

Consultation Paper No. 4/ 2009



Telecom Regulatory Authority of India

Consultation Paper
on
DTH Issues relating to Tariff Regulation
&
new issues under reference

New Delhi

March 6, 2009

PREFACE

The pay Direct-to-Home (DTH) TV services in India started gaining momentum from 2006 onwards. With the entry of new DTH service providers, there has been a rapid growth in the number of subscribers using DTH services. At present there are five pay DTH service providers providing services to more than ten million subscribers.

To provide a conducive environment for growth to this new delivery platform, Telecom Regulatory Authority of India has issued an amendment to the Interconnection Regulation on 4th September 2007. This amendment provides for publishing reference interconnection offers (RIO) and compulsory offering of all the pay channels on a-la-carte basis by the broadcasters. To safeguard the interests of the DTH subscribers, TRAI has also issued a quality of service regulation for DTH service on 31st August, 2007.

On the tariff side, no explicit tariff regulation has been formally provided by TRAI so far for DTH services. However, on the basis of a general consensus which emerged during the course of interactive discussions with the broadcasters, a press advisory was issued on 18th April, 2008 which essentially provides that the broadcasters will provide their channels to the DTH operators at 50% of the rates at which these bouquets and channels are being offered to the non-CAS cable TV platform.

There has been a request from the DTH service providers for wholesale tariff regulation for DTH services. On a petition filed by one of the DTH operators, Hon'ble Punjab and Haryana High Court has also asked TRAI to consider and decide on the representation of this DTH operator regarding fixing DTH input cost.

Further, Ministry of Information and Broadcasting, Government of India has recently requested TRAI to give its recommendations on some of the issues which have come up for their consideration and the Authority feels that those issues also need consultation before any recommendations are made to the Government by the Authority . These issues include provisioning of value added services like Movie on Demand, Video

on Demand and Pay Per View by DTH operator; carrying of radio channels on DTH platform and certain emerging new business models in DTH services. The consultation paper has raised these issues as well as the tariff related issues relating to DTH services. Comments of all the stakeholders on the issues raised in the consultation paper are invited.

The Authority has requested for written responses from all the stakeholders by 30th March, 2009. For further clarification, stakeholders can get in touch with Shri R.N. Choubey, Principal Advisor (B&CS) on tel no 011-23231509. Submission in electronic form at e mail bcs@traf.gov.in or traicable@yahoo.co.in will be highly appreciated.

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Chairman, TRAI

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CHAPTER I: INTRODUCTION

1.1 The powers and functions of the Telecom Regulatory Authority of India (TRAI) are listed in section 11 of the Telecom Regulatory Authority of India Act, 1997. The functions of the Authority, inter alia, include ensuring technical compatibility and effective inter-connection between different service providers, regulation of arrangements amongst service providers for sharing their revenue derived from providing telecommunication services, laying down the standards of quality of service to be provided by the service providers and notifying in the Official Gazette the rates at which the telecommunication services are to be provided within India and outside India.

1.2 The Government of India issued a notification dated 9th January, 2004, in exercise of the powers conferred upon it under clause (d) of sub-section (1) of section 11 and proviso to clause (k) of sub section (1) of section 2 of the Telecom Regulatory Authority of India Act, 1997, and notified “broadcasting services” and “cable services” as “telecommunication services”. The notification dated 9th January, 2004 cast the responsibility of regulation of broadcasting and cable services upon the Telecom Regulatory Authority of India.

1.3 The Telecom Regulatory Authority of India began regulation of the broadcasting and cable services sector by issuing various regulations and tariff orders. The tariff orders issued by the Authority for regulation of tariff for cable TV services in non-CAS areas and CAS areas are discussed in Chapter II of this Consultation Paper.

1.4 The issue of regulation of tariff for DTH services was examined by the Authority in its consultation paper on “Issues Relating to DTH” dated March 2, 2007. The Authority had, at that time, decided against regulation of tariff for DTH services for various reasons enumerated in that Consultation Paper. The views of the Authority as reflected in the said consultation paper on issues relating to DTH dated March 2, 2007 are at Annexure – I to this consultation paper. On the issue of regulating the wholesale tariffs of pay channels payable by DTH operators to broadcasters/ distributors and the retail tariffs applicable to the end consumer for such channels, it was stated in the said consultation paper dated March 2, 2007, that the, “.... Need for regulating the wholesale and retail tariffs is to be viewed in the context of the competitive environment prevalent in the market, the industry structure, the present levels of penetration of the service, future potential for penetration in rural and remote areas where the incumbent cable service is yet to reach such areas, etc.”.

It was also stated in the said consultation paper that, “... the retail tariffs payable by the consumers is invariably linked to wholesale tariffs payable by the DTH operators to the broadcasters/ distributors. DTH platform by virtue of being inherently an addressable system, competitive play of market forces are likely to lead to discovery of efficient prices in the market in the interest of all stakeholders. To what extent this will become a reality particularly in non-CAS areas will depend upon the pace of penetration of DTH services...”. The said consultation paper also mentioned that, “... the Authority can intervene at any point of time against any retail tariff of DTH operators in any part of the country if such tariff packages are found to be not consumer friendly or are not transparent in the offer. Till such time and till the impact of the roll out of CAS can be assessed, it would be premature to initiate the consultation process on DTH tariff issues both at the retail level as well as the wholesale level...”.

1.5 Sometime in October, 2007 M/s. Tata Sky Ltd. filed a Writ Petition in the Hon'ble Punjab & Haryana High Court in Chandigarh, amongst others, against TRAI and M/s. Zee Turner Ltd. in respect of the ETC. Punjabi channel being distributed by M/s. Zee Turner Ltd. Amongst others, relief had also been sought against TRAI seeking a of a direction to TRAI to ensure level playing field conditions including fixing content tariffs for DTH and to ensure that similarly placed systems, namely CAS and DTH are treated equally. In the "Grounds" of the said Writ Petition, amongst others, it was stated, by M/s Tata Sky Ltd. that, "... the key regulatory objectives is to ensure Level playing field conditions between two similarly placed platforms – DTH and CAS. DTH is an addressable platform which has to be treated at par with Conditional Access System (CAS) as both are addressable platforms with striking similarities..". It was also mentioned in the Grounds raised in the said writ petition that, ".... The failure of the regulator to determine and fix DTH/content pricing has a direct bearing on consumers and subscribers of the DTH platform.." In the Writ Petition, it was prayed, amongst others, that, "... pass a writ, order or direction ... to the respondent Authority to forthwith ... ensure level playing field conditions including fixing content tariffs for DTH...". A copy of the said Writ Petition is annexed as Annexure-II to this Consultation Paper.

1.6 The Hon'ble Punjab & Haryana High Court vide its order dated March 11, 2008 directed that, "...on an application moved before the TRAI by the petitioners within a week, it shall apply its mind with regard to price fixation within a period of eight weeks...". M/s. Tata Sky Ltd. filed a representation dated 18th March, 2008 with TRAI and the same was decided by the Authority vide order dated May 12, 2008. In the order dated May 12, 2008 of the TRAI, it was stated that the representation dated March 18, 2008 submitted by M/s Tata Sky Ltd.

was devoid of merit and required no action by the Authority on the requests contained in it on the grounds that:-

a) the Reference Interconnect Offers (RIO) published by broadcasters in pursuance to the provisions of the Telecommunication (Broadcasting and Cable Services) Interconnection (Fourth Amendment) Regulation, 2007 (9 of 2007), had been received, in the meanwhile, by the Authority which was followed by the Authority by interactive discussions with the broadcasters of pay channels on the issues of rates and packaging of channels being offered by them for Direct To Home Platform;

b) during the course of these discussions with the broadcasters, a general consensus emerged on the composition of bouquets and pricing of a-la-carte channels and bouquets, and, as per this consensus, the broadcasters agreed to offer the same bouquets to the DTH operators as were being offered by them for non-CAS cable distribution. In addition, they were free to offer additional bouquets and that the rates of bouquets and a-la-carte rates of pay channels so offered to the DTH operators will broadly be in consonance with the TDSAT's judgment dated the 31st March, 2007 in petition no. 189(C) of 2006 and judgment dated 14th July, 2006 in petition no. 136(C) of 2006 wherein the rates were to be fifty per cent of the rates at which these bouquets/channels are being offered by them for non-CAS cable distribution, i.e., non-addressable platform and that all bouquet rates and the a-la-carte rates were also to satisfy the provisions of the aforesaid Interconnection regulations;

c) to facilitate the implementation of the consensus reached in the interactive discussions, as mentioned in the above paragraph, the Authority released two 'Information notes to the Press' (Press Release Nos.38/2008 and 39/2008) on April 18, 2008 and the same were also placed on the website of the Authority. The Press Release number 39, in

addition to what had been mentioned about consensus reached during the interactive discussions, as mentioned in the above sub-paragraph, stated that, “....The a-la-carte rates and bouquet rates of pay channels, as reported by the broadcasters for cable TV operations in non-CAS area have also been put up on the website of the Authority today (i.e. on April 18, 2008). It is expected that the above will facilitate and expedite the conclusion of interconnection agreements among the broadcasters and DTH operators....”.

It was further stated by the Authority in the said order that the Authority has made sincere efforts to address the grievances of M/s Tata Sky Ltd. and, indeed, the concern of M/s Tata Sky Ltd. relating to regulating the manner and the wholesale prices at which broadcasters will offer their channels had been addressed in full by the actions of the Authority. It was also held that in view of the rates and packaging of channels as indicated in the press release numbers 38 and 39 dated April 18, 2008, of the Authority, the rates mentioned in paragraphs 8 and 10 of the representation of M/s Tata Sky Ltd. had no relevance.

1.7 Dissatisfied with the Authority’s order dated May 12, 2008, M/s. Tata Sky Ltd. filed a Misc. Petition before the Hon’ble Punjab & Haryana High Court alleging that the order dated May 12, 2008 was merely rejection of the representation of the petitioners and not an order regarding fixing of price within the meaning of Section 11(2) of the TRAI Act, 1997 with regard to the price of the DTH Industry. The Hon’ble Punjab & Haryana High Court passed final judgment in the case on the 21st August, 2008 directing “...*the petitioners to file fresh comprehensive representation before the TRAI within ten days from today and an appropriate order, as envisaged under Section 11(2) of the TRAI Act shall be passed by the competent authority within a period of six weeks thereafter. Before passing the said order, the competent authority shall*

afford an opportunity of hearing the petitioners and all other affected parties...". A copy of the judgment dated 21st August, 2008 passed by Hon'ble Punjab & Haryana High Court is annexed as Annexure – III to this Consultation Paper.

1.8 However, instead of filing a fresh comprehensive representation before the TRAI as directed by the Hon'ble Punjab & Haryana High Court, M/s. Tata Sky Ltd. filed a Civil Miscellaneous Application under section 151 of Code of Civil Procedure for clarification of the order dated 21st August, 2008 before the Hon'ble High Court of Punjab & Haryana at Chandigarh. In the said application a prayer was made to clarify that in para 4 of the order dated 21.8.08 the submission of the counsel for petitioner was with regard to fixing DTH content prices/ the input content cost for the DTH industry. A prayer was also made to the Hon'ble Punjab & Haryana High Court for directing the respondent Authority (TRAI) to fix DTH content prices/ the input content cost by way of a tariff order under S. 11(2) of the TRAI Act, 1997.

1.9 The Civil Miscellaneous Application was disposed of by the Hon'ble Punjab & Haryana High Court on 9th December, 2008 with a direction that *"...in case the petitioners file a comprehensive representation before the TRAI within two weeks from today, the respondents shall decide the same within a period of six weeks thereafter and while deciding the representation, all aspects as raised in the present writ petition as also in the representation would be considered by the competent authority."* A copy of the order passed by Hon'ble Punjab & Haryana High Court on 9th December 2008 is annexed as Annexure – IV to this Consultation Paper. The Hon'ble High Court has not directed TRAI to specifically issue a Tariff Order for DTH platform. It is significant to note here that Hon'ble High court has in its judgment dated August 21, 2008 directed the TRAI to pass an appropriate order as envisaged under Section 11(2) of the TRAI

Act, and in its subsequent order dated December 9, 2008 again directed the Authority to decide the representation of the petitioner within six week, in case the petitioner filed a comprehensive representation before it. The submission of the TRAI was that TRAI, while issuing regulatory orders and directions, exercises its powers of subordinate legislation under TRAI Act.

1.10 Following this, on 23rd December, 2008, M/s. Tata Sky Ltd. once again filed a copy of their earlier representation dated 18th March, 2008 and requested the Authority for treating the same as a fresh representation in the context of the above order of the Hon'ble High Court. The representation was considered by the Authority and the Authority came to the conclusion that taking an appropriate decision under Section 11(2) of the TRAI Act regarding regulation of Tariff for DTH services would affect a large number of parties including other DTH operators, all the pay channel broadcasters, all the MSOs and cable operators (who are directly competing with the DTH operators for same set of subscribers), and all the subscribers (who have to pay for the DTH and/ or the cable TV services). The judgment dated 21st August 2008 of Hon'ble Punjab & Haryana High Court has also directed the Authority to *"...afford an opportunity of hearing the petitioners and all other affected parties."* Further, sub-section (4) of section 11 of the Telecom Regulatory Authority of India Act, 1997 requires the Authority to ensure transparency while exercising its powers and discharging its functions.

1.11 The Authority has accordingly decided to go through a formal consultation process by issue of the present consultation paper in order to comply with the directions of Hon'ble Punjab & Haryana High Court as recorded in the judgment dated 21st August, 2008, in the Civil Writ Petition No. 16097 of 2007 directing the respondent Authority to *"...afford an opportunity of hearing the petitioners and all other affected*

parties.” and the statutory requirement of ensuring transparency while exercising its powers and discharging its functions. The Consultation Paper will be followed by Open House Discussions in order to afford widest possible opportunity of hearing to all the affected parties.

CHAPTER II: TARIFF REGULATION FOR BROADCASTING & CABLE SERVICES

2.1 Since both DTH as well as cable TV are competing platforms delivering the same service, it would be useful to briefly recount the tariff and interconnection regimes existing on cable TV side, so that discussions on DTH tariff can be put in proper perspective. As mentioned in the previous chapter, the Telecom Regulatory Authority of India has been given the responsibility to regulate tariff for Broadcasting & Cable Services. The power to regulate tariff includes power to forbear, the power to prescribe tariff ceilings and/ or floor tariffs and also the power to freeze tariff. At the time of issue of notification dated 9th January, 2004 which notified “broadcasting services” and “cable services” as “telecommunication services”, there were no standard rates at which services were provided by the cable operators to the subscribers. To bring some certainty in the rates prevailing for cable TV services, it was considered necessary by the Telecom Regulatory Authority of India to intervene in the matter. Accordingly, the Authority issued a Tariff Order on 15th January, 2004 in which the charges being paid by the cable subscribers to cable operators, by the cable operators to multi system operators and by multi system operators to broadcasters, as on the reference date of 26th December 2003 with respect to both free-to-air channels and pay channels were made into ceilings beyond which amounts could not be charged.

2.2 A comprehensive self-contained Tariff Order was issued by the Authority on 1.10.2004. The Tariff Order preserved the sanctity of the ceiling prescribed by the earlier tariff order dated 15.1.2004 to protect the interests of consumers. The Tariff Order also provided for variation in the ceiling in the case of introduction of new pay channels/ conversion of FTA channels to pay channels/ reduction in the number of channels that

were shown as on 26.12.2003. Price of new pay channels/ reduction in ceiling on account of dropping of channels was to be with reference to rates of similar channels prevailing on 26.12.2003.

2.3 The Tariff Order dated 1.10.2004 was amended on 4th October, 2007. This amendment shifted the reference date for tariff from 26.12.2003 to 1.12.2007. In addition, specific consumer level ceilings were also prescribed based on the number of channels for different categories of cities, towns and habitations. The Broadcasters were required to provide all their channels on a-la-carte basis to the multi system operators (MSOs)/ independent cable operators. However, the said Tariff Amendment Order dated 4th October, 2007 has been set aside recently by the Hon'ble TDSAT vide their judgment dated 15th January, 2009 in appeals No. 10 (C) of 2007, 11(C) of 2007, 12(C) of 2007, 13(C) of 2007 and 15(C) of 2007. TRAI has now moved Hon'ble Supreme Court by way of an appeal against the Hon'ble TDSAT's judgment. The Hon'ble Supreme Court has on 12.02.2009 ordered "status quo".

2.4 The Authority issued a tariff order for CAS areas on 31st August, 2006. The key feature of the Tariff Order for CAS areas was that on one hand the Tariff Order fixed the ceilings for pricing of channels (both for pay channels as well as for FTA channels in the Basic service tier) and on the other hand it prescribed Standard Tariff Packages for renting of Set Top Boxes. The ceiling for Basic Service Tier, comprising of at least 30 FTA channels, was fixed at Rs. 77/- p.m. (excluding taxes) and the ceiling for maximum retail price of Pay Channels was fixed at Rs. 5/- per channel per subscriber per month with the stipulation that channels should be made available to subscribers on a-la-carte basis. Two options in the standard tariff package for renting of Set Top Boxes were prescribed - one with a refundable security deposit of Rs. 999/- with a monthly rental of Rs. 30/- and the other with a refundable security

deposit of Rs. 250/- and monthly rental of Rs. 45/-. The tariff order required every multi system operator / cable operator in a CAS area to compulsorily offer to the subscribers both Option I and Option II of the standard tariff package.

2.5 The Authority has amended the tariff order for CAS areas on 26th December 2008 and revised the ceilings for pricing of content (both for pay channels as well as for FTA channels) and the Standard Tariff Packages have also been modified. Other terms and conditions have not been amended. The revised ceiling for FTA channels in the Basic Service Tier is Rs. 82/- and the revised ceiling for maximum retail price of Pay Channels is Rs. 5.35 per channel per subscriber per month. The two revised options in the standard tariff package for renting of Set Top Boxes are - one with a refundable security deposit of Rs. 750/- with a monthly rental of Rs. 22/- and the other one with a refundable security deposit of Rs. 200/- and monthly rental of Rs. 34/-.

2.6 A common Interconnection Regulation for all distribution platforms for television channels had been issued by the Authority on 10th December 2004. The Interconnection Regulation was amended on 24th August 2006 to provide for Standard Interconnect Agreements for CAS areas. The standard interconnect agreements for CAS areas also prescribed the revenue sharing mechanism for the distribution chain comprising of broadcaster, multi system operator and local cable operator. The revenue sharing mechanism laid down in the standard interconnect agreements is intimately linked with the tariff order for CAS Areas. Broadly speaking, the revenue sharing mechanism for CAS areas covering different revenue streams is as under:-

Revenue Stream	Share of	Share of	Share of
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	Broadcaster	MSO	LCO
Pay Channels Subscription	45%	30%	25%
Basic Service Tier Fee	-	-	100%
Carriage Fee	-	100%	-
Advertisement Revenue	100%	-	-

2.7 The Interconnection Regulation was again amended on 4th September, 2006 to provide for making it mandatory for broadcasters to publish their Reference Interconnect Offers (RIOs) for non addressable systems. The Regulation was last amended on 3rd September, 2007 to expand the scope of provisions for RIO to cover RIO for DTH operators also. The Broadcasters are presently required to publish Reference Interconnect Offers (RIO) for Direct to Home (DTH) service specifying, *inter-alia*, the technical and commercial terms and conditions for interconnection for the direct to home platform, including the following terms and conditions, namely:-

- (a) rates of the channels on a-la-carte basis and the rates of bouquets offered by the broadcaster to the direct to home operator;
- (b) details of discounts, if any;
- (c) payment terms;
- (d) security and anti-piracy requirements;
- (e) subscriber reports based on subscriber management system and audit;
- (f) tenure of agreement;
- (g) termination of agreements.

2.8 Offering of all channels to DTH operators on a-la-carte basis has been made compulsory for broadcasters and the broadcasters have been prohibited from compelling any DTH operator to offer the entire bouquet or bouquets in any specific package or scheme. The regulation also provides that the bouquet and a-la-carte prices of the channels should satisfy the specified twin conditions to prevent perverse pricing.

Moreover, the DTH operators are permitted to repackage channels taken as a bouquet.

2.9 The regulation further provides that the Authority may direct any broadcaster to modify its Reference Interconnect Offer (RIO) if the Authority is of the opinion that the Reference Interconnect Offer (RIO) published by any broadcaster requires modifications so as to protect the interests of service providers/ consumers, to promote or ensure orderly growth of the sector or if the RIO has not been prepared in accordance with the provisions of the regulations. There is no expectation of prior approval.

2.10 The Broadcasters issued their RIOs for DTH service in compliance of the amended interconnection regulations towards the end of February 2008. However, the DTH operators were not satisfied with the rates offered by the Broadcasters as well as the terms and conditions mentioned in the RIOs for DTH service. Therefore, the DTH operators approached the Authority requesting for its intervention. After the problems relating to the RIOs of Broadcasters for DTH operators were brought to the notice of the Authority, the Authority held interactive discussions with the broadcasters of pay channels in the context of rates and packaging of channels being offered by them for DTH Platform. Thereafter, the Authority issued a Press Release on April 18, 2008 outlining the broad consensus that emerged during the meetings with the broadcasters. The relevant extracts from the Press Release are reproduced below:-

The Broadcasters will offer the same bouquets to the DTH operators as are being offered by them for non-CAS cable distribution. In addition, they are free to offer additional bouquets. The rates of bouquets and a-la-carte rates of pay channels so offered to the DTH

operators will broadly be in consonance with the TDSAT's judgment dated 31st March, 2007 in petition no. 189(C) of 2006 and judgment dated 14th July, 2006 in petition no. 136(C) of 2006 wherein the rates were to be fifty per cent. of the rates at which these bouquets/ channels are being offered by them for non-CAS cable distribution i.e. non-addressable platform.

2.11 As a result of this initiative, all the pay channel broadcasters, except two, offered their channels in the manner outlined in the said Press Release. The Authority had to issue directions to the remaining two broadcasters to modify their Reference Interconnect Offers as the Authority was of the opinion that their RIOs required modifications so as to comply with the norm laid down by the Hon'ble TDSAT (in its judgment dated the 31st March, 2007 in petition no. 189(C) of 2006 and its judgment dated the 14th July, 2006 in petition no. 136(C) of 2006) wherein the rates for DTH platforms were to be fifty per cent. of the rates at which the bouquets/ channels were being offered for non-CAS cable distribution and to protect the interests of service providers and consumers of the broadcasting sector and cable sector, and to promote and ensure orderly growth of the broadcasting sector and cable sector. Thus as on date, the RIOs issued by all the broadcasters for DTH service are now in line with the general consensus reflected in the Press Release mentioned above.

2.12 In paragraphs 2.10 and 2.11 above, a reference to Hon'ble TDSAT judgment dated 14th July, 2006 passed in the petition no.136 (C) of 2006 and judgment dated 31st March, 2007 passed in the petition no.189 (C) of 2006 has been made. For ease of reference, relevant extracts of the operative part of these two judgments are reproduced below:-

a) Petition no.136 (C) of 2006 (ASC Enterprises Limited Vs. Star India Private Limited)

“.....3.2 Rates to be charged by the broadcaster from the DTH operator for supply of TV signals:

xxxxxxxxxxxx We have no basis to lay down the actual rates per channel which we feel is the prerogative of the TRAI. However, to begin with we feel that 50 per cent of the rates being charged for cable platform be made applicable to DTH platform. In the instant case for both the bouquets we therefore, direct the respondent to make available all the channels to the petitioner at a rate not more than Rs.27/- per subscriber exclusive of taxes. Respondent is at liberty to introduce slab rate or give volume discount to the petitioner subject to maximum rate of Rs.27/- per subscriber. ...”.

b) Petition no.189 (C) of 2006 (Tata Sky Limited Vs. Zee Turner Limited and Others)

“...In the judgment dated 14th July 2006 this Tribunal had fixed a norm in the interim till price fixation is done by TRAI, that broadcaster will charge the DTH operator 50% of its listed price for cable platform. For the present we would like to continue with the said norm ...”

2.13 Impact on DTH of setting aside TRAI's non-CAS Tariff amendment order dated 04.10.2007 by Hon'ble TDSAT :

TRAI had issued an amendment order dated 04.10.2007 for the non-CAS areas. This amendment order, eighth in the series of the second Tariff Order of 2004, revised the reference date of the initial Tariff Order

from 26.12.2003 to 01.12.2007. The amendment dated 04.10.2007 was set aside by Hon'ble TDSAT on dated 15.01.2009. Thereafter, TRAI has submitted an appeal on the same matter to the Hon'ble Supreme Court. Henceforth, the matter is currently under the jurisprudence of the Hon'ble Supreme Court.

a). The tariff amendment order dated 04.10.2008 mandated broadcasters to offer their channels on a-la-carte basis in non-CAS Cable services and declare the bouquet rates as well as their a-la-carte rates as on 01.12.2007 for their channels for non-CAS areas. Subsequently after arriving at general consensus with the broadcasters, all the available (as on 01.12.2007) bouquets and a-la-carte channels for non-CAS areas were being made available to DTH operators at 50% rate of such non-CAS bouquet rates and a-la-carte rates by the broadcasters for DTH platform. Accordingly, all the broadcasters have provided their Reference Interconnection Offers for DTH platform with 50% of non-CAS a-la-carte rates and bouquet rates to DTH operators. Now, in the absence of impugned tariff amendment order, the non-CAS a-la-carte rates of channels will not be transparently known. The broadcasters may no longer declare a-la-carte rates for non-CAS cable sector and some have even withdrawn their a-la-carte rates for their channels which are already declared by them in accordance with the impugned tariff order even though others may not do so because of the "status quo" order passed by the Hon'ble Supreme Court in the appeal filed by TRAI. If the broadcasters do not offer their channels on a-la-carte basis in the non-CAS sector and do not declare the a-la-carte and bouquet prices of their channels, the non-CAS cable distribution platform, 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. This will undermine the viability of DTH

service, thus reducing competition for Cable TV and consequently affecting the DTH subscribers as well as digitalization of the sector as a whole.

b). The impugned tariff amendment order provided the ceiling based on habitations and number of pay channels provided by the service providers to the consumers. The order also had provisions of freezing the prices for the consumers that existed as on 01.12.07 within the permitted ceiling. The consumers subscribing to cable TV services after 01.12.07 were protected by the ceiling prescribed by the tariff amendment order. With the setting aside of the said order, the habitation wise ceilings for non-CAS cable TV subscribers no longer exist except to the extent of protection under the “status quo” order passed by the Hon’ble Supreme Court. DTH being in competition with cable TV services, the DTH retail prices although under forbearance, were perforce of the non-CAS tariff regime under the Tariff Order dated 4.10.2007, found to be comparable with the cable TV ceilings for reasons of competition. With the ceilings in non-CAS areas having ceased, the retail tariff in DTH may also increase.

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 and, therefore, a tendency on the part of the broadcasters to increase the rates of channels and bouquets introduced subsequent to the cut off date of 26.12.03. can not be ruled out. This in turn, may have its effect on the content cost for the DTH platform.

TRAI has filed a statutory appeal in Hon’ble Supreme Court against the judgment dated 15.01.09 of Hon’ble TDSAT, and the same is pending.

CHAPTER III: ISSUES RAISED BY M/S. TATA SKY LTD.

3.1 As already mentioned in Chapter – I, the Authority has initiated the present consultation process in order to comply with the directions of the Hon’ble Punjab & Haryana High Court as per their judgment dated 21st August, 2008 and the order passed on 9th December, 2008 while disposing of C.M. No. 18017 of 2008 in W.P. No. 16097 of 2007. The Hon’ble Punjab & Haryana High Court gave a direction to the Authority that “...in case the petitioners file a comprehensive representation before the TRAI within two weeks from today, the respondents shall decide the same within a period of six weeks thereafter and while deciding the representation, all aspects as raised in the present writ petition as also in the representation would be considered by the competent authority.”

3.2 M/s. Tata Sky Ltd. have only filed a copy of their earlier representation dated 18th March, 2008 and requested the Authority for treating the same as a fresh representation in the context of the above order. The representation received from M/s. Tata Sky Ltd. is annexed as Annexure – V to this consultation paper. M/s. Tata Sky Ltd. have sought regulatory intervention to fix content tariffs for DTH in line with tariff fixation for similar addressable systems like CAS. M/s. Tata Sky Ltd. have raised the issue of level playing field conditions for DTH platform. It has been stated by M/s. Tata Sky Ltd. that in order to develop the capacity to cater to the divergent demands of consumers, at reasonable affordable prices, a DTH operator requires the following essential requisites:-

- Availability of popular content at reasonable prices.
- Flexibility to DTH operator to package popular content for mass scale consumption.

- Flexibility to package channels of different broadcasters and maximizing choice to the consumers

3.3 M/s. Tata Sky Ltd. have also pointed out the difference between the CAS rate and the then DTH RIO rate of ETC Punjabi channel in their representation. It has been submitted by M/s. Tata Sky Ltd. that a-la-carte prices now offered in the DTH RIOs are substantially higher than the existing prices being offered to DTH platforms prior to the RIOs. M/s. Tata Sky Ltd. have claimed that availability of same/ similar content at different prices on different distribution platforms is a facet of discriminatory pricing. It has been claimed that consequence of the RIO would result in higher cost to a DTH subscriber.

3.4 M/s. Tata Sky Ltd. have compared DTH service with addressable cable TV services in CAS areas and claimed that the fundamental attributes of both the systems are similar. M/s. Tata Sky Ltd. have alleged that absence of wholesale content tariff regulation for DTH platform is creating a significant entry barrier for DTH and also creating pricing and packaging disadvantages vis-à-vis CAS operators.

3.5 The directions of Hon'ble Punjab & Haryana High Court as recorded in the order passed on 9th December, 2008 while disposing of C.M. No. 18017 of 2008 in W.P. No. 16097 of 2007 require the Authority to consider all aspects as raised in the Writ Petition as also in the representation to be filed by M/s. Tata Sky Ltd. A copy of the Writ Petition filed by M/s. Tata Sky Ltd. is annexed as Annexure – II to this consultation paper.

3.6 In the Writ Petition, M/s. Tata Sky Ltd. had sought issue of directions to M/s. ETC. Punjabi and M/s. Zee Turner Ltd. to make

available the ETC. Punjabi channel on the DTH platform of M/s. Tata Sky Ltd. apart from seeking directions to the Telecom Regulatory Authority of India to discharge its obligations under the TRAI Act to ensure level playing field conditions including fixing content tariffs for DTH and to ensure that similarly placed systems, namely CAS and DTH are treated equally and viewers/ subscribers of these systems/ platforms are not denied popular content, due to anti-competitive practices or otherwise.

3.7 M/s. Tata Sky Ltd. have raised the issue of level playing field between the two addressable platforms, namely CAS and DTH. A reference has also been made to para 5.26 of CAS tariff order dated 31st August, 2006 wherein, it was, inter alia, stated that the prices on two addressable platforms should normally be same, if other conditions are uniform. The issue of offering of channels by the broadcasters only in the form of bouquets has also been raised in the petition. M/s. Tata Sky Ltd. have also referred to the observation of Hon'ble TDSAT in the case of M/s. Tata Sky Ltd. Vs. M/s. Zee Turner Ltd. in its order dated 31.3.2007 stating that TRAI should come out with price fixation and regulation as early as possible. M/s. Tata Sky Ltd. have alleged that non availability of ETC. Punjabi channel on the DTH platform of M/s. Tata Sky Ltd. is contrary to the mandate of Interconnection Regulations.

3.8 It has also been alleged in the petition that the amendment dated 3rd September, 2007 to the Interconnection Regulations and the Quality of Service Regulations for DTH issued on 31st August, 2007 do not address the issues raised in the petition and do not facilitate level playing field conditions.

3.9 The petition states that the regulator should have taken into account the ground realities of vertical monopoly in the industry and

rampant under-declaration in the cable industry. It also referred to the consultation paper dated March 2, 2007 and the fact that the issue of DTH commercial pricing was not covered in the same.

3.10 To sum up, the request made by M/s. Tata Sky Ltd. in its representation, is for fixation of wholesale rate of pay channels at Rs. 2.25 per channel per subscriber per month at par with CAS or 20% of the prevailing “cable a-la-carte rate”, subject to an overall ceiling. It has been further stated that an analysis of RIOs submitted by the broadcasters clearly demonstrates the deployment and use of onerous and unjustifiable conditions and exorbitant pricing.

CHAPTER IV: OTHER RELEVANT ISSUES

4.1 A separate consultation process had been initiated by the Authority by issue of a Consultation Paper on Interconnection Issues relating to Broadcasting & Cable Services on 15th December, 2008. Some of the issues relevant to fixation of DTH Tariff have been covered in the said consultation paper. However, for sake of completeness, the important issues are again being posed for consultation.

4.2 **Tariff Component Issues:** Determining the price of content of a TV channel from the Regulator's point of view is an extremely difficult task:

4.2.1 **Content Cost:** Carriage is largely significant in Telecom services while both content and carriage play vital role in broadcasting and cable services. Contents are vital to the popularity of a TV channel and hence to the pricing of the channel. Content is basically a matter of personal choice / taste which makes it subjective (hence complex) resulting in varying viewership pattern of the same content by different viewers across different regions, cultures and demography making it equally complex to determine pricing of the content. Even similar channels, i.e., of same genre are priced differently. Besides, a TV channel, say National Geographic, may be shown in many countries with varying viewership patterns, thus fetching different advertisement and subscription revenues across the countries. This may further make it more difficult to do country wise allocation of the content cost of a given international TV channel.

4.2.2 **Distribution Cost:** Contents from broadcasters are carried to the end consumers via distribution platforms (DTH operators or MSOs, the latter with or without the involvement of intermediaries such as LCOs)

each of which deploy technology / infrastructure / manpower, incurring operational expenses, e.g, content aggregation & up linking to the satellite transponder by broadcasters; down linking in the headend with or without CAS (Conditional Access System) for encryption and SMS (Subscriber Management System) for billing by MSOs who may serve direct points or through LCOs employing cable distribution network comprising cables and amplifiers. In case of DTH, the DTH operators have to incur expenses relating to hiring of transponders, maintaining the earth station, royalty for encryption system (CAS) and hiring of technical personnel for carrying channels. The carriage facilitates wider viewership across the country and increased potential for higher advertising revenues despite limited transponder capacity which limits the number of channels to be carried. This enables the DTH operators to charge technical fee / carriage fee from the broadcasters because of demand supply mismatch (400 odd channels approved by the Government while carriage capacity of the distribution platform is limited). Similar phenomenon exist on analogue cable side due to limited cable carrying capacity (about 90 channels in 860 Mhz band). Carriage / placement / Technical fee is not limited to FTA channels alone and sometimes the pay channel broadcasters also have to pay placement fees to the distributors of TV channels. The issue of carriage fee needs to be addressed / taken into account while determining tariff and is accordingly dealt in para 4.4. All the infrastructure deployed (content creation to content delivery to the end user) across the value chain is installed, operated, maintained and managed by skilled manpower adding a cost element to the tariff of TV channel. Service providers provide support services to meet QoS regulations and provide quality service to the end consumer (viz. call centers for grievance redressal, recharge coupons facility for DTH prepaid, billing, collection, etc.), which bring other cost factors into consideration.

4.2.3 Taxes and Levies: Besides, there are government revenues from the DTH service providers which comprise the following components:

- a). License fee
- b). Service Tax
- c). Income Tax

The latter two are common to both DTH and cable distributor platforms.

Apart from these revenue streams, the Government also gets customs / excise duties & income tax from Set top box manufacturers. The State Governments also get entertainment tax from DTH Service Providers.

Presently the license fee charged from DTH operator is 10% of the gross revenue. Higher growth will lead to faster breakevens and increasing collection of income tax.

4.2.4 DTH mode of delivery is the main source of competition to the incumbent cable TV services. The popularity of DTH will depend on whether it can provide service at par with the cable TV operations as well as IPTV Service providers at comparable prices and with an acceptable level of QoS. At present the cable TV services enjoy advantage vis-à-vis DTH in terms of incumbency, initial investment by a consumer in customer premises equipment, the subscription charges and taxation policies etc. There is no license fee on cable TV operation whereas license fee has to be paid by DTH operators. Further, in case of DTH since the content is delivered through satellite, there is an associated high cost of transponder lease, spectrum royalty and monitoring charges etc. Besides the entry fee of Rs. 10/- crores, the DTH operator is also liable to pay 10% of its gross revenue as license fee to the government. However, there is no intermediary between DTH operator and the end consumer, whereas there is one intermediary, i.e, LCO, between MSO and the subscriber. Thus, there are significant cost differentials between the two modes of transmission through DTH and through Cable TV. However,

there is increasing competition amongst the DTH Service Providers with five pay DTH operators already in operation.

4.2.5 Further, in case of cable TV services, the government revenues also suffer on account of non-realization of due taxes because of lack of addressability, as there is no technological mechanism to ascertain the correct number of subscribers in cable TV which is, for the most part, analogue and unaddressable. The DTH services on the other hand are subjected to multiple taxation which inter-alia includes service tax @ 12.36%, entertainment tax at different rates by State governments and VAT @ 12.5%. In addition, if license fee @ 10% is also added, the cumulative taxation would come to a significant amount which leads to high incidence of levies and taxes for DTH service. On the other hand, the incidence of taxes and levies in cable TV are much less because of two reasons. Firstly, there is no license fee payable by LCOs / MSOs. Secondly, in the absence of addressability, there is always considerable scope for evasion of taxes in the cable TV segment.

4.3 Tariff regulation for DTH : The impact of the tariff order for CAS areas and the market developments in CAS have some, though limited, a bearing on issues relating to DTH service as both are addressable platforms. The DTH is emerging as an alternative to cable TV and there is a certain degree of competition between CAS service providers and DTH operators apart from competition existing in non-CAS areas.

A framework for regulating tariff, if found necessary, in the matter of provision of DTH service in the country may comprise of fixing retail tariffs for channels (pay and FTA) and regulating the wholesale tariff of pay channels. One way to do this is by mandating a revenue share arrangement between broadcasters/ distributors and DTH operators and regulating the commercial terms of supply of set top boxes to consumers.

Need for regulating the wholesale tariffs of pay channels payable by DTH operator to broadcasters and the retail tariff applicable at the consumer end for such channels is to be viewed in the context of the competitive environment prevalent in the market, the industry structure, the present levels of penetration of the service, future potential for penetration in rural and remote areas where the incumbent cable service is yet to reach. In many parts of rural India, cable TV is yet to penetrate and DTH service providing pay channels may be one such mode of reaching the population in such areas. Any mandate of a-la-carte and its pricing needs to be considered after taking into account the implications for penetration in rural and remote parts of the country vis-à-vis benefit to non-rural consumers of such a regulatory prescription. Further, DTH mode of delivery is the main source of competition to the incumbent cable TV services since large scale commercial launch of services like IPTV are yet to take place covering the whole country. In most parts of the country, the cable TV services are not required to be provided through an addressable system. An addressable system has been mandated for cable TV services in notified areas which is in a very limited geographical area of the country, i.e., in the four metropolitan cities only.

The retail tariff payable by the consumer is invariably linked to wholesale tariff payable by the DTH operator to the broadcasters / distributors. DTH platform by virtue of being an inherently addressable system, competitive play of market forces are likely to lead to discovery of efficient prices in the market in the interest of all stakeholders. To what extent this will become a reality particularly in non-CAS areas will depend on the pace of penetration of DTH services. Interconnect regulations already exist which mandate non-discriminatory provision of channels to DTH operators.

Some of the issues which may have a bearing on regulation pertaining to regulation of DTH tariff are :

- a) Whether tariff fixation should be based on genre of channels or in general?
- b) What should determine retail price and how it should be linked with the wholesale price?
- c) What should be the treatment of set-top boxes vis-à-vis CAS provisions (detailed at para 4.8)?
- d) Carriage fee extends the reach and hence the advertisement revenue linked with the TV channel to the broadcaster. Thus carriage fee and advertisement revenue be accounted for while determining retail and whole tariffs (detailed at para 4.4)?
- e) For TV channels being viewed across many countries, how to carry out country wise cost allocation of such channels?

4.4 Carriage Fee

4.4 The issue of regulation of carriage fee was earlier raised for consultation in the Consultation Paper on Interconnection Issues relating to Broadcasting & Cable Services released on May 11, 2006. Even as the Authority decided not to regulate carriage fee at that time, the matter was discussed in detail in the Explanatory Memorandum to The Telecommunication (Broadcasting and Cable Services) Interconnection (Third Amendment) Regulation, 2006 issued on 4th September, 2006. The relevant extracts of the Explanatory Memorandum are reproduced below:-

“Carriage fee regulation

17. Regulation of carriage fees has been opposed by all the multi system operators as well as the Cable Operators Federation of India.

It has been suggested that such regulation would lead to multiplicity of disputes. Regulation of carriage fee in the present circumstances is very difficult as it also implies regulation of positioning. In different parts of the country, there are different viewership patterns. The capacities of cable networks also vary a great deal. Thus, the levels of carriage fee are different in different parts of the country depending upon demand and supply gap. “

Presently, there are more than 6000 multi system operators, which follow different systems of accounting. Payment of carriage fee is very often done in cash or in kind. Thus, it is not easy to find out the actual payments being made towards carriage fees.

The issue of carriage fee was also examined by the Authority in its recommendations on issues relating to Broadcasting and Distribution of TV channels on 1.10.2004. The Authority had observed that:-

“6.5 On the issue of ‘Must Carry of TV Channels’ the existing scenario of capacity constraint in carrying signals in analogue mode and its consequences of competition for space on the Cable Spectrum has been kept in view. Since digitalisation is a long-term goal, no fresh regulation on ‘Must Carry Obligations’ is proposed apart from the ones already there in the Cable Act and Rules. As and when capacity is augmented the ‘must carry’ regulation will be introduced. For the present therefore there will be no regulation on carriage charges.”

In its recommendations on Digitalisation of Cable Television dated September 14, 2005, the Authority had recommended that licencing should be introduced for offering of digital services after a cut-off date. It was also recommended that the licences for digital service should have only a provision for non-discriminatory carriage of channels on the basis of the existing DTH licence conditions which require that the licensee

shall provide access to various content providers/channels on a non discriminatory basis.”

The issue of regulation of carriage fee was posed as one of the issues for consultation in the consultation paper on interconnection issues relating to broadcasting & cable services issued by the Authority on December 15, 2008. Based on the inputs received during the consultation process the authority tentatively decided on the amendments to be made in the Interconnection Regulations. However, considering the importance of these amendments, the Authority placed the draft Telecommunication (Broadcasting and Cable Services) Interconnection (Fifth Amendment) Regulation, 2009 on its website for a second round of consultation. The draft Telecommunication (Broadcasting and Cable Services) Interconnection (Fifth Amendment) Regulation, 2009 does not introduce any provisions to regulate carriage fee, except for a provision restricting applicability of clause 3.2 of the Interconnect Regulation such that a distributor of TV channels is barred from seeking signals in terms of clause 3.2 of the Interconnect Regulation from a broadcaster for those channels in respect of which carriage fee is being demanded by the distributor of TV channels from the broadcaster.

4.5 In 2006, the DTH platforms were having very small subscriber base and were hardly in a position to demand payment of Carriage Fee. However, the combined subscriber base of the pay DTH operators as at the end of December 2008 was about 10 Million. Thus, the DTH platforms have made an impressive beginning. Moreover, the number of channels registered under the downlinking guidelines has also increased substantially. Therefore, the DTH operators are now in a position to demand Carriage Fee.

4.6 The DTH operators have to incur expenses relating to hiring of transponders, maintaining the Earth Station, royalty for encryption system (Conditional Access System) and hiring of technical personnel. These expenses are directly attributable to the number of channels (including FTA channels) carried by the platform. The Broadcasters of channels carried by a DTH platform benefit from wider reach of their channels across the country and the potential for higher advertising revenues is large. This is coupled with limited transponder capacity available with the DTH operators. Hence, the DTH operators charge Technical Fee/ Carriage Fee from the broadcasters. Even Doordarshan is charging such a fee from Broadcasters for carrying the channels on its Free To Air DTH service, which is presently Rs. 60 lakh per annum per channel.

4.7 Some of the broadcasters have now complained that while the broadcasters are required to provide signals of their TV channels on non-discriminatory terms to all DTH operators in view of Clause 3.2 of the Interconnect Regulations, there is no corresponding obligation on the DTH Operators to carry such TV channels without charging carriage fee. It has also been alleged that the DTH Operators are demanding higher and higher carriage fees for carrying the signals of TV channels.

4.8 Comparison of DTH with CAS

4.8 Any comparison of DTH platform with the CAS platform needs also to take into account the differences between the two platforms. Although both DTH and CAS are addressable platforms, the cable network in CAS areas mandatorily carries 'basic service tier' of minimum thirty free to air channels in unencrypted mode as mandated by the Cable Television Networks (Regulation) Act, 1995. Thus, any viewer who is interested in watching only basic service tier is not required to use any Set Top Box

with his television set. However, in case of DTH service, a viewer is required to use a Set Top Box along with a dish antenna to receive the signals. This requirement is there even for watching the Free To Air DTH service of Doordarshan. Therefore, the freedom available to the cable consumer in a CAS notified area to view only FTA channels without incurring expenditure on a set top box is not available to a DTH customer.

4.9 The second major difference is regarding a-la-carte choice of channels to subscribers. While the regulatory framework for CAS has mandated provision of pay channels to subscribers on a-la-carte basis, there is no such stipulation for DTH service at present. Provision of channels to subscribers on a-la-carte basis or otherwise can be managed only through subscriber management and conditional access systems of the distributor of TV channels (CAS/ DTH as the case may be). The DTH operators have already deployed their subscriber management and conditional access systems and these are already functional. None of the DTH operators is providing a-la-carte choice to its subscribers at present.

4.10 The third major difference between CAS and DTH platforms is regarding the standard tariff packages for Set Top Boxes. While the Multi System Operators/ Cable Operators in CAS areas are required to compulsorily offer both the options of standard tariff package for renting of Set Top Boxes, no such standard tariff package for set top boxes has been prescribed in case of DTH.

CHAPTER V: ISSUES FOR CONSULTATION

5.1 The background to the issues relating to tariff regulation for DTH services on which comments of the stakeholders are to be solicited have been discussed in detail in the preceding chapters. The specific issues for consultation are listed in this chapter. While an attempt has been made to discuss all the issues raised in the writ petition filed by M/s. Tata Sky Ltd. as also in the representation dated March 12, 2008 filed by M/s. Tata Sky Ltd., the stakeholders may also send their comments on any other issue raised in the writ petition or the representation dated March 12, 2008 which should also have been covered according to them.

5.2 Tariff fixation for DTH services

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

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?

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

CHAPTER VI: NEW ISSUES ON DTH UNDER REFERENCE FROM MINISTRY OF INFORMATION AND BROADCASTING

The Government of India have requested for the recommendations of TRAI on the following new issues related to Direct-To-Home services under their reference letter D.O. No. 8/5/2006-BP&L dated 02.02.2009. The new issues under reference are as follows:

- i)** Provisioning of new services like Movie-on-Demand, Video-on-Demand, Pay-per-View, Value added Services/ Interactive services, Advertisements on DTH service platform.
- ii)** Carriage of radio channels on DTH platform

Since a decision on these issues will impact a wide range of stakeholders, it has been considered necessary to include these in this Consultation Paper. Thus the Authority would have the benefit of the views of stakeholders before it gives its recommendations to the Government.

Here, Part 6.1 deals with the issues related to “Provisioning of new services on DTH platform” while Part 6.2 deals with the issues related to “Carriage of radio channels on DTH platform”.

6.1: Provisioning of new services on DTH platform

6.1.1 It has been observed that some of the DTH operators are providing services like Movie-on-Demand, Video-on-Demand, Pay-per-View, Near Video-on-Demand, etc. These services are available when any active subscriber sends a request through a SMS or a telephone call or Internet and is authorized, in turn, for viewing the requested content at predetermined time on assigned channels. Further, some DTH service providers are offering services such as Active stories, Active Sports, Active Whizkids, Active Learning, Active Matrimony, Active games, Active Cooking, Active Astrology, ICICI Active, News active, etc.

6.1.2 Such a set of services has come under reference from the Ministry of Information and Broadcasting vide D.O. letter no. 8/5/2006-BP&L dated 02.02.2009. Therefore, recommendations or comments with respect to these kind of services have not been dealt with in previous instances.

6.1.3 As these services mentioned above are relatively new in nature, issues have been raised in the Ministry's reference with respect to such services being in consonance with the existing provisions of DTH license, Uplinking and Downlinking Guidelines, restrictions on cross holding and adherence to Program Code (PC) and Advertisement Code (AC). As such these "channels" or the services through DTH platform are not currently approved as a TV channel registered with the Ministry of Information and Broadcasting as per the Uplinking and Downlinking Guidelines.

6.1.4 Here, it is pertinent to mention the relevant provisions of the prevalent regulatory mechanism. As per Article 6.7 of the schedule to the DTH license agreement “ *no licensee shall carry or include in his DTH service any television broadcast or channel which has not been registered by the Central Government for being viewed within the territory of India.*”

As per Article 10 of the Schedule to the license agreement “ *the DTH facility shall not be used for other modes of communication, including voice, fax, data, communication, Internet etc. unless specific license for these value-added services has been obtained from the competent authority.*”

Article 1.4 of the DTH license agreement provides a restriction on cross holding as follows:

“The Licensee shall not allow Broadcasting companies and/or Cable Network Companies to collectively hold or own more than 20% of the total paid up equity in its company at any time during the license period.”

6.1.5 In view of the above situation, the following issues are posed for comments of the various stakeholders:

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?

It is well accepted that these services are of a recent origin. In principle, these types of services not only provide the choice of content according to target subscriber base but also extend

the mechanism to provision of such services as and when so demanded or desired. This kind of flexibility is welcome on account of service personalisation on 24 X 7 basis with a simple approach to indicate the choice and subscribe. These also help in fully exploiting the addressability features of DTH platform.

There is one view that content provision lies in the sphere of the broadcasters. If this view is accepted, then, introduction of these services under the control and ownership of a DTH operator may appear to be in contravention of the existing DTH license provisions. However another view is that these are not conventional TV channels, and that these are value added services that utilize the interactivity features of a DTH platform. A final view would be taken depending upon the outcome of the consultation process.

- 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?**

In case a view is taken that these services and channels carrying them are broadcast channels, then this content would be open for further distribution on non-exclusive basis under the 'must provide' clause of Interconnection Regulation. Additionally, all services as channelized would need to be provided with specific permission for Uplink/ Downlink guidelines, registration of channels and, amendments to the

cross ownership norms. Moreover, if such content has been developed for exclusive distribution to a known set of subscribers, such exclusivity may cease to exist under 'must provide' clause.

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?

One approach may be that each DTH operator obtains requisite permissions to offer such services and these services are not treated as broadcasting channels but merely as value added services. Another approach could be to provide stipulated transition time to all existing DTH operators to hive-off such services into separate and independent entities treating such entities as broadcasters, which are then subject to general policy of must provide a non-discriminatory offering of channels. Comments may be offered on any other kind of regulatory framework.

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?

If these services or channels are not termed as broadcast channels, then this content will have to be delivered to the specific set of subscribers only at their choice. In such a case, all subscription packages to the subscribers may need to present an option where any subscriber is free to choose the offer with or without these services. The responsibility for Programme Code and Advertisement Code may have to be cast upon the DTH operator, except where content has been certified by competent agencies such as Censor Board etc. Suggestions may also be offered on appropriate definition of such value added services, if they have to be treated as distinct from conventional TV channels.

The number of such services may grow each day and therefore, periodic review may be required.

- 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.?**

With the development of technology, many new services targeting the specific subscriber base may be offered with the preferred mode of service delivery based on a request made through SMS, e-mail, phone call, internet or even through 2-

way interactivity. It may be impractical to grant permissions for each minor addition or modification. The permissions may have to be granted in principle for the first time proposal against a set of similar services or channels and be extended universally to subsequent proposals on similar lines. Another proposal regarding automatic permission may be to allow only post-facto reporting after the commencement of service.

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

Views may be offered regarding possible amendments required in both the scenarios, i.e., when these services are treated as normal broadcast channels, and alternatively, when they are not treated so.

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?

In general, advertisements also denote content meant for the subscribers. Traditionally, it has been the domain of the

broadcasters that supply them along with the program feed. A DTH operator only carries such content in the form of encrypted signals. The issue is linked with the first question and may be considered accordingly.

- 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?**

This is an additional issue that becomes relevant once a DTH operator is permitted to carry its own exclusive content with the locally inserted advertisement in the same feed. Another combination may also appear when content belonging to regular broadcaster channel is demanded without advertisements. In such a scenario, a possibility may arise where a DTH operator wishes to have advertisement free clean program feed from the broadcaster and delivers it finally to the subscribers with its own procured advertisements. Comments are also invited on whether such an arrangement would require review of “ must provide’ clause in Interconnection Regulation.

6.2: Radio channels on DTH services

6.2.1 The carriage of Radio channels is not explicitly envisaged with respect to DTH license conditions and guidelines. There are at present two accepted modes of radio channel transmission. These are as follows:

- a. Terrestrial Radio Services: AIR channels are made available through terrestrial transmission and reception by using Amplitude Modulation (AM) or Frequency Modulation (FM). Moreover, the private FM radio channels and community radio are available in some areas across the country under permission granted by the Ministry of Information and Broadcasting.
- b. Satellite Radio services: The Satellite Radio Policy under formulation indicates registration process for satellite radio channels to be carried through Satellite Radio transmission and receiver system. It may carry All India Radio (AIR) channels, non-AIR channels or private channels for reception by subscribers.

However, some DTH operators are now providing radio broadcasts also.

6.2.2 Such a set of services has come under reference from the Ministry of Information and Broadcasting vide D.O. letter no. 8/5/2006-BP&L dated 02.02.2009. Therefore, recommendations or comments with respect to these kinds of services have not been dealt with in previous instances.

6.2.3 As these services mentioned above are relatively new in nature, issues have been raised in the Ministry's reference with respect such services being in consonance with the existing provisions of DTH license, Uplinking and Downlinking Guidelines, restrictions on cross holding and, adherence to Program Code (PC) and Advertisement Code (AC).

6.2.4 In view of the above, the following issues may be posed for consultation:

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

TV signals are audio-video in nature while radio signals are audio in nature. This results in lower bandwidth requirement for carriage of radio signals and simpler reception equipments. It will provide radio content to DTH subscribers as well. At the same time, option of carriage of radio signals may not add any significant burden on the carrier capacity and of transponder bandwidth. At present, these radio channels are being broadcast for free by FM radio operators except in the case of Satellite Radio service provider i.e. World Space.

b. 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?

- c. **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?**

For b) & c) above:

At present, the “must provide” policy and non-discriminatory offering of channels under Interconnection Regulations cover TV channels. A view will have to taken whether it needs to be extended to cover radio broadcast also.

ANNEXURE - I

Extracts of Consultation Paper on issues relating to DTH dated March 2, 2007

1.10 Provision of satellite TV services through DTH mode of delivery in India is comparatively of a recent origin. In many parts of rural India, cable television is yet to penetrate and DTH service providing pay channels may be one such mode of reaching population in such areas. Any mandate of a-la-carte and its pricing is therefore required to be considered after taking into account the implications for penetration in rural and remote parts of country vis-à-vis the benefits to non-rural consumers of such a regulatory prescription. Further, DTH mode of delivery is the only source of competition to the incumbent cable television services, as large scale commercial launch of services like IP TV have not yet taken place in the country. In large parts of the country, the incumbent cable TV services are not required by regulatory mandate to provide their services through an addressable system. An addressable system has been mandated for cable TV services in notified areas which is a very limited geography of the country and it is too early to obtain the feedback of its implementation and its analysis with respect to the extent of its success, pitfalls if any, and the underlying factors behind such phenomena. However, the Authority would in due course of time consider initiating a process of market analysis of CAS implementation to obtain feedback of implementation which could serve as a critical input for putting in place a roadmap for future roll out of addressable systems in the country and the manner of its regulation. Till such time, throughout the non-CAS areas, the incumbent cable television operators who enjoy the dominance in the market, are not required by any regulatory mandate to introduce an addressable system to the populace. Therefore, mandating a-la-carte channel and regulation of its pricing for DTH services is likely to be interpreted to mean that the new entrant DTH operators are asymmetrically regulated against the incumbent mode of delivery which has dominant market share.

1.11 Needless to say, the retails tariffs payable by the consumers is invariably linked to wholesale tariffs payable by the DTH operators to the broadcasters/ distributors. DTH platform by virtue of being inherently an addressable system, competitive play of market forces are likely to lead to discovery of efficient prices in the market in the interest of all stakeholders. To what extent this will become a reality particularly in non-CAS areas will depend upon the pace of penetration of DTH services.

Interconnection Regulation already exists which mandates non-discriminatory provision of channels to DTH operators.

1.12 Having said this, the Authority can intervene at any point of time against any retail tariff of DTH operators in any part of the country if such tariff packages are found to be not consumer friendly or are not transparent in the offer. Till such time and till the impact of the roll out of CAS can be assessed, it would be premature to initiate the consultation process on DTH tariff issues both at the retail level as well as the wholesale level.

IN THE HIGH COURT OF PUNJAB & HARYANA AT CHANDIGARH
CIVIL APPELLATE JURISDICTION

C.M. No. _____ of 2007

In C.W.P. NO. _____ OF 2007

IN THE MATTER OF:

Tata Sky Ltd. and another

... Petitioners

Versus.

Telecom Regulatory Authority of India Ltd and others

..... Respondents

Application Under Section 151-C.P.C. exemption
from filing the true typed copies and certified
copies of Annexures P-1 to P-15.

RESPECTFULLY SHOWETH:-

1. That the petitioner is filing the accompanying C.W.P. in this Hon'ble Court and the same is likely to succeed on the grounds mentioned therein.

2. That the true typed copies and certified copies of Annexures are not readily available with the petitioner. However, the typed copies of the same are being attached with this petition.

3. That if the filing of the true typed copies of the Annexures are not dispensed with, the petitioner would suffer an irreparable loss and injury.

It is, therefore, respectfully prayed that petitioner be exempted from filing the true typed copies and certified copies of Annexures P-1 to P-15 and allowed to place on record the of the same, in the interest of justice.

Note: No Affidavit is required.

Chandigarh

Dated: 05.10.07

(Akshay Bhan)(Vaneet Soni)

Advocates

Counsels for the petitioners

SYNOPSIS

This writ petition filed by the petitioner raises issues which have far reaching consequences namely of inaction/abdication of statutory functions vested in the respondent Authority, the Telecom Regulatory Authority of India (TRAI) which is the sectoral regulator for broadcasting.

The petitioner is a DTH service provider and was given a licence by the Ministry of Information & Broadcasting to offer DTH services where signals are sent directly to the home of a viewer. The viewer gets a choice/range of channels and is entitled to watch/receive popular content as part of the DTH service.

DTH is a fully addressable platform and is entitled to equal treatment at par with other addressable platforms such as CAS which is necessary to create competition. DTH was conceived of as an alternate content delivery platform to offer and provide competition to the existing cable TV dominance. The respondent Authority in the Explanatory Memorandum to its Regulations dated 10th December 2004 has clearly stated that DTH is seen as an alternate platform to cable and CAS.

However, in reality the respondent Authority has taken no steps to ensure that DTH services are able to coexist with CAS/Cable and are able to offer effective choice to a consumer/viewer. This is primarily on account of the fact that the respondent Authority has not come out with content pricing for DTH, in the absence of which consumers are being deprived of popular choice. This is evident from the fact that one of the most popular channels in the State i.e. ETC Punjabi channel on which a live telecast of the Gurbani is available from the Harmander Sahib/ Golden Temple, despite repeated efforts made by the petitioner and several communications having been addressed to the respondents, is not available on its platform, though this channel is offered as a free-to-air platform on Doordarshan by resp. no. 2 & 3.

The petitioner states that creating a Level Playing Field is one of the key regulatory objectives but in the case of DTH, the respondent Authority has failed to ensure the same which has had a direct bearing and impact on the petitioner and its viewers and subscribers.

The authority which is a creature of a statute is required to discharge its functions under the statute but has failed to do so. As a result the respondents have abused their dominant position and have deprived and denied viewers of the petitioner's platform access to the ETC Punjabi channel which has hurt the religious feelings and sentiments of its viewers.

The arbitrary and discriminatory treatment meted out to the petitioner's platform is a facet of regulatory inaction and discrimination, which requires to be redressed and emergent orders are required to be passed to ensure that viewers and subscribers of the petitioner's DTH platform are not put to any disadvantage and are able to enjoy/watch popular channels such as ETC Punjabi at an affordable price.

Thus the ends of justice will be met and public interest served if appropriate directions are given by this Hon'ble Court to correct/remedy this distortion and anomaly.

Hence this petition.

Chandigarh

Dated: 05.10.07

(Akshay Bhan)(Vaneet Soni)

Advocates

Counsels for the petitioner

IN THE HIGH COURT OF PUNJAB & HARYANA AT CHANDIGARH

CIVIL APPELLATE JURISDICTION

C.W.P. NO. _____ OF 2007

IN THE MATTER OF:

Tata Sky Ltd. and another

... Petitioners

Versus,

Telecom Regulatory Authority of India Ltd. and others

..... Respondents

LIST OF DATES AND EVENTS

- 24.03.06 The petitioner obtained a licence dated 24.3.06 from the Ministry of I&B for offering DTH TV services on its platform.
- Annexure P-1.**
- The petitioner states that under the DTH service it can transmit signals through the satellite directly to the customers' premises.
- 28.10.04 The petitioner states that curiously the stand and approach of respondent-1 Authority has always been to boost DTH services and even as far back as 2004 the Authority has suggested that contents must be made available freely and on a non-discriminatory basis. **Annexure P-2.**
- 31.08.06 The Respondent No. 1 issued a notification making it mandatory for every cable operator to transmit or re-transmit programmes of every pay channel

02.03.07

The petitioner states that respondent issued a consultation paper on 2.3.07 on issues pertaining to DTH. However, the said consultation paper omitted the issue of price regulation for the DTH platform. **Annexure P-3.**

The petitioner sent its response dated 5.4.07 to the same and sent further representations dated 17.4.07 and 1.8.07 **Annexure P-4 (Colly).**

13.06.07

The petitioner made a request to the respondent no. 3 to provide it with the broadcasting signals of "ETC Punjabi channel" which has popular content of live Gurbani from the Golden Temple, Amritsar. The petitioner's letter called upon respondent to treat the petitioner in a manner similar with DD Direct where ETC Punjabi was available to consumers. **Annexure P-5.**

02.07.07

The petitioner states that the respondent failed to send any reply to the said communication and a reminder was sent on 2.7.07. A copy of the communication dated 2.07.07 sent by the petitioner to respondent 3 is annexed and marked hereto as **Annexure P-6.**

The respondent sent a reply dated 11.8.07 stating that it could not accede to the petitioner's request but it was ready and willing to provide signals of all Zee channels forming part of bouquet 3, 4 and 5 including signals of ETC Punjabi at 50% of the applicable rate of these bouquets for the cable platforms. The Petitioner again wrote to the Respondent on 24th September 07 in response to their letter dated 11.08.07 and once again requested the

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Respondent to provide the ETC channel on non-discriminatory and reasonable basis so that the viewers of Tata Sky, particularly the Sikh community is not deprived of their religious rights. The Respondent's letter dated 11.08.07 and the Petitioner's subsequent letter dated 24.09.07 is Annexed herewith as **Annexure P-7.(Colly)**

Various communications have been addressed by viewers to the petitioner seeking broadcast of these signals. Several viewers and consumers have filed complaints in the Consumer Forums in the State of Punjab against the petitioner seeking live coverage of the Gurbani from Golden Temple is shown on the petitioner's platform. **Annexure P-8.**

The petitioner further states that several complaints have also been addressed to the TRAI (Respondent 1) on the same issue. The petitioner states that these letters clearly show that the live telecast of the Gurbani is a sensitive matter which has a bearing on the religious feelings of the Sikhs. The anger and anguish expressed in these communications highlights the fact that content on the ETC Punjabi channel is very popular in the state of Punjab and despite every effort on the part of petitioner, the respondent no. 3 has not offered this channel thus depriving the subscribers and viewers of the petitioner. **Annexure P-9.**

08.08.07 The petitioner states that respondent-2 sent a legal notice dated 17.7.07 bearing No. 4389/07, received by petitioner on 1.8.07, stating that they were exclusive licensees of

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respondent-4 and the petitioner was not entitled to broadcast the audio feed of ETC Punjabi on its platform. The petitioner replied to the said notice by a communication dated 8 August, 07 expressing its surprise that the respondent has entered into an exclusive agreement with the SGPC for the exclusive rights to the recitations of Gurbani from Harmandir Sahib, Golden Temple. **Annexure P-10 (Colly).**

25.08.07 That a news article dated August 25, 2007 appeared a national daily whereby an SGPC spokesman was quoted as saying that as per the contractual conditions, ETC (Respondent No 2) was accountable to telecast the religious content on each satellite network and if it failed to do so, the contract could be reviewed or cancelled anytime.

Annexure P-11.

29.08.07 The petitioner states that in view of the above mentioned article, the petitioner addressed a letter dated 29th August 2007 to the SGPC requesting for SGPC's assistance in ensuring that the religious content carried by Etc Punjabi be made available on the Petitioner's platform on non discriminatory basis. **Annexure P-12.**

18.09.07 The petitioner was pleased to receive a response from the SGPC in the form of the letter dated 18.09.07 addressed to ETC Networks whereby the SGPC has requested ETC to undertake all possible efforts to make Gurbani telecast on the Petitioner's platform also. It is pertinent to point out that the SGPC has noted in this letter that the 'Gurbani Kirtan' from Shri Harimandir Sahib is being received by almost all other DTH services except Tata Sky. However in spite of the said letter no steps have been taken by the

31.03.07

Respondent No 1 to make the content available on the Petitioner's platform. **Annexure P-13.**

The petitioner states that the TDSAT in the case of Tata Sky v. Zee Turner Ltd. in its order dated 31.3.07 has clearly noted that TRAI should come out with price fixation and regulation as early as possible since price regulation is a must for protecting consumer interest. The delay on the part of Authority in carrying out this job was prejudicial to DTH operators. Further, it may be stated that the Hon'ble Minister of Information & Broadcasting stated on the Floor of Parliament on 15.5.07 that the respondent Authority should come out with price fixation and regulation as early as possible. **Annexure P-14.**

14.07.06

The petitioner states that in the case of *ASC Enterprises v. Star India*, the TDSAT had observed that the TRAI would come out with regulations to lay down charges for each channel and as an arrangement it held that 50% of the rates charged for the cable platform were to be made applicable to the DTH platform. **Annexure P-15.**
Hence the present writ petition.

Chandigarh

Dated: 05.10.07

(Akshay Bhan)(Vaneet Soni)

Advocates

Counsels for the petitioner

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THE HIGH COURT OF PUNJAB & HARYANA AT CHANDIGARH
CIVIL APPELLATE JURISDICTION

C.W.P. NO. ____ OF 2007

IN THE MATTER OF:

1. Tata Sky Ltd., 3rd Floor, Bombay Dyeing A O Building, Pandurang Budhkar Marg, Worli, Mumbai - 110 025 through Mr. Anshuman Sharma, Chief Legal & Regulatory Affairs Officer.
2. Mr. Gurinder Singh S/o *Lata Sardar Shiv Singh* R/o H. No. 2403-B, Sector -70, SAS Nagar, Mohali, Punjab

... Petitioners

Vs.

1. Telecom Regulatory Authority of India Ltd., Mahanagar Doorsanchar Bhawan, Jawahar Lal Nehru Marg, New Delhi - 110 002 through its Registrar.
2. ETC Punjabi, L-9 Green Park Extension, New Delhi 110016, through its President.
3. Zee Turner Ltd., 5th Floor, Radisson Plaza, NH 8, New Delhi-110 0307 through its President.
4. Shiromani Gurdwara Prabandhak, Committee Teja Singh Samudari Hall, Amritsar, Punjab 143006 through its Secretary.
5. Union of India through its Secretary, Department of Telecommunication, New Delhi.

... Respondents

Civil Writ Petition Under Articles 226/227 of the Constitution of India praying for the issuance of an appropriate writ, order or direction especially for the issuance of a writ in the nature of Mandamus directing the respondent Authority (TRAI) to forthwith discharge its obligations under the TRAI Act to ensure level playing field conditions including fixing content tariffs for Direct To Home (DTH) platform.

To

The Hon'ble Chief Justice and his companion
Justices in the High Court of Punjab & Haryana at Chandigarh.

MOST RESPECTFULLY SHEWETH:

1. This Writ Petition is being filed under Articles 226 and 227 of the Constitution of India by M/s. Tata Sky Ltd., an Indian company, incorporated under the Companies Act, 1956 having its registered office at 3rd Floor, Bombay Dyeing AO Building, PB Marg, Worli, Mumbai - 400 025, which is a DTH service provider and provides/transmits signals through the satellite directly to the consumers' premises. The Petitioner was granted licence by the Ministry of Information & Broadcasting, Government of India on March 24, 2006 to engage in the business of distributing television channels on KU band. The said writ petition is being filed by Mr. Anshuman Sharma, Chief Legal & Regulatory Affairs Officer.

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2. By way of this writ petition, the petitioner is, inter alia, seeking a mandamus to the respondent-1 Authority to discharge its statutory functions under the TRAI Act, 1997 and to fix DTH content tariffs and ensure level playing field and equal or similar conditions between two similar addressable systems namely CAS and DTH.
 3. The petitioner states that at present viewers and subscribers of its DTH service are deprived of popular content, namely of the live telecast of the 'Gurbani' from the Golden Temple, Amritsar, which is shown on the ETC Punjabi channel, which is the most popular local channel in the State of Punjab.
 4. The Respondent No. 1 is the Telecom Regulatory Authority of India (TRAI), a regulatory body, which was created under the TRAI Act, 1997 and is the sectoral regulator for telecommunications and broadcasting. The functions of the Authority are prescribed under S. 11 of the TRAI Act, 1997 and, inter alia, include fixing tariffs and regulating arrangements among service providers, apart from fixing the terms and conditions of interconnectivity between service providers.
 5. The Respondent No. 2 carries on the business of operating television channels known as "ETC Punjabi" which consists of popular content for the state of Punjab.
 6. The Respondent No. 3 is M/s Zee Turner Ltd. is the distributor of, inter-alia, the channel 'ETC Punjabi' which shows the 'Gurbani' live from the Golden Temple, (Shri Harminder Sahib), Amritsar.
 7. The petitioner states that respondent-4 is Shiromani Gurdwara Prabandhak Committee (SGPC). The SGPC has given a licence to respondent-2 for live telecast of Gurbani from the Golden Temple, (Shri Harminder Sahib) in Amritsar. Respondent-4 has also addressed a communication to respondent-2 stating that it

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channel was available on all platforms except that of the petitioner.

8. The petitioner states that this writ petition raises several substantial questions of public importance:

a. Whether a viewer/subscriber of a DTH platform can be deprived of popular content, in violation of Article 19 (1) (a) of the Constitution?

b. Whether TRAI, the Regulatory Authority, has a statutory duty to fix DTH content tariffs and create level playing field conditions between two addressable systems/CAS and DTH and ensure as follows :

- i) Facilitate competition in broadcasting by removing unreasonable restrictions for alternate platforms of carriage like DTH and create level playing field conditions between two addressable systems/CAS and DTH.
- ii) Regulate tariff of the Direct-to-Home platform ("DTH"), which is a fully addressable system.
- iii) Ensure orderly and healthy growth of the sector with newer technologies coming in, while protecting consumer interest.

c. Whether the Respondent No. 1 can act in an unfair, unreasonable, discriminatory and irrational manner in refusing to regulate the tariff for DTH whilst regulating the Tariff for CAS, an addressable platform similar to DTH, which violates Articles 14, 19(1)(a), 19(1)(g) of the Constitution of India?

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- d. Whether the TRAI ought to have acted upon and given effect to the observations of the TDSAT in its judgment dated 14.7.06 *ASC Enterprises Ltd. v. Star India Ltd.* in petition No. 136(C)/2006 and dated 31.3.07 in *Tata Sky Ltd. v. Zee Turner Ltd.* in petition no. 189(C)/2006 and ought to have determined pricing for content with respect to DTH services to protect the interests of DTH Consumers?
- e. Whether regulatory inaction and regulatory discrimination have resulted in discrimination between two similarly placed platforms, namely, CAS and DTH even though the preamble of the TRAI Act, 1997 requires that level playing field conditions should be created to protect the interest of consumers and service providers?
- f. Whether the existing regulations of the Authority are inadequate, incomplete and suffer from a lacuna insofar as they have failed to address the core issues of concern to DTH service providers and have failed to provide a level playing field across various similar and competing content distribution platforms?
- g. Whether the inaction on the part of respondent Authority is inconsistent and contrary to the explanatory memorandum to the Interconnection Regulation dated 10th Dec. 2004 under which the Authority had itself recognized the need to promote DTH platform as an effective alternate to CAS and cable?
9. The petitioner states that the brief facts giving rise to the present case are as follows:

- i) The petitioner obtained a licence dated 24.3.06 from the Ministry of I&B for offering DTH TV services on its platform. A copy of the License dated 24.03.06 is annexed and marked as Annexure P-1.
- ii) The petitioner states that under the DTH service it can transmit signals through the satellite directly to the customers' premises.
- iii) In order to operate a DTH service the petitioner has to obtain rights for channels from broadcasters who own these channels.
- iv) The success of a DTH platform depends on offering popular content on its platform.
- v) There is absence of competition in carriage of broadcasting signals/programs requiring facilitation of entry of alternate platforms of carriage to Cable TV and CAS. The Respondent No.1 has itself admitted the aforesaid position in the detailed Consultation Paper No. 9/2004 on 'Issues relating to broadcasting and distribution of TV channels'.
- vi) The Cable TV market is fragmented and dominated by the vertically integrated monopolies, which has resulted in several imperfections/a stranglehold on the market which is against public interest.
- vii) The petitioner states that the roll out of a DTH service will ensure competition between the two platforms and the extent of competition will depend on the extent to which popular content is equally available on both platforms.
- viii) The petitioner states that the interest of consumers, viewers and subscribers is paramount and all popular channels must be available on all platforms on a non-

discriminatory basis. This will promote healthy and will be beneficial to consumers/viewers.

- ix) DTH is perceived as being an effective competitor to cable. For a consumer/viewer to avail of a DTH service, it is necessary that popular channels/content is available on the DTH platform since it is illogical for a consumer/viewer to establish two arrangements to view different content.
- x) It is in this context that the Respondent No 1 came up with Interconnection Regulations dated 10.12.04 being the Telecommunication (Broadcasting & Cable services) Interconnection Regulation, 2004 (No. 13/04) which was to cover arrangements among service providers for interconnection. These regulations, inter-alia, introduced a concept of 'must provide', which requires every broadcaster to provide its television signals to all platforms of carriage including DTH operator on non-discriminatory, just, fair and reasonable terms. Such 'must provide' obligations under the Interconnect regulation were imposed on Broadcasters with intent to provide a helping hand to the nascent technologies in the content distribution business e.g. DTH and CAS. The underlying principle was that in interest of consumers it is essential that all channels are available on all platforms on a non-discriminatory basis. The Explanatory Memorandum to the interconnection regulations states that DTH services have to compete with cable TV and if popular content available on TV is not available on the DTH platform it would not be able to effectively give competition to the cable networks. The explanatory memorandum clearly states that the issue has to be seen primarily from the consumer's perspective.

- xi) The petitioner states that curiously the stand and approach of respondent-1 Authority has always been to boost DTH services and even as far back as 2004 the Authority has suggested that contents must be made available freely and on a non-discriminatory basis. A copy of the article which appeared in Hindu Business dated 28th October 2004 is annexed and marked hereto as **Annexure P-2**.
- xii) On August 31, 2006, the Respondent No. 1 issued a notification making it mandatory for every cable operator to transmit or re-transmit programmes of every pay channel through an addressable system in the following cities:-
- a) Whole of Chennai & Kolkata
 - b) Metropolitan Areas and Areas covered by Municipal Council of Greater Mumbai; and
 - c) National Capital Region of Delhi.
- xiii) On August 24, 2006, the Respondent No. 1 notified 'The Telecommunication (Broadcasting and Cable Services) Interconnection (Second Amendment) Regulation, 2006 (*"Amended Interconnect Regulation"*) whereby the Telecommunication (Broadcasting and Cable Services) Interconnection Regulation, 2004 was amended. By the Amended Interconnect Regulation, TRAI determined the revenue share at the wholesale level for CAS platform. In specific, by virtue of the Amended Interconnect Regulation, the broadcasters get 45% share in the revenue whilst the Multi System Operator/Local Cable Operator get 55% share in the revenue.
- xiv) In furtherance of the abovementioned notification and with an aim to regulate the monopolies in the delivery of television services and to foster competition and to

promote orderly growth of the broadcasting industry, the Respondent No. 1 issued a tariff order on August 31, 2006 for regulating the prices chargeable in relation to provision of services on CAS platform to a subscriber. It is noteworthy that in the aforesaid tariff order/ notification, the Respondent No. 1 took note of the judgment of TDSAT dated July 14, 2006 and, inter alia, observed the following:

(a) In the Explanatory Memorandum -

- (i) The fundamental principle of regulation is to allow the market forces to work and to ensure a level playing field amongst various service providers. At the same time whenever the Regulator considers that there is not enough competition in the market, regulatory intervention is required to protect the interests of the subscribers. This fundamental principle has been kept in mind by the Authority while finalising this tariff order.
- (ii) The Authority would closely monitor the developments in the market and as the level of competition increases a review of the tariff regime would be considered.
- (iii) The slow pace of growth of the alternative modes of delivery of television services is one of the major factors responsible for the lack of competition in the market. Coupled with the unequal bargaining powers amongst various players as explained above, the sector witnessed rampant disconnection disputes, numerous billing and payment disputes, allegations of discriminator practices in pricing and unfair trade practices in the last few years resulting in considerable litigation in the courts of law. This affected the interests of subscribers as they did not have

effective choice of delivery platforms, choice of operators or choice of channels.

- (iv) Price regulation is justified when markets fail to produce competitive prices. When markets are competitive and are said to function smoothly, they will lead to "efficient" prices that maximum value to consumers. For this efficient ideal competitive situation to be realized, the market must meet a number of conditions. These conditions include that the market must have several suppliers and consumers with none so large as to affect prices.
- (v) There should also be free entry to and exit from the market. Where all these conditions are not present, the market will not generally produce optimal results. In such a situation, there is justification for intervention by the Regulator to improve social welfare. The introduction of price regulation in any market is one such intervention necessitated on account of lack of adequate competition in the market. Such market failures are caused by a number of factors.
- (vi) In the case of cable television sector in India, historically, there has been lack of effective competition and lack of choice to the subscribers. Cable services, particularly the last mile operations, are in the nature of a monopoly market in India. Although, the cable TV industry is fragmented, it is characterized by a few dominant broadcasters and large Multi System Operators (MSOs) with some of them having vertically integrated operations, resulting in unequal bargaining powers amongst various players in the supply chain.

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(vii) At para 5.26 of tariff order dated August 31, 2006, TRAI has noted the similarities between CAS and DTH platform and inter alia stated that the prices on the two addressable platforms should normally be same, if other conditions are uniform. The petitioner further states that though the two addressable systems CAS and DTH are similar, which would be evident from the following chart, the Authority has treated equals unequally, which amounts to discrimination and has put DTH platform at a disadvantage.

	DTH	CAS
Set top Box with Conditional access system	<input type="checkbox"/>	<input type="checkbox"/>
Delivery of signals in digital format	<input type="checkbox"/>	<input type="checkbox"/>
Back end subscriber management & billing systems	<input type="checkbox"/>	<input type="checkbox"/>
Completely addressable platform	<input type="checkbox"/>	<input type="checkbox"/>
Capacity to offer channels a-la-carte	<input type="checkbox"/>	<input type="checkbox"/>
High Investment	<input type="checkbox"/>	<input type="checkbox"/>

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requirement		
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- xv) That the similarity between DTH and CAS is evident from the fact that both require a set top box with CAS and have the capacity to offer channels on an ala carte basis which promotes consumer choice. The delivery of signals is in digital platform, both are completely addressable and ensure full addressability, both have back end subscriber management and billing systems and entail high investments.
- xvi) The petitioner states that respondent issued a consultation paper on 2.3.07 on issues pertaining to DTH. However, the said consultation paper omitted the issue of price regulation for the DTH platform. A copy of the Consultation paper dated 2.03.07 is annexed and marked hereto as **Annexure P-3**.
- xvii) The petitioner sent its response dated 5.4.07 to the same and sent further representations dated 17.4.07 and 1.8.07. The petitioner in its representations had emphasized that -
- There is an urgent need for DTH content pricing to be regulated.
 - With the DTH tariff and commercial framework not in place, DTH is unable to provide effective choice or flexibility to consumers.
 - In this situation consumers are being subjected to unreasonable price variations between delivery platforms.

- The practice of indulging in undue profiteering by launching new pay channels and shifting popular content from existing pay channels to the newly launched channels is anti-consumer and unethical.
- The Regulations do not address such situations. To ensure equity and fair play for the addressable platforms, there is no provision which can ensure delivery of channels on an a-la-carte basis to DTH while the same is provided for Analogue Cable and CAS.
- The broadcasters, owing to their monopolistic position, offer popular content bundled with low viewer ship channels. The DTH operator has to choose between either saddling its consumers with higher costs and unwanted content or not offer the popular content.

A copy of the response dated 5.4.07 along with further representations dated 17.4.07 and 1.8.07 are annexed and marked hereto as **Annexure P-4 (Colly)**.

- xviii) The petitioner in 2006 had filed a petition against respondent no. 3 in the TDSAT. The petition was filed because respondent-3 had thrust unwanted and unpopular content on the petitioner at exorbitant prices. This did not however address the issue of DTH commercial pricing.
- xix) That the key to competition in the content distribution sector is access to popular content. Popular content of different broadcasters caters to the taste of viewers and takes into account the diversity of Interest, language, viewing habits, taste, etc. This gives the viewers a choice.

xx) By communication dated 13.6.07 the petitioner made a request to the respondent no. 3 to provide it with the broadcasting signals of "ETC Punjabi channel" which has popular content of live Gurbani from the Golden Temple, Amritsar. The petitioner's letter called upon respondent to treat the petitioner in a manner similar with DD Direct where ETC Punjabi was available to consumers. In this context, the petitioner drew the attention of respondent-2 to the judgment passed by TDSAT dated 31.3.07 where it was observed that:

"If a DTH operator has to take all, including channels which are not in its commercial interest, it will have to pay to the broadcaster by way of charges for such channels. His expenses will increase which he will naturally pass on to the consumer. So ultimately the consumer will be the sufferer."

A copy of the communication dated 13.6.07 sent by the petitioner to respondent 3 is annexed and marked hereto as **Annexure P-5**.

xxi) The petitioner reiterated that since consumer interest is paramount, the respondents 2 and 3 should ensure that signals of ETC Punjabi are available in a just and fair manner, failing which the DTH service will become expensive and will keep consumers away from it. The DTH platform will then be unable to effectively compete with CAS/ cable.

xxii) The petitioner states that the respondent failed to send any reply to the said communication and a reminder was sent on 2.7.07. A copy of the communication dated 2.07.07 sent by the petitioner to respondent 3 is annexed and marked hereto as **Annexure P-6**.

xxiii) The respondent sent a reply dated 11.8.07 stating that it could not accede to the petitioner's request but it was ready and willing to provide signals of all Zee channels forming part of bouquet 3, 4 and 5 including signals of ETC Punjabi at 50% of the applicable rate of these bouquets for the cable platforms. The Petitioner again wrote to the Respondent on 24th September 07 in response to their letter dated 11.08.07 and once again requested the Respondent to provide the ETC channel on non-discriminatory and reasonable basis so that the viewers of Tata Sky, particularly the Sikh community is not deprived of their religious rights. The Respondent's letter dated 11.08.07 and the Petitioner's subsequent letter dated 24.09.07 is Annexed herewith as **Annexure P-7 (Colly)**

xxiv) The petitioner states that respondent no. 3, for all practical purposes, has denied the request of the petitioner for providing ETC Punjabi channel, by taking unfair advantage of the lacuna in the Regulatory Framework. It is noteworthy that the Consultation Paper on DTH on March 2nd, 2007, which was floated by the Respondent-1, failed to address the most crucial/important issue about the adequacy of Regulations in ensuring a level playing field between two addressable platforms

xxv) Various communications have been addressed by viewers to the petitioner seeking broadcast of these signals.

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Several viewers and consumers have filed complaints in the Consumer Forums in the State of Punjab against the petitioner seeking live coverage of the Gurbani from Golden Temple is shown on the petitioner's platform. A copy of the various complaints filed by subscribers in the Consumer Forums in the State of Punjab are annexed and marked as **Annexure P-8. (Cally)**

xxvi) The petitioner further states that several complaints have also been addressed to the TRAI (Respondent 1) on the same issue. The petitioner states that these letters clearly show that the live telecast of the Gurbani is a sensitive matter which has a bearing on the religious feelings of the Sikhs. The anger and anguish expressed in these communications highlights the fact that content on the ETC Punjabi channel is very popular in the state of Punjab and despite every effort on the part of petitioner, the respondent no. 3 has not offered this channel thus depriving the subscribers and viewers of the petitioner. A copy of the several complaints addressed to TRAI are annexed and marked as **Annexure P-9. (Cally)**

xxvii) The petitioner states that it sent replies to the various complaints and to the communication received from respondent-1.

xxviii) The petitioner has raised this issue with the respondent-1 Authority. The problem lies in the fact that the respondent no. 3 is offering ETC Punjabi as part of its bouquet 5 bundled with other two bouquets of its own. Bouquet 5 of Respondent 3 consists of ETC Punjabi, the most popular channel in Punjab and other channels which are relatively unknown /unpopular. The respondent no. 3

is however insisting that it will only offer ETC channel as part of the bouquet 5 along with its bouquet 3 & 4 and will not offer the same on a stand alone basis or on an ala carte basis. The petitioner states that this situation has arisen in view of the monopoly enjoyed by respondent no. 2 and 3 as content providers in disregard of the sentiments of the viewers.

xxix) The petitioner states that respondent-2 sent a legal notice dated 17.7.07 bearing No. 4389/07, received by petitioner on 1.8.07, stating that they were exclusive licensees of respondent-4 and the petitioner was not entitled to broadcast the audio feed of ETC Punjabi on its platform. The petitioner replied to the said notice by a communication dated 8 August, 07 expressing its surprise that the respondent has entered into an exclusive agreement with the SGPC for the exclusive rights to the recitations of Gurbani from Harmandir Sahib, Golden Temple. A copy of the legal notice dated 17.07.07 sent by Respondent 2 alongwith the petitioner's reply dated 8.08.07 is annexed and marked hereto as **Annexure P-10 (Colly)**.

xxx) That a news article dated August 25, 2007 appeared a national daily whereby an SGPC spokesman was quoted as saying that as per the contractual conditions, ETC (Respondent No 2) was accountable to telecast the religious content on each satellite network and if it failed to do so, the contract could be reviewed or cancelled anytime. A copy of the news article dated 25.08.07 is annexed and marked as **Annexure P-11**.

xxxi) The petitioner states that in view of the above mentioned article, the petitioner addressed a letter dated 29th August 2007 to the SGPC requesting for SGPC's assistance in ensuring that the religious content carried by Etc Punjabi be made available on the Petitioner's platform on non discriminatory basis. A copy of the letter dated 29.08.07 from the petitioner to SGPC is annexed and marked hereto as **Annexure P-12.**

xxxii) The petitioner was pleased to receive a response from the SGPC in the form of the letter dated 18.09.07 addressed to ETC Networks whereby the SGPC has requested ETC to undertake all possible efforts to make Gurbani telecast on the Petitioner's platform also. It is pertinent to point out that the SGPC has noted in this letter that the 'Gurbani Kirtan' from Shri Harimandir Sahib is being received by almost all other DTH services except Tata Sky. However in spite of the said letter no steps have been taken by the Respondent No 1 to make the content available on the Petitioner's platform. A copy of the letter dated 18.09.07 from SGPC to the petitioner is annexed and marked as **Annexure P-13.**

xxxiii) The above situation clearly illustrates the inadequacy of the regulations governing the DTH industry as consumers subscribing to a DTH service are at a disadvantage and are being discriminated against even though consumers/viewers across platforms are entitled to popular content at reasonable/affordable prices.

xxxiv) The petitioner states that the TDSAT in the case of Tata Sky v. Zee Turner Ltd. in its order dated 31.3.07 has clearly noted that TRAI should come out with price fixation

and regulation as early as possible since price regulation is a must for protecting consumer interest. The delay on the part of Authority in carrying out this job was prejudicial to DTH operators. Further, it may be stated that the Hon'ble Minister of Information & Broadcasting stated on the Floor of Parliament on 15.5.07 that the respondent Authority should come out with price fixation and regulation as early as possible. A copy of the judgment dated 31.3.07 is annexed and marked as **Annexure P-14.**

, xxxv) The petitioner states that in the case of *ASC Enterprises v. Star India*, the TDSAT had observed that the TRAI would come out with regulations to lay down charges for each channel and as an arrangement it held that 50% of the rates charged for the cable platform were to be made applicable to the DTH platform. A copy of the judgment dated 14.07.06 is annexed and marked as **Annexure P-15.**

xxxvi) The petitioner states that while CAS and DTH are two addressable systems which are similar, but there is a lack of level playing field conditions between the two addressable systems.

xxxvii) The petitioner states that even though the DTH platform offers 100% addressability as opposed to the cable platform where there is rampant under-declaration, ad hoc rate fixed for the DTH service is half the cable rate which only gives 10 to 15% declarations. Further, though the platform gives 100% declaration it is entitled to only half of the cable rate, while its costs are five times higher compared to analogue cable which acts as a barrier.

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xxxviii) The petitioner further states that heavy investments to the tune of thousands of crores have been made for the DTH services as it offers superior technology and offers a customer/viewer choice - gives him access to popular content. However, even though the interconnection regulations provide for a must provide obligation, the terms and conditions on which this has to be provided are yet to be fixed, as a result of which there is no mechanism to ensure delivery of channels on ala 'carte basis to the DTH platform as against CAS which has a similar addressable system. However, the stand taken by respondent no. 2 & 3 and its approach has denied people of the State of popular content and has hurt their religious feelings/sentiments. This has also created multiplicity of litigations and complaints being filed before the respondent-1 Authority. The petitioner has made all efforts to persuade the respondent no. 2 to offer popular content at an affordable price but these requests have, not elicited a positive response.

xxxix) The petitioner states that in this background respondent-1 Authority must discharge its statutory functions and which is fortified by the observations made by the TDSAT in two judgments to ensure that viewers are not deprived of popular content and, at the same time, create level playing field conditions.

xi) The petitioner states that in this context the advertisement and representations made by respondent no. 3 to the public at large clearly show that the respondent-3 is abusing its monopolistic position. The advertisement issued by respondent-3 clearly shows that ETC Punjabi

channel is exclusively available only on DTH platform - Dish TV. This is contrary to the mandate of the Interconnection Regulations and is against public policy. A Copy of the advertisement issued by respondent 3 is annexed and marked here to as **Annexure P-16**.

- xli) The petitioner states that it has repeatedly raised this issue with the respondent-1 Authority but till date no solution has been found.
- xl ii) The petitioner states that the respondent Authority came out with the Telecommunication (Broadcasting & Cable Services) Interconnection Fourth Amendment Regulation dated 3.9.07 as well as the Direct to Home Broadcasting Services (Standards of Quality of service) and Redressal of Grievances Regulations, 2007 dated 31.8.07. Both these regulations do not address the issues raised in the petition and do not facilitate level playing field conditions. In fact, the quality of service standards impose stringent obligations on the DTH service provider and saddle the DTH service provider with further burden and additional costs which are more onerous than similar requirements for CAS and in comparison to telecom operators.
- xl iii) The petitioner states that the conditions mandated under the quality of standard regulations are economically and financially unviable and the existing regulatory regime would act as an entry barrier for DTH. The petitioner also addressed a communication to the Respondent no 3, copied to Respondents 1 & 4 referring to the revised Regulations by the Respondent 1, however no positive response has been received from Respondent 3, which substantiates the inadequacy of the revised regulations

xliv) The petitioner therefore states that the existing lacunae and infirmities in the regulatory regime have to be fixed/ redressed and inter-alia require the Authority to come out with DTH content pricing. While the Authority has taken similar steps for other platforms probably to address the political constituency but, no steps have been taken to ensure that popular content is available/ offered on a just and reasonable basis, which calls for directions from this Hon'ble Court to ensure that both addressable platforms are treated at par and consumers and subscribers of a DTH service are not victimized or made scapegoats.

xlv) The petitioner further states that the Interconnection Regulations which have been notified by the Authority and which are likely to come into effect from 1.12.07 are ineffective in the absence of content tariffs/pricing and has created a distortion. This distortion will affect the growth of DTH services, which is contrary to the regulatory objective and mandate of promoting DTH as an effective and efficient alternative to cable. These piecemeal regulations do not solve/address these problems vis a vis CAS and Cable. On the contrary the QoS norms and the amended interconnect regulations add to the existing problem of making the DTH platform unaffordable and incapable to giving effective competition to the cable and CAS. TRAI should have provided a holistic solution to ensure conditions for a level playing field.

xlvi) The petitioner further states that the expectation of a consumer or subscriber from a platform service is that he would get all benefits and advantages as under CAS.

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However, in reality this is not so. The petitioner states that this acts as a huge disincentive to subscribe to a DTH service and will disable a DTH operator from competing with other addressable platforms.

xlvii) The petitioner further states that the regulator should have taken into account the ground realities, namely the vertical monopoly in the industry and rampant under-declaration in the cable industry on account of which the price which is offered on cable is directly related to the extent of under declaration as against DTH which ensures 100% declaration and is a far more efficient platform. Thus, even though DTH is a more efficient platform it has been penalized and treated shabbily as a "country cousin", though DTH is widely recognized as the medium for the future.

xlviii) This shows yet another facet of regulatory discrimination vis-à-vis DTH and unless rectified/remedied can sound its death knell. The Authority must discharge its statutory functions, inter alia, of providing level playing field conditions by creating a regime/framework in line with the regulatory intention and mandate set out in the Memorandum to the Interconnection Regulations dated 10.12.04 which notes that popular content should be available on the DTH platform to enable it to compete with cable TV and to provide effective and meaningful choice to viewers and subscribers.

xlix) The complete apathy of the respondent/Authority has reduced consumers/viewers of DTH as hapless and mute spectators who are deprived of popular content to channels such as ETC Punjabi. This Hon'ble Court in exercise of its powers under Article 226 can do substantive justice

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between the parties and can give appropriate directions and pass effective orders which will serve public interest, which lies in the thread which flows through regulatory decisions.

10. It is in this background and in these facts and circumstances that the petitioner is approaching this Hon'ble Court by way of this writ petition on the following amongst other grounds taken without prejudice to one another:

GROUND:

- A. The authority which is a creature of a statute is required to discharge its functions under the statute but has failed to do so.
- B. That the TRAI has a statutory duty in terms of Section 11(1) (4) of the TRAI Act, 1997 to regulate the wholesale content tariff for DTH platform and is mandated to act in a fair and transparent manner whilst discharging its functions. The mandate is to empower the consumer with flexibility and offer choice of viewership. The refusal to perform its statutory duty by TRAI is creating a significant entry barrier for DTH by way of creating pricing and packaging disadvantages vis-à-vis CAS operators in the minds of the consumers.
- C. The failure on the part of the authority to discharge its functions has resulted in discrimination/differentiation between ~~two~~ addressable systems and a complete failure on the part of the respondent in creating level playing field conditions. The religious sentiments of the people of the State

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have been hurt as the ETC Punjabi channel is not available on the petitioner's platform denying its consumers/viewers of popular content.

D. That the failure on the part of the Authority to make regulations has created an anomalous situation between two addressable systems/platforms and such regulatory inaction will further perpetuate the monopoly of the cable platform and would defeat the objective of the Interconnection regulations framed by the Authority which is to promote digitalization and give choice to viewers.

E. That one of the key regulatory objectives is to ensure Level playing field conditions between two similarly placed platforms - DTH and CAS. DTH is an addressable platform which has to be treated at par with Conditional Access System (CAS) as both are addressable platforms with striking similarities but the respondent/Authority has failed to do so.

F. That a nascent and emerging platform such as DTH has been put to a competitive disadvantage though one of the key regulatory objectives was to ensure effective competition across platforms. The failure of the regulator to determine and fix DTH/content pricing has a direct bearing on consumers and subscribers of the DTH platform.

G. That when the respondent Authority came out with Issues relating to DTH by way of a consultation paper issued in March, 2007, the petitioner had highlighted various issues, in particular the need for level playing field conditions in order to

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encourage competition which is in consumer interest and to enable DTH to compete with cable.

H. That these examples clearly illustrate the inadequacy, lacunae and infirmity in the existing regulatory regime/scenario and call for urgent regulatory intervention in order to provide and create a level playing field. This is one of the objectives of the TRAI Act and the Hon'ble Supreme Court has held so on in the case of COAI v. UOI (Ref: 2003 3 SCC 186).

I. That a pricing mechanism (for content pricing) becomes vital to create a level playing field. This has been recognized even by the Telecom Disputes Settlement & Appellate Tribunal (TDSAT) in two judgments where it has observed that the Authority must come out with DTH content pricing in order to protect the interests of consumers and viewers as well as the interests of the DTH service provider.

J. That the denial of popular content such as ETC Punjabi channel has put the petitioner's platform at a disadvantage and this unfair and undue advantage is being exploited by respondent no. 3. In fact, the respondent no. 3 has been issuing advertisements and making representations that the ETC Punjabi channel is available exclusively only on Dish TV, its DTH platform. This is anti-competitive and highly prejudicial to public interest and shows the dictatorial manner in which the respondent no. 3 is exploiting the situation to the detriment of viewers and subscribers and in order to corner a larger share of the DTH market. The petitioner states that exclusivity of content is prohibited under the inter-connector.

Regulations and these acts of the respondent are in violation of the same.

- K. That the DTH platform will increase the level of competition in a vertically inclined industry as this platform offers better and superior technology and its level of penetration is likely to increase in future, including in rural areas. Thus it is vital that DTH is treated at par with the other addressable system namely CAS.
- L. That regulatory inaction and lack of level playing field conditions and regulatory discrimination is ex-facie arbitrary and in violation of Art. 14 of the Constitution of India.
- M. That consumer/subscriber choice lies at the heart of DTH. However, the DTH platform depends on content and the cost of content/input cost is a vital consideration to ensure the success of the DTH platform, i.e. where popular content is available at an affordable price. The petitioner states that though these platforms are similarly situated the respondent-1 Authority has failed to determine and fix the DTH content costs. As a result, two similarly placed platforms - DTH and CAS - have not been treated at par and regulatory inaction and lack of regulatory intervention has created the present impasse.
- N. That there has been complete non-application of mind by the respondent Authority which having recognized the similarities between CAS and DTH platform at para 5.26 of tariff order dated August 31, 2006, where it has, inter alia, stated that the

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prices on the two addressable platforms should normally be same, if other conditions are uniform, has failed to fix the DTH content price. As a result, the Authority has failed to ensure level playing field conditions though it is duty bound to do so. It is relevant to mention that both the input costs and the infrastructure cost for a DTH platform are significantly higher than the cable/CAS platform.

O. That while the consultation process dealt with various issues, it did not go into the issue of pricing though without determining content pricing the entire exercise and purpose is half-baked and self-defeating. As a result, there is great variation in the price of popular content across platforms. For example, content which in a CAS regime, is made available to the operator at approx. Rs. 2.25, is offered to the DTH platform at times at 7 times the CAS pricing. This is amply demonstrated by the present case where the respondent-2 is offering popular content by way of ETC Punjabi Channel as part of its Bouquet-5 even though this is available as a free-to-air channel on Doordarshan and is also available on another competitor's platform (Sun's DTH platform as a Free to Air channel.), which has been denied to the petitioner by virtue of monopolistic, anti-consumer practices and bundling by the Respondent 2. The prohibitive cost of content acts as a deterrent and deprives viewers and subscribers of the petitioner's DTH service access to the ETC Punjabi channel. Likewise, if a channel is a part of a particular bouquet offered by a particular broadcaster and then moves/shifts to become part of another bouquet of another broadcaster, the broadcaster is in a position to dictate terms to the DTH

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platform service provider and can price that channel exorbitantly and, as a result, will deprive the DTH subscriber of popular content.

P. That the viewers and subscribers of the petitioner's DTH platform had a legitimate expectation that they are entitled to popular content and cannot be deprived of popular content as it amounts to violation of rights under Art. 19(1)(a) of the Constitution. The petitioner states that the right to entertainment is a facet of Art. 19(1)(a) and popular content lies at the heart of this.

Q. That in terms of the avowed right vested in the petitioner no. 2 in terms of Articles 19 (1)(a) of the Constitution of India and with there being no level playing field for a DTH Platform, the petitioner is being deprived of popular content which tantamounts to violation of the fundamental rights of the petitioner as enshrined in Article 19(1)(a) of the Constitution of India.

R. The Authority has not given effect to the basic objective of promoting DTH as an effective platform though it is in consumer interest and gives choice to a viewer and is supposed to provide access to popular content.

S. That a subscriber in a CAS area is entitled to popular content and can exercise its free choice, whereas a subscriber of a DTH service is deprived of the same though there is no logic or rationale for the same. The petitioner states that the basic

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purpose of the Interconnection Regulations is to ensure/promote choice for consumers/viewers.

- T. That the interconnection regulations cast a 'must provide' obligation on the broadcaster but without prescribing a commercial framework for the same. As a result respondent no. 2 & 3 have unfairly, unjustly and in an arbitrary and discriminatory manner held back the ETC Punjabi channel from the platform of the petitioner and have deprived the petitioner's viewers and subscribers of popular content. This is a gross form of discrimination not only across addressable systems but against viewers and subscribers who form one class.
- U. That the respondent no. 3 enjoys a monopoly and is misusing the vertical integration in the cable and broadcasting sector in a manner which is contrary to public interest. Thus the respondent no. 2 & 3 are exploiting the religious sentiments of viewers across the State.
- V. That while the respondent-1 had issued a consultation paper on 2.3.07 on issues pertaining to DTH, the issues of DT commercial pricing has been ignored/overlooked. The petitioner states that in its communication addressed to the respondent Authority it has highlighted the fact that D' platform offers choice and flexibility to viewers and the same is being adversely affected in the absence of necessary regulations and a framework which is being exploited by respondent-3.

W. That the Respondent No1 has acted in violation of the directions and findings of the orders dated July 14, 2006 and March 31, 2007 passed by the TDSAT in the matters of ASC Enterprises Limited Vs. Star Indian Private Limited and Tata Sky Limited Vs. Zee Turners Limited & others respectively.

X. That the Respondent's action is arbitrary and not premised on any rationale given that for an alternative identical carriage platform, i.e., CAS not only price regulation has been provided but also an appropriate commercial framework.

Y. That the highhanded and illegal actions of respondent 2 & 3 have resulted in various consumer complaints being filed and complaints being addressed to the respondent-1 Authority. Several calls have been received from irate /offended viewers and subscribers at the call centre of the petitioner. The action of the respondent no. 2 & 3 has offended the religious sentiments of the people which is an emotional and sensitive issue and requires to be addressed forthwith in order to assuage their feelings. The respondent no. 3 has put its private commercial interest over the interests of viewers and subscribers and is exploiting its monopolistic hold/control. Urgent/emergent orders are required to control the fallout of the feelings of people who are deprived of the ETC channel on the petitioner's platform.

Z. That the inaction on the part of the respondent Authority contrary to the letter and spirit and mandate of Interconnection regulations dated 10.12.04 which h

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enabled respondent no. 3 to do indirectly what it cannot do directly.

AA. That the essence of regulation is to ensure availability of popular channels at a reasonable price. The petitioner states that the touchstone for deciding these issues should be the overwhelming public interest involved which tilts the matter in favour of the petitioners viewers and subscribers.

BB. The petitioner states that this Hon'ble Court has powers under Articles 226 and 227 of the Constitution of India to pass appropriate orders in public interest and to direct the respondent Authority, which is a subordinate body, to act in accordance with the mandate of the TRAI Act, 1997, the statute under which it was created.

CC. That various reports have appeared in the newspapers which show the clear resentment brewing among the Sikh population who have flooded the respondent no. 4 with complaints. The petitioner states that in an article which appeared in the Hindustan Times on 25th Aug. 07, it is said the spokesperson for the SGPC has been quoted as saying, the ETC Punjabi Channel is accountable to telecast 'Kirtan' on each satellite network and if it fails to do so its contract can be cancelled. Thus emergent orders are required to ensure that this channel is available on all networks/platforms.

DD. That while the petitioner's platform offers 100% addressability as against the cable platform where the declaration is only 10 to 15%, whereas the rate of DTH is only

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half the cable rate. However the costs are five times compared to analogue cable which acts as a barrier. This affects the petitioner's right to do business under Art. 19(1) (g).

EE. That the unreasonable restrictions imposed on the DTH service provider, as a result of which it cannot offer popular content and due to the absence of DTH content pricing, have an impact on the petitioner's investments in the DTH service and in growing its business which amounts to a violation of Article 19(1) (g).

FF. That the inaction of the respondent Authority in coming out with appropriate Regulations/content pricing has the potential to lead the DTH industry to economic unviability on the other hand it may perpetrate the vertical monopoly enjoyed by Respondent 3. This will have a direct bearing on the petitioner's right to do business under Article 19(1)(g) (Ref. AIR 1957 SC 220).

GG. That the abuse of the vertical monopoly enjoyed by respondent-3 coupled with regulatory inaction have a direct bearing on the petitioner's business and will lead to churning of its subscribers. This amounts to infringement of the petitioner's rights under Article 19(1) (g).

11. The petitioner states that the cause of action in the present case has arisen on account of regulatory inaction and lacuna and the failure of the Regulator to fix DTH content tariffs and to ensure level playing field conditions. In addition the denial of content

Respondent- 2 & 3 to the petitioner, due to the regulatory inaction / lacuna, on account of Respondent 1 which the ETC Punjabi channel cannot be seen/is not available on its platform, has also given cause of action to the petitioner which is subsisting as on date.

12. It is submitted that since the TRAI has not complied with/disregarded the advice rendered by the TDSAT (which is the appellate Tribunal under the TRAI Act) and refused to regulate the content pricing for DTH platform, the Petitioner has not any other alternative equally efficacious remedy but to approach this Hon'ble Court for the relief prayed in this petition.
13. That the petitioners have been left with no other statutory remedy even by way of an appeal or revision except to invoke the extra-ordinary writ jurisdiction of this Hon'ble Court under Articles 226/227 of the Constitution of India against the order.
14. That the petitioners have not filed any other such or similar writ petition earlier in this Hon'ble Court or in the Hon'ble Supreme Court of India.
15. In these facts and circumstances the petitioner has no other ~~alternative or efficacious~~ remedy and is approaching this Hon'ble Court and prays that this Hon'ble Court may be pleased to grant the following reliefs:

Prayer:

- a) pass a writ, order or direction in the nature of mandamus to the respondent Authority to forthwith discharge its obligations under the TRAI Act to ensure

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level playing field conditions including fixing content
tariffs for DTH ;


- b) pass a writ, order or direction to the respondent-1
Authority to ensure that similarly placed systems,
namely CAS and DTH are treated equally and viewers
and subscribers of these systems/platforms are not
denied popular content , due to anti competitive
practices or otherwise ;
- c) pass a writ, order or direction to declare that viewers
and subscribers have the right under Article 19(1)(a)
to popular content on the DTH platform;
- d) direct the respondents no. 2 and 3 to make available
/offer popular content of the ETC Punjabi channel on
the petitioner's DTH platform; and
- e) pass any other or further order as deemed fit and
proper in the facts and circumstances of the case.

Interim prayer:

- a) Pending any regulatory decision or adjudication of
this petition, direct the respondents to ensure that
popular content, particularly ETC Punjabi Channel is
available to viewers and subscribers on the
petitioner's DTH platform on the same basis as it was
made available to Doordarshan DTH or "Free To Air"
basis , as is done in case of cable / CAS platforms ;
and
- b) Pass any other or further order as deemed fit and
proper in the facts and circumstances of the case.
- c) Dispense with the filing of certified copies o
Annexures.

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d) Costs of the writ petition may kindly be awarded in
favour of the petitioner. *

CHANDIGARH


Petitioner No. 1


Petitioner No. 2

Dated: 05.10.07

THROUGH COUNSEL

(Akshay Bhan) (Vaneet Soni)


ADVOCATES

COUNSEL FOR THE PETITIONER

VERIFICATION:-

Verified that the contents of paras 1 to 7 and para No. 9 to 15
of the above writ petition are true and correct to the best of my
knowledge. The contents of para no. 8 of the above writ petition are
believed to be true and correct being made on advice of the counsel.
No part of it is false and nothing has been kept concealed therefrom.

CHANDIGARH


Petitioner No. 1


Petitioner No. 2

Dated: 05.10.07

**IN THE HIGH COURT OF PUNJAB & HARYANA AT
CHANDIGARH**

CWP No. 16097 of 2007

Date of decision: August 21, 2008

Tata Sky and another

--- Petitioners

Versus

Telecom Regulatory Authority of India and others

---- Respondents

**CORAM: Hon'ble Mr. Justice Ashutosh Mohunta
Hon'ble Mr. Justice Rajan Gupta**

Present: Mr. Gopal Jain, Advocate, with
Mr. Akshay Bhan, Advocate,
for the petitioners.

Mr. Anil Rathee, Advocate, for
respondent No.1.

Mr. Ashok Aggarwal, Sr. Advocate, with
Mr. Manish Jain, Advocate, for
respondents No. 2 & 3.

Mr. PS Thiara, Advocate, for
respondent No. 4.

Ashutosh Mohunta, J.

This Court vide order dated March 11, 2008 directed the petitioners to move an application with regard to price fixation before the Telecom Regulatory Authority of India (for short “the TRAI”) and the same was to be decided within a period of eight weeks.

Counsel for the petitioners submits that period of 8 weeks as granted by this Court has already expired, but no order has been passed by the TRAI.

Mr. Rathee, counsel for the TRAI states that the representation of the petitioners has been decided vide order dated May 12, 2008 and, therefore, no further orders are required to be passed.

In reply to this submission, Mr. Jain learned counsel for the petitioners submits that the order dated May 12, 2008 was merely rejection of the representation of the petitioners and not an order regarding fixing of price within the meaning of Section 11(2) of the TRAI Act, 1997 with regard to the price of the DTH Industry.

In this view of the matter, we direct the petitioners to file fresh comprehensive representation before the TRAI within ten days from today and an appropriate order, as envisaged under Section 11(2) of the TRAI Act shall be passed by the competent authority within a period of six weeks thereafter. Before passing the said order, the competent authority shall afford an opportunity of hearing the petitioners and all other affected parties.

The writ petition stands disposed of accordingly.

Copy of the order be given dasti under signatures of Court Secretary.

[Ashutosh Mohunta]
Judge

[Rajan Gupta]
Judge

August 21, 2008
'ask'

CM No. 18017 of 2008

in

IN THE HIGH COURT OF PUNJAB & HARYANA AT

Date of order : December 9, 2008

Tata Sky & another --- Petitioners

Versus

Telecom Regulatory Authority of India & others ----- Respondents

**CORAM: Hon'ble Mr. Justice Ashutosh Mohunta
Hon'ble Mr. Justice Rajan Gupta**

Present: Mr. A.K.Chopra, Sr. Advocate, with
Mr. Gopal Jain, Ms. Rupa Pathania &
Mr. Akshay Bhan, Advocates, for the petitioners.

Mr. Anil Rathee, Advocate, with
Mr. Vikas Mehta, Advocate, for
respondent No.1.

Mr. Manish Jain, Advocate, for respondents No.2 & 3.

Ashutosh Mohunta, J (Oral).

This order shall be read in conjunction with the order dated August 21, 2008.

The petitioners have filed this application for clarification of the order dated August 21, 2008.

Counsel for the petitioners submits that while directing the petitioners to file a comprehensive representation before the Telecom Regulatory Authority of India (TRAI) within ten days from the date of passing of the order, this Court did not mention that an

CM No. 18017 of 2008

in
CWP No. 16097 of 2007

appropriate tariff order on DTH content price, as envisaged under Section 11(2) of the TRAI Act, be passed by the competent authority. The petitioners pray that the words "Tariff order on DTH content price" be added in the order dated August 21, 2008.

Counsel for the petitioners admits that despite specific directions passed by this Court for filing a comprehensive representation before the TRAI, no such representation has been filed by them till date.

Mr. Rathee appearing for the respondents, however, submits that all the questions raised in the writ petition as well as in the representation, which may be filed by the petitioners, would be considered by the respondents.

The aforementioned statement has been made on the basis of instructions from Sh. Rakesh Gupta, Joint Adviser, TRAI, who is present in Court.

In view of the above, we dispose of the present application with a direction that in case the petitioners file a comprehensive representation before the TRAI within two weeks from today, the respondents shall decide the same within a period of six weeks thereafter and while deciding the representation, all aspects as raised in the present writ petition as also in the representation would be considered by the competent authority.

Copy of the order be given dasti.

[Ashutosh Mohunta]
Judge

[Rajan Gupta]
Judge

December 9, 2008
'ask'



December 23rd, 2008

Telecom Regulatory Authority of India
Mahanagar Doorsanchar Bhawan
Jawahar Lal Nehru Marg
New Delhi – 110 002

Re: Representation for fixing DTH Content Tariffs

Ref: **Order dated 9 December, 2008 in C M No. 18017 of 2008 in CWP No. 16097 of 2007 titled Tata Sky Limited & Anr. Vs. TRAI & Ors.**

Dear Sir,

1. We write with reference to the urgent need to regulate content tariffs for DTH platform to ensure orderly and healthy growth of the sector and facilitate competition in the broadcasting industry. Specific reference is made herewith to the order dated 9 December, 2008 in CM No. 18017 of 2008 in CWP No. 16097 of 2007 (copy attached for ready reference).
2. In view of the direction of the Hon'ble High Court, please find enclosed our representation dated March 18, 2008 (hereinafter the 'Said Representation') seeking urgent regulatory intervention to fix content tariffs for DTH. We reiterate our submissions in the Said Representation and the same may be treated as a fresh representation within the context of the above mention order.
3. We shall look forward to your decision after your consideration of all aspects / issues raised in the Said Representation as well as in our CWP No 16097 of 2007 in terms of the above mentioned order.

Thanking you,

Yours sincerely,
For Tata Sky Limited

Anshuman Sharma
Chief Legal & Regulatory Affairs Officer

Encl: As Above

Tata Sky Ltd.
Broadcast Centre, Chhattarpur Mandi Road
PO Mehrauli, New Delhi-110 030, India
Tel : +91 11 6616 3000, Fax : +91 11 6616 3030

End.B



March 18, 2008

Telecom Regulatory Authority of India
Mahanagar Doorsanchar Bhawan
Jawahar Lal Nehru Marg
New Delhi – 110 002

Kind Attention: The Principal Advisor (B&CS)

Re: Representation for fixing DTH Content Tariffs

Dear Sir,

1. We write with reference to the urgent need to regulate tariffs for DTH platform for carriage of the broadcast content to ensure orderly and healthy growth of the sector and facilitate competition in the broadcasting industry. We have made several representations to the Authority vide letters dated 13.11.06, 11.6.07, 1.8.07, and the recent representation dated 7th March, 2008 (copies attached). Specific reference is made herewith to the order dated 11.3.08 **(copy attached for ready reference)** passed in **Writ Petition No. 16097/07 pending before the Hon'ble Punjab and Haryana High Court**. The Honorable High Court, has also noted that the A-La-Carte Rates submitted by the broadcasters under the new interconnect regulations are exorbitant.
2. In view of the direction of the Hon'ble High Court, we are making this representation to seek urgent regulatory intervention to fix content tariffs for DTH in line with tariff fixation for similar addressable systems like CAS. This will create level playing field conditions between the DTH platform and content.



owners/broadcasters and will protect both the DTH platform and its viewers and subscribers.

Background

3. DTH platforms work on pay television model, and owing to their geographical reach and mass scale services, has the capacity and the capability to serve areas that are even uneconomic for traditional analogue cable to serve. We submit that if the tariff regulation is made non-discriminatory then RURAL MARKETS will be served better and an addressable TV service can be made available to the common man in line with the impetus given by enlightened Government policy. You will also appreciate the Addressable platforms like DTH , will be the biggest source of revenue for the Government .
4. However, the existing regulatory framework invariably favors the inefficient, fragmented analogue cable services which are impossible to be held accountable, let alone contribute to the exchequer
5. To give effective competition to analogue cable DTH platforms not only need to carry popular channels and provide platform services to a nationwide consumer base, they also need to balance various content segments, which could be catering to different social/ consumer segments. A right balance of channels which reflect the popular choice of the consumers at large determines the success of a DTH-operator. In order to develop the capacity to cater to the divergent demands of consumers, at reasonable affordable prices, a DTH operator requires the following essential_requisites:-
 - Availability of popular content at reasonable prices;
 - Flexibility for DTH operator to package popular content



for mass scale consumption;

- Flexibility to package channels of different broadcasters and maximizing choice to the consumers;

6. In our various representations, we had emphasized that the absence of DTH content tariffs has resulted in denial of popular content to viewers and subscribers of the DTH platform. The live telecast of the Gurbani which is available only on the ETC Punjabi Channel is one such example and is in issue before the Hon'ble Punjab & Haryana High Court.
7. A DTH Platform is expected to receive non-discriminatory access to content provider/channel. However, in view of the infancy of the DTH business in India which is in its nascent stages, mandating access has to be backed/supported by a proper commercial framework. In the absence of fixing DTH content tariffs the broadcaster (who is an upstream monopolist) has fixed unrealistic and arbitrary prices which affects access to content of downstream competitors such as DTH operators/other carriers. In this manner the object and rationale of the Regulations framed by this Hon'ble Authority will be rendered nugatory and would stand defeated. This makes it imperative for this Hon'ble Authority to fix wholesale pricing for the DTH platform.
8. A DTH operator either has to give in to exorbitant prices charged by broadcasters. While the CAS rate is Rs. 2.25, the DTH RIO rate is Rs. 6/- for the ETC Punjabi channel. This is 167% more than the CAS. The perverse pricing has the capacity to deny viewers and subscribers access to popular content, which, in turn, affects the competitiveness of DTH as a delivery platform.



9. The attention of the Authority is also drawn to the RIOs filed by the Broadcasters under "The Telecommunication (Broadcasting And Cable Services) Interconnection (Fourth Amendment) Regulation, 2007". Please find enclosed herewith comparative charts of the ala-carte rates, offered by Sun, Zee Turner and ESPN in their respective RIOs for your perusal. **It is evident the ala-carte prices offered in the RIOs are not only perverse but also substantially higher than the exiting price being offered to the DTH Platforms . The RIOs are also coupled with onerous conditions , which impose further cost burdens and to same extent violative of the current set of Regulations**
10. The availability of same/similar content at different prices on different distribution platforms is a facet of discriminatory pricing which is violative of the mandate of Art. 14 of the Constitution of India. Equals have to be treated equally and cannot be treated unequally. The input cost of content for CAS in a similar addressable platform is Rs. 2.25. The same content is marked up/jacked up for the DTH platform between 100 to 1500 times , As a result, the broadcasters are indulging in monopolistic behaviour and are exploiting 'forbearance' in a manner which deprives the viewer/subscriber of choice, which lies at the heart and soul of the DTH platform. The RIO submitted by the broadcasters in certain cases even exceeds the norm fixed by the Hon'ble TDSAT, that DTH price will be 50% of the cable rate.
11. We further submit that ,Under Regulation 9 of the Direct to Home Broadcasting Services (Standards of Quality for Service Redressal of Grievances) Regulation 2007 a DTH operator is barred from increasing charges for a subscription package offered to a



subscriber or change the charges to the disadvantage of the DTH subscriber for a minimum period of six months from the date of enrolment of the subscriber for such package. The consequence of the RIO would result in higher cost to a viewer/subscriber and put the DTH operator in direct conflict with the DTH quality of standard norms framed by this Hon'ble Authority.

12. We would like to make a further reference to the order of the Honorable High Court of Punjab & Haryana , which has, recorded that the observation of the **TDSAT vide its judgment dated 31.3.07 in the matter of Tata Sky Vs Zee Turner**
13. In this context we wish to submit that even while both CAS and DTH are similar mode of carriage as their fundamental attributes are similar, the Authority has only regulated content tariff for CAS. Both CAS and DTH are similar addressable platforms, is evident from
 - o Set top Box with Conditional access system
 - o Delivery of signals in digital format
 - o Back end subscriber management & billing systems
 - o Completely addressable platform
 - o Capacity to offer channels a-la-carte
 - o High Investment requirements.
14. We submit that Price regulation for the CAS platform has given its consumers flexibility and has empowered them to make an informed choice in regards to the content selection. However the absence of similar Tariff regulation for DTH platform has given an



opportunity to the Broadcasters to indulge in hostile discrimination and unreasonable market distortions.

15. The absence of wholesale content tariff regulation for the DTH platform is creating a significant entry barrier for DTH and will perpetuate the exploitative monopoly of entrenched interests by :-

- (a) Creating pricing and packaging disadvantages vis-à-vis CAS operators in the minds of the consumers.
- (b) Hostile discrimination and unreasonable market distortions against DTH, subjecting the consumers to incomparable offerings and unreasonable fluctuations across platforms thereby defeating consumer choice.
- (c) Imposing vagaries of un-addressable system (where the declaration levels range between 10% to 20%) on DTH (which is fully addressable (100%)).

16. The unfair and discriminatory treatment meted out to the DTH platform has been a matter of grave concern which requires to be addressed/remedied. The Authority is also kindly aware that DTH is also subjected to additional taxation and substantial License Fee , which are not payable by Cable Platforms.

17. This will ensure that viewers and subscribers of the DTH platform are not denied popular content and level playing field conditions are maintained between the DTH platform and other platforms in line with the regulatory mandate of non-discriminatory treatment/equal access to content. The Supreme Court in *Cellular Operator Association Of India v. UOI* reported in (2003) 3 SCC 186 has held



that there must be a level playing field amongst all addressable platforms so that competition can be encouraged in the best interests of the consumers at large. In the case of *Reliance Energy Ltd. v. Maharashtra State Road Development Corporation*, reported in (2007) 8 SCC 1 the Hon'ble Supreme Court held that the level playing field is an important doctrine embodied in Art. 19(1)(g) since it provides space within which equally placed competitors are allowed to bid for government contracts so as to sub-serve the larger public interest – Decisions or acts of the State which result in unequal and discriminatory treatment, would violate this doctrine.

Requests

18. The principles embodied in these judgments may be followed by the Authority in both letter and spirit. **In the light of the above the Authority may kindly consider the following options:**
- i) **The content price for DTH should be comparable and equivalent to the CAS rate for the same content. Content should be offered at Rs. 2.25 on the DTH platform at par with the CAS for similar popular content.**
 - ii) **The TDSAT in its judgment dated 14th July, 06 had fixed an adhoc rate for DTH at 50% of the cable rate pending tariff fixation by the Authority. However, as there is gross under-declaration to the extent of almost 80% on the cable platform, there is hundred percent addressability on the DTH platform. The DTH a la carte rate should not be more than 20% of the prevailing "cable a-la-carte rate", subject to a overall ceiling .**



19. The Authority has powers under S. 13 to give appropriate directions which it has done in the past to ensure that the terms and conditions in the RIO are non-discriminatory. The Authority has also from time to time given interim directions. Applying the same principle the Authority can forthwith fix the tariff in the light of submissions made above on an interim basis.
20. We would like to reiterate that incomparable offerings, unreasonable price fluctuations across similar platforms will take away flexibility from the DTH platform, though it benefits viewers/consumers. It is noteworthy to state that the Indian market is mature – there is strong competition at the distribution level that is at the level of content distribution. However, at the level of content ownership it is inherently monopolistic. The fate of almost eight million DTH viewers and subscribers hinges on breaking this monopoly and stranglehold and in providing a pricing and commercial framework which will redress this imbalance.
21. As the DTH platform is making progress towards creating a competitive environment, it should not be put at a competitive disadvantage. Fixing of DTH content tariffs is therefore vital and necessary to safeguard the interests of the DTH platform and its viewers and subscribers.
22. The Authority has itself, in its consultation paper dated March, 2007, recognized that as far as DTH tariffs are concerned, it will undertake a price fixation exercise at some point of time. **A year has passed and there is now urgent need for regulatory intervention especially when an analysis of the RIOs submitted by the broadcasters clearly demonstrates the**



**deployment and use of onerous and unjustifiable conditions
and exorbitant pricing.**

- 23.** We also request the Authority may kindly afford us, an opportunity
of hearing, to make oral submissions.

Thanking you,

Yours sincerely,
For Tata Sky Limited

A handwritten signature in dark ink, appearing to read "Anshuman Sharma".

Anshuman Sharma
Chief Legal & Regulatory Affairs Officer



भारतीय दूरसंचार विनियामक प्राधिकरण
महानगर दूरसंचार भवन, जवाहर लाल नेहरू मार्ग,
(पुराना मिनटो रोड), नई दिल्ली-110002

TELECOM REGULATORY AUTHORITY OF INDIA
Mahanager Doorsanchar Bhawan, Jawahar Lal-Nehru Marg,
(Old Minto Road), New Delhi-110002
Fax : 91-11-23213294

May 12, 2008

F.No 11-27/2007-B&CS

To,

M/s Tata Sky Ltd.,
3rd Floor, Bombay Dyeing A.O. Building,
Pandurang Budhkar Marg,
Worli,
Mumbai 400 025

Sub: Representation submitted by M/s Tata Sky Limited in pursuance to the directions of the Hon'ble Punjab and Haryana High Court dated March 11, 2008

Sir,

Please refer to your representation dated March 18, 2008, submitted in pursuance to the Directions of the Hon'ble Punjab and Haryana High Court dated March 11, 2008.

2. Before coming to the issue of the consideration of the representation submitted by you as mentioned above it is necessary that the brief background of the case be mentioned. M/s Tata Sky Ltd. have filed a Civil Writ Petition No. 16097 of 2007 in the Hon'ble High Court of Punjab and Haryana at Chandigarh. The case of M/s Tata Sky Ltd. in the Writ Petition, in the main, is that:-

(A) The Telecom Regulatory Authority of India has taken no steps to ensure that Direct to Home (DTH) services are able to coexist with Conditional Access System (CAS)/ Cable and are able to offer effective choice to a consumer/ viewer by not laying down the content pricing for DTH; and
(B) The Telecom Regulatory Authority of India has failed to create a level playing field in the case of DTH and as a result the viewers and subscribers of its DTH platform have been deprived of access to the live telecast of Gurbani from the Harminder Sahib (on the ETC Punjabi Channel).

3. In the writ petition, M/s Tata Sky Ltd. has *inter alia*, made a prayer for issue of a direction by the Hon'ble Punjab and Haryana High Court to the TRAI to intervene and ensure level playing field conditions between the DTH platform and other addressable systems including fixing content tariffs for DTH within a given timeframe not exceeding four weeks.

4. While considering the writ petition of M/s Tata Sky Ltd., the Hon'ble High Court of Punjab and Haryana passed a direction on March 11, 2008 as under:

".....we direct that on an application moved before the TRAI by the petitioners within a week, it shall apply its mind with regard to price fixation as has been indicated above after hearing the parties within a period of eight weeks.....".

5. Pursuant to the Directions of the Hon'ble Punjab and Haryana High Court as mentioned in paragraph 4 above, M/s Tata Sky Ltd. submitted a representation dated March 18, 2008, to the Authority. In paragraph 18 of the Representation dated March 18, 2008, it has been stated as under:

".....18.In the light of the above the Authority may kindly consider the following options:

- (i) The content price for DTH should be comparable and equivalent to the CAS rate for the same content. Content should be offered at Rs. 2.25 on the DTH platform at par with the CAS for similar popular content.
- (ii) The TDSAT in its judgement dated 14th July, 06 had fixed an adhoc rate for DTH at 50% of the cable rate pending tariff fixation by the Authority. However, as there is gross under-declaration to the extent of almost 80% on the cable platform, there is hundred percent addressability on the DTH platform. The DTH a-la-carte rate should not be more than 20% of the prevailing "cable a-la-carte rate", subject to a overall ceiling.....".

6. From the submission, as mentioned in paragraph 5 above, of the M/s Tata Sky Ltd. it is observed that the relief as per the representation dated March 18, 2008 is different from the relief being sought in the writ petition. In the prayers of the writ petition parity with CAS system has been sought whereas in the representation in addition to parity of rates with CAS areas, a-la-carte rates of not more than 20 per cent of the rates prevailing in non-CAS areas has been sought. Therefore, the representation is not in consonance with the Directions of the Hon'ble Punjab and Haryana High Court as a new plea has been raised which is not a part of the writ petition.

7. In the meanwhile, the Reference Interconnect Offers (RIO) published by broadcasters in pursuance to the provisions of the Telecommunication (Broadcasting and Cable Services) Interconnection (Fourth Amendment) Regulation, 2007 (9 of 2007), have been received by the Authority. This was followed by interactive discussions with the broadcasters of pay channels on the issues of rates and packaging of channels being offered by them for Direct To Home Platform. During the course of these discussions with the broadcasters, a general consensus emerged on the composition of bouquets and pricing of a-la-carte channels and bouquets. As per this consensus, the Broadcasters will offer the same bouquets to the DTH operators as are being offered by them for non-CAS cable distribution. In addition, they are free to offer additional bouquets. The rates of bouquets and a-la-carte rates of pay channels so offered to the DTH operators will broadly be in consonance with the TDSAT's judgment dated the 31st March, 2007 in petition no. 189(C) of 2006 and judgment dated 14th July, 2006 in petition no. 136(C) of 2006 wherein the rates were to be fifty per cent of the rates at which these bouquets/ channels are being offered by them for non-CAS cable distribution, i.e., non-addressable platform. All bouquet rates and the a-la-carte rates must also satisfy the provisions of the afore-said Interconnection regulations.

8. To facilitate the implementation of the consensus reached in the interactive discussions, as mentioned in the preceding paragraph, the Authority released two 'Information notes to the Press' (Press Release Nos.38/2008 and 39/2008) on April 18, 2008 and the same were also placed on the website of the Authority. The Press Release number 39, in addition to what has been mentioned about consensus reached during the interactive discussions, as mentioned in paragraph 7 above, stated that, "....The a-la-carte rates and

bouquet rates of pay channels, as reported by the broadcasters for cable TV operations in non-CAS area have also been put up on the website of the Authority today (i.e. on April 18, 2008). It is expected that the above will facilitate and expedite the conclusion of interconnection agreements among the broadcasters and DTH operators....".

9. In pursuance to the Directions of the Hon'ble Punjab and Haryana High Court, the representatives of M/s Tata Sky Ltd. were given an opportunity of being heard. Accordingly, a hearing was held in the Authority on April 22, 2008. The following officials of M/s TATA Sky Ltd. were present during the hearing, namely:-

1. Mr Vikram Kaushik, MD & CEO
2. Mr Anshuman Sharma, Chief Legal & Regulatory Affairs Officer
3. Mr Amit Thukral, Senior Counsel- Regulatory Affairs

10. During the hearing, held on April 22, 2008, the representatives of M/s Tata Sky Ltd. reiterated the submissions already made by them in the representation dated March 18, 2008. It was submitted by the representatives of M/s Tata Sky Ltd. that the DTH is still in its infancy and the last mile cable operator enjoys a virtual monopoly. It was also submitted that the wholesale content pricing should take into account the alleged level of under declaration of upto 80 per cent in the non-CAS areas and that there is a failure of market forces. It was stated by the representatives of M/s Tata Sky Ltd. that the Hon'ble TDSAT judgement regarding 50 per cent of non-CAS pricing was an adhoc interim measure. It was also stated that DTH is a new revenue stream for the broadcasters. It was submitted that while cable networks charge much higher carriage fee for much smaller subscriber base, M/s Tata Sky Ltd. are charging, nowadays, around Rs.3.5 Crore for new channels and that every month 3 to 5 new channels are carried by them. However, the maximum capacity of channels that can be carried is 150 channels. They said that the carriage fee is a very small fraction of revenues of M/s Tata Sky Ltd, and that the content cost is about 60%. The representatives of M/s Tata Sky Ltd. submitted that they are not very clear about the contents of Press Release numbers 38 and 39 dated April 18, 2008 of the Authority and that a tariff order be issued and that the wholesale prices of channels should be about 20-25% of Non-CAS cable charges.

11. The Authority carefully considered the contents of the representation dated March 18, 2008 of M/s Tata Sky Ltd. and the oral submissions made by the representatives of M/s Tata Sky Ltd. during the hearing held on April 22, 2008.

11.1 It has been noted that M/s Tata Sky Ltd. are seeking price parity with CAS system on the ground that just as CAS is an addressable system so is the DTH. The contention of M/s Tata Sky Ltd. is not correct. While, DTH and CAS are similar as far as both being addressable platforms is concerned, they are not 'similar' in certain other aspects because in CAS, the end consumer gets the signals through intermediaries, i.e., either from a Multi System Operator (MSO) or a local cable operator, whereas in DTH the signals reach the end consumer directly from the DTH operator through satellite.

11.2 It is also noted that on the one hand, M/s Tata Sky Ltd. are seeking price parity with CAS as stated in paragraph 18 (i) of the instant representation, on the other hand in paragraph 18(ii) of the representation, the applicant is comparing DTH platform with non-CAS cable regime and is seeking a-la-carte rate of not more than 20% of non-CAS rates. It appears that M/s Tata Sky Ltd. are not clear as to whether they seek parity with CAS or non-CAS. It is to be noted that all the three modes (CAS, Non-CAS and DTH) of receiving TV signals are dissimilar from each other in certain aspects. It is for this reason only that Clause 3.5 of the Principal Regulations, as amended by the Telecommunication (Broadcasting and Cable Services) Interconnection (Third Amendment) Regulation, 2006" (10 of 2006), clarifies that,

" 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-à-vis distributors of TV channels using non addressable systems. "

12. *It also needs to be made clear that even in CAS and non-CAS areas tariff or prices for cable services have not been fixed. Only a general, overall ceiling for the charges has been specified by the Authority. Within the general overall ceiling, service providers are free to charge the tariff they consider appropriate.*

13. 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 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 the end consumer for such channels is to be viewed in the context of the competitive environment prevalent in the market, the industry structure, the present levels of penetration of the service, future potential for penetration in 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.

14. Further, as brought out in paragraphs 7 and 8 above, the Authority has made sincere efforts to address the grievances of M/s Tata Sky Ltd. and, indeed, the concern of M/s Tata Sky Ltd. relating to regulating the manner and the wholesale prices at which broadcasters will offer their channels has been addressed in full by the actions of the Authority as mentioned in paragraphs 7 and 8 above. In view of the rates and packaging of channels as indicated in the press release numbers 38 and 39 dated April 18, 2008, of the Authority, the rates mentioned in paragraphs 8 and 10 of the representation of M/s Tata Sky Ltd. have no relevance.

15. It has also been noted that the issues raised in paragraph 9 of the representation are basically in the nature of dispute between M/s Tata Sky Ltd. and the broadcaster of the ETC Punjabi channel and, therefore, in terms of the specific provisions of the Telecom Regulatory Authority of India Act, 1997, such disputes are amenable to the exclusive jurisdiction of the Hon'ble TDSAT.

16. While dealing with the issues raised in the representation, it is seen that in paragraph 19 of the representation, it has been stated that, ".... Applying the same principle the Authority can forthwith fix the tariff in the light of submissions made above on an interim basis...". In this context it needs to be clarified that under the provisions of the TRAI Act, 1997, the Authority has been conferred powers, *inter alia*, to frame regulations to carry out the purposes of the Act. The regulations made under section 36 of the TRAI Act, 1997 are subordinate legislation and are required to be laid before each house of Parliament and the Parliament can, *inter alia*, modify such regulations and the regulation shall thereafter have effect only in such modified form or be of no effect, as the case may be. Similarly, sub-section (2) of section 11 of the said Act confers powers upon the Authority to notify the rates at which the telecommunication services within India and outside India are to be provided. Both these functions, namely that of making regulations to carry out the purposes of Act and

legislation) of the Authority delegated by an Act enacted by Parliament. 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 executive authority cannot be asked to enact a law which it has been empowered to do under the delegated legislative authority, as per a number of judgments of the Hon'ble Supreme Court of India [State of J&K Vs. AR Zakki (AIR 1992 SC 1546, Narinder Chand Hem Raj Vs. Lt. Governor, Administrator, U.T.H.P. (AIR 1971 SC 2399), etc.].

17. In view of the position as brought out in preceding paragraphs, particularly, as mentioned in paragraphs 7, 8 and 14 above, the Authority is of the view that the representation dated March 18, 2008 submitted by M/s Tata Sky Ltd. is devoid of merit and requires no action by the Authority on the requests contained in it. Thus, the representation is disposed of in terms of the Directions dated March 11, 2008, of the Hon'ble Punjab and Haryana High Court.

18. This issues with the approval of the Authority.


(R.K. Arnold)
Secretary