Response to Supplementary Consultation Paper No 11/2013

on

Issue related to New DTH Licenses

By

Dish TV

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Dish TV is placing below its response to the Supplementary consultation paper on issues relating to new DTH Licenses. At the outset, we would like to place our introductory comments.

1. Introductory Comments

1.1 Consultation Paper discriminates DTH distribution platform vis-à-vis Telecom distributors

We believe that the consultation paper is entirely one sided as while intending to bring the DTH Licensing fee provisions as are applicable to USL, it proposes to place cross holding restrictions against only one class of distributors i.e. DTH and HITS and leaves out Telecom distributors such as those of IPTV or other streaming services. It will not be out of place to mention that IPTV and Telecom network based on-demand services now form a major part of distribution networks in developed countries and the trend is now increasing in India as well. In this context we would like to draw your attention to a recent news article where one of the companies which also own DTH operations is proposing to move to USL based licensing.

The question is why the Telecom companies are sought to be continually exempted from any cross holding restrictions discriminating against distribution companies i.e. DTH and HITS which are similarly placed and compete in the same market. Not only that, as per proposals from TRAI, even where Cable operators provide IPTV services on their cable network, they are subject to Cross holding restrictions(Para 1.15 of TRAI consultation paper), but when Telecom operators provide the same IPTV service via their networks, they are not governed by any cross holing restrictions. Thus we have two classes of operators providing the same IPTV services to the same household- one of which is sought to be restricted by cross holding provisions, while the other is not. We believe that this on the face of it is highly discriminatory.

1.2 Issues for Consultation have been Selectively Picked up by the TRAI Suo-Moto ignoring Industry Representations

We are shocked to find that certain issues have been picked up suo-moto and brought into the ambit of consultation whereas many others which the industry has repeatedly voiced have been ignored. An example is the use of Satellite Capacity for DTH services. While the consultation paper points out in Section 1.4 " *…where the sector is facing bandwidth capacity crunch due to limited availability of transponders. This translates into a limited TV channel carrying capacity of a DTH operator*".

The facts of the matter, as the industry has pointed out, are quite the opposite. The shortage is artificially created due to the restriction based by MIB to source capacity only through Antrix, which is bound by tendering and other restraints. The fact is that there are over 80 transponders over India which are ready to be used by DTH operators if they are allowed to be leased by them directly in a manner similar to the C-Band transponders. We had specifically raised this issue in our response to consultation paper No. 9/2013, however the same does not find any mention in the present Supplementary Consultation Paper.

1.3 Alignment with Global Standards and Practices

The consultation paper seeks to create own standards e.g. for interoperability which diverge from globally recognized standards and practices. Even though the Indian DTH industry is one of the largest in the world, it is being continuously constrained by regressive steps such as defining of standards and interfaces when it is well known that these undergo a rapid change. The CI interface, for example is a global standard for worldwide use of STBs and CAMs. (Common Interface is a technology which allows separation of conditional access functionality from a digital TV receiver-decoder (Host) into a removable conditional access module (CAM). It is also referenced as DVB-CI for Digital Video Broadcast - Common Interface. All Common Interface equipment must comply with the EN 50221-1997 standard. This is a defined standard that enables the addition of a conditional access module (CAM) in a DTV receiver to adapt it to different kinds of cryptography. Indeed, one of Digital Video Broadcasting's main strengths is the option of implementing the required conditional access capability on the Common Interface. This allows broadcasters to use modules containing solutions from different suppliers

in the same broadcast system, thus increasing their choice of anti-piracy options.)

It is unthinkable on why different and incompatible standards should be evolved in India taking the industry away from global standards and practices.

1.4 Entity based control

The TRAI has proceeded to propose a number of Cross holding Caps based on the concept of "Entity based Control" which in its wisdom will enrich the DTH industry and make it more competitive.

On the other hand the Indian DTH industry is the most competitive in the World. Whereas UK has only one DBS operator (BskyB) and USA two operators (Dish Network and DirecTV), India has six operators and there is stiff competition in services. The number of customers of the top three providers are also very close (9-12 Million each) signifying a vibrant competitive industry. In this scenario if the cross holding restrictions were to lead some of the operators to sell out their operations, it will lead to consolidation and jacking up of tariffs. This is evident from countries such as South Africa where the dominant DTH operator Multi-choice has 95% of the market (6 Million) and ARPUs which are 50 times that of India.

RESPONSE TO ISSUES FOR CONSULTATION

2.1 Stakeholders are requested to give their views on the modification of clauses 1.4 and 1.5 of the DTH Guidelines, as mentioned in para 1.15, prescribing cross-holding/control restrictions. Stakeholders are welcome to suggest other options, if any, with justifications.

Stakeholders are also requested to give their views on the timeframe to be given to the existing DTH licencees to comply with the new provisions and the justification thereof.

Response

2.1.1 The Authority proposes to recommend the substitution of the existing clauses 1.4 & 1.5 in the DTH licensing guidelines with the following clauses.

"1.4 The Licencee shall not allow any entity controlling Broadcasting and/or any TV channel distribution operator to control it….

1.5 Any entity controlling the Licencee should not control any broadcasting and/or any TV channel distribution operator……."

Thus new cross holing based on "Entity Control" is sought to be proposed.

2.1.2 This is being sought to be justified on the following ground:

(i) It is necessary to protect the interest of broadcasters as because of the capacity crunch in DTH it may not be feasible to mandate "must carry" provisions in the DTH sector;

(ii) In such a scenario a vertically integrated DTH operator would have all means to prevent entry or drive out channels of a competing broadcaster and thus has the potential to distort the market to further its own interest;

(iii) In case the distribution platform operators are integrated and has market dominance such entities can block content selectively in their own interest. The vertical integration across segment and/or horizontal integration across TV channel distribution platforms could compromise or limit competition.

(iv) The selective blocking of content may also restrict content plurality.

It may be submitted that all the above mentioned reasons for effecting the change in the existing clauses 1.4 & 1.5 of the DTH Licensing Guidelines are entirely misplaced and misconceived. These are mere apprehensions and there is no data/evidence in the consultation paper to suggest that in the last 10 years of DTH operations there has been any kind of market distortions, limiting competition and/or selective blocking of content because of lack of cross holding restrictions now sought to be proposed.

2.1.2 The "Entity Based Control" cross holding restrictions proposed are wholly unnecessary and devoid of any justification in view of the fact that there are multiple players in the Industry with different parentages which include Telecom Operators, Media Houses, Equipment manufacturers and others. Moreover other

operators are not prevented from entering the market, and would have done so if restrictive Ku band leasing policies had not been followed.

In this context, it is pertinent to point out that at present there are 6 DTH operators operating in the market and they are fiercely competing with each other. Not a single DTH operator has complained that because of so-called vertical integration they have faced any kind of problem in their operations. This is because of the fact that a well-defined regulatory framework is already in place in the form of various Interconnection Regulations issued by TRAI coupled with a strong disputes adjudicatory mechanism in the form of TDSAT - which ensures that channels of all the broadcasters are available to all the DTH operators on demand (Must Provide regime) and that too on non-discriminatory basis.

Similarly, no broadcasting entity has ever complained that its channels are being blocked by a DTH operator in order to give preference to the channels of vertically integrated broadcaster.

2.1.3 It is also pertinent to mention that the argument that proposed cross holding provisions are necessary in the absence of “must carry” mandate because of the so-called capacity crunch in the DTH sector, is also entirely misconceived and misplaced.

In this context, it may be pertinent to mention that in digital cable where there is abundant bandwidth capacity and there are no capacity constraints, no “must carry” provisions have been mandated by TRAI. Therefore, to justify the “entity based control” restrictions on the basis of capacity constraint and absence of “must carry” provision in DTH is entirely untenable. In fact, the distribution platforms whether DTH or Cable, carry on their platforms such channels as are required by their subscribers and in accordance with their commercial viability and business model. Vertical integration has nothing to do with the carriage of content on the distribution platforms including DTH.

It is a matter of fact and record that all the channels of the national relevance , are carried./ distributed by all the DTH operators. This situation abundantly negates the contention of TRAI that any cross holding would prevent entry or drive out channels of any broadcaster. The current competitive and business envoirnment ensures a competitive behavior by all the DTH operators. The very fact that 6 DTH operators are operating in the market and have more then 50 million registered registered subscribers amongst them clearly depicts that the argument pertaining to limiting the competition or compromising the same is entirely misplaced and misconceived.

2.1.4 The proposed “Entry Based Control” cross Media restrictions are meaningless in the current context when Content Generators can continue to generate content from within India or overseas and can deliver it via different media including IPTV, VoD or streaming.

We believe that it is necessary to make the Indian Media Industry competitive globally, to expand its presence beyond India and to have companies which have a global scale of operations. In the current digital cable delivery scenario, there is no dearth of capacity or channels and multiplicity of content can always be maintained. With up to 1000 channel capacity in digital cable , no case is made out for restricting vertical integration or horizontal integration with respect to either content generation or distribution platforms.

Some of the larger global platforms are able to sustain and grow due to synergies which arise from vertical and horizontal integrations, just as in the manufacturing industries.

The users have multiple choices and as pointed out hereinabove TRAI has issued various Regulations including Interconnect & Tariff Regulations so as to ensure free & fair competition and to prevent any kind of discrimination/dominance/anti-competitive practices.

2.1.5 It may be noted that the scale of operations of Indian Content producers, MSOs and DTH operators is very small in comparison to a global Scale. It is of paramount importance that the India media companies and broadcasting companies be allowed to have vertical integration and grow to a global scale. The absence of such vertical integration places the Indian media companies seriously disadvantaged in comparison to media companies from overseas, which can invest 74-100% but are highly vertically integrated in their markets. The examples of such companies are many, and we have already cited Newscorp, Time Warner and Viacom. The question is therefore whether Indian companies should be placed at a disadvantage and not allowed to vertically integrate despite the fact that Indian customers now have multiple choices and that the capacity of digital platform takes the channel capacity 20 times making it difficult for any channel content generator to monopolize the market.

2.1.6 In this context we would also like to bring to your kind notice the e following:

(i) The term “broadcasting companies” which has been used is in fact not in conformity with the definition of “Broadcasters” or “Broadcast Stations” which are used internationally and which are used to place restrictions in different markets.

(ii) In India the companies which generate TV channels for different platforms are in fact “TV channel Producers” and do not own a broadcast station. **They are in fact generating the content which by TRAI Regulations must be offered to all platforms of carriage on a mandatory “Must provide” and non-discriminatory basis.**

(iii) Hence as per international practice, there is no justification in placing either media cross holding or Platform ownership (such as DTH) restrictions on such companies.

In USA for example the restrictions are not placed on content generators (Such as Sony) but on Broadcast stations (Such as ABC, CBS, Fox and NBC).

Moreover such media restrictions exist only for newspapers and not for DTH platforms.

(iv) We would further like to point out that the restrictions which have existed in different markets are not for DTH distribution platforms, but these have been for “Radio Stations” and “TV Stations “ which have been engaged in analog transmission.

(v) **Broadcaster vs Content Originator**

We would like the TRAI to refer to the INDO-US paper which clearly distinguishes the role of a **Broadcaste**r vis-à-vis a **Content Originator** such as CNN, CNBC or others. In contrast such entities are treated as "Broadcasters" with all applicable restrictions.

Quote:

It is useful to explain the term “broadcaster” as it is used in the United States. In the United States, a “broadcaster” is an entity that has a license from the FCC to use broadcast spectrum to distribute programming to television viewers across the United States, free-over-the-air, e.g. ABC,

NBC, CBS and Fox. The "broadcaster" may or may not have a financial interest in the programming it distributes. The FCC requires any entity that wants to use free-over-the-air broadcast spectrum to apply for a license to "broadcast" signals in the United States. In the United States, programming networks such as Discovery Channel, CNN, MTV etc., do not use spectrum to send their programming services to consumers. Rather they contract with other distributors such as cable operators or direct to home satellite providers to send their signals to consumers. ***Therefore, any restrictions related to "broadcasters" do not apply to such channels either domestic or foreign.***

Similarly, foreign programming networks that wish to distribute their signals in the U.S. contract with local cable and satellite companies to send their programming to consumers. As with domestic programming networks distributed in this way in the United States, no license is required for foreign programming networks to distribute their programming over cable or satellite.

Unquote

Extracted from
http://www.usibc.com/sites/default/files/committees/files/ictbroadcastingpaper.pdf

(v) To elaborate the point further, first, such content generators such as CNN, MTV etc. do not require an FCC License. Secondly, the Platform operators (Such as DBS operators or Cable TV operators) are not subject to any cross holding restrictions.

In fact countries such as USA not only permit 100% holding of a DTH license by a single entity, it even allows for 100% foreign holding of such platforms.

In the present Consultation paper, the TRAI has equated Content generators (Such as Zee, Star, Colors, Sony, Sahara) with Broadcasters, and therefore cited the same as reason to impose cross holding restrictions based on "entity based control", whereas in other countries the fact is just the opposite- such operators which generate content are not subject to media cross holding restriction.

2.1.7 Foreign Investors which may include broadcasters and foreign DTH operators which are allowed to hold 74% in DTH operations can therefore proceed to invest in Indian DTH as their foreign linkages and specifically **"control"** cannot be determined to any degree of accuracy.

The question which TRAI has not raised is whether there can be "control" by foreign DTH operators or Broadcasters over Indian DTH or Broadcasting operations.

2.1.8 Issue of Dominance / Monopoly / Plurality under the domain of Competition Commission of India:

While the TRAI has relied upon the Competition Commission of India definition of 'control' and 'group' as defined in the Competition Act, (Section 1.12 of the consultation paper), it has ignored the following:-

(i) The Competition Act, 2002 (the **Competition Act**) is entrusted with ensuring a level playing field and ensuring that there is no foreclosure in the market (which in turn ensures plurality and diversity).

The provisions of the Competition Act, prohibiting '*Anti-competitive Agreements'* and '*Abuse of Dominant Position'* were notified and the Competition Commission of India (the **CCI**) commenced its regulatory/enforcement activities in these two spheres on 20 May 2009. The provisions relating to merger control - the third critical regulatory limb of the Act - were notified by the Government of India on 4 March 2011 and these provisions are in force with effect from 01 June 2011.

The key provisions relating to the Competition Act deal with:

a) ***Prohibition on Anti-Competitive Agreements*** (Section 3):
Section 3 proscribes any agreement (vertical or horizontal) that has an Appreciable Adverse Effect on Competition (**AAEC**).

b) ***Prohibition on Abuse of Dominant Position*** (Section 4):
Section 4 of proscribes abuse of dominance. Thus, any conduct by a dominant enterprise that are likely to have a harmful effect will be prohibited under this provision.

c) ***Regulation of Combinations*** (Sections 5 & 6):

The Competition Act vide Section 5 & 6 prohibits any structural change in an enterprise (vertical, horizontal or otherwise) that causes or is likely to cause an AAEC.

(ii) Thus, while Sections 3 and 4 of the Competition Act are *ex-post* measures to address competition concerns that arise from conclusion of an agreement or through conduct of a dominant enterprise, Sections 5 and 6 are *ex-ante* measures that address and contain competition concerns that are likely to arise from any structural change.

Further, the provisions of the Competition Act are applicable to all sectors, including the entertainment and media industry. In fact, the provisions of the Competition Act are more comprehensive and address all perceivable issues relating to competition in the market. Therefore, any issue arising with respect to vertical or horizontal integration is likely to be covered under the Competition Act.

(iii) More importantly, the approach that is adopted under the Competition Act is based on the *effect* (presence of AAEC) on competition in the market. This standard is likely to be more effective than blanket restrictions as proposed regulations in the Consultation Paper, as this approach would not factor in the pro-competitive effects that may arise.

The CCI, the regulatory body responsible for the enforcement of the Competition Act, has wide powers to assess, investigate and pass appropriate orders as it deems fit to ensure healthy competition in the market.

(iv) As submitted hereinabove, the provisions of the Competition Act prohibiting '*Anti-competitive Agreements'* and '*Abuse of Dominant Position'* were notified and the Competition Commission of India (the CCI) commenced its regulatory/enforcement activities in these two spheres on May 20, 2009. Central to the first three enforcement/regulatory dimensions stated above is the concept of the *"market"*. In every enquiry under the Act, the 'market' in which competition is said to be appreciably adversely effected has to be identified since the *basic concern of the Act is with enterprises that are in a position to exercise a considerable amount of influence in the market*. This 'market power' is generally measured in relation to the product in question (includes 'goods' and 'services') and a geographic area for that product. The definition of market is more specific in cases relating to abuse of dominance where the conduct is assessed in the 'relevant market'. In the Act therefore, the relevant market is defined in

terms of the 'relevant *geographic* market' and the 'relevant *product* market.

(V) Section 19 (4) of the Competition Act provides for various factors that the CCI is to take into consideration when assessing dominant position in the relevant market. As can be seen from the list of factors, in order to determine dominance, the level of concentration is not the only factor. Dominance is a rather dynamic concept that depends on the market structure such as entry barriers, countervailing buying power etc. Additionally, the CCI also has the power to assess any other factor that it may consider relevant. This gives immense power to the CCI to not be constricted/limited, if the facts and circumstances of the case require otherwise. Applying the provisions of the Competition Act with respect to the concerns through cross-media ownership, if an enterprise gains prominence in the market through vertical or horizontal integration it is most likely to be in a position that is to put it in a position of economic power and it is likely to be considered a dominant enterprise.

Thus Dish TV is against any kind of modification in clause 1.4 and 1.5 of the DTH Guidelines and the proposed cross holding restriction based on "entity based control" are not at all warranted.

Without prejudice to the above, it is stated that should TRAI go ahead with its recommendations on the lines proposed in the consultation paper, a minimum time frame of 3 – 5 years is required to be given to existing DTH Licensees to comply with the new provisions.

2.2 Do you agree with the approach discussed in para 1.25, on the aspect of technical compatibility and effective interoperability of STBs among different DTH service providers? If not, an alternative approach may be suggested with justification.

RESPONSE:

2.2.1 Dish TV has always been supporting the concept of technical interoperability as in long term the same would be advantageous to the consumers especially when the concept of the IDTV (integrated digital televisions) will come in. However it is

important to mention here that there is an apparent lack of the willingness on the part of all concerned to implement the technical interoperability.

In this context, it is important to mention that the BIS standards in this regard were formulated by a BIS committee constituted by the sectional committee comprising of the following:-

Doordarshan : Convenor

Members : BIS,

Dish TV

Bharti Airtel Digital

Tata Sky

Reliance Big Tv

Sun Direct

Videocon

CEAMA : Representing Manufacturers

Voice : Consumer Organisation

In developing the standards all the stake holders unanimously agreed on various specification and standards and only thereafter the standards were notified.

It is also a matter of fact that all the DTH operators in their affidavit submitted to the Honable TDSAT in the Petition No 60 (C) of 2010 (Tamilnadu Progressive Consumer Centre (TPCC) v/s Ministry of Information and Broadcasting and others) have admitted that they are Technical interoperable and are following the BIS norms for the same.

2.2.2 We believe that interoperability should be based on a CI interface to be mandatorily provided on STBs and a CAM card be made available to all those desiring the facility. The CI interface, for example is a global standard for worldwide use of STBs and CAMs. (Common Interface is a technology which allows separation of conditional access functionality from a digital TV receiver-decoder (Host) into a removable conditional access module (CAM). It is also referenced as DVB-CI for Digital Video Broadcast - Common Interface. All Common Interface equipment must comply with the EN 50221-1997 standard. This is a defined standard that enables the addition of a conditional access module (CAM) in a DTV receiver to adapt it to different kinds of cryptography.

Indeed, one of Digital Video Broadcasting's main strengths is the option of implementing the required conditional access capability on the Common Interface. This allows broadcasters to use modules containing solutions from different suppliers in the same broadcast system, thus increasing their choice of delivering content directly to TV's

2.2.3 TRAI has mentioned in Para no 1.25 of the consultation paper that the Government shall ensure that:-

i. The BIS specifications are based on open architecture and should incorporate the latest technological developments with respect to the technical interoperability of DTH STBs, taking into account its practicability as well as the international experience;

ii. The BIS specifications clearly specify the contours of interoperability between the STBs based on different technological standards.

Dish TV agrees to this view that BIS should keep on revising the standards and releasing the updated standards/versions to incorporate the technological changes. However this should not be construed that the older standards go out of the picture, are superseded and remain no longer operative & applicable as there would be cases where certain service providers will like to deploy the boxes of the standards which were in practice when they initiated the services or those which may be relevant for a particular type of service or customer base.

As the TRAI is aware, different platforms operate on different technologies which range from MPEG-2 DVB-S to MPEG-4 DVB-S2-8PSK. Further there are constant changes in technology. However this does not make the existing decoders any less functional, nor does it signify a need for any change. It will not be out of place to mention that the STBs used in the Sky network remain MPEG-2 for standard definition services. For the newly launched HD services, all operators are using MPEG4 technology.

2.2.4 In this context we would further like to mention that Dish TV however does not agree to the view that the License conditions be amended to mandate compliance to the latest BIS specification for the STB to be offered to all the new subscribers.

For instance let us take an example - today the latest technological update available is the High Definition transmission. Now if we go by the suggested wordings of the licensing conditions, it would mean that all the operators have to necessarily offer all the customers, the HD STB within 6 months of the standards being formulated by BIS. Whereas the customer may not be taking the HD services at all and thus it may become not only unnecessary but burdensome as well for him to buy this box and will also impose uncalled for obligation upon the operator to provide a box whose capabilities are not required.

Going forward, BIS may come out with the specs of the Hybrid boxes which may have dual tuners to receive both DVB-T and DVB-S. It should not mean that operator will have to start providing the same whereas majority his customers may not be needing those services. However if this is mandated as a licensing condition, the Operators will be forced to invest in something from which they cannot generate revenue and customer will be asked to pay more for a feature which he never intends to use.

Thus in our considered opinion, compliance to the latest BIS specifications for the STB's to be offered to all the new subscribers in not required as a part of mandatory obligation by way of licensing conditions. The DTH operators by virtues of their business model will keep adopting the technologies themselves and they may be asked to declare the level of the interoperability of their boxes transparently to the consumers and consumer can thus choose the service provider, he feels is right for his needs.

2.2.5 Dish is of the opinion that there is no need for any time frame to be mandated for the operator to change the boxes or adopt providing the boxes of the particular technology which he may not be using or may have the plan to use. We are of the view that the consumer interest are better served by the process of transparent declaration by the operator to the consumers about the capability of the boxes on the interoperability.

As pointed out herein above mandating such a stipulation may lead to the situation, which will put burden on the operator and the consumer both.

At present we do not believe that there is any ground to provide guidelines for any other mode of compatibility. As a concluding comment, we would like to say that there is no case for any interoperability specifications, except that the

boxes must support a CI interface and the CAM should be available for use in other operator STBs.

2.3 Do you agree that, in line with the Unified Licence, the licence fee for DTH services should be charged at the rate of 8% of the AGR where AGR be calculated by excluding Service Tax and Sales Tax actually paid to the Government, if Gross Revenue had included components of Sales Tax and Service Tax? If not, an alternative formulation may be suggested along with justifications.

RESPONSE

2.3.1 The view of the authority that the DTH services be charged Licence Fee at the rate of 8% of the AGR where AGR be calculated by excluding only Service Tax and Sales tax actually paid to the Government, if the Gross Revenue had included components of Sales Tax and Service, comes as a shock.

DTH services operators have been regularly appraising the authority on the matter of the heavy cost they have been incurring for the provision of the services. It has been a matter of fact that the DTH services not only pay takes to the tune of 33% of their revenue but also pay around 35% to 40% of their revenue as the content cost. There is a huge investments in subsidizing the Consumer Premises Equipment to the consumers of which the Set Top Boxes being the major component.

It is pertinent to mention that there is great difference in the services being provided under the Unified Licenses and the DTH . The unified license providers are mere carriers. They pick voice or data traffic from a point and deliver it at a point. They do not have to pay for what they are carrying on their networks nor they have to subsidies the hardware to the end users.

2.3.2 We are of the view that the License fee should not be pegged at the level of 8% of AGR where AGR is to be calculated by excluding only the Service Tax and Sale Tax actually paid to the Government. In addition to excluding Service Tax, Sale Tax, Entertainment Tax and/or any other Tax levy, the content cost actually

paid to the Broadcasters should also be deducted from the Gross Revenue in order to arrive at AGR.

At present, the content charges range from 35% to 40% of the total revenues collected by the DTH operator. The principle of AGR being used as a basis of license fees is to exclude the direct payouts which include Taxes and must also include third party content charges as exclusions.

Hence the suggested formula should have been:

License fees = (Total Revenues from DTH Licensing activities -Content Charges - Taxes and Levies) X 8%

2.3.3 It should be noted that an AGR of 8% may be appropriate for Telecom providers where there is no direct payout to the extent of 40% to third parties. The operators use their own networks for generating the revenues. If they pay any amounts as interconnect charges, they also receive similar interconnect charges for incoming calls. Hence these balance out and the 8% License fees gets applied to revenues retained by them.

This is totally different from DTH where the 8% license fees (at present 10%) also gets applied to the direct payouts to content providers. DTH operators, as a result of payout to broadcasters, retains approximately 50% of the revenue, whereas the License fee gets applied to the full revenue, it amounts to levying fee on the the revenues of a DTH operator at 8% out of 50% or at 16% effective rate (20% at existing level of 10%).

To summarize, owing to the 50% or more content cost, an AGR based tax of 4% equates to an effective AGR tax rate of 8% for the revenues retained by the operator.

2.3.4 In the para 1.29 of the consultation paper Authority has also admitted that it had agreed to the levying the license fee at 6% on Gross Revenue (GR) basis in response the Ministry of Information& Broadcasting letter dated 17th March 2008.

It is now a total shift from the position taken from the earlier two recommendations and also contrary to the Honable TDSAT's judgment dated 28th May 2010 in the matter of Sun Direct Pvt Ltd v/s Union of India Petition no 92 (c) and Bharti Telemedia v/s Union of India Petition no 93 (c) where the Tribunal had laid down the underlying principles to be taken into account which calculating the AGR based Licence fee.

The attention in this regard is invited to our response to the Consultation Paper No. 9/2013 in this regard which reads as under:

QUOTE

License fee:

2.5.1 As per the present licensing terms, a DTH operator is required to pay a license fee @10% of its gross revenues. In this context, it is pertinent to mention that at the time of framing of DTH licensing guidelines and grant of DTH license i..e in 2003, the Service tax and Entertainment tax was not applicable on DTH services. The price of the service was to be in line with the incumbent player which was cable operator who had the advantage of the carriage fee being paid to them for carriage of the channels by the broadcasters, and accordingly the content cost for cable distribution was virtually one tenth of the DTH players.

2.5.2 Subsequently, DTH services were subjected to Service Tax by the Central Government and Entertainment Tax by various State Governments. A comparison of DTH service with the cable sector would reveal the DTH services are subjected to heavy multiple taxation which inter alia includes Service Tax @10.30%, Entertainment Tax @25% and VAT @12.5%. In addition, if license fee @10% is also added, the cumulative taxation would come to around 60% which renders DTH services totally unviable vis-à-vis cable services.

2.5.3 This fact was recognized by the authority and in its Recommendations on Issues relating to Broadcasting and Distribution of TV channels dated October 01, 2004 had appreciated the difficulty of the high taxation being levied on the DTH sector and to bring in a level playing had recommended a reduction in the license fee by 2% and also bring in the concept of the AGR. The relevant extracts of the said recommendations are reproduced below :

7.1 There is a fundamental difficulty in providing competition within the cable industry in the provision of last mile services. In some parts of the world this has been explicitly recognized and the local operator has been given an exclusive franchise in a given geographical area. This is not feasible in India given the way the industry has grown and evolved. The most feasible way of giving

competition to the cable industry in the short run, is through DTH.

7.2 If there has to be competition between the two platforms then license fees, taxes etc. should all be made as uniform as is possible. To some extent given the differences in size, technology and reach, complete uniformity is not possible.

7.4 Presently DTH operators are being charged annual license fee of 10% of its gross revenue as reflected in the audited accounts. DTH operators' revenue include pay channel charges and sale of hardware and therefore a significant amount of license fee is payable on account of these. This license fee increases the cost of pay channels and hardware for DTH subscribers.

7.5 There is need to provide as even a playing field as possible, between DTH and the Cable industry given the differences in scale of operation and technology. The cable operators have to pay an annual fee of Rs.500/-. Taking a cable operator who has only 500 connections this means an average of Re.1 per annum. In contrast if we take the consumer bill for a DTH consumer with full content at Rs.300 per month a 10% revenue share comes to Rs.30 per month or Rs.360 per annum. Therefore from both angles – the need to maintain parity with cable industry and the need to popularize DTH as a mass market instrument there is a need to bring down the levels of license fee for the DTH operators. At the same time there is need to provide checks to ensure that the accounts are being correctly presented – this can be done by using the CAGs audit to ensure that there is no loss of revenue to the Government. Necessary changes should be made to the license conditions to incorporate these changes.

2.5.4 Originally, the TRAI has recommended a reduction of 2% in the license fee for DTH i.e. 8% from the existing level of 10% which is to be calculated on Adjusted Gross Revenue (AGR). The AGR was to be calculated by reducing:

(a) Subscription fee charges passed on to the pay channel broadcasters;

(b) Sale of hardware;

(c) Services/Entertainment Tax actually paid to the Central/State Governments, if the gross revenue had included them.

However, in the subsequent recommendations dated 15/4/2008, TRAI has proposed the license fee as 6% of the Gross Revenue, which recommendations the Ministry has accepted. It may be mentioned that 6% of Gross Revenue would result in realization of more revenue by the Govt. vis-à-vis 8% of AGR which is to be calculated after reducing the subscription fee paid to the pay channels by a DTH operator.

2.5.5 The TRAI in its recommendations dated 1/10/2004 has also stated that:

> ***7.7 TRAI has expressed its views in various recommendations that the telecom services should not be treated as a source of revenue for the Government. Imposing lower license fee on the service providers would encourage higher growth, further tariff reduction and increase service provider revenues. With increased growth, it would be a win-win situation for the industry and the Government. The Government would also get higher license fee and service tax if revenue for the service provider increase.***

2.5.6 In view of the above, there is a strong case for reduction of license fee from the existing level of 10% of Gross Revenue to 6% of Gross Revenue realized from the **licensed DTH activity**. Although MIB has accepted the TRAI recommendations in this behalf still the matter is pending thus causing huge financial detriment to the DTH operators. There is an urgent need to implement the reduction in the license fee without further delay.

We accordingly request Authority to once again impress upon MIB to effect the reduction in the licensing fee in accordance with its recommendations dated 15/04/2008 by effecting necessary modifications in the licensing conditions.

UNQUOTE

Thus in the Opinion of Dish TV there can be two approaches:

1 License fee be charged as per the TRAI recommendations vide its letter 17-01/2008-FA dated 15th April 2008 , which is 6% of the GR and these recommendations have been accepted by the Ministry of Information and Broadcasting.

2 Alternative can be the principles laid down in judgment of Hon'able TDSAT dated 28th May 2010 i.e. 10% Gross Revenue after deducting the pass thro elements such as content costs, central and state taxes like Service Tax, Entertainment tax, VAT and other tax levies, transponder costs, hardware sale revenue, etc..

2.4 Do you agree with the approach discussed in para 1.39, for arriving at the quantum of migration fee to be charged from the existing DTH licencees on their migration to the new DTH licencing regime? If not, an alternate formulation may be suggested along with justifications.

Dish TV differs strongly on the whole concept of migration fee as formulated in the CP. In the present facts and circumstances, no migration of the licenses is taking place as normally migration is when the licensees who were either in specific geography or in services are being brought at par with the new licensees. Here the current licensee will be continuing and the majority of the conditions of their operating the services will remain. Mere redefining or modifications in certain clauses of DTH license cannot be termed as a migration and thus there is no question of migration fee being charged in lieu of the same. We do not find any rationale in the migration fees for DTH operators. The USL regime allows for provision of multiple services. However if the DTH operators wish to continue providing the existing DTH services, no migration fees should be applied.

We have already submitted our response on the issue of charge the Entry fee. Dish TV is of the opinion that Entry fee which was charged was one time charge to the operators and thus the existing operators should not be asked to pay the same again.

2.5 Do you agree with approach regarding migration of existing DTH licencees to a new licensing regime, discussed in para 1.41? If yes, how much time, after notification of the new DTH licensing regime, should be given to the existing DTH operators for migration to new DTH licencing regime? If not,

what should be the approach followed for migration of existing DTH operators to a new licensing regime? Please elaborate your response with justifications.

As we have already stated that Dish TV is of the view that this is not the migration but mere further amendments and clarifications of the current DTH guidelines and thus will apply to all the operators from the day these are notified and only matter will remain of the entry fee which in our opinion is onetime fee.

We believe that the only recommendations needed by the TRAI are as follows:

- **Open Skies Policy for lease of Ku band transponders**
- **License fees of 8% to be applied on AGR to be calculated after deducting the pass thro elements such as content costs, central and state taxes like Service Tax, Entertainment tax, VAT and other tax levies, transponder costs, hardware sale revenue, etc. from the amount of Gross Revenue.**

2.6 (i) If any stakeholders has a view that any other provision of the DTH Guidelines requires any change or any provision is required to be added to these guidelines, the same be suggested along with justifications.

(ii) In light of the fact that a new DTH licensing regime is being discussed, stakeholders may also give their modified views, if any, on the issues that have been discussed in the consultation paper dated 1st October 2013.

We have already submitted the response of the consultation paper 01 Oct 2013 and during the discussions held on the same in the office of the TRAI, the matter of the quantum of the BG was discussed. It was suggested that the amount of the BG to be submitted may be kept at the same level and the DTH service providers may be asked to pay license on Quarterly basis. Joint response in this regard has already been submitted by DTH Association on the matter.

Our replies to the consultation paper may be read in conjunction and continuation with our response to the consultation paper dated 1st Oct 2013.

Annex-1

Airtel seeks migration to unified licence regime on certain conditions-Report

TT Correspondent | | 15 Nov 2013

The leading telecom operator Bharti Airtel has sought DoT's approval to migrate from Unified Access Service Licence (UASL) to Unified Licences (UL) on certain conditions, according to an Economics Times report,

The migration to Unified Licences (UL) allows telecom companies to provide all services under one permit using any technology as against the existing regime which places various restrictions.

Under new licence regime the operators can share spectrum, participate in mergers and acquisition activity that was not allowed under Unified Access Service Licence (UASL).

Airtel in its communication to Dot said, "It is our submission that certain terms and conditions of the UL & UL Guidelines already form the subject matter of pending court proceedings, to which the DoT is also a party.

The latter went on to say that these proceedings are at an advanced stage of adjudication before various courts and tribunals across India and both parties are bound by and will continue to be bound by the interim orders that have been passed therein till the final disposal.

"Therefore, the rule of sub-judice will apply to all clauses of the UL & UL guidelines, which forms subject matter of proceedings, and would be subject to the final orders and principles laid down by courts/TDSAT," Airtel said.