

TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL

NEW DELHI

DATED 12th SEPTEMBER 2012

Petition No.67 (C) of 2012

Hathway Cable & Datacom Ltd. ...Petitioner

Vs.

Pragya Vision Pvt. Ltd. ...Respondent

BEFORE:

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

For Petitioner : Mr.Arun Kathpalia, Advocate
Mr. Nasir Husain, Advocate

For Respondent : Mr. Vineet Bhagat, Advocate
Ms. Neha Jain, Advocate

ORDER

The Petitioner, a Multi Service Operator and the Respondent, a Broadcaster, entered into a channel placement agreement on or about 25.1.2010. The said agreement was valid for a period of one year. The networks of the Petitioner in respect whereof the channels were to be placed are as to under:-

Agreed Frequencies for the Term

Sr. No.	PVPL Channel	Agreed Frequencies
1.	PRAGYA	"UHF Band in all of the below mentioned networks

HCDL Network names

Sr. No.	City	Frequency
1.	<i>Delhi, Faridabad, Gurgaon, Noida (NCR)</i>	<UHF 45
2.	<i>Mumbai – Kamla Mills</i>	<UHF 45
3.	<i>Pune</i>	<UHF 45
4.	<i>Indore</i>	<UHF 40
5.	<i>Bhopal</i>	<UHF 40
6.	<i>Jaipur</i>	<UHF 40
7.	<i>Mandsaur</i>	<UHF 40
8.	<i>Gwalior</i>	<UHF 40
9.	<i>Raipur</i>	<UHF 40
10.	<i>Bilaspur</i>	<UHF 40
11.	<i>Durg/Bhillai</i>	<UHF 40
12.	<i>Korba</i>	<UHF 40
13.	<i>Jagdalpur</i>	<UHF 40

14.	<i>All of Gujarat (GTPL)</i>	<UHF 45
15.	<i>Allahabad</i>	<UHF 35
16.	<i>Lucknow</i>	<UHF 35
17.	<i>Sharanpur</i>	<UHF 35
18.	<i>Palampur</i>	<UHF 35

2.

The placement charges, however, was fixed for a sum of Rs.5.75crores payable by the Respondent in the following terms:-

Sr. No.	Installment	Amount	Payment Due Date
1.	1 st	80,00,000/-	January 2010
2.	2 nd	45,00,000/-	February 2010
3.	3 rd	45,00,000/-	March 2010
4.	4 th	45,00,000/-	April 2010
5.	5 th	45,00,000/-	May 2010
6.	6 th	45,00,000/-	June 2010
7.	7 th	45,00,000/-	July 2010
8.	8 th	45,00,000/-	August 2010
9.	9 th	45,00,000/-	September 2010
10.	10 th	45,00,000/-	October 2010
11.	11 th	45,00,000/-	November 2010
12.	12 th	45,00,000/-	December 2010

The said charges were exclusive of taxes to be paid.

3. By way of placement charges the Respondent was to pay a sum of Rs.6,72,83,000/- inclusive of taxes. It has made payments of Rs.5,45,98,500/- leaving a balance of Rs.1,26,84,500/-.

4. It, however, appears that the said agreement despite having not been renewed, the Petitioner continued to place the channels of the Respondent till March, 2011.

5. The Petitioner alongwith its petition has annexed three invoices being dated 23.12.2010, 23.3.2011 and 31.3.2011 for a sum of Rs.45.00 lakhs, Rs.45.00 lakhs and 25.00 lakhs respectively.

So far as the third invoice is concerned, admittedly a request to reduce the amount of placement charges was made by the Respondent and the same was acceded to by the Petitioner.

It is also necessary to mention that Respondent despite the fact that it has denied and disputed the receipt of the said invoices, alongwith its reply has annexed eight invoices. Some invoices, however, have also been placed by the Petitioner alongwith its rejoinder.

6. The Respondent in its reply has inter-alia raised the following contentions:-

(a) The Petitioner had switched off or changed the frequencies in violation of Clauses (iii) and (iv) of the agreement, the consequence whereof would be that:-

- (i) Only pro-rata payments were to be made.
- (ii) The Petitioners have been over-paid and in that view of the matter, the Respondent is entitled, on re-conciliation of accounts to obtain a refund of huge sum it.
- (iii) No invoice having been received by it, the Respondent had no legal liability with regard thereto.
- (iv) The invoices placed on record showed that the signals were not been supplied in terms of the agreement which would amount to termination of the agreement.
- (v) The Petitioner having failed and/or neglected to place on record the channel placement map which was said to have been sent alongwith the invoices, it is entitled to any amount whatsoever.
- (vi) The payments made to the Petitioner were infact by way of pro-rata payments.
- (vii) From a perusal of the invoices, it would appear that in some months the placements were made in respect of some areas; whereas in the others only some channels

were placed and in that view of the matter, the Petitioner is not entitled to the demanded amount as prayed for in petition or at all.

7. I have been taken through, a large number of correspondences entered into by and between the parties hereto.

E-mails on behalf of the Respondent were being sent by one Praveer Gaur who was the head of the distribution department of the Respondent.

8. It is stated by Mr. Kathpalia that in none of the said correspondences, it now stands admitted, any complaint had ever been made and it would also appear from the record that payments have been made to the Petitioner for the amounts mentioned in the invoices.

9. The Petitioner raised the issue of non-payment of its dues by issuance of some e-mails. We may notice some of them.

10. On 9th November, 2010 Mr. Harish Reddy (PW-1) had reminded Mr. Gaur that the outstanding amount is Rs. 1.5 crores and by 22nd of the said month, it would be of Rs. 2.00crores.

Mr. Gaur in response thereto contended that payments would be made by 18th/19th November, 2010 which has been confirmed by the office of the Chairman.

The said payments, however, were not made and in that view of the matter, the status of the said commitments made by the Respondent was asked for by Mr. Harish Reddy from Mr. Gaur by an e-mail dated 22nd November, 2010.

11. A reminder was sent on 22nd November, 2010 at about 05:19 PM.

As no response thereto was received, again on 23rd November, 2010, Mr. Gaur was intimated as under:-

*“We are amused and surprised the way it is going.
You had confirmed that the payments will be made
yesterday and now you are not responding to our calls
and your mobile is switched off at this point of time.”*

12. The parties met thereafter. A promise is said to have been made on behalf of the Respondent that payments would be made by 25th November, 2010 by an e-mail dated 6th December, 2010, Mr. Gaur was requested to release payments which stood at a sum of Rs.2.00 crores.

13. Similarly an e-mail was sent on 4th January which is to the following effect:-

“24th of January, 2011 is the deal period ending date.

We have to receive balance amount of 1.99 crores from you as on date for the period 25th January, 2010 to 24th January, 2011. Every time you are giving fresh dates and not honoring. Even today our person is waiting at your office for the cheque from lunch as per your promise. You are not answering the phone too. Request you to release the payments today without fail.”

14. Mr. Gaur in response to the said e-mail, sent the following e-mail

“With reference to placement charges/carriage fee due on account of Pragya TV placement on all Hathway networks, the management has released a payment of Rs.48,64,230/- vide Cheque Number 058083 dated December 27th 2010 drawn in favour of “Hathway Cable & Datacom Ltd.”

With the release of this payment we have released a total of Rs.97,28460/- in the month of December 2010. The balance payment will be released in the month of January 2011.

I would hereby request you to kindly get the channel started on Hathway – Chandini Chowk and also on all Digital Network sof Delhi/NCRs. The cost of the encoders will be included while the deal is being renewed for the period 2011 to 2012.”

15. I would revert back to the this letter while considering the cross examination of Mr. Tiwari, the Chairman-cum-Managing Director of the Respondent Company vis-a-vis in particular the question No. 56.

A bare perusal of the said e-mail, however, would clearly go to show that the Respondent had released a payment of Rs. 48,64,230/- being a sum of Rs. 45.00 lakhs plus taxes on account of “Pragya TV Placement on all Hathway Networks”. Balance payments were assured to be released in the month of January, 2011.

16. Pursuant to or in furtherance of the said assurances, placement of the channels is stated to have been continued.

However, as the payments were hard to come by, the Petitioner sent an e-mail on 28th January, 2011 reminding the Respondent that the agreement had come to an end on 24th January and thus, the channel would be switched off on the next day.

To the said e-mail, the Respondent by an e-mail dated 28th January, 2011, stated as under:-

“I have been in a long meeting with the chairman yesterday and today to close further deal in S-Band for Pragya TV. For outstanding payment amounting to Rs.1.35 crores + taxes, I am meeting him again tomorrow afternoon at 2.30 PM. Kindly hold the fort till I get the outstanding cleared and sign current agreement by tomorrow evening.”

17. Yet again payments were sought for by an e-mail dated 31st January, 2011.

By reason of an e-mail dated 9th February, 2011, it was stated:-

“Based on your request the channel is still being aired. But no payments received though you had assured for the same by yesterday.

Your renewal also is due. Kindly revert by today evening with payments and renewal treat this as urgent.”

Yet again by an e-mail dated 23rd February, the Petitioner stated as under:-

“Kindly revert immediately with payments and agreement as the channel is still on as per your request and confirmation to pay for the period after expiry. We

will be sending you invoice for the period 25th January to 24th February, 2011 today. If no confirmation regarding the renewal then the channel will be taken off air tomorrow at all our networks.”

18. Mr. Gaur on behalf of the Respondent, however, made a request to the following effect:-

“With reference to Pragya Tv deal for the period 2011 to 2012, the old deal which had expired on January 24, 2011 shall continue on pro-rata basis till March 31, 2011, however we shall request you to only consider a payment of Rs. 25 lacs only for the period 25.02.2011 to 31.03.2011 since the channel had been switched off on almost all of your networks.

*W.E.F. April 01, 2011 the deal has been reworked for S-Band @ Rs. 12 crores + Rs. 25 lacs towards travel to Greece for Delhi and NCR distributors for a period of 12 months for the territories mentioned in last year agreement excluding the markets **of M.P., Rajasthan and Chhattisgarh.***

*A detailed **agreement to be signed by 25.03.2011.**
Payment to be released by April 10, 2011.”*

19. For the aforementioned period, the request of the Respondent was acceded to and as indicated heretobefore; an invoice for a sum of Rs.25.00 lakhs was sent on 31st March, 2011. The placement

agreement, however, came to an end as the channels were switched off by the Petitioner.

20. The balance amount of Rs.1.62crores had been claimed by the Petitioner for the period January, 2010 to March, 2011.

21. Some of the clauses of the agreement may, however, be noticed:-

“iii) The Agreed Frequencies shall not be changed/shifted by Affiliate without prior written consent of PVPL under any circumstances whatsoever. In the event, Affiliate changes/shifts the Agreed Frequencies, PVPL shall be entitled to immediately terminate the Letter Agreement and/or be entitled to determine the reduction in Placement Fees as PVPL deems appropriate.

iv) In the event the signals of PVPL Channels to Affiliate’s Network remains suspended/deactivated for continuous period of more than 3 days due to breach of any of the terms and conditions and the Agreement and Affiliate fails to remedy the breach complained of by PVPL within 3 (three) business days of being notified of any such breach of the terms of the

Agreement, PVPL shall in addition to its other rights, be entitled to immediately discontinue payment of Placement Fees and/or demand refund of any Placement Fees for the immediately preceding month.

viii) Affiliate shall within 5 days from the end of each calendar month, provide a report to PVPL disclosing the exact placement of PVPL Channels on Affiliate's Network. PVPL or its representatives shall have the right at any time, to inspect the head-end/control room/ Network of Affiliate to determine whether Affiliate is placing PVPL Channels on the Agreed Frequencies."

22. The Respondent contends that clauses (iii) and (iv) are to be read together. It is, however, difficult to accept the said contention.

They apply in different situations. Whereas clause (iii) provides for a bar to change/shift agreed frequency; clause (iv) provides for suspension and/or de-activation for a continuous period of more than 3 days, due to breach of any of the terms and conditions of the agreement and to remedy the same on a complaint made by it within three days of being notified.

The consequences of not complying with the said clauses are also different.

23. Clause (viii) enjoins a duty on the Petitioner herein to provide a report to the Respondent disclosing the exact placement of its channels on its network.

24. So far as applicability of clause (iii) in the instant case is concerned, evidently no case has been made out that the Petitioner at any point of time deliberately switched off its signals of its channel as has been alleged by the Respondent or at all.

It is also accepted that switching off certain channels in certain areas resulted in, as per the request of the Respondent to down-gradation of replacement charges from Rs.45.00lakhs to Rs.25.00 lakhs for the period 24.2.2011 and 25.3.2011.

25. So far as alleged violation of clauses (iii) and (iv) of the agreement are concerned, no complaint in writing has been made.

26. The Petitioner in support of its case has examined Mr. Harish Reddy, who as noticed heretobefore, has been making correspondences with Mr. Parveer Gaur of the Respondent.

In his deposition, the said witness stated :-

“5. As the Respondent was not making payments in terms of the Agreement, I sent several mails to the Respondent requesting them to clear the dues. Some of these letters/e-mails were duly responded to by the Respondent, where they not only acknowledged the liability and their defaults, but also promised to clear the outstanding. Copies of correspondence/mails exchanged between the Petitioner and Respondent are marked as Annexure ‘P-4 (Colly) and Exhibited as Exhibit PW-1/4 (Colly) Pages 19-38 of paper book.

6. I further state that in the course of this correspondence, the terms of the Agreement dated 25.1.2010 came to an end. However, the Respondent requested the Petitioner to continue and retain the said channel on the designated frequencies till 31.3.2011, on the same terms and conditions, pro rata to which the Petitioner agreed. However, even though the channel was retained on the designated frequencies after 24.1.2011, at times the placement services were suspended for the reasons of non-payment by the Respondent. In these circumstances, the Respondent vide its letter dated 24.3.2011 requested the Petitioner to only charge a sum of Rs.25.00lakhs for the placement

services for the period 24.1.2011 to 31.3.2011, to which also the Petitioner agreed.

7. *I state that the Petitioner, finally vide its letter dated 12.12.2011 which was sent on 13.12.2011 and received by the Respondent on 14.12.2011 requested the Respondent to release the payments forthwith as soon as possible but the Petitioner's request fell on deaf ears and the Respondent even did not care to reply to this letter and several verbal and telephonic requests. Copy of the above stated letter alongwith its proof of delivery is marked as annexure 'P-5' (colly) and is exhibited as Exhibit PW-1/5 (colly) page 39-42 of paperbook."*

27. We may notice certain questions and answers from the cross examination portion of the said witness.

"Ques: Is it correct that your invoice dated 25.4.2010 does not mention placement in UP and HP?"

Ans: None of our invoices have mentioned UP and HP, may be it is an error by accounts department but was never disputed by Pragya till date regarding non-placement of channels.

Attention of the witness is drawn to page 94 to 97 of the paper book

Ques: Is it correct that these are your office copies?

Ans: Yes.

Ques: Have you placed on record the proof of dispatch of these invoices to the Respondent?

Ans: All the invoices for all the broadcasters are served in person, not by post or courier.”

“Q: Have you furnished to the Respondent the monthly placement report in terms of the agreement?

A: At the time of sending the invoices we usually send the mapping. Anyway there was no dispute on placement of channel till we had filed for recovery through court, which suggests that there was no displacement throughout the agreement period.

Q: Is there anything on record to show that a separate channel mapping sent to the Respondent with the invoices?

A: As long as there is no written information or complaint regarding displacement by the broadcaster it is deemed that the agreement is being honoured.

Q: Is it correct to say that under the agreement it was your obligation to supply to the respondent your channel mapping?

A: As mentioned earlier every invoice usually accompanied by a monthly channel map. If it was not received the broadcaster would have requested/demanded through mail or in writing.

Q: I again ask you is there anything on record to show that a separate channel mapping send to the respondent with the invoices?

A: I don't think it is there as it was never disputed till date.

Vol: may be some copies in my office.

Q: Have you brought those copies today?

A: I never thought it was necessary as there was no dispute till date.

Q: Can you produce those copies?

A: My office is very close by. I can ask someone to bring here in another 15 minutes or so, if required."

28. The cross examination of Mr. Tiwari makes an interesting reading.

We may notice certain questions and answers from his cross-examination.

"Q.8: You say that there has been a material breach of Clause III of the agreement as the petitioner

changed/switched off the respondent's channel without their written consent?

A: Yes.

Q.9: When did the petitioner change the frequency of your channel, as you say?

A: They changed it frequently.

Q.10: Could you give the period?

A: I do not remember the exact period.

Q.11: Did you ever write any letter complaining of this change in frequency, as you say?

A: I did not write. My people should have written that who were monitoring it and they periodically telephonically did complain about the change in the frequency and switching off the channel.

Q.13: Do you remember the changed frequency?

A: I do not remember that also.

Vol.: As I am running more than 4 channels, it is very difficult for me to remember the frequency of each and every channel.

Q.14: Could you tell me as to who in the respondent company made the complaint to in the petitioner company?

A: There were different people in the distribution department headed by Mr. Praveer Gaur. I will have to find out as to who had made the complaint. The complaint was made to the different offices of the

petitioner as their offices were located in different states.

Q.15: Is there any letter or correspondence on record confirming this statement of yours?

(Witness peruses court file)

A: It will be a matter of record.

Q.16: Is the expression “switching off” used in para C of your affidavit with reference to Clause III of the agreement?

(Ld. Counsel for the respondent objects to the tenor of the question.)

A: Yes.

Vol.: The channel was placed in a non visible frequency which amounted to switching off the channel.

Q.17: What is meant by non visible frequency?

A: Non visible frequency means a frequency which cannot be watched on television. Audio and Video of the frequency cannot be seen clearly or heard clearly”.

29. It is not necessary to refer to a large number of questions to which, attention of mine is drawn by Mr. Kathpalia, keeping in view the fact that in sum and substance, he deposed that although no protest/complaint had been made in writing, oral complaints were made to the offices of the Petitioner whose names, however, he could not recollect.

According to him, channels were not placed on the desired frequencies from the networks of the Petitioner at all.

He furthermore sought to shift the blame on his Accounts Department and Distribution Department to contend that it is at their instance the cheques were signed by him and no complaint had been lodged in writing.

30. Queries were made in that regard as to or in what basis payments have been made, although he stated that he had to ask the Accounts Department, he accepted that the channels were never de-activated.

31. We may, however, notice the following:-

Q.43: What do you mean by pro-rata?

A: Pro-rata means that in some areas the channel was visible and in some areas it was not visible on the agreed frequency.

Q.45: Did the respondent in any letter state that it was making payments pro-rata?

A: No.

Vol.: But it was discussed and explained to the petitioner who received the payment.

Q.47: Who did you have this discussion with or give this explanation to?

A: The person whoever came to collect the payment and also to the officers of the petitioner on telephone.

Q.50: Could you tell me any payment made by the respondent which was less than Rs. 45 Lacs, which was the amount of each of the installments from the second to the twelfth installments payable?

A: No.

Q.51: By no do you mean you can not tell me or no payment was less than Rs. 45 Lacs?

A: No payment is less than Rs. 45 Lacs.

Q.55: For which month was the last payment made?

A: December 2010.

(Attention of the witness is drawn to pages 31 and 33 of the Paper Book.)

Q.56: If the entire payment had been made till December 2010, as you say, why do the respondent's E Mails dated 4.1.2011 and 28.1.2011 refer to and admit outstanding amounts as being payable to the petitioner?

A: The balance payment referred to in the said letters was subject to renewal of the agreement, which was not renewed.

Q.57: Nevertheless the balance payments outstanding refers to the payments due under the agreement for the period January 2010 to January 2011?

A: No.

Q.58: How could your letters refer to an outstanding payment, in respect of an agreement which has not come into force?

A: I do not know. I will have to check and revert back.

32. On a plea that, he was a diabetic patient and required to take his lunch, his further cross examination was deferred.

He was furthermore cross examined on 16.7.2012.

33. It is for consideration of this Tribunal as to whether despite the statements made by Mr. Tiwari, that payments were made on the advice of the Accounts Department and Mr. Gaur and Mr. Reddy had personal relationship, which was not proved, the Petitioner would be bound by its own admission that from the invoices, it would appear that for several months channels were not placed on the desired frequency and/or at all in respect of all the areas for which the same was agreed to.

34. Mr. Bhagat would contend that the Petitioner, having failed to prove the channel placement mapping must be held to bound by the locations of the places in respect, mentioned in the invoices wherefor the aforementioned placement agreement had been entered into. According to the learned counsel balance payment in terms of the e-mail dated 28th January, 2011 having been made on a pro-rata basis, no further amount is due from the Petitioner.

We may notice hereinafter, that in different invoices, different places of location had been mentioned.

INVOICE

<i>Name: M/s Pragya Vision Pvt. Ltd.</i>	<i>Invoice No: Dated:</i>	<i>CF/10-11/Dec/14 23-Dec-2010</i>
<i>S.No.</i>	<i>Particulars</i>	<i>Amount (Rs.)</i>
	<i>Channel: Pragya</i>	<i>4,500,000.00</i>

	Location: Delhi-NCR Mumbai, Pune Rajasthan, MP, Chhattisgarh, Gujarat <i>Product: Placement Fees</i> <i>Period: 25-Dec-10 – 24-Jan-11</i>	
	Gross Amount	4,500,000.00
	<i>Service Tax -@ 10%</i>	450,000.00
	<i>Education Cess on ST @ 2%</i>	9,000.00
	<i>Higher Edu. Cess on ST @ 1%</i>	4,500.00
	<i>Net Amount</i>	4,963,500.00
	Total Payable	4,963,500.00

INVOICE

<i>Name: M/s Pragya Vision Pvt. Ltd.</i>	<i>Invoice No: Dated:</i>	<i>CF/10-11/MAR/17 23-Mar-2011</i>
<i>S.No.</i>	<i>Particulars</i>	<i>Amount (Rs.)</i>
	<i>Channel: Pragya</i> Location: Delhi-NCR Allahabad, Lucknow, Gwalior, Palampur, Saharanpur, Chandni Chowk, Mumbai 7 Pune <i>Product: Placement Fees</i> <i>Period: 25-Jan-11 – 24-Feb-11</i>	4,500,000.00
	Gross Amount	4,500,000.00
	<i>Service Tax -@ 10%</i>	450,000.00
	<i>Education Cess on ST @ 2%</i>	9,000.00
	<i>Higher Edu. Cess on ST @ 1%</i>	4,500.00

	<i>Net Amount</i>	4,963,500.00
	Total Payable	4,963,500.00

INVOICE

<i>Name: M/s Pragya Vision Pvt. Ltd.</i>	<i>Invoice No: Dated:</i>	<i>CF/10-11/Mar/20 31-Mar-2011</i>
<i>S.No.</i>	<i>Particulars</i>	<i>Amount (Rs.)</i>
	<i>Channel: Pragya</i>	2,500,000.00
	<i>Location: Delhi-NCR</i>	
	<i>Product: Placement Fees</i>	
	<i>Period: 25-Feb-11 - 31-Mar-11</i>	
	<i>Gross Amount</i>	2,500,000.00
	<i>Service Tax -@ 10%</i>	250,000.00
	<i>Education Cess on ST @ 2%</i>	5,000.00
	<i>Higher Edu. Cess on ST @ 1%</i>	2,500.00
	<i>Net Amount</i>	2,757,500.00
	<i>Total Payable</i>	2,757,500.00

35. The Petitioner, being an MSO was bound to show, when questioned, that the terms of the placement agreement were adhered to.

PW-1 in his deposition categorically stated that having regard to clause (viii) of the agreement the channel maps were used to be sent alongwith the invoices.

The invoices filed by the Petitioner do not show the same. It will bear repetition to state that alongwith the petition only three invoices had been annexed.

36. The Respondent of course has filed invoices which appeared to have undergone the scrutiny of its officer before the payments were made; however, so far as the rest of the invoices are concerned, the Petitioner has not been able to prove the service thereof on the Respondent.

It is beyond any doubt or dispute that the channel placement map is the best evidence to prove that all the channels of the Respondent had been placed on the stipulated frequencies.

37. The Petitioner did not raise the plea of sending channel mapping record with the invoices in the petition. It did not even mention thereabout in its rejoinder. Even PW-1 in his affidavit did not say so. It is evident that clause (viii) of the agreement had not been complied with.

38. It is possible as has been submitted by Mr. Kathpalia that locations mentioned in the invoices would not amount to channel placement mapping as has been submitted by Mr. Bhagat but in its reply, the Respondent had stated as under:-

“D. That it is very humbly submitted that there has been a clear breach of Clause (viii) of the Agreement, insofar as no Reports have been placed on record by the Petitioner to prove the placement of the Respondent channel and hence the Petition of the Petitioner is liable to be dismissed on this ground alone.”

39. In its rejoinder to the said reply, the Petitioner merely contended:-

“That the contents of Para D of the reply are wrong and denied. It is submitted that the channel was placed as per the Agreement, and the same has never been disputed by the Respondent. That there is no dispute about the channel being placed on the agreed frequency, is also endorsed by the fact that the Respondent never asked for any inspection in terms of clause (viii) of the agreement. In fact the correspondence on record proves that the channel was placed on the agreed frequency.”

40. It is possible that the invoices had not been scrutinized with the care it deserved.

It is also possible that because of some wrong data being fed in the computer, the invoices which are computer generated could have shown a mistake with regard to the location in all the invoices but the fact remains that it was not so.

41. If the Petitioner by design has not furnished the channel placement mapping and PW-1, whose nature of evidence we have noticed heretofore, in his cross examination contended that channel mapping records used to be sent alongwith invoices, it was for the Petitioner to prove that it was so.

42. In a situation of this nature, the burden of proof being on the Petitioner in terms of Sections 101 and 102 of the Indian Evidence Act, there cannot be any doubt or dispute that it was obligatory on its part to bring on record the channel placement mapping.

43. We may notice that in his cross-examination, PW-1, according to Mr. Bhagat, which has not been disputed by Mr. Kathpalia, stated that the channel mapping record was produced before this Tribunal after two hours, although it was to be done within 15 minutes. The channel mapping has not been proved, despite the fact that according to PW-1, the channel mapping report could be produced within 15 minutes, his office being situated nearby the Tribunal.

44. Mr. Kathpalia may be right in his submission that channel mapping could have shown the frequency and not the locations.

I am also prepared to assume in favour of the Petitioner that locations have been mentioned in invoices state-wise in stead and in

place of station wise but there is absolutely no reason why be different locations would be shown in different invoices.

In one of the invoices, as indicated heretobefore, merely Delhi has been mentioned.

PW-1 in his evidence as noticed heretobefore categorically stated as to what should be the pro-rata amount in respect of some locations, the channels of the Respondent having not been placed in the proper frequency.

In this regard, a chart has been submitted by Mr. Bhagat which reads as under:-

“PRO-RATA CALCULATION

<i>Agreement Value</i>	5,75,00,000/-
<i>Total Value of Breakup as per Petitioner witness</i>	10,25,00,000/-
<i>Ratio/comparative Value</i>	$\frac{5.75 \text{ cr} \times 100}{10.25 \text{ cr}} = 56.09\%$

Ratio of values as given by Petitioners witness

<i>Gwalior, Allahabad, Lucknow Saharanpur, Palampur</i>	$0.75 \text{ cr} \times 56\%$	$= 42 \text{ L p.a}$ $= 3.5 \text{ L p.m}$
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<i>All of Gujarat</i>	<i>1 cr x 56%</i>	<i>= 56 L p.a =4.67 L p.m</i>
<i>Chattisgarh, Raipur, Bilaspur Durg / Bhilai, Korba</i>	<i>1 cr x 56%</i>	<i>=56 L p.a =4.67 L p.m</i>
<i>Indore, Bhopal & Jaipur</i>	<i>1 cr x 56 %</i>	<i>=56 L p.a 4.67 L p.m</i>

Adjustment in terms of Invoices

<i>Pg 94-106 for UP & HP</i>	<i>305L x 13 =45,50,000/-</i>
<i>Pg 107 for Gujarat</i>	<i>4.67 L x 1 = 4,67,000/-</i>
<i>Pg 107 for Chattisgarh , Raipur Bilaspur, Durg / Bhilai, Korba</i>	<i>4.67 L x 1 =4,67,000/-</i>
<i>Pg 107 for Indore, Bhopal & Jaipur</i>	<i>4.67 L x 1 =4,67,000/-</i>
<i>Total pro-rata adjustment in terms of Invoices of the Petitioner</i>	<i>59,51,000/-</i>

Correctness of the said chart is not in issue.

45. A purported admission made by an employee without adequately verifying the record may or may not be conclusive; it would depend upon his duties, responsibilities and powers conferred upon him. On the other hand, as a practice the Petitioner states that the locations for which the channel placement agreements had been entered into were mentioned in the invoices. If all the statistics in respect whereof the channels were to be placed were not possible to

be mentioned, it is difficult to understand as to on what basis the States of UP and HP had not been mentioned in the invoice dated 23.12.2010 and as to how the places in question are mentioned by the Petitioner in its invoice dated 23.3.2011.

In the later invoice, the Petitioner has not mentioned even ten locations. Yet again, in the invoice dated 31.3.2011 only Delhi NCR has been mentioned.

46. It is, therefore, not a case where a mistake has been committed. The said conduct on the part of the Petitioner coupled with the fact that it has not supplied channel mapping report for every month which it was bound to do in terms of the clause (viii) of the agreement, go to show that it has not been able to prove that it had complied with its contractual obligations.

47. I am, therefore, of the opinion that the Petitioner should be entitled to a decree for a sum of Rs.67,33,500/-, i.e., (Rs.1,26,84,500 - Rs.59,51,000). It is directed accordingly.

48. This decree is being passed with a view to avoid any future litigation as the Petitioner, was merely entitled to the amount as per its channel mapping report which having not been exhibited cannot be taken into consideration by the Tribunal.

49. The Petitioner shall also be entitled to interest @ 12 per cent per annum on the decretal amount, till the date of filing of this petition, and interest *pendent lite* and future @ 9 per cent per annum.

50. This petition is allowed in part and to the extent mentioned heretobefore with proportionate costs. Advocate's fees assessed at Rs.25,000/-.

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(S.B. Sinha)
Chairperson

HKC/