that date having been a sum of Rs.3,40,28,313/- payable towards monthly fixed charges, totaling a sum of Rs.4,25,21,916/-.

10. By reason of a letter dated 19.02.2009, the Respondent, however, stated:-

> *"During our regular audit process, we found that there are certain variations in the subscriber numbers for the months of October and November 2008 sent to you previously.*
>
> *While regretting the error, we would request you to send us your revised invoice/credit note for the difference amount, based on the below revised Subscriber Reports for the month of October and November 2008:*
>
> 1. *Channel wise subscriber number for the month of October 2008 is as below :-*

S.No.	*Name of Channel*	*No. of subscribers as on Sept. 30, 2008*	*Revised No. of subscribers as on Oct 31, 2008*	*Revised Average subscribers for Oct 2008*
1.	*Neo Cricket*	*90,378*	*59,724*	*75,051*
2.	*Neo Sports*			

> 2. *Channel wise subscriber number as on November 2008 is as below :-*

S.No.	*Name of Channel*	*No. of subscribers as on Oct.. 31, 2008*	*Revised No. of subscribers as on Nov. 30, 2008*	*Revised Average subscribers for Nov. 2008*

1.	*Neo Cricket*	*59,724*	*77,739*	*68,732*
2.	*Neo Sports*			

You will appreciate that such mistakes are rare and adequate precautions have been taken to ensure that the same are not repeated.

You will appreciate that such mistakes are rare and adequate precautions have been taken to ensure that the same are not repeated. You are our valued partner and we seek your support in this matter."

11. Contention of the Petitioner in this behalf is that despite the mode and manner in which the number of subscribers was to be calculated being the average in the number of the subscribers on the first day and the last day of the month, the Respondent sent a letter on 19.02.2009 said to be upon correcting its own record, but the same was not acceptable to the Petitioner in so far as it by various letters being 25.02.2009, 09.03.2009 and 09.06.2009 exercised it's right of auditing its SMS system of the Respondent, which having been denied, the said amount of Rs.3,908,895/- became payable.

12. Respondent, on the other hand, submits that it did not deny or dispute the right of the Petitioner to make inspection or audit its system but what was requested was to defer the same till the financial year was over.

On the aforementioned premise, it was submitted that the Petitioner has not made out any case for passing a decree in respect of the aforementioned claim.

13. With a view to appreciate the rival contentions of the parties, we may notice that the Petitioner vide its letter dated 25.02.2009 expressed its shock and surprise as to how despite an overall growth of the DTH platform of the Respondent i.e. addition of approximately one million subscribers per month, its subscriber base has decreased, stating:-

> *"It is further to be pointed out that decreasing trend was shown by you through your reports even during the period of live & exclusive matches shown on our channels, which compels us to opine that the reports sent to us are not correct. We do not find any logic behind the substantial drop in the subscription base as reported by you.*
>
> *We would also like to bring to your notice that as per the Inter Connect Agreement our channels are to be sold on six monthly or yearly basis, consequent upon which the*

subscriber base cannot show de-growth for first six months. However your Subscriber reports have shown a different trend which is conflicting with the terms of the executed agreement.

Keeping in mind the popularity of our channels we are of the opinion that there cannot be de-growth in our subscriber base. Considering the facts and circumstances as stated above we wish to invoke Clause (C) 3 of the Agreement that reads as under and would like to conduct an audit of your records and System :
"Records, Reports and Audit :

NEO reserves the right to verify/audit the subscriber base, Reports and/or Records of the Affiliate through its representative and/or through an outside agency, after giving 48 hours notice to the Affiliate. However it is agreed that in case of audit by an outside agency, NEO shall appoint any of the top four Audit firms operating in India or the Audit firm of a good repute which shall not be the Auditor of any other DTH operator. In addition NEO also reserves the right to inspect/review/audit the SMS/CAS and/or other systems, books and records of the Affiliate once in every quarter with respect to the Channels/Service of NEO for the purpose of compliance of the terms and/or determining the subscriber base/fee. The Affiliate shall fully co-operate and assist the audit team of NEO as they may reasonably require in order to carry out any audit."

We would like to conduct the audit on 11th March 2009 by our internal team and solicit your co-operation for the same. Please note that our team will visit your office on 11th March 2009 during the working hours. You are

requested to keep all the records, books, papers, SMS and other systems and details pertaining to subscribers ready for our team in Agreement. Kindly confirm the time and contact person in connection to this.

This is for your information, record and necessary action."

14. Respondent, however, vide its email dated 6th March, 2009 stated as under :-

"We regret to once again remind you that there has been no response from your end in spite of your repeated assurance. Our meeting on 23rd Jan, 09 followed with several telephonic discussion and follow up with you have not seen no result from your end in making the payments for the month of Nov. Dec. 2008 and the report of Jan,09 is still pending as on 6th of March, 2009.

Kindly treat this as our last reminder and we shall have no option but to release Public Notice or initiate inserting OSD on Neo Channels on Big TV for the default of payments.

We also await a reply from you with reference to our letter dated 25.2.09, expressing our desire for an audit on the 11th March, 2009."

15. As regards payment in respect of the overdue payment, the Respondent by its E-mail dated 7th March, 2009 stated :-

> *"Our apologies for the delay which is due to year end pressures. The payment is under process and will be released next week.*
>
> *We have already sent you our response to your letter dated 25.02.09."*

16. Petitioner responded to the said communication dated 9th March, 2009, wrongly referred to as 3rd June, 2009 in the following terms:-

> *"This is one more assurance from you, waiting to be delivered. We still do not understand as why matter related to Neo does not figure in your priority list. It is shocking to note that payments for the month of November, December 2008 and January 2009 is over due and according to you are held back due to year and process. How does a year end pressure can hold back payments related to the month of Nov, Dec and Jan? The Jan and Feb 09 reports are also pending while I write this mail to you. We are also into the year ending process, but it does not make any difference to the normal functioning of any of our departments. I am sorry to inform you that there are DTH platforms launched after you, they have been punctual and adhering to the time limits as mentioned in the Interconnect Agreement.*

Its shocks to note your refusal to our right to verify/audit Neo Subscriber based, which goes against Clause (C) 3 of the Interconnect Agreement. By this you are denying our rights to audit Neo Subscriber base which are reporting Subscriber numbers that challenges the market trend. We had given more than 48 hours to provide us access to an audit and you have denied it with an excuse of a year ending pressures at your end. This is again not accepted and we once again request you to reconsider our request for an audit on the 11th of this March, 09.

Request you to release our payments and confirm the Audit."

17. It is pertinent to note that Shri Narender Pal Singh, the witness examined on behalf of the Respondent in his evidence, stated as under:-

"I do not personally maintain the accounts of the company with the broadcasters.
It is correct that I am not aware of the accounts maintained by the Respondent company with the Petitioner.
Q1: Does the Respondent company maintain any system to calculate/record the subscriber number of a channel on a daily/monthly basis?
A: I would not be able to reply.

Q2: Are you aware of the SMS system?

A: Yes.

Q3: Does your company maintain any SMS system?

A: Yes, it is required as per the law.

Q4: On what basis do you report the opening and closing monthly subscriber numbers to the broadcasters?

A: I am not aware of it.

(Attention of the witness is drawn to Page 94 of the Paper Book.)

Q5: Did the Respondent send this letter to the Petitioner?

A: Yes."

18. Mr. Mehta would submit that the contention of the Respondent in this behalf should not be accepted as the Petitioner only wanted auditing of the Respondent's system in February 2009 also keeping in view the fact that an opportunity therefor was to be accorded within 48 hours from the time of making such request.

Perusal of the materials brought on record, shows that the Petitioner wanted such audit to be conducted only on 11.03.2009 and the Respondent never denied nor disputed the Petitioner's right to audit its system.

We are, therefore, of the opinion that interest of justice would be sub-served if the Respondent is directed to allow the Petitioner to audit its system so as to enable the parties to consider the correctness or otherwise of the revised information furnished by the Respondent herein relating to the reduction in its subscriber base within a period of two weeks from date.

The Petitioner in this behalf may be compensated in terms of cost. We have, however, passed this order in the interest of justice. There is no doubt that the Respondent ought to have allowed the Petitioner to audit its system. We are also not oblivious of the fact that the Respondent even has not produce the requisite documents before us.

19. So far as the second issue is concerned, the period involved is 01.01.2009 and 30.06.2009.

It also covers a part of the third issue from 20.06.2008 till 31.12.2008.

20. The said issue raises a pure question of law. Indisputably this Tribunal in a petition filed by one of the DTH operators being ACS

Limited against STAR Den India Limited, inter-alia on the premise that under-declarations are made in the cable services, and the charges levied by the broadcaster are treated to be 100% of their subscriber base, opined that on an ad-hoc basis and till the TRAI comes out with an appropriate tariff, 50% of the rate prescribed for the Non-CAS areas should be treated to be the rate for the DTH operators.

21. This Tribunal again in a petition filed by M/s Tata Sky Ltd. against Zee Turner Ltd. refused to interfere with fixation of the said rate at that stage.

22. Indisputably by a Tariff Order dated 26.12.2008, the TRAI permitted the Non-CAS rate to be increased by 7% w.e.f. 01.01.2009.

23. Petitioner has raised invoices with the said increase of 7% over its rate contending that in terms of the Interconnect Agreement entered into by and between the parties; it had the requisite power to increase its rate.

24. The contentions of the Respondent, on the other hand, are:-

(i) Any unilateral increase by the Petitioner is not permissible.

(ii) The Tariff Order dated 26.12.2008 has no application to an existing contract.

(iii) The said increase, having regard to the ceiling of 7% contained therein, in any event was, subject to negotiations between the parties.

25. Petitioner by a letter dated 31.12.2008 contended:-

"As you are aware that TRAI has issued the Telecommunication (Ninth Amendment) Order 2008 on 26th December 2008 whereby the Authority has allowed to increase the price of the channels by 7% of the exiting price. Consequent upon introduction of said Tariff Order and in pursuance to the Clause V (E) (4) of the Interconnect Agreement the Company has revised its price for its channels which will be effective from 1st January 2009 and the new rates will be charged to all DTH Operators including you with effect from such date. The detail of the revised price has also been filed with TRAI and available on the web-site of the Company. The revised rates are as follows :-

Revised Rate Cards wef-1st Jan 2009 Excluding Taxes		*DTH*
NEO Cricket & NEO Sports	*Bouquet*	*20.73*
NEO Cricket	*ala carte*	*17.73*

NEO Sports	*ala carte*	*13.30*

Accordingly we will implement the revised rates on invoices from January 2009 onwards."

26. It is not in dispute that the Respondent did not pay the said amount contending that DTH rates being separate, the said Tariff Order was irrelevant and increase of 7% in the rate was not automatic.

27. We have noticed heretobefore that in terms of the Interconnect Agreement, the Petitioner could increase the rate.

For the aforementioned purpose, the reason for which the said Tariff Order was issued may also be noticed. Despite rise in the cost of production and/or inflation the broadcasters could not increase their rates, as the same was frozen by the TRAI in the year 2003. They made representations to the TRAI which was considered and the said tariff order was issued as having regard to the fact that the rates were frozen, they could not have increased the same. The TRAI, in terms of the said tariff order, gave liberty to the broadcaster to exercise its discretion. Such a course of action in future by reason of change of law was envisaged by the parties, keeping in view the same.

28. We may notice the statements made in the reply of the Respondent in this behalf:-

> *"C. Under the said agreement, the monthly subscription fee payable by the Respondent to the Petitioner was to be calculated on the basis of the average number of subscribers of the "Neo Bouquet" of channels on the Respondent's DTH Platform multiplied by the wholesale rate of the Neo Bouquet of channels. That Clause V D(4) of the said subscription agreement provided that the Petitioner could revise the price of its channels in accordance with law which the Respondent was obliged to pay to the Petitioner.*
>
> *G. That with effect from 1.1.2009, an increase of 7% to the cable rates was allowed by the Telecom Regulatory Authority of India in its Tariff Order dated 26.12.2008. That consequently the Cable Rates and the DTH Rates were immediately revised by the Petitioner by an increase of 7% w.e.f. 1.1.2009. Thus, the wholesale price of the Neo Bouquet of Channels which was Rs.19.37 per month per subscriber was revised to Rs.20.73 per month per subscriber w.e.f. 1.1.2009.*
>
> *4. That the Petitioner has further claimed an amount of Rs.10,39,863/- on account of unilateral increase in the subscription rate by 7% on the basis of the Tariff Order dated 26.12.2008 carried out by it, is most respectfully submitted that the Tariff Order merely authorizes the increase of Tariff of NON-CAS rates by a maximum of 7%. However, such increase cannot be unilateral, and must be based on negotiation between the parties, especially where the agreement is already in existence.*

The Respondent vide its letter dated 12.01.2009 had also objected to imposition of such unilateral revision of rate by the Petitioner. The unilateral increase so sought to be recovered, therefore, cannot be permitted to the Petitioner, and the claim to that extent is liable to be dismissed."

29. Mr. Chawla would contend that the Respondent by its letter dated 12.01.2009 also refuted the claim on the Petitioner that it was entitled to increase its rates, stating :-

"This has reference to your letter dated 31st December,08 received by us on 2nd January,09. Vide this letter you have advised revision of the bouquet price of the 2 channels viz. NEO Cricket and NEO Sports from the current rs.19.37 per sub per month to Rs.20.73 per sub per month pursuant to TRAI order of 26th December 2008 allowing increase in the price of the Channels by 7%.

We are surprised to receive this letter from you considering that our revenues are already under pressure due to the existing high price of the Channel. Offtake of Neo Package is already not as expected and any further increase in price by NEO will only worsen the situation for all stakeholders i.e. Subscriber, Channel and Reliance, as the channel will become dearer to the subscriber thus, putting under further pressure revenues for both Reliance and NEO. Also this will make us non

competitive in the market thus rendering the channels unviable."

30. It may be true that the Petitioner did not respond to the said letter but keeping in view that the Regulator itself had made such an enabling provision by conferring liberty on the Broadcasters, the said claims must stand or fall on its own grounds.

31. Reliance has been placed by Mr. Chawla on a Judgment of this Tribunal dated 29.3.2006 in Petition No.142 (c) of 2005 - India Cable Net Company Limited Vs. Star India Pvt. Ltd., wherein it was held:-

"19. This point refers to the dispute between the parties in regard to the actual subscription payable for signals of bouquet No.1 supplied to ICNL by Star. The contention of ICNL is that as per the agreement it was liable to pay Star a monthly subscription of Rs.30 per subscriber for bouquet No.1 whereas in the first invoice raised by the Star, contrary to the agreement, it has charged subscription at the rate of Rs.32.10 per bouquet per subscriber which ICNL contends is contrary to the agreement. The learned counsel for Star contended that by the time the parties entered into an agreement TRAI has w.e.f. 1st January, 2005 permitted the broadcasters

to increase the subscription amount by seven per cent from what was being charged for the previous year. Since Rs.30/- per bouquet per subscriber was the rate which was prevailing prior to 1.1.2005 it is entitled to a raise it by seven per cent. Therefore, demand for payment of Rs.32.10 per bouquet per subscriber was permissible under the above said tariff fixed by TRAI. The learned counsel for ICNL, however, submits that the Regulation empowering the increase in subscription fee was only an enabling provision and is not an ipso facto binding provision. If Star wanted to charge the enhanced subscription then it should have done so at the time of agreement itself in consultation with ICNL. Since the same was not done on the date of agreement, subsequent unilateral increase by Rs.2.10 which is equal to seven per cent over the previous year's subscription cannot be justified. We are in agreement with the learned counsel for ICNL on this issue. Star India was aware that it could charge Rs.32.10 on the date of the agreement but for some reason or the other it agreed to the rate of Rs.30/- per subscriber in the agreement for bouquet No.1 and having agreed to this rate, it could not have raised the subscription by Rs.2.10 unilaterally. Even though it had the power to increase the subscription since the agreement had been entered with, the increase subsequently should have been done with the consent of the ICNL. Since the same was not done, for the current subscription year, it is not open to Star India to charge Rs.32.10 per bouquet per subscriber. In our view it can only charge Rs.30/- per subscriber for bouquet No.1."

In that case, an agreement had been entered into on 08.6.2005 i.e. after the TRAI had affected the increase from 01.01.2005.

As the Agreement provided for a lower rate despite the fact that the tariff order provided for an increase, the distinguishing feature in the present case, vis-à-vis India Cable Net Company (Supra) is evident. A party is entitled to waive its right. It is in that context, the said provision contained in the tariff order must be viewed. It was in the aforementioned fact situation, this Tribunal held that an unilateral increase in the subscription fee by Rs.2.10 was not permissible without the consent of ICNL; at a later stage Star having not done so i.e. at the time of entering into the agreement.

Moreover, this Tribunal in Tata Sky Ltd. Vs. ESPN Software Pvt. Ltd Petition No.155 (c) of 2010, by a judgment and order dated 22nd July, 2010 held as under:-

> *"18. The law moreover does not envisage a vacuum. If 7% increase in terms of the order of the TRAI has been implemented, there is no reason as to why in absence of any other statute to the contrary the same would be denied to Respondent."*

32. Moreover, the Petitioner may not enter into negotiations with different DTH operators to enter into contracts providing for different

rates. It is otherwise bound to supply signals of its channels on non-discriminatory basis.

If the rate is increased by 7% by reason of a Tariff Order issued by the Regulator, we do not see any reason as to why the same shall have no application in the instant case, particularly in view of the fact that even the agreement between the parties provides therefor.

33. Submission of Mr. Chawla that the subsequent increase will not be applicable in the case of the concluded contract is stated to be rejected.

The rate fixed by this Tribunal being an ad-hoc one, it did not take into consideration any future contingency.

This Tribunal as also the Regulator proceeded on the basis that 50% of the Non-CAS rates should be applicable to the DTH platform. If the cable operators have to bear 7% extra cost, we do not see as to why the DTH operator would not pay the extra amount. Moreover, it would bear repetition to state that even the agreement contemplated such a situation.

34. The third claim of the Petitioner for a sum of Rs.27,94,066/- consists of two components.

One is 7% increase and the second is claim of 100% of the rate relying on or on the basis of the decision of this Tribunal in Appeal No. 10 (c) of 2008 ESPN Vs. TRAI disposed upon 13.5.2009.

35. Contention of the Petitioner in this behalf is that when this Tribunal fixed the rate of 50% of the rate applicable to Non-CAS area with regard to DTH platform, there was no concept of add-on package.

The Tribunal proceeded on the basis that the rate would be applicable with regard to the basic package only.

36. Our attention in this behalf has been drawn to page 97 of the paper book to show how packages are offered.

So far as Tata Sky is concerned, admittedly the concept of add-on package was visualized in June, 2008; whereas the judgment of this Tribunal in ASC Ltd. (Supra) was delivered on 14.7.2006.

Respondent offered 09 different packages to its customer.

The first package is valued at Rs.115/- plus taxes. It consists of 108 channels.

In all other package, the basic entry pack plus few add-on packages are included, as a result whereof, the value thereof increases.

37. Respondent's channels figure in the platinum pack costing Rs.315/-.

38. Admittedly, from the brochure issued by the Respondent, it would appear that alternative packages were to be availed on "three easy steps for complete entertainment". The first step is "Choose from our wide variety of entry offers and bring home India's best Digital TV services". The second step is "Choose your regional pack from a wide variety of languages'.

The viewers could seek packages offered at Rs.15 + taxes a-la-carte.

The step three provided for 'Enhance your entertainment with our add-on packs". Neo Sports packages could be subscribed for a sum of Rs.65 plus taxes over and above the basic pack'.

39. There exists a slight dispute with regard to the nomenclature of packages.

According to Mr. Navin Chawla, the Respondent offered 09 different basic packages; whereas Mr. Mehta would contend that the nomenclature is not decisive in as much as after the entry level package with the minimum pricing, each package would cost more, and the same would be containing the channels including the one which have been offered in the next below pack.

In the year 2006-2007, when ASC (Supra) and Tata Sky (Supra) were decided, the concept of add-on packs were absent. For the first time, the concept of add-on package vis-â-vis the entry level packages was considered by the TRAI in its Notification of July, 2011.

40. It is in the aforementioned backdrop of events, we have to consider the background facts involving the decision of this Tribunal in M/s ESPN Software Pvt. Ltd. Vs. Telecom Regulatory Authority of India being Appeal No. 10 (c) of 2008.

Following the decision of this Tribunal in ASC Enterprises (Supra) and Tata Sky Ltd. (Supra), the TRAI issued a Press Note directing that, as far as DTH platform was concerned, the rate shall be 50% of the Non-CAS rates.

ESPN, however, contended that it was not bound thereby. In its RIO, it included a condition that DTH operators should agree to keep all the channels of the services in the entry level package.

Tata sky questioned the same as being violative of Clause 13.2 A.11 of the Regulations, as amended in the year 2007.

41. ESPN sought to withdraw the said RIO. Respondent issued a direction by a letter dated 24.6.2008 that ESPN should, within 15 days, modify its RIO for the DTH operators so as to :-

> *"(ii) offer to the DTH operators the bouquets/channels at 50% of the rates at which such bouquets/channels are being offered for non-CAS cable distribution, i.e. non-addressable platform so as to comply with the above norm laid down by the TDSAT in letter and spirit."*

A notice to show-cause was issued to ESPN.

ESPN filed an amended RIO on 08.7.2008, including the following Clause:-

> *"The Company shall offer a discount of 50% on the price per Set Top Box per month to those DTH operator(s) who provide the Company's channels (the Services) such wide coverage/viewership as was being provided by the DTH*

operators when the decisions dated July 14, 2006 and March 31, 2007 by the TDSAT respectively in ASC Enterprises case and in Tata Sky case came into force."

42. A representation was made by ESPN inter-alia contending that this Tribunal in ASC (Supra) and Tata Sky (Supra) intended that 50% of its Non-CAS rates should be the basis of directing the broadcasters to offer its channels to DTH operators. It, furthermore, contended that although it was not a party to the aforementioned two judgments, it would offer 50% of its Non-CAS Digital rates to the DTH operators but as at that point of time, the concept of add-on packs did not exist and, thus, there was no occasion for this Tribunal to go into question as to what should be the price for the individual channels offered in the add-on packs.

According to it, the concept evolved for the first time on 01.6.2008, as far as the TATA Sky was concerned therein.

The TRAI however, according to ESPN, had brushed aside the said contentions.

43. This Tribunal its order dated 14.7.2006 noticed that in ASC Enterprises Ltd. Vs. Star India Pvt. Ltd. [Petition No. 136 (c) of 2006] as well as the Order dated 31.3.2007 in Tata Sky, it was opined:-

"A. In view of the above, there is logic in the statement of the Petitioner that the rates laid down and being charged for the Cable TV platform cannot be made applicable to the DTH platform and we agree with this contention of the Petitioner. We have no basis to lay down the actual rates per channel which we feel is the prerogative of the TRAI. However, to begin with we feel that 50 per cent of the rates being charged for cable platform be made applicable to DTH platform.

B. Today the position is that this Tribunal has already requested TRAI to come with price regulation in this area. Price fixation should be done by TRAI. In the judgment dated July 14, 2006 this Tribunal had fixed a norm in the interim till price fixation is done by TRAI, the broadcaster will charge the DTH operator 50% of its listed price for cable platform. For the present we would like to continue with the said norm and we reiterate that the TRAI should come out with the price fixation and regulation in this behalf as early as possible."

44. Submission of ESPN was that keeping in view the concept of add-on pack, where the viewership is limited, there incomparables could not have been compared.

45. This Tribunal, upon taking into consideration the rival contentions of the parties, held as under:-

> *"18. We have carefully considered the arguments of both the learned counsels. As per clause 13.2A.11, it is mandatory on the part of the broadcaster to offer pay channels on a-la-carte basis to DTH operators and such offering shall not prevent the broadcaster from offering such pay channels additionally in the form of bouquets. It is further provided that the broadcaster shall directly or indirectly not compel any DTH operator to offer the entire bouquet or bouquets offered by the broadcaster to such operator in any package or scheme being offered by such DTH operator to its subscribers. This regulation does not appear to have been violated by the Appellant because there is no compulsion imposed by the Appellant to take the entire bouquet or bouquets. The fact that the RIO envisages the placement of all channels and services in the entry level tier because of attracting the viewership on the basis of the total subscriber base of the DTH operator and to offer a volume based discount as has been offered in the two cases decided by this Tribunal and referred to in the directions issued by the Respondent. It is to be examined, whether the Clause 13.2A.11 envisages any embargo on placement of channels in a particular tier. The plea of the Appellant is that the 50% price envisaged in the Tata Sky and ASC Enterprises cases is for the viewership of the channels on being placed in the Basic Service Tier. The main thrust of 13.2A.11 is that once the pay channels are obtained on a-la-carte basis by the DTH operator, the broadcaster cannot prevent the offering of such pay channel in the form of bouquets. In case the broadcaster*

obtains all the channels of a bouquet by paying a-la-carte rate for each channel, protection has been offered in Clause 13.2A.13. This clause mentions that in case the DTH operators packages the channels comprised in such opted bouquet in a manner resulting in different subscriber base for different channels comprised in such opted bouquet, then, the payment, to the broadcaster for such entire opted bouquet by the DTH operator, shall be calculated on the basis of the subscriber base for the channel which has the higher subscriber base amongst the channels comprised in that bouquet. It is clear from this clause that the viewership is a very important consideration for tariff fixation for DTH operators. This was also decided by us in the case of Sun Direct TV Pvt. Ltd. Vs MSM Discovery Pvt. Ltd (62(C) of 2008). The Petitioner in this case was entitled to receive channel/ channels of his choice from the Respondent and position them in the manner of his choice but at the same time it is obliged to pay to the broadcaster as per Clause 13.2A.13.

20. Having carefully considered various aspects, we must record our observation that the judgments in ASC case and Tata Sky case were issued in July, 2006 and March, 2007 respectively, i.e. more than 2-2½ years ago. The directions of this Tribunal in those orders were essentially meant to give a general indication as to how the tariff fixation should be approached. In the ASC Enterprises case, this Tribunal had clearly stated that this Tribunal had no basis to lay down the actual rates per channel, which is the prerogative of TRAI. It was only as an ad hoc measure that this Tribunal had indicated a broad figure of 50% in case of DTH platform.

It was reasonable to expect that TRAI would thereupon fix the tariffs after due examination. We are informed that it was only recently that TRAI had initiated this exercise and circulated a consultation paper. We are further informed that the exercise is underway and a decision is likely to be taken by the Authority shortly. In this regard, we direct the Authority to take into consideration the situation arising in cases where the 'add on packages' are involved. It is clear that this Tribunal's orders in the ASC Enterprise and Tata Sky Case had no relation to add on packages, which concept itself came up subsequently. We hold that the general principle of 50% tariff applies in the general situation and that too only as an interim measure, pending the determination by TRAI. We hold that this principle of 50% tariff should not be mutatis mutandis applied in the case of an 'add on package'. We leave the exact formulation to TRAI since the exercise is already underway. We direct all interested parties including the Appellant to present its case to the Respondent as part of the consultation process and that the same shall be given due consideration.

21. There remains the question whether the impugned direction itself should be pursued. We did not find any impropriety or irregularity in the direction issued by the Respondent. It had done so in the bona fide exercise of its powers and keeping in view the two judgements in the ASC Enterprises and Tata sky cases. As observed by us above, the directions in those two cases were keeping the general situation in mind and also as an interim measure. Nevertheless, In the light of our observation that the entire question of tariff for 'add on packages'

should be re-considered, we feel it appropriate to direct the Respondent not to proceed further with any action in pursuance of the impugned direction. We would also like to make it clear that this should not be read as our endorsement of that portion of the amended RIO dealing with 'add on packages'. This is evidently a grey area. Considering that we have held that the 50% tariff is not necessarily applicable to the 'add on packages', we leave the question of 'add on packages' for negotiation between the respective parties but only till such time as TRAI issues a Regulation in this regard. Needless to state, we hope that the Authority will, having already initiated the exercise of fixing the DTH tariff, complete the same within the next 4 months."

46. Before us, diverse contentions have been raised by learned counsel for the parties.

Mr. Mehta would contend that :-

(i) by reason of the said judgment, the add-on packages were de-regulated;

(ii) fixation of 50% rate was a judge made law, and thus, bringing add-on package outside the same must also be considered to be a law;

(iii) the said decision must be considered having regard to the fact that the TRAI had not fixed tariff for a

long time and the situation drastically changed after rendition of the aforementioned judgments;

(iv) the ESPN in its RIO having asked for payments on the basis of the 100% of the subscribers and having regard to the fact that add-on packages was to lower the subscriber base because the same will be at the option of the consumers, this Tribunal found that it would not be fair to stick to the concept of 50%, and in that view of the matter a direction was issued that the parties should negotiate.

47. On the other hand, Mr. Chawla submitted that:-

(a) the rate offered by the Respondent in the original Agreement being Rs.19.37 and the Petitioner itself having offered the rate of Rs.20/-, it would be wholly unreasonable that Respondent pays a sum of Rs.41.45 to the Petitioner (if the 7% increase is to be added, although the Respondent had been charging only at the rate of Rs.40/-);

(b) there is nothing in the agreement to show that Respondent should place its channel at the minimum price level;

(c) from the judgment of this Tribunal, it would be evident that it had always referred the matter to the Regulator for determination of the question as to whether separate rates should be fixed for the add-on packages;

(d) the judgment of this Tribunal in ESPN (Supra) must be read in its entirety;

(e) it must be read having regard to the backdrop of events. ESPN preferred an appeal against the direction issued by the Regulator. Either the said direction should have been upheld or set aside. This Tribunal was clearly of the opinion that no further step need be taken by the TRAI by the Regulator to implement the said direction.

48. Had the direction issued by the TRAI found favour with the Tribunal; the requisite consequences would have ensued. Appropriate direction would have been issued.

This Tribunal although opined that the direction of the TRAI was not arbitrary keeping in view the backdrop of events and in particular, its order in ASC (Supra) and TATA Sky (supra), but there was absolutely no reason as while taking note of the fact that the concept of add-on packages came up subsequently, it opined that 50% of the

tariff should not be *mutatis mutandis* applied in the case of add-on package, leaving the exact formulation to the TRAI as the exercise in that behalf was underway. It also left the question of add-on packages for negotiations between the respective parties. We feel that the judgment of the Tribunal so read, supports the contention of the Petitioner.

49. The question, however, is as to whether the Petitioner was entitled to unilaterally increase the rate to 100% in the facts and circumstances of this case? We think it was not.

Respondent, it is not disputed, had not changed its bouquet from the very beginning of the date of entering into the Agreement, and, thus, there was no change in the situation, to which the Petitioner could have taken the benefit.

This Tribunal merely permitted negotiations. It did not confer any right upon the broadcasters to increase its rate to 100%.

What should be the market rate could have been the subject matter of a contract.

Petitioner contends that the Respondent never came forward for negotiations. It however, appears that a supplementary agreement

between the parties was entered into on or about 01.9.2010. The said agreement was valid for a period of six months. After the expiry of the said supplement agreement, the old rate was to revive. Had the intention of the Petitioner been that after the expiry of supplementary agreement, it would be charging Rs.41/- per subscriber per month, the same could have explicitly been stated. Respondent had been contending from the very beginning that it would not pay anything extra.

50. In this connection, we may notice the letter of the Respondent dated 12.01.2009, which reads as under:-

> *"Dated 12th Jan, 2009*
>
> *Mr. Arun Poddar*
> *Neo Sports Broadcast Pvt. Ltd.*
> *Nimbus Centre, Oberoi Complex,*
> *Andheri (W), Mumbai – 400 053.*
>
> *Dear Mr. Poddar,*
>
> *This has reference to your letter dated 31st December, 2008 received by us on 2nd January 2009. Vide this letter you have advised revision of the bouquet price of the two channels viz, NEO Cricket and NEO sports from the current Rs.19.37 per sub per month to Rs.20.37 per sub per month pursuant to TRAI order of 26th December 2008 allowing increase in the price of the Channels by 7%.*

We are surprised to receive this letter from you considering that our revenues are already under pressure due to the existing high price of the Channel. Offtake of Neo package is already not as expected and any further increase in price by NEO will only worsen the situation for all stakeholders i.e Subscriber. Channel and Reliance, as the channel will become dearer to the subscriber thus putting under further pressure revenues for both Reliance and NEO. Also this will make us non competitive in the market thus rendering the channel unviable.

To optimize revenues both for the platform as well the Broadcaster, it is important that we revisit the deal on terms which enhance revenues for both. In view of the above, please let us know a convenient time to set up the meeting to discuss this.

And due to the above reasons and in the best interests of both the parties, we will not be able to accept the increase in price as mentioned by you in your letter.

Yours faithfully
For Reliance BIG TV limited
Neha Damania
Head-Content Alliances"

It would also be profitable to notice the manner in which the said supplementary agreement was entered into.

PW1, in his deposition, stated :-

"Q.3: Were there any negotiations held between the parties before entering into the agreement dated 1.9.2009?
A: No."

51. On or about 10.6.2009, the Petitioner had issued a letter to the following effect:-

> *"However in case you intend to distribute them in an "add on package" in compliance with Clause II (H) of the Inter Connect Agreement, in such eventuality we propose the Price of the Channels as follows with effect from 1st July, 2009.*

Channels	*Channel price in Rupees to be charged by NEO to the DTH Operators (Per subscriber per month, excluding taxes)*	*Maximum Retail Price to be charged by DTH Operator (Per subscriber per month, excluding taxes)*
Neo Cricket	*Rs.35.45/-*	*Rs.42.54/-*
Neo Sports	*Rs.26.60/-*	*Rs.31.92/-*
Bouquet (consisting of Neo Cricket & Neo Sports	*Rs.41.45/-*	*Rs.49.74/-*

> *The above price is proposed to have the consistency in price of the channels by retaining the existing margin on whole sale price, so as to benefit the consumer in a better manner and to avoid confusions of large variations prevalent in pricing for the same.*

We would appreciate your views, feedback and suggestions on this issue at the earliest so that we are able to maximize the benefits for both our organizations. We therefore would like to propose a meeting with you in this respect as we appreciate your invaluable contribution in distributing our channels through your DTH Platform.

We would really appreciate in case you may spare your time and come to our office at 3rd Floor, Neo Sports Broadcast Pvt. Ltd., Nimbus Centre, Andheri-West, Mumbai-400053 or alternatively we can also visit your office at your convenience day and time.

For the above we would like to have a meeting on 16th day of June 2009 at 4.00 p.m. for which we request you to confirm your availability and the place of meeting within three days from receipt of this letter."

52. By reason thereof, thus, only an offer was made.

We will assume that the Respondent did not make any counter offer but evidently a supplementary agreement was entered into which must have been preceded by some negotiation.

53. Mr. Mehta would, however, submit that if that was the position, the Respondent could not have issued a letter dated 22.9.2009.

It reads as under:-

> *"In this connection, we would like to inform you that in terms of the Interconnection Agreement entered into between us and also the judgment dated May 13, 2009 of Telecom Disputes Settlement & Appellate Tribunal in Appeal No. 10 (C) of 2008, you cannot unilaterally increase the Subscriber Price/Maximum Retail Price. In addition, in view of various issues involved in this matter from regulatory and contractual frameworks including the promotional scheme just launched, such revision is untenable and not beneficial to us, you and also the Subscribers.*
>
> *For the reasons specified above, we are not able to accept such revision in the Subscriber Price/Maximum Retail Price. We would also urge upon you to desist from any attempts at unilaterally revising the Subscriber Price/Maximum Retail Price. In view of the above, we request you to withdraw the Invoice No. DTH-REL/04-2009-10 and Invoice No. DTH-REL/05-2009-10 for the months of July and August 2009 issued in accordance with the price revisions specified in your letter dated June 10, 2009 immediately and issue revised invoices as per the earlier rates of 19.37/- per subscriber."*

54. From the said letter, at least it appears the offer of the Petitioner had not been accepted. The relationship between the parties, however, continued.

55. It was in the aforementioned situation, the question of reasonableness of the said demand on the part of the Petitioner would also assume importance, in view of the contention of the Respondent, which appears to be correct, that it had all long been realizing only a sum of Rs.40/- from its subscribers.

56. We agree with Mr. Chawla that the demand of the Petitioner on that count appears to be unreasonable.

57. For the forgoing reasons the issues between the parties are determined as under:-

(i) Respondent must allow the Petitioner to audit its system within two weeks from date.

(ii) Petitioner is entitled to 7% increase on the subscription fee on and from 01.01.2009.

(iii) It is declared that the Petitioner is not entitled to any decree on the basis of its claim of 100% rate relying on or on the basis of the judgment of the Tribunal in ESPN (Supra).

(iv) Applicability of the Tariff Order of 2010 framed by the TRAI shall be governed by the decision of the Supreme Court of India.

(v) The parties, however, shall be at liberty to ventilate their grievances, if any, arising between them in the light of the said judgment.

58. This petition is allowed in part and to the extent mentioned heretobefore with costs.

Advocate's fee assessed at Rs.50,000/-.

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

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

HKC/rkc