

TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL**NEW DELHI**Dated 30th March 2007**PETITION No. 39(C) OF 2004****Star India Private Limited****...Petitioner****Vs****M/s Asianet Satellite Communications Private Limited****...Respondent**

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BEFORE:**MR. VINOD VAISH, MEMBER****LT.GEN.D.P.SEHGAL(RETD), MEMBER**

For Petitioner : Mr Rajeev Nayyar, Sr.Advocate with
Mr.Gopal Jain, Ms Simran Brar
Ms.Amrita Bhattacharya, Mr.Manu
Agarwal,Advocates for Karanjawala
& Co.

For Respondent : Mr.C.A.Sundaram, Senior Advocate
with Mr.Naveen Chawla,Ms.Shirin
Khajuria,Mr.Kunal Tandon,Mr.Arjun
Suresh, Advocates

ORDER

1. This matter is being decided by this Tribunal in the light of the orders of the Hon'ble Supreme Court dated 19/9/2006 in CA No.2600 of 2006 (Star India Pvt. Ltd vs Asianet Satellite Communications Private Limited) and SLP(C) No.9625 of 2006. For facility of reference we quote the said orders in toto as under:-

“Appeal admitted.

We have heard counsel for the parties and with their consent we proceed to dispose of this appeal.

The Tribunal by its impugned order dated March 3, 2006 has made the following directions in the operative part of the order:

“We accordingly direct that the parties shall reconcile the accounts for the period 1.1.2003 to 31.12.2003 as per the terms of the written agreement for that period and on such reconciliation if any amount is found due by the Respondent to the Petitioner, the same shall be paid within 30 days. In the case of reconciliation showing excess amount having been paid by the Respondent for the said period, credit shall be given by the Petitioner to the Respondent to be adjusted towards the dues after 31.12.2003.

In regard to the period after 31.12.2003 accounts would accordingly need to be reconciled on the basis of reasonable subscriber base as indicated herein above and on that basis the amount payable to anyone of the sides would be determined, and parties will further enter into an agreement for continued supply of signals, as per the Interconnect Regulations and in particular taking into account our observations in regard to the need to ensure that the terms are non-discriminatory, reasonable and fair. We give 30 days time to the parties for this purpose. In this period of 30 days the signals would be continued as before on the existing terms on the basis of which the signals were being given during the pendency of the petition subject to the final reconciliation. In case agreement is not reached between the parties, the Petitioner would be free to disconnect the signals and the Respondent would be free to approach this Tribunal for any relief that it may be entitled to under the TRAI Act and the related regulations”.

So far as the first paragraph of the direction is concerned, that has attained finality since no appeal has been preferred against that part of the order which relates to the period 1.1.2003 to 31.12.2003.

In regard to the period 1.1.2004 to 30.4.2006, the Tribunal has directed that the accounts should be reconciled on the basis of reasonable subscriber base as indicated in the order and that basis the amount payable to anyone of the parties would be determined. The parties have further been directed to enter into an agreement for continued supply of signals and to ensure that the terms are non-discriminatory, reasonable and fair.

For the subsequent period, we are informed a separate dispute has been raised which is pending before the Tribunal.

Having considered all aspects of the matter, we consider it appropriate that rather than leaving the parties to determine a reasonable subscriber base, the Tribunal itself should make an inquiry into the matter and determine the issue on the basis of the material that the parties may produce before the Tribunal. For this purpose, the Tribunal may give appropriate directions to the parties whereafter it shall consider the evidence produced by the parties and determine the question finally.

We have not expressed any opinion on the observations made and principles laid down by the Tribunal in its order, and this order should not be considered either as approval or disapproval of the principles enunciated or observations made by the Tribunal as contained in the impugned order.

Since several disputes will be resolved if this issue is determined finally by the Tribunal, we request the Tribunal to dispose of the matter finally, preferably within three months from the date on which a copy of this order is produced before the Tribunal by either of the parties.

The appeal is disposed of in the above terms.

S.L.P. (C) No.9625 OF 2006

In view of the order that we have passed, counsel for the petitioner in S.L.P.(C) No.9625 of 2006 prays for leave to withdraw the Special Leave Petition. The Special Leave Petition is accordingly dismissed as withdrawn.”

Thus it is settled that for the period 1/1/2003 to 31/1/2/2003 the terms of the written agreement for that period would be applicable. However, for the period 1/1/2004 to 30/4/2006 the Hon'ble Supreme Court has asked the Tribunal to determine the reasonable subscriber base and dispose of the matter finally.

2. Although we have dealt in detail in our order of 3/3/2006 the rival contentions of the parties as contained in the pleadings, we record some of the salient aspects so as to make the present order self-contained.

M/s Star India Pvt. Ltd, the Petitioner, and the Respondent M/s Asianet Satellite Communications Pvt. Ltd. entered into a subscription agreement dated 1.1.2003 for a period of 12 months whereby a package of TV channels belonging to the Petitioner was agreed to be given to the Respondent for further distribution. This agreement stipulated a monthly subscription fee of Rs.83,40,000/- and the number of subscribers indicated against the said subscription fee was 2,78,000. Based on this agreement the Respondent started receiving signals from the Petitioner. These signals were continued even after the expiry date mentioned in the said written agreement and because the Respondent did not pay the subscription fee as demanded by the Petitioner, it fell into arrears and according to the Petitioner, as on 30th September 2004, the amount due and payable by the Respondent was Rs.8,58,20,295/- .

In the petition, details have been given of the various letters exchanged between the Petitioner and the Respondent starting with the first letter dated 22/5/2003 from the Petitioner to the Respondent asking the latter to clear its outstanding amount of Rs.4,02,47,000/-. A legal notice was ultimately sent on 1/12/2003 by the Petitioner seeking payment of outstanding sum of Rs.6,24,77,375/- . The Respondent sent its replies basically pointing out that matters were under discussion between the two sides and that the outcome of these discussions should be awaited. The Respondent also by two letters dated 9/3/2004 and 10/3/2004 sent certain proposals for revising the subscription base and the subscription fee from a back date and for fixing the subscription fee from January 2004 onwards. The Petitioner did not accept these offers. In these communications the Respondent asked for parity from the Petitioner vis-a-vis competitors of the Respondent in Kerala and again requested for concessions based on that approach. These communications were replied to by the Petitioner on 23rd March 2004 pointing out that there was a contract between the Petitioner and the Respondent, the terms of which were quite clear and that the Respondent had signed the same and the parties were fully aware of the market dynamics and both the parties had consciously entered into an agreement which would therefore continue to be applicable. On 9/8/2004 the Petitioner sent a reply to a proposal dated 6/5/2004 sent by the Petitioner and stated that the said proposal was not as per the discussion between the parties on 23rd July 2004 and called for a further discussion and sending of a fresh proposal based thereon. No further progress could be made on the above. The Petitioner has alleged breach on the part of the Respondent of the subscriber agreement dated 1.1.2003 and it is alleged that although it continued to enjoy the benefit of uninterrupted supply of signals of the channels of the Petitioner it did not make payment as per the said agreement resulting in total amount outstanding of Rs.8,58,20,295/- as on 30th September 2004. The following prayers have been made in the petition.

- (a) direct the Respondent to make payments and settle the outstanding dues of the petitioner of Rs.8,58,20,295/- towards subscription charges.
- (b) Direct that aforesaid amount and all amounts due and payable be paid with interest @ 18% per annum thereon from the date when the amounts become due and payable till date of payment as per clause 9 of the Agreement;
- (c) Pass such further and other orders this Hon'ble Court may deem fit and proper in the facts of the case.

3. In its reply the Respondent has admitted that it entered into an Agreement dated 1/1/2003 with the Petitioner for receiving the TV signals of the Petitioner the validity of which was for a period of 12 months which ended on 31/12/2003. However, according to the Respondent, the Petitioner could ask for payment of dues based on the said Agreement only for the period limited to the Agreement. For the period beyond 31/12/2003 the Respondent has taken the stand that "it was well within its right to pay only on the basis of its actual subscribers rather than on an exaggerated base which according to the Respondent it was coerced into agreeing at the time of signing of the Agreement dated 1/1/2003". The Respondent has denied that it has admitted to the outstandings as alleged by the Petitioner and has taken the stand that there is no subsisting agreement between the parties after the expiry of the agreement on 31/12/2003. Whatever payments were made were in the nature of ad-hoc payments pending finalization of the terms.

Respondent has further stated that the repeated meetings that were held between the representatives of the Respondent Company and the Petitioner went on debating the issue of reduction of total monthly payment by way of subscription fee to the Petitioner based on the norms made applicable to the Respondent's competitors and on principles of equity and natural justice.

Respondent denies as incorrect and misleading the assertion that the Respondent gave assurance in its response to the various letters from the Petitioners that it shall clear the alleged outstanding amount. On the other hand it is stated that the Respondent had been insisting on reduction in the quantum of payment and the declared subscriber base.

It is the stand of the Respondent that unless the quantum of monthly payout to the Petitioner is assessed based on acceptable norms and parity, it would be impossible to arrive at the quantum of total dues. This has to be equated against the payments already made and then only one can arrive at a decision on the extent of amount due to/from the Petitioner, based on acceptable norms and parity.

Further, it is the case of the Respondent that most of the smaller operators had joined together to form all Kerala Cable Operators Association and their office bearers had filed an affidavit in the Hon'ble Court of Kerala claiming more than eight lakh connections. There were some other operators however who had not joined the association. According to the Respondent, it is estimated that Kerala has at present about 1.7 million cable TV homes. During the course of the discussion between the Respondent and the Petitioner, the executives of the

Petitioner had admitted that in Kerala, from Cable operators other than the Respondent, it realized a revenue of Rs.28.35 lakhs per month. This brought out the fact that while the Respondent's holding was less than one third of the total connections in the State at around 5 lakhs it was paying Rs.83.40 lakhs monthly which was nearly 3 times that of others. Since then the Respondent had been time and again requesting the Petitioner to determine the dues of the Respondent on the basis of parity with its competitors which would have reduced the payouts of the Respondent substantially. According to the Respondent, though there were favourable responses, which are now denied in the present Petition, the Petitioner had only partly admitted the need for corrective action and made only paltry concessions. However, the Petitioner, even after the expiry of the agreement in December 2003, had continued to bill for the later period on the old terms which were neither agreed to nor admitted by the Respondent resulting in the alleged figure of outstanding of Rs.8.58 crores. According to the Respondent the viewer ship of Star bouquet as per TRP ratings was only about 3.67% covering the cities of Kochi and Trivandrum while for the other areas where Asianet was present in Kerala it was only 3.95%. The Respondent has stated that the demand of Rs.83.40 lakhs per month, was based on a declared subscriber base of around 55% of the total number of its subscribers which was a very high figure, unknown in the industry, which normally adopts 30%, and for a bouquet which was not popular in Kerala this was nothing but perpetuation of injustice on the Respondent.

4. During the hearing of arguments learned senior counsel for the Petitioner Shri Rajeev Nayyar cited (1984) 2 SCC 324 (paras 5 & 7 thereof) to put forth the contention that after the remand order of the Hon'ble Supreme Court of 19/9/2006, the matter has to be decided afresh on the basis of new and additional evidence that had been produced and no reliance could be placed on the order of the Tribunal dated 3/3/2006 in this petition which had been challenged in Appeal by the Petitioner in the Supreme Court. We have carefully looked into this contention of Shri Nayyar right at the start as we need to be absolutely clear about the scope of the present proceedings. In the case cited above it was held as follows:

“This Court in exercise of appellate powers vested in it under Article 136 of the Constitution had set aside the Bench decision of the High Court delivered in 1971 and that judgment for all intents and purposes had become non-existent. The present Division Bench of the High Court was not entitled, by any process known to law, to resurrect that judgment into life”, and

“.....the Division Bench could have applied its mind afresh to the materials already on record and the appeals should have been disposed of by an independent judgment and not by restoring to life judgment which had, in exercise of appellate powers of this Court, been rendered lifeless”

In the matter presently before us the Hon'ble Supreme Court in its remand order has held as under:

“Having considered all aspects of the matter, we consider it appropriate that rather than leaving the parties to determine a reasonable subscriber base, the Tribunal itself should make an inquiry into the matter and determine the issue on the basis of the material that the parties may produce before the Tribunal. For this purpose, the Tribunal may give appropriate directions to the parties whereafter it shall consider the evidence produced by the parties and determine the question finally.

We have not expressed any opinion on the observations made and principles laid down by the Tribunal in its order, and this order should not be considered either as approval or disapproval of the

principles enunciated or observations made by the Tribunal as contained in the impugned order.”

A plain reading of the above indicates that the principles laid down by this Tribunal in its Judgment and Order of 3.3.2006 were not interfered with by the Hon'ble Supreme Court and this Tribunal had been asked to finally determine the “reasonable subscriber base” and had also indicated that for this purpose this Tribunal may give directions to the parties to adduce relevant evidence. There is no indication whatsoever in the said remand order that the order of 3/3/2006 had been nullified by the Hon'ble Supreme Court. It is our understanding that by the said remand order the Hon'ble Supreme Court has desired that the Tribunal carry forward the earlier exercise and make an enquiry and determine reasonable subscriber base and dispose of the matter finally on the basis of material that the parties may produce before the Tribunal and for this appropriate directions may be given by the Tribunal to the parties. We also find that in the case cited by the learned counsel the Hon'ble Supreme Court had allowed the appeals by setting aside the judgment of the High Court and had sent the cases back to the High Court to take the appeals on its file and dispose them of according to law in the light of the directions by the Supreme Court. This kind of situation does not exist in the matter presently before us. We accordingly reject the contention of the learned counsel of the Petitioner that no reliance can be placed by us on our order of 3/3/2006, in regard to the determination of reasonable subscriber base, and the liabilities for the period after 31/12/2003.

5. According to the learned senior counsel for the Petitioner the only issue to be determined as per the remand order is the subscription base of the Respondent. Reliance was placed on the affidavit dated 20/11/2006 of Shri Mohammed Mujeebuddin witness for Star which shows charts at pages 7, 10 and 11 indicating that not only the Respondent added operators but it also reached out directly to subscribers on account of which over the time its subscriber base had increased. According to Shri Nayyar on this aspect there was no cross-examination on the part of the Respondent. Under Section 138 of the Evidence Act, the evidence tendered by the Petitioner thus stands established. In support of the argument that the Respondent's subscribers had increased, reliance was also placed on the following :

- (a) At page 5 of his affidavit at para 12 the Respondent's witness Shri Mahesh Kumar has admitted the figures of 5.42 lakh subscribers for 2004, 6.23 lakh subscribers for 2005 and 6.74 lakh subscribers for 2006.
- (b) The Respondent's witness Mr Mahesh Kumar has admitted at page 5 para 12 of its affidavit that the said figures/subscriber numbers for 2004, 2005 and 2006 include the 7-8% annual growth of the Respondent.
- (c) The fact of the Respondent's growth in subscriber base by the addition of cable operators has been admitted by the witness of the respondent company-Mr. Mahesh Kumar during his cross-examination at Questions/Answers No.111 to 114. [Cross-exam of Mahesh Kumar].
- (d) Petitioner's affidavit's has stated at page 9 para 17 that the Respondent's subscriber number in the year 2003 was 6.86 lakhs and on the basis of increase of 13% based on NRS data the

Respondent's subscriber base for the year 2004 would be 7,75,180 and increase of 17,600 because of addition of new cable operators to the Respondent's network adding upto 7,92,780 and at page 16 para 32 the Respondent's subscriber numbers have been stated as being 9,22,201 lakhs for the year 2005 and at page 16 para 34 the Respondent's subscriber numbers have been stated as being 10,48,177 lakhs for the year 2006.

- (e) The respondent company's Managing Director Mr.Nair in a letter dated 23.1.2004 to TRAI has stated that the number of subscribers for the year 2004 was 5.5 lakhs. [page 12 para 20 of the affidavit of Petitioner's witness, Shri Mujeebuddin].

All these have been cited on behalf of the Petitioner to establish, both on the basis of material on record and on Respondent's own admissions, that subscriber numbers have increased since 2003 whereas the Petitioner has charged the Respondent for a subscriber base of 2.78 lakhs only for the period 2004 to April 2006.

Heavy reliance was placed during the arguments of Shri Rajeev Nayyar on the agreement for the period 1/1/2003 to 31/12/2003 being taken as the basis for determining the reasonable subscriber base for the period after 31/1/2/2003. He argued that the validity of the agreement had been upheld by this Tribunal in its order of 3/3/2006 as per the following:

"11.9 As already mentioned we have taken the view that for the period 1/1/2003 to 31/12/2003 the written agreement between the parties would form the basis of the contractual terms and we reject the arguments on behalf of the Respondent which seek to reopen this contract....."

"11.10.....We accordingly direct that the parties shall reconcile the accounts for the period 1.1.2003 to 31.12.2003 as per the terms of the written agreement for that period and on such reconciliation if any amount is found due by the Respondent to the Petitioner, the same shall be paid within 30 days In the case of reconciliation showing excess amount having been paid y the Respondent for the said period, credit shall be given by the Petitioner to the Respondent to be adjusted towards the dues after 31.12.2003."

In the remand order Hon'ble Supreme Court has stated the following in regard the above directions of the Tribunal:

"So far as the first paragraph of the direction is concerned, that has attained finality since no appeal has been preferred against that part of the order which relates to the period 1.1.2003 to 31.12.2003."

According to Shri Nayyar since this agreement had been upheld and parties have not executed any fresh agreement for the subsequent period the petitioner is not disentitled to make its claim on the basis of the last written agreement. The following additional material was cited in support of this argument.

- (a) As brought out in the evidence of Shri Mujibuddin, witness of Petitioner (page 84 – para 19) in the case filed by the Respondent in City Civil Court, Ernakulam, it was stated by the Respondent that they were holding on to the agreement of 1.1.2003 for the future years. It was argued that although it was also mentioned “except for commercial terms” such a stand was not legal as holding over should be either whole or none. The contract of 1.1.2003 should therefore be taken as having been held over for the period after 31.12.2003 in all respects.
- (b) The figure of 2.78 lakhs subscribers was arrived at without any coercion or fraud and on the basis of negotiations and exercise of an option by the Respondent whereby it consciously agreed to increase its declared subscriber base from 1.39 lakhs to 2.78 lakhs in order to avail of a concession per subscriber rate of Rs.30/- instead of the earlier rate of Rs.40/-. This has also been admitted by Shri Mahesh Kumar, witness of Respondent while answering Question Nos.69-71 as below:
- “Q.69 Now, a comparison of page 60 and 62 of the addendum executed by your office show that there is increase of 4500 subscriber bases between 01 Nov and 01 Dec 2002. Is it correct?”*
- A. Yes.*
- Q.70 Which of the four options that Asianet elected to opt for in response to offer dated 06.12.2002 given by star at page 64.*
- A. We have chosen option no 1. Volunteer to say. From this unilateral pricing policy.*
- Q.71 What was the subscriber number you or our office signed in the agreement dated 01.01.2003?*
- A. 2.78 lakhs.”*
- (c) Clause IV A of the agreement read as under

“IV FEES

A. Affiliate Subscription Fees:

- (i) Immediately upon execution of this agreement, based on the actual number of Subscribers of the Affiliate, the Affiliate shall pay to the Licensor Subscription Fee, in advance, as detailed in Annexure-A hereof, in the event of any increase in the number of the Affiliate’s Subscribers, Subscription Fee shall be calculated and increased accordingly. **The Affiliate agrees that the Subscription Fee shall not reduce below what is stated in Annexure-A.***
- (ii) The Licensor reserves its right to revise the aforementioned Subscription Fee from time to time. Upon such revision, the Affiliate agrees and undertakes to pay the revised Subscription Fee pro-rata from the effective date of such revision, in advance, in case any disputes arising from such revision, the Parties agree that the decision of the Distribution head of the Licensor shall be final and binding.*
- (iii) In the event the Licensor believes in its reasonable discretion that the Affiliate has under declared its subscriber base or there has been an increase in the base of the Affiliate Subscribers, the Licensor may call for an increase of the subscriber fees payable hereunder. If after a period of 7 days the Affiliate fails to pay the increased Subscriber Fee, as requested by the Licensor; the licensor may deactivate/disconnect the Subscribed Channel hereunder provided and/or terminate his agreement without prejudice to its rights to claim additional*

Subscriber Fee resulting from such under declaration by the Affiliate or the increase in its subscriber base referred to above. For avoidance of doubt, an increase of Affiliate subscribers shall include without limitation, increase of Subscribers to which Affiliate directly distributes the Subscribed Channel or an increase of such subscribers to which the Subscriber Channels are distributed by the sub-operators, sub-affiliates/cable operators and other sub-operators and sub affiliates/cable operators added by the Affiliate during the term of this agreement.”

This in effect postulates in the portion highlighted above that fee will not go down below Rs.83 lakhs during the term of the agreement.

- (d) The statement in affidavit of evidence of Petitioner’s witness, Shri Mujeebuddin in para 18 has remained unrebutted, namely,

“I say that the total universe of the Respondent would be 7,92,780 (775180+17600) whereas the Respondent was paying the Petitioner on the basis of 2.78 lakhs subscribers which is only 35% of the Respondent’s actual subscriber base for 2004. This by itself shows that the rates being paid by the Respondent were fair and reasonable and in fact the Respondent was paying on a far lower subscriber base than the actual number of subscribers to whom it was giving signals and from whom it was collecting subscription charges.”

It was argued by Shri Nayyar that the stand taken by the Respondent, that it was required to pay to the Petitioner based on the principles of parity i.e. the payments to be made by the Respondent had to be in consonance with the payments which were being made by other operators in Kerala, was a clear afterthought of the Respondent and a ruse to wriggle out of the Respondent’s contractual obligations. At the time of negotiations with the Respondent there was no discussion or reference to other operators. According to him this is wholly irrelevant and immaterial in the context of the present case and is a red-herring thrown in by the Respondent to divert the attention of the Tribunal from the breach committed on the part of the Respondent.

6. In this regard before we proceed ahead we deem it fit and relevant to take note of our following findings and observations in our order of 3.3.2006:

- (i) *“11.5 It has been the main grievance of the Respondent that in Kerala State while it is being charged a subscription fee of Rs. 83.4 lakhs per month for a declared subscriber base of 2.78 lakhs and a subscriber universe attached to it of 5 lakhs (disputed by the Petitioner as 6.5 lakhs), the other cable operators are paying Rs.28 lakhs per month although having a subscriber universe of around 10 lakhs thereby implying that a declared subscriber base of about 1 lakh (about one third that of the Respondent) has been accepted from them. On the principle of parity, according to the Respondent, it should be charged on a declared subscriber base of around 60,000 or at most 81,000, instead of the 2.78 lakhs recorded in the agreement for the period 1/1/2003 to 31/12/2003. It is clear that the Petitioner who is privy to all the relevant information in the above matter, namely the exact amounts being charged and how they are being linked with the subscriber universe and in turn the declared base of subscribers, has for reasons best known to it decided to adopt a rigid and inflexible approach. It did however show willingness to enter into negotiations with the Petitioner, and had also assured the Petitioner in a written communication as well as during the discussions, that it would protect the interests of the Respondent and ensure parity in regard to the terms of payment. However no proposals in this regard have been divulged. Since there is enough material on record to indicate that the principle of parity has not been adhered to by the Petitioner in relation to the Respondent vis-à-vis other Cable operators in Kerala*

State, we do not find any justification in the claim of the Petitioner that the amount due as on 30/9/2004 from the Respondent to the Petitioner is Rs. 8,58,20,215 towards subscription charges. In fact we find considerable weight in the stand of the Respondent that the quantum of monthly payment needs to be first determined on the principle of parity for the period after 31-12-2003 till such time as the signals are availed by the Respondent and this has to be set off against the amounts already paid.

*We have been made aware of the widespread menace of under declaration and the gaps in the regulatory framework which have not specified the interconnection and distribution charges payable to the various tiers in the hierarchy of Cable TV distribution starting from the Broadcaster at the apex and going down through the Multi-system Operator and Cable Operator to the consumer. For various reasons the system of linking payments to the actual channels accessed has not been implemented except in a few places like Chennai as such the exact subscriber base of any channel or of the group of channels belonging to a broadcaster cannot be determined in a fool proof manner. The questions which need to be answered in the matter before us are (a) what is the subscriber base of the Petitioner's Channels in the subscriber universe of 10 lakhs to 8.5 lakhs of the other cable operators (i.e., other than the Respondent); (b) If it is assumed that all have been given access to these channels, then the second question would be what proportion the declared subscriber base bears to the subscriber universe. The declared subscriber base of other cable operators presently is 1.01 lakhs. This bears a proportion of 12.5% to the subscriber universe of the other cable operators if that universe is taken as 8.5 lakhs. If the subscriber universe of the Respondent is taken as 6.5 lakhs then its declared subscriber base of 2.78 lakhs (assumed by the Petitioner based on agreement of 1/1/2003) constitutes about 41%. For bringing about parity Respondent has argued that its declared subscriber base be reduced to 81,000. The Petitioner has disputed this reasoning by stating that the universe of its subscribers in the category of 'other cable operators' is only 2.75 lakhs and not 8.5 lakhs. **From the evidence adduced, it appears to us that the figure of 2.75 lakhs has been pitched at a low level and is the root cause for the dispute regarding parity.**"*

- (ii) "11.7 For the period after 31/12/2003, there would be a need to determine the amount payable and the agreement which came to an end on 31/12/2003 cannot be the basis for the same."
- (iii) "11.7.....We are somewhat surprised that the Petitioner did not consider it prudent to accept the proposal of the Respondent, particularly the one made on 6/8/2004 wherein on the basis of an outstanding amount of Rs.593.40 lakhs as on 31/12/2003, the Respondent proposed that monthly subscription rate for the period 1/1/2004 to 31/12/2004 be fixed at Rs.60 lakhs per month and a schedule of payments was proposed for clearing the balance outstanding as on 31/7/2004 of Rs.541.25 lakhs over the period August 2004 to June 30, 2005, apart from payment of current monthly subscription fee at Rs.60 lakhs per month.

These terms were definitely markedly superior to the ones offered by the Respondent in their letter of 9/3/2004. in which it had been proposed that :

- (a) *Subscriber base of Asianet be revised to 1,53,600 on the basis of 32% of the Asianet Universe of 4,80,000 which would have translated into a monthly payment of Rs.44.7 lakhs from January 2004 onwards.*
- (b) *Retrospective application of 1,53,,600 subscriber base from August 2003 translating into subscription fee for August to December 2003 getting fixed at Rs.46.08 lakhs per month.*
- (c) *A discount of Rs.6 lakhs per month to the Respondent for the period January to July 2003 for the negative growth of Asianet during 2003.*
- (d) *Total outstanding payment based on above calculation would be Rs.4.33 crore after including March 2004 billing.*

- (e) *Total payment outflow required between March 2004 and December 2004 would be Rs.8 crore including the outstanding dues. A schedule would be worked out for liquidation of the entire amount over the next 10 months.*

Both the proposals i.e those made on 9/3/2004 and 6/8/2004 were rejected by the Petitioner.

On behalf of the Petitioner it was put across to us at the time of arguments that these proposals constituted important admissions of liability on the part of the Respondent and also constitute evidence to show that the earlier contract of 2003 was subsisting. It was also argued before us that the outstanding amounts indicated in these proposals should be treated as admissions regarding the amounts due as on the dates indicated therein. This was particularly stressed at the initial stages of hearing of the petition when the Petitioner sought orders of Tribunal that the Respondent be asked to pay the admitted amounts due if it wants to continue to avail the benefit of the signals.

Learned Counsel for the Respondent strongly contested the above stand. He drew our attention to the ruling of the Allahabad High Court in AIR 1936 Allahabad 157, Shibcharan Das vs Gulabchand Chhotey Lal wherein it was held that:

“ Where negotiations are being conducted with a view to settlement it should be held that these negotiations are being conducted ‘without prejudice.’ In such circumstances it is not open for one of the parties to give evidence of an admission made by another. If negotiations are to result in a settlement each side must give away a certain amount. If one of the parties offers to taken something less than what he later claims he is legally entitled to, such offer must not be used against him; otherwise persons could not make offers during negotiations with a view to a settlement. ”

“In view of the above legal position we are unable to accept the contention on behalf of the Petitioner that these proposals constituted commitments about the Respondent’s liabilities to the Petitioner.”

- (iv) ***“11.9 As already mentioned we have taken the view that for the period 1/1/2003 to 31/12/2003 the written agreement between the parties would form the basis of the contractual terms and we reject the arguments on behalf of the Respondent which seek to reopen this contract. As regards the period after 31/12/2003 we reject the arguments on behalf of the Petitioner that the terms of the contract entered into for the period 1/1/2003 to 31/12/2003 would continue to remain applicable. This contract came to an end on 31/12/2003 and has neither been renewed or extended. It is true that the TV signals of the Petitioner company have been delivered lawfully to the Respondent who has availed of the benefit and it was not meant to be given gratuitously and the Petitioner is therefore entitled to compensation. The Respondent has accepted this right of the Petitioner. The question to be decided is the amount of compensation payable and the manner of calculation thereof. It is absolutely clear that it cannot be on the basis of the agreement of 1/1/2003 which has stipulated a subscription amount based on a declared subscriber base of 2,78,000 whereas on the principle of parity M/s Asianet has during the course of arguments indicated calculations to us which would lead to drastic reduction of the figure from 2,78,000 to around 62,000 to 81,000. We are of the view that the burden is on the Petitioner to disclose the subscription amount payable, based on the principle of parity with the other cable operators in Kerala State and on that basis reach an agreement with the Respondent for the period beyond 31/12/2003 and compute the total payable amount by the Petitioner. The past accounts would accordingly need to be reconciled on that basis to determine the amounts to be paid/refunded to either side. We would like to observe that the proposals made in the past by the Respondent and which were rejected by Petitioner at that point of time which we have referred to in our order should not be totally brushed aside and both sides should take these into account for the purpose of reaching an agreement on the amount payable for the period after 31/12/2003.”***

(v) *“11.10 In regard to the period after 31-12-2003 accounts would accordingly need to be reconciled on the basis of reasonable subscriber base as indicated herein above and on that basis the amount payable to anyone of the sides would be determined, and parties will further enter into an agreement for continued supply of signals, as per the Interconnect Regulations and in particular taking into account our observations in regard to the need to ensure that the terms are non-discriminatory, reasonable and fair. We give 30 days time to the parties for this purpose. In this period of 30 days the signals would be continued as before on the existing terms on the basis of which the signals were being given during the pendency of the petition subject to the final reconciliation.. In case agreement is not reached between the parties, the Petitioner would be free to disconnect the signals and the Respondent would be free to approach this Tribunal for any relief that it may be entitled to under the TRAI Act and the related regulations.”*

(vi) *‘11.3 We have carefully gone through the cross examination of Shri V.Mohan, Area Sales Manager of the Petitioner Company in this regard. In his cross examination dated 30.9.2005 this witness has clearly stated that he was present when the agreement was signed some time in January, 2003 and that the signing of the agreement was preceded by discussions between the parties and that he was present during the discussions. However, no record was maintained of these discussions. He also confirmed that Shri Mahesh Kumar was present during the discussions along with Shri S. Rajeev. The witness has clearly stated that at the relevant time there were 15 lakhs cable T.V homes in Kerala based on NRS figures. He admitted that he did not ever inspect or call for subscriber’s records of the respondent company even though he admits that during the discussions the respondent company did orally mention to offer its records to prove its subscriber base. Even after receipt of an E-mail dated 12.11.2003 from the respondent offering their records for inspection the witness did not verify the records of the respondent company. The witness has stated that “the actual subscriber base declared to broadcasters by a cable operator is about 35-40% of the real subscriber base of such cable operators.” In answer to a question “Mr. Mohan, there are about 1600 other cable operators with whom you have no contract. Are their subscriber base getting feed of Star Channels? The witness stated that “ there are cable operators who are not the subscribers of the petitioner but they also get petitioners’ signals”. It is relevant to take note that the witness answered that the figure of “2.78 lakhs mentioned as number of subscriber base in the said document at Annexure-A is the agreed subscriber base for the purpose of payment of subscription to the petitioner and is not the actual total subscriber base of the respondent” and that “though the subscriber base is 2.78 lakhs as mentioned in Annexure-A the total subscriber base of the respondent at that point of time was about 7 lakhs as per his understanding” and further that “the suggestion that more than 50% of the subscriber base of the respondent live in rural area is not admitted by him. On the contrary he assumes it will be less than 50%. In his opinion a percentage of respondent’s subscriber base in the rural area would be about 20-30% only”. We reproduce below the following very significant answer given by the witness during cross examination. In his answer to the question –“ Mr. Mohan I take it during June / July there was some discussion between Asianet and Star in regard to the subscriber base declared. Are you aware of and present in any of these meetings ?”, he stated that “ during the discussion with the representatives of the petitioner and the representatives of the respondent in the month of June there was an assurance given by Mr. Mujeebuddin that he will bring about a parity in regard to the declaration of payment of subscription between respondent herein and other cable operators in Kerala”.*

“11.4 We are therefore convinced that there does not exist any subsisting agreement between the parties for the period after 31-12-2003. Much has been made of the fact that the Respondents treated it as a holding over agreement as brought out in a Civil Suit filed by the Respondent during this period. Also words have been taken from here and there from the large number of letters to indicate that the Respondent had accepted the liability to pay as per the agreement of 1/1/2003. However it is abundantly clear from this correspondence that the Respondent had kept insisting on reduction in subscriber base and consequent reduction in the monthly subscriber fee and had in fact not entered into any agreement whether written or oral in regard to the commercial terms. Many proposals were

given from time to time regarding the commercial terms by the Respondent but these were promptly rejected by the Petitioner.”

Thus based on detailed reasoning we have in our order of 3/3/2006 given important findings as under:

- (i) “we find considerable weight in the stand of the Respondent that the quantum of monthly payment needs to be first determined on the principle of parity for the period after 31-12-2003 till such time as the signals are availed by the Respondent and this has to be set off against the amounts already paid.”
- (ii) In regard to the subscriber universe of other Cable operators having access to Star signals we have stated *“from the evidence adduced, it appears to us that the figure of 2.75 lakhs has been pitched at a low level and is the root cause for the dispute regarding parity.”*
- (iii) In regard to the argument that certain proposals having been made during the course of negotiations these should be treated as commitments made on behalf of the Respondent, we have held *“In view of the above legal position we are unable to accept the contention on behalf of the Petitioner that these proposals constituted commitments about the Respondent’s liabilities to the Petitioner.”*
- (iv) As regards the agreement for the period 1/1/2003 to 31/12/2003 being taken as the basis for the period after 31/12/2003 we have held that *“as regards the period after 31/12/2003 we reject the arguments on behalf of the Petitioner that the terms of the contract entered into for the period 1/1/2003 to 31/12/2003 would continue to remain applicable. This contract came to an end on 31/12/2003 and has neither been renewed or extended. It is true that the TV signals of the Petitioner company have been delivered lawfully to the Respondent who has availed of the benefit and it was not meant to be given gratuitously and the Petitioner is therefore entitled to compensation. The Respondent has accepted this right of the Petitioner. The question to be decided is the amount of compensation payable and the manner of calculation thereof. It is absolutely clear that it cannot be on the basis of the agreement of 1/1/2003 which has stipulated a subscription amount based on a declared subscriber base of 2,78,000 whereas on the principle of parity M/s Asianet has during the course of arguments indicated calculations to us which would lead to drastic reduction of the figure from 2,78,000 to around 62,000 to 81,000. We are of the view that the burden is on the Petitioner to disclose the subscription amount payable, based on the principle of parity with the other cable operators in Kerala State and on that basis reach an agreement with the Respondent for the period beyond 31/12/2003 and compute the total payable amount by the Petitioner and we are therefore convinced that there does not exist any subsisting agreement between the parties for the period after 31-12-2003. Much has been made of the fact that the Respondents treated it as a holding over agreement as brought out in a Civil Suit filed by the Respondent during this period. Also words have been taken from here and there from the large number of letters to*

indicate that the Respondent had accepted the liability to pay as per the agreement of 1/1/2003. However it is abundantly clear from this correspondence that the Respondent had kept insisting on reduction in subscriber base and consequent reduction in the monthly subscriber fee and had in fact not entered into any agreement whether written or oral in regard to the commercial terms. Many proposals were given from time to time regarding the commercial terms by the Respondent but these were promptly rejected by the Petitioner”.

We had clearly also cast a burden on the Petitioner to disclose relevant information in this regard for the purpose of reaching an agreement. Now that a determination has to be made in regard to the ‘reasonable subscriber base’ by the Tribunal as per the remand order of the Hon’ble Supreme Court, the burden was on the Petitioner to have additional relevant evidence in this regard. We would be justified in adhering to these findings unless there is new evidence furnished to justify reopening of the same.

7. After receipt of the remand order we gave the following directions to the parties:

“As matters stand today, we are required to now determine “reasonable subscriber base” for the period 1.1.04 to 30.4.06 and quantify the monthly amounts payable.

We have briefly heard learned counsels representing both the sides. We also recall that as part of the execution proceedings, for the purpose of determining the reasonable subscriber base and also to quantify the monthly amounts payable, we had, in the context of our order of 3.3.06, given directions to M/s Star India Private Limited to submit the following information for each of the years 2004 and 2005 on affidavit supported by documentary evidence capable of being verified.

(i) Total subscriber base of the ‘other cable operators’ who have access to Star signals in Kerala State.

(ii) Declared subscription base for Star signals of “other cable operators” in Kerala State.

(iii) Computation of amount payable per month indicating the rural-urban breakup and the per subscriber rate adopted.

(iv) The proportion which Serial No.(ii) bears to Serial No.(i) above.

(v) Total subscriber base of M/s Asianet in Kerala State.

(vi) The computed subscriber base of M/s Asianet if the proportion calculated at Serial No. (iv) is applied to the figure in Serial No.(v).

(vii) Computation of amount payable on the computed subscriber base at Serial No.(vi) above, clearly indicating the rates adopted and the rural-urban breakup.

This exercise could not be carried forward to its logical conclusion in view of stay orders of the Delhi High Court in LPA 1007 of 2006 which has been disposed of on 10.10.06.

Accordingly, taking into account the order of the Hon’ble Supreme Court of 19.9.06, we give opportunity to M/s Star India Private Limited to submit the said information on affidavit along with such other evidence on affidavit as may be considered relevant for deciding this matter within two weeks’ time with

a copy of the same being handed over to the opposite party. Ten days' time is given to M/s Asianet Satellite Communications Private Limited to give its response supported by affidavit along with such other evidence on affidavit as may be considered relevant in support of its case a copy of which should be made available to other side.

List on 7th November,2006 for directions/hearing.”

7.1 Affidavit of Mr. Mohammed Mujeebuddin dated 17-11-2006 was submitted on behalf of the Petitioner. This evidence clearly states that based on National Readership Survey (NRS), there was a growth of approximately over 13 % in the market of Cable TV in Kerala in the year 2004. According to the Petitioner, the universe of the Respondent's subscriber base in the year 2003 was 6,86,000. On the basis of 13% increase estimated from the NRS data, the Respondent's base in 2004 would be approximately 7,75,180 and taking into account additional cable network added in this period it would be approximately 7,92,780. The witness has stated that in the year 2003 the total universe was 15 lakhs. Out of this, the universe of Star was approximately 8.6 lakhs. Star Universe of Asianet in the year 2003 was 6.86.lakhs. Other cable operators in the state of Kerala, carrying STAR were catering to 1.9 lakhs subscribers. This goes to establish that Asianet while paying for 2.78 lakhs subscribers was charged only at 40% while other cable operators paying for 1,01,307 subscribers were charged at 53%. The contention of the Respondent that it has been charged at a higher rate qua the other cable operators is wrong and incorrect.

In regard to the specific information sought by the Tribunal the witness had the following to say

“I say by order dated 11-10-2006 the Tribunal has sought the following information from the Petitioner:

(i) Total Subscriber base in Kerala State.

This is not relevant for the purpose of determining the subscriber base of the Respondent in respect of which information has been provided in the instant affidavit and through other documentary and material evidence. I say that in order to determine the subscription charges payable to the Petitioner, two factors have to be determined viz the subscriber base of the Respondent and the applicable rate for the given year and not the subscriber base of other cable operators.

(ii) Declaration subscription base of STAR signals of other cable operators in Kerala Sate.

I say that the Petitioner company cannot disclose the information and figures of other cable operators of Kerala State as the same is confidential and commercially sensitive information. I further say that the information already placed on record in the instant affidavit is sufficient for adjudicating the instant matter pending consideration before it.

(iii) Computation of amount payable per month indicating the rural / urban breakup and per subscriber base adopted.

I say that the negotiated subscriber base in every agreement is a composite figure which takes into account all factors in the market and this figure was agreed to by the Respondent.

(iv) The proportion which S.No.2 bears to S.No.1 on above.

Does not arise for consideration.

(v) Total subscriber base of Asianet.

2004	2005	2006
7.92	9.22	10.38

(At least 5.55 lakhs subscribers as admitted by the Respondent itself in its letter dated 23-1-2004.)

(vi) No response is required in view of what is stated above.”

Thus the Petitioner took the stand that the information sought for by the Tribunal by way of evidence was either irrelevant or could not be disclosed being confidential in nature. According to the Petitioner, for the purpose of adjudication of this Petition, information and data which are relevant pertain to subscriber numbers of the Respondent which has no bearing or nexus with the subscriber numbers of other operators. In any event, that information in respect of the other operators is commercially sensitive and therefore the Petitioner is unable to place the same for consideration before this Hon'ble Tribunal.

7.2 Affidavit of evidence of Shri Mahesh Kumar dated 17-1-2007 was submitted on behalf of the Respondent. On the seven points in which information was sought by the Tribunal, the witness has stated as follows:

“Under one pretext or another, the Petitioner have chosen to avoid giving the data as the Petitioner is certain that if the data is submitted, it will reveal the great disparity in the amount charged to the Respondent and the Rest of Kerala Operators and would result in a huge decrease in the subscriber base and the monthly subscription amount claimed from the Respondent and a large refund to the Respondent.

In reply to para 36 (v), it is wrong and hence denied that the total subscriber base of Asianet for the year 2004 was 7.92 lakhs, for the year 2005 was 9.22 lakhs and for the year 2006 is 10.48 lakhs or any where near it.

In the above circumstances, with a view to assist this Hon'ble Tribunal in determining the “reasonable subscriber base” and the monthly subscription amount payable based on the principles of parity, the Respondent is setting out its evidence in response to the 7 points asked for by the Hon'ble Tribunal.

(i) Total Subscriber base of the Other cable operators in Kerala State who have access to Star signals:

The total subscriber base of ‘other cable operators’ in Kerala was 12.91 lakhs for the year 2004 and 14.60 lakhs for the year 2005. This is evident from the following:

- 1. NRS-The total for the relevant Years were 18.33 lakhs and 20.83 lakhs respectively.*
- 2. As per verifiable records of Asianet, its subscriber base relevant for the year 2004 was 5.42 lakhs and for year 2005 was 6.23 lakhs.*
- 3. Letter dated 22nd October 2006 of the Kerala Cable Operators Association addressed to the Chairman, TRAI claiming that they have 70% of the Cable Connections in the State whereas we have only 30% and that they show all the popular satellite channels in their network.*

4. Letter dated 14/3/2006 from an advertising agency which markets for 2 networks in Trivandrum stating that they have about 9 lakh viewers (about 1.8 lakh connections based on 1:5 ratio of connection v/s viewers) in Trivandrum itself.

5. Letters from Asianet's Regional Heads for the 5 regions of the Cable operators/competitors in their region and whether they get Star bouquet signals or not. The total of these connections to my knowledge; the actual figure could be higher) is close to 15 Lakhs in April 2006, which proves that what Star claimed that only 1.9 Lakh subscribers get their signals is incorrect.

(ii) **Declared subscription base for Star signals of "other cable operators" in Kerala State.**

This is 1.05 lakhs at the most for the year 2004 upto April 2006. It is stated that this has not increased since the letter dated 22.9.2003 of the Petitioner to the Respondent and in fact, as per market information of the deponent, it has decreased. The total subscriber base for which Star is getting paid is about 0.9 lakhs . i.e. it is getting paid for less than 10% of the total base actually 5.2%.

Over the last 3 years, the rest of Kerala operators connection base has grown from about 10 lakhs in 2003 to about 18 lakhs in 2005 December, but at the same time, their declaration has gone down from 1.05 lakhs in 2003 to about 0.94 lakhs in 2006 as per Statement of declaration to Star in the Rest of Kerala based on the market inquiries received by me, which is annexed herewith and marked as **Exhibit R-34**.

From the above, it is seen that there is 80% growth in connection base but 10% drop in declaration due to the reasons as stated above.

(iii) **Computation of amount payable per month (by Rest of Kerala) indicating the rural-urban break-up and the per subscriber rate adopted.**

Based on a charge of Rs. 30 per urban subscriber and Rs. 12 per Rural subscriber (as per the evidence given by Mr. Mohan Kumar, witness of the Respondent), the amount paid by rest of Kerala Operators to Petitioner-Star is a maximum of Rs.28.35 lakhs p.m., since 2003, as per market information with the deponent. This is also confirmed by letter dated 22.9.2003 of the Petitioner to the Respondent.

(iv) **The proportion which Serial No.(ii) to Serial No.(i) above**

- For the period relevant to the year 2004, since the 'Universe' of rest of Kerala was 12.91 lakhs while they were paying for only a maximum of 1.05 lakhs subscribers, the proportion which serial No. (ii) bears to serial no. (i) is 8.1%. Similarly, for the year 2005, upto April 2006, the proportion would be 7.2% ('Universe' at 14.60 lakhs while declared subscriber continued to be 1.05 lakhs maximum).
- In fact, the agreements entered into between Asianet and some cable operators while taking over, r/w Bills issued on them by Star show that with other cable operators Star has been charging only 3-4% of their Universe while Star has been charging over 50% from Asianet.
- TRP ratings for the years 2003 to 2005 show that Star has only 1.25% viewers.
- The Petitioner in WP No.24105 of 2006 has admitted that they are paid for 10-15% of the total connections.

(v) **Total subscriber base of M/s Asianet in Kerala State.**

As per the Records of Asianet, which can be verified by Star; the total subscriber base of M/s Asianet relevant for the year 2004, increased from 5 lakh subscribers to 5.42 lakhs subscribers and for the period

relevant to the year 2005 upto April 2006, it further increased to 6.23 lakh subscribers. Asianet took the Auditor's Certificates in April 2006, wherein it was confirmed that the connection base was only 6.74 lakhs, which will be relevant for the next year

(vi) **The computed subscriber base of M/s Asianet if the proportion calculated at Serial No.(iv) is applied to the figure in Serial No.(v).**

This declared subscriber base, for which Asianet is to pay Star is 0.44 lakhs for the years 2004 and 0.45 lakhs for the years 2005 upto April 2006.

(vii) **Computation of amount payable on the computed subscriber base at Serial No.(vi) above, clearly indicating the rates adopted and rural-urban breakup."**

- *It has been admitted by the Petitioner's witness's cross examination that about 30% of the subscriber base is in rural areas. (Even though it has been the contention of the Asianet more than 50% of its base is in rural areas).*
- *It has also been admitted by Star witness, that it charges only Rs.12 for subscriber for rural areas as against Rs.30 in urban areas.*
- *Accordingly, charging Rs.12 per subscriber for 0.13 lakhs subscribers and 0.13 lakh subscribers (being 30% of the Asianet's total declared subscriber base of 0.44 lakhs and 0.45 lakhs) for the years 2004, 2005 and upto April 2006 respectively, monthly amount payable for rural areas will be Rs.1.59 lakhs p.m. for the year 2004 and Rs.1.61 lakhs p.m. for year 2005 upto April 2006.*
- *So also, charging Rs.30 per subscriber for the remaining 70% subscribers, the amount payable for urban areas for the year 2004 will be 9.26 lakhs p.m. and for the year 2005 upto April 2006 it shall be Rs.9.41 lakhs p.m.*
- *Hence, the total amount payable by Asianet for the year 2004 shall be Rs.10.84 lakhs p.m. and for the year 2005 upto April 2006 it shall be 11.02 lakhs p.m.*

8. The determination of reasonable subscriber base would have been greatly facilitated had the Petitioner, who was in a best position to do so, come forward with the requisite information. However, it has consciously chosen to be evasive. The principle of parity referred to in our order of 3/3/2006 is not any complicated piece of grand originality suddenly conceived out of the blue by this Tribunal. Ingrained in the said principle is that similarly placed cable operators / MSOs be charged on similar basis by the Broadcaster. Parity in the present case has two aspects

- (i) Parity with regard to rate (urban/rural) per subscriber and
- (ii) Parity as to the percentage, which the declared subscriber base of the Cable Operators bears to his Universe / Total Subscriber Base.

In the order of 3-3-2006 this Tribunal had stated that STAR's contention that it was giving signals to only 2.75 lakhs subscribers in the rest of Kerala i.e. Cable operators other than Asianet, was pitched at a very low figure and was hence the root cause of the dispute. This is to be seen against the Universe of the rest of Kerala estimated to be 10 lakhs subscribers. The total number of Cable TV subscribers in Kerala was not in dispute and

hence the only thing to be determined was whether access to STAR is available everywhere in Kerala. The onus of proving this was on STAR.

During the cross examination also Shri Mujeebuddin stated that the above information was commercially sensitive and confidential as follows:

“Q.66 I call on your to disclose to the Tribunal the declared subscriber base accepted by you for the year 2006 by all the MSO and cable operators in Kerala other than Asianet?”

A. This is confidential information between me and my customers and I am not in a position to disclose it before this Tribunal.

Q.124 Please see my question no.66 wherein I had asked you to disclose the total declared base accepted by you for all MSO and cable operator in Kerala other than Asianet. Would you kindly disclose this figure?

A. I have already answered this question. This information is confidential. I deny to answer.

Q.124(A)Q. Is it your case that disclosure of the total declared subscriber base of MSO and cable operator other than Asianet without disclosing any commercial or technical details is confidential.

A. It is confidential.”

We are surprised at this stand taken by the Petitioner. Since the information was within the personal knowledge of STAR, the burden of proving such a fact especially within the knowledge of a person u/s 106 of the Evidence Act is upon the party within whose knowledge that fact is i.e upon STAR. Section 106 of Indian Evidence Act reads as under:

“106. Burden of Proving fact especially within knowledge – When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him.”

The onus of proving ‘reasonable’ and ‘market’ price was on STAR for another reason also, namely, because it had come to the Tribunal to pursue its demand for payment for the signals provided to Asianet. However, no proof whatsoever has been given by STAR as to the market price. i.e the price at which signals were being provided by STAR to other Cable Operators in the rest of Kerala. Under normal circumstances the party, which fails to provide such information which in within its knowledge cannot claim any compensation for the goods / service received by another party on the basis of market price. However, we are conscious of the fact that the Respondent has enjoyed the signals of the Petitioner on the basis of our interim orders after the filing of the Petition. As such we considered it important to determine the reasonable / market price that could be made payable to the Petitioner. We have already seen as mentioned earlier that the market price of Cable TV signals for a distributor like the Respondent is a derived figure calculated by taking into account what is called a ‘declared number of subscribers’ and this is multiplied by the rate per subscriber notified by the broadcaster for the bundle of channels (also called a bouquet). For this to be transparent and meaningful it is also necessary

to know the formula establishing the relationship between the actual number of subscribers who have access to the signals and the 'declared number of subscribers.' Unless this is known any player in the market would not be able to determine whether the monetary outgo to which it is subjected to by the broadcaster or supplier of signals is close to that being charged from its competitors in the same market. However, when specifically called upon to do so by this Tribunal, STAR has refused to produce it on the specious and false plea that such information is 'confidential'.

8. We find that greater focus has been given by the Petitioner towards proving that the total subscriber base of the Respondent had over the time increased. Also, even great stress has been laid on showing why the agreement of 1.1.2003 should be the basis for determining the liabilities for the period after 31.12.2003.

We are of the view that mere increase in numbers in the total subscriber base of Asianet would not be of much relevance in the determination of 'reasonable subscriber base' until it is known as to what proportion the declared subscriber base of "other cable operators" who are its competitors in the same market, bears to the total subscriber base of this category. On the other hand the increase in the total subscriber base in absolute terms would be totally irrelevant information for the purpose of determination of reasonable subscriber base if it is found that during the period of such increase the declared subscriber base of 'other cable operators' who are competitors in the same market has been accepted as static. We cannot believe that the subscriber base of this category has not kept pace with the general estimated growth of Cable TV market in Kerala state. In fact surprisingly there is evidence to indicate that the subscription amount collected for this category has gone down from 1.05 lakhs in 2003 to 0.94 lakhs in 2006 vide evidence of Mr. Mahesh Kumar, witness of Respondent, and the evasive reply given by the witness of the Petitioner Shri Mujeebuddin in this regard.

9. We have already given our finding on why the agreement of 1.1.2003 cannot be taken as the basis for determining the reasonable subscriber base. No new evidence has been adduced by the Petitioner to persuade us to change our above finding.

10. In the above background, we would now consider the various estimates that could be made in regard to the reasonable subscriber base and the monthly subscription fee which Asianet should be required to pay to M/s Star Pvt. Ltd. during the pendency of Petition 39 (C) of 2004 for the three periods namely, October-December 2004, January – December 2005 and January – April 2006.

10.1 At the outset we find that there is no denial by M/s Star India Pvt. Ltd. to the assertion of M/s Asianet Satellite Communications Pvt. Ltd. that 'other cable operators' in Kerala State have been paying at the rate of Rs.28.35 lakhs per month for this entire period. The burden was on M/s Star India Pvt. Ltd. to deny the said assertion and to have come up with the factual information in their possession but it has failed to do so. This is a significant starting point in our exercise towards computation of the amounts payable by way of subscription fee. It is also significant that in spite of the growth of 13% per annum claimed by M/s Star India Pvt. Ltd. in the number of subscribers, as brought out in the communication sent to M/s Asianet Satellite Communications Pvt. Ltd., stated to be on the basis NRS figures, whereby the total universe of Cable TV homes is supposed to have

gone up from 15 lakhs to 21 lakhs during the period 2002 to 2005, the amount being charged from 'other cable operators' has remained the same. M/s Star India Pvt. Ltd. has not given any factual information nor given any reasons in this regard. Thus even for the sake of argument if it is assumed that the Universe of subscribers getting Star signals in case of 'other cable operators' has grown, the fact remains that the product of the declared subscriber base and the rate per subscriber has remained static. Under these circumstances, there is no justification for us to accept the contention of M/s Star India Pvt. Ltd. that the declared base for Asianet subscribers having access to Star signals would increase at 13% annually, when the declared subscriber base of 'other cable operators, has been accepted as static.

10.2 It has been clearly admitted by M/s Star India Pvt. Ltd. that the universe of Cable TV homes was 15 lakhs in 2002 and this figure has been the basis for the computation of subscription fee in 2003. According to information provided by M/s Star India Pvt. Ltd in the correspondence exchanged between the two sides during 2003 and 2004 the universe of Star subscribers out of 15 lakh Cable TV Homes was 2.50 lakhs for 'other cable operators' and 6.5 lakhs of M/s Asianet Satellite Communications Pvt. Ltd.. This meant that out of total of 15 lakhs Cable TV Homes only 9.00 lakh homes i.e. about 60% were having access to Star signals. This also brings out strikingly the position that while according to the Petitioner all subscribers of Asianet were having access to STAR signals, in the case of "other cable operators" only 2.50 lakhs out of 8.5 lakhs i.e. 30% were having access to STAR signals. However, the Respondent has disputed this position and according to it all 8.5 lakhs subscribers were having access to Star signals.

If the declared subscriber base of 1.05 lakh (of other cable operators) and the disputed figure of 2.78 (of M/s Asianet Satellite Communications Pvt. Ltd.) are added up it means a total declared base of 3.83 lakhs out of 15 lakhs Cable TV Homes. This would mean a percentage share of 25.5%. This figure, as we shall soon see, is pitched at a high level as the average All India percentage is only 17% and in Kerala it cannot be higher than the country average.

We have evidence on record, and this has not been rebutted by M/s Star India Pvt. Ltd., that as per TRP ratings the viewership of Star programmes in Kerala is about 3.67% to 3.95% which is reflective of comparative low viewership. Our attention was also drawn by the witness of M/s Asianet Satellite Communications Pvt. Ltd., Shri Mahesh Kumar to the statement of Mr. Peter Mukherjea, CEO of M/s Star India Pvt. Ltd. wherein it is stated that on an average Star declared base is 1/6 of total Cable TV Homes in the country. Extract of the affidavit of Shri Mahesh Kumar in this regard is relevant:

"It is also stated in letter dated 17-3-2004 of the Respondent to the Petitioner that Television Audience Machine ratings (known as TAM rating) instituted by the Ratings Agencies for Kerala indicate that viewership for Star Bouquet in Kerala is only about 3% of all bouquet channels and is much lesser than Rest of India. Annexed herewith as Ex-R-7 is a copy of the letter from the Respondent dated 7.3.2004.

It is stated that the declared subscriber base for the Star Bouquet of channels is not more than 16% in the whole of India while the Petitioner represented to the Respondent at the time of signing of the Agreement dated 1.1.2003 that the others were paying on the basis of about 55%. The fact that declared base for the Star Channels, all over India, on an average, is only 16% is evident from the recent interview given by the Star India CEO dated 27.6.2005. Annexed herewith and marked as Ex-R-8 is the recent interview

posted on 27-6-2005 on Indiatelevision.com of the CEO of the Petitioner stating that subscription for only 1/6th of the subscriber base is collected by STAR.

In fact, Kerala being a non-Hindi speaking State and Regional Market, the subscriber base for Star Channels, which are primarily Hindi Channels, is much lesser than the national average of 16%. It is stated that the Television Rating Points (TRP) of Star is lower at about 3%. Attached herewith as EX-R-9 is the TAM Rating Report for the week 42-44 of 2004 where all the channels in the Star bouquet total to less than 3%.

That unlike any other state where Star TV is present, Kerala is a regional non-Hindi market where above 90% of the cable TV subscribers view only the regional channels (Malayalam). The same is evident from the various TRP ratings where the local Malayalam channels have more than 90% TRP. Annexed herewith and marked as Ex-R-10 are the recent TRP ratings published in May 2005 where the TRP of Star Bouquet was 2.67%.

I state that in similar regional market of Chennai, where CAS is mandatory and therefore it is easy to find out the number of subscribers for each bouquet, the total subscribers for the Petitioner's bouquet of channels was only 45,000 against a total subscriber base of 12,00,000 (i.e 3%). In the whole of Tamil Nadu the situation is almost similar.

I state that based on the latest NRS Report for year 2004, the total cable TV homes in Kerala is approximately 20 lakhs of which the Respondent has approximately 550,000 subscribers (a drop from the earlier market share of 29% to 22%) and the number of viewers of the petitioner's channel out of the above subscribers is only less than 3%."

This statement was not rebutted. Clearly the subscriber base of Star in Kerala on this basis and in view of the low TRP rating of Star programmes could not be higher than the All India Average. The declared subscriber base of Star in Kerala on the basis of All India Average of 17% would not be more than 2.55 lakhs in a total Universe of 15 lakhs. If 1.05 lakhs is the declared base of 'other cable operators', it means that the declared base cannot be more than 1.50 lakhs for M/s Asianet Satellite Communications Pvt. Ltd..

On this basis, if the subscription fee of 'other cable operators' is Rs.28.35 lakhs for a declared subscription base of 1.05 lakhs that of M/s Asianet Satellite Communications Pvt. Ltd. for a base of 1.50 lakhs should not be more than Rs.40.50 lakhs per month. Clearly this would be an upper limit as the declared subscriber base as a proportion of the total Universe of Cable TV homes would be lower than 17% in Kerala State.

10.3 There is however another argument which we need to address in this context. It is stated on affidavit submitted on behalf of M/s Asianet Satellite Communications Pvt. Ltd. that all the 15 lakhs Cable TV homes were having access to Star signals in Kerala State (from the new evidence on record it appears that almost 92% are having such access) If that be so then the position of monthly subscription fee payable would be as follows in the following 3 scenarios.

Figures in lakhs

TOTAL UNIVERSE – 15			
	Scenario I	Scenario II	Scenario III
Asianet Share	5.0	6.5	7.0

Other Cable Operators' Share	10.0	8.5	8.0
Subs Fee of Other Cable Operators	Rs. 28.35	Rs.28.35	Rs.28.35
Subs. Fee of Asianet (Computed)	Rs.14.18	Rs. 21.68	Rs.24.81

We had given M/s Star India Pvt. Ltd. opportunity to come out with the factual information in this regard on affidavit supported by documents but they have failed to do so.

If the monthly subscription fee of M/s Asianet Satellite Communications Pvt. Ltd. is taken as Rs.24.81 lakhs as against Rs.28.35 lakhs for a declared subscriber base of 1.05 lakhs for 'other cable operators' this means that the declared subscriber base of M/s Asianet Satellite Communications Pvt. Ltd. on the basis of parity comes to 91,890. The total declared base of Star subscribers (1,05,000 + 91,890) at 1,96,890 on this basis gives a percentage of 13.12 % as against the All India Average of 17%. This figure might be closer to reality as the calculation based on the assumption of All India Average of 17% for Kerala is somewhat optimistic and can at best indicate the maximum possible figure that could be computed for purpose of subscription fee. Since the TRP rating shows that viewership of Star signals is certainly on the lower side it would be reasonable to assume that the figure for Kerala would not exceed the All India Average.

11. This means that on the one extreme we have the figure of monthly subscription fee of Rs. 40.50 lakhs per month based on the assumption of 17% declared subscriber base of M/s Star India Pvt. Ltd. in Kerala and on the other we have the figure of Rs.24.81 lakhs per month which gives 13.12% as the declared subscriber base for M/s Star India Pvt. Ltd. in Kerala. If we take the mean of these two figures it would make it 32.65 lakhs or rounded off to 33 lakhs for simplicity of calculation, and thus gives 14.50% as the declared subscriber base for M/s Star India Pvt. Ltd. in Kerala as against the All India Average of 17%.

On the basis of the above we get the range within which the monthly subscription fee payable by M/s Asianet Satellite Communications Pvt. Ltd. to M/s Star India Pvt. Ltd. could be fixed for the years 2004 & 2005 and in the year 2006 until the period ending 30th April 2006. However seeing the contentious nature of this matter and the fact that the Respondent could have taken the stand that M/s STAR was free to disconnect the signals if it was not agreeable to the terms imposed by STAR, which it actually did not do, and neither did it come up before this Tribunal promptly if it was aggrieved by the terms sought to be imposed by the Petitioner, we give benefit of doubt in this regard to M/s STAR to the limited extent of accepting the higher of the figures mentioned above namely Rs.40.50 lakhs per month as the reasonable subscription fee for the said period. This would correspond to a declared subscriber base for M/s Asianet of 1.50 lakh subscribers. We may also extrapolate the relationship of 1.50 lakhs declared subscriber base with 6.5 lakhs universe of Asianet getting STAR signals to arrive at a figure of 4.55 lakhs universe for "other cable operators" having access to STAR signals corresponding to the figure of 1.05 lakhs declared subscribers leading to a total STAR universe in Kerala of 11.05 lakhs out of 15 lakh Cable TV Homes. This means that 74% Cable TV Homes would be having access to STAR signals. This seems to be a somewhat realistic middle figure between 60% emerging from information provided by M/s STAR and 100% stated by the Respondent.

The total declared subscriber base for M/s Star India Pvt. Ltd. in this approach would be 1,50,000 + 1,05,000 = 2,55,000 which would give the figure of 17% for the declared subscription base of Star as a proportion of the total Cable & TV homes in Kerala.

Since for the 'other cable operators' the amount has remained static at Rs.28 lakhs per month right from 2003 onwards, there is no reason in our view, in the absence of any data to the contrary, why on considerations of parity and non discrimination there should be any yearly increase in subscription fee for M/s Asianet Satellite Communications Pvt. Ltd..

In our above approach since we have established a mathematical relationship between subscription amount and the declared subscriber base pertaining to the Respondent on the one hand with corresponding figures for the "other cable operators" in our pursuit of establishing parity between the two sets of competitors in the same market we have not considered it necessary to go into details of rural – urban distribution profile and the applicability of the rural concessional rate as we take it that it would apply to the same extent to the Respondent and "other cable operators." We have also not considered it necessary to get into the details of the extent of area and population in Kerala State which is not having access to STAR signals as in the approach indicated by us in the earlier paragraph we were not required to make use of this parameter for arriving at the figure of reasonable subscriber base for 2004, 2005 and period upto April in 2006.

Learned Senior Counsel for the Respondent had argued that based on the evidence of Shri Mahesh Kumar, and the information contained therein the declared subscriber base of Asianet would be 0.44 lakhs for the year 2004 and 0.45 lakhs for the years 2005 and 2006. The amounts payable by way of subscription fee have been calculated as 10.84 lakhs and 11.02 lakhs respectively. These calculations place heavy reliance on many assumptions, like all Cable TV Homes in Kerala having access to STAR signals and 30% of Asianet declared subscribers of STAR signals being of rural category and therefore a lower rate of Rs.12/- per subscriber becoming applicable instead of Rs.30/- which according to the Petitioner is the rate for urban subscribers. We do not consider it necessary or prudent to accept these extreme assumptions for the purpose of calculating the reasonable subscriber base in the light of the pleadings and the correspondence exchanged between the parties over the years. Besides, as already mentioned earlier it is the Petitioner who has approached us for relief and not the Respondent . We have in this context tried to take a balanced view for the purpose of determining the reasonable subscriber base and in this approach we have carefully taken into account the various objections of the Respondent.

12. Accordingly we decide that the accounts of the Petitioner and Respondent be reconciled on the basis of the following:

- (1) The agreement of 1.1.2003, which has been upheld already, being taken as the basis for the period 1.1.2003 to 31.12.2003.
- (2) Rs.40.50 lakhs per month as the monthly subscription fees for the year 2004, 2005 and 2006 until 30th April 2006.

(3) No signals were received by the Respondent for a period of 3 months and 10 days in 2005 for which corresponding deductions will be made by the Petitioner.

13. The Petitioner is directed to rework its demand for the period ending 30.4.2006 taking into account our determination in para 12 above and the payments that have been received from time to time from the Respondent as per interim orders of the Tribunal or otherwise and reconcile and settle the accounts on the above basis with the Respondent.

We further direct that the statement of accounts be finalized by the Petitioner in the above manner in order to determine the exact amounts payable or refundable from one side to the other and the parties are directed to settle the accounts on that basis within a period of one month thereafter.

14. This petition is disposed of accordingly with no order as to costs.

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(Vinod Vaish)
Member

(D.P. Sehgal)

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Member