

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

Dated 27th May, 2015

Petition No.439(C) of 2014

Noida Software Technology Park Ltd.

.....Petitioner

Versus

Ministry of Information & Broadcasting

.....Respondent

BEFORE:

HON'BLE MR.JUSTICE AFTAB ALAM, CHAIRPERSON

HON'BLE MR. KULDIP SINGH, MEMBER

For Petitioner

: Mr. Vivek Chib, Advocate
Ms. Ruchira Goel, Advocate
Mr. Joby Verghese, Advocate

For Respondent

: Mr. Ruchir Mishra, Advocate
Mr. Sanjiv K. Saxena, Advocate
Mr. Ramneek Mishra, Advocate

ORDER

By Aftab Alam, Chairperson – The petitioner, Noida Software Technology Part Ltd., is a Head-end-in-the-Sky (HITS) operator under a licence granted by the Union of India under section 4 of the Indian Telegraph Act 1885. A HITS operator, like a direct-to-home operator, a multi-system operator, a local cable operator, is a distributor of a TV channels within the meaning of the

broadcasting regulations (vide clause 2(g) of Interconnection Regulations 2004 and clause 2(q) of the Interconnection Regulations 2012).

The petitioner sought a loan of Rs.15 crores from a bank for its working capital. According to the petitioner, the bank agreed to advance the loan, subject to assignment of its HITS licence as a collateral security for the loan. The petitioner sought permission of the Ministry of Information & Broadcasting (MoIB) for assignment of its HITS licence as security for financial assistance vide its letter dated 6 November 2013. In this letter, the petitioner, *inter alia*, stated that while processing its request for loan, the bank had asked it to keep its HITS licence as a collateral security in favour of the bank for grant of credit which is subject to licensing conditions laid down by MoIB. Along with the request letter it also enclosed an order passed by MoIB on 3 December 2009 by which permission was granted to Direct-to Home (DTH) operators for assignment of their licences for securing credit, subject to certain conditions.

The relevant part of the order is extracted herein below:

“The matter has been examined in the light of the provisions contained in Article 2.2 & 6.4 of the DTH License Agreement and the procedure followed in the Telecom sector. It has now been decided that all DTH Licensee(s) desirous of assigning their License Agreement as security to the banks/financial institutions for receiving financial loan/assistance for the setting up/operation of DTH services shall be required to execute a Tripartite Agreement as per the enclosed Format between the Licensor, the Licensee and the Lenders before grant of permission for assignment of the License Agreement as security to the lenders for receiving financial loan/assistance for the setting up/operation of DTH services. The DTH Licensee will also be required to furnish copies of the respective loan agreements entered into by the Licensee with the respective lenders.”

The MoIB rejected the petitioner's request by letter dated 3 September 2014. The letter simply states that there is no policy in the ministry to allow HITS service providers to assign their HITS permission to banks for raising loans for their HITS operations and hence, the petitioner's request cannot be acceded to.

The petitioner has come to the Tribunal challenging the refusal by the MoIB to grant permission to assign its HITS licence/permission to the bank for raising working capital. The case of the petitioner is mainly grounded on the plea of parity with DTH operators and it is contended on its behalf that the stand of the MoIB is adversely discriminating against it.

The petitioner got a licence agreement executed in its favour on 24 January 2003 pursuant to which on 16 April 2003 it was accorded the permission to set up Head-end-in-the-Sky. [The licence agreement, in terms of clause 2(i) was for a period of 10 years from the date of issue of wireless operational licence by WPC. However, it stands renewed upto 30 April 2015 vide renewal certificate dated 6 August 2014]. Article 5 of the terms and conditions of the licence provides for prohibition of certain activities. Article 5.1 makes the licence non-transferable and Article 5.6 stipulates as under:

“5.6 The Licensee shall not either directly or indirectly assign or transfer its right in any manner whatsoever under this Agreement to any other party or enter into any Agreement for sub-licence and/or partnership relating to any subject matter of the Licence to any third party either in whole or in part. Any violation of the terms shall be construed as breach of the Licence Agreement and Licence of the Licensee shall be terminated immediately, without any prior notice.

On such termination, the Licensor shall take possession and control of the Licensee's Service, Systems and infrastructure with immediate effect."

At this point, it is significant to note that in 2003 when the petitioner was granted the licence and the permission to set up Head-end-in-the-Sky, there were no guidelines for HITS operations and it was much later in the year 2009 that the MoIB, in consultation with TRAI, formulated the policy, "Guidelines for Providing Head-End-In-The-Sky (HITS) Broadcasting Service in India". It appears that before issuance of the guidelines two entities, including the present petitioner were granted permission for setting up Head-end-in-the-Sky and alluding to them, in the introduction to the guidelines, it was stated as under:

"The permission of the existing two permission holders who have been given permission to provide HITS services in the year 2003 will continue for the remaining period of permission and operationalization of HITS services may be done by them as per terms and conditions laid down in these guidelines."

Clauses 3.3, 4.1 to 4.3 and 5.1 of the guidelines are also important for the present and are reproduced below:

- "3.3 The permission granted to the company shall be non-transferable except with specific and prior approval of the Government.
- 4. NON-REFUNDABLE ENTRY FEES AND OTHER FEES.
 - 4.1 The applicant will be required to pay a non-refundable entry fee of Rs.10 crores.
 - 4.2 No annual fee will be required to be paid.
 - 4.3 The company/permission holder shall also in addition pay the license fee and royalty for the spectrum used as prescribed by Wireless Planning & Coordination Authority (WPC), under the Department of Telecommunications.

5.1 The applicant company shall, within one month of the issuance of the SACFA clearance by WPC, submit to the Ministry of I & B, a Bank Guarantee from any Scheduled Bank in the format notified, for an amount of Rs.40 crores valid for a period of three years.”

Clause 13 contains provisions with respect to existing permission holders and clause 13.1 provided as under:

“13.1 Notwithstanding anything contained in the terms and conditions of permission issued earlier, these Guidelines will also be applicable to the existing permission holders.

13.1.1 The existing permission holders will be allowed to operationalize their services only after they give an undertaking supported by its Board resolution to Ministry of Information and Broadcasting to ensure compliance with all the provisions contained in the Guidelines within a period of three months from the issuance of these Guidelines which period may, at the discretion of the Government, be extended to a maximum of six months.

13.1.2 Existing permission holder will within a period of one month of the issuance of these Guidelines also submit a detailed plan for ensuring compliance to the provisions contained in guidelines. The existing permission holder will also have to deposit the non-refundable entry fee of Rs.10 crores and submit proof of such deposition.

13.1.3 If compliance to provisions of 13.1.1 and 13.1.2 is not ensured by the existing permission holder within the stipulated time period the permission given earlier shall stand withdrawn.

13.1.4 xxxxxxxxxxxxxxxx”

After coming into force of the guidelines the petitioner was asked to pay Rs.10 crores as the non-refundable entry fee in terms of clause 13.1.2, as against Rs.1 crore paid by it at the time of the grant of the licence (vide MoIB letter dated 18 December 2009 and order dated 25 February 2010 rejecting the petitioner’s representation, at pages 397 & 398 of the brief). The petitioner

challenged the demand before this Tribunal in petition no.148(C) of 2010 which was disposed of by a lengthy judgment dated 21 April 2011 that apparently absolves the petitioner from payment of the entry fee of Rs.10 crores as also from giving any performance bank guarantee.

At this stage, it will be useful to take a look at the corresponding provisions in the direct-to-home (DTH) licence. Article 2 provides for the term of the licence and clause 2.2 states as under:

“2.2 The license shall not be transferred without prior approval of the Licensor.”

Article 3 provides for the licence fee in the manner hereunder:

“3.1 The Licensee shall pay an initial non-refundable entry fee of Rs.10 crores before the issue of letter of intent to him by Licensor, and, after the issue of the Wireless Operational License by the Wireless Planning and Coordination (WPC) Wing of the Ministry of Communications, an annual fee equivalent to 10% of its gross revenue in that particular financial year within one month of the end of that year.

3.2 The Licensee shall also in addition pay the license fee and royalty for the spectrum used as prescribed by Wireless Planning & Coordination Authority (WPC), under the Department of Telecommunications.”

Article 4 deals with bank guarantee and clause 4.1 provides as under:

“4.1 The Licensee shall, within one month of issuance of SACFA clearance by W.P.C., submit to the Ministry of I & B, a Bank Guarantee from any Schedules Bank in Form-C for an amount of Rs.40 crores valid for the duration of the license.”

Article 6 prohibits certain activities and clause 6.4 provides as under:

“6.4 Except with prior approval of Licensor, the Licensee shall not either directly or indirectly assign or transfer its right in any manner whatsoever under this Agreement to any other party or enter into any

Agreement for sub-license and/or partnership relating to any subject matter of the License to any third party either in whole or in part. Any violation of the terms shall be construed as breach of the License Agreement and License of the Licensee shall be terminated immediately.”

On a comparison of the provisions governing the two systems it would thus appear that both DTH and HITS operators are required to pay the non-refundable entry fee of Rs. 10 crores (the petitioner, though has not paid this amount on the basis of the Tribunal’s order in Petition no. 148 (c) of 2010); both DTH and HITS operators are required to furnish bank guarantees of Rs. 40 crores, which in the case of a DTH operator must remain valid for the duration of the licence but in the case of HITS operator only for the period of three years (the petitioner did not furnish any bank guarantee as clause 13 of the guidelines does not provide for it); both DTH and HITS operator are required to pay the licence fee and royalty for the spectrum used as prescribed by Wireless Planning & Coordination Authority (the petitioner is duly making this payment); in addition, the DTH operator is required to pay annual licence fee equivalent to 10% of its gross revenue. This additional obligation of the DTH operator from which a HITS operator is completely relieved is evidently based on the fact that unlike a DTH operator, a HITS operator cannot reach the subscriber, the end user directly; it reaches the subscriber only through the intermediary, the MSO and/or the LCO and consequently has to share its revenue with the intermediary. We will presently consider how far this difference, which may be important from the point of view of government revenue and which, in fact, has been

emphasised in the Reply filed on behalf of the MoIB, may be a relevant and valid consideration for the matter at issue.

Mr. Vivek Chib, counsel appearing for the petitioner submitted that both HITS operator and DTH operator are distributors of TV channels and carriers of TV channels to the subscribers and there is no reason, therefore, that one should get the permission while the other should be denied the permission to give its licence in assignment to a bank as collateral security for the loan. He submitted that the stand of the MoIB in refusing permission to the petitioner clearly amounts to hostile discrimination against HITS operators.

In support of the submission that a HITS operator and a DTH operator are comparable, Mr. Chib referred to certain passages from the decisions of the Tribunal dated 13 August 2008 in petition no.114(C) of 2008 (at pages 445-446 of the brief) and 12 September 2013 in petition no.166(C) of 2013 (at pages 72, 73 and 101 of the brief). He further submitted that though clauses 5.1 and 5.6 of the petitioner's licence agreement barred its transfer or assignment in any manner, the prohibition was relaxed by clause 3.3 of the guidelines that made the permission transferable subject to specific and prior approval of the Government and thus, the provisions of the licence/guidelines governing HITS was also brought at par with the corresponding provision in respect of DTH operations.

In the reply filed on behalf of the MoIB, it is submitted that not only HITS and DTH operate on completely different technological systems but the

two are also governed by licence provisions and guidelines that are materially different. It is stated that a DTH licensee is required to:

- (i) pay entry fee to the extent of Rs.10 crores,
- (ii) submit bank guarantee to the extent of Rs.40 crores and
- (iii) pay annual fee equivalent to 10% of its gross revenue.

But in the case of HITS licence, the aforesaid financial obligations are not there. Though, in terms of HITS guidelines issued on 26 November 2009 certain financial obligations are required to be fulfilled by HITS service operators but the present petitioner avoided making those payments.

After a discussion of the provisions governing the two systems, the differences between HITS and DTH services are summarized in five subparagraphs of paragraph 18 of the reply. Paragraphs 18.1 and 18.3 deal with technological issues that are of no relevance for the present; paragraphs 18.2 and 18.4 that relate to the financial obligations of the service providers under the two systems state as under:

“18.2 DTH transmission model is revenue sharing model between licensee and Central Government whereas there is no provision of revenue share under HITS services.

18.4 Under DTH services performance bank guarantee has to be remained effective till currency of license whereas under HITS services, the performance bank guarantee has to be remained effective for a period of 3 years till the HITS services are completely rolled out. Thereafter, the bank guarantee has to be either returned back in case of HITS service has been successfully rolled out within the prescribed period or encashed by the Government in case of permission holder failed to provide HITS services.”

Paragraph 18.5 refers to clause 6.4 of the DTH licence and states that there is no similar provision in the HITS licence for its assignment subject to the prior approval of the licensor.

From the Reply it is evident that the MoIB considers DTH technologically a much advanced system and also finds it more profitable from the point of revenue generation as it is based on a model of revenue sharing with the Government. The question, however, is whether these considerations are germane to facilitate bank loans for DTH and thus to help its commercial promotion at the expense of HITS as long as both systems are recognised under the law as distributors and carriers of TV channels and the Government continues to grant licence for HITS operations. In case the Government finds that the application of a certain technology for television broadcasting is in the larger public interest and that system also operates on a more friendly revenue terms with the Government, it is certainly open to the Government to allow that system alone for television broadcasting and not to allow any other system for television broadcasting. But if more than one systems of television broadcasting are allowed to operate at the same time and those are allowed to operate in a competing market, it is debatable whether the Government as a licensor can take different stands that would promote one commercially at the expense of the other.

The stand of MoIB also appears to be quite curious on the issue of the provisions concerning assignment and transfer in the licences/guidelines relating

to HITS and DTH licences. It is stated that DTH licence has clause 6.4 that allows transfer or assignment, subject to the prior approval of the licensor but there is no similar provision in the HITS licence of the petitioner and clause 5.6 of that licence completely prohibits its transfer or assignment directly or indirectly. When it is pointed out that the prohibition in the petitioner's licence agreement is relaxed by clause 3.3 of the 2009 guidelines that allows transfer or assignment of the permission indeed with prior approval of the licensor and that brings the corresponding provisions in the DTH and HITS licences at par, the MoIB takes the stand that the petitioner not having paid Rs.10 crores as entry fee and not having furnished the financial bank guarantee in compliance with clauses 4.1 and 5.1 of the guidelines cannot take any benefit or advantage of clause 3.3 of the guidelines. In this regard it is stated in paragraphs 22 to 24 of the Reply as under:

“22. In order to be governed by the new HITS guidelines, the petitioner is required to (i) pay non refundable entry fee of Rs.10 crores under clause 4.1, (ii) pay license fee and spectrum royalty prescribed by WPC under clause 4.3 and (iii) submit bank guarantee as per clause 5.1.

23. Therefore, if the petitioner wants to be governed by new HITS guidelines, the petitioner is bound to accept the whole guidelines completely, and not selectively. Meaning thereby the petitioner without fulfilling the obligations required to be met under the new guidelines, inter-alia, under clause 4 & 5 cannot submit that it is governed by clause 3.3 and claim parity with similar or other provisions under DTH service as being claimed to be entitled to the permission as granted to DTH licensees vide order dated 3.12.2009.

24. Therefore, it is emphatically submitted that the petitioner without fulfilling the obligations under the new HITS guidelines,

cannot say that it is governed by new guidelines including clause 3.3.”

The stand of the MoIB appears incorrect and misconceived on more than one count. Firstly, it overlooks that the petitioner was absolved from payment of Rs.10 crores as entry fee by a judgment and order passed by the Tribunal and that would not give the right to the MoIB not to apply the other provisions of the guidelines in the case of the petitioner for that reason. Secondly, it is quite erroneous not to bring the petitioner under the rigours of the guidelines and to let it operate completely free and independent of the guidelines simply because the Tribunal found and held that it was not liable to pay the entry fee or submit the bank guarantee as provided under the guidelines.

In light of the discussions made above, we are unable to sustain the grounds advanced by the MoIB to justify and support its refusal to grant permission for assignment of the petitioner’s HITS licence/permission as security for the bank loan. It is to be noted here that the MoIB rejected the petitioner’s request by its letter dated 3 September 2014 on the ground “that there is no *policy* in the Ministry to allow Therefore your request cannot be acceded to”. We are clearly of the view that it is incumbent upon the MoIB to take a policy decision in this regard, taking into account all the relevant considerations. It must then reconsider the petitioner’s request in light of the policy framed by it. It is ordered accordingly.

The MoIB is directed to take a fresh decision on the petitioner's request, as directed above, within two months from the date of receipt of a copy of this order.

In the result the petition is allowed to the extent indicated above. There will be no order as to costs.

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(Aftab Alam)
Chairperson

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(Kuldip Singh)
Member

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