TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL

NEW DELHI

Dated 1st August, 2014

Petition No. 253 (C) of 2013

(M.A. No. 69 of 2014)

IMCL & Ors.	…	Petitioners
Vs.		
Media Pro Enterprise India Pvt. Ltd.	…	Respondent

BEFORE:

HON'BLE MR. JUSTICE AFTAB ALAM, CHAIRPERSON
HON'BLE MR. KULDIP SINGH, MEMBER

For Petitioner Nos. 1-4	…	Ms. Vandana D. Jaisingh, Advocate Ms. Kanupriya Gupta, Advocate with Mr. Sandeep Arya, Manager (Legal)
For Petitioner No.5	…	Mr. Sukant Vikram, Advocate
For Respondent	…	Ms. Prathiba M. Singh, Sr. Advocate Mr. Tejveer Singh Bhatia, Advocate Mr. U. Thakur, Advocate Mr. Yatin Grover, Advocatefor Singh & Singh Law Firm LLP

O R D E R

Kuldip Singh:

The dispute in the present case pertains to the rates charged by the respondent as subscription fee for DAS phase II areas. Petitioner No.1 is a

company registered under the Companies Act, 1956 and is engaged in the business of Multi System Operator (MSO). Respondent is an authorized distributor of signals of Star and Zee Group of channels. Petitioners No. 2 to 4 are joint ventures of petitioner no.1 and Petitioner No. 5 is a partnership firm. Petitioner no. 1 retransmits cable television signals to its link operators as well as to its direct consumers in various territories across the country.

2. On 06.02.2013, Petitioner No.1 entered into a Memorandum of Understanding with the respondent for re-transmission of the respondent's channels from its network for a period of twelve months commencing from 01.7.2012. As per this Memorandum of Understanding, the term of the same was from 01.7.2012 to 30.6.2013 or till the mandatory implementation of DAS phase II, as notified by Ministry of Information & Broadcasting. Para 2 of the said Memorandum of Understanding relating to the term is as under :-

> *"2. The term of this MoU shall commence from 1st July, 2012 and shall be valid upto 30th June, 2013* ***("Term").***
>
> *For the sake of clarify, the Term of this MoU for the headends falling within the ambit of mandatory implementation of DAS Phase II as notified by Ministry of Information & Broadcasting ("MIB") shall commence from 1st July, 2012 and shall be valid upto mandatory implementation of DAS Phase II or 30th June, 2013, whichever is earlier."*

3. On 01.4.2013, the respondent wrote to petitioner No.1 that his areas of Nasik-Thane have come under the DAS regime with effect from 01.4.2013 and asked it to execute a mutually negotiated agreement for DAS-II areas by 15.4.2013 in terms of its Reference Interconnect Offer (RIO) and in case the petitioner failed to do so, it would lead to de-activation of its signals.

Petitioner No.1 had, however, filed its objections to the RIO of the respondent in June 2012 and since the same had not been disposed of by TRAI till that date, was not willing to sign the RIO based agreement. Perceiving threat of disconnection of its signals, it filed a Writ Petition No. 2505 of 2013 before the Hon. High Court of Delhi under Article 226 of the Constitution of India, as the Tribunal was not functional at that time.

4. The parties agreed before the Delhi High Court for a protem arrangement on 18.4.2013 as per which, petitioner No.1 was to sign the DAS agreement by 25.4.2013 and deposit in Court 50% of the amount of the difference between what was being paid at that time and what was being demanded by the respondent under the new regime, within ten days and to deposit balance 50% by way of bank guarantee in favour of Registrar General of Court within two weeks. (copy of order is available as Annexure-P-1 on pages 29-31 of the Paper Book).

In pursuance of this order dated 18.04.2013 Petitioner No.1 had to execute the Memorandum of Understanding with respondent before 25.04.2013. The proposed Memorandum of Understanding drafted by the respondent was already sent to petitioner for execution via email dated 04.04.2013. The said Memorandum of Understanding was for the areas of Ahmadabad, Surat, Vadodara, Kalyan-Dombivali, New Mumbai, Thane, Nagpur, Pune, Nasik, Solapur, Bangalore, and Mysore as stated in the Schedule B of the draft. Three of these areas did not belong directly to petitioner No.1 but to its joint ventures i.e. Petitioners No.2-4 and petitioner no. 5, which is a partnership firm. For the area of Kalyan-Dombivali Petitioner No.1 had a joint venture with petitioner No.2, for the area of Pune Petitioner No.1 had a joint venture with Petitioner No.3 and Petitioner No.4,and the area of Solapur was managed by Petitioner No.5. Therefore, in order to comply with the order dated 18.04.2013 all the petitioners have executed their respective Memoranda of Understanding for their respective areas as mentioned above with respondent on 24.04.2013 under protest and without prejudice to their rights and contentions.

After the Tribunal resumed functioning, petitioner No.1 was allowed by the Hon. High Court of Delhi on 08.8.2013 to withdraw its Writ Petition and approach the Tribunal and the present petition was filed on 21.8.2013.

5. Before we examine the matter on merits, we may briefly explain the process of migration of the re-transmission of cable television signals from the analog to digital regime. In the analog regime, signals received from the broadcaster or any agent of the broadcaster, by a MSO, were re-transmitted to one or more cable operators / consumers in an analog mode after placing the same in suitable bands and frequencies. This had an inherent dis-advantage that all the signals of all the channels were sent to the consumers whether the consumer wanted them or not. As compared to this, digital addressable system (DAS) regime provides for an electronic device (Hardware & Software) by means of which signals of the various channels can be sent in digital encrypted form which can be decoded by a device called the Set Top Box (STB) at the premises of the subscriber. Set Top Box can be authorized to decode only such channels that are wanted and requested by the subscriber through the Conditional Access System (CAS) and Subscriber Management System (SMS) available with the MSO. In the DAS regime, the number of subscribers receiving the signals of a particular broadcaster can be objectively determined using the SMS which was not possible in the analog case. In analog case, since all the subscribers were receiving all the signals, the subscribers who watched signals of a particular broadcaster could only be roughly estimated and this was one of the main reasons for a number of disputes. There are other advantages of the DAS regime in terms of the quality of service, etc.

Telecom Regulatory Authority of India (TRAI) notified The Telecommunication (Broadcasting and Cable Services) Interconnection (Digital Addressable Cable Television Systems) Regulations, 2012 on 30.4.2012 that set out the framework for the DAS regime. DAS areas were notified by the Central Government under sub-section (1) of Section 4A of the Cable Television Networks (Regulations) Act, 1995 (7 of 1995) that made it obligatory for every cable operator to transmit or re-transmit programs of any channel in encrypted form through a digital addressable system in DAS areas [1].

6. On 22.8.2013, the Tribunal passed an interim order directing that respondent shall not disconnect the signals to the petitioner on the similar terms & conditions as prescribed in the order dated 18.4.2013 passed by the Delhi High Court. However, the petitioner, with the consent of the parties, was asked to make the deposit in terms of that order before the TDSAT instead of the High Court. It was also directed that the amount deposited by the petitioner with the Delhi High Court may also be transferred to the TDSAT. The amount deposited by the petitioner as also that may be received from the Delhi High Court may be kept in the FDR for six months. Subsequently, vide order dated 23.01.2014, the interim order passed earlier by the High Court and continued by the Tribunal was modified in the following terms :-

[1] DAS areas were notified in phases

"1. The petitioner shall submit the SLR to the respondent every month as per the provisions of the MoU and shall make payments of the monthly subscription fee @Rs. 35/- per subscriber as per the number of its actual subscribers for that month. The subscriber base shall comprise the aggregate for all the 12 cities covered by the agreement.

2. Payments in the above terms shall be made from the month of November, 2013 onwards. The subscription fees for the months of November, December and January shall be made by February, 28, 2014 in two equal installments.

3. Subject to the above, the respondent shall continue to supply all 59 channels to the petitioner.

4. The petitioner is relieved from the obligation of making deposits in the Tribunal any further. The amount already deposited, shall be kept in a fixed deposit and shall abide by the final outcome of the petition."

7. It is the contention of the petitioner [all the petitioners are collectively referred to as the petitioner] that Memorandum of Understanding signed by it on 24.4.2013 pursuant to the order of Delhi High Court was signed under protest and without prejudice to its rights and contentions. As per it, though this MoU takes into account the growth of 11% vis-a-vis previous analog agreement, the actual subscribers have reduced due to competition with DTH for the last six years. Ms. Vandana D. Jaisingh, learned counsel appearing for the petitioner, submitted that this MoU is for a fixed monthly fee which is based on a benchmark number of subscribers. The fixed fee prescribed is the

figure reached by multiplying the benchmark number of subscribers by an amount of Rs.35/- which is the cost per subscriber (CPS) and if the number of subscribers exceed the benchmark figure, for every such subscriber in excess of benchmark subscribers, the cost per subscriber (CPS) of Rs.35/- is to be paid per month over and above the fixed fee. Ms. Jaisingh submitted that the actual number of subscribers of the petitioner are much below this benchmark figure and therefore, they have been paying subscriber fee which is very high and excessive. As per Ms. Jaisingh, taking the case of Ahmedabad as an example, the number of Set Top Boxes[2] as on 26.5.2013 were 39,593 and with this subscriber base and the cost of Rs.35/- per subscriber, the amount payable comes to Rs.13,85,755/- as against Rs.48.84 lakhs payable as per the MoU. There is a similar situation prevailing in other areas.

Petitioner further contends that the very fact that petitioner No.1 and respondent have entered into various MoU for different areas comprising phase-2 of DAS shows that it is not considered imperative by the parties that they enter into a long form agreement. The parties have consistently found it appropriate to define their jural-commercial relationship through the means of MoU and, therefore, the action of respondent proposing to disconnect the signals of petitioner No.1's network at Nasik-Thane in the event it fails to execute the agreement based on RIO was arbitrary and uncalled for.

[2]Every subscriber is to be given a Set Top Box

It is also the contention of petitioner that the rate of Rs.35/- cost per subscriber was agreed and documents were executed between both the parties for metro cities of Mumbai and Delhi i.e. DAS phase I cities. As per the per-capita income, the cities involved in this petition are of 'B' category and the appropriate and reasonable rate for these cities should be Rs.25/-.

8. Ms. Prathiba M. Singh, learned senior counsel appearing for the respondent, submitted that in the present regulatory regime petitioner can either opt for a RIO based subscription agreement or a mutually agreed one. Petitioner No.1 can either have the fixed fee agreement sent on 04.4.2013 or execute the RIO based agreement and make payment of subscription fee to respondent on that basis.

9. With regard to the submission of Ms. Vandana Jaisingh that there was no need of long form agreement, we may note clause 5(3), 5(6) and 5(7) of The Telecommunication (Broadcasting and Cable Services) Interconnection (Digital Addressable Cable Television Systems) Regulations, 2012 which are as under :-

> *"5(3) Every broadcaster shall, within a period of thirty days from the date of receipt of request from the multi-system operator, enter into an interconnection agreement or modify the existing interconnect agreement* ***in accordance with the terms and conditions of the Reference Interconnect Offer published under these regulations or as may be mutually agreed****.*

5(6) It shall be mandatory for the broadcasters of pay channels to reduce the terms and conditions of the interconnection agreements into writing.

5(7) ***No broadcaster of pay channels shall make available signals of TV channels to any multi-system operator without entering into a written interconnection agreement."***

(emphasis supplied)

From clause 5(7) it can be seen that in order to supply its signals, it is mandatory for the broadcaster of pay channels to enter into interconnection agreement with the multi-system operator. We also note that as per clause 5(3), unless the parties come to mutually acceptable terms, the agreement shall be based on the RIO terms. We, therefore, agree with the submission of Ms. Prathiba M. Singh. We also note that as per the regulations the broadcasters are required to publish the Reference Interconnect Offer based on which the multi-system operator may enter into agreement with them. A copy of the respondent's Reference Interconnect Offer is available from pages 721-763 of the paper book. We also note that in terms of the existing agreement dated 6.2.2013, the term of the same was till 30.6.2013 or mandatory implementation of DAS Phase 2 whichever is earlier. We find that after the implementation of DAS Phase 2, petitioner had a choice to select channels of its choice on the RIO based rates published by the respondent. However, petitioner chose to subscribe to the 59 channels of respondent on a fixed monthly fee for different cities for certain number of subscribers as the

benchmark subscribers and beyond which the cost of Rs.35/- per subscriber was to be paid per month for subscribers in excess of the benchmark subscribers. We also find that this rate of Rs.35/- was in the nature of a volume discount and a promotional offer whose basis was that a minimum amount as per the fixed fee would be paid irrespective of the number of subscribers. We, therefore, do not agree with the contention of Ms. Vandana Jaisingh that since the subscriber base reached by petitioners was less than the benchmark, rates being charged by respondent were excessive. We may note that during the course of hearing, we were given to understand by the petitioner that subsequently their subscriber base had reached or even exceeded the benchmark figures.

10. In the meanwhile, a review application[3]was filed by the respondent. Mr.Tejveer Singh Bhatia, Ld. counsel for the respondent appearing in support of the application, submitted that the respondent was being given different subscriber base figures by petitioners for the same months. He invited our attention to page-49 of the volume titled "Additional Affidavit on behalf of the petitioners" that gave the average of the subscribers for October 2013 as 82291. He, then, pointed out that at page 63 of the brief there was an annexure to the affidavit filed in compliance with the Tribunal's order dated 14.03.2014 as per which the subscriber base figure for the same month i.e. October 2013 was shown as 44471. For the month of November 2013, the

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subscriber base figure was 52859 (which again was about 30000 less than the figure for October 2013 as shown at page – 49); for the month of December 2013, the subscriber base figure was shown as 84389 (at page 69 of the brief). We, however, noted that these figures pertained to Bhima Riddi Digital Services, which is Petitioner No. 5 in this petition. No such discrepancies were shown being committed by the first four petitioners. Ms. Jaisingh, was prima facie, unable to satisfy us in regard to the discrepancy in the figures submitted by petitioner no. 5. The Tribunal, vide order dated 3.4.2014, directed a comprehensive technical audit of the system of petitioner no. 5by BECIL[4]. The technical audit was, accordingly, conducted by BECIL from May 8, 2014 to May 10, 2014. The system of petitioner no. 5 was not found technically compliant with the regulations.

In the M.A., it was also prayed to direct the petitioner to clear the pre-DAS dues outstanding qua Phase-II areas to the tune of Rs. 4,42,93,664/- The petitioner, however, submitted that prayer for fresh reliefs in the petition filed by it are not permissible. We may note that this issue was not pressed during hearing.

11. In view of the foregoing, we do not find any merit in the petition and the same is, accordingly, dismissed. The amounts deposited by petitioners with the Tribunal in terms of its order dated 22nd August, 2013 shall be released to the respondent. The respondent, after taking into consideration the amount

[4]Agency authorized by the regulator

received from the Tribunal, may raise demand for balance, if any, in terms of the MOU dated 3.4.2013 executed on 24.4.2013. The balance due, if any, shall be paid by petitioners within 4 weeks of the receipt of the demand. Petitioner No. 5 shall also ensure that its system is made compliant with the regulations within 4 weeks.

M.A. No. 69 of 2014 also stands disposed in terms of this order. Parties shall bear their own costs.

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(Aftab Alam)
Chairperson

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(Kuldip Singh)
Member

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