

ISSUEWISE REPRESENTATION AND COMMENTS ON BEHALF OF MULTI SCREEN MEDIA PRIVATE LIMITED

Issue 1:

Is there a need to define and differentiate between domestic subscribers and commercial subscribers for provision of TV signals?

Response:

The answer to the present issue is in the affirmative.

In a market economy, the state steps in to regulate private enterprise in any sector only where there is market failure. The backdrop in which the broadcasting sector, with specific reference to tariff issues, came to be regulated, was the complaints from domestic consumer / organizations that they needed respite from the unregulated and opaque mechanism of tariff. Thus, the decision to regulate the sector was on account of providing succor to domestic subscribers.

This is the reason why the TRAI did not address the issue of commercial subscribers when it was formulating the tariff orders in 2004 and 2005. When the Hotels were being asked to pay rates that were higher than the rate frozen by TRAI for domestic consumers and they went to the TDSAT against the threatened disconnection and the Tribunal ruled that these entities were not consumers, the TRAI finally agreed to look at this separate category.

The very first time that the TRAI looked at this issue, on 7th March, 2006, it specifically recognized that a separate category of subscribers exists which requires (a) separate definition and (b) separate treatment. The reason for this, as was very succinctly given by TRAI was that whereas the domestic / ordinary subscriber uses the signal for its own domestic use, the commercial subscriber uses it for the commercial benefit derived for its own customers.

This distinction has stood the test of time and never been disturbed either by the TDSAT or the SC or even TRAI, till its Tariff orders of 16.7.2014 and 18.7.2014. Incidentally, these have been struck down by the TDSAT on the sole basis that the TRAI, in drafting these tariff orders, while mindful of the distinction between the two categories of subscribers, as reflected in the separate definition, has completely ignored the nature of "user" by the two distinct categories of consumers of the signal.

The use of channels by both categories of subscribers is different; domestic subscribers use the channels for their domestic purpose i.e. for their own personal consumption only, whereas the commercial subscriber uses it for the benefit of its customers, clients, members or any class or group of persons having access to the commercial i.e. for commercial purpose and commercial gain. The Authority has itself acknowledged that commercial subscribers are a class that is distinct from ordinary domestic subscribers and have also recognized the difference in purpose of use of the channel signals by both classes. This classification is necessary to appreciate the fact that a commercial subscriber uses the signals of the channels for the enhancement of the commercial value of the commercial establishment.

Thus, there is a need to differentiate between the domestic subscribers and commercial subscribers.

Issue 2:

In case such a classification of TV subscribers is needed, what should be the basis or criterion amongst either from those discussed above or otherwise? Please give detailed justification in support of your comments.

Response:

Differential treatment between Ordinary and Commercial Subscribers was all along an established practice. Amongst the different classification of subscribers provided in this consultation paper, the criteria differentiating between the domestic subscriber and commercial subscriber on the basis of a) Place of viewing TV signals and b) Type of usage criteria for TV signals should be the preferred way for differentiating between both the types of subscribers.

- a) Place of viewing TV signals- Even though the definition accorded to Commercial Subscriber primarily focuses on the usage of the TV signals, the place of viewing TV signals in our view is also a way to differentiate between an Ordinary and a Commercial Subscriber. It is pertinent to note that when the TV signals are viewed at residential households, there is no intention of exploiting such signals commercially. However, when the signals are placed in Commercial Establishments the prime reason for such is to gather some kind of commercial gain. When we refer to commercial gain, it doesn't necessarily mean charging money from their customers/clients etc. but to enhance their work place/ commercial environment to attract customers. For e.g. we could draw a comparison between two hotels of the same standards, and place TV set in one with the signals of multiple channels, and no TV set in another, footfalls in the hotel where TV set has not been placed will as a matter of fact reduce than the other. The basic amenities that hotels boast of amongst others are the placement of TV sets. Another example to entice customers to visit their restaurant/pubs is placing TV sets and screening events that has the ability to pull crowds. Thus, place of viewing also plays a major role in analyzing the differentiation between Ordinary and Commercial Subscribers.
- b) The classification depending upon usage for TV signals primarily focuses on the fact that individual subscriber's use the signals of the Channel for their personal viewing, on the other hand, commercial subscribers use the signals of the Channels for the purposes of their clients/customers as an addition to the services provided by them for which they charge from their customers and the same is factored/in-built in the tariff charged by them to their customers. It is usually contended against the aforementioned classification that the commercial subscribers do not charge separately for the watching TV, it is present as one of the services. It is widely accepted that various services provided by the commercial subscribers are not charged separately but a consolidated payment is taken for it.

Further, the commercial subscribers have sufficient bargaining power hence no need for sub categorization arises. Moreover, commercial subscribers carry out their commerce for either a fee that is specific for such viewing or as a part of overall services rendered against a fee or as a means of indirect or direct incentive to its clients/visitors/viewers. The idea of sub- categorization of commercial subscribers is also not feasible and is most likely to result in impairing disputes and trigger aggravated perceptions of discrimination among those included within the category as opposed to those who have not been so included. However, the Public Viewing Areas show the channels on even base and thus the broadcasters should be allowed to have separate arrangements with them.

Moreover, it is well-accepted that there is no dispute around the fact that there is a substantial difference between the rates offered to Commercial Subscribers and Ordinary Subscribers with respect to including without limitation property, water, gas, electricity, etc.

Thus, it is imperative that we have a distinct classification between a Commercial Subscriber and an Ordinary Subscriber.

Issue 3:

Is there a need to review the existing tariff framework (both at wholesale and retail levels) to cater for commercial subscribers for TV services provided through addressable systems and non-addressable systems?

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Issue 4:

Is there a need to have a different tariff framework for commercial subscribers (both at wholesale and retail levels)? In case the answer to this question is in the positive, what should be the suggested tariff framework for commercial subscribers (both at wholesale and retail levels)? Please provide the rationale and justification with your reply.

We are commenting on both the aforesaid questions and providing a single response as follows:

The Indian Pay-TV industry as of today has grown manifold and is one of the most competitive and diverse pay TV markets in the world with thousands of MSOs and cable operators, private operating DTH systems, IPTV offerings, HITs offerings, mobile television etc. The cable and satellite TV industry operates in a highly competitive marketplace where there is furious competition among the channels and various TV delivery systems for eyeballs and consumer rupees. The ever-increasing competition has led to high growth of subscribers and has put pressure on tariffs, which have seen a sharp drop over the years. From 2004, when broadcasting and cable services came under the purview of TRAI, to 2015 when TRAI has released this consultation paper market dynamics have changed significantly, with the advent of addressable digitalization. What is required at this point is that TRAI takes note of the dramatic transformation in the Pay-TV industry over the past few years and determine whether continued regulation of tariff is even warranted with respect to any category of subscribers' especially commercial subscribers.

As on date there is active competition at all levels of the Pay TV industry to discourage perverse pricing. TRAI is seized of the fact that there is now effective competition at all levels in the Industry, signifying that the Indian Pay-TV industry is ready for *forbearance*. Even a study of the International markets will go on to show that the Regulators take a lenient view thereby ensuring active competition in the market and leave decisions like wholesale rates, packaging choice to market players. It is submitted that the wholesale Non DAS ceiling currently applicable to analogue platforms, and used as reference point for addressable systems, should be withdrawn, leaving tariffs to be determined by market forces.

TRAI should adopt forbearance when it comes to pricing as there is enough competition in the market and therefore there is no reason to put a cap on pricing of channels. The present debate over Tariff Fixation emanates from the fact as to whether there is any need to define and differentiate between domestic subscribers and commercial subscribers for the purpose of supply of TV signals. The need to define and differentiate between domestic subscribers and commercial subscribers arises from the fact that both the subscribers have a totally different nature of usage and for this very reason the same have been defined as separate categories of subscribers in the previous regulations.

In fact, the situation in the last 5 years has become more favourable for market forces to decide pricing at all levels. There are now more than 800 television channels and even the number of commercial

subscribers has risen exponentially. We submit that the presence of a plethora of players in the market clearly indicate that there exists enough and adequate competition in the market and no monopolistic practices or unfair trade practices can be practiced in such a scenario.

Similarly, the commercial subscribers, in the present market conditions, are possessed with sufficient bargaining power. Moreover, any commercial subscribers, by no standard of measures, may be considered to be disadvantaged section of the society meriting any special regulatory or government concession.

Thus there should be total forbearance vis-à-vis commercial subscribers. The Courts have recognized the Authority's power to regulate through forbearance and also adopt different approach qua different subscribers. We therefore ask the regulator to completely deregulate the pricing piece in so far as commercial subscribers are concerned.

Issue 5:

Is the present framework adequate to ensure transparency and accountability in the value chain to effectively minimize disputes and conflicts among stakeholders?

And

Issue 6:

In case you perceive the present framework to be inadequate, what should be the practical and implementable mechanism so as to ensure transparency and accountability in the value chain?

Response:

We are commenting on both the aforesaid questions and providing a single response as follows:

We would like to draw your attention to the fact that currently there is no transparency in the current framework.

The addressable systems are accountable to an extent, as determination of viewership can be adjudged and facilitated by means of mechanically generated data. However, the supply of TV channels to Commercial Subscribers by the MSO/LCO/cable operator still remains unregulated.

- a) Subscriber reports- This brings in the importance of amending the regulation to ensure that the subscriber reports provided to the broadcasters by the MSO/ LCO/ DTH operators give a clear distinction between the two kinds of subscribers- Ordinary and Commercial Subscribers. The subscriber report of the Commercial Subscriber should mention full particulars of Commercial Subscribers, their activation and deactivation during the month.
- b) CAF- Further, it is equally vital that the CAF submitted by the subscribers have a distinction between Ordinary and Commercial Subscriber.

The non- addressable markets (60-70% of the country) suffer from various lacunae and the issue of addressability severely affects it furthermore. Until the subscription base of a market/ industry is transparent and comprehensible, no apposite data can be derived from any assessment/ study/survey, as the actual demand will always be hypothetical. If a data base is based on hypothetical derivatives, the results are sure to suffer infirmities.

We believe that the commercial subscribers should directly deal with broadcasters and once the negotiations are settled and agreements are in place, the broadcaster should identify the DPO who will further supply TV signals to the commercial subscriber. The onus should also be attached to Commercial Subscriber to ensure and satisfy themselves that the DPOs that they are receiving/intend to receive the signals from have been mandated by the broadcasters to provide signals. Commercial Subscribers should conduct a complete due diligence (including reviewing of the link documents) before entering into an

agreement with a particular DPO to ensure that the DPO has been given appropriate authorization for providing the signals to the Commercial Subscribers. The agreements can be both in the form of Reference Interconnect Offer (RIO) and as well could be left to mutual negotiation between the parties. At present, the broadcasters face huge loss in revenue (which can be substantiated) as there is lack of transparency at the grass root level in relation to commercial subscribers, especially where agreements are being directly entered into with DPOs. Therefore it becomes pertinent that the commercial establishments enter into agreements directly with the broadcasters. Additionally, it needs to be ensured that the DPOs authorised by the broadcasters in this regard should possess the necessary infrastructure to ensure that, in the event of non-compliance of regulations/violation of terms of agreement by the commercial subscriber, the broadcaster has effective control to switch off the commercial subscriber.

TRAI as on date needs to appreciate that there is enough competition in the market and more so the commercial subscribers / establishment already have enough bargaining power. It is to be appreciated by the Hon'ble Authority that the Broadcasters continue to be over regulated by the existing Tariff orders and other regulations like price ceilings, advertisement caps etc. That we find it pertinent to get to the kind attention of the Regulator that any water tight approach followed by the Regulator with respect to the Tariff for commercial subscribers, will only lead to failure in achieving the desired results and which will slow down the overall growth of the broadcasting industry. We therefore take this opportunity to point out the Regulator's own observations over the past few years which have not been considered while issuing this Consultation Paper.

1. In 2004 pursuant to the Tariff Order dated October 1, 2004, TRAI's own position on price regulation was that "the regulation of prices as outlined above is only intended to be a **temporary measure** and till such time there is no effective competition. The best regulation of price is done through competition. Therefore, as soon as there is evidence that effective competition exists in a particular area price regulation will be withdrawn."
2. TRAI has itself observed and noted in its various studies that the international regulatory practices in the broadcasting and distribution industry are guided by market conditions to ensure that there is effective competition and that the supply and demand forces act freely and prices are automatically aligned to the value attached by the consumer for particular products and services.
3. It has always been the stand of TRAI that price control is only an interim measure and will be withdrawn once there is effective competition. However it can be seen for past sometime now that despite there being effective competition the Regulation at the whole sale level has become even more stringent.
4. That TRAI has all along observed and noted that the strongest advocacy for forbearance has been from the broadcasters, and the major arguments in support thereof are:
 - (i) Price regulation impedes the introduction of quality content, investment flows and impact the revenue and bottom lines of the broadcasters;
 - (ii) There is adequate competition at the level of content and now even at the delivery platform level specifically with reference to commercial subscribers;
 - (iii) TV channels and content are matters of intellectual property, and not an essential commodity requiring control;
 - (iv) Even if a decision is taken to control tariff, there has to be some criterion for determining sufficiency of level of competition and sunset date for lifting of control.

Thus it is not out of place to mention here that just because a particular state of affairs was allowed to continue for a period of time does not render such state of affairs sacrosanct or inviolable. The

commercial subscribers are being at all times guided by profit motive; charge exorbitant rates from the hotel guests however when it comes to the pay outs to the broadcasters the commercial subscribers are not willing to pass on the legitimate dues to the Broadcasters.

The broadcasters are at the receiving end because not only do they have to pay huge amounts to produce and procure content for running their channels, but they also are being driven at losing out on their subscription revenue owing to such stringent Regulation and Tariff orders. The Consultation paper purports to continue with tariff regulation and further resorts to laying down the manner of pricing of packaging, instead of declaring areas of forbearance and this is least to say not a proper discharge of functioning of Statutory Duty. That we are in disagreement with the proposal of ceiling of tariffs at wholesale level in totality as the same will lead to distortion of the market, create imbalances, confusion and merely create a scenario tilted in favor of the Platform owners and Commercial subscribers. In fact TRAI has not had an occasion to examine the room rates being charges by the Hotels which have no ceiling and the same is not even remotely proportionate to the pay out to the Broadcasters and it is pertinent to note that the very basis of equating an ordinary cable subscriber with a commercial subscriber is not justified.

We feel that the business has continued for the last more than 10 years under total forbearance vis-à-vis commercial subscribers and the market should not be distorted by over regulation. Thus total forbearance for commercial subscribers would be adequate.

Issue 7:

Is there a need to enable engagement of broadcasters in the determination of retail tariffs for commercial subscribers on a case-to-case basis?

Response:

The broadcasters should be allowed to directly negotiate with the commercial subscribers and once the negotiations are settled and agreements are in place, the broadcaster shall identify the distributor platform operator (DPO) who will supply the signals to the commercial subscriber. The Agreements can be both in the form of Reference Interconnect Offer as can be left to mutual negotiations between the parties. We are strongly advocating forbearance at all stages for the reason that commercial subscribers are not ordinary subscribers, who earn to run the family and the basic necessity of their own but are the organization/ companies / factories /hotels etc., who maintain profit and loss account books. Commercial subscribers are one who is to do business and provide their services to customers (third person). No commercial subscriber should be allowed to benefit of any tariff order for residential / domestic subscribers. The prices for commercial subscribers should not be regulated and left on market forces. TV Channels are non-essential services from a Constitutional point of view. Accordingly for non-essential services it needs to be appreciated that free contract pricing should be the norm rather than an exception. DPOs may be allowed to serve Commercial subscribers only consequent to approvals to this effect from the broadcaster concerned, which approval shall ensue once an agreement between the broadcaster and the commercial subscriber has been formalized. The broadcaster may at their discretion enter into commercial understandings with operators for servicing such commercial establishments.

Total forbearance for Commercial Subscribers is thus the only option. There is no necessity for the Authority to now set the clock back by prescribing otherwise as that will result in uncertainty and will unsettle business practices that have evolved and settled over time resulting in unnecessary erosion of investor confidence.

In case of request by any commercial subscriber for change in the DPO, the Commercial Subscriber should be asked to obtain a No-Dues Certificate from the earlier DPO or have documentary proof that there is no outstanding dues. Before availing of signals, Commercial Subscriber should also satisfy itself

that the concerned DPO is duly authorised. It should also be mandated that all the Commercial Subscribers need to sign the agreement with the Broadcasters or Broadcasters & operators within stipulated timelines.

The Hon'ble Regulator will appreciate the fact that the contracts between parties are mutually negotiated and in the event there arises any dispute the Hon'ble TDSAT has been constituted to look into resolution of the disputes and in fact there are compliances to be undertaken by the Broadcasters in terms of Annual filing of their entire commercial data.

Issue 8:

How can it be ensured that TV signal feed is not misused for commercial purposes wherein the signal has been provided for non-commercial purpose?

When a clear distinction between domestic and commercial subscriber is done and the DPOs abide by the same in the letter and spirit. The onus is on the DPOs to ensure the same and take rectification measures. Further, the broadcasters can suo motto on having knowledge of any such misuse of the signals take remedial measures by asking the DPOs to switch off signals of the concerned subscribers and also initiate legal proceedings wherever necessary for unauthorized usage of the signals and infringement of copyrights. This would also be of deterrent in nature thereby limiting misuse of signals.

Issue 9:

Any other suggestion which you feel is relevant in this matter. Please provide your comments with full justification.

Under the Indian legal system, all broadcasters are bound by the terms of the Uplinking and /or Downlinking licenses issued to them by the MIB and the policy guidelines laid down by the MIB and modified from time to time in addition to the other specific laws to which they are subject. **The Regulator cannot regulate such arrangements in a manner which impinges directly on the fundamental rights of Broadcasters on "Freedom to carry out Trade or Business" in terms of Article 19 of the Constitution.** The time has perhaps come to ask the question whether continued existence of the current Regulatory Regime and the continuous limitation of role of the Broadcasters by TRAI is justified?? Or one ought to look beyond existing Regulatory formulations. It is submitted that regulatory strictures curb the growth of the market.

Pay TV channels are non-essential, discretionary services primarily intended for entertainment. Any methodology or principle used for unnecessary control is likely to result in a misallocation of resources and lead to market distortions. The broadcaster incurs huge expenditure in the development and procurement of the content. The broadcasting industry itself is very dynamic in nature. In order to have a clear financial visibility and budget support, the broadcaster needs to have an element of stability in revenue stream and projections.

Any proposed Regulation of Tariff will have the effect of reducing the ability of Broadcasters to fund development of both new types of content and new infrastructure and at the same time will constrain investment in content, and force the Broadcasters to continue to focus only on mass-market, advertising-supported content, severely limiting the number and type of content channels available to consumers. In the long run, consumer choice will become the victim of the proposed Regulation. In the event the Tariff to be charged for commercial subscribers are not left to forbearance it will result in abnormal profits/revenue share in the hands of commercial subscribers and Platform Operators in terms of higher profit margins derived by them at the cost and expenses of the Broadcaster.

Commercial Subscribers would broadly include persons who in their ordinary course of business or affairs permit the viewing of Pay Television by their employees, customers, clients, members, patients, guests or visitors within the premises of their place of business or where they carry out their affairs from, either for a fee that is specific for such viewing or as part of overall services rendered against a fee/tariff or as a means of direct or indirect incentive to its employees, customers, clients, members, patients, guests or visitors. In such a scenario it is submitted that there ought to be total forbearance both in tariffs as well as interconnection when it comes to dealing with commercial subscribers, as they cannot by any stretch of imagination be considered to be a disadvantaged section of society meriting any special regulatory or government care. Moreover there should not be any distinction among Commercial subscribers.

No larger public interest shall be served by Regulating the Tariff for commercial subscribers. It will not only not serve any public purpose but shall ultimately violate the fundamental rights of the Broadcasters as provided under Articles 14, 19 and 21 of the Constitution of India. Thus in the light of the above, it becomes imperative on the part of the authority to recognize the fact that putting a ceiling on Tariff will not help in promoting and protecting the interest of the consumers and the service providers, as mandated by the Preamble to the Telecom Regulatory Authority of India Act 1997. It is pertinent that the arrangements between Broadcasters and Commercial Subscribers should be kept outside the purview of Regulations otherwise, it shall be resulting in the breakdown of the business model of the industry, trigger conflicts of interests, blur dividing lines between Distributors and Broadcasters, and lead to unhealthy competition between broadcasters on the one hand and distributors on the other hand.

To conclude it is pertinent to state that TRAI should take into account the fact that in effect, any over regulation at every level on the Broadcasters will only go on to crippling the broadcasting industry. It is pertinent to mention here that it is the Broadcasters who take the entire credit risk and all other liabilities pertaining to the distribution of the channels. In the event the Tariff's to be charged for commercial subscribers are regulated in effect it will ensure that there is no level playing field. The mission of TRAI is to create and nurture an environment which will enable the quick growth of the telecommunication sector in the country. One of the major objectives of TRAI is to protect the interest of the Service providers. Also the Hon'ble Regulator has not provided any justification as to how the grant of forbearance will affect the Commercial Subscribers who have a sufficient level playing field. That the Hon'ble Authority should take into account the changed market dynamics and the inflation in costs being faced by the Broadcasters, as on date and therefore consider the submissions of the Broadcasters and leave the Tariff's to be charged from commercial subscribers to forbearance.
