

IN THE HIGH COURT OF KERALA AT ERNAKULAM

Present:

THE HONOURABLE MRS. JUSTICE ANU SIVARAMAN

Monday, the 9th day of March 2020/19th Phalgun, 1941

WP(C) No.2879/2020(H)

PETITIONERS

1. ALL INDIA DIGITAL CABLE FEDERATION,
236 OKHLA INDUSTRIAL ESTATE PHASE-III NEW DELHI 110 020, INDIA
REPRESENTED BY ITS SECRETARY GENERAL MANOJ PRAKASH CHHANGANI
2. KERALA COMMUNICATIONS CABLE LTD,
1ST FLOOR, 142-H1 AM COA BHAVAN, THOUNDAYIL ROAD, PANAMPILLY NAGAR,
ERNAKULAM 682 036, KERALA REPRESENTED BY ITS MANAGING DIRECTOR
MR. SURESH KUMAR P.P

RESPONDENT

TELECOM REGULATORY AUTHORITY OF INDIA,
MAHANAGAR DOORSANCHAR BHAWAN, JAWAHARLAL NEHRU MARG (OLD MINTO ROAD) NEW
DELHI 110 002, INDIA REPRESENTED BY ITS SECRETARY.

Writ Petition (civil) praying inter alia that in the circumstances stated in the affidavit filed along with the WP(C) the High Court be pleased to

1. stay operation of Regulation 4(3), Regulation 4(8) r/w Schedule VIII, amended second proviso to Regulation 8(2) and amended Regulation 18(4) of Exhibit P1 Telecommunication (Broadcasting and Cable) Services Interconnection (Addressable Systems) (Second Amendment) Regulations, 2020 dated 01-01-2020 issued by the Respondent and Regulation 4(1) of Exhibit P2 Telecommunication (Broadcasting and Cable) Services (Eight) (Addressable Systems) Tariff (Second Amendment) Order, 2020 dated 01-01-2020 issued by the Respondent, Or
2. Stay all further proceedings initiated by the Respondent seeking enforcement of Regulation 4(3), Regulation 4(8) r/w Schedule VIII, amended second proviso to Regulation 8(2) and amended Regulation 18(4) of Exhibit P1 Telecommunication (Broadcasting and Cable) Services Interconnection (Addressable Systems) (Second Amendment) Regulations, 2020 dated 01-01-2020 issued by the Respondent and Regulation 4(1) of Exhibit P2 Telecommunication (Broadcasting and Cable) Services (Eight) (Addressable Systems) Tariff (Second Amendment) Order, 2020 dated 01-01-2020 issued by the Respondent, pending disposal of this Writ Petition (Civil).

This petition again coming on for orders upon perusing the petition and the affidavit filed in support of WP(C) and this court's order dated 18-02-20 and upon hearing the arguments of SRI.JAYANT MEHTA(B/O),M/S M.GOPIKRISHNAN NAMBIAR, JAI MOHAN, JOSON MANAVALAN, K.JOHN MATHAI, KURYAN THOMAS, PAULOSE C. ABRAHAM, Advocates for the petitioner, SRI.SAKET SINGH (B/O), ASSISTANT SOLICITOR GENERAL OF INDIA & SRI.MANU SRINATH, Advocates for respondent, the court passed the following:

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ANU SIVARAMAN, J.

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Dated this the 9th day of March, 2020

ORDER

1. This writ petition is filed seeking the following prayer :-

“Issue a writ, direction or order in the nature of mandamus or any other writ. order or direction quashing and setting aside Regulation 4(3), Regulation 4(8) r/w Schedule VIII, amended second proviso to Regulation 8(2) and amended Regulation 18(4) of Exhibit P 1 Telecommunication (Broadcasting and Cable) Services Interconnection (Addressable Systems (Second Amendment) Regulations. 2020 dated 01.01.2020 issued by the Respondent and Regulation 4(1) of Exhibit P2 Telecommunication (Broadcasting and Cable) Services (Eight) (Addressable Systems) Tariff (Second Amendment) Order, 2020 dated 01.01.2020 issued by the Respondent;

2. Heard Sri.Jayant Mehta, the learned counsel appearing for the petitioners and Sri.Saket Singh, the learned counsel appearing for the respondent.

3. The challenges raised to the amended Regulations and the Tariff Order in this writ petition are essentially the following :

4. The first one, the amendment to Regulation 18(4) of the 2017 Regulation, is the provision which directs that logical channel

number allotted to a channel shall not be changed without the prior permission of the Telecom Regulatory Authority of India (for short TRAI). The said amendment is challenged on the ground that it violates the freedom of trade guaranteed to the petitioners under Article 19(1)(g) of the Constitution that it impinges the right to property under Article 300A of the Constitution and it suffers from the vice of arbitrariness and irrationality, thus violating Article 14 of the Constitution. It is also contended that the said amendment is beyond the jurisdiction of the TRAI since placement is outside the purview of interconnection and therefore, outside the jurisdiction of the TRAI.

5. The second challenge is that the impugned Tariff Order reduces the Network Capacity Fee and provides absolute limits thereon without any proper consultation being carried out. It is contended that this provision is also an arbitrary fetter on the freedom of trade and that it is irrational since the amount fixed is less than the computed cost of carrying of the number of channels. It is stated that the consultation paper did not have any proposal for fixing of a cap on the NCF and therefore it is patently illegal. It is further submitted that the Tariff Order, 2017 became

effective on 01.02.2019 and there is no circumstance for the TRAI to undertake a substantial downward revision within less than 11 months.

6. It is stated that the impugned Tariff Order provides for mandatory discounting of net work capacity fee for Multi TV homes and provides that only 40% of the standard NCF can be charged for additional connections in Multi TV homes. It is contended that such mandatory discounting has no rational basis and is based on vague definition of Multi TV homes which is susceptible to rampant misuse. It is further contended that the said issue was also not properly put to consultation and that as such, the change effected without any relevant data on the point is completely irrational.

7. It is stated that limiting, by amendment of Regulation 4(3) of marketing area of a DPO to a single State or Union territory and the limitation, without any consultation, of a discontinuation threshold is also violative of the rights of the DPOs and is not informed by any data or any proper consultation on the point. It is contended that the arbitrary method provided under the

amended Regulation 4(8) for calculation of discontinuation threshold forces DPOs to carry channels which have little circulation thus placing a fetter on the freedom of trade. It is further submitted that the delimitation of target market is not made applicable to DTH operators in respect of whom alone, mention was made in the proposal.

8. The fixation of maximum carriage fee irrespective of number of subscribers in respect of SD and HD channels is also challenged on the ground of lack of proper consultation.

9. The essential contention of the learned Senior Counsel appearing for the petitioners is that the impugned Regulations which restrict to the freedom of trade guaranteed to the petitioners under Article 19(1)(g) of the Constitution of India suffer from vice of arbitrariness and irrationality and are thus violative of Article 14 of the Constitution of India. It is stated that the impugned Regulations in so far as they relate to the placement of the channels and the lock-in of order of placement in perpetuity are beyond the jurisdiction of the TRAI. While regulating interconnections, the TRAI is bound to function within its

jurisdiction. It is further submitted that the impugned regulations are vitiated in as much as they have been introduced without proper consultation and are therefore violative of the provisions of the Act. It is contended that the effect of the impugned amendments carried out in the Regulations and in the Tariff Order is intended to regulate the capital investment, rate of return and amount of profits of DPOs and is a clear incursion into the freedom of contract which is not contemplated by the TRAI Act.

10. With regard to the placement of channels and the lock-in of the Logical Channel Number (LCN for short), it is contended that the Telecommunication (Broadcasting and Cable) Services Interconnection (Addressable Systems) Regulations, 2017 provided at Regulation 18(2) and 18(4) as follows:-

"18. Listing of channels in electronic programme guide:-

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(2) It shall be mandatory for the distributor to place channels in the electronic programme guide, in such a way that the television channels of same genre, as declared by the broadcasters, are placed together consecutively and one channel shall appear at one place only:

Provided that all television channels of same language within

the same genre shall appear together consecutively in the electronic programme guide:

Provided further that it shall be permissible to the distributor to place a channel under sub-genre within the genre declared for the channel by the broadcaster.

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(4)The channel number once assigned to a particular television channel shall not be altered by the distributor for a period of at least one year from the date of such assignment:

Provided that this sub-regulation shall not apply in case the channel becomes unavailable on the distribution network:

Provided further that if a broadcaster changes the genre of a channel then the channel number assigned to that particular television channel shall be changed to place such channel together with the channels of new genre in the electronic program guide. "

11.It is stated that the consultation paper dated 25.9.2019 for the impugned Regulations only provided that representations had been received from broadcasters that Distribution Platform Operators (DPO for short) are requiring them to sign placement deals *de hors* the interconnection agreements and it is put to consideration as to whether there should be a frame-work for regulating interconnection agreement for placement. It is stated that there was no consultation or proposal for perpetual lock-in for LCN in the Consultation Paper and that as such, the provision

for seeking permission for a change in LCN number from the TRAI is completely vitiated for want of proper consultation. It is further submitted that there is absolutely no criteria provided based on which the TRAI would be required to consider any such request for change in LCN number and that therefore it leads to arbitrary exercise of power by statutory authority which is impermissible in law. It is stated that the real purpose and effect of the impugned Regulations is to completely eliminate placement, which is not a part of the regulatory exercise which the TRAI can attempt in terms of the Act.

12. The learned Senior Counsel for the petitioners relies on the judgment of the TDSAT to contend that interconnection does not amount to placement. The decision of the **COAI v. TRAI** [AIR 2016 SC 2336] is relied on to contend that a subordinate legislation is also liable to be tested on the count of reasonableness of the restriction and that consultation, to be meaningful, should be a full and open consultation. The decisions of the Apex Court in **Shri.Sitaram Sugars and others v. Union of India** [(1990) 3 SCC 223] and **Bennet Coleman and others v. Union of India** [(1972) 2 SCC 788] are also relied on to

contend that where a delegated legislation is issued in excess of jurisdiction or is arbitrary and unreasonable, the power of judicial review is available as against the same. With regard to the cap on NCF and carriage fees and discontinuation threshold as also the discontinuance of NCF for Multi-TV homes, the learned Senior Counsel contends that though those issues were within the regulatory power of the TRAI, there was no proper consultation in respect of such matters and no data was either available with the TRAI or relied on in support of the decisions.

13. Sri.Saket Singh, the learned Senior Counsel appearing for the TRAI would submit that the decision of the Apex Court in **Star India Pvt. Ltd v. Vijay Television Pvt. Ltd** [2018 SCC Online Mad 1595] is authority on the point that the jurisdiction of TRAI is to be considered in terms of Section 36 of the Act read with the amended preamble thereto and the power is not circumscribed by any other provisions including section 11. It is contended that all aspects of interconnection between service providers is liable to be considered by the TRAI and that in view of the fact that the entire matter was placed for consultation and in the absence of the petitioner producing any reliable data to show that the

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regulations are bad in any manner, this Court would not be justified in interfering with an exercise undertaken by the TRAI within its jurisdiction. It is further contended that a reading of the consultation papers with the explanatory note would make it clear that all the requirements of a transparent and proper consultation had been carried out and that the challenge raised by the petitioners after participating in such consultation at a time when the regulations are due to be rolled out is completely unwarranted. It is contended that if there are any problems noticed in the functioning of the Regulations after the roll out, the issues will be appropriately dealt with by the TRAI and no prejudice will be caused to the petitioners. It is further submitted that similar writ petitions have been attempted before other High Courts but no interim orders have been issued.

14. The TRAI Act is an Act to provide for the establishment of the TRAI and the TDSAT to regulate the telecommunication services, adjudicate disputes, dispose of appeals and to protect the interest of the service providers and consumers of the telecom sector, to promote and ensure orderly growth of the telecom sector and for matters connected therewith or incidental thereto. The Central

Government vide notification dated 9.1.2004 has notified broadcasting services and cable services to be telecommunication services. Section 36 of the TRAI Act provides that the authority may, by notification, make regulations consistent with this Act and the Rules made thereunder to carry out the purposes of this Act. Section 11(b)(i) to (ix) provides for the functions of the Authority. Section 11(c) provides for levy of fees and other charges at such rates and in respect of such services as may be determined by regulations. Section 12 provides powers of the Authority to call for information, conduct investigations, etc.

15. On a consideration of the statutory provisions, I notice that the role of the TRAI is that of a regulator. The TRAI is expected in terms of the Act to protect the interest of the service providers and consumers of the telecom sector (inclusive of the broadcasting sector in view of the notification) to promote and ensure its orderly growth and for matters connected therewith or incidental thereto. Regulation and fixation of prices, though perfectly competent under the provisions of the Act obviously cannot extend to deny of the fundamental right of any service provider in terms of Article 19(1)(g) of the Constitution of India.

The Apex Court in **COAI v. TRAI** (*supra*) has clearly held that a law restricting a right under Article 19(1)(g) has to pass the dual tests of being in public interest and being reasonable. It was held that the motive behind the framing of a regulation cannot make it immune to a challenge on the ground of violation of fundamental rights. It was also held that to justify the imposition of a regulation which tends to restrict the rights under Article 19(1)(g) the consultation process must be shown to be transparent and meaningful. Though a reasonable restriction on the fundamental right to carry on trade or business is permissible in terms of Article 19(6) of the Constitution, it is amply clear that any such restriction would have to answer the test of fairness and reasonableness. In view of the fact that the express language of the statute itself calls for a transparent consultative process, I am of the opinion that the respondent has to show that the consultative process with regard to the imposition of a limitation of change in the placement of channels without the prior permission of the TRAI was clear and meaningful and that the restriction has been imposed after considering the objections of the affected parties specifically on the point. From a consideration of the consultation papers and the explanatory

memoranda, I am unable to find a specific proposal having been mooted with regard to the requirement for a prior permission to change the placement of a channel. Further more, I notice that no indications of any criteria for the consideration of the request for change of channels has also been framed. The impression which can be gathered from the consultation papers and the explanatory memoranda is that the purpose sought to be achieved is the elimination of the concept of placement fee. This, without a dispute, would amount to an incursion into the right of the DPO and would affect its revenue earning capacity. Even if the contention of the respondent that placement is also a matter which can be regulated by the TRAI under the powers available to it under Section 36 of the Act is accepted, I am of the opinion that a decision which tends to restrict the right to carry on a trade or business would have to be informed by a clear and transparent consultative process. In the absence of which, such an incursion would not be permissible.

16. With regard to the issue of imposing a cap on the NCF and the reduction in discontinuation threshold and in respect of second connections in Multi TV households, the contention of the

petitioners is that the same was not informed by a due consultative process. However, it was vehemently argued by the learned Senior Counsel appearing for the TRAI that all available data including those placed on record by the petitioners and other DPOs had been specifically taken note of and that in case of any difficulties arising in the rolling out of the Tariff Orders and the Regulations, the complaints raised by the petitioners and other service providers will also be taken due note of and steps for rectification thereof will be issued. Ext.P1 and the explanatory memorandum appended thereto would show that there were discussions as to the need for the amendments and the views of the participants have been taken note of. It is further contended that the action of the petitioners in having rushed to the court without waiting to see how the impugned amendments impacted the situation and whether such amendments would be detrimental to any of their rights was completely unwarranted. It is contended that in case any illegalities are noted during the roll out and implementation of the amendments in the Regulations and in the Tariff Order, the same will be properly redressed by the respondent, which is duty bound to do so in terms of the Act.

17. I find that with regard to the question of placement, the very jurisdiction of the TRAI has been challenged. The question whether placement is part of interconnection and can be regulated by TRAI is said to be pending before the Apex Court. Moreover, the explanatory memorandum would show that what was put for discussion was sequencing of channels in the Electronic Program Guide (EPG). The question of freezing of placements and the embargo as to change of placements without the prior permission of the TRAI does not appear to be a question which was put to consultation at all. Moreover, there are no guidelines as to how applications for permission to change the LCN will be dealt with by the TRAI. Even if it is admitted for the purpose of this order that the TRAI has jurisdiction under Section 36, it is apparent that the proposals with regard to the freezing of placement of a channel in perpetuity and permission for change being imposed was not preceded by any specific consultation on the said question.

18. In the above view of the matter, the amended provision in Regulation 18(4) of the Principal Regulation 2017 shall stand stayed. With regard to the other impugned provisions, the

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petitioners are permitted to file a detailed representation before the TRAI pointing out the objections to the amendments producing all relevant data which will be duly considered by the TRAI and appropriate remedial steps shall be taken after due consultation with all stake holders as required by law. Till such time, the provisions except the provision with regard to freezing of the placement of channels in perpetuity shall be permitted to be operated.

Post for completion of pleadings after a month.

Sd/- ANU SIVARAMAN, JUDGE

sj/jvt

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ASSISTANT REGISTRAR

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