

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

DATED 12TH FEBRUARY, 2009

M.A.No.158 OF 2008

in

PETITION No.62(C) OF 2008

M/s Sun Direct TV Pvt. Ltd.

... Petitioner

Vs.

MSM Discovery Pvt. Ltd

... Respondent

BEFORE:

HON'BLE MR.JUSTICE ARUN KUMAR	CHAIRPERSON
HON'BLE DR. J. S. SARMA	MEMBER
HON'BLE MR.G. D. GAIHA	MEMBER

For Petitioner : Mr.Parag Tripathi, Senior Advocate with
Mrs.Narayani K. Sibal,
Ms.Shruti Ranjan, Advocates

For Respondent : Mr.N.K.Kaul, Senior Advocate with
Mr.Gopal Jain, Mr.Kaushik Mishra,
Ms.Anu Mehta, Mr.A.J. Bhambhani.
Ms.Nisha Bhambhani,
Ms.Lakshita Sethi, Advocates

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ORDER
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By this Miscellaneous Application, the Applicant prays that the Respondent be directed to immediately provide signals to the Applicant/Petitioner on à la carte basis as per the terms of the Reference Interconnect Officer (**RIO**) and also for action to be

initiated against the Respondent for failure to comply with the judgement dated 1.10.2008 of this Tribunal.

2. Briefly, the Applicant/Petitioner had filed Petition No. 62(C) of 2008 which was disposed of by this Tribunal vide judgement dated 1.10.2008. In that judgement, we had held that the Petitioner is entitled to the channel(s) of its choice from the Respondent on à la carte basis and directed the Respondent to supply signals of such channel(s) that the Petitioner may desire and as per the rates and terms of RIO. It was also stipulated therein that in the event the Petitioner offers the channel(s) received from the Respondent to its subscribers as part of a bouquet, the payment will be made as per the provisions of clause 13.2A.13 of the Telecommunication (Broadcasting and Cable Services) Interconnection (Fourth Amendment) Regulation, 2007 (no. 9 of 2007) (hereinafter referred to as the **Interconnect Regulation, 2007**).

3. The matter having come up for hearing on 9.2.2009, the counsels for both the parties were heard. The contention of the Applicant is that pursuant to the above judgement, it had corresponded with the Respondent seeking *all the channels* of the Respondent on à la carte basis and that in reply, the Respondent had sent a draft agreement which was not in compliance with the directions of this Tribunal or the terms stipulated in the RIO. The argument of the learned counsel for Petitioner is that the judgement of the Tribunal states that the Petitioner is entitled to receive the channel/s of its choice from the Respondent and position them in the manner of its choice and that it is obliged to pay to the broadcaster as per the Interconnect Regulation, 2007. According to him, the choice of signals, à la carte, is provided for in clause 13.2A.11 and the payment for channel/s taken on à la carte basis is to be made as per clause 13.2A.12 of the said Regulation. In particular, the Applicant contends that clause 13.2A.13 of the Interconnect Regulation, 2007 will be applicable only

in case the Petitioner/Applicant opts for one or more entire bouquet/s from the broadcaster. Since the Petitioner has always demanded the channels on à la carte basis, the said clause is claimed to be not applicable to the Petitioner. Besides, the contention of the learned counsel is that the Petitioner now wants only 11 of the 15 channels of the Respondent's bouquet. As such, the argument of the learned counsel for Petitioner is that payment for these channels should be guided by the provisions of clause 13.2A.12 and not clause 13.2A .13.

4. Countering this argument, the Respondent states that the Applicant/Petitioner is seeking to reopen the judgement of 1.10.2008. It is contended that the Petitioner had, vide its letter of 7.10.2008, specifically asked for *all the channels* on à la carte basis which was agreed to by the Respondent on 8.10.2008 and that the final agreement was signed, in the form of a Term Sheet, also incorporating the findings given in the Tribunal's judgement. The choice of *all the channels* on à la carte basis is also stated clearly in the affidavit. He underlines the fact that both the letter and the affidavit are inked after the judgement of 1.10.2008. The counsel for Respondent referred to para 16 of the judgement and stated that the Tribunal had held clearly that while the Petitioner is entitled to receive the channel/s of its choice on à la carte basis, it is obliged to pay to the Respondent as per the provisions of clause 13.2A.13 of the Interconnect Regulation, 2007. His contention is that after having signed the agreement, the Petitioner/ Applicant is now trying to shift the goal posts.

5. We have carefully considered the matter. For purpose of convenience, clauses 13.2A.11, 13.2A.12 and 13.2A.13 of the Interconnect Regulation, 2007 are extracted below:-

6. It is clear from the above that these clauses make it mandatory for broadcasters to offer pay channels on à la carte basis to all DTH operators; that the sum of the à la carte rates of pay channels shall in no case exceed one and a half times the rate of that bouquet. Clause 13.2A.13 gives freedom to the DTH operator to re-package the channels but the payment shall be calculated on the basis of the subscriber base for the channel which has the highest subscriber base among the channels comprised in that bouquet.

7. While the counsel for Petitioner states that the Petitioner wants 11 of the 15 channels on à la carte basis, in its letters to the Respondent as well as in the affidavit, the Petitioner had indicated that it wanted *all the channels* of Respondent on à la carte basis. The bone of contention between the counsel for Petitioner and counsel for Respondent is that the former states that having opted for 11 channels, the payment is guided by clause 13.2A.12 whereas the latter states that clause 13.2A.13 applies. According to the counsel for Respondent, this is exactly what the Tribunal had ordered on 1.10.2008. Para 16 of the judgement dated 1.10.2008 reads as follows:-

“16. Another submission made by the counsel for Respondent during the course of arguments is that the petition is receiving the SET MAX channel at Rs. 8.50 per subscriber per month but that he is charging at the rate of Rs. 20 per month from a subscriber and in the process profiteering at the expense of Respondent. The counsel for Petitioner points out that he is entitled to do so under the regulations and that he will abide by the provisions of the interconnection regulations no. 9 of 2007. Clause 13.2A.13 of the telecommunications (broadcasting and cable services) interconnection (fourth Amendment) regulations, 2007 (no. 9 of 2007) reads as follows:

“... every direct to home operator ... may decide the packaging of the channels from such bouquet or bouquets which may be offered by it to its direct to home subscribers: ... (a) ... (b) packages the channels comprised in such opted bouquet in a manner resulting in different subscriber base for different channels comprised in such opted bouquet, then, the payment, to the broadcaster for such entire opted bouquet by the direct to home operator, shall be calculated on the basis of the subscriber base for the channels which has the highest the channels comprised in that bouquet”.

It is therefore clear that the Petitioner is entitled to receive a channel/channels of his choice from the Respondent and position them in the manner of his choice but at the same time he is obliged to pay to the broadcaster as per clause 13.2A.13 of the Telecommunications (Broadcasting and Cable Services) Interconnection (Fourth Amendment) Regulations, 2007.”

8. In our view, if the Petitioner had any difficulty with this Order, it should have filed a review petition. It had not done so. It had sought from the Respondent *all the channels* on à la carte basis, which is what has been incorporated in the Annexure ‘B’ of the Term Sheet dated 9.1.2009 which was signed between both the parties. While the contention of the counsel for Petitioner is that the Term Sheet was signed without prejudice to their rights and contentions and subject to the outcome of the order in Petition No. 62(C)/2008 before this Tribunal, this in our view is not very relevant. Clauses 9 and 11.3 of the Term Sheet read as follows:

9. A-La-Carte Rates of Channels

“The à la carte rates of channels shall be as provided in Annexure-B hereto, as modified from time to time.”

XXX XXXX XXXXX XXXXXX

11.3 “Average Number of Subscribers” means the average number of Subscribers for a month calculated by dividing (i) the sum of (A) the total number of Subscribers on the first day of such month and (B) the total number of subscribers on the last day of such month by (ii) two. For purposes of calculating the Average Number of Subscribers, the number of Subscribers in a multi-unit dwelling and which is billed on a bulk single rate basis shall be equal to the number of individual units in such dwelling and which is billed on a bulk single rate basis shall be equal to the number of individual units in such dwelling. The subscriber base of the Channel having the highest subscriber base in the Operator’s platform shall form the basis for the purposes of calculating the Average number of Subscribers for all the Channels, in terms of Clause 13.2A.13 of The Telecommunication (Broadcasting and Cable Services) Interconnection (Fourth Amendment) Regulation, 2007 dated 3rd September, 2007 vide the Judgement of the Hon’ble TDSAT dated 1.10.2008.” (emphasis supplied).

9. Annexure 'B' of the Term Sheet lists all the 15 channels offered as a bouquet by the Respondent in the RIO. There is no mention of 11 channels either in the pleadings or in the Term Sheet handed over by the counsel for Petitioner today. What the Petitioner is doing then is seeking all the channels of the bouquet but on à la carte basis. The question is which of the clauses is relevant for determining the amount payable for the channels by the DTH operator to the broadcaster. It needs to be examined whether, as contended by the learned counsel for the Petitioner, there is really a dichotomy between clauses 13.2A.12 and 13.2A.13 of the Interconnect Regulation, 2007.

10. It would be useful to refer ourselves to the Explanatory Memorandum accompanying the Interconnect Regulation, 2007, which explains the objects and reasons of the Regulation. The Memorandum states that the objective in providing the à la carte choice is that DTH operators should not be forced to take all the channels of every broadcaster. It also refers to the judgement of this Tribunal in Petition No. 189 (C) of 2006 in the case of Tata Sky Limited versus Zee Turner Limited and others wherein this Tribunal held that forcing a DTH operator to take all channels of every broadcaster would increase the cost for DTH operator and also to the consumer and that it would be anti-consumer. This Tribunal was also of the view that such obligation would exhaust the transponder capacity of the DTH operator, which may not be in its business interest. The Explanatory Memorandum states that taking these and other aspects into consideration, the Telecom Regulatory Authority of India (**TRAI**) felt that provision of channels on à la carte basis also necessitates the need for regulating the relationship between the price of channels on à la carte basis and bouquet prices. Accordingly, clause 13.2A.12 was formulated to ensure that while offering the channels à la carte, the broadcaster does not price it in such a way that a DTH operator really has no choice. As indicated in the

Explanatory Memorandum, the provisions of Clause 13.2A.12 is for “regulating the relationship between the prices of channels on à la carte basis and bouquet prices so to ensure that the à la carte choice of channels does not become illusory on account of perverse pricing of channels and bouquet of channels.”The TRAI wanted, at the same time, to protect the interests of the broadcasters by mandating that the highest subscriber base for any channel in a bouquet shall be the basis for payment to the broadcaster for the entire bouquet. This is what is stipulated in clause 13.2A.13.

11. It is against this background that Clauses 13.2A.11, 13.2A.12 and 13.2A.13 have to be read harmoniously. It is clear that while clause 13.2A.12 is to protect the interests of the DTH operators, clause 13.2A.13 is to protect the interests of the broadcasters. While the former determines the pricing of each channel, the latter clearly stipulates that in the event the DTH operator in turn bundles the channels into its own bouquets, the highest subscriber base for any channel in the bouquet, offered by the DTH operator, shall be the basis for payment to the broadcaster for the entire bouquet. In our view, the term bouquet here includes the channels which are part of the bouquet. If clause 13.2A.13 is to be interpreted only to refer to an entire bouquet, there is no other clause dealing with the basis for payment to the broadcaster, for channels which are picked up on à la carte basis out of the bouquet offered by the broadcaster and which are then repackaged by the DTH operator. A reading of the three clauses clearly shows that while clause 13.2A.11 offers the à la carte choice to the DTH operator, clause 13.2A.12 prescribes a ceiling on the pricing of each such channel. On the other hand, clause 13.2A.13 deals with the manner of paying to the broadcaster if such channels or even the entire bouquet are /is repackaged by the DTH operator, bundled into operator’s own bouquets and so offered by the DTH operator to its customers. In our view, it does not matter whether the channels of the broadcaster so picked up on à la carte basis and bundled by the DTH operator constitute part or whole of

the broadcaster's bouquet. In fact, the very purpose of providing à la carte choice is that the DTH operator would pick up part of the bouquet.

12. As indicated by us above, there is nothing in the pleadings or in the Term Sheet to show that the Petitioner/Applicant sought only 11 channels. Even if it were so, it would not make any difference. The exercise of choice by the Petitioner, in this case, to take all channels of bouquet, but on à la carte basis, appears to be singularly exceptional. This is particularly so when we note that the cost of channels indicated in Annexure 'B' of the Term Sheet works out to Rs. 67.95 per subscriber per month whereas the cost of the entire bouquet itself is Rs.67 per subscriber per month, as indicated in the RIO. In other words, the choice of all channels, à la carte, by the Petitioner appears to be not with the intention to choose only some of the channels of the Respondent but to take all of them on à la carte basis and re-package them in such a way as to minimise the payment to the Respondent. This surely is not the way the regulations are framed or are intended.

13. In our view, the choice of all channels in the bouquet, on à la carte basis, is not what is intended by the regulations and we accordingly hold that if an operator desires to take channels on à la carte basis, it can only be for some, but not for all channels that are offered in a bouquet. It is not necessary to stipulate the number of such channels as long as it is less than all the channels in the bouquet. But, in so far as payment by the DTH operator to the broadcaster is concerned, it is unequivocal that the provisions of clause 13.2A.13 shall apply irrespective of whether the entire bouquet is taken or whether some channels of the bouquet are opted for on à la carte basis. We do not agree with the contention of the learned counsel for Petitioner/Applicant that the provisions of this clause shall apply only where one or more entire bouquets are opted for.

14. We accordingly reiterate the direction in Para 16 of our judgement dated 1.10.2008 in petition no. 62 (C) of 2008 that while the Petitioner/Applicant is free to repack the channels received from the broadcaster, it is obliged to pay to the broadcaster as per clause 13.2A.13 of the Telecommunication (Broadcasting and Cable Services) Interconnection (Fourth Amendment) Regulation, 2007 (9 of 2007).

15. M.A no. 158 of 2008 in Petition no. 62 (C) of 2008 is accordingly disposed of. No costs.

.....**J**
(Arun Kumar)
Chairperson

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(J. S. Sarma)
Member

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(G. D. Gaiha)
Member