TheOneAlliance

April 24, 2009 By Fax/Courier/Email

Telecom Regulatory Authority of India
Mahanagar Door Sanchar Bhawan
Jawahar Lal Nehru Marg
New Delhi

Kind Attn: Mr.N Parameswaran, Pr Advisor (B&CS)

Subject: **Consultation Paper No.4/2009 dated March 6, 2009 on DTH issues relating to tariff regulation and new issues under reference ("Consultation Paper")**

Dear Sir

Please find enclosed herewith our **Preliminary Response** in pursuance to the aforesaid Consultation Paper.

We submit that we are filing this preliminary response "Under Protest and Without Prejudice" to our rights and contentions made in the Special Leave Petitions (SLPs) filed by IBF, Star Den and MSM Discovery Private Limited, before the Hon'ble Supreme Court against the orders of the Hon'ble Punjab and Haryana High Court in C.W.P. No.16097 of 2007, whereby the Authority had been directed to decide on the representation of Tata Sky Limited on the issue of price fixation for DTH services in terms of Section 11(2) of the TRAI Act and consequent to which the Telecom Regulatory Authority of India ("Authority") has come out with the abovesaid Consultation Paper.

We had made a request to your kindself for extension of timelines vide our letter dated 24.04.09, in view of the aforesaid SLPs that has been preferred in the Hon'ble Supreme Court to which however we have not received any reply from your end. We are thus left with no other alternative but to tender our preliminary response "under protest" and "without prejudice" as aforesaid.

Yours truly,

For MSM Discovery Private Limited

Pulak Bagchi
Senior Manager - Legal and Regulatory

Encl: As Above

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A. Introduction:

Contentions at Para 2.13 of the Consultation Paper under the heading – "**Impact on DTH of setting aside TRAI's non-CAS Tariff amendment order dated 04.11.2007 by Hon'ble TDSAT" –**

(a) "……. the DTH operators will not know in a transparent manner the non-CAS rates of bouquets and individual channels (particularly those introduced after 26th December, 2003) which would have enabled them to arrive at 50% rates of these for DTH platform. …….

b). …… With the setting aside of the said order, the habitation wise ceilings for non-CAS cable TV subscribers no longer exist …….

c). With the setting aside of the order, about 95 out of the 129 pay channels and their bouquets which have come after 26.12.03 will be out of purview of effective tariff regulation ……."

- are misplaced and unwarranted; the matter is sub judice before the Hon'ble Supreme Court; comments such as these are unfortunate.

B. Comments:

5.2 Tariff fixation for DTH services

5.2.1 *Whether there is a need to fix tariff for DTH?*

Our Comments:

1. There are now five DTH operators each with considerable financial clout who do not need tariff protection. DTH subscription has grown exponentially without protection. There should be a level playing field and tariff fixation causes distortion. Further the existence of analogue/terrestrial and digital platforms ensures there is no monopolization or cartelization. Even if there is, the Competition Act has the required remedies. The time has perhaps come to ask the question whether continued existence of the current Interconnection/Tariff regime is justified or one ought to look beyond existing Regulatory formulations. It is submitted that regulatory strictures that partake the character of mandatory standardized off

the shelf terms for Distribution, casts a duty upon owners of copyright to compulsorily license away their property to other commercial entities for the latter to profit at the cost of the former and are thus exceptions to the rules of exclusivity embodied in the Copyright Act. They are market distorting and act in derogation of the legal principles that the public's interest in access to expressive works is best served by the market-based incentives that result from clearly-defined and meaningful exclusive rights. While such standardized formulations of interconnection or for that matter tariff may be seen as a means of lowering transactions costs in cases of inefficient or failed markets, government rate-setting and administration are traditionally inefficient, involve higher transactions costs, and are far less flexible than private-sector negotiations in functioning markets. ***See*** **Robert P. Merges, *Compulsory Licensing vs. the Three "Golden Oldies: Property Rights, Contracts, and Markets"* (Cato Policy Analysis No. 508, 2004)**. As a result, TRAI should regularly review the question whether the policy justifications that formed the basis for compulsory licensing by way of enactment of the "Must Provide" Regulations and the abnormally low tariffs, continue to exist today.

2. It may be conceded that during the formative years of Pay TV in India, the acknowledged market distortive effects of such compulsory licensing were deemed acceptable on the strength of the assumption that it would be impractical and unduly burdensome to require every Distributor of TV Channels to negotiate the broad terms with every broadcaster whose work was retransmitted by such distributor. The question that now warrants asking is whether that assumption has withstood the test of time. At that time it was thought that regulatory mandates were perhaps designed as a transitional measure to facilitate competition and the marketplace's ability to meet the needs and demands of satellite and cable subscribers. But TRAI surely could not have intended the mandatory regulations with regard to

RIO/SIA/tariffs to be a permanent fixture in the regulatory landscape of Pay Television in India.

3. Today, the massive penetration of Pay TV in India is undisputed, so is the plethora of platforms. Considering this, as well as the fact that satellite services and cable systems, redistribute the offering of broadcasters directly in the marketplace, it is again fair to ask whether the goal articulated by TRAI in enacting the Interconnect/Tariff Regulations have been achieved.

4. The cable and satellite Interconnection/Tariff Regulations provide a number of examples of the market-distorting effects of compulsory licensing. There is no market based reason why operators cannot negotiate with broadcasters covering all aspects of cable and satellite redistribution. This happens every day with cable networks and satellite service providers all across the globe. Moreover broadcasters have to subject themselves to competitive bid to procure content, and have to submit to market forces to obtain rights for popular programming. Indeed, in the absence of mandatory non discriminate must provide clauses, Operators like all program providers, have every incentive to negotiate agreements for distribution of their products in as many markets and on as many platforms as possible. The only reason such rights would not be sought for cable and satellite distribution is that the must provide non discriminatory interconnection and tariff regulations take away the incentive for them to do so. In effect, such Regulations take the right to determine the terms of distribution out of the hands of market participants and places them squarely into the hands of TRAI. One might ask whether the fact that broadcast signals continue to be regulated through TRAI mandated statutory Interconnection/Distribution/Tariff clauses, rather than in the market, reflect a market failure, or whether

whatever market failure may exist is in fact the outgrowth of the compulsory must provide non discriminatory clauses itself.

5. In another example of market distortion, cable and satellite rates determined through the government-run rate-setting process are consistently below those that would have been negotiated in the market. ***See also*** **Merges, supra (noting the problem that compulsory licenses "can easily become outdated and unreflective of supply and demand" and that "[i]n practice, ... compulsory licensing has led to price stagnation.").** The end result is a statutorily-mandated and sizeable subsidy for cable and satellite providers paid for by broadcasters who are copyright owners. Significantly, there is no evidence that any of this subsidy is passed on to subscribers.

6. Even where TRAI attempts to reflect the market in its Regulatory formulations, the enactments tend to make assumptions that may or may not be reflected in fact. For example, the Regulations assume addressable systems are inviolable and sacrosanct, irrespective of whether or not such addressability actually exists on the ground in view of the fact that there is hardly any legislation or other mechanism that would enforce and ensure addressability in real meaningful terms. This reflects a common defect of the Regulations as currently drafted, which is that the existing Interconnection/Tariff regime increasingly involves the TRAI in deciding the terms of carriage for television networks and affiliates without an opportunity for the people who invest billions of dollars in the provision of those signals to negotiate over where and how those signals are used by others. Whether it is TRAI deciding that "must provide, non discriminatory" clauses shall apply to Broadcasters thereby enabling Operators who claim abysmally low subscriber bases to avail signals, provisions crafted to ensure ceiling of rates, or even the persistent refusal to allow the

broadcasters to enter into contracts freely with the Operators to atleast ensure that packaging and pricing are not the sole prerogative of the Operators alone, the Interconnection/tariff regime continues to expand its reach in supplanting the rights of broadcasters who in most cases are themselves the copyright owners, in controlling how their products are used by other commercial entities.

7. All that said, we recognize that in assessing whether the Mandatory Interconnect/tariff regime should continue to exist, consideration must be given to the impact elimination of the Interconnect and Tariff Regulations would have on the Distribution practices and expectations formed over the past 06 years since 2004. Disruption in the market for distribution of programming by cable and satellite systems would be inconsistent with the legislative intent in instituting those Regulations. It is for that reason we are not here to advocate repeal of the cable and satellite interconnection and tariff regulations, but rather to urge TRAI to give careful consideration to these questions in light of past experience and the market as we know it today.

8. To the extent that the TRAI believes there is justification for a continuation of the statutory Regulations, whether over the short or long term, it should include specific recommendations designed to limit the various market-distorting aspects of those Regulations, including but not limited to those that have been raised herein. Also a Sun Set Clause ought to be introduced to give out the likely tenure of such Regulations. Yardsticks of effective competition should also be formulated.

9. In view of 1 to 8 *supra* MSMD does not envisage any need to fix tariff for DTH. Motion pictures are immensely popular in India, yet the government has not stepped in to regulate the pricing of such films or

their distribution terms for that matter. There is no regulation deciding the pricing of a ticket for a film. The same is entirely left to market forces. This should also be the approach for the Broadcasting Sector. Even multiplexes charge higher than stand alone Cinema Halls for the same film. Currently there is a standoff between Multiplexes on the one hand and Producers and Distributors of Motion Pictures on the other, yet the government has done well not to intervene in a commercial dispute and instead it has left it to the market forces to decide for themselves. There is no reason why broadcasting should be treated any differently.

5.2.2 *If yes, whether tariff regulation should be at wholesale level or at retail level or both, i.e., whether tariff should be regulated between broadcasters and DTH operators or between DTH operators and subscribers or at both the levels?*

5.2.3 *Whether tariff regulation for DTH at wholesale level should be in terms of laying down some relationship between the prices of channels/ bouquets for non-addressable platforms and the prices of such channels/ bouquets for DTH platform? If yes, then what should be the relationship between the prices of channels/ bouquets for non-addressable platforms and the prices of such channels/ bouquets for DTH platform? The basis for prescribing the relationship may also be explained.*

5.2.4 *Whether tariff regulation for DTH at wholesale level should be in terms of fixation of prices for different bouquets/ channels? If yes, then the prices for different bouquets/ channels may be suggested. The methodology adopted for arriving at the prices for such bouquets/ channels may also be elucidated. Further, the methodology to fix price for a new pay channel may also be given.*

5.2.5 *Whether retail regulation of DTH tariff should be in terms of maximum retail prices of various channels or is there any other way of regulating DTH tariff at retail level?*

5.2.6 *In case DTH tariff is to be regulated at both wholesale and retail levels, then what should be the relationship between the wholesale and retail tariff?*

Our Comments:

1. All these queries are interrelated and hence clubbed together for the purpose of our response. In view of our comments in 5.2.1 supra we are not in favour of any tariff being fixed for the DTH sector both at the retail as well as the whole sale level.

2. Without any tariff order or price regulation, the whole sale bouquet rates meant for DTH operators which were initially at 60% or thereabouts of the whole sale bouquet rates for non addressable platforms are currently at 50 percent of the whole sale bouquet rates meant for non addressable platforms. Without heavy handed regulatory intervention, market forces have already brought prices to a level that is not unacceptable to content owners as well as content distributors. There is thus a manner and principle already in vogue at the wholesale level which need not be unsettled in the short run, moreso at the instance of any particular service provider. Once the whole sale bouquet rates have been derived as aforesaid, the whole sale ala carte rates can be arrived at following the existing relationship that has been prescribed vide the Interconnect Regulations dated 3rd September 2007. In the event any new channels are introduced, the same are currently being priced on the principle of "similar rates for similar channels" as enshrined in the Tariff Order dated 1st October 2004.

3. In non addressable platforms the channels are distributed and delivered to subscribers without packaging them into any bouquets. The

subscriber base of the platform thus acts as the subscriber base for all the channels that are available in such platform. However operators in addressable platforms enjoy complete freedom in packaging. On the other hand broadcasters have been completely barred from stipulating any package related conditionalities in their contracts with DTH operators. The present interconnection regime also allows a DTH operator to charge hefty placement fees from broadcasters for favorable packaging. The subscriber base of a particular channel is entirely dependant on how a DTH operator packages such channel in its platform. Herein lies a major scope for discrimination as DTH operators who are vertically integrated with a Broadcaster shall ensure that channels of such broadcaster ("inhouse channels") are packaged favorably vis a vis channels of other broadcasters. The DTH operator may promote inhouse channels by placing them in bouquets where popular channels of other broadcasters have also been included. Again those broadcasters including new entrants who are not in a position to pay any placement fees shall be vulnerable to discrimination. Article 7.6 of Schedule to Form B i.e. The License Agreement between the Direct To Home Service Providers and the Ministry of Information and Broadcasting reads as follows:

"7.6 The Licensee shall provide access to various content providers/channels on a non-discriminatory basis."

4. Therefore a DTH Operator should distribute all the channels on a non discriminatory basis. The realms within which non discrimination has to work are the following: a) Language b) genre c) placement d) treatment of inhouse channels of vertically integrated broadcasters. Again addressability needs to be ensured by enacting suitable laws to that effect and devising practical ways and means for enforcement. Thus there is no market based need to relate DTH prices with those prevailing for non addressable platforms. The dynamics prevailing in both the markets are entirely different and are not comparable. There should thus be no relationship between DTH and non addressable pricing in the ultimate

analysis. TRAI itself admits as such when it says at Clause 3.5 of the Principal Regulations as amended by the Telecommunication (Broadcasting and Cable Services) Interconnection (Third Amendment) Regulations 2006 (10 of 2006):

"…For the removal of doubts, it is further clarified that the distributors of TV channels using addressable systems including DTH, IPTV and such like cannot be said to be similarly based vis – a – vis distributors of TV channels using non addressable systems."

5. If TRAI's intention is to impose pricing restrictions at the wholesale level (to which we are opposed in principle) retail ala carte prices cannot remain untouched as this again distorts the pricing chain. Hence if at all pricing at the DTH retail level needs to be fixed it may be done but at not more than a certain per cent of the wholesale ala carte price charged by the broadcasters.

6. Welfare Economists the world over are unanimous that "ala carte" offerings by broadcasters/Operators are anti consumer and "bundling offers" have always been traditionally pro-competition. (Please refer to the Annexure submitted by MSMD in Comments to the Consultation Paper on Interconnection Issues, posted in TRAI's website on 3rd February 2009 – CAP ANALYSIS - **THE FCC'S FURTHER REPORT ON A LA CARTE PRICING OF CABLE TELEVISION March 7, 2006** Jeffrey A. Eisenach, Richard E. Ludwick). MSMD is thus in favour of bouquet formations both at the wholesale and retail levels.

7. MSMD reiterates thus, that Price fixation for broadcasters should always be under forbearance and market forces ought to determine such prices; the price of a channel should be allowed to vary depending upon the unprecedented diversity that India offers. Platforms also differ inter-alia - in terms of viewing experience.

5.3 Comparison with CAS

5.3.1 *Whether the basic features of tariff order dated 31st August, 2006 for cable services in CAS areas, namely fixing of ceiling for maximum retail prices of pay channels, at the level of the subscriber, fixing of ceiling for basic service tier and standard tariff packages for renting of Set Top Boxes should be made applicable to DTH services also?*

Our Comments:

(1) There can be no comparison between CAS and DTH:

- cable consumer in a CAS notified area can view only FTA channels without incurring expenditure on a set top box, unlike a DTH customer,
- cable operators in CAS have to compulsorily offer pay channels on a-la-carte basis, no such requirement for DTH players
- standard tariff package for renting of Set Top Boxes have been prescribed, no such requirement for DTH thus far.
- There are multiplicity of players in the distribution chain in CAS areas, this is not so in DTH.
- No DTH operator would charge a mere Rs. 5/- per channel per subscriber per month, and then share the same with broadcasters.
- Addressability in cable industry has been brought through Government/Court ordered mandate unlike DTH. The governmental diktat on subscribers to buy STBs in areas Notified for CAS has been attempted to be offset by TRAI by prescribing an abnormally uniform low tariff for all pay channels irrespective of language or genre. This is not the case for DTH which is voluntary.
- There are substantial differences in the stage of evolution of Cable and DTH and also the volume in terms of number of operators who are widely scattered and vary in terms of size and possession of wherewithal in case of Cable but are only a cash rich handful of them in case of DTH.

(2) TRAI has brought out several regulations, directions and advisories with regard to DTH pricing, through consultative, interactive and participative processes that involved all the stakeholders in the industry consequent to the Judgment of the Hon'ble TDSAT in Petition No. 189 (C) of 2006 and Petition no. 136 © of 2006; Because of such consensus building processes initiated by TRAI, broadcasters are gradually attempting to coming to terms with the present regulatory dispensation. It shall make no sense whatsoever to queer the pitch even more by overloading and adding on to the existing pile of Regulations that have since gripped the industry. The tariff formulations with regard to Mandatory CAS in any case was intended to be an interim stop gap measure as stated by none other than the Authority itself; and was never based on any consensus nor was it favored by the majority of the stakeholders including the broadcasters. The broadcasters have traditionally maintained that the same never made any business sense. The abnormally low uniform tariff prescribed for mandatory CAS had an unfortunate element of regulatory compulsion inbuilt into it. The Broadcasters were thus compelled to approach the Hon'ble Supreme Court on the issue of CAS pricing and the matter is sub judice.

(3) DTH has had an unprecedented growth vis a vis mandatory CAS, that too with no pricing regulation.. In "The Indian Telecom Services Performance Indicators October– December 2008", TRAI states at Page no. 15 paragraph E3:

"Total number of reported registered subscribers being served by these five Private DTH operators is 11.1 million at the end of quarter ending 31st December 2008." (Also reiterated at Page 50, paragraph 6.9) And at page 15:

"E.5 At the end of the quarter 30th September 2008, there were 717722 number of set top boxes (STBs) installed in the CAS notified areas of Delhi, Mumbai, Kolkata and Chennai. Now, in the quarter ending 31st December 2008, the STB number has increased to 767616 in the CAS notified areas of Delhi, Mumbai, Kolkata and Chennai." (Also reiterated at page 48 para 6.3)

Again at paragraph 1.3 of the Consultation Paper on Issues relating to DTH dated March, 02, 2007:

"As far as the two DTH operators are concerned, they offer several pay channels and the number of their DTH subscribers in the country is estimated to be about 2.3 million at present. As compared to this, the other addressable delivery platform, namely Conditional Access System (CAS) for cable television has about 5.5 lakh subscribers in the CAS notified areas of the country."

(4) We are therefore not in favour of any tariff regulation for the DTH operators. The extension of the CAS pricing regimen to DTH will be detrimental to the future growth of this digital platform as it will jeopardize further investment in this fast growing sector which will act as a disincentive to product and/or service innovation to the detriment of subscribers. On the other hand, if at all the Authority is in favour of an interim measure, the existing regulatory formulations for DTH may be extended to areas under mandatory CAS rather than having it the other way round. Also the mechanisms suggested under 2 to 4 for 5.2.2 to 5.2.6 *supra* may please be adopted. Also an analysis of DTH penetration in notified areas under mandatory CAS is imperative before any decision is taken by TRAI to this effect.

5.3.2 *Whether the ceiling for maximum retail prices of pay channels for DTH should be the same as laid down for cable services in CAS areas?*

Our Comments:

(1) No. The absurdly low rates prevalent in CAS areas have resulted in a local telephone call that lasts for an hour costing many times more than the monthly subscription fees meant for a pay channel. To illustrate, assuming a local call tariff of Re. 0.50 per minute, an hours duration shall cost Rs. 30/-. However a subscriber shall be paying Rs. 5.35 for availing a pay channel in notified CAS areas for the entire month. Equity and international best practices demand that not only should the broadcaster be paid a fair price for the content it invests in and generates

but it should also get remunerated for the signals it transmits. This is a glaring pointer to the fallacy involved in the tariff structures prevailing today.

(2) It may be pertinent to mention that the TRAI in the Explanatory Memorandum to the Tariff Order dated 31st August 2006 had itself argued at paragraph 5. 27:

"5.27 It has to be noted that the DTH contracts and the standard contracts for CAS follow two different routes. Since the TDSAT price fixation formula has been derived from the non CAS practices, the impact of the MRP now fixed for CAS area is not likely to adversely impact the prevailing business models in non-CAS areas. It is noted that the prices of the ESPN/Star Sports bouquet in the DTH regime is likely to be higher than what will emerge under the present tariff order for CAS areas. The two regimes are different in terms of their origins as well as spread. Therefore, symmetry of treatment with reference to interconnect regulation is not relevant as classification of the two are very different in terms of both model as well as geographical spread. The MRP regime in CAS areas has been mandated to ensure smooth roll out of CAS and the Authority proposes to revisit this after the market has settled and the subscribers have been given the comfort levels for the change over from non-CAS to CAS regime. ***Therefore, it is not necessary for the DTH wholesale prices to be equated with the CAS prices fixed in this tariff order.*** *This is being specifically provided in the tariff order. ……." (Emphasis Ours)*

(3) In any case, the tariff fixation for mandatory CAS is now sub judice before the Hon'ble Supreme Court of India. Mandatory CAS was a creature of statute and even after Mandatory CAS became a reality in parts of 4 metropolitan cities of Kolkata, Mumbai, Chennai and Delhi, the Central Government has not so far extended mandatory CAS in other parts of the country, presumably due to the poor consumer response to CAS in the areas presently notified and the practical difficulties in its implementation.

(4) Extending the tariff meant for Mandatory CAS to DTH Operators shall have the effect of converting entire India into a notified area u/s 4 A of The Cable Television Networks (Regulation) Act, 1995 in so far as the tariff meant for such notified areas is concerned; this was surely never contemplated by the relevant statute. Section 4 A begins by saying:
"Where the Central Government is satisfied that it is necessary in the public interest so to do....."

(5) It is not advisable to fix a "one size fit all" tariff in a heterogeneous country like India given the varied content offered by broadcasters across genres and the differences in viewing patterns across states and their linguistic and cultural preferences.

(6) Procurement costs for content are not uniform; neither are they amenable to precise determination or correlation to the final product; Broadcasters do no have the luxury of a compulsory, non discriminatory must provide to fall back upon in order to generate quality content. Over the years content procurement costs have shot through the roof whereas subscription revenues have stagnated given the abnormally low pricing norms fixed by TRAI in CAS and non CAS areas. . If the Regulatory regime is not enabling enough, Broadcasters shall have no incentive left to generate quality content. The broadcasting sector provides large scale employment to the educated youth of this country, and any adverse regulations will only add to the woes of an economy already plagued with recession and unemployment.

(7) Indian market with the number of operators from DTH platform (existing and prospective operators) is competitive and therefore the current price cap in CAS areas should not only be lifted but it would be inappropriate for the regulator to extend such capped MRP on channels in DTH.

(8) The prices should be allowed to be set by commercial agreement. The production of new content and its distribution is an expensive and risky venture with a long breakeven period and the pricing restrictions reduces the incentive and impedes investment.

(9) The Indian consumer currently gets an average of over 200 channels at an average cost of Rs. 200 per household which is the lowest in the world. Price Regulation should be reserved for essential service industries such as water and electricity or industries in which competition is not deemed to exist. Pricing of channels is best left to market forces.

(10) Pay TV channels are non essential, discretionary services primarily intended for entertainment. Any methodology or principle used for price controls is likely to result in a misallocation of resources and lead to market distortions.

5.3.3 *Whether DTH operators should be mandated to provide a basic service tier of FTA channels and if so, what mechanism should be adopted by DTH operators to provide the service of unencrypted Basic Service Tier, which is available in CAS areas without having to invest in a Set Top Box?*

Our Comments:
We believe such a regulation will not only restrict a DTH subscriber's freedom of choice but it will create more distortions between FTA and Pay channels. In any event, it is highly unlikely that a DTH subscriber shall be subscribing to such basic tier alone after going through the rigors of installing a dish antennae at his premises. Hence we do not recommend such a step.

5.3.4 *Whether the DTH operators should be required to make available the pay channels on a-la-carte basis to the subscribers as the cable operators are required to do in the CAS areas?*

Our Comments:

(1) Welfare economists are unanimous in their view that ala carte offering is anti consumer and bundling has always been traditionally beneficial for consumers. (Please refer to Annexure submitted by MSMD in Comments to the Consultation Paper on Interconnection Issues, posted in TRAI's website on 3rd February 2009 – CAP ANALYSIS - **THE FCC'S FURTHER REPORT ON A LA CARTE PRICING OF CABLE TELEVISION March 7, 2006** Jeffrey A. Eisenach, Richard E. Ludwick).

(2) Offering channels on an a-la-carte basis not only reduces diversity in programming and consumer choice but also raises costs for consumers and restrains industry growth.

(3) The broadcast industry is not an essential service industry and there has been an increase in the competition in the DTH sector which has been acknowledged by TRAI itself time and again.

(4) A mandate for a-la-carte pricing of pay TV channels could have the effect of chilling additional investment in India's digital economy, leading to higher costs – higher marketing and promotional costs for more number of individual channels instead of one bouquet, increased legal costs due to more number of contractual arrangements, higher operating costs due to hiring and training of more staff, up gradation of business to allow more sophisticated billing system, costs of renegotiations - for programmers and distributors, fewer viewing options to consumers, restricting investment and leading to stagnation in the creation of new and quality content. These concerns of broadcasters would get replicated for DTH operators as well, *mutatis mutandis*, if it decides to offer channels on ala carte to its consumers.

(5) It is believed that packaging regulation and in particular a-la-carte pricing has a severe impact on the distribution and availability of the channels to the viewers thereby directly effecting the operations of the channel business in terms of reducing over all revenues, lowering pay channel revenues and reducing program diversity.

(6) Pricing and packaging of channels if left to market forces, cable operators and channels themselves are forced to protect and improve their market position by delivering quality entertainment and services to consumers thereby relying on supply and demand to dictate pricing and programming.

(7) Bouquets are the most cost-efficient means of delivering variety of quality content as it facilitates the spreading of marketing and operational costs across a range of channels. Given the level of upfront Investment and long breakeven period the risk of launching a new channel would increase substantially in the absence of ability to secure wide reach of distribution as part of bouquet and to negotiate a fair and reasonable rate of return. Without the wide reach the bouquets offer, channels will struggle to attract advertisers leading to suffering of revenue, slowing of investment in programming. In this situation the channels will have to raise the subscription fees or they will be compelled to close down having failed thereby resulting in large scale unemployment of educated youth who have built their competencies around broadcasting. This shall have a cascading effect on the Distributors of TV channels as well.

(8) Rather than having channels on ala carte it is advisable that DTH platforms come up with multiple bouquets taking into account the varied tastes and preferences of its consumers. Ala carte provisioning of channels may be allowed but on a non discriminatory basis having regard to language, genre, placement, inhouse channels of vertically integrated broadcasters, et al.

5.3.5 *Whether standard tariff packages for renting of Set Top Boxes should also be prescribed for DTH operators?*

Our Comments:

(1) Yes. This shall ensure limited commercial interoperability. But for commercial interoperability to be effective, technical interoperability is imperative. Explanatory Memorandum to the Direct to Home Broadcasting Services (Standards of Quality of Service and Redressal of Grievances) Regulation, 2007 dated August 31, 2007. Para 18 of the Explanatory Memorandum reads as under:-

"18. The provisions relating to standard tariff packages for set top boxes for cable services in CAS areas were necessitated by the need for keeping entry barriers low ……. However, DTH service is purely an optional service and any subscriber opting for DTH service makes a free choice and therefore entry barrier need not be artificially lowered through regulation in the prevailing circumstances. At the same time, it is felt that mandating rental or hire purchase schemes has the advantage of offering an easy exit route for the subscribers who may not be happy with their service providers. Therefore, the Authority has mandated that the subscribers shall be given an option to procure DTH Consumer Premises Equipment (CPE) on out right purchase basis or hire purchase basis or rental basis. However, the hire purchase or rental schemes have not been specified by the Authority for the present and the DTH operators are free to come out with their own schemes in this regard."

(2) It may be pertinent to mention that no DTH operator has till date come out with any hire purchase or rental schemes for STBs whatsoever. The Consultation paper on issues relating to DTH dated 2nd March 2007 states as follows:

" Scheme in CAS

4.4 In the CAS areas, the Authority has prescribed two standard tariff packages ……. The standard tariff packages are rental packages and provide for a monthly rent of Rs.30/- with a one time deposit of Rs.999/- and the

second option with a monthly rent of Rs.45/- and a one time deposit of Rs.250/-. Thus, the subscriber can change his service provider as and when he wishes and get a refund of the Deposit (with some deductions towards the depreciation) by returning the Set Top Box to his service provider.

Changes in DTH License conditions

4.5 In the case of DTH the existing exit scheme is based on the technical interoperability requirement which has been incorporated in the license conditions. This approach has two drawbacks. Firstly it is not easy for consumers to switch from one DTH operator to the other …… The second is that the license conditions only allow a consumer to switch from one DTH operator to the other. It is not possible for the consumer to get out of the DTH platform and migrate to a cable or IPTV platform. Alternatively it could be argued that the existing licensing conditions provide an effective exit option specially with new service providers coming in and all that needs to be done is to remove the problems in the scheme. On the issue of rental schemes for Set Top Boxes for DTH services, the Authority had recommended in its recommendations on Licensing Issues relating to DTH sent to the Government on August 25, 2006 that

"…The DTH Service Providers should also be encouraged to provide Basic or Advanced Set Top Boxes to consumers under rental schemes, but there should be no dilution in the technical interoperability conditions as they exist today…".

At present it is seen that the DTH operators are not giving any rental schemes and are only providing a purchase scheme. The question of whether there is need to change the licensing conditions now will need examination as the DTH consumers have a limited option as compared to the CAS consumers."

5.4 Other Relevant Issues

5.4.1 *Whether the carriage fee charged by the DTH operators from the Broadcasters should also be regulated? If yes, then what should be the methodology of regulation?*

Our Comments:

Carriage fee is a market pricing distortion created by the 'must provide' obligation without a corresponding 'must carry' requirement. If this distortion is removed, there will not be any demand for carriage fee and the question will be redundant. Until this happens however Operators must be restrained from unjustly exploiting an artificial scarcity and in such a situation carriage as well as placement fees need to be regulated as there is hardly any difference between the two apart from nomenclature. Placement inherently and intrinsically includes Carriage. A DTH operator ought to be precluded from asking for Channels on a Must Provide, if it demands carriage or placements fees.

5.4.2 *Whether any ceiling on carriage fee needs to be prescribed? If yes, then whether the ceiling should be linked with the subscriber base of the DTH operator or should it be same for all DTH operators?*

Our Comments:

We are in principle against the levy of carriage fees from broadcasters by whatever name called.

5.4.3 *Comments may also be offered on the prayers made in the writ petition of M/s Tata Sky Ltd.*

Our Comments

(1) Legislations fall within the domain of "Policy" and unless there are compelling reasons, Courts usually abstain from looking into the same. Neither do courts in India in exercise of its writ jurisdiction prescribe laws nor direct the legislature to come up with particular laws as the latter is an exercise in Policy making, from which Courts in India have traditionally steered clear in pursuance to the constitutional principles of the "Separation of Powers".

(2) With due respect, it is submitted, that the Hon'ble Punjab and Haryana High Court has erred in passing such an order. . The use by a commercial entity of Constitutional Writs and The Civil Procedure Code by way of preferring Applications under Section 151 of the Code or initiating Miscellaneous Petitions against a statutory authority, is unprecedented in itself and poses a substantial question of law which TRAI ought to have agitated before the Hon'ble High Court or in a superior forum.

(3) It is settled law that when an executive authority exercises a legislative power by way of subordinate legislation pursuant to the delegated authority of a legislature, such authority cannot be asked by any party least of all the Judiciary, to enact a law which it has been empowered to do under the delegated legislative authority. Please see AIR 1992 SC 1546; AIR 1971 SC 2399.

(4) It may be pertinent to mention that the Tariff Order pertaining to the notified CAS areas came into effect on 31st August 2006.

(i) Subsequent to the issuance of this Tariff Order, proceedings being Petition No.189(C) of 2006 were initiated before the Hon'ble TDSAT.

(ii) The petition was disposed off by the Hon'ble TDSAT on 31st March 2007 directing the respondent broadcaster to supply channels at 50 percent of the rates meant for Non CAS areas. The Petitioner DTH Operator therein had gone in an Appeal against the said Order before the Hon'ble Supreme Court but it had not challenged the Tariff Order dated 31st August 2006, citing any alleged discrimination or demanding so called level playing fields or parity with Operators in CAS areas. On the contrary it had withdrawn its appeal in the Hon'ble Supreme Court.

(iii) Hence, the said Petitioner/DTH Operator cannot now under a Writ proceeding seek what it could have sought in such earlier proceedings, as the same shall be barred by constructive res judicata.

C. Miscellaneous

a) *Whether Movie-On-demand, Video-on-Demand, Pay-per-view or other Value added services such as Active Stories should be recognized as a broadcast TV channel?*

Our Comments:

In so far as such services utilize precious and scarce transponder space the same ought not to be permitted until additional transponder capacity becomes available. It cannot be that on one hand DTH service providers deny carriage to broadcasters on the plea of lack of transponder space and in the same breath push their own contents through their respective platforms. Such independent offerings by DTH players fundamentally militate against the license conditions of the Ministry of Information and Broadcasting ("MIB"), Government of India, and are also contrary to TRAI's recommendation to the Ministry on media ownership whereby separation of broadcasting and distribution services have been advised. Such formulations have the effect of blurring the distinction between Broadcasters and Distributors. Content should be the sole preserve of broadcasters and distribution should be the turf for operators. TRAI had itself recognized this issue in its recent Recommendation on media ownership dated 25.02.09 at paragraph:

"4.52 With the present dispensation a company/entity can have controlling stake in a broadcasting company and a DTH licensee company, without violating the license conditions. This defeats the purpose of putting such restrictions and may lead to vertical integration between the broadcaster and the distributor. Such a broadcaster could then block the contents of a competitive broadcaster in the DTH distribution network by citing the reason of insufficient bandwidth. Similarly with around 400 channels that are being

broadcast, a similar anti-competitive behaviour is possible from broadcasters who may have a stake in MSO/cable operators. So it would be in the interest of consumers and competition that a clear distinction is maintained between the broadcaster and the distributor."

b) *In case these are termed as broadcast TV channels, then how could the apparent violation of DTH license provision (Article 6.7, Article 10 and Article 1.4), Uplinking and Downlinking guidelines be dealt with so that availability of new content to consumer does not suffer for want of supporting regulatory provisions?*

Our Comments:

Content should unequivocally be in the domain of broadcasters alone. DTH licensees under no circumstances should be allowed to generate content on their own.

c) *What should be the regulatory approach in order to introduce these services or channels while keeping the subscriber interest and suggested alterations in DTH service operations and business model?*

Our Comments:

Such services (and especially in a country like India where enforceability of regulations has always been an issue) are not amenable to monitoring by regulators on a 24/7 basis. Therein lies the need for added caution. Also subscriber interest is not going to be upheld by any means with DTH licensees being permitted to generate content in any form or manner whatsoever. If they are permitted to do so they shall be in direct competition with that of broadcasters which shall not augur well for the industry at all.

d) *In case these are not termed as broadcast TV channels, then how could such a channel be prevented from assuming the role of a traditional TV*

channel? How could bypassing of regulatory provisions- Uplinking/ Downlinking, Programme Code, and Advertisement Code be prevented?

Our Comments:

Please refer to comments made in a) to c) supra.

e) *Whether it should be made mandatory for each case of a new Value added service to seek permission before distribution of such value added service to subscribers? Or whether automatic permission be granted for new services on the basis that the services may be asked to be discontinued if so becomes necessary in the subscribers' interest or in general public interest or upon other considerations such as security of state, public order, etc.?*

Our Comments:

Please refer to comments made in a) to c) supra.

f) *In view of above, what amendments shall be required in the present DTH license conditions and Uplink/ Downlink guidelines?*

Our Comments:

Please refer to comments made in a) to c) supra.

g) *How could the selling of advertisement space on DTH channels or Electronic Program Guide (EPG) or with Value added Service by DTH operators be regulated so that cross-holding restrictions are not violated. In this view, a DTH operator may become a broadcaster technically once the DTH operator independently transmits advertisement content which is not provided by any broadcaster. How could the broadcaster level responsibility for adherence to Program code and Advertisement Code be shifted to a DTH operator, in case the operator executes the sale and carriage of advertisements*?

Our Comments:

In so far as EPG is concerned, there is no issue. Also as stated in a) to c) *supra,* value added services that have the capacity to compete with content produced, generated and transmitted by broadcasters, ought to be prohibited.

h) *Traditionally advertisements as well as program content fall in the domain of the Broadcasters. In case, DTH operator shares the right to create, sale and carry the advertisement on his platform, then the channels are necessarily distinguished on the basis of who has provided the advertisement with the same program feed. In what way any potential demand to supply clean feed without advertisement by a DTH operator be attended to (by a broadcaster)? Should 'must provide' provision of the Interconnect Regulation be reviewed, in case supply of clean feed is considered necessary*?

Our Comments:

The Authority it is submitted is treading on dangerous territory. There should under no circumstances be a "must provide" for broadcasters to supply "clean feed" to Operators as this will deny Broadcasters access to a fast growing sector viz. DTH subscribers. Advertisers will be reluctant to take spots on regular channels if the channels are mandated to provide a 'clean' feed to DTH operators and this will have serious financial repercussions on Broadcasters threatening their business models. Under no circumstances should DTH operators be allowed to sell advertisement slots on their respective platforms. This shall result in a total breakdown of the business model of the industry that has evolved so far and shall cause irreparable damage to all the stakeholders of the industry. Roles shall get blurred, and there shall be unnecessary competition between broadcasters and distributors with no level playing field whatsoever in so far as the broadcasters are concerned. Such competition is detrimental to the industry at large and should be altogether avoided. DTH licensees have full freedom in packaging content in their respective platforms, while broadcasters do not. Traditional Revenue streams (namely that of advertising, subscription fees,

and carriage/placement) shall also get skewed in favour of the DTH licensees at the cost of the broadcasters if such policies are put into place. Adherence to the programme and advertisement codes issued by the MIB would be an impossible task to ensure for any content generated by and appearing in such platforms. Subscriber choice will be limited as a DTH Operator will choose his own content over that of the Broadcasters. A broadcaster would have a very difficult time in finding a carrier/distributor, while contents developed by DTH operators would be having a ready captive market, thereby leading to a total lack of level playing field between such broadcasters and the Operators. There shall be no incentive whatsoever for the broadcasting industry to carry on and all the more to shut shop.

i) Whether carriage of radio channels by a DTH operator be permitted? Should such permission cover all kind of radio channels to be carried?

Our Comments:

In so far as such services do not materially affect the transponder space available to broadcasters, the same may be permitted with due caution. Again, the prohibitions and precautions for cross holding/ownership and content monitoring also need to be in place.

j) In case this is permitted, whether DTH license, Uplink/ Downlink guidelines, Conflict of business interests conditions with existing radio system operators, should be amended keeping in view, the incumbent or new DTH operators?

Our Comments:

Under no circumstances should DTH players be allowed to run their own radio systems.

k) If so, what changes are needed in the existing regulatory provisions so that the general policy of must provide and a non-discriminatory offering of channels be extended to between radio channels and DTH operators?

Our Comments:

Please refer to comments made at j) supra.