

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

13th August, 2008

Petition No.114(C) of 2008

1. Wire and Wireless(India) Ltd.
B 10, Lawrence Road Industrial Area
New Delhi – 110 035

 2. Dish TV India Limited
FC 19, Sector – 16A
Noida
-Petitioners

Versus

1. Star Den Media Services (P) Ltd.
205, Okhla Industrial Estate
Phase – III, New Delhi

 2. Star India Pvt. Ltd.
205, Okhla Industrial Estate
Phase – III, New Delhi
- ...Respondents

And

Petition No.115(C) of 2008

1. Wire and Wireless(India) Ltd.
B 10, Lawrence Road Industrial Area
New Delhi – 110 035

 2. Dish TV India Limited
FC 19, Sector – 16A
Noida
-Petitioners

Versus

1. MSM Discovery Pvt. Ltd.
Interface Building No.7, 3rd Floor
Malad Link Road, Malad West
Mumbai – 400 064

2. SET Discovery Private Limited
Interface Building No.7, 3rd Floor
Malad Link Road, Malad West
Mumbai – 400 064

BEFORE:

HON'BLE MR.JUSTICE ARUN KUMAR, CHAIRPERSON

For Petitioners : Mr.Maninder Singh, Advocate
Mr.Yoginder Handoo, Advocate
Mr.Kunal Sood, Advocate

For Respondent : Mr.C.S.Vaidyanathan, Sr.Advocate
Mr.Ramji Srinivasan, Sr.Advocate
Ms.Mamta Tiwari, Advocate
Mr.Prateek Kumar, Advocate

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ORDER

This order will dispose of these two petitions. I had directed that the matter be listed for hearing regarding prayer of petitioner for interim relief. However, at the commencement of hearing counsel for both parties stated that the arguments for purposes of interim relief as well as for final disposal will be the same and, therefore, the matter be considered for final disposal. Accordingly, I have heard the matter fully and I propose to dispose of the same.

Petitioner No.2 holds a licence for distribution of signals of TV channels through HITS (Headend-In-The-Sky) platform granted by the Government of India. The petitioner No.1 is a Multi-System Operator (MSO). Both the petitioners are companies belonging to the same group. The prayer in the petition is for direction to respondents to make available to the petitioners activated decoders/viewing cards forthwith for receiving signals of the channels available with the respondents on non-discriminatory basis for distribution on the HITS platform of petitioners. It is submitted that petitioner No.1 is a Multi System Operator and is supplying various Free-to-Air channels and Pay channels to subscribers through its distribution network and cable operators throughout the country. Petitioner No.1 is an existing affiliate of the respondents and is availing

the signals of various Free-to-Air channels and pay channels available with respondent No.1 for onward transmission in various parts of the country. This applies to both CAS and non-CAS areas.

Petitioner No.2 i.e. M/s Dish TV India Ltd. was earlier known as ASC Enterprises Ltd. The HITS licence in C-Band frequency was granted to the petitioner by Ministry I & B on 9th July, 2003. According to the petitioners HITS is a system which besides ensuring choice to the customer to opt for only the channels that he wishes to watch and to pay accordingly, also brings in transparency in the system by capturing the actual number of subscribers having the channels through Subscribers Management Service (SMS). In pursuance to the licence granted to it the petitioner No.2 is said to have set up the necessary infrastructure for providing HITS service in India. Petitioner No.2 is the first HITS licensee in the country. It is stated in the petition that petitioner No.1 and petitioner No.2 have entered into an arrangement/tie-up in pursuance of which they are in the process of launching the HITS service for the benefit of consumers. The petitioners further say that all necessary formalities have been completed for providing HITS services including grant of Government clearances. Reference has been particularly invited to Ministry of I & B's letter dated 28.03.2008 addressed to petitioner No.2 wherein permission has been given for change of satellite from INSAT-3A to NSS-703 and ASIASAT-4S hired through Department of Space to operationalise their HITS platform. This permission is further subject to the petitioner complying with its undertaking furnished to the Government on 21st February, 2008 for migration to the new HITS guidelines and fulfillment of all terms and conditions of new guidelines within a period of three months from the date of notification of the guidelines. The Government has to issue guidelines regarding the HITS operations either separately or by amendment of the existing guidelines. There was delay on the part of the Government in doing so and, therefore, the Government had sought an undertaking from the petitioner No.2 before permitting it to operationalise its HITS licence. The undertaking was to the effect that as and when the fresh guidelines were issued, within three months the petitioner will fulfill all terms and conditions of the guidelines and fall in line with them. The petitioner has already submitted its undertaking as

is apparent from Ministry of I&B's letter dated 28.03.2008 under reference. This letter further contains condition that the HITS licensee would uplink only those TV channels which have been permitted/registered under uplinking/downlinking guidelines for downlinking into India. This letter is heavily relied upon by the petitioners to urge that they have got all the clearances for going ahead in operationalising their HITS platform and the respondents are bound to provide the channels under their umbrella on a non-discriminatory basis. The petitioners say that they have approached the respondents/content providers in this behalf, however, this has been without any success.

It is disclosed by the petitioners in the petition that Respondent No.1 is an agent of 17 channels of various broadcasters. Respondent No.2 is the broadcaster i.e. the content provider with respect to most of these 17 channels. According to the petitioners, the respondents are withholding their channels from the petitioners without any valid reason. They are obliged to provide the signals as per statutory regulations framed by the Telecom Regulatory Authority of India (TRAI). The petitioners submit that they have made repeated requests to the respondents to provide their channels for re-transmission on the HITS platform.

In most parts of this country the distribution of TV channels, both Free-to-Air and Pay channels, is through Multi-System Operators(MSOs) and Cable Operators (COs). The cable operator is providing channels to the consumers on a lump sum basis in which consumers have no choice of channels or option of payment as per the number of channels which a consumer wants to watch. The cable operator works on an analogue cable network which can carry at the most upto 60 to 65 channels. The picture quality is poor. Besides this, the biggest menace in the existing system of cable operator is under-declaration. It is not an addressable system and, therefore, there is a constant dispute between the broadcaster and the MSO or the MSO and cable operators about the number of subscribers. In the HITS technology the biggest disadvantages of cable operator system i.e. under-declaration and capacity constraint are eliminated. Subscriber Management

System (SMS) which is there in the DTH technology also is an addressable system and takes care of the problem of under-declaration completely.

Like DTH, CAS is also a completely addressable system. Set-top boxes are provided to the consumers by the cable operator. The consumer is able to choose the channel he wants to watch and pays accordingly. This ensures complete addressability. However, in CAS the Government has to issue notification for notifying areas where CAS is to be made applicable. In the HITS technology the advantage is that one does not have to wait for Government notification while all the advantages of an addressable system are available. In the HITS technology signals are made available by the broadcaster/MSO to the cable operators/subscribers through an addressable system. The subscriber receives the signals only after having a set-top box available to it and is required to pay for the signals of channels received in the same manner in which there transmission is provided to the subscribers in a CAS area. The petitioner has stated in this petition that “Headend-In-The-Sky (HITS) is one such mode which confers benefits of wider reach even in far-flung and rural areas and also ensure digital delivery in most effective and economical manner. With HITS technology, the digitization and addressability can be achieved throughout the country at one stroke and with an investment far lower than what is needed to establish terrestrial digital headends in each city. Selecting HITS based delivery technology paves way for uniform delivery of signals countrywide with high flexibility and low cost per headend. It also provides for easy migration of customers from city to city as well as protection of investment in Customer Premises Equipment(CPE).

The TRAI recommended early implementation of HITS in view of its distinct advantages.

The petitioner has placed reliance on Regulation 3.2 of the Telecommunication (Broadcasting & Cable Services) Interconnection Regulation 2004 to submit that the respondents are bound to supply signals to the petitioners on a non-discriminatory basis. Regulation 3.2 is quoted as under:

“3.2 Every broadcaster shall provide on request signals of its TV channels on non-discriminatory terms to all distributors of TV channels, which may include, but be not limited to a cable operator, direct to home operator, multi system operator, head ends in the sky operator; Multi system operators shall also on request re-transmit signals received from a broadcaster, on a non-discriminatory basis to cable operators.

Provided that this provision shall not apply in the case of a distributor of TV channels having defaulted in payment.

Provided further that any imposition of terms which are unreasonable shall be deemed to constitute a denial of request.”

The petitioner has stated that despite numerous communications and meetings with the officials of the respondents the petitioners have not been able to succeed in receiving signals which are under the umbrella of the respondents. Copies of various letters written by the petitioners to the respondents in this behalf and the replies thereto by the respondents have been placed on record.

In this connection the recommendations of the Telecom Regulatory Authority of India (TRAI) on the issue of allowing existing HITS permission holders to operate under the new licensing framework have relevance and, therefore, portions thereof are quoted as under:

“1. M/s ASC Enterprises (at present M/s Dish TV) and M/s Noida Software Technology Park Ltd. (M/s NSTPL) were granted permission in 2003 for HITS operations using teleport facility. M/s Dish TV had reportedly launched its HITS service in August, 2003. Later, because implementation of CAS was deferred, M/s Dish TV reportedly surrendered the satellite transponder capacity. M/s NSTPL had received the permission for HITS service in 2003 but reportedly did not start the HITS service.

2.these permission holders are presently having valid permission to run HITS service over their teleport and neither of them is at present operating HITS service. M/s Dish TV claims to be in a state of readiness to start operations and has sought permission from the Government for change of satellite to start HITS operation.

3. To ensure digitization and addressability in the cable sector and to ensure greater competition it is desirable that these permission holders should be allowed to provide the HITS operation on the existing guidelines terms and conditions, till at least such time that the terms and conditions of HITS license are notified by the Government of India. Thereafter, the two existing permission holders should be encouraged to migrate to the new licensing regime of HITS within a specified time frame. Therefore, the Authority recommends as follows:

(i)

(ii) However, the existing HITS permission holders will be allowed to commence the HITS operation on the basis of their existing HITS permission provided they give an undertaking to the effect that they shall migrate to the new HITS licensing regime within a period of three months from the date of notification of the new HITS licensing framework by fulfilling of the terms and conditions of the new license and that in the event of their failure to do so after having given such an undertaking their existing HITS permission shall be liable to be cancelled.”

It is noted in the said recommendations that M/s Dish TV gave a letter dated 5th February, 2008 regarding their willingness to migrate to the new licensing regime within the stipulated period.

In the context of TRAI's recommendations regarding HITS, Ministry of I&B vide its letter dated 21st January, 2008 enquired from the TRAI as to whether M/s Dish TV be allowed to start operations or not and if so, on what terms and conditions. In reply vide its letter dated 15th February, 2008 addressed to the Secretary, Ministry of I&B, TRAI stated as under:

“As regards the issue of existing HITS permission holders, the Authority is of the opinion that for faster roll out of digitalization and Conditional Access System in cable sector it is essential to have a framework for these permission holders to operate and to migrate to the new licensing regime of HITS, as and when these are notified by the Government. The recommendations of the Authority in this regard are enclosed at Annexure to this letter.”

I have already made reference to the recommendations of the TRAI which are annexed with this letter.

After this the Ministry of I&B allowed petitioner’s request for change of satellite vide its letter dated 28th March, 2008. Thus, the petitioner says it is ready to launch its HITS operations. In fact, the petitioners have made a grievance that they have incurred heavy expenses on creating the infrastructure for launch of their HITS platform and on account of delay in supply of the signals by the respondents, petitioners are suffering heavy losses.

It is the case of the petitioners that they have been approaching the respondents for supply of their signals since November, 2005. They have placed copies of correspondence exchanged between the parties in this behalf. In some of the letters the petitioners have asked the respondents to give their commercial and other terms for making available their channels on the HITS platform of the petitioners. As late as 20th May, 2008 the petitioners wrote to the respondents that in spite of repeated requests there was no meaningful response from their side regarding supply of signals to the petitioners and the commercial terms for the same. Further reference has been made to various meetings which took place between the parties to negotiate regarding supply of signals by the respondents to petitioners. A specific reference has been made to meetings between Mr.Gurjeev Singh and Mr.Mujeeb of the respondent and Mr.A.Mohan and Mr.Rajiv Khattar of the petitioners on April 4, 2008 in Mumbai and again on 9th May, 2008 in Noida. However, nothing

materialized out of the said meetings. It is significant to note that neither in the replies to petitioners' letters nor in the meetings held between parties there has been denial on the part of respondents to supply signals to petitioners. Equally significant is the fact that no objection has been raised that right person has not approached for supply of signals. Still the fact remains that respondents are not willing to supply signals to petitioners. They have raised several objections to any relief being granted to petitioners in this petition.

One of the questions raised is about the basis on which petitioners will pay to respondents in the event of order for supply of signals being passed. On the question of tariff, the petitioners suggest that as an interim measure the tariff approved by TRAI for CAS areas may be applied till the TRAI comes forward with specific tariffs applicable to HITS platform. To draw a parallel in this behalf it is stated that re-transmission of signals of TV channels under HITS technology through the set-top box is on Subscriber Management System (SMS) which is also present in the CAS areas. Accordingly, it is submitted that rates for individual Pay channels on *a la carte* basis which the TRAI has applied for CAS areas, be applied in case of HITS.

In the background of these facts the petitioners sent a detailed communication dated 13th May, 2008 to respondent No.1 recapitulating the entire course of events and repeating their request for supply of signals of channels available with respondents. It is argued that these acts on the part of the respondents constitute a denial of request for providing signals within the meaning of Interconnection Regulations dated 10.12.2004.

The respondents have contested the petition on various grounds. The following are the main grounds which need to be considered:-

- (i) Petitioner No.1 is not the licensee for HITS license. The license is held by Petitioner No.2. The request for supply of signals was made only by Petitioner No.1 who was not entitled to make such a request. Petitioner No.2 who could make the request had never

any such request and, therefore, the petition is not maintainable. In this context it is further argued that since Petitioner No.2 has not made a request for supply of signals, the petition is also premature.

- (ii) The Government has not yet amended the existing guidelines so as to cover the HITS operations nor has it framed separate guidelines for the HITS operations. As recommended by TRAI there is need to amend the guidelines in order to permit the broadcaster to supply signals through a HITS platform. In support of this argument it is submitted that as per present guidelines a broadcaster is allowed to provide satellite TV channel signals only to registered MSOs/Cable Operators or registered DTH operators. Reference has been made to Clause 5.6 of the Policy guidelines in this behalf. On this basis it is submitted that petitioner No.2 who is the licensee for HITS platform is not entitled to receive signals because it is neither a registered MSO or Cable Operator nor it is a DTH operator. TRAI has itself recommended need for amendment of the guidelines to enable HITS operators to get signals from the broadcasters.
- (iii) On the question of tariffs, it is submitted that fixation of tariff is the function of the TRAI and this Tribunal will not assume that function. Besides this legal objection, it is submitted that the suggestion of taking a parallel of the CAS tariff is not apt and cannot be applied in the present case.
- (iv) There is a possibility of misuse of the platform in as much as there is a possibility that the signals may be supplied beyond the permissible area without any checks and balances.
- (v) In petition No.115(C) of 2008 the respondents allege that the petitioners are defaulters and are in arrears of Rs.7.6 crores and a request even if made for signals cannot be considered in view of proviso to regulation 3.2 which is mandatory. The petitioners have denied this. According to petitioners they have paid whatever was due and whether somebody is a defaulter within the meaning of Regulation 3.2 requires determination. Without determination a party cannot be treated as defaulter.

(vi) Lastly my attention was drawn to the prayer for interim relief contained in the petition wherein it is stated that the interim relief be made available for the HITS platform of the petitioner in “notified CAS areas at the rates notified by TRAI for CAS areas.” It was argued that the petitioners have confined interim relief to notified CAS areas where already exists an addressable system and, therefore, there was neither any need nor urgency for an order for interim relief. Further it was stated that petitioner No.2 got the licence in the year 2003 and has not been able to operationalise the same so far, where was the sudden urgency so as to seek interim order from this Tribunal.

(i) **Petitioner No.1 is not the licensee for HITS and Petitioner No.2 has not applied for supply of signals. Therefore, petition is not maintainable.**

I do not find any merit or substance in this argument. The objection has been raised by way of an afterthought by the respondents only while filing reply to this petition. There has been lot of correspondence between the parties prior to the filing of the petition and such an objection was never taken. The respondent were fully aware of the fact that the petitioner No.2 was the HITS licensee. This is borne out from their own pleadings about the litigation between ASC Enterprises and Star India Pvt. Ltd. before the MRTP Commission and thereafter before the Supreme Court of India. In this litigation it was clear that M/s ASC Enterprises was the HITS licensee and was seeking signals of Star channels from M/s Star India. So far as petitioner No.1 is concerned its position is well known. Petitioner No.1 is an MSO backed by the Zee group. Both petitioners belong to the same group of companies. Obviously petitioner No.1 asks for signals for HITS platform for licensee i.e., petitioner No.2. The request for supply of signals by petitioners to respondents started with petitioner’s letter dated 25th November, 2006. The respondent No.2 replied vide its letter dated 30th November, 2006 which concludes with the following statement:

“We would be happy to meet with you at a time of mutual convenience to take this discussion forward.”

Instead of promising to take the request based discussion further, the respondent could have said that maker of request was nobody. Further correspondence is on same lines to discuss modalities of the arrangement of supply of signals to be worked out between the parties. What needs to be emphasized is this that the respondents never took the objection which is being taken now, although the status of both the petitioners was very well known to them. Later in its letter dated 05.09.2007 petitioner No.1 wrote to respondent No.2 saying that till date there was no meaningful response from their side. Petitioner asks for terms and conditions for making available Star channels and also seeks a meeting in this behalf. On 13.09.2007 petitioner No.1 sent a reminder to Star. Star writes back to petitioner No.1 on 3rd October, 2007 wherein they express apprehension about the Ministry of I&B guidelines but there is no objection of the type which is under consideration. Petitioner No.1 sent reply to the above on 22nd October, 2007 followed by a detailed letter dated 13th May, 2008 from petitioner No.1 to respondent No.1 explaining everything. This is followed by the present petition filed towards the end of May, 2008.

A copy of the letter dated 27th May, 2008 sent by respondent No.1 to the Ministry of I&B has been placed on record in which Star Den has sought clarifications as to whether they can go ahead with providing signals to the HITS platform of the petitioner. After the parties were already before this Tribunal, petitioner No.2 wrote to the Ministry of I&B on 3rd June, 2008 seeking clarification that providing content to it by the broadcaster will not be violative of downlinking policy. Similarly on 27th May, 2008, M/s Star Den had also written to Ministry of Information & Broadcasting seeking similar clarification. On 7th June, 2008, petitioner No.1 sent a detailed reply to M/s Star Den explaining all aspects and what will be respective roles of petitioner No.1 and petitioner No.2. From this entire correspondence one thing is clear that the respondents never took the objection that petitioner No.1 had no business to talk in this matter and to approach them. They have been entertaining the representatives of the petitioners. They have held meetings with each other and it is impossible to believe that you meet somebody and discuss business with him

without knowing who that somebody is. The request for supply of signals was very much before the respondents and they cannot be permitted to urge that there was no request for supply of signals by the right party. For all these reasons this objection is rejected.

(ii) Amendment to uplinking/downlinking guidelines

On this aspect the stand of the respondents is as under:

“It is submitted that the Government of India, MIB, Broadcasting Wing, vide its Notification No.F.No.13/2/2002-BP&L/BC-IV dated 11th November, 2005 has formulated policy guidelines for downlinking satellite television channels downlinked/received/transmitted and re-transmitted in India for public viewing. Clause 5.6 of the said Guidelines clearly stipulate that a broadcaster shall provide satellite TV channel signals, reception decoders only to registered MSOs/Cable Operators or registered DTH Operators. Clause 5.6 of the said policy guidelines is reproduced hereinbelow:

“5.6 The applicant company shall provide Satellite TV channel signal reception decoders only to MSOs/Cable operators registered under the Cable Television Networks (Regulation) Act 1995 or to a DTH operator registered under the DTH guidelines issued by Government of India.”

On this basis it is contended by the respondents that there is no provision as on date regarding supply of signals to a HITS operator by a broadcaster and, therefore, the respondents are unable to enter into a Subscription Agreement for supply of signals on HITS platform. Reliance has been placed by the respondents on the Consultation Paper floated by the TRAI on 24th July, 2007 on Headend-In-The-Sky(HITS). In the said Consultation Paper, it has been observed in Chapter-4, Para 4.2 that the existing framework is not adequate to roll out HITS operations. In Para 4.3, it is specifically mentioned that the uplinking/downlinking guidelines of broadcaster stipulate that the broadcasters will supply their signals only to DTH operators or to MSOs, as a result HITS could

not acquire content. This is followed by recommendations of the TRAI dated 17th August, 2007 on Headend-In-The-Sky(HITS). In Para 2.58(ii), the Authority has recommended “appropriate changes should also be made in the uplinking/downlinking policy for the broadcaster to enable the broadcasters to provide their signals to HITS operators which is presently not envisaged”. Same thing has been reiterated in Chapter 3 which contains Summary of Recommendations. Para 3.3 reads as under:

“The uplinking/downlinking guidelines should be amended to enable the broadcaster to provide signals to all distributors of TV channels such as cable operators, multi-system operators, DTH operators, HITS operators, IPTV service providers etc.”

The TRAI issued a Press Release on 4th January, 2008, concluding part whereof reads as under:

“The uplinking/downlinking guidelines should be amended to enable the broadcaster to provide signals to all distributors of TV channels such as cable operators, multi-system operators, DTH operators, HITS operators, IPTV service providers.”

It is not disputed that the Government has not issued any fresh guidelines to cover the HITS operations nor any amendment of the existing guidelines of the year 2005 has been issued in this behalf so far. The argument on behalf of the respondents is that so far as these guidelines are in force, the respondent broadcaster or its distributor cannot give signals on HITS platform. It is authorized to give signals only to registered MSOs or cable operators or on the DTH platform. The respondents contend that till the time the guidelines are amended and HITS operators are brought within their purview with permission to broadcasters to supply signals on HITS platform, signals cannot be provided to petitioner No.2 as licensee of HITS platform. It is not the case of petitioners that petitioner No.1 is seeking signals as an MSO and HITS platform does not come in the picture.

On this issue, respondent No.1 had written to the Ministry of Information & Broadcasting as well as to the TRAI on 27th May, 2008, expressing that in the light of the current policy framework, broadcasters were not permitted to provide signals to HITS operators. Respondent No.1 made a request in the said letter that the Government of India or the TRAI should advise them of the correct legal position in this behalf. In fact, petitioner No.2 also wrote to Ministry of Information & Broadcasting on 3rd June, 2008 pointing out that some of the broadcasters/content owners had expressed apprehensions qua the Government policy with particular reference to Para 5.6 of the guidelines. It was further stated that the broadcasters were withholding their channels and the HITS licensee was not able to operationalise its HITS platform. They requested the Government to issue necessary clarification immediately clarifying the position about the stand of content owners/broadcasters. The letter ended with the remarks “such a clarification would enable the writer of the letter to procure content/channels from broadcasters/content owners and start re-transmission/distribution of services from its HITS platform.” Thus, it is clear that petitioners are aware of the hurdle in their way on account of apprehension expressed by respondents/content providers that Government Guidelines do not permit content providers to provide signal on HITS platform. Petitioners also take-up this matter with the Government i.e., Ministry of Information & Broadcasters.

The Ministry of Information & Broadcasting has disposed all these letters, one from M/s Dish TV dated 3rd June, 2008, other from M/s MSM Discovery dated 3rd June, 2008 and the one from M/s Star Den dated 27th May, 2008 by marking copies to all three of them of their circular letter dated 7th July, 2008. The said circular letter which is heavily replied upon by petitioners, makes interesting reading and the same is reproduced as under in its entirety:

“To

All the permitted TV channels – as per list.

Subject: Operationalisation of HITS platform – Clarification regarding providing permitted TV channel through HITS platform of Dish TV.

Sir,

In this regard, this is to circulate a copy of the permission issued to M/s Dish TV India Limited vide this Ministry's letter of even number dated 28.03.2008 to operationalise their HITS platform, for providing their permitted TV channels for distribution to MSOs/Cable Operators through the HITS platform of M/s Dish TV India Limited.

Yours faithfully,

(Inderjeet Grewal)
Assistant Director (INSAT)
Tele.23381745

Copy to:

1. Dish TV India Limited w.r.t. their letter dated 3.6.2008
2. MSM Discovery Private Limited w.r.t. their letter dated 3.6.2008 – for necessary action.
3. Star Den Media Services Pvt. Limited w.r.t. their letter dated 27.5.2008 – for necessary action.”

Question is does this letter meet the point raised by the respondents as well as the petitioners about apprehension of broadcasters in making their signals available to HITS platform licensee in view of the existing guidelines?

I have carefully considered this letter as well as the letter dated 28th March, 2008 which is referred to in this letter. The relevant portion of the letter dated 28th March, 2008 is also reproduced as under:

“ii) The company would uplink only those TV channels which have been permitted/registered under uplinking/downlinking guidelines for downlinking into India.”

I am unable to find anything from these letters which permit broadcasters to provide signals/content to a HITS licensee. It is argued on behalf of respondents that assuming petitioner No.2 has permission for linking and downlinking, that does not mean that respondents also have a

corresponding permission from the Government to provide signals at HITS platform. Either the guidelines need a change or fresh guidelines need to be issued in this behalf. This is the stand of TRAI as pointed out before. The letter dated 7th July, 2008 cannot be read to mean amendment of the guidelines or issue of fresh guidelines. The guidelines are issued by way of a Government notification and would have to be amended by the same process. An Assistant Director of the Ministry cannot, in my view, amend the guidelines by issuing such a letter.

A bare perusal of the letter dated 7th July, 2008 shows that in the first part it refers to Ministry's letter dated 28th March, 2008 in which firstly permission for change of satellite has been granted to petitioner No.2 and secondly, they have been permitted to operationalise their HITS platform permitting TV channels for distribution to MSOs and cable operators through HITS platform of petitioner No.2. Lastly, copies of this letter have been marked to petitioner No.2, respondent No.1 [in Petition No.115(C) of 2008] and respondent No.1 [in Petition No.114(C) 2008] making a reference to their respective letters. The letters referred to raise substantial points on which clarifications have been sought from the Ministry of Information & Broadcasting. Merely, marking copies of the letter dated 7th July, 2008 does not answer the points raised in the letters by these parties. For instance, in its letter dated 27th May, 2008, respondent No.1 has specifically mentioned that the current policy framework/law neither allows existing HITS operators to licence its infrastructure facilities to MSOs nor permits broadcasters to provide signals to HITS operators. While concluding the letter respondent No.1 requests the Government "We would be highly obliged if you could advise us of the correct legal position". "No sooner we get the necessary clarifications we are willing to negotiate with the authorized entity for delivery of our channels through HITS platform". Thus, the letter dated 27th May, 2008 of respondent No.1 raises specific queries and seeks answers from the Ministry of Information & Broadcasting, Government of India. Does the letter dated 7th July, 2008, quoted above, answer the queries? In my view the answer is emphatic no. I am unable to find any reason or justification for sending

copy of the letter dated 7th July, 2008 by the Ministry of Information & Broadcasting to respondent No.1 and stating therein in the “Copy to” portion that it was with respect to their letter dated 27th May, 2008 for necessary action. The letter dated 7th July, 2008 does not meet the points raised by respondent No.1. Same is the position for the respondent in Petition No.115(C) of 2008 i.e. MSM Discovery to whom also a copy of letter dated 7th July, 2008 has been marked with respect to their letter dated 3rd June, 2008. The Government is thus avoiding to clear the confusion created by it, rather it is ensuring that the confusion continues. If the intention was to permit broadcasters to provide content to HITS operators, this should have been clearly stated.

The petitioners have tried to meet this objection by annexing with their rejoinder a copy of letter dated 7th June, 2008 written by petitioner No.1 to respondent No.1. In the said letter it is stated that policy framework being relied upon by Star was only in respect of future HITS licensees to be granted after HITS policy framework is laid down by the Government. It is further stated in the said letter that for existing HITS licensees there was no impediment. Further it is explained that the Dish TV would enter into an agreement with Star Den for downlinking and turn around of various TV channels which would be re-transmitted through HITS platform to WWIL (MSO) and other independent cable operators/MSOs who are desirous of obtaining the digital signals from them for onward transmission to the subscribers through the cable network. This explanation to my mind does not meet the point raised by the respondents. The policy Guidelines of 2005 clearly state that broadcaster can provide signals only to the registered MSOs or cable operators or to a DTH operator registered under the DTH guidelines issued by the Government of India. The use of word “only” has to be appreciated and not ignored. What follows from this is that petitioners may be ready to roll out HITS platform, but the Ministry of Information & Broadcasting is not ready to give permission to broadcasters to provide content to HITS licensees.

Petitioners have relied on the fact that they had furnished the undertaking as required by the Ministry of Information & Broadcasting, to migrate to new guidelines as and when it is notified. Therefore, this should be taken as Ministry of Information & Broadcasting’s permission for HITS

to roll out. This may be permission to petitioners. But this cannot be taken to be permission to broadcaster to ignore the relevant part of the guidelines.

I cannot help observing that neither party disputes the advantages under the HITS system. It is also not disputed that this will be beneficial to the consumers as it will reduce the costs to the consumer while the MSOs and broadcasters will have the benefit of an addressable system. If every player stands to benefit from the system, I fail to understand why the Government is dithering on issuing clear Guidelines to allay the apprehensions of the broadcasters. The broadcasters today apprehend that in view of the existing guidelines if they provide signals/content to the HITS platform, they will be violating the existing Guidelines because the existing Guidelines permit supply of signals/content only to registered MSOs and cable operators and to the DTH platform. Breach of Guidelines may have adverse consequences so far as the broadcasters are concerned and the broadcasters do not want to take a risk. The TRAI as well as the Government have shown keenness that HITS technology should be operationalised but this keenness remains only on paper till the Guidelines are amended or the Government issues authoritative instructions that providing signals/content by broadcasters to HITS operators will not be taken as violation of the existing Guidelines. It is high time that the Government immediately takes a decision on this aspect in consumer interest. We all talk of consumer interest and say that consumer interest comes first. But this has remained a mere slogan. In reality nobody appears to be bothered about consumer interest.

In view of the above discussion, I am of the view that the petitioners are not entitled to any relief till the Government comes out with necessary clarification.

In view of my finding on point No.(ii), it is not necessary to go into the other points raised by the respondents. The petition is dismissed without any order as to costs.

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

New Delhi
Dated August 13, 2008