

RESPONSE OF STAR DEN MEDIA SERVICES PRIVATE LIMITED ON THE CONSULTATION PAPER NO 4/2009 DATED MARCH 6, 2009 ON DTH ISSUES RELATING TO TARIFF REGULATION AND NEW ISSUES UNDER REFERENCE.

PREAMBLE

Special Leave Petitions filed by Indian Broadcasting Federation (“IBF”), Star Den Media Services Private Limited (“Star Den”) and MSM Discovery Private Limited (“MSMD”)

Before we dwell upon the specific issues raised by the Authority in the CP, we submit that we are filing this preliminary response without prejudice to our rights and contention in the Special Leave Petitions (SLPs) filed by IBF, Star Den and MSM Discovery Private Limited MSMD, 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 issued the Consultation Paper No.4 of 2009).

We further state that the Special Leave Petition filed by the IBF bearing CC nos 5564 to 5566 of 2009 was listed for mentioning before the Hon’ble Supreme Court on 24th April 2009. After hearing the counsels appearing in the matter, the Hon’ble Supreme Court was pleased to list the matter on May 4, 2009.

We state that in the SLPs filed by IBF, STAR DEN and MSMD several significant and substantial issues of law have been raised before the Hon’ble Supreme Court of India. Furthermore, the jurisdiction of the Hon’ble Punjab and Haryana High Court in passing the Impugned Orders has also been challenged. A copy of our SLP is annexed herewith to appraise the Authority of the significant issues raised in it.

Considering the fact that the Hon’ble Supreme Court is seized of the matter, we feel that it would be inappropriate on the part of the Authority to proceed with the consultation process till the matter is heard by the Hon’ble Supreme Court. The Authority would further agree that the very purpose of filing the SLPs will be frustrated if the Authority were to proceed with the consultation process.

We further submit that in any event, the time limit of 6 weeks’ stipulated by the Hon’ble Punjab and Haryana High Court to decide the representation of Tata Sky Limited has also expired in February 2009 and apparently an Application filed by the Authority before the Hon’ble Punjab and Haryana High Court seeking extension of time is still pending.

In the light of the above and for the reason that the Hon'ble Supreme Court is now seized of the matter, we request the Authority to not proceed with the consultation process till the time the SLP's are heard.

We hope that the Authority will accept our request to not proceed with the consultation process and discharge the powers bestowed on the Authority under the TRAI Act, in the right spirit and in line with the objects of the legislation.

Proceedings before the Hon'ble High Court of Punjab and Haryana :

On reviewing the CP, we note that that the paper has been issued by the Authority on the representation made by Tata Sky Limited ("Tata Sky"), as directed by the Hon'ble High Court of Punjab and Haryana dated 9th December 2008 ("Order"). In this context, we respectfully submit that tariff fixation is a serious issue and will have far reaching implications on the working of the distribution sector across all delivery platforms. The tariff if any set for DTH sector, pursuant to this CP, will going forward, set the benchmark prices/rates for all existing and future addressable platforms.

As the Authority is aware, Tata Sky's petition before the High Court of Punjab and Haryana pertains to its disputes with Zee Turner Limited with respect to a "ETC Punjabi" channel. It is indeed unfortunate that Tata Sky is misleading the Hon'ble High Court and trying to seek relief in the form of tariff fixation by coloring its disputes with a single broadcaster for a single channel as a threat to survival of the DTH sector, warranting tariff fixation. Contrary to Tata Sky's claims in the petition, we submit that the DTH sector is currently running smoothly in the existing regulatory environment. To the extent dispute arise amongst stake holders, the TRAI Act itself provides for an inbuilt framework for dispute resolution mechanism in the form of TDSAT which has been empowered to adjudicate upon disputes between service providers as has been held by the Authority itself in paragraph 15 of its decision dated May 12, 2008 on the representation of Tata Sky dated March 18, 2008 pursuant to the order of the Hon'ble High Court dated March 11, 2008.

The Authority would agree that individual disputes cannot be the foundation for enactment of any legislation in the form of tariff fixation. If the authorities enact legislations/change law to redress individual disputes, it will be amount to mockery of jurisprudence/legal system. While we are fully confident that the Authority will follow the principles of transparency as embodied in the provisions of the TRAI Act while deciding the representation of Tata Sky, we earnestly request the Authority to adopt a pragmatic and balanced approach. The Authority will agree that the broadcasting/distribution sector is an amalgam of the interests of all its stakeholders viz the operators across all delivery platforms, broadcasters/producers of content and the end consumers. If the Authority decides to impose extreme form of regulation in the form of tariff fixation to satisfy the one sided demands of Tata Sky, it will not only be extremely counter productive for the working of the distribution sector, but will also set a bad precedent for future whereby all stakeholders will seek change in law or enactment of

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legislation to redress their individual grievances to the detriment of others. Indeed, we would make the point that the multitude of providers of services, both within the industry and increasingly from the industry to consumers, is an important part of the environment, of which the Authority should take due note in making its decisions on tariffs.

Circumstances under which price freeze/ceiling was imposed no longer exists

We submit that the circumstances under which tariff freeze/controls were imposed by the Authority for non-CAS as well as mandated CAS no longer exists.

The price freeze imposed in the non CAS markets has always been projected by the Authority as a “temporary measure” and was intended to be in force only till such time there is competition. In this context its is important to draw the attention of the Authority to paragraph 5 of the Explanatory Memorandum to The Telecommunication (Broadcasting and Cable) Services Tariff Order 2004 which is reproduced hereinbelow:

Quote

“There is considerable amount of uncertainty about different aspects of the Conditional Access System (CAS) regime and a detailed examination is required of the various issues, including the rates for broadcast and cable services in CAS and non-CAS areas. Not only are there no standard rates or conditions at which services are provided by the cable operators to the subscribers, there are reports that there maybe an increase in the rates charged to the subscribers. The Authority has begun its process of examination of the relevant issues, including those relating to CAS, through a consultation process. To bring some certainty in the rates prevailing for these services, it was considered necessary by the Telecom Regulatory Authority of India to intervene in the matter. The TRAI has, therefore deemed it appropriate to specify as ceiling the rates at which the charges will be paid by the cable subscribers to cable operators, by the cable operators to multi system operators and by multi system operators to broadcasters, as those prevailing on 26th December 2003 with respect to both free to air channels and pay channels, and for both CAS and non-CAS areas. This intervention will continue until a final determination by the Telecom Regulatory Authority of India on the various issues involved. The Hon’ble Delhi High Court, in CW No. 8993-4/2003 dated 26th December 2003, directed the continuance of implementations of CAS in Delhi on a trial basis, initially for a period of three months, after which appropriate directions would be issued after taking into account the feedback for the three month’s experience. The ceiling rates have therefore been specified as those prevailing on 26th December 2003”

Unquote

Even the maximum retail price for channels at Rs 5/- and the revenue share arrangement fixed by the Authority in 2006, for notified CAS areas, was clearly stated by the Authority to enable implementation of mandatory CAS and to ensure that the consumers transit to mandatory CAS smoothly and to avoid a black out situation. When the

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broadcasters voiced their concerns in several forums/courts/tribunals the Authority had repeatedly reassured the broadcasters that the extreme price controls will be displaced in a very short time.

With effective competition through Cable, DTH, HITS, IPTV and with other emerging platforms like mobile television/broadband at advanced stages of implementation, the sector has come a long way in the last few years thereby displacing the circumstances which led to extreme regulatory intervention. The sector has grown tremendously across all delivery platforms. The market has matured swiftly with effective competition at all levels of the distribution chain. Today, there is intense competition amongst broadcasters as well, in terms of manifold increase in the number of channels from 80 in 2004 to almost 320 in 2008. Pay channels not only compete with each other but also compete with FTA channels. Competition at all levels has thrown open a whole lot of choice to the consumers in terms of channels as well as delivery platforms.

These developments clearly calls for deregulation of the sector and pave the way for free market forces to take over the sector. We respectfully submit that continued over regulation will undo the growth that has ensued over the years.

In fact, if one were to analyze the growth that has taken place in the market, it will emerge that the addressable platforms including DTH have grown tremendously without any regulatory intervention as against the over regulated analog and CAS markets. In fact DTH players themselves have been claiming at several forums that the DTH sector is growing at the fastest rate in India in comparison to other parts of the world. Our estimates show that the addressable system (combined DTH and digital cable TV) in the non CAS areas has grown to 15 % at 12 million (10 million DTH homes and 2 million cable STB homes) of the 80 million cable and satellite homes. This is even borne out in the Consultation Paper of the Authority No 151/2008 dated December 15, 2008 on Interconnection Issues Relating to Broadcasting and Cable Services, where the Regulator has observed

Quote

“Voluntary CAS in non –cas areas is already being rolled out in different pockets across the country because of competition from DTH. There are some industry estimates that nearly one million Set Top Boxes have been deployed in non-cas areas of the country, as against 0.7 million in CAS areas”

Unquote

This clearly establishes that competition is driving digitalization and addressability without any regulatory intervention.

In this context, it is also pertinent to compare the growth of digitalization in the market driven non CAS areas, with the over regulated CAS areas. We respectfully submit that despite over regulation and controls penetration of boxes in CAS areas have been not

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been encouraging. As can be seen above, it is much lower than the boxes seeded in non CAS areas. There is utter chaos in the CAS areas with rampant piracy, huge payment defaults and system failures. Most of the MSOs who were issued permission by the government are not ready even today to roll out CAS. Even those MSOs who have rolled out the system have not been able to successfully implement CAS resulting in complete failure of CAS in the notified areas.

Through the course of these years since the price freeze, pay channels, distributors and content creators have repeatedly pointed out to TRAI that the price freeze imposed on the cable television industry is fundamentally inconsistent with the current realities of the Indian marketplace when pricing of other goods and services are being deregulated in favor of market competition: energy, telecommunications, utilities, and insurance (to name just a few). Furthermore, the Authority has repeatedly responded that the price freeze is only temporary and will be lifted shortly. We were assured that the “interim” price freeze would enable the Authority to deal with the ills of the industry, including specifically the issues of under declaration, piracy, poor infrastructure and other industry problems.

We are therefore concerned to note that the Authority, without having addressed issues that continue to plague the industry and restrict its growth, is now considering fixing tariffs for the DTH service thereby imposing additional measures aimed at restricting the broadcasters’ ability to protect their investments.

We submit that the “interim” price freeze has been detrimental to the business of broadcasters and has affected their ability to carry their rising overhead, capital and operational costs. By limiting the broadcasters’ ability to reinvest in quality programming, it is the consumers who will be ultimately harmed, which is ironic given that Authority claims that these orders are aimed at protecting consumers.

In this context it is also pertinent to note that the Hon’ble Supreme Court and Hon’ble TDSAT are currently seized of cases relating to pricing on CAS, non-CAS and DTH platforms which are either currently subjudice or reserved for final orders. The outcome in such matters will have a considerable impact on the pricing on all platforms and you would agree that it would be inappropriate to make any comment(s) or observation(s) on legal matters which are subjudice before a Judicial Forum.

Current Recessionary Economic Environment :

Authority must also take into account the current recessionary impact on the growth of all sectors including broadcasting. The broadcasters today are facing the brunt of recession like any other sector. In recent years, broadcasters invested in extremely high quality programming resources to improve quality. The whole media sector was in a virtuous cycle, driven by growth and deep pocketed investors. With the current global economic crisis, the entire broadcasting industry has suffered rapid financial erosion and conditions are dire. Flow of funds and liquidity in the sector has been hugely impacted due to depleting advertising spends by corporates which in turn has made financing the

increasing content cost an upheaval task. In the circumstances imposing extreme form of tariff regulations will become a major threat to the very survival of the channels, thereby reducing consumer choice. The Authority must aim to create a robust economic environment for the sector, which would create a conducive environment of growth for all stakeholders.

Unique Features of Pay TV vis-à-vis other services :

Television in general and pay-TV specifically, is an entertainment product distributed in a highly competitive marketplace. Television competes with a wide range of alternative media delivery systems for consumer rupees and “eyeballs”, including programming on DVDs, print media, internet delivery systems, and emerging new media technologies such as mobile broadcasting. There is also furious competition among pay-TV delivery systems. Within the television industry, there is avid competition among free-to-air and pay-TV systems and inter se pay systems. Indeed, with thousands of cable suppliers, five operating DTH systems (and more coming), and IPTV offerings, India has the makings of one of the most diverse and competitive pay-TV sectors in the world.

A significant feature of India’s television landscape is its large and successful public service broadcaster. Doordarshan, like public service broadcasters in other countries, is funded to provide an essential public service available to all citizens without charge. It meets the public’s needs for basic television services across the nation with great effectiveness. It should also be borne in mind that pay-TV in particular is a discretionary expenditure (indeed a luxury, in many households).

Careful conceptual distinctions should be drawn between the necessary public service, provided by the public service broadcaster, and the discretionary entertainment products which make up the pay-TV industry.

It would be highly inappropriate to expect that all channels must be available to the consumers across all delivery platforms at uniform charges. While we share the Authority’s concerns for the consumer interest and its initiative to promote digitalization and addressability, it has to be borne in mind that the very purpose of addressability is to provide choice to the consumers to opt for channels of their choice, and not lower charges to consumers. Digital premium content cannot be made available to consumers at historical prices with increases fixed on the basis of whole sale price increase. The consumer has to incur some additional expenditure to receive premium and niche content. The objective here is to create a system which allows consumers an array of diverse content to choose from depending upon his needs and financial budgets. **The Authority must digress from creating an environment where the end consumer seeks more and more channels for the same charges which would virtually amount to offering all consumers “mercedes” at the cost of “santro”. Once addressability allows choice, consumers are free to opt for channels according to their means.** In order that the consumer gets variety of channels to choose from, the Authority must allow market forces of demand, supply and consumer choice to determine prices which will automatically put constraints across the distribution chain, given the competitive market environment.

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The Authority has to recognize that Indian consumers pay the lowest charges for content which at the current Average Revenue Per User (“ARPU”) of Rs 250/- (followed by the Authority) works out to Rs 8.00 per day for a minimum of 90 channels. If this were to be compared with print medium which is synonymous to the broadcasting sector in terms of working model, a consumer on an average pays Rs 4/- per newspaper per day for just one news paper.

To elaborate by way of an example, if a consumer today were to pick up a mix of magazines and newspapers for his family he will have to incur approximately a minimum of Rs 395 per month as detailed below:

Times of India	Rs 4.50 X 30 days	= Rs 135
Business Standard	Rs 3.00 X 30 days	= Rs 90
Business World	Rs 10.00 X 4	= Rs 40
Femina	Rs 20 X 2	= Rs 40
Filmfare	Rs 20 X 2	= Rs 40
Comics for children		= Rs 50

Total Rs 395/- per month

If the consumer wants to spend less he can accordingly amend his requirement and do away with some magazines. However, the consumer cannot expect the public authorities to make available all the magazines at uniform prices to fit his household/financial budgets.

We therefore submit that the Authority’s decision on tariff fixation has to take into account the several complexities which are unique to the sector.

Against this background we are furnishing herewith our preliminary response to the issues raised in the Consultation Paper.

ISSUES FOR CONSULTATION

5.2 Tariff fixation for DTH services

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

- At the outset, we would like to stress our belief that market forces provide the best form of regulation in an industry such as broadcasting, and legislative intervention in the form of tariff fixation should be restricted to incidences of proven market failure or when public protections are absolutely necessary.
- In this context, STAR DEN highlights that the current frozen tariffs in the non CAS markets are also based on the market driven tariffs, including all variations in geography and consumer profile. These variations show how the market most effectively creates pricing to increase consumer demand. A price set by regulation

cannot move with consumer demand, even if initially based on consumer driven pricing.

- Notwithstanding the above, we further submit that the Authority for the reasons cited in paragraph 1.4 of the CP had specifically decided to not intervene with wholesale or retail pricing in the DTH sector, when it issued the Consultation Paper on issues relating to DTH in March 2007. No grave factors have arisen in the interim, which has been counter productive to the growth of the DTH sector, warranting tariff fixation. Indeed, with almost 10 million subscribers currently and a forecast of 25 million by 2013, India's DTH sector is growing at a rapid pace and is poised to be the largest in Asia. In this context it is pertinent to draw the attention of the Authority to paragraph 13 of the Authority's decision dated May 12, 2008 in the representation filed by Tata Sky pursuant to the order of the Punjab and Haryana High Court dated March 11, 2008, which is reproduced hereunder :

Quote

The reasons for not regulating the tariff for DTH services by way of a tariff order in the country have been given in detail in the Consultation Paper on Issues relating to DTH issued by the Authority on the 2nd of March 2007 wherein it has been stated that till such time and till the impact of the roll out of CAS can be assessed, the Authority feels it would be premature to initiate the consultation process on DTH tariff issues both at the retail level as well as the wholesale level. It has been further stated in the said consultation paper that the need for regulating the wholesale tariffs of pay channels payable by DTH operators to broadcasters/distributors and the retail tariffs applicable to end consumers for such channels is to be viewed in the context of the competitive environment prevalent in the channels market, the industry structure, the present levels of penetration of the service, future potential for penetration on the rural and remote areas where the incumbent cable service is yet to reach such areas etc. The position as stated in the Consultation Paper dated March 2, 2007 still holds good.

Unquote

In the light of the Authority's aforesaid decision dated May 12, 2008 whereby it had declined Tata Sky's representation seeking intervention/price fixation for DTH platform on several counts, we do not see any reason for the Authority to alter decision now, more so, when Tata Sky has filed identical representation which was earlier rejected by the Authority.

- In this context, it is also necessary to review the extent of protection already available to the DTH operators under provisions of the Interconnection Regulations which is briefly enumerated below:
 - Broadcasters to make available all channels to DTH operators within 60 days of request on "must provide" basis on non discriminatory terms.

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- No parallel obligation on DTH operators to carry the channels of broadcasters.
 - Imposition of packaging restrictions on DTH operators by broadcasters shall be deemed to be imposition of unreasonable terms and hence denial of access.
 - DTH operators have full freedom to place channels on any tier and design customer packages
 - Mandates broadcasters to make available channels on a a-la-carte basis to DTH operators
 - No parallel obligation on the DTH operators to offer the same on a-la-carte basis to consumers.
 - Authority has been empowered to intervene in the interests of stakeholders in the event any terms of the RIO of any broadcaster is unreasonable
- A mere glance of the aforesaid provisions clearly establishes that DTH operators are already given adequate protection, and in fact the provisions are highly skewed in their favor with no scope for negotiations on any issues. On the contrary DTH operators are today in a more advantageous position to negotiate with the broadcasters and drive consumer prices as they control retail pricing.
 - We further submit that subscription revenue is a factor of rate and subscriber numbers. The very reason broadcasters were compelled to drop rates drastically for addressable systems was on the premise that in an addressable market, broadcasters will get 100% addressability and be paid for all subscribers. However, since DTH operators have complete freedom in packaging the channels, subscriber numbers of broadcasters are largely driven by the decision of the DTH operators depending upon what tier/package the channels are incorporated. The packaging is also driven by the carriage fee that a DTH operator receives from broadcasters. Hence, DTH operators with the existing regulatory protection are in absolute control of subscriber numbers of the channels as well.
 - In the light of the above, to impose additional restrictions in the form of tariff fixation would adversely impact broadcaster's subscription revenue and give absolute control to the DTH operators with no benefit to consumers as well. In any event in the current stiff competitive environment where hundreds of channels compete, broadcasters cannot afford to over price themselves.
 - The Authority should also bear in mind that any decision to rely on market forces to control prices of pay TV does not completely exclude regulatory influence. The threat of re-regulation/intervention will always place a very significant restraint

on industry players. It is difficult to envisage players “whimsically” increasing prices to unjustifiable levels after removal of tariff regulation as it would be counter-productive to their preference for pricing flexibility to risk re-regulation. Of course prices may go up or down, but that is an essential feature of any market, to follow costs. STAR DEN also believes that constraints operate as a result of the need to retain viewership in order to ensure advertising revenues.

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?

- For the reasons explained in the foregoing paragraph, we submit that there should be no tariff regulation for DTH.
- However, in the event Authority decides to fix tariffs, the same should be on the basis of sound regulatory principles and framework with sunset provisions.
- To the extent Authority determines that it will continue to regulate tariffs, STAR DEN submits it must explicitly recognize the limits and temporary nature of regulation. It is insufficient to simply refer to this in policy; there should be a clear, objective framework for deregulation.
- As for the levels of tariff fixation, we submit that tariff fixation will not achieve its purpose if controlled at just one level. Content owners and broadcasters face the difficult circumstances of having their revenues regulated while their costs for acquiring the Bollywood, sports and international content that Indian consumers demand have been rapidly increasing and remain unregulated. Controlling tariff at the only the wholesale level without controlling the retail level will be highly inequitable and imbalanced and will only serve the interests of the DTH operators at the cost of consumer as well as broadcasters interests. Given the regulatory protection already available to the DTH operators, controlling tariff at the wholesale level and leaving the retail pricing to market forces will only result in giving DTH operators enormous powers to dictate terms and conditions in the market. With huge incentives in the form of carriage fees and complete freedom of packaging with no a-la-carte option to the consumers, DTH operators will thrust unwarranted content at abnormally high rates to consumers.
- In fact, international precedent (such as in the US and Taiwan) suggests that any regulation of pay TV prices should be limited to basic tier bouquets at the retail level. The answer is not then to just regulate all programs regardless. It is completely inappropriate to fix the prices of high cost programming such as certain general entertainment, sports and movie channels. For example, rates need to reflect not only the rising cost of broadcasting professional sports, but the spiraling costs of operating professional sports teams as well.

- Regulators world wide seek to protect the interests of consumers and producers by regulating the middlemen. In the current instance the middlemen (DTH operators) are seeking to take advantage of the regulatory protection to derive undue advantage at the costs of consumers and producers.
- In the light of the above, we feel that tariff regulation if any should be made applicable at both the wholesale as well as the retail level.

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.

- While our submissions are to not to fix tariffs for the DTH sector, in the event the Authority were to fix wholesale tariff, we submit that tariff regulation for DTH at wholesale level should not 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.
- In the non-CAS market deals are struck between the broadcasters on the basis of negotiated subscriber base depending upon the level of declarations made by the cable operators for different areas. In the absence of addressability the broadcasters are compelled to do a revenue deal with the MSO's/cable operators. Under declaration by the cable operators has created a system of cross subsidy in the market where charges to consumers for a maximum of 75 pay and free-to –air channels vary from Rs 350/- to Rs 80/- per month. In the absence of addressability coupled with band with constraint, the consumer has no choice in the non-CAS market. Effectively, the working of a non-CAS market is completely different and not comparable in any manner with DTH which is an addressable platform. In DTH the consumer has access to
 - choice of content
 - more number of channels
 - high quality digital content
 - high quality of services

In the light of the above and in the light of the completely distinct nature of the working of the DTH market, it would be highly inappropriate to derive prices for DTH market from the prices prevalent in the non–CAS market.

- In fact the prize freeze imposed by the Authority in the non CAS market itself was intended to be a temporary measure as explained above and reflected in the Authority's own Explanatory Memorandum to the first Tariff Order dated

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15.01.2004. To derive wholesale tariff for DTH from the non-CAS rates which itself were frozen tariffs and not fixed in terms of sections 11(2) of the TRAI Act, would be a mockery of tariff fixation exercise and more so when part of the non CAS tariff order itself has been struck down by the TDSAT and is pending before the Hon'ble Supreme Court on an appeal preferred by the Authority.

- The Authority should bear in mind that tariff if any fixed for the DTH sector will set the benchmark for tariff for all existing and future addressable platforms. Currently there are approximately 120 million TV homes and 80 million cable and satellite homes. The Authority's road map for digitalization aims to convert the entire population of TV homes in the country to digital homes. This also includes plans to convert the existing analog/non-CAS homes to digital/addressable homes in a phased manner by 2012. Therefore, the Authority cannot extend the defective and inadequate pricing mechanism that currently prevails in the non-CAS market to all TV homes in the country.
- We therefore believe, that the Authority needs to address thus the issue of price fixation squarely with a futuristic approach, taking into account the characteristics and features of the DTH sector, to ensure that the concept of the price controls dose not become a mockery and huge disincentive for digitalization, content innovation and improvement.

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.

- The Authority would agree that tariff fixation process in general is a complex exercise which requires detailed research, market surveys and collection of huge amount price related data. Even when government undertakes price fixation exercise or for that matter decides on imposition of duties like say anti dumping duty/safeguards duty it is done on the basis of detailed understanding of the working of the concerned sector and relevant data which is a time consuming process and subject to intense deliberations.
- In case of broadcasting services the price fixation exercise gets even more complex because of its unique nature. For the reason that prices of channels are not fixed/controlled in any part of the world (except Pakistan which again is not comparable to India), no benchmark or data are readily available to suggest quick formula for pricing.

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- The Authority itself has in several of its Consultation Papers admitted that price fixation for channels is a complex exercise.
- In order to suggest a reasonable methodology, we need to conduct several studies/surveys to understand the ground realities inter -alia
 - actual penetration of the DTH service – state/district wise vis-à-vis cable and other delivery platforms ,
 - Estimated subscriber growth/penetration to estimate subscriber volumes
 - consumer choice/preference for each of the channels distributed by us which in turn requires an in depth study of the subscriber base for each of the packages distributed by DTH operators in which the channels are incorporated.
 - Correct estimation of the ARPU across all delivery platforms in relation to the number of channels offered.
- Also since we represent as many as 18 pay channels, it is necessary for us to have extensive deliberation with each of our channel partners/principals in line with our contractual obligations with them, to suggest a price for each of the channels.
- In the circumstances, it is not possible for us to suggest prices for different bouquets/channels in the short time frame allowed by the Authority.
- **Given the time constraints and given the complexities of the exercise, we recommend that in the event the Authority despite our plea for no price controls decides in favor of price fixation, then the same should be on the basis of a much more detailed consultation process for which a separate process should be initiated by the Authority as the study encompasses a much wider scope than what is covered in the existing consultation paper.**

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?

- As recommended above, we request the Authority to carry out a separate consultation process to develop a robust model of pricing with fixed time frame/parameters for deregulation.
- In the context of retail pricing, we submit that in order to recommend maximum retail prices, it is necessary for broadcasters to understand the costs/working of a DTH operator which we are currently not aware of. This again calls for extensive deliberations amongst all stakeholders in the distribution chain to arrive at a proper methodology and cannot be done in haphazardly in a hurried manner.

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?

We rely on our response in the foregoing paragraphs.

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?

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?

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?

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?

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

We vehemently oppose the application of the basic features of tariff order dated 31st August 2006, for cable services in CAS areas to DTH operators, for the following reasons:

- Mandatory CAS was rolled out in limited areas of Mumbai, Delhi, Kolkatta and whole of Chennai pursuant to the orders of the Hon'ble Delhi High Court, which constitutes approximately 3% of the 80 million cable homes and 2% of the 120 Indian TV homes (which is effectively potential pay TV homes).
- TRAI fixed the MRP of channels at Rs 5/- per channel and notified the Standard Interconnection Agreement prescribing revenue share arrangements, in order to ensure smooth roll out of CAS and to prevent a black out situation.

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- The MRP of Rs 5/- per channel was derived by the Authority on the basis of ARPU of Rs 180/- and the number of channels viewed by the consumers. The Authority had further clearly stated that it had relied on the data contained in its survey report of 2004 with respect to the ARPU of Rs 180/- and the number of channels viewed by the consumers. The Authority had clearly mentioned in its Explanatory Memorandum that in order to ensure a smooth transition to mandatory CAS without any price shocks to the consumers in a short period of six months, the Authority was unable to conduct a scientific exercise of price fixation and had to fix the MRP at Rs 5/- on the basis of 2004 data.
- TRAI has in several forums reiterated that that the over regulation in the CAS areas was for a very limited period and shall be subject to review within a year. This was reiterated by the TRAI in several forums and in their submissions before the Hon'ble TDSAT and the Hon'ble Supreme Court.
- As explained above, the circumstances which warranted extreme form of regulation for implementation of CAS do not exist anymore. In fact, CAS has proved to be a non-starter and a complete failure.
- Unlike CAS, which is a mandatory regime, DTH is a voluntary addressable system across the country and is free to compete with cable across the country. The potential of DTH players is not just the 2.5 million CAS households but the entire 120 million TV homes in India. In fact the rural markets is a vast market for the DTH players to fully exploit without competition from cable.
- **To extend an over regulated and mandated CAS regime, which represents a meager 2% of the Indian TV homes, to DTH operators who operate across the country, is highly irrational and unreasonable. In this context the Authority must bear in mind that tariff if any fixed for DTH will set the foundation for tariff of all existing and future addressable delivery platforms which will effectively tantamount to the Authority extending the interim CAS regime to 120 million TV homes.**
- **In fact, the Authority must immediately take steps to dislodge the CAS pricing itself especially now that the over regulated CAS regime has proved to be a complete failure in the last two years.**

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?

- We submit that in the event the Authority decides to impose price controls in the form of tariff fixation, it would be highly inequitable to not control the carriage fee. As we have explained in the foregoing paragraph, in order that restraints if any will fail to achieve its objects if it is one sided. Therefore, in the event the Authority decides to impose any price restraints on the broadcasters, it must also regulate the carriage fee charged by the DTH operators.

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?

- We submit that carriage fee regulation must not be linked to subscriber base of the concerned channel on the concerned DTH platform. The subscriber base of the channel as explained above depends on the package on which the DTH players incorporate the concerned channel on which the broadcasters do not have any control under the existing regulatory environment. The Authority will agree that since carriage fee is paid to get the desired reach, it is only reasonable that the same be linked to the subscriber base of the concerned channel and not the subscriber base of the platform. It will serve no purpose to the broadcaster if the DTH operator charges huge amount of carriage fee based on its subscriber base if the channel for which the carriage fee is paid reaches a very insignificant part of the subscriber base of the DTH operators. For example if the subscriber base of the DTH operator is 3 million with only 50,000 of the base receiving the channel, there is no reason that carriage fee be paid basis 3 million. **Hence, carriage fee needs to be fixed basis subscriber base of the channel and the package on which the channel is to be incorporated by the DTH operator.**

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

- As explained in the Preamble, we submit that the Authority's decision whether or not to fix tariffs must be independent of Tata Sky's grievances as set out in the petition. Tata Sky is seeking to redress its disputes inter - se a single broadcaster for a single channel by seeking regulatory intervention in the form of tariff fixation. We once again submit that fixing tariffs on the sole representation of Tata Sky would set a bad precedent and encourage stake holders to seek regulatory intervention to serve self interests, which will be against the principles of enactment of legislation.
- Tata Sky's self serving objectives are clearly evident from its representation. Even while Tata Sky is alleging lack of level playing field, discrimination and inequality vis-à-vis CAS pricing, it is seeking only part

of the same regime to the extent it is in beneficial to it. To elaborate the point, while it seeks or wholesale price fixation for DTH sector at the wholesale CAS price to broadcaster of Rs 2.25/- per channel with complete freedom to price in retail. It further wants complete freedom in packaging with no compulsion on its part to offer channels on a-la-carte basis to end consumers. This in effect would amount to DTH operators acquiring content at Rs 2.25/- from broadcaster on a-la-carte basis from broadcasters and offering the same as a bouquet to consumers at whatever charge it feels is right. This is granted will clearly amount to discriminating all other stakeholders as against the DTH operators and will be contrary to the “non discrimination” principles of the Authority as embodied in the Inter connection Regulations. We further submit that if the Authority were to conduct a study and compare the DTH connections in the CAS areas to the STB penetration in the CAS areas, it would be apparent that DTH connections in CAS areas are not far behind the CAS numbers and would clearly establish that CAS pricing does not in any way impact the viability of the DTH operators.

- In fact Tata Sky is voluntarily bringing down the DTH ARPU by resorting to under cutting and pricing its packages at low charges with a sole view to drive competitors and to restrict competition in the DTH sector.
- Tata Sky’s grievances vis-a-vis monopolistic power of broadcasters is highly ill founded and irrational. Issues arising out of broadcaster’s monopoly powers have already been addressed by the “Must Provide”. Broadcasters today are compelled to make available their content on non discriminatory terms on a “must provide” basis to all distributors of TV channels including DTH operators. However, there is no parallel “must carry” obligation on the DTH operators to carry all channels of the broadcasters. As explained in the foregoing paragraphs, DTH operators are given adequate regulatory protection for content acquisition.
- Tata Sky’s contention that in view of 100% addressability in DTH the rate of channels should be 20% of the analog cable rate, we urge the Authority to do conduct an audit of the Subscriber Management Systems and Conditional Access Systems of the DTH Operators, which will clearly show that even today, broadcasters do not get paid for all the subscribers as laid out in the Interconnection Regulations. To elaborate by way of an example, even while the current combined DTH subscriber base is estimated at 10 million, broadcasters do not get paid for the same.
- In this context it is also pertinent to mention that it would be highly inappropriate to derive channel rates for the addressable DTH system from the analog rates. In the analog market subscriber numbers are negotiated on the basis of declarations made by operators which itself varies for different operators. Also, the cable charges to consumers are a factor of

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cross subsidy, where all subscribers receives all channels depending on the band width of the operator. However, in DTH system subscriber numbers of channels depends on the tier /package in which DTH operator incorporates the channels which is completely controlled by the DTH Operators.

- In the light of the above we submit that the Authority must provide some flexibility to the broadcasters on pricing and fixing whole sale price would give DTH operators control the revenue of the broadcasters without passing on the benefit to consumers.
- It is important here to mention that the formula of 50% of non CAS pricing as determined by the Hon'ble TDSAT in its judgments in Petition No 136 (C) of 2006 and 189 (C) of 2006 itself was a temporary measure. In fact the judgments had clearly stipulated that the suggested 50% formula is interim and that it is the prerogative of the Authority to fix prices if deemed necessary and in accordance with the provisions of the TRAI Act.
- Despite knowledge of these judgments the Authority has decided not intervene in pricing of the DTH sector, which has been reiterated by the Authority several times including in its decision dated May 12, 2008 in the representation filed by Tata Sky.
- Last but not the least the burdens of license fee and heavy taxation on DTH operators cannot form the basis to seek fixation of content price. These are costs attached in the normal course of DTH business of which Tata Sky was fully aware before it embarked on the business. We strongly recommend that Tata Sky should seek appropriate relief from concerned authorities in the from of tax holidays/tax sops/ duty free import of set top boxes and restructuring/dislodging of license fee and cannot seek to overcome these costs constraints by seeking reduction in content costs.

Enclosure : As above