

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

**Dated 16<sup>th</sup> November, 2018**

**Broadcasting Petition No. 676 of 2015**

1. Grant Investrade Ltd.  
Hinduja House, 171, Dr Annie Besant Road,  
Worli, Mumbai – 400081.
  
2. Indusind Media Communications Ltd.  
IN Centre, 49/50, MIDC, 12<sup>th</sup> Road,  
Andheri (East), Mumbai – 400093. ... Petitioners

Versus

1. Taj Television (India) Pvt. Ltd.  
Registered Office at 135, Continental Building,  
Dr. Annie Besant Road, Worli, Mumbai-400018  
Corporate Office at B-10, Essel House,  
Lawrence Road, Industrial Area, Delhi-110035
  
2. Zee Entertainment Enterprise Limited,  
Registered office at A-Wing, Marathon Futurex,  
N.M. Joshi Marg, Lower Parel, Mumbai-400013.  
Regional Office at Essel Studio, Filmcity 19,  
Sector 16-A, NOIDA – 201 301.
  
3. Zee Media Corporation Ltd.  
Registered Office at 135, Continental Building,  
Dr. Annie Besant Road, Worli, Mumbai-400 018.  
Regional Office at Essel Studio, Filmcity,  
19, Sector 16-A, NOIDA – 201 301.
  
4. Turner International (India) Pvt Limited  
Registered Office at 5<sup>th</sup> Floor, Radisson Commercial  
Plaza, National Highway No.8, Mahipalpur,  
New Delhi – 110 037.  
Regional Office at 3<sup>rd</sup> Floor, Shrayans Audios,  
Fun Republic Lane, Andheri West, Mumbai-400053 ... Respondents

**BEFORE:**

**HON'BLE MR. JUSTICE SHIVA KIRTI SINGH, CHAIRPERSON**  
**HON'BLE MR. A.K. BHARGAVA, MEMBER**

For Petitioner : Mr.C.S.Vaidyanathan,Sr.Advocate  
 Mr. Manjul Bajpai, Advocate  
 Dr.Shashwat Bajpai, Advocate  
 Mr. Jagjeet Singh Sahani, Advocate  
 Mr.Sharad Aggarwal, Advocate  
 Mr.Anirudh Gupta, Advocate  
 Ms.Palak Verma, Advocate

For Respondents : Mr.Meet Malhotra, Sr.Advocate  
 Mr. Tejveer Singh Bhatia, Advocate  
 Mr.Upender Thakur, Advocate  
 Mr. Kunal Vats, Advocate  
 Mr.Rohan Swarup, Advocate

**JUDGMENT**

**By S.K. Singh, Chairperson** – Petitioner No.1 was the original petitioner which has now demerged into Petitioner No.2 which is the resulting company and hence, “the petitioner”. This petition was preferred by the petitioner on 17.12.2015 against four respondents who are in the category of broadcaster whereas the petitioner is a HITS (Headend In The Sky) Operator. Its grievances against the respondents will be obvious from a bare perusal of reliefs prayed for, which are as follows:

- “(a) Direct the Respondents to sign and execute the interconnection agreement on reasonable and non-discriminatory terms or in the

alternative direct the Respondents to sign and execute the Reference Interconnect Offer, for all their Channels;

- (b) In the alternative, direct the Respondents to sign and execute the interconnection agreement on reasonable and non-discriminatory terms or direct the Respondents to sign and execute the Reference Interconnect Offer with respect to Petitioner's active service, pending consideration of the Petitioner's passive service by this Hon'ble Tribunal, for all their Channels;
- (c) Hold and declare that the "passive" service proposed to be offered by the Petitioner is permissible under the HITS Policy and Petitioner's GOPS/Licence;
- (d) pass ad-interim/interim/ex-parte order(s) in respect of the above prayers; and
- (e) pass such other and further order(s) as this Hon'ble Tribunal may deem fit and proper in the facts and circumstances of the case."

2. At the very initial stage of this proceeding, the parties entered into negotiations leading to a RIO based agreement for supply of Zee Channels as also Turner Channels. This is recorded in the order dated 13.1.2016 which further recorded that – "what remains unresolved is the petitioner's request for entering into an arrangement with the respondent for passive infrastructure services". From a conjoint reading of the main prayers (a, b & c), it is evident that since the petitioner has been enjoying an interconnection agreement with the respondents which has been renewed also, the relief in respect of its active service is already available to it and therefore prayers (a) and (b) are practically infructuous, unless prayer (a) is read expansively so as to include both, active and passive services of

the petitioner as a HITS operator. Prayer (c) is only a declaratory relief sought with a view to overcome the reasons assigned by respondents in the reply dated 23.11.2015 (Annexure Y & R1) for not accepting the petitioner's request for an agreed arrangement to give effect to its capacity for providing passive service to other MSOs etc. ("White label" model in contradistinction to the "Full Service" model).

**3.** Petitioner's reply dated 25.11.2015 to respondents aforesaid letter dated 23.11.2015 is enclosed as Annexure-Z and it contains the gist of petitioner's entire present case and the grounds for seeking the declaratory relief (c) already noted earlier. For making the declaration sought for, two documents require scrutiny. The first one, the HITS policy (guidelines) of Ministry of Information & Broadcasting (MIB) dated 26.11.2009 is Annexure – A. The other one is the License Agreement for HITS services in favour of petitioner dated 14.7.2015 (Annexure – H).

**4.** The Policy Guidelines (Annexure – A) in the very "Introduction", exhibit the relevant paragraphs (unnumbered) at no. 3 to 6. The nature of HITS service is referred to as - "multichannel downlinking and distribution of television programme in C-Band or Ku-Band, wherein all the pay channels are downlinked at

a Central facility (Hub / Teleport) and again uplinked to a satellite after encryption of channels”. The next three paragraphs read as follows:

“After obtaining a HITS license from the Ministry of Information & Broadcasting, the HITS operator can himself contract with different broadcasters for buying the content, aggregating the same at an earth station and then uplinking with his own encryption to a satellite hired by him. The uplinked channels can then be downlinked by the cable operators using a dish antenna for onward distribution through last mile conventional cable network to the TV homes. In this model, the HITS operator works like a conventional MSO, except that virtually the head-end is in the sky, instead of being located on ground.

The HITS operator can also decide to merely provide passive infrastructure facilities like transponder space on satellite, earth station facilities and the provision for simulcrypting/multiscrypting of channels aggregated by different MSOs with different encryption systems to one or more MSOs or to a consortium of cable operators/MSOs desirous of uplinking TV channels to his HITS satellite for downlinking and further transmission to the TV homes by the cable operators across the country. The HITS operator in this case need not contract with the broadcasters for content. He only enters into contracts with one or more MSOs or consortium of cable operators desirous of uplinking their aggregated channels from HITS earth station(s) to the HITS satellite.

The HITS operator has the freedom to use his satellite’s transponder capacity both for transmitting his own aggregated content, as well as to provide passive infrastructure to other MSOs for uplinking/downlinking their aggregated content.”

5. The first extracted para above relates to “Full Service” model and now there are no issues in respect of the same. The next two are relevant because these relate to the passive service (white label model). These clearly show that a HITS Service provider like the petitioner has been allowed / permitted by the

Policy guidelines to offer passive service, as clearly described but in such a case he “need not contract with the broadcasters for content.” He needs to enter into contracts with MSOs or consortium of cable operators desirous of uplinking “their aggregated channels from HITS earth station to the HITS satellite.” Similarly, in the last extracted para also it is well clarified that in addition to his own “Full Service”, he can use his satellite’s transponder capacity to provide passive infrastructure to other MSOs for uplinking / downlinking “their aggregated content”.” (Emphasis added at all the above places).

6. The License agreement of the petitioner dated 14.7.2015 (GOPA) is valid for 10 years and permits the petitioner to establish, maintain and operate its HITS platform on specific terms and conditions accepted by both the parties. The right to operate is dependent upon fulfilling various conditions including those as per guidelines as amended from time to time. These read with the Policy / Guidelines of 2009 warrant grant of the relief (c), but only partially. Petitioner has sought a declaration not in only general terms under the HITS Policy /Guidelines but also in respect of his proposed model of passive service. While we hold and declare generally that “passive service” can be offered as it is permissible under the HITS Policy and also the relevant license agreement, we do have a caveat in respect to

petitioner's model, particularly because the petitioner's purpose is to get over the objections of respondents as raised in their reply dated 23.11.2015.

7. Before continuing with the above aspect of controversy and related discussion, it would be fair to note down some relevant submissions made by the parties and also materials relied upon by them.

8. Learned Senior Counsel for the petitioner, Mr. Vaidyanathan has taken up through the HITS Policy / Guidelines of 2009 with a view to persuade us that the passive service is not only permitted but is flexible enough to meet all the objections of respondents. In particular, he refuted the contention that the recommendations of TRAI dated 17.10.2007 suggesting a third model as a hybrid of first two models has not been accepted and not provided in the HITS Policy. He has shown that paragraphs 2.2, 2.3 and 2.4 of the recommendations of TRAI have only been paraphrased, compressed and totally accepted in the 3 paragraphs of the HITS Policy already extracted earlier. On the other hand, learned senior counsel for the respondents, Mr. Malhotra has highlighted that the opening sentence in para 2.4 of the recommendations used the words – "In the third model, which is a hybrid of the first two models....." but those have been omitted in the policy and therefore that model shall be treated as recommended but not accepted by MIB. But on a careful reading of relevant paragraphs in the

recommendations and in the HITS Policy, we do not find merit in the above stand of the respondents. We hold that the HITS operator has the necessary freedom even under the HITS Policy for what TRAI described as the third or hybrid model.

9. But the respondents have taken another objection that even with all the three relevant paragraphs of HITS Policy (already extracted) the difficulties in the way of the petitioner's proposed model do not get addressed or resolved. That difficulty, according to Mr. Malhotra lies in clear wordings in the HITS Policy which leave no manner of doubt that except in the "Full Service" model, the HITS operator does not get a right of content aggregation in respect of respondents' channels. For this right, he has to depend upon a voluntary agreement – bi-partite or tri-partite as suggested in this case on behalf of the petitioner. The provisions in the relevant Regulations do create an obligation upon the Broadcaster to supply its signals of TV channels to licensed entities like HITS operators and MSOs but for limited use in accordance with the terms of license of such entities. It was highlighted that MSOs are required to have their own Headends for content aggregation and removal of such a restriction would require amendments in their license. The HITS policy would also require changes to clearly permit such user through laid-down procedure of appropriate nature to take care of commercials and piracy issues with adequate control in the hands of the broadcasters.

**10.** According to the respondents, the issue at hand has been considered by TRAI and is covered by clause 2.39 and other parts of its recommendation dated 29.3.2017. These are still pending under consideration by MIB. Hence, the petitioner must wait for the final policy decision and cannot claim any right to force the respondents to enter into any kind of agreement to suit its model of passive service. Such right may accrue only when the proposed model is permissible under further guidelines / policy that may be issued by the MIB.

**11.** On-going through the recommendations of TRAI dated 29.3.2017, it is absolutely clear from discussions in paragraphs 2.34 to 2.37 and the recommendations in paragraphs 2.38 and 2.39 that what the petitioner is seeking as its model for passive service has been discussed as a third model, a hybrid one. This third model in paragraph 2.34 is to be on a voluntary basis wherein the HITS operator can share encrypted streams of TV channels obtained through agreements with Broadcasters under the full service model, with other MSOs in simulcrypt mode and also provide infrastructure services to that MSO for uplinking of encrypted streams of TV channels, unique for that particular MSO under second model. As per TRAI, “this would ensure the efficient use of satellite resources”. This model has been further praised in paragraph 2.35 for ensuring efficient use of scarce resources by combining the features of the first and the

second model. It would be a win-win model for stake holders “if the necessary techno-commercial arrangements and agreements are put in place.”

**12.** The summary of recommendations of TRAI dated 29.3.2017 is contained in Chapter-3. Under the heading “Other”: Infrastructure sharing in HITS platform, TRAI has made four recommendations in paragraph – 4 which cover the proposed model of the petitioner. In paragraph-5 it has recommended that “to enable sharing of the HITS platform and transport streams transmitted by HITS platform, the Authority recommends that the Guidelines for providing HITS services should be suitably amended.”

**13.** In the written submissions made on behalf of the petitioner, detailed discussions have been made as to how the interest of the Broadcaster and Broadcaster’s control with respect to anti-piracy and provision for switching off for non-payment can be fully ensured. No doubt, according to petitioners it is possible to prevent piracy by identification of MSOs, switching off MSO due to non-payment and equating independent digital Headend of MSO with Cable Operator Premises Equipment (COPE). However, further discussion of those materials is not deemed necessary because, on consideration of the existing Guidelines and the proposed Guidelines as recommended by TRAI in 2017 and on considering the salient features of petitioners proposed passive service model, we

find that petitioners' model is not yet covered fully by the relevant recommendations under the existing Guidelines. After discussion with the stake holders, TRAI has made relevant recommendations on 29.3.2017. Considering the fact that MIB has not yet acted and further guidelines are still awaited, in our view it would not be proper to issue a mandatory injunction to the respondents to enter into an agreement so as to enable the petitioner to share with other MSOs in simulcrypt mode, encrypted transport streams of TV channels obtained from the respondents through agreements signed under the first model or the Full Service model. Only when further Guidelines / HITS Policy is issued by MIB on the lines under recommendation, the petitioner may have the right to invoke the "Must Supply" principle against the respondent Broadcasters for availing TV channels for its proposed model for passive services.

**14.** Considering that TRAI has found considerable merits in the model which the petitioner wants, and has also described it as a win-win situation for all the stake holders and that it would ensure efficient use of scarce resources, we permit the petitioner to file a representation before the concerned Authority of MIB for early decision on the pending recommendations of TRAI. We request the concerned Authority to consider the representation and take a decision on the pending recommendations in the light of the relevant materials which may come

to its notice, at an early date, preferably within three months from the date of production / communication of a copy of this order.

**15.** Although we have prima-facie found the proposed model of the petitioner to be useful for all the stake holders and for that reason it appears to have been accepted by many Broadcasters other than the respondents, but for the reasons indicated above we are unable to issue any mandatory injunction on the respondents. The petition is disposed of accordingly.

There shall be no order as to costs.

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**(S. K. Singh, J)**  
**Chairperson**

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**(A.K. Bhargava)**  
**Member**

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