

**TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL
NEW DELHI**

Dated 25th September, 2014

**Petition No. 47 (C) of 2014
(M.A. No. 29 of 2014)**

Star Sports India Pvt. Ltd., Mumbai ... Petitioner
Vs.
Hathway Cable & Datacom Ltd., Mumbai ...Respondent

Petition No. 210(C) of 2014

Hathway Cable & Datacom Ltd. ...Petitioner
Vs.
Star Sports India Pvt. Ltd. ...Respondent

Petition No. 214(C) of 2014

Hathway Cable & Datacom Ltd., New Delhi ...Petitioner
Vs.
Star Sports India Pvt. Ltd., Haryana ...Respondent

Petition No.319(C) of 2014

Hathway Cable & Datacom Ltd.MumbaiPetitioner
Vs.
Star India Pvt. Ltd., Mumbai ...Respondent

**Petition No.335(C) of 2014
(MA Nos.218 & 223 of 2014)**

Hathway Cable & Datacom Ltd., Mumbai ...Petitioner
Vs.
Taj Television (India) Pvt. Ltd., Mumbai ...Respondent

BEFORE:

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

For Petitioner [In P.No.47(C) of : Mr. Rakesh Dwivedi, Sr. Advocate
2014] Mr. Saikrishna Rajagopal, Advocate
Mr. Gopal Singh, Advocate
Mr. Saurabh Srivastava, Advocate
Mr. Sidharth Chopra, Advocate
Ms. Shilpa Gupta, Advocate

For Petitioner [In P. Nos. 47(C), : Mr. Arun Kathpalia, Advocate
210(C) 214 (C), 319(C) & 335(C)
of 2014] Mr. Navin Chawla, Advocate
Mr. Jayant Mehta, Advocate
Mr. Nasir Husain, Advocate

For Respondent [In P.Nos. : Mr. Rakesh Dwivedi, Sr. Advocate
210(C), 214 (C) & 319(C) of
2014] Mr. Saikrishna Rajagopal, Advocate
Mr. Gopal Singh, Advocate
Mr. Saurabh Srivastava, Advocate
Mr. Sidharth Chopra, Advocate
Ms. Shilpa Gupta, Advocate

For Respondent [In P.No. : Mrs. Prathiba M. Singh, Sr. Advocate
335(C) of 2014] Mr. Tejveer Singh Bhatia, Advocate
Mr. Upender Thakur, Advocate
for Singh & Singh Law Firm LLP

ORDER

By Aftab Alam, Chairperson – This batch of cases arises from disputes between a big multi-system operator on the one side and some major broadcasters and/or their agent-intermediary on the other. An interesting feature of the case is that the disputes between the two sides seem to be growing and changing shades with time; as the focus shifts from one to the other issue, even new issues seem to arise and the two sides keep adjusting their positions accordingly. This was evidenced, as we shall see at the appropriate stage in this judgment, even in the course of the hearing of the case which was spread over

several days. Hence, we recount the facts in the order in which these petitions came before us, following the development of the disputes between the two sides.

Petitions nos. 47 (C) of 2014, 210 (C) of 2014 and 214 (C) of 2014:

Hathway and Star Sports:

M/s Hathway Cable & Datacom is a multi-system operator (MSO). It is one of the largest MSOs in the country. Earlier it was getting the Star Sports group of channels under an agreement with ESPN¹ Software India Pvt. Limited. Hathway's agreement with ESPN was in the form of a Term Sheet dated 21 August 2012, the term of which was from 1 November 2012 to 31 October 2013. In terms of this agreement, Hathway received five channels² of Star Sports in the cities of Mumbai and New Delhi (DAS Phase I cities) on payment of the *fixed amount* of Rs.1,13,29,712.00 as monthly subscription fee. The agreement between Hathway and Star Sports came to end on 31 October 2013. Nevertheless, Hathway continued to receive the Star Sports channels as the law provides for a three months' negotiation period for parties to arrive at a fresh agreement and directs that the provisions of the existing agreement shall continue to apply till the new agreement is entered into or for three months following the date of expiry of the existing agreement. After the expiry of the

¹ Later name changed to 'Star Sports'

² Namely, ESPN (now called, Star Sports 4), Star Sports (now called, Star Sports 1), Star Cricket (now called, Star Sports 3), ESPN HD (now called Star Sports HD 2) and Star Cricket HD (now called, Star Sports HD).

agreement some meetings took place and there was also some exchange of emails between the two sides. But what transpired in those meetings is not clear and each side accuses the other of stone-walling any meaningful negotiations for mutually agreed terms. One gets the distinct feeling that there was no sincere intent on either side to try to find some common meeting ground and each side waited for the other to make the first move. Finally, as the statutory period of three months from the date of expiry of the previous agreement came to close, on 30 January 2014 Hathway intimated Star Sports that though it had objections to certain clauses in its Reference Inter-connect Offer (RIO), it would take its(Star Sports') channels from 1 February 2014 on an *a-la-carte* basis on terms and at rates fixed under the RIO.

The previous agreement between the two sides was on a fixed fee basis. Hence, Hathway found it profitable to put as many (or as few) of the Star Sports channels in its bouquets as best suited its marketing policy, without incurring any increase in the monthly subscription payable to Star Sports. But after switching over to *a-la-carte* rates, it simultaneously withdrew all Star Sports channels from all its bouquets and began to offer each Star Sports channel to ordinary subscribers only on *a-la-carte* basis. The sudden withdrawal of the channels from all Hathway's bouquets made Star Sports imagine that its channels were being completely blacked out by Hathway. Star Sports,

accordingly, came to the Tribunal in Petition no. 47 (C) of 2014³ making the grievance that Hathway had taken off air all its channels in Delhi and Mumbai without following legal procedure. Hathway denied that it had taken the Star Sports channels off air and it explained that it had simply withdrawn the channels from its bouquets and was offering these channels to ordinary subscribers only on *a-la-carte* basis, which was an option perfectly open to it under the law.

Even as this petition awaited completion of pleadings, some further developments took place. Hathway's strategy of offering the Star Sports channels to ordinary subscribers only on *a-la-carte* basis and not as part of any bouquets greatly brought down the number of Star Sports' subscribers, and resultantly also the amount of the monthly subscription fee (paid by Hathway to Star Sports), which was now no longer a fixed amount but was to be calculated by multiplying the number of subscribers especially asking for the channel(s) by the rate for the channel in Star Sports' RIO. Star Sports responded by applying the RIO rates for the past three months, taking the stand that the regulation that extends the provisions of the existing agreement till the new agreement is entered into, or for three months from the date of expiry of the existing agreement, *also directs that once the new agreement comes into being it shall apply from the date of expiry of the earlier agreement.* It calculated the subscription fees for the months of November and December 2013 and January

³Filed on 4 February 2014.

2014, the three months between the expiry of the previous agreement and the coming into existence of the new agreement, by taking the total number of subscribers for any bouquet offered by Hathway that included one or more of the Star Sports channels *as the number of subscribers for the Star Sports channels in that bouquet* and multiplying it by the RIO rates for those channels. It is noted above that under the previous fixed fee agreement it was cost-effective for Hathway to put all the five Star Sports channels in all or most of its bouquets, but when the number of subscribers of the bouquet was taken for application of the RIO rates of the Star Sports channels, it produced a figure that startled Hathway. The amount for three months subscription fees came to Rs.15,11,03,568,00.00 (as against Rs.1,13,29,742.00 per month under the previous agreement). Star Sports sent the demand letter to Hathway on 13 February 2014. The letter was also stated to be a notice of disconnection under clause 6.1 of the DAS Regulations. The demand-cum-disconnection notice was followed by a second notice under clause 6.1 and a public notice as required by clause 6.5 of the DAS Regulations was issued by Star Sports on 23 February 2014.

Now, it was Hathway's turn to come to the Tribunal and it came with Petition no. 210 (C) of 2014⁴ questioning the demand raised by Star Sports and assailing the disconnection notices issued by it. By now the two sides, besides litigating before the Tribunal, were also indulging in a full-blown fight in the

⁴Filed on 11 April 2014

public domain. Each side was running on-screen displays (OSDs) and putting advertisements in newspapers and on buses and large hoardings trying to hurt the other in whatever ways they could conceive. As a result, just five days after filing its first petition, Hathway came with another petition [numbered 2014 (C) of 2014⁵] seeking directions restraining Star Sports from issuing advertisements, notices, scrolls, OSDs, or pamphlets intended to hurt it commercially.

Attempt at Mediation:

In those circumstances, on a suggestion made by the Tribunal, the Counsels for both Hathway and Star Sports sensibly agreed that the parties should stop attacking each other and try to resolve their disputes through mediation. Accordingly, by an order dated 17 April 2014 passed in Petition no.210 (C) of 2014, the disputes between the two sides were referred for mediation. Initially, it was reported to the Tribunal that the mediation was proceeding satisfactorily; a little later, it was reported that though disagreement persisted on whether the new RIO based agreement would operate from the date on which Hathway expressed its willingness to take the supply of signals on RIO terms (1 February 2014) or retrospectively from the date, following expiry of the previous agreement (1 November 2013), the parties had at least agreed to settle the rest of their disputes before the mediator, leaving the issue regarding the date of applicability of the new agreement to be determined through

⁵Filed on 16 April 2014

adjudication by the Tribunal. Then, even while the mediation was pending, Star Sports made a grievance before the Tribunal that though opting to get the signals on RIO terms, Hathway had not furnished its monthly subscriber reports from February 2014 onwards. It was thus impossible for Star Sports to raise invoices for the monthly subscription fees, and as a result Hathway was enjoying uninterrupted supply of its channels without paying anything in return. By order dated 16 July 2014 passed in Petition no. 210 (C) of 2014, the Tribunal recorded the statement of the Counsel representing Hathway that Hathway would furnish to Star Sports the subscriber reports for the months of February to June 2014 (for DAS-I area) and for April to June 2014 (for DAS-II areas) within one week from that date (and continue furnishing subscriber reports for future months). Star Sports would raise invoices applying the RIO rates to the subscriber base furnished by Hathway, and Hathway would make payments of the invoices as per the Regulations.

The matter was under mediation in this state when similar and broader disputes broke out between Hathway and some other broadcasters. And as the Tribunal started hearing petitions arising from those disputes, it was requested both on behalf of Hathway and Star Sports that their matter may also be recalled from mediation and heard along with the other cases. By order dated 26 August 2014, the matter was recalled from mediation and heard along with the other cases.

Petition nos. 319 (C) of 2014 and 335 (C) of 2014:**Hathway and Star and Zee:**

Coming now to Hathway's disputes with other broadcasters, Hathway was taking Star Group's general entertainment channels (GEC) and the Zee and Turner groups of channels, besides a few other television channels in terms of Interconnect agreements executed on their behalf by a corporate entity named M/s Media Pro Enterprise India Pvt. Ltd. Media Pro was an "agent or intermediary" (an expression defined in the Regulations). It was also called a "content aggregator" (a term not used in the Regulations) because it made composite bouquets of channels belonging to different broadcasters for distribution to MSOs and cable operators.

Hathway had separate agreements with Media Pro for different areas, for example, DAS Phase-I cities of Delhi and Mumbai and Kolkata Metropolitan Area and Howrah, and DAS Phase-II cities. For the sake of convenience, however, we propose to refer to the agreements relating to Delhi and Mumbai. Under the agreement for Delhi, Hathway received the GEC of the Star and Zee Groups besides a number of other channels of different broadcasters (for which also Media Pro acted as the agent) on payment of a fixed monthly fee of Rs.1,77,10,000.00 (exclusive of taxes) as provided in clause 5 of the licence dealing with "Licence Fee". It was further stipulated in clause 5 that in case the subscriber base of Hathway exceeded 5,06,000 (called in the agreement as

“benchmark subscribers”), it would pay, in addition to the fixed fee, an additional sum at the rate of Rs.35.00 per subscriber. The agreement was thus based partly on fixed fee and partly on cost per-subscriber(CPS) basis. It may, however, be noted that if the amount of the fixed fee (Rs.1,77,10,000.00) is divided by the figure of benchmark subscribers (5,06,000), one would come to the figure of Rs.35.00. In other words, the consideration for the supply of signals was at the rate of Rs.35.00 with an assured subscriber base of 5,06,000⁶.

A separate agreement was executed for Mumbai. Under this agreement the monthly licence fee was a fixed amount of Rs.1,82,70,000.00, subject to the condition that if the number of subscribers exceeded 5,22,000 (“bench-mark subscribers”), Hathway would pay, apart from the fixed amount, an additional sum at the rate of Rs.35.00 per subscriber. Later by amendment dated, 7 November 2013 (called “the Second Amendment) to the MOU dated, 13 August 2013, Hathway was required to pay, as licence fee, for the period 1 May 2013 to 31 July 2013, the fixed amount of Rs.2,19,24,000.00 (exclusive of taxes) per month and for the period 1 August 2013 to 30 April 2014, the fixed amount of Rs.1,82,70,000.00 (exclusive of taxes) per month.

The agreement for Delhi and Mumbai ended on 30 April 2014⁷. Shortly before the expiry of the agreement, on 10 February 2014, TRAI inserted clause

⁶The other agreements were also based on Rs.35 as cost per subscriber, however, with different “bench-mark subscribers”

⁷ The agreements for Kolkata and DAS-II areas had already come to end on 31.03 2014 and other agreements too came to end more or less at the same time.

10 in the DAS Regulations. The newly added provision mandated *inter alia* that every broadcaster must ensure that the bouquet of TV channels contained in its RIO is provided to the distributors of TV channels without any modification in its compositions, and that no such bouquet of TV channels, at the wholesale level, is bundled with the bouquet of channels of other broadcasters. We are told that the prohibition against making composite bouquets from channels belonging to different broadcasters frustrated the very purpose for which Media Pro was formed, and as a consequence it ceased to act as the “agent or intermediary” of its erstwhile principals, including Star and Zee.

On 11 April 2014, a Press Release was issued by Zee Turner Limited and Star Den Media Services Limited, the two constituents of Media Pro, making the announcement that they would discontinue the distribution of their channels through their joint venture (Media Pro) and would set up their own independent Affiliate Sales Teams for their respective channels.

Following the press release, Star India Pvt. Ltd. took the distribution of its GEC channels as well as the sports channels of its sister company, Star Sports, in its own hands. Consequently, Star issued an RIO on 22 April 2014 giving *a-la-carte* rates of its GEC channels and of the sports channels of Star Sports. There are no bouquets or any bouquet rates in the RIO.

Zee-Turner assigned the distribution of its channels to another corporate entity, Taj Television India Pvt. Limited, which became the “agent or intermediary” of the broadcasters.

On 22 May 2014, Media Pro sent a letter to Hathway informing it that it would cease to execute fresh agreements with affiliates, and that both Star and Zee groups had set up independent distribution teams and would distribute their channels through these teams. The letter further advised Hathway to get in touch with the broadcasters directly for all matters relating to distribution, renewal of agreements, inter-connection issues, reference inter-connect offer and tariff.

It is stated on behalf of Hathway that though the letter was dated 22 May 2014, it was actually withheld and sent much later and was actually received by it on 20 June 2014, towards the end of the three months' period for negotiations. It is further stated on behalf of Hathway that within three days of receipt of the letter from Media Pro, it received a letter from Star dated 23 June 2014, which declared that all negotiations for an agreement on mutually agreed terms had failed and forwarded the reference inter-connect offer of Star asking Hathway to sign the RIO offer if it wished to continue to receive Star TV channels. It needs to be noted here that it was a consolidated RIO, covering both the sports channels of Star Sports and the GEC of Star that Star had issued in April 2014 after Media Pro had ceased to be its agent or intermediary. A similar letter dated 26 June 2014, enclosing the RIO (for Zee group of channels), was received from M/s Taj Television (India) Pvt. Ltd., acting as the "agent or intermediary" of Zee and Turner.

On behalf of Hathway, an impression is sought to be given that it was kept in the dark all the time and that it was intimated regarding the change in the

distribution platform only at the end of the three months' negotiation period, simultaneously with the ultimatum to sign the RIOs. This impression, however, does not appear to be quite true. On the DAS Regulations being amended by insertion of clause 10 on 10 February 2014, it became widely known in the broadcasting sector that Media Pro would be put out of business. In many other cases before the Tribunal it was stated on behalf of Media Pro that after the amended Regulations came into force it was not entering any inter-connect agreements on behalf of its earlier Principals with any distributor. It is, therefore, difficult to believe that Hathway, a major player in the broadcasting sector, was unaware of the changes imminent in the distribution arrangement of the Star and Zee groups of channel.

As it appears to us, even after the expiry of Hathway's agreements on 31 March 2014 (in respect of Kolkata and DAS-II areas) and on 30 April 2014 (for Delhi and Mumbai), no concern was shown in regard to future arrangements by anyone in the earlier tripartite arrangement. As a matter of fact, Hathway stopped giving monthly subscriber reports to either Media Pro or Star or Zee on the specious plea that it had started up-grading its technical system from 1 April 2014. In the absence of subscriber reports, the broadcasters were unable to raise invoices for monthly subscription fees. And thus Hathway enjoyed the continued and uninterrupted supply of all the TV channels of both Star and Zee groups, without paying anything, for more than three months after the expiry of

the previous agreements, and until the matter reached the Tribunal and interim orders were passed on these petitions.

After the expiry of the previous agreement, each side tended to present a complacent appearance, waiting for the other to make the first move. The first move came from the broadcasters. Star sent its RIO along with a letter dated 23 June 2014 declaring the failure of negotiations, and Taj sent its RIO along with a letter dated 26 June 2014 with similar contents.

Here it may be recalled that when Hathway received the letter of 23 June from Star, its dispute with Star Sports, a sister company of Star, had already been under mediation for two months. Hathway apparently hoped that its affairs with Star would also be sorted out in that mediation process, but Star evidently had different ideas. After the letters from Star (dated 23 June) and Taj (dated 26 June) on behalf of Zee, there were a few meetings and an exchange of correspondence in which the rival sides seem to accuse each other of not being earnest and sincere in their negotiations to come to some mutually acceptable terms for fresh agreements. The matter then came to head when Star gave notice for disconnection of its signals on 4 July, under clause 6.1, and on 9 July 2014, issued a public notice under clause 6.5 of the Regulations. Taj, too, followed by giving a disconnection notice on 8 July 2014, under clause 6.1, and on 11 July 2014, issuing a public notice under clause 6.5 of the Regulations.

To the notices issued by Star and Taj, Hathway responded differently. It challenged the disconnection notices issued by Star in Petition no. 319 (C) of

2014⁸ alleging that Star was subjecting it to adverse discrimination and was acting unreasonably, unfairly and unlawfully. It would be interesting to note here in passing that about two and half months ago, on 21 April 2014, Hathway had exercised the option to take Star's GEC channels on RIO rates for Mysore, Bangalore and Hyderabad⁹.

It is noted above that when Hathway filed the petition against Star, it had not paid the monthly licence fee since the expiry of the previous agreement. Hence, addressing first the issue of non-payment of monthly licence fee by Hathway, the Tribunal passed the interim order on 28 July 2014. This order, briefly noted the stands of the two sides and directed that, for the period from expiry of the previous agreement till 31 July 2014, Hathway would make payment for the Star Sports channels on the basis of the monthly subscribers reports for each of the channels on *a-la-carte* basis at the RIO rates as directed by the interim order dated 16 April 2014 passed in the Petitions nos. 210(C) and 214(C) of 2014. For the same period, Hathway would make payment at the rate of Rs.23.00 per subscriber for Star's GEC channels. But from 1 August 2014, Hathway would make payments for both the Star Sports and Star GEC channels

⁸Filed on 22 July 2014.

⁹ In the southern cities of Mysore, Bangalore and Hyderabad Star GEC channels seem to have less viewership than the northern parts of the country and the decision of Hathway was apparently based on purely commercial considerations. At the stage of the preliminary hearing of the case it was vociferously argued on behalf of Star that Hathway was plainly indulging in double standards; it took Star GEC channels where it suited its commercial interests on RIO rates but wants a negotiated deal on "reasonable" terms for Delhi and Mumbai and some other parts of the country. It was contended that Hathway cannot be permitted to take such an inconsistent stand. This issue, however, no longer survives in view of the stand taken by Star towards the end of hearing of the case.

at a consolidated rate of Rs.27.00 per subscriber, by taking into account every set-top box by means of which any Star channel is viewable.

As regards the disconnection notice by Taj, Hathway responded by signing its RIO on 28 July 2014 and sending back the counter-signed RIO along with cheques for Rs.16.80 crores as dues of licence fees for the period from the date of expiry of the previous agreement till the execution of the fresh RIO agreement. Needless to say, the dues of the licence fees were calculated at the fixed rates of the previous agreement. Taj declined to accept the payment and actually deactivated the TV signals of its principals-broadcasters at midnight between 31 July and 1 August 2014. Hathway came rushing to the Tribunal in Petition no. 335(C) of 2014¹⁰. It was stated on Hathway's behalf that it had executed the RIO based agreement, paid all the dues and also furnished the subscribers reports on 28 July 2014, and hence, none of the grounds mentioned in the disconnection notices survived and that Taj had, therefore, no right to disconnect the TV signals. Taj, on the other hand, maintained that Hathway had not cleared the dues of monthly fees for the period of three months between the expiry of the previous agreement and the execution of the new RIO based agreement. Like Star Sports, Taj maintained that the new RIO based agreement must relate back to the date of expiry of the previous agreement, and that the licence fees for the three months interim period must be calculated by taking the total number of subscribers for any bouquet offered by Hathway that contained

¹⁰Filed on 1 august 2014.

one or more of Taj's channels and multiplying that number by RIO rates for those channels. Thus calculated, the licence fee for the three months came to the overwhelming amount of Rs.111.39 crores¹¹. In this petition, the Tribunal passed the order dated 1 August 2014 observing that the relationship between the two sides with effect from August 2014 would be governed by the RIO agreement executed by Hathway on 28 July. It further directed Hathway to pay the licence fees for the period between the expiry of the previous agreement and the coming into being of the new agreement at the rate of Rs.21.60 per subscriber, subject to which Taj was asked to reactivate its TV signals to Hathway. The order also framed the issues that might have to be determined at the stage of final hearing of the case.

These are more or less all the facts in which these five petitions have come to the Tribunal.

To sum up, Petitions nos. 210(C) of 2014 and 214(C) of 2014 have served their purposes and no further orders need be passed in those two cases. Of the remaining three, Petition no. 335(C) of 2014 raises a relatively narrower issue that is already framed in the interim order dated 1 August 2014 passed in that case as under:

- “(i) Whether the RIO based agreement and the rates prescribed under the RIO would apply retrospectively from the date immediately following the expiry of the earlier agreement or prospectively from the date it was executed by both sides?

¹¹Vide letter dated 30 July 2014 from Zee at page 593, volume Iv of Petition no. 335 (C) of 2014.

- (ii) Whether in the facts of this case, Hathway's liability to make payment on RIO rates would arise from 26.6.2014 when the agreement was signed by Taj Television and it was sent to it for its counter signature?
- (iii) What would be Hathway's liability towards payment of monthly subscription fee for the period immediately following the expiry of the earlier agreement and the date on which the RIO agreement between the two sides came into effect?"

Petition no. 47 (C) of 2014 gives rise to the same issue arising in Petition no.335 (C) of 2014. Hathway, at the end of three months from the date of expiry of the previous fixed fee agreement, conveyed its willingness to Star Sports to take its channels on *a-la-carte* basis from 1 February 2014 onwards on its RIO rates. Though the agreement has not so far been executed by both sides signing the RIO, Star Sports maintains that an agreement on RIO terms came into being with acceptance expressed by Hathway to take its channels on RIO rates. The only question that thus needs to be decided in the case is the same as in Petition no. 335 (C) of 2014, that is, whether the RIO based agreement would date back to 1 November 2013 or whether it would be operative only from 1 February 2014. To put it differently, is Hathway liable to pay subscription fees for the months of November and December 2013 and January 2014 for the Star Sports channels at RIO rates, or at the fixed rate under the previous agreement, or on any other basis? On behalf of Hathway, however, an attempt was made to wriggle out of this position. Referring to the interim order passed in Petition no.319 (C) of 2014, in which direction is given for payment of licence fee at the consolidated rate of Rs.27.00 for both the Star GEC channels and the Star

Sports channels, it is suggested that the terms in regard to the Star Sports channels may also be determined along with the terms relating to the Star GEC channels. We will presently examine whether, in the facts and circumstances of the case, it is permissible for Hathway to get out of the acceptance expressed by it to take the Star Sports channels from 1 February 2014 on *a-la-carte* basis on RIO rates.

Petition no. 319 (C) of 2014 raises much wider issues than the other two petitions. It is grounded on the premise that though essentially a private contract, the inter-connect agreement for provision of TV signals by a broadcaster to a distributor is mandated by law to be based on fairness, reasonableness, transparency, and principles of non-exclusivity and parity. We would indeed examine the issues raised in the case but may not be called upon to answer some of the finer issues in view of the stand taken by Star towards the end of hearing of the case.

At this stage it will be useful to take a look at the provisions of the Telecommunication (Broadcasting & Cable Services) Interconnection (Digital Addressable Cable Television Systems) Regulations, 2012 (DAS Regulations) that regulate the relationships between a broadcaster and an MSO, and an MSO and a local cable operator, operating in a digital addressable system. The DAS Regulations are divided into six chapters. Chapter-I is under the heading “Preliminary”. It has the first two clauses: clause 1 gives the short title and the

date from which the regulations will come into force and clause 2 contains the definitions of the terms and expressions used in the regulations. Here we need to take note of some of the definitions.

The term “DAS area” is defined in clause 2(p) as under:

“(p) “DAS area” means the areas where in terms of notifications issued by the Central Government under sub-section (1) of section 4A of the Cable Television Networks(Regulation) Act, 1995 (7 of 1995), it is obligatory for every cable operator to transmit or retransmit programmes of any channel in an encrypted form through a digital addressable system.”

The terms “*a-la-carte*” and “*a-la-carte rate*” are defined in clauses 2(d) and (e) as under:

“(d) “a-la-carte” with reference to offering of a TV channel means offering the channel individually on a standalone basis;

(e) “a-la-carte rate” means the rate at which a standalone individual channel is offered to the distributor of TV channels or to the subscriber, as the case may be.”

The terms “broadcaster” and “broadcasting services” are defined in clauses 2(g) and (h) as under:

“(g) “broadcaster” means a person or a group of persons, or body corporate, or any organisation or body providing programming services and includes his or its authorised distribution agencies.”

(h) “broadcasting services” means the dissemination of any form of communication such as signs, signals, writing, pictures, images and sounds of all kinds by transmission of electromagnetic waves through space or through cables intended to be received by the general public either directly or indirectly and all its grammatical variations and cognate expressions shall be construed accordingly.”

The terms “bouquet” and “bouquet rate” are defined in clauses 2(i) and (j) as under:

“(i) “bouquet” or “bouquet of channels” means an assortment of distinct channels, offered together as a group or as a bundle;

(j) “bouquet rate” or “rate of bouquet” means the rate at which a bouquet of channels is offered to the distributor of TV channels or to the subscriber, as the case may be.”

The term “multi-system operator” is defined in clause 2(s) as under:

“(s) “Multi-System Operator” means a cable operator who has been granted registration under rule 11C of the Cable Television Networks Rules, 1994, and who receives a programming service from a broadcaster or its authorised agencies and re-transmits the same or transmits his own programming service for simultaneous reception either by multiple subscribers directly or through one or more local cable operators and includes his authorised distribution agencies, by whatever name called.”

The terms “ordinary subscriber”, “subscriber” and “subscriber base” are defined in clause 2(t), (za) and (zb) respectively, as under:

(t) "ordinary subscriber" means any subscriber who receives a programming service from a multi system operator directly or through his linked local cable operator and uses the same for his domestic purposes.

(za) "subscriber" means a person who receives the signals of a service provider at a place indicated by him to the service provider without further transmitting it to any other person and includes ordinary subscribers and commercial subscribers unless specifically excluded;

(zb) "subscriber base" means the number of subscribers reflected in the subscriber management system, of the digital addressable systems.”

The term “RIO” is defined in clause 2(x) as under:

“(x) "RIO" means the Reference Interconnect Offer published by a service provider specifying terms and conditions on which other service provider may seek interconnection from the service provider making the offer;

Chapter-II has the heading “Interconnection”. It contains clause 3 with the marginal heading “General Provisions relating to Interconnection”. Clause

3 has sixteen sub-clauses which can be broadly divided into three parts. Clauses 3(1) to 3(7) cast obligations on the broadcaster for provision of signals to an MSO and the terms and conditions on which a broadcaster must not insist on as conditions for giving signals to an MSO. Of the aforesaid, clauses 3(1), 3(2) and 3(3) are relevant for the present and are reproduced below:

“3. General Provisions relating to interconnection.-(1) No broadcaster of TV channels shall engage in any **practice or activity or enter into any understanding or arrangement**, including exclusive contract with any multi system operator for distribution of its channel **which may prevent any other multi system operator from obtaining such TV channels for distribution.**

(2) Every broadcaster shall provide signals of its TV channels on **non-discriminatory basis** to every multi system operator having the prescribed channel capacity and registered under rule 11 of the Cable Television Networks Rules, 1994, making request for the same.

Provided that nothing contained in this sub-regulation shall apply in the case of a multi system operator who is in default of payment.

Provided further that imposition of any term which is **unreasonable** shall be deemed as a denial of request.

(3) Every broadcaster or his authorized agent shall provide the signals of TV channels to a multi system operator, **in accordance with its reference interconnect offer or as may be mutually agreed**, within sixty days from the date of receipt of the request and in case the request for providing signals of TV Channels is not agreed to, the reasons for such refusal to provide signals shall be conveyed to the person making a request within sixty days from the date of request.”

Clause 3(6) gives an indication of an unreasonable term as envisaged under the second proviso to clause 3(2) and provides as under:

“(6) If a broadcaster before providing signals to a multi system operator insist for placement of its channel in a particular slot as a pre-condition for providing signals, such precondition shall amount to imposition of unreasonable terms.”

Similarly, clauses 3(9) to 3(13) cast the converse obligation on the MSO to carry the signals of a broadcaster and indicate the terms and conditions upon which an MSO must not insist for carrying the signals of a broadcaster. Finally, clauses 3(14) to 3(16) oblige the MSO to provide signals of TV channels to local cable operators.

Chapter-III, under the heading “Reference Interconnect Offer”, has clause 4 which has the marginal heading “Reference Interconnect Offer”. Clause 4 through its nine sub-clauses deals with the different aspects of the RIO. Sub-clauses (1), (2), (4), (6) and (9) of clause 4 are relevant for the present and are as under:

“4. General Provisions relating to Reference Interconnection Offer.--(1) Every broadcaster shall, within thirty days of commencement of these regulations, submit to the Authority its Reference Interconnect Offer specifying the technical and commercial terms and conditions including the terms and conditions as mentioned in Schedule II of this regulation and publish it on its website.

Provided that a broadcaster may submit different interconnect offers for different types of digital addressable system.

(2) No broadcaster shall, directly or indirectly, prohibit any digital addressable cable TV system operator from providing its services to any subscriber.

(4) Every broadcaster shall modify their existing Reference Interconnect Offer within thirty days of commencement of these regulations so as to bring them in conformity with provisions of these regulations.

(9) The Authority may, in order to protect the interest of the consumer and the service provider and to promote and ensure orderly growth of broadcasting and cable services, direct the service provider to modify its Reference Interconnect Offer.”

Chapter-IV, has the heading “Interconnection Agreements”. It contains clause 5 with the marginal heading “General Provisions relating to Interconnection Agreements”. Clause 5 has twenty-one sub-clauses. Clause 5(1) and the other sub-clauses relevant for the present are as under:

“5. General Provisions relating to interconnection agreements.-(1)
A multi system operator may enter into an agreement with the broadcaster **in accordance with the terms and conditions of the Reference Interconnect Offer published by the broadcaster on such non-discriminatory terms and conditions.**

(2) Every broadcaster shall, who publishes revised Reference Interconnect Offer after the commencement of these regulations, give an option to all multi system operators to enter into an agreement in accordance with the revised Reference Interconnect Offer and it shall be open to the multi system operator to enter into fresh agreement or continue with the existing agreement.

(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.

(4) Every broadcaster shall offer all its channels to the multi system operator on a-la-carte basis:

Provided that the broadcaster may, in addition to offering all its channels on a-la-carte basis, offer its channels in the form of bouquet.

(5) No broadcaster shall compel any multi system operator to include its channels or bouquet of channels in any package or scheme offered by the multi system operator to its subscribers.

(11) In case the broadcaster and the multi system operator fail to enter into an interconnection agreement, such broadcaster or multi system operator, without prejudice to the provision of section 14 A of the Act or any other law for time being in force, at any time, may make a request to the Authority to facilitate the process of entering into such agreement and the Authority may issue such directions to the broadcaster and the multi-system operator as it may deem fit.

(15) It shall be open to a multi system operator to decide the packaging of the channels offered to the subscribers from bouquet of channels provided to it by the broadcaster:

Provided that in case the multi system operator does not offer to a subscriber the entire bouquet of channels provided to it by the broadcaster but only certain channels of such bouquet or packages the channels of such bouquet in a manner resulting in different subscriber base for different channels of such bouquet, the payment to the broadcaster for such bouquet shall be calculated on the basis of the subscriber base for that channel of the bouquet which has highest subscriber base.

Chapter-V deals with “Disconnection of signals of TV channels” and Chapter-VI has miscellaneous clauses with which we are not concerned at present.

In light of the above regulatory provisions we now proceed to examine the respective cases of the two sides.

Hathway’s case against Star has two heads. First, it is submitted that compared to Hathway, Star has been giving highly profitable rates to another MSO, namely DEN Networks Limited, and is thus discriminating against Hathway in breach of the DAS Regulations. Secondly, it is submitted that in the course of negotiations Star unfairly, unreasonably and arbitrarily rejected the cost-per-subscriber (CPS) rate offered by it and in return quoted a CPS rate that has no rational basis.

It is stated that the agreement with Media Pro was for both Star GEC channels and the Zee group of channels, besides a few other channels of other broadcasters. The agreement between Media Pro and DEN was at the rate of Rs.30.50p CPS (whereas with Hathway the CPS rate was Rs.35.00). It is further

stated by Hathway that in the payment made to Media Pro (Rs.35.00 CPS by Hathway and Rs.30.50p by DEN) the share of Star was 53%, which also included the very small shares of NDTV, ABP and MGM channels¹². In the payment made by DEN, therefore, the share of Star (along with the broadcasters of the three other channels) came to Rs.16.16p, and after deducting the payments for the three other channels it came to Rs.14.80p as CPS. Adding 7% to this as a reasonable annual increase, the figure would come to Rs.15.84p, which could be rounded off to Rs.16.00. Hathway, accordingly, made the offer of Rs.16.00 as CPS for Star GEC channels and an additional amount of Rs.6.00 as CPS for the Star Sports channel; in other words, Rs.22.00 CPS basis for both Star GEC channels and Star Sports channels.

But Star rejected Hathway's offer out of hand. It did not make any counter offer in the course of negotiations; however, in the course of hearing for making the interim arrangements order on 28 July 2014, a demand was made on behalf of Star for Rs.31.00 as CPS.

Mr.Kathpalia, learned counsel appearing for Hathway, strongly submitted that Rs.31.00 as CPS was an arbitrary figure without any rational basis. He further submitted Star's stance in telling Hathway to take its TV channels either at Rs.31.00 CPS or on RIO rates, while at the same time giving its channels to DEN at Rs.14.80p was unacceptably discriminating and was clearly aimed at

¹² According to Star the break-up of the payment made by Den was as follows: Star: 50.4%, Zee: 47% and NDTV, ABP & MGM combine: 2.6%. On calculating on this basis there would be a marginal difference of some decimal points from the calculation given above on behalf of Hathway.

promoting DEN by badly under-cutting Hathway. Mr.Kathpalia contended that for entering into an interconnect agreement for giving its TV channels to an MSO, the broadcaster does not have complete freedom as it might in any purely private contract. Learned counsel submitted that the action of Star in rejecting Hathway's offer of Rs.22.00 as CPS and insisting that it should either pay Rs.31.00 as CPS or take the channels at RIO rates while giving its channels to DEN at Rs.14.80p CPS was not just patently unreasonable and unfair, but was also in breach of the regulatory clauses relating to parity and non-discrimination.

Mr.Kathpalia submitted that a bare perusal of clauses 3, 4 and 5 of the DAS regulations would make it clear that the relationship between a broadcaster and an MSO must be based on reasonableness and the values of parity and non-discrimination, which in turn would draw in principles of fairness and transparency.

Mr.Rakesh Dwivedi, senior advocate appearing for Star, equally forcefully presented the counter view. Learned Counsel submitted that the rate of licence fee fixed under the previous agreement between Hathway and Media Pro cannot form the basis for negotiations for any future agreements, and he referred to clause 5(9) of the agreement that declared that "the CPS of Rs.35 is purely promotional offer.....and shall not be the reference point for negotiation for renewal of this MSO". He further submitted that for fixing the licence fee, the broadcaster takes into account countless factors relating to the

market and it is not obliged to disclose and explain the “rationale” of the rate offered by it to an MSO or, for that matter, different rates offered to different MSOs.

Mr.Dwivedi submitted that clause 4 of the Telecommunication (Broadcasting & Cable Services) (Fourth) (Addressable Systems) Tariff, 2010 fixed the ceiling for the *a-la-carte* rates in wholesale for pay channels, and that currently the ceiling was at 42% of the *a-la-carte* rates of the channel as specified by the broadcaster for non-addressable systems. He further submitted that it was perfectly open to the broadcaster to fix *a-la-carte* rates for its channels within the ceiling prescribed by law, and that once published in the RIO, those rates would apply without exception to every MSO who might wish to take the broadcaster’s channels on RIO rates. Mr.Dwivedi contended that the condition of parity and non-discrimination was thus fully satisfied with the publication of the RIO on the broadcaster’s website. He further contended that the RIO gave the option to an MSO to take the channels on the terms and at the rates prescribed therein but that the regulations did not stop either the MSO or the broadcaster, if they so agreed, to make some negotiated terms as the basis of the agreement, and in that event, the broadcaster had the complete freedom of negotiations like in any other private contract. Mr.Dwivedi further submitted that the submissions made on behalf of Hathway was based on importing the provisions under Chapter-II of the DAS Regulations under the heading “Interconnection” to provisions relating to “Reference Interconnect Offer”

under Chapter-III of the DAS Regulations. Elaborating these submissions, Mr.Dwivedi stated that the DAS Regulations have an uncommon structure in that unlike other regulations, these are divided into different chapters. Mr.Dwivedi pointed out that Chapter-II has the heading “Interconnection” and Chapter-IV “Interconnection Agreements”. He referred to clause 5(6) that makes it mandatory for the broadcaster of pay channels to reduce the terms of the interconnection agreement into writing and argued that the question of interconnection would come only after the interconnection agreement was made in writing and executed by the two sides. According to him, therefore, the provisions under Chapter-II relate to the stage after the interconnection agreement as stipulated in Chapter-IV comes into existence. He then submitted that unlike the provisions of clause 3, clause 5 does not use the expressions “parity”, “non-discriminatory”, “reasonableness” or “fairness”. According to him, therefore, the scheme of the Regulations allowed the broadcaster complete freedom of negotiation (in case the agreement was not on RIO terms) but once the agreement was signed, the broadcaster was obliged to provide interconnection to all MSOs with which it was on contract terms on a basis of parity, non-discrimination, reasonableness and fairness.

On careful consideration of the rival submissions, we find it difficult to accept Mr.Dwivedi’s submissions that the provisions of Regulation 3 under Chapter-II would not apply to the stage before the execution of the interconnect agreement and would apply only after the interconnection agreement was

executed between the broadcaster and the MSO. We are unable to accept the submission that the execution of the agreement would be governed by provisions of clause 5 alone, and that even though clause 3 under Chapter-II is placed before clause 5 under Chapter-IV, the former would operate only after the execution of the contract. To our mind, the argument defies logic and plain common sense. In our view, the provisions of clause 3 and the mandate regarding reasonableness, parity and non-discrimination contained therein, would apply with full force to the process leading to the execution of the agreement between the broadcaster and an MSO. As we see the scheme of the Regulations, the chapters and the clauses under each of them are in good sequence. Chapter-II deals with “Interconnection” of which execution of the interconnect agreement is but a part, and it is thus evident that the execution of the interconnect agreement is equally covered by clause 3 under Chapter-II. Then “Reference Interconnect Offer” comes under Chapter-III and “Interconnection Agreements” under Chapter-IV. In our view, the provisions of the first few sub-clauses of clause 5 in Chapter-IV mainly relate to agreements based on RIO, and RIO is dealt with in the preceding Chapter-III. It is sought to be pointed out on behalf of Star that unlike clause 3, clause 5 does not use the expressions “parity”, “non-discriminatory”, “reasonableness” or “fairness” but it is overlooked that clause 5(1) refers only to RIO based agreements and has no reference to any agreement as may be mutually agreed. Sub-clauses 2 and 3 of

clause 5 deal with the situation arising from any change in the RIO of the broadcaster.

We find equally unacceptable the second plank of Mr.Dwivedi's arguments that an RIO published by the broadcaster fully satisfies the condition to act non-discriminatingly and that apart from the RIO the broadcaster has full freedom of negotiation with no obligation to be bound by reasonableness, parity and non-discrimination.

To sum-up, we do not accept the submission that for arriving at a negotiated interconnect agreement, the broadcaster is not obliged to observe reasonableness and fairness and the principles of parity and non-discrimination, and we also reject the submission that just an RIO without anything else satisfies all the conditions stipulated in clause 3 of the regulations.

A pragmatic way to test the correctness of a proposition is to see how it works out in reality. To that end, we propose to take a look at Star's dealings with another MSO, DEN Networks Limited.

Star and DEN:

DEN Networks Ltd. is an MSO and, like Hathway, it operates at the national level. In the consultation paper dated 3 June 2013 issued by the Telecom Regulatory Authority of India (TRAI) on "monopoly/market dominance in cable TV services", the market share of Hathway, determined on the basis of set top boxes seeded in all phase-1 and phase-2 cities in the country,

is given as 23.5% and that of DEN as 18.5%. In another part of the consultation paper, it is stated as under:

“Some of the prominent national MSOs are DEN Networks Ltd., Digicable, Hathway Datacom, IndusInd Media and Communication Ltd. and Siti Cable.”

It is thus indisputable that Hathway and DEN are comparable multi-system operators. According to Hathway, DEN is one of its main rivals and business competitors.

Now a glance at the relationship between Star and DEN: Star India Pvt. Ltd. and DEN Networks Ltd. earlier came together to form Star DEN as a content aggregator for the Star group of channels and the channels of NDTV, ABP and MGM. Star DEN then came together with another content aggregator, namely, Zee Turner, to form Media Pro, which was thus a combination of two content aggregators. The commercial relationship between Star and DEN is thus evident and undeniable.

Now a look at dealings between Star and Den. It may be stated at the outset that any arrangement for interconnection and any interconnect agreement between the supplier and the seeker of signals is, for commercial reasons, a closely guarded secret. Nonetheless, Hathway was able to lay its hand on three agreements between Media Pro and Den and put them on record as annexure D to the Rejoinder affidavit filed on its behalf. It does not have the details of any other agreements between Star and DEN. But as the dispute between Hathway and Star is mainly based on the plea of discrimination, we directed the counsel

for Star to file, in a sealed cover, all the past and present agreements concerning Star and DEN for our perusal. At the end of hearing of the case, the Counsel for Star submitted a sealed cover that contained only one agreement between Star and Den for the territory of Delhi. No other agreement was submitted without assigning any reasons. We are, therefore, constrained to examine what emerges from the four agreements before us and draw inferences on that basis.

The first two agreements between Media Pro and Den (annexure D to Hathway's Rejoinder) were executed on 17 August 2012. Both the agreements commenced from 1 November 2012 and ended on 30 June 2013. One of the agreements was for Mumbai on a fixed licence fee of Rs.36,00,000.00 per month. (For the period 1 May 2013 to 31 July 2013, the licence fee for Hathway was Rs.2,19,24,000.00¹³). The second agreement was for Delhi, again at a fixed licence fee of Rs.1,72,00,000.00*. Both the agreements were on fixed fee basis; there is no benchmark or any CPS. This means that DEN was under no obligation to share any increase in the subscriptions received from its local cable operators (LCOs) and ordinary subscribers and any expansion of its subscriber base would be to its sole benefit.

The third agreement was for a number of DAS-II cities. It was executed on 14 May 2013. It commenced from 1 April 2013 and came to end on 31 March 2014. For the first six months of the agreement period, the licence fee payable

¹³Vide. Second amendment dated 7 November 2013 to the MOU dated 13 August, 2013.

by DEN was Rs.4,39,81,255.00 (that is, Rs.73,30,209.00 per month) and for the last six months at the rate of Rs.30.50 per subscriber per month.

The two agreements for Mumbai and Delhi ended on 30 June 2013, and the three months from that date that are allowed to enter into fresh agreement, came to end on 30 September 2013. It is, however, undeniable that DEN continued to uninterruptedly receive all channels being distributed by Media Pro, in complete violation of clause 6(5) of the Das Regulations. Unlike Hathway, in case of Den the public disconnection notice was issued by Media Pro in March 2014, about six months after the expiry of the previous agreement. According to Hathway, even that notice was issued only after it was realised that Hathway had come in possession of the agreements between Media Pro and DEN.

The fourth agreement before us (the one submitted by the counsel for Star in a sealed cover) is once again between Media Pro and Den. It was executed on 31 March 2014 but dates back to 1 July 2013 and comes to an end on 30 June 2014. It is for the territory of Delhi and has a variable licence fee. For the period 1 April to 30 June 2014, DEN is required to pay the fixed amount of Rs.2,06,40,000.00 (that is, at the rate of Rs.68,80,000.00 per month); for the next period, from 1 July 2013 to 31 March 2014, the fixed amount of Rs.3,09.60,000.00 (that is, at the rate of Rs.34.40,000.00 per month); and for the remainder three months of the agreement at Rs.30.50p CPS basis.

An interesting fact relating to this agreement is that after the amendment of the DAS Regulations on 10 February 2014¹⁴, the only distributor with which Media Pro entered into a fresh interconnect agreement was DEN. Thus it would not be wrong to describe this agreement, dated 31 March 2014, as the “parting gift” from Media Pro to DEN.

We were not given any agreements with DEN for Mumbai and the DAS-II cities. We are, therefore, not in a position to know whether there are agreements at all with Den for Mumbai (after 30 June 2013) and for DAS-II cities (after 31 March 2014); or whether the supply of signals to DEN in Mumbai and the DAS-II cities is discontinued or whether DEN continues to receive signals in Mumbai and the DAS-II cities even in the absence of any interconnect agreements and in violation of clause 6(5) of the DAS Regulations.

But upon scrutiny of the four licences between Media Pro and DEN, we come to the firm conclusion that in comparison with Hathway, DEN was given far lower rates and much more advantageous terms. Though none of the agreements say that the rates given to DEN were “promotional”, there can be little doubt that the rates and terms given to DEN were aimed at giving it a solid push to expand its subscriber base and grab a larger share of the cable television market. We are constrained to observe that the deal between Star and Zee with DEN through the common intermediary Media Pro is an instance of unfair market practice. It was calculated to undermine the very object of the

¹⁴Made enforceable after six months of the notification.

Regulations, that is, to ensure a level playing field with the view to promoting healthy competition.

Perhaps faced with this situation, towards the end of the hearing of the case, a statement was made on behalf of Star that henceforth it would enter into interconnect agreements with every distributor of channels, for a period of one year, only on *a-la-carte* basis at its RIO rates. Star was asked to make the statement on affidavit. Accordingly, it filed a short affidavit. This is a crucial piece in the case and hence, the averments contained in it are reproduced below.

“2. That without prejudice to our rights and contentions made in Petition No.319(C)/2014 before TDSAT during the course of the hearing and the submissions made in Petition No.210(C)/2014 & Petition No.47(C)/2014 in relation to Clause 5(16) of the DAS Regulations, the respondent is filing this affidavit in compliance with the observations of the Hon’ble Bench.

3. That in cases where the Agreement between Media Pro/Star Sports India Private Limited and any MSO in DAS notified areas came to an end in 2014 and no new Agreement has been executed so far, Star India Private Limited would henceforth enter into fresh agreements with such MSOs. The new RIO Agreements would for a period of one year. **The RIO Agreements would commence three months after the expiry of the erstwhile Agreement and would only be on the basis of the published Reference Interconnect Offer.**

4. That as of 10th September 2014, some Interconnect Agreements with MSOs operating at Regional/State level have been entered into on CPS basis and they would operator for their full terms. Names of these MSOs are as per Annexure-1 attached hereto.

5. That no CPS Interconnect agreement has been entered into with any MSO having a National license from the Ministry of Information & Broadcasting and operating at the national level after expiry of their respective previous agreements.

6. That as and when the RIO is amended it would be offered to all MSOs as mandated by law.”

(emphasis added)

That in order to put the matter beyond any doubt we made certain queries and recorded the response of the Counsel for Star in the order passed for taking the affidavit on record of the case. The order is as under:

“At the fag end of the hearing, an affidavit is being filed on behalf of M/s Star India Pvt. Ltd. making its position clear. Let the affidavit be taken on record.

In reply to certain queries made by us in reference to the statement made in paragraph-3 of the affidavit, Mr.Saikrishna, counsel appearing for M/s Star India Pvt. Ltd., on instructions received from duly authorized officers present in court, stated that in DAS notified areas any new interconnect agreement with any MSOs operating under a national license or a regional/local license would only be on the basis of the RIO of M/s Star India Pvt. Ltd. And it would not enter into any interconnect agreement in the DAS areas with anyone on fixed fee or on CPS basis for a period of one year.”

On the face of it, the affidavit meets, at least prospectively, the charge of discrimination, as it professes a uniform basis for agreements with all distributors. But Mr.Kathpalia still has a problem with it and he submits that the catch lies in the condition that the RIO Agreements would commence three months after the expiry of the previous agreement. He submitted that the condition was intended to perpetuate the discrimination already existing between Hathway and DEN. He explained that even though an interconnect agreement is yet to be executed between Hathway and Star, once it is executed, regardless of the date of execution, Hathway would be liable to pay the licence

fee at the RIO rates with effect from 1 August 2014 for Delhi and Mumbai and from 1 July 2014 for Kolkata and the DAS-II cities. In case of DEN however, the current agreement is expiring on 30 June 2014, and thus, it would be liable to pay the licence fee for Delhi at the RIO rates with effect from 1 October 2014. He submitted that even the difference of two to three months in the application of RIO rates would lead to a vast difference in terms of money and would have major consequences for Hathway. He insisted that in order to remove discrimination completely, the RIO based agreements must apply in case of all distributors, including Hathway and DEN, with effect from a common date.

The submission made by Mr.Kathpalia is not inconsequential and cannot be brushed aside, but the objection raised by him also involves the question of enforcement of an RIO based agreement from a date prior to its execution. This issue, as noted above, arises directly in petitions nos.47(C)/2014 and 335(C)/2014. We, accordingly, advert to examine the question whether in case of a switch over from a fixed fee agreement to an *a-la-carte* based agreement on RIO rates, the RIO rates can be enforceable from a date prior to the execution of the RIO agreement. We have seen above that in case of Star Sports, Hathway's agreement expired on 1 November 2013, and in case of Zee, its agreement with Media Pro expired on 31 March 2014 (in respect of Kolkata and DAS-II areas) and on 30 April 2014 (in respect of Delhi and Mumbai). In both cases, at the end of three months' from the date of expiry of the previous agreements,

Hathway either executed the RIO (in case of Zee) or expressed its willingness (in case of Star Sports) to take their respective channels on *a-la-carte* basis at the respective RIO rates. On behalf of Hathway, it is contended that RIO rates would apply only from the date of signing of the RIO, or maybe even from the date it expressed its willingness to accept the RIO rates, and that for the three months period between the expiry of the previous agreement and the coming into existence of the fresh agreement, it would be liable to pay only at the rates fixed in the previous agreement. On behalf of Zee and Star Sports, it is strongly contended that as soon as the RIO agreement comes into existence, it would relate back to the date of expiry of the previous agreement and hence, for the past three months period, Hathway must pay the licence fee on *a-la-carte* basis at RIO rates. The contention advanced on behalf of Zee and Star Sports is based on sub-clause 16 of clause 5 of the DAS Regulations which is as under:

“(16) Every service provider shall enter into a new agreement before the expiry of the existing agreement and in case the service provider fails to enter into the new agreement before the expiry of the said agreement, the provisions of the existing agreement shall continue to apply till the new agreement is entered into between the service providers or for the next three months from the date of expiry of existing agreement, whichever is earlier **and if the service providers are able to enter into an agreement before the expiry of the said three months, the new agreement shall apply from the date of expiry of earlier agreement:**

Provided that if service providers are not able to enter into a new agreement, they may be entitled to disconnect the signals of TV Channels by giving three weeks’ notice published in two local newspapers, out of which one shall be published in the newspaper of the regional language of the area for which the said agreement is applicable.”

(emphasis added)

At first glance the provision indeed appears to support the stand of the broadcasters, but the matter needs to be examined a little more carefully.

It is necessary to understand here that there are three possible bases for payment of licence fee under an interconnect agreement: (i) a fixed amount payable monthly or over a period as may be stipulated in the agreement. This is commonly called the “fixed fee basis” and the fixed amount is payable regardless of the subscriber base of the distributor increasing or decreasing during the period of the agreement; (ii) “cost per subscriber” basis, in which a certain amount (e.g. Rs.30.00 or Rs.35.00) is payable per month per subscriber. There may also be a hybrid mode for payment of licence fee, in which a certain amount (a sort of minimum guarantee) is fixed upto a certain number of subscribers and beyond the pre-fixed number of subscribers, a cost per subscriber (CPS) is applied; (iii) *a-la-carte* basis at the rates prescribed in the broadcasters’ RIO.

It can be easily seen that on the fixed fee basis, the distributor would be free to put as many channels of the broadcaster in as many of its bouquets as it might please because that would not cost him anything extra. In the CPS basis, the distributor may still put the broadcaster’s channels in a number of bouquets to make the bouquets attractive to the subscriber as per its marketing policy. But in the *a-la-carte* basis, a distributor would hardly, if ever, put any channels of the broadcaster in a bouquet because, according to the regulations, if any channel of the broadcaster is part of a bouquet made by the distributor, the

entire subscriber base for the bouquet is to be taken as the factor for multiplying with the *a-la-carte* cost of the channel, regardless of how many subscribers to the bouquet are actually watching the broadcaster's channels. Therefore, a distributor taking the channels of a broadcaster on *a-la-carte* basis would almost invariably offer those channels to its subscribers also on *a-la-carte* basis. And in that case, the licence fee would be determined by multiplying the number of subscribers *asking for the channel specifically*, as recorded in the subscriber management system, multiplied by the *a-la-carte* cost of the channels prescribed in the RIO. It is thus evident that *a-la-carte* basis is an altogether different mode of computation of the licence fee as compared to the fixed fee or the CPS modes for determining the licence fee. And we are completely at a loss to find a suitable mechanism to apply the *a-la-carte* rates to a past period during which, as a matter of fact, the channels were put in bouquets. We repeatedly asked counsel appearing for Star and Zee to suggest a fair and reasonable mechanism for application of *a-la-carte* rates to channels that were earlier retransmitted to subscribers as part of bouquets.

Mr.Dwivedi, learned senior counsel for Star, referred to schedule-II of the DAS Regulations in which under the marginal heading "Calculation of Licence Fee", it is provided as follows:

"I. In case a multi system operator avails one or more Bouquet(s) of _____(name of the Broadcaster):

- (a) If the multi system operator is providing the Bouquet(s) as a whole to its subscribers, the Monthly License Fee for

such Bouquet(s) shall be equal to the Bouquet rate as set out in the Annexure multiplied by the number of monthly average number of subscribers availing the Bouquet(s).

- (b) If the multi system operator does not offer such opted bouquet(s) as a whole to its subscriber but offers only certain channels comprised in such bouquet or 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 _____ (name of the Broadcaster) for such entire opted bouquet by the multi system operator, shall be calculated on the basis of subscriber base for the channel which has highest subscriber base amongst the channels comprised in the bouquet.

II. In case a multi system operator avails one or more or all channels of _____(name of the Broadcaster) on ala carte rate basis:

- (a) If the multi system operator is providing the channels on ala carte basis to its subscribers, the Monthly License Fee for such ala carte channels shall be equal to the ala carte rate as set out in the Annexure multiplied by the number of monthly average number of subscribers availing the channels on ala carte basis.
- (b) If the multi system operator does not offer such opted ala carte channel(s) as ala carte to its subscriber but offers the ala carte channel(s) in packages, then the payment to _____(name of the Broadcaster) for each of the ala carte channels, shall be calculated on the basis of subscriber base of the package in which such opted ala carte channel has been placed.”

We are unable to find in the above provisions the mechanism that we are looking for. Instead, the above provisions highlight the differences in the modes of computation of licence fee in cases where the distributor is taking the channels as bouquets formed by the broadcaster and where the distributor is taking the channels *a-la-carte*.

The two modes of computation are fundamentally different.

Let us elaborate the point by means of an illustration. Assuming a supplier of cooked food gives fifty dishes to an eating place every day. The eating place finds it profitable to serve food to its customers as buffets for a certain amount as cover charge. Assuming further that after the process has gone on for three months, it is discovered that the serving of food as buffet was unauthorised and now the supplier of food insists that he would charge the eating place on *a-la-carte* rates for each of its customer and for each of its fifty dishes. The result would obviously have no bearing to what actually took place. It would be unfair to the eating place because it can no longer realise money from its customers on *al-la-carte* basis and it would be equally unfair to the customers because they did not order the dishes on *a-la-carte* basis.

In the present case, we are faced with the same situation.

On careful consideration, we find and hold that clause 5(16) will have no application in a case in which after three months of the negotiation period, parties enter into an agreement on a basis which is completely different from the basis on which the previous agreement was founded.

This is clearly a lacuna in the regulations and it is for the Regulator to take remedial measures.

But the question before us is how to deal with the present case and for that we must find an equitable solution.

It is seen that for the period 1 April to 30 June 2014 DEN is paying the fixed amount of Rs.2,06,40,000.00 (that is, at the rate of Rs.68,80,000.00 per month), for the next period from 1 July 2013 to 31 March 2014, the fixed amount of Rs.3,09,60,000.00 (that is, at the rate of Rs.34,40,000.00 per month) and for the remainder three months of the agreement at Rs.30.50p cost per subscriber basis. In Rs.30.50p, the share of Star (50.4%) comes to Rs.15.37p and of Zee (47%) to Rs.14.33p. As against that by the interim order dated 16 April 2014 Hathway is directed to pay for Star GEC channels at the rate of Rs.23.00 cost per subscriber. We think it would be just, fair and reasonable that Hathway be directed to pay for Star GEC channels at that rate from the date the previous agreement came to end till the fresh RIO based agreement comes into existence. This would mean an increase of Rs.5.36p per subscriber over what Hathway was paying to Star under its previous agreement (Rs.35.00 per subscriber) and an increase of Rs.7.62p over what DEN is paying to Star currently. Applying the same formula, Hathway should pay for the Zee group of channels at the rate of Rs.21.50p (rounded off from Rs.21.44p) per subscriber from the date of expiry of the previous agreement till the coming into existence of the new agreement and further it should pay at the rate of Rs.4.00 cost per subscriber for Star Sports channels from the date the earlier agreement came to end till the new RIO based agreement came into being.

Should Hathway complain that it is directed to pay for the interregnum between the two agreements at a much steep rate, it needs to be reminded that its own conduct has been far from faultless and it too is partly responsible for bringing about the present situation.

In light of the discussions made above, we summarize our findings as under:

- (i) It is wrong to assume that publication of the RIO on the website satisfies the condition to act non-discriminatingly and besides the RIO, the broadcaster or the MSO (as the case may be) has full freedom of negotiations including the right to not maintain parity and discriminate between comparable seekers of signals;
- (ii) The conditions of reasonableness, parity, non-exclusiveness and non-discrimination stipulated in regulation 3 of the DAS Regulations commence from the stage a seeker makes request for provision of signals and goes right up-to the execution of the agreement followed by the actual provision of signals;

In this case, however, especially in view of the affidavit filed by Star, there is no reason for any further detailed analysis of regulations 3 and 5 and, therefore, we expressly leave open the question as to the *extent of freedom* of negotiation enjoyed by the provider and the seeker of signals

and the *extent to which the RIO of the provider regulates, limits or expands the area of negotiation.*

- (iii) On the materials on record, there is no escape from the conclusion that the broadcasters Star and Zee, acting through their intermediary Media Pro, provided their channels to DEN at much lower rates and more advantageous terms than Hathway.
- (iv) Clause 5(16) has no application in a case where after expiry of an agreement parties enter into a new agreement, the basis of which is completely different from the basis on which the previous agreement was founded.
- (v) In case the new agreement is on a different basis and is arrived at after two or three months from the date of expiry of the previous agreement during which the seeker continued to receive signals in terms of the expired agreement, it is likely that one of the parties might suffer loss but in the Regulations, as those stand currently, there is no mechanism to fairly and reasonably compensate the losing party. There is urgent need for the Regulator to take remedial measures.

To conclude we make the following directions:

- (i) Hathway Datacom Pvt. Ltd. and Star India Pvt. Ltd. are directed to execute an interconnect agreement based on Star's Reference

Interconnect Offer for Star GEC channels and Star Sports channels by 30 September 2014.

- (ii) In case Zee has not so far countersigned the RIO sent to it duly signed on behalf of Hathway, it would execute the agreement by signing the RIO by 30 September 2014.
- (iii) In case Hathway has any objections to any of the clauses in the RIOs of Star and/or Zee, it would be open to it to make representations in that connection to TRAI. But the clauses under representations would continue to be binding upon it unless and until those are set aside or modified by TRAI.
- (iv) Hathway shall make payment of licence fees to the broadcasters at the RIO rates from the date of execution of the RIO based agreement.
- (v) For the interregnum between the expiry of the previous agreement and coming into existence of the new RIO based agreement, Hathway shall pay for the Star GEC channels at the rate of Rs.23.00 cost per subscriber. The licence fee on CPS basis as directed will be computed by taking into account every set-top box by means of which any Star channel is viewable.
- (vi) Similarly for the interregnum between the expiry of the previous agreement and coming into existence of the new RIO based agreement, Hathway shall pay the licence fee to Zee at the rate of

Rs.21.50p cost per subscriber. The licence fee on CPS basis as directed will be computed by taking into account every set-top box by means of which any Zee channel is viewable.

(vii) For the interregnum between the expiry of the previous agreement and coming into existence of the new RIO based agreement, Hathway shall pay the licence fee to for Star Sports channels at the rate of Rs.4.00 cost per subscriber. The licence fee on CPS basis as directed will be computed by taking into account every set-top box by means of which any Star Sports channel is viewable.

(viii) Needless to say that payments will be made following reconciliation of the accounts and taking into consideration the payments made earlier by Hathway.

Before parting with the records of the case, we would like to observe that the submission made on behalf of the broadcasters that publication of their RIO on their websites satisfies the condition to act non-discriminatingly, (which we have categorically rejected) may be the ideal but can never be accepted as valid having regard to the way RIOs are being framed by the broadcasters and the MSOs at present. In the state in which we find the RIOs at present, this argument becomes a ploy to turn the RIO into a coercive tool and a threat to the seeker of the TV channels, and it undermines the essence of the regulations, which is to promote healthy competition by providing a level playing ground.

We must clarify here that our observation is not directed to the broadcasters in this case alone, but we find it true not only of most of the broadcasters but also of MSOs in their dealings with the seeker of the signals below them in the distribution line. We find, in case after case, an MSO or an LCO complaining that it was being required (by the broadcaster or the MSO, as the case may be) to take the signals at the price quoted by the provider or to sign on the dotted lines in the RIO.

The “Reference Interconnect Offer”, as defined under the Regulations, is a positive concept and if framed properly it should go a long way in ensuring a level playing ground. In Europe, and in an increasing number of jurisdictions worldwide, incumbent operators and/or those with significant market power are required to produce a Reference Interconnect Offer. “This Specimen offer provides a **common and transparent basis** for all agreements for the provision of interconnection services subject to regulation. It also helps to ensure that **new entrant operators can be confident of gaining terms which will not be less favourable to those applied to others (including the interconnection provider’s own retail operation)**”. Seen thus the RIO may be said to define the parametre of negotiations for arriving at an agreement on mutually acceptable terms. It may be argued that the RIO must contain the details and rates relating to all the bases on which the maker of the RIO intends to enter into a negotiated agreement.

In this country, unfortunately, RIOs are framed seemingly in negation of these attributes. RIOs mostly give only *a-la-carte* rates and even those rates are fixed with reference to the maximum permissible under the tariff orders. But in reality the maker of the reference would be giving signals to most parties, or at least its favoured ones, at rates far lower than those stated in the RIO. In other words, the RIO rates are completely divorced from the market rates. The vast difference between the realistic market prices and the rate in the RIO gives the provider a free hand to quote a price much higher than the market price to a new seeker or one in disfavour, a price that would be commercially unviable and force the seeker either to accept that price or to accept the RIO.

Clause 4(1) of the DAS Regulations requires the RIOs to be submitted to the TRAI and clause 6 requires that any amendments in the RIO must also be similarly submitted to the TRAI. The Regulations thus imply the endorsement of the RIOs by TRAI and that gives the RIOs a certain degree of sanctity. But we are constrained to observe that the TRAI has failed to examine the rates quoted in the RIO submitted before it from the point of view indicated above. In an earlier judgment [*Petitions nos.836(C)/2012 & 382(C)/2011 – Dish TV India. Ltd. Vs. ESPN Software India Pvt. Ltd.*], we had asked the TRAI to pay attention to this aspect of the matter but unfortunately our observations failed to receive due attention. We reiterate the urgent need for TRAI to examine the

RIOs submitted to it, especially the rates quoted by broadcasters and MSOs, to make these serve the purpose as intended in the regulations.

The petitions nos.47(C)/2014(with M.A. no. 29 of 2014), 210(C)/2014, 214(C)/2014, 319(C)/2014 and 335(C)/2014(with MA Nos.218 & 223 of 2014) stand disposed of.

.....
(Aftab Alam)
Chairperson

.....
(Kuldip Singh)
Member

sks