ACM LEGAL
ADVOCATES

To Whomsoever It May Concern

Dear Sir/Ma'am,

For and on behalf and under instructions from our Client, MSM Discovery Private Limited, and in light of the order dated 17.09.2014 passed by The Hon'ble Supreme Court in the case of *TELECOM REGULATORY AUTHORITY OF INDIA* vs. *SET DISCOVERY P. LTD & ORS.*, C.A. No. 829-833 of 2009, we are hereby submitting the present Representation. Please find the same enclosed herewith for your kind perusal, reference and record.

Shalini Sati Prasad
Authorized Signatory

ACM LEGAL
Advocates

Enclosed: 1. Representation on behalf of MSM Discovery Private Limited

2. Order dated 17.09.2014 passed by the Hon'ble Supreme Court in the matter of Telecom Regulatory Authority of India Vs. Set Discovery Pvt Ltd. & Ors. Ltd, C.A. No. 829- 833 of 2009.

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TheOneAlliance

MSM Discovery

(An ISO 9001:2008 Certified Company)

By Hand Delivery/ Electronic Mail

30.09.2014

Representation on behalf of MSM Discovery Private Limited to Telecom Regulatory Authority of India's (TRAI) Report dated 21st July, 2010 on Tariff issues related to Cable TV services in Non- CAS areas, submitted to the Hon'ble Supreme Court of India in pursuance of its order dated 13th May, 2009 passed in Civil Appeal Nos. 829-833 of 2009, and in pursuance of order dated 17th September, 2014 of the Hon'ble Supreme Court of India in Civil Appeal Nos. 829-833 of 2009.

Kind Attention: The Advisor (B & CS)
Telecom Regulatory Authority of India,
Mahanagar Doorsanchar Bhawan,
Jawaharlal Nehru Marg,
Old Minto Road,
New Delhi- 110 002

We welcome TRAI's (the Authority) initiative on submitting a detailed report on directions of the Hon'ble Supreme Court of India, relating to the formulation of a new tariff Order applicable to cable TV services in Non- addressable areas to replace the Telecommunications (Broadcasting and Cable) Services (Second) Tariff (Eighth Amendment) Order.

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Our present representation relates to the proposed tariff Order namely "The Telecommunication (Broadcasting and Cable) Services (Fifth) (Non- Addressable Systems) Tariff Order", hereinafter referred as 'the proposed Tariff Order', as presented before the Supreme Court of India alongwith TRAI's Report dated 21st July, 2010 **in Civil Appeal Nos. 829- 833 of 2009**.

The representation/ suggestion (s) as stated herein, are being made on behalf of Multi Screen Media Private Limited (referred to as "Broadcaster") who has appointed us i.e. MSM Discovery Private Limited (MSMD) as its authorized sole and exclusive distribution agent, with effect from 1st April, 2014, to inter alia distribute its television channels, across the territory of India ("Territory"), to various distribution platforms in accordance with the TRAI Regulations.

At the outset, we wish to emphasize that the report was promulgated in the year 2010, while currently, we are in the last quarter of 2014 and the cable and satellite industry has remarkably changed in the following manner:

I. **Implementation of Digital Addressable Cable Systems in all four metros i.e. Delhi, Mumbai, Kolkata ,Chennai and 38 other cities of India -** Impact of this transformation is that the issue of non - addressability in respect of these 42 cities has been addressed to a great extent, which was unthinkable in Analogue system.

II. **Introduction of several new channels:** There are currently more than 800 channels which have been issued 'uplinking' and 'down-linking' licenses by the Ministry of Information and Broadcasting. Thus it demonstrates that that the industry has become more competitive and the stage has come when pricing of channels can be left to be decided by the market forces.

III. **Multifold increase in penetration of various distribution platforms like DTH, IPTV, HITS, etc.:** In this span of 4 years the other distribution platforms namely, HITS, DTH, IPTV etc. have grown manifold and are now available throughout the country. The Government broadcaster Prasar Bharti has also launched

its DD Direct service which is available even in remote areas. This progress ensures that no single player is in a dominant position so as to be able to increase prices arbitrarily.

ISSUE-WISE REPRESENTATION:

a) **WHOLESALE TARIFF:**

We submit and reiterate our view that wholesale tariff should not be regulated and there should be complete forbearance from the Authority. We firmly believe that the Broadcasting sector should be allowed to price its content freely as sufficient and adequate market forces exist to ensure fair pricing and there is no need to regulate the prices. We reiterate that there exists adequate competition in the market. TRAI, in its Report dated 21st July, 2010, has admitted that, "*The last five years have changed the dynamics of the market significantly. There are around 200 Broadcasters, 24 Aggregators, 550 television channels, 6,000 Multi System Operators (MSOs), up to 60,000 Local Cable Operators (LCOs), 7 DTH/ satellite TV Operators and several IPTV service providers*".

We believe that while the report dated 21st July, 2010 is a comprehensive study on the issue of wholesale tariff fixation, it is not conclusive on certain important issues, which will be discussed in detail in our representation further. The report purports that *"the Authority is of the view that, it is premature to allow forbearance at the wholesale level. The report suggests that the results of cost based model are of limited reliability and applicability due to the lack of comprehensive data from the industry and nature of industry."*

We further submit that the situation in the last five years has become much more competitive and favourable for market forces to operate making it

redundant to regulate pricing at all levels. There are now more than 800 television channels, hundreds of MSOs, thousands of LCOs, seven DTH operators, three HITS operators. Further with digitalisation every MSO can now offer broadband services including IPTV. We submit that the presence of a plethora of players in the market clearly indicate that there exists enough competition in the market and no monopolistic practices or unfair trade practices can be practiced in such a scenario. Moreover, now, five years have passed since the report and the publication of the proposed Tariff Order dated 21st July, 2010 and as per the data available on the website of Ministry of Information and Broadcasting (hereinafter referred as 'M.I.B.') as on 31.08.2014 there are about 810 channels of different broadcasters licensed by the M.I.B. Therefore, the statement that there is not enough competition in the market does not survive and hold good in the year 2014.

Further, vide its notification dated 22nd March, 2013 on Standards of Quality of Service (Duration of Advertisements in Television Channels) (Amendment) Regulations, 2013 the TRAI has placed a cap on the amount of advertisements that may be carried at not exceeding twelve minutes in a clock hour. Resultantly, the revenue earning of Broadcasters have gone down by manifolds as on one hand there is a price ceiling on channels and on the other hand there is also a limit on advertisement time slot. The policy of price fixation would only further bleed Broadcasters.

Thus, TRAI should let the market forces decide the pricing of channels and there should be complete forbearance from any type of regulation on channel pricing.

TRAI's role is that of a facilitator for the industry, it should ideally place reliance on issues like (but not limited to) competitive practices, number of players in the market, Quality of Service, etc., limiting the amount of regulation exercised to let the market forces shape the price discovery regime.

Also, keeping in mind that Broadcasting and Cable industry is not an essential commodity, we believe that the same needs no regulatory framework for tariff fixation.

It is respectfully submitted that the concept of genre based channel pricing by the Authority has little rationale or logic. While issuing licences to channels, the Ministry of Information and Broadcasting recognises only two categories: News and Current Affairs and "Non news and current affairs". TRAI in its wisdom has chosen to differentiate the non-news category into several genres and come out with price caps based on genre. This method of price fixation has no parallel in any other Country. A distinction, for example is made between a "movie channel" and a "General Entertainment Channel" with different price caps. But a GEC often premieres movies and Movie Channels often premier shows other than movies. Movie channels like MAX and Star Gold also show live sports which is another genre with a different price cap. There seems no rationale behind this genere based pricing and it is completely arbitrary and unreasonable. The mechanism adopted by the Authority to arrive at genre based pricing of channels must be disclosed to the broadcasters and an opportunity be given to them to represent and present their stand before the Autgority.

In fact, going by the intent of the latest judgment of the Hon'ble Telecom Disputes Settlement & Appellate Tribunal dated 25th September, 2014 in Petition No. 47(C) of 2014 titled as Star Sports India Pvt Ltd, Mumbai Vs. Hathway Cable and Datacom Ltd (copy enclosed herewith), it can be perceived that the same in some manner supports the concept of forbearance between the parties and not over-regulation.. By forbearance, the Authority seems to have a misplaced view that this would encourage Broadcasters to increase prices of popular channels. But the Authority cannot be oblivious of the fact that in a competitive market which means absence of monopoly, if one popular channel increases its price arbitrarily there will be resistance from subscribers. Thus,

the play of market forces will ensure that the equilibrium would be maintained as far as the chargeability is concerned. It is submitted that now the major issue of non- availability of data on content costs incurred by Broadcasters stands addressed as sufficient data is already available in that regard.

b) <u>PRICE FIXATION AT RETAIL LEVEL:</u>

We submit that any price fixation even at retail level affects not only the consumers but the entire distribution chain i.e. Cable operators, MSO/ LCOs and Broadcasters.

The preamble to the TRAI Act, 1997 reads as follows:

"To provide for the establishment of Telecom Regulatory Authority of India and the Telecom Dispute Settlement and Appellate Tribunal to regulate the telecommunication services, adjudicate disputes, dispose of appeals ***and to protect the interests of service providers*** *and consumers of the telecom sector* ***to promote and ensure orderly growth of the telecom sector*** *and for matters connected therewith or incidental thereto"*

The function of the Authority as a regulator is to ensure that in the process of development the interests of all concerned in the value chain are considered and an orderly growth is assured.

It is respectfully submitted that any ceiling even at a retail level is going to affect all the stake holders. The MSOs under the guise of regulated retail pricing would either further renegotiate with the Broadcasters or would fill up their bandwith with lesser priced channels. Resultantly, Broadcasters would have to incur more expenses on carriage and placement. Therefore, while issuing any such Order the Authority must take into consideration the area wise monopoly enjoyed by a cable operator.

c) **INFLATION RATE:**

We wish to point out that the issue of Inflation Rate has to be considered only if the Authority finds that the Wholesale rate still needs to be regulated by the Authority. If the Authority leaves the wholesale rate entirely to forbearance, then the issue of inflation rate need not be discussed.

Even otherwise, the Authority, vide its Tariff Order promulgated on 31st March, 2014 has already allowed an increase of 15% with effect from 1st April, 2014 and another 12.5% with effect from 1st January, 2015. The said tariff order is operative.

As per our representation, we believe that there should be complete forbearance in tariff regulation.

d) **CARRIAGE AND PLACEMENT FEES:**

We submit that TRAI is well aware that the Carriage and Placement Fee is charged indiscriminately by the MSO from the Broadcasters to carry and place their channels. This practice has dramatically increased the price of distribution of channels, which in turn has negatively impacted the financial health of the Broadcasters further resulting in worsening contents, and questioning the very survival of the Broadcasting industry. If the situation continues, there would be fewer broadcasters in the market, leading to disruption of free and fair competition. The Report dated 21st July, 2010 extensively discusses the issue, but all in vain, as the proposed Tariff Order has refrained from addressing the rampant issue of carriage and placement fee, which affects the Broadcasters to a large extent. In fact, while subscription fee is completely regulated, leaving placement and carriage completely unregulated leads to unhealthy and unfair practices by the MSOs by their continued arm twisting of the Broadcasters at

the ground level. This also affects the renewability and negotiating power of the Broadcaster on ground.

Another aspect that needs the Authority's immediate attention is the fact that the higher cost of placement and carriage increases the cost of content, and that while on every aspect related to the Broadcaster, the Broadcaster is regulated, the MSOs and LCOs carry a completely unregulated business.

The carriage capacity of the analogue system is limited to 80- 90 channels. The present number of channels in the market is more than 800. This demand supply mismatch creates an unfavourable tilt in favour of the MSOs/ LCOs as the Broadcasters are left at the mercy of the MSO/ LCOs who arbitrarily fix rates to carry and place channels in their network, which is detrimental to the interests of other stakeholders.

The Report dated 21st July, 2010 states the following:

"The Authority is of the view that all Carriage and Placement Fee transactions should be a part of inter connection agreements between the Broadcasters and MSO/ LCOs in the case of pay channels, or separately formalised as Carriage and Placement Fee Agreements in the case of FTA channels, and these should be filed with the TRAI. Such filings of Carriage and Placement Fees will enable the Authority to monitor Carriage and Placement Fee transactions regularly and regulate the same through interventions where considered necessary."

In pursuance of the above-mentioned, no such clause has been inserted in the proposed Tariff Order and the Authority has blatantly ignored to address the present issue.

We submit that if the Regulator considers it necessary to regulate tariff of channels, the Carriage and Placement Fee must also be brought under a regulatory framework

e) **REQUIREMENTS TO BE FULFILLED ONLY BY THE ROADCASTERS:**

We submit that the proposed Tariff Order is apparently lopsided as it prescribes various regulatory measures to be followed by the Broadcasters, *only*, but no such regulatory mandate is prescribed for any other fraction of the supply chain.

While going through the proposed Tariff Order in a cursory manner, we observed that the MSO/LCOs have been mandated with no reporting requirement to the Authority. The MSO/ LCOs have been prescribed no formats to adhere to and the Authority need not receive any input and/ or report from them.

On the other hand, ***Clause 5*** of the proposed Tariff Order states that - ***"Broadcasters to specify rates for channels and bouquets within specified ceilings"*** and ***Clause 8*** of the proposed Tariff Order states the ***"Reporting Requirement".*** Both of the comprehensive Clauses specifically deal with the functioning and reporting requirements of the Broadcasters. In pursuance of Clause 5, the Broadcasters have to specify the rates of their channels, both a la carte and bouquet. The price specified cannot be increased for a whole year. The notifications of new channels/ FTA converted into Pay channels/ Pay Channels converted to FTA/ bouquet channel contents should be done in a particular way as per the prescribed format laid in the Clause. Even the mode of determining prices of newly launched channels has been prescribed in the abovementioned Clause. In pursuance of Clause 8, the Broadcasters have to report and furnish all details to the Authority with regard to nature of channels offered, a la carte rates per channel, bouquet rates, revenue share agreement with owners of the channels, target audience, advertisement revenue etc. These

are onerous obligations that only increase the cost of compliance without any appreciable effect on serving the needs of stakeholders. In any event as the Regulator has already introduced a separate regulation on advertisements there is no need to include requirements like reporting advertisement data, revenue share arrangements, target audience.

f) ISSUE OF SUBSCRIPTION BASE:

We submit that the Hon'ble Telecom Disputes Settlement & Appellate Tribunal in its order dated 15.01.2009 specifically mentioned the following:
"We direct TRAI to study the matter afresh in the light of our observations and issue a comprehensive Order covering all aspects ***including the issue of subscription base*** *in a non addressable system."*

We are addressing the present issue considering that Analogue System is likely to continue in some part of the country until the extended period for complete implementation of DAS is achieved.

We submit that the major issue of subscription base remains untouched vide the Report dated 21st July, 2010 and the proposed Tariff Order. TRAI has not covered this aspect to bring accountability in relation to the actual subscription base. In Non- CAS markets, it is quite difficult to estimate the exact number of subscriber base, yet steps are needed to ensure transparency and accountability of the MSO/ LCOs for the benefit of the whole supply chain including the ultimate consumers. As per Clause 7, by making issuance of bills and receipts by the MSO/ LCOs to the subscriber accounting for every pay channel, mandatory, does not ipso facto solve the issue of under-reporting of subscription base. Rather, it in no way provides for any accountability as the information is not mandated to be submitted to the Authority and furthermore no checks have been imposed for the same.

We strongly believe and submit that the inter-connect regulations must allow for Broadcasters to conduct surprise audits and surveys with their respective technical teams to prevent under-reporting of subscriber base. In addition to the aforementioned, other methods of calculating the subscriber base should be explored and such parameters should be enumerated, like total number of electricity connections or TV (or other consumer goods) owning households in a particular area, the number of electors registered on the electoral rolls, population in a particular area, declaration of income, and entertainment tax details and such other statutory filings (including census report surveys in relation to household and household assets). Broadcasters should be allowed to consider and rely upon such data points at the time of executing subscription agreements.

It is further observed that since the proposed "Fifth Non Addressable Systems Tariff Order" was submitted to the Supreme Court, several other orders and regulations have been issued by the Regulator. In several of these, terms like "broadcaster", "broadcasting services", "cable service", etc., have already been defined and used and the terminology may have undergone changes which may not be reflected in the proposed Order. Further the concept of a "CAS Area" has become redundant with Phases 1 and 2 of digitalisation and the amendments made to the Cable Television Networks Regulation Act, 1995.

CONCLUSION:

The proposed Tariff Order along with the study report is comprehensive and it touches various aspects for bringing a new Tariff Order.

However, the proposed Tariff Order fails to incorporate various elements that are of grave importance and need urgent redressal by the Authority as also observed by the Hon'ble Telecom Disputes Settlement & Appellate Tribunal.

Our main submissions are summarised as follows:

1. We reiterate that there should be total forbearance in the area of tariff fixation. We believe that there is adequate competition in the market and it should be left on the market forces to fix the best prices. Any kind of restrictions /regulations on the Broadcasters in respect of pricing and channel bouquets will limit the industry growth and in fact we feel forbearance in all offerings by the Broadcaster will provide a balancing act amongst the stakeholders.

2. The issue of carriage and placement fee though mentioned in the Report dated 21st July, 2010 has been left untouched in the proposed Tariff Order. We respectfully submit that if there is no forbearance as regards tariff fixation, even carriage and placement should be regulated in order to avoid monopolistic behaviour of the MSOs.

3. We reiterate that the Broadcasters should be allowed to conduct surprise audits and surveys with their respective technical teams to clinch the issue of subscriber base. In addition to the aforementioned, other methods of calculating a conservative figure of subscriber base should be explored and such parameters of reliance should be enumerated. There also exists no recommendation in the proposed Tariff Order relating to licensing of the MSO/ LCOs to provide for better industrial health.

4. The proposed Tariff Order should ideally enlist some standard data base (s)/ form/ prescription which can be relied upon by the stake holders while entering into interconnection agreements.

5. It is also important for the Authority to look into the following issues:

a) As regards the bouquet pricing mechanism- it should be sufficient if the sum of the a la carte rates of the pay channels comprising the bouquet does not exceed 1.5 times the rate of the bouquet. This itself ensures that the bouquet price is much lower than the aggregate a la carte price. There is no need for a second condition- that is unduly restrictive.

b) HD and 3D channels being niche and requiring high technology, should not be subject to any tariff restrictions.

c) Instead of the present mandate of intimating TRAI of a new channel launch 30 days prior, it is felt that a seven day prior notice should be sufficient.

6. The proposed Tariff Order prima facie comes across a Tariff Order regulating only the Broadcasters and not the whole Broadcasting and Cable Industry. It has also failed to provide any adequate safeguard to back either the Consumer or the Broadcaster.

6. The proposed Tariff Order casts unreasonable obligations on broadcasters requiring them to report advertising revenue, revenue sharing arrangements, "target audience" etc.

In light of these submissions, we state that the Proposed Tariff Order suffers from various infirmities and the issues as stated herein need urgent redressal. We urge TRAI to give careful consideration to the suggestions made herein in light of past experience and the market as we know it today. TRAI needs to ensure that the existing regulations not be expanded or tightened further resulting in incurring hardships in business or further expenditure by the Broadcasters. We suggest that TRAI should keep in mind the changes due to digitalisation, introduction of new platforms, availability of data in the public domain for authentic fact findings, review and rationalisation of genre- based

pricing and increase in subscriber base.. We reiterate that the consultation paper issued in relation to the Report dated 21st July, 2010 is now almost five years old and the broadcasting and cable industry, owing to the dynamic nature, has changed a lot since then which the Regulator needs to consider afresh.

This response is without prejudice to any of our rights. In particular we reserve our right to challenge any direction, tariff orders, regulations, recommendations or any other order(s) that may be made/ passed by TRAI on the subject matter.

For MSM Discovery Private Limited

(On behalf of Multi Screen Media Private Limited)

Gururaja Rao

Senior Director- Legal

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NOS. 829-833 OF 2009

TELECOM REGULATORY AUTHORITY OF INDIA Appellant(s)

VERSUS

SET DISCOVERY P. LTD. ETC. Respondent(s)

O R D E R

These appeals are directed against an order dated 15.01.2009 passed by the Telecom Disputes Settlement & Appellate Tribunal (for short 'the Tribunal').

The Tribunal dealt with the validity of the Telecommunications (Broadcasting and Cable) Service (Second) Tariff (Eighth Amendment) Order 2007 dated 04.10.2007 issued by the Telecom Regulatory Authority of India (for short 'the TRAI').

During the pendency of the appeal, an order was passed on 13.05.2009 by this Court noticing that the Tribunal has directed the TRAI to study the matter afresh and issue a comprehensive order covering all the aspects including the issue of subscription base in a non-addressable system.

It was stated by learned senior counsel appearing for the TRAI that a revised study would be completed within a short period after hearing all the stakeholders at the earliest.

Pursuant to the order dated 13.05.2009, the TRAI prepared a report dated 21.07.2010, but that is not the subject-matter of the present appeals.

While challenging the order passed by the Tribunal, learned counsel for the TRAI made two principal submissions, namely, (i) that the Tribunal erroneously held that the TRAI could not fix a ceiling of charges to be paid by the subscribers to the LCOs/MSOs and by the LCOs/MSOs to the broadcasters and (ii) the Tribunal was wrong in holding that the process of issuing the impugned tariff order was not transparent in terms of Section 11(4) of the Telecom Regulatory Authority of India Act, 1997 (for short 'the Act')

We have heard learned counsel for the parties and find that there is no clear finding given by the Tribunal that the TRAI cannot fix a ceiling as has been done in the impugned tariff order. Whether the TRAI can in fact put a ceiling on charges will, therefore, need to be decided in an appropriate case.

As far as the issue of transparency is concerned, now that a fresh report has been prepared by the TRAI, pursuant to our order dated 13.05.2009, after hearing all the parties, we are of the opinion that the question whether the impugned tariff order was issued in a non-transparent manner or suffers from absence of indicating all the material relied upon by the TRAI, has become academic. If the report that has now been prepared by the TRAI during the pendency of the appeal is notified and converted into a tariff order (as proposed by the TRAI), it would be open to the respondents and other stakeholders to challenge that order, inter alia, on the ground that it suffers from a lack of transparency as required by Section 11(4) of the Act.

In this view of the matter, we do not feel it appropriate to go into the correctness of the order passed by the Tribunal on 15.01.2009, the exercise having been rendered academic.

We accordingly dispose of these appeals leaving all questions open for being agitaged by the stakeholders as and when the TRAI passes a fresh tariff order in terms of the report prepared by it.

We may note the submissions made by learned counsel for the TRAI that since the report was prepared in 2010, there may be a necessity of holding further consultations. In any case, representations may be made by the stakeholders and to the extent possible, the TRAI will attempt to notify the fresh order immediately after 31.12.2014.

We make it clear that we have left all questions of law open and also make it clear that the status quo as on today will continue till 31.12.2014.

In case any of the stakeholders intend to make representations to the TRAI, they may do so positively within ten days and in any case on or before 30.09.2014.

The appeals are disposed of in view of the above.

..... J.
(MADAN B. LOKUR)

..... J.
(C. NAGAPPAN)

New Delhi;
September 17, 2014.

ITEM NO.101 COURT NO.12 SECTION XVII

S U P R E M E C O U R T O F I N D I A
RECORD OF PROCEEDINGS

Civil Appeal No(s). 829-833/2009

TELECOM REGULATORY AUTH.OF INDIA Appellant(s)

VERSUS

SET DISCOVERY P.LTD.ETC. Respondent(s)

(with appln. (s) for intervention and vacating stay and permission to file additional documents and ex-parte stay and intervention and directions and office report)

Date : 17/09/2014 These appeals were called on for hearing today.

CORAM :
HON'BLE MR. JUSTICE MADAN B. LOKUR
HON'BLE MR. JUSTICE C. NAGAPPAN

For Appellant(s) Mr. Rakesh Dwivedi, Sr. Adv.
Mr. Sanjay Kapur, Adv.
Ms. Lekha Vishwanath, Adv.
Mr. Anmol Chandan, Adv.

For Respondent(s) Mr. Amit Sibal, Sr. Adv.
Mr. Amitesh Chandra Mishra, Adv.
Ms. Shalini Sati Prasad, Adv.
Mr. Namit Suri, Adv.

Mr. Parag Tripathi, Sr. Adv.
Mr. Manjul Bajpai, Adv.
Mr. Shashwat Bajpai, Adv.
Ms. Bina Gupta, Adv.
Mr. Ranjit Raut, Adv.
Ms. Disha Sachdeva, Adv.

Mr. Gopal Jain, Sr. Adv.
Mrs. Nandini Gore, Adv.
Ms. Aditi Bhatt, Adv.
Ms. Devina Sehgal, Adv.
Ms. Chinmayee Chandra, Adv.
Mrs. Manik Karanjawala, Adv.

Mr. Tejveer Singh, Adv.
Mr. Gaurav Sharma, Adv.
Mr. Abhinav Mukerji, Adv.

Mrs. Pratibha M. Singh, Sr. Adv.
Mr. Saikrishna Rajagopal, Adv.
Mr. Sidharth Chopra, Adv.
Mr. Saurabh Srivastava, Adv.

Mr. Anil Kumar Mishra-I, Adv.

Mr. Atul Sharma, Adv.

Mr. Gagan Gupta, Adv.

Mr. Rajiv Mehta, Adv.

M/s Fox Mandal & Co., Advs.

Ms. Sumita Hazarika, Adv.

UPON hearing the counsel the Court made the following

O R D E R

The appeals are disposed of in terms of the signed order.

(R.NATARAJAN)
Court Master

(JASWINDER KAUR)
Court Master

(Signed order is placed on the file)

Comments Received w. r. t. “Draft Tariff Order applicable for Non-Addressable Cable TV Systems” issued on 01.12.2014

RESPONSE TO DRAFT TARIFF ORDER

A. Introduction

We welcome TRAI's (the "***Authority***") initiative on issuing a new Proposed Tariff Order in pursuance of the order passed by the Hon'ble Supreme Court of India in the matter of TRAI vs. Set Discovery Pvt. Ltd. & Ors. [C.A. No. 829-833 of 2009] dated 17.09.2014 along with an Explanatory Memorandum providing the rationale behind the formulation of the Proposed Tariff Order.

Our present written views/comments pertains to the Consultation on Draft Tariff Order applicable to Non Addressable Cable TV Systems namely "The Telecommunication (Broadcasting and Cable) Services (Seventh) (Non- Addressable Systems) Tariff Order, 2014" (the "***Draft Tariff Order***") proposed to come into force from 01.01.2015.

The present written submission/comments made by MSM should be read as a part and parcel of the earlier representation dated 30.09.2014 made by MSM Discovery Pvt. Ltd. in pursuance of the Order passed by the Hon'ble Supreme Court on 17.09.2014 in the matter of TRAI vs. Set Discovery Pvt. Ltd. &Ors. [C.A. No. 829-833 of 2009] and the contents of the Representation dated 30.09.2014 are not repeated herein for the sake of brevity. The Representation dated 30.09.2014 has already been uploaded on TRAIs website along with the Consultation Paper.

B. Background

1. It is submitted that vide the Order dated 17.09.2014 the Hon'ble Supreme Court left all questions of law open and ordered maintenance of status quo as on the date of the order to continue till 31.12.2014. The Authority was directed to issue a revised Tariff Order, keeping in mind the changes in the Broadcasting & Cable sector since the report dated 21.07.2010 was submitted before the Hon'ble Supreme Court in pursuance of Order dated 13.05.2010 in the matter of TRAI vs. Set Discovery Pvt. Ltd. & Ors. [C.A. No. 829-833 of 2009].

2. The Authority had issued the Telecommunication (Broadcasting and Cable) Services (Second) Tariff (Eighth Amendment) Order, 2007 dated October 4, 2007 ("***Impugned Order***"). The Broadcasters and the MSOs had filed separate appeals against the provisions of the Impugned Order before the Hon'ble TDSAT. The issues for adjudication before the Hon'ble TDSAT were as follows:

    (a) Whether the Impugned Order is without jurisdiction?

(b) Whether the Impugned Order violates the provisions of section 11(4) of the Telecom Regulatory Authority of India Act, 1997 ("***TRAI Act***") and whether the obligation of transparency has not been fulfilled?

(c) Whether instead of fixing tariffs as stipulated in the TRAI Act, the Impugned Order is only in the nature of interim Tariff Order resulting in freezing of prices?

(d) Whether TRAI had wrongly concluded that adequate and effective competition in the market is lacking, despite clear evidence of substantial growth?

(e) Whether the ceiling imposed on the subscription charges to be collected by LCOs from the subscribers is without basis?

(f) Whether the classification of cities and towns as well as the slab system stipulated by the Impugned Order is irrational?

(g) Whether the stipulation that the Broadcasters should provide channels on à la carte basis to the MSOs/LCOs is wrong?

(h) Whether the direction, in the Impugned Order, seeking information from the service providers is inappropriate?

3. After hearing all concerned parties, the Hon'ble TDSAT in its judgment dated January 15, 2009 set aside the Impugned Order and asked the Authority to study the matter afresh and issue a comprehensive Tariff Order. The relevant portions of the said Hon'ble TDSAT's judgment are extracted below:

> **"83.** *In conclusion, we hold as follows:*
>
> 1. *On the issue of whether the Impugned Order is without jurisdiction, we do not wish to take a too technical view of the omission relevant provisions of law while issuing the impugned Order; we however feel that a statutory Authority, such as TRAI, should have taken due care while passing an important Order such as this.*
> 2. *On the issue of whether the impugned Order violates the provisions of Section 11(4) of the TRAI Act and whether the obligation of transparency has not been fulfilled, we hold that the principle of transparency has been violated by the Authority.*
> 3. *On the issue of whether instead of fixing tariffs as stipulated in the TRAI Act, the Order is only the nature of interim Order resulting in freezing of prices, we hold that the impugned tariff Order is not an exercise in tariff fixation as is ordained by section 11(2) of the Act, in insofar as it relates to fixing the prices as on 1.12.2007.*
> 4. *On the issue of whether TRAI had wrongly concluded that adequate and effective competition in the market is lacking, despite clear evidence of*

substantial growth, we hold that while introduction of forbearance or otherwise is within the competence of the judgement of Authority, it must be based on a more rational analysis than what was attempted.

5. *On the issue of whether the classification of cities and towns as well as the slab system stipulated by the impugned Order is irrational, we hold that the price ceiling fixed in Schedule I to the Tariff Order, including for different tiers of channels/cities is arbitrary and irrational.*
6. *On the issue of whether the stipulation that Broadcasters should provide channels on à la carte basis to the MSOs/LCOs is wrong, we hold that while the idea of making à la carte choice of channels available to them is desirable, it must be backed up by adequate safeguards both to the consumer as well as to the broadcaster.*
7. *On the issue of whether the direction, in the impugned Order, seeking information from service providers is inappropriate, we hold that this is part of routine regulatory functions of the Authority; we do not wish to go into the matter.*

84. *With these findings, we set aside the Telecommunication (Broadcasting & Cable) Services (Second) Tariff (Eighth Amendment) Order 2007 dated 4.10.2007 of the Telecom Regulatory Authority of India. We direct the TRAI to study the matter afresh in the light of our observations and issue a comprehensive Order covering all aspects including the issue of subscription base in a non-addressable system. We expect the Authority to complete this Study in six months for which they may call for such relevant information as is required from the service providers. We also direct all the service providers that non-cooperation in this exercise including non-furnishing of information will be viewed as violation of this Tribunal's orders.*"

3. The Authority filed an appeal before the Hon'ble Supreme Court of India against the Hon'ble TDSAT's judgment of January 15, 2009. On April 13, 2009, the Hon'ble Supreme Court of India directed status quo as on the date of the Hon'ble TDSAT's judgment dated January 15, 2009. During the pendency of the appeals, the Hon'ble Supreme Court of India, on May 13, 2009, passed an order directing the Authority to consider the matter afresh and issue a comprehensive order covering all aspects including the issue of subscription base in a non-addressable system. Pursuant to the Hon'ble Supreme Court of India's order of May 13, 2009,

the Authority, after consultative process, prepared a report titled "Tariff Issues related to Cable TV Services in non-CAS areas" ("***Report***") and submitted the same with the Hon'ble Supreme Court of India on July 21, 2014 together with new draft Tariff Order for non-addressable systems. On September 17, 2014, the Hon'ble Supreme Court of India by its final order disposed of the appeals, as both the Report and the fresh tariff order proposed to be introduced by the Authority in terms of the Report ("***New Tariff Order***"), were not subject-matter of the instant appeals. The Hon'ble Supreme Court of India, however, granted liberty to the Broadcasters and/or the MSOs to agitate all questions as and when New Tariff Order is introduced by the Authority. The Hon'ble Supreme Court of India also ordered that *status quo* to continue until December 31, 2014 and the Authority to attempt to notify such fresh tariff order immediately after December 31, 2014. The relevant portions of the of the Hon'ble Supreme Court of India's order of September 17, 2014 are extracted below:

> *"We accordingly dispose of the appeals leaving all questions of law open for being agitated by the stakeholders as and when the TRAI passes a fresh tariff order in terms of the report prepared by it….*
>
> *We make it clear that we have left all questions of law open and make it clear that the status quo as on today will continue till 31.12.2014….*
>
> *The appeals are disposed of in view of the above***."**

4. The Authority was directed to issue a revised Tariff Order, keeping in mind the changes in the Broadcasting & Cable sector since the report dated 21.07.2010 was submitted before the Hon'ble Supreme Court in pursuance of Order dated 13.05.2010 in the matter of TRAI vs. Set Discovery Pvt. Ltd. & Ors. [C.A. No. 829-833 of 2009].The present consultation paper dated 01.12.2014 has covered various aspects and incorporated new clauses. TRAI is of the view that the way forward is implementation of addressable digitization in the Broadcasting and Cable TV sectors. The Proposed Tariff Order dated 01.12.2014 has incorporated various amendments that have been notified since the report dated 21.07.2010, along with a Proposed Tariff Order, was filed before the Hon'ble Supreme Court.

5. A perusal of the Proposed Tariff Order accompanied by an explanatory memorandum reflects that the representation submitted in accordance to the order dated 17.09.2014 passed by the Hon'ble Supreme Court, by the Stakeholders, have been kept at abeyance and the same have not been considered/relied upon or incorporated in the Proposed Tariff Order. Vide the present written views/ comment we are hereby reiterating our views expressed in the previous Representation dated 30.09.2014 along with an analysis of the Proposed Tariff Order, our observations and suggestions thereto.

ISSUE WISE REPRESENTATION:

A. WHOLESALE TARIFF

6. We reiterate our earlier views on Wholesale Tariff fixation and submit that the Authority should follow complete forbearance. TRAI should let the market forces decide the pricing of channels and there should be complete forbearance from any type of regulation on channel pricing. TRAI's role is that of a facilitator for the industry, it should ideally follow the "soft touch" rule on tariff regulation and instead focus on issues like (but not limited to) quality of service, transparency in declaration of subscriber numbers, addressability, etc. limiting the scope of regulation to allow market forces to determine price discovery and shape the pricing regime. Also, keeping in mind that the contents of Broadcasting and Cable industry are not an essential commodity, we believe that the same needs no regulatory framework for tariff fixation.

7. It is stated that the existing tariff regulations for non-addressable systems are skewed against the Broadcasters because of which the Broadcasters' revenues are seriously affected. The challenges/issues being faced by the Broadcasters' in non-addressable areas are explained below:

   (a) It is stated that the Authority had imposed ad hoc ceiling on wholesale tariffs applicable for non-addressable systems over 10 years ago[1]. The numbers of pay channels since then have increased from 30 to 35 in 2010[2] to about 233 in the third quarter of 2013[3]. As on 30.11.2014, there are 821 TV channels in India.

   (b) In 2009, the revenue size of Indian Television Industry was estimated at 25,700 Crores. Of this, Rs. 16,900 Crores (66%) was attributed to subscription fees generated from consumers and the balance Rs. 8,800 (34%) comes from the advertising market. The size of the subscription market for non-addressable systems is estimated at Rs. 13,500 Crores (68 million subscribers x ARPU of Rs. 165 per month); of which the Broadcasters' share was about Rs. 2,900 Crores (i.e. 20%) and the MSO's and LCO's together share was about Rs. 10,600 Crores (i.e. 80%)4. The revenue from carriage and placement fee was estimated at approximately Rs. 900-1000 Crores.

   (c) In view of the foregoing, it is evident that in non-addressable areas, the owners (i.e. Broadcasters) get merely 20% of the subscription fees generated from consumers, whereas the distributors (i.e. MSOs and LCOs) get 80% of such subscription revenues. This is a sharp contrast to any other distribution models where the owners normally get at least 80% and the distributors (on the higher side) get 20%. Further, since the number of pay

[1] The Telecommunication (Broadcasting and Cable) Services Tariff Order, 2004 dated January 15, 2004
[2] Para 3.6 of the Explanatory Memorandum to The Telecommunication (Broadcasting and Cable) Services (Eighth) Tariff Order, 2007 dated October 4, 2007
[3] Para 11 of the Consultation Paper on Distributor of TV Channels from Broadcasters to Platform Operators dated September 3, 2013
[4] Para 1.46 of the TRAI's Recommendations on Implementation of Digital Addressable Cable TV Systems in India dated August 5, 2010

channels have substantially increased, the Broadcaster subscription revenues per channel have further reduced.

(d) The Authority has admitted that the advertisement revenues in 2009 were low as compared to global benchmarks[5]. Further, since the number of pay channels have substantially increased, per Broadcaster advertisement revenues have further gone down. Despite such ground realities, the Authority has mandated the Standards of Quality of Service (Duration of Advertisements in Television Channels) Regulations, 2013, which has further lowered per Broadcaster advertisement revenues.

(e) It is a known fact that non-addressable systems can carry only limited number of channels. With the increase in the number of channels and limited bandwidth of non-addressable systems, the carriage and placement fees payable by the Broadcasters have substantially increased

8. It is submitted that the subscription fees payable by the MSOs to the Broadcaster are based on two components, i.e. the tariff and the subscriber base. In non-addressable systems, having an on adhoc ceiling on one component (i.e. tariff) does not have any direct bearing on the subscription fees as the subscriber base, any which ways, need to be negotiated to arrive at the subscription fees payable by the MSOs. Such adhoc ceiling only acts as an impediment to the Broadcasters' negotiation abilities, and getting fair share of the subscription revenues. It is stated that the present regulatory framework merely encourages the MSOs to under declare its subscriber base, which as per the Authority's own analysis is less than 10% of their actual subscriber base[6] and discourages digitalization with addressability.

9. Since the inception of adhoc ceiling, the numbers of channels have substantially increased because of which the Broadcasters are, in fact, competing amongst themselves and paying huge placement fees to non-addressable systems merely to get their channels carried. In this background, we fail to understand how the Authority can come to the conclusion that forbearance on whole tariff in non-addressable systems can possibly lead to higher prices for the consumer[7]; and suggest continuance of the existing price-freeze / price-control regime. Further, in order to justify continuance of the existing price-freeze / price-control regime that Authority, in the Explanatory Memorandum to Draft Tariff Order, has time and again referred to its inability to propose forbearance or fixation of tariffs for non-addressable systems in the absence of addressability. If the Authority is sincere about its justification, in view of visibility on subscriber numbers and choice available to subscribers in addressable markets, it must immediately implement complete forbearance on wholesale tariff in addressable systems.

[5] Para 1.42 of the TRAI's Recommendations on Implementation of Digital Addressable Cable TV Systems in India dated August 5, 2010
[6] Para 1.64 of the TRAI's Recommendations on Implementation of Digital Addressable Cable TV Systems in India dated August 5, 2010
[7] Para 19 of the Explanatory Memorandum to Draft Tariff Order

10. The Proposed Tariff Order dated 01.12.2014 aims to arrive at an appropriate tariff at the wholesale and retail level. The exercise of reaching a logical conclusion by conducting a de novo exercise has been left untouched as the Authority holds the view that the earlier observations with regard to wholesale tariff still hold good. The Authority has observed that the current regime, despite its imperfections, is working at the ground level. The Authority also observed that as far as the non-addressable cable TV systems are concerned, even as on date the market dynamics are more or less the same at the time the consultation process for report dated 21.07.2010 was carried out. Furthermore, the digitization of cable TV sector is underway and the Government had already notified the time frame for digitization of cable TV sector which envisions complete digitization by December 2016.

11. In view of the above, it is apparent that the Authority has not addressed the underlying issue of wholesale tariff fixation and no de novo exercise has been carried out. In pursuance of the latest judgment of the Hon'ble Telecom Disputes Settlement & Appellate Tribunal dated 25th September, 2014 in Petition No. 47(C) of 2014 titled as Star Sports India Pvt Ltd, Mumbai vs. Hathway Cable and Datacom Ltd., it was suggested that the way forward is forbearance between the parties and not over-regulation in today's day and age. The Authority seems to have a misconceived view that under forbearance the Broadcasters would exorbitantly increase prices for popular channels. However there is no empirical data produced by the Authority to support this view. But the Authority cannot be oblivious of the fact that with so many popular channels now available, and given the competitive nature of the industry no broadcaster will risk losing market share by increasing prices beyond affordable levels. Thus, the equilibrium would be maintained as far as the chargeability is concerned.

    In light of the above stated, we submit and reiterate our view that wholesale tariff should not be regulated and there should be complete forbearance. We firmly believe that as the Broadcasting sector is a creative industry, content should be allowed to be priced freely as there exists adequate competition in the prevailing market set-up.

B. A LA CARTE PROVISION AT WHOLESALE LEVEL

12. The Proposed Tariff Order states that the composition of a bouquet existing as on 01.12.2007 cannot be changed. The proviso provides new formula for determining the rate of the modified bouquet. As per which, such a rate is equal to: [rate of existing bouquet] x [sum of a-la-carte rate of all the pay channels comprising the modified bouquet / sum of a-la-carte rate of all the pay channels comprising the existing bouquet]. Annexure I of the consultation paper provides an illustration for the reconfiguration of bouquets based on the formula provided. The Broadcasters are also mandated to declare the genre of their channels as one of the specified 11 genres, pricing similar channels similarly. The rates of new channels shall be determined on the basis of rates of existing channels of similar nature. In the same clause all the genre prevalent are specified which includes News, Current Affairs, Infotainment, Sports, Kids, Music or Lifestyle, Movies, Religious, Devotional,

General Entertainment (Hindi), General Entertainment (English) or General Entertainment (regional language).

13. Vide the Proposed Tariff Order, TRAI has prescribed certain conditions for pricing bouquets and a-la-carte channels. We submit that the whole concept of genre-based pricing and the principle of pricing similar channels similarly should be rationalised and reviewed.

14. The Telecommunication (Broadcasting and Cable) Services (Third) (CAS Areas) Tariff Order, 2006 issued by TRAI in clause 5.18 of its explanatory memorandum states as follows:

> "*Genre Pricing*
> *5.18 - One of the frequent suggestions that have been made is that different tariff ceilings should be fixed for different genres of TV channels. The Authority has carefully considered this suggestion. It appreciates that there are certain sports and entertainment channels which have a different commercial model for transmission of their content. Often the costs of special programmes in such channels are dependent on competitive prices paid which may bear no relationship to the production cost. It has also been pointed out that the subscriber preference/choice for such channels is for a limited period of the event. Therefore any determination of regular revenue based on annual subscription is also not applicable in such cases. Similar advocacy was made on behalf of 24 hour film channels. One basic difficulty is that are channels which have got mixed programming and a puritanical approach to genre based classification is not possible. Moreover, commercial models in case of such channels are dependent on advertisement revenues in view of their higher popularity. Even a comparison of the bouquets of different channels shows that there is no uniformity amongst the broadcasters in their approach to the pricing of different genres. Therefore, the authority is of the view that an objective criteria to have a genre based MRP is not feasible. Instead the ceiling on MRP determined by the Authority is expected to take care of the interests of such specialized programmes within the overall ceiling*.

15. Accordingly, only one MRP has been stipulated and this would apply to all types of channels. To take care of the concerns of the periodical and short terms choices made by subscribers, it has also been stipulated that any subscriber opting for a pay channel on an a-la-carte basis must subscribe to the channel for a period of at least four months. A subscriber taking a channel for less than four months will have to pay the MRP of four months."

16. Thus, the concept of pricing similar channels similarly and genre based pricing does not hold good since two different channels belonging to the same genre may have varied contents and the costs incurred for procurement/creation of this content may also drastically vary. Hence, the proposed mandate of TRAI in treating all channels of the same genre at an equal footing is hit by the vice of arbitrariness as it seeks to treat unequals equally.

17. In our view, for Non- DAS areas, the Authority should observe complete forbearance with relation to pricing and modes of pricing per channel and its distribution thereof. It has been the general experience that the MSOs merely with a view to arm twist the Broadcaster take out the channels from a bouquet and put the same under the a-la-carte offering while it is impossible for the MSO to survive by offering channels on a-la-carte. The ultimate sufferer is the consumer. It is submitted that a la carte provisioning is technologically not possible in a Non Addressable System. The subscribers cannot choose the channels they wish to subscribe leading to monopoly of the MSOs and the Cable Operators. Hence, it is technologically impossible to pass on the benefit of a-la-carte provisioning to the consumer as the signals in analogue system cannot be controlled.

    In light of the aforesaid, for Non- DAS areas, the Authority should observe complete forbearance with relation to pricing and modes of pricing per channel and its distribution thereof.

C. RETAIL TARIFF

18. We reiterate and submit that any price fixation affects not only the consumers but the entire distribution chain i.e. Cable operators, MSO/ LCOs and Broadcasters. We reiterate our views that were submitted to TRAI in our Representation dated 30.09.2014.

19. It is restated that an overall ceiling on monthly cable charges will be an unworkable measure and would hinder the ideal market driven approach of price determination, which has been used in a pro- consumer way in the Indian Cable TV industry to increase accessibility of Cable TV.

20. Furthermore, the issue of lack of addressability in the analogue sector makes it technically impossible to reach a definitive conclusion to fix a maximum price for different combination of connections. We reiterate that the issue of subscription base is still left unaddressed vide the Proposed Tariff Order. The retail prices are laid in Part I & II of the Schedule of the Proposed Tariff Order.

21. The Schedule states that the maximum amount of charges applicable will be as follows:

    i. For minimum 30 FTA channels to be Rs 150/-, exclusive of taxes;
    ii. For minimum 30 FTA and upto 20 Pay channels, the maximum amount of charges applicable will be Rs. 211/- exclusive of taxes;
    iii. For minimum of 30 FTA and more than 20 pay channels, maximum amount of charges applicable will be Rs. 263/- exclusive of taxes.

22. The reasoning provided for increasing the price caps is the same as was provided in the previous proposal dated 21.07.2010 filed before the Hon'ble Supreme Court. The reports and surveys relied upon by TRAI to formulate the consultation paper dated 01.12.2014 are the same on which the previous proposal dated 21.07.2010 (filed before the Hon'ble Supreme Court) was based. TRAI is of the view that the

earlier conclusions as provided in the proposed order dated 21.07.2010 filed in the Hon'ble Supreme Court with regard to retail tariff and its related aspects, in principle, still hold good.

23. A bare perusal of the explanatory memorandum shows that no de novo exercise has been conducted by TRAI and a half- hearted exercise has been carried by TRAI which is devoid of any logical derivations.

24. It is restated that as the Proposed Tariff Order, like the earlier proposal dated 21.07.2010 submitted to the Hon'ble Supreme Court, does not mandate accountability of MSOs or LCOs. The MSO/LCOs, vide the Proposed Tariff Order, are under no obligation, liability or any regulatory mandate to work in a transparent manner. The issuance of bills and receipts are the only mandate prescribed which also remains unregulated in the Proposed Tariff Order. The MSO/ LCOs are under no obligation to disclose their subscription base to the Authority and, therefore, the issue of accountability remains unresolved.

25. Moreover, in deterrence to the interests of the Broadcasters and also the subscribers, such retail price ceilings in Non- addressable areas (which have a limited channel carrying capacity) is likely to lead to a situation where the MSO/LCO would deliberately fill up their network's bandwidth primarily with FTA/low priced channels and thereafter demand hefty placement and carriage fee from the Broadcasters of channels carrying quality content. Moreover TRAI in its recommendation on Platform Services has also proposed permitted MSOs to have their own local channels which will displace bandwith otherwise available to broadcasters.

D. INCLUSION OF COMMERCIAL ESTABLISHMENT & COMMERCIAL SUBSCRIBER

26. The Proposed Tariff Order includes the definition of "commercial establishment" and "commercial subscribers" vide clause 3 (o) and (p) respectively. The same has also been incorporated in Clause 4 of the Proposed Tariff Order vide sub-clause 2 wherein the tariff applicable for "commercial subscribers" has been stipulated.

27. It is pertinent to mention herein that vide amendment dated 16.07.2014, the Tariff Order for Non- Addressable cable TV systems was amended so as to make the tariff stipulations applicable to the "commercial subscribers" also. Such tariff stipulation despite distinguishing between 'ordinary cable subscriber' and 'commercial subscriber' still went on to prescribe that the charges payable by an ordinary cable subscriber would also be the ceiling in case of commercial subscribers. The said amendment dated 16.07.2014 has been challenged by Indian Broadcasting Foundation in the Hon'ble TDSAT in the matter of Indian Broadcasters Foundation & Ors. vs. TRAI vide Appeal No. 7(C) of 2014 and the same is pending adjudication and has already been disputed by the stakeholders on the following grounds viz.

i. Treating commercial subscriber at par with domestic subscriber is treating unequal as equal. Since 2004 TRAI has itself recognized the ordinary/domestic and

commercial subscribers as separate and distinct categories and had also recognized that the type of use in a household is different from the use in a commercial establishment. Thus having now proceeded in recognizing commercial and domestic subscriber as one and the same is arbitrary.

ii. The amendment is founded on non- application of mind and is devoid of logic and rationale. TRAI itself in the Consultation Paper dated 11.06.2014 provided for an alternative that the Tariff for commercial subscribers be kept under total forbearance and if not, at least different and distinct rates should be allowed to be charged. No reasoning/rationale for leaving out these alternatives has been given. Further, the Honourable TDSAT itself in one of its judgement dated 28.05.2010 had held that one cannot compare selling a piece of bread in a Dhaba with the one in a five star hotel. All selling the same product, may have to spend differently on a large number of things, including hygiene and different rates could be fixed for different consumers.

iii. Said amendment has failed to comply with the requirements of Section 11(4) of the TRAI Act mandating 'Transparency'.

iv. The order dated 24.11.2006 passed by the Hon'ble Supreme Court in the matter of Hotel and Restaurant Association and Anr. vs. Star India Pvt. Ltd. & Ors. has been erroneously construed and misinterpreted by TRAI in formulation of the impugned amendment.

v. The proviso to Clause 3 (c) of the Tariff Order dated 16.07.2014 states that in the event that a commercial subscriber charges his customer or any person for any programme, then the rates payable by the commercial subscriber to a Broadcaster shall be as mutually decided between the parties. This proviso is inherently contradictory because, in any event, a commercial subscriber is in fact charging all its customers for all the facilities made available by it including the charges for TV channels. This charge is built into the charge payable by such customer.

The situation envisaged by the proviso to Clause 3(c) as explained above is therefore completely unworkable.

Accordingly TRAI should not include any provisions relating to commercial subscribers/commercial establishments in the proposed Non DAS Tariff Order.

vii. APPLICATION OF PROVISIONS OF TELECOMMUNICATION (B&C) SERVICES (FOURTH) (ADDRESSABLE SYSTEMS) TARIFF ORDER, 2010(1 OF 2010)

28. The Proposed Tariff Order by way of explanation to Clause 4 as well as Clause 5 provides that the provisions of Telecommunication (B &C) Services (Fourth) (Addressable Systems) Tariff Order, 2010 (1 of 2010) shall apply to the Broadcasting and Cable services being provided to the consumers through the addressable systems.

29. In this regard, it is submitted that the Authority should consider the following:

(a) TRAI has not yet notified the amendment whereby it had proposed to levy fines and penalties on MSOs/LCOs for defaulting in issuing bills/receipts to the subscribers as per their SMS systems. Despite the expiry of about two years, the SMS systems of the MSOs are not in place. The said clause should be made subject to the condition that the amendment under reference regarding the penalties/fines be notified immediately.

(b) TRAI should categorically clarify that the provisions of Telecommunication (B&C) Services (Fourth) (Addressable Systems) Tariff Order, 2010(1 of 2010) would only apply where the system installed by MSO is fully addressable (voluntary DAS). In other words, the provision provided in the Explanation to Clause 4 & 5 would only apply where the number of subscribers receiving channels is clearly ascertainable from the SMS systems maintained by MSOs. The said provision should be clarified by TRAI by way of stipulating a necessary provision in this regard that where the MSO is effecting digital delivery i.e. the signals are being provided through STBs, the system must be addressable and should meet the prescribed specifications laid down by BECIL.

viii. CARRIAGE AND PLACEMENT FEES

30. The issue of carriage and placement fees still remains unaddressed vide the Proposed Tariff Order dated 01.12.2014. We reiterate our views as mentioned in our earlier representation dated 30.09.2014. We resubmit that in the current "must provide" regime without a corresponding "must carry" obligation (except for a limited number of FTA channels), TRAI is well aware that the carriage and placement fees are charged indiscriminately by the MSO to carry and place broadcasters' channels. Since tariffs are regulated but carriage and placement is not, this practice of charging huge carriage and placement fees has negatively impacted the financial health of broadcasters. Unfortunately the draft Tariff Order makes no mention of carriage or placement despite calling itself a de novo exercise.

31. While subscription fee being completely regulated, the practice of leaving placement and carriage completely unregulated leads to unhealthy and unfair practices by the MSOs by their continued arm twisting the broadcasters on the ground level. This in turn also affects the renewability and negotiating power of the broadcasters on ground. The MSO/LCOs, on the other hand, can continue to charge arbitrary rates to carry and place channels on their network without any checks and balances. TRAI cannot blow hot and cold at the same time: allow carriage and placement to be determined by market forces but place subscription rates under price regulation. This itself distorts the market as broadcasters are forced to negotiate with one arm tied behind their backs: not only do they have to provide their channels on demand but they also have to pay whatever carriage and/or placement is levied by the MSOs. Unregulated carriage and placement leads to unhealthy practices in television ratings as TRAI is fully aware and comes at the cost of diversifying content creation.

ix. REPORTING REQUIREMENTS

32. The Proposed Tariff Order vide Clause 8 stipulates the reporting requirements to be followed by the Broadcasters. The Proposed Tariff Order mandates that revenue share agreement between owners of channels in a bouquet, and the advertisement revenue for the last three financial years shall be filed annually with the Authority. The Proposed Tariff Order also mandates notification of any introduction/ conversion/ discontinuation/ change in a-la-carte rates, bouquet rates, genre, language, name etc. of the channels one month prior to such introduction/ conversion/ discontinuation/ change.

33. It is submitted that the furnishing of advertisement revenue for last three financial years, annually, serves no purpose and is devoid of any rationale. Moreover, it violates the principles of confidentiality and privity. In any event TRAI's competence to determine advertising time is itself under challenge in the High Court of Delhi and if TRAI cannot go into advertising time, neither can it delve into advertising rates. This provision needs to be removed.

34. It has now been provided that in case of launch of new pay channel and/or in case of conversion of FTA to pay channel, the relevant intimation should be notified to the Authority one month (30 days) before such change takes place. It is submitted herein that vide the earlier tariff order, the Broadcasters could file the necessary declaration with the Authority within seven days of the launch of any new channel. The change of the said requirement from seven days to thirty days for intimation is bound to cause practical hardship in today's day and age. The Broadcasters have been following the earlier rule at ground level and the same has been functional without any trouble or inconvenience to the whole of the distribution chain or the Authority. We submit that the earlier requirement may be retained so as to avoid undue hardships to the Broadcasters.

x. ISSUE OF SUBSCRIPTION BASE

35. We resubmit herein that the Hon'ble Telecom Disputes Settlement & Appellate Tribunal in its order dated 15.01.2009 specifically mentioned the following:

> *"We direct TRAI to study the matter afresh in the light of our observations and issue a comprehensive Order covering all aspects including the issue of subscription base in a non- addressable system."*

36. TRAI has failed to consider the aspect of addressability to bring accountability in relation to the actual subscription base. It is a well- known fact that in Non- DAS markets, it is difficult to estimate the exact number of subscriber base, yet steps are needed to ensure transparency and accountability of the MSO/ LCOs for the benefit of the whole supply chain including the ultimate consumers.

37. We are of the view that the issue of subscription base and addressability should be a priority in order to formulate a holistic tariff order. We reiterate herein that the Broadcasters should be allowed to conduct surprise audits and surveys with their respective technical teams to clinch the issue of subscriber base. In addition to the aforementioned, other methods of calculating a comprehensive figure of subscriber base should be explored and such parameters of reliance should be enumerated, like total number of electricity connections in the area, the economic variations within the population in a particular area, declaration of income, and entertainment tax details and such other statutory filings (including census report surveys in relation to household and household assets). All such other statutory filings can also be the basis of finding or mapping a close-to-accurate subscriber base.

CONCLUSION

38. The Proposed Tariff Order calls for various changes and inclusions to be incorporated so as to address the issues of Non- Addressable systems holistically. We reiterate and resubmit our views and suggestions made in our Representation dated 30.09.2014 along with our observations in light of the Proposed Tariff Order herein.

39. Our main submissions regarding the same are summarised as follows:

1. We reiterate that there should be total forbearance in the area of tariff fixation. We believe that there is adequate competition in the market and it should be left on the market forces to fix the best prices.

2. The issue of carriage and placement fee though mentioned in the Report dated 21st July, 2010 has still been left unaddressed in the Proposed Tariff Order. .

3. The inclusion of "Commercial Subscriber" and "Commercial Establishment" should be reconsidered as the same has already been challenged by Indian Broadcasters Foundation before the Hon'ble TDSAT in Appeal No. 7(C) of 2014.

4. Vide Clause 8 of the Proposed Tariff Order, it has been provided that the advertisement revenue for the last 3 financial years is required to be furnished annually with the Authority. The said clause, in our view, is devoid of any logic and there exists no cogent purpose of stipulating this requirement. It is submitted that such requirements are bound to violate principles of confidentiality and privity between the Broadcaster and the Advertiser. Hence, it is submitted that the requirement of furnishing advertisement revenue for the last three financial years should be done away with as the same lacks merit and serves no purpose related to the issues in the present scenario in Broadcasting and Cable sector. Moreso as TRAI's competence to go into advertising time itself is under challenge in the Delhi High Court.

5. In case of launch of new pay channel and/or in case of conversion of FTA to pay channel, the relevant intimation should be notified to the Authority one month (30 days) before such change takes place is unwarranted and bound to cause practical hardships. In our view, the earlier rule that the broadcaster could file the necessary declaration with the Authority within 7 days of the launch of any channel still holds good. The Broadcasters have been following the earlier rule at ground level and the same has been functional without any trouble or inconvenience to the whole of the distribution chain or the Authority. We submit that the earlier requirement may be retained so as to avoid undue hardships to the Broadcasters.

6. We reiterate that the Broadcasters should be allowed to conduct surprise audits and surveys with their respective technical teams to clinch the issue of subscriber base. In addition to the aforementioned, other methods of calculating a conservative figure of subscriber base should be explored and such parameters of reliance should be enumerated. There also exists no recommendation in the Proposed Tariff Order relating to licensing of the MSO/ LCOs to provide for better industrial health.

7. The Proposed Tariff Order also provides for no set parameter to analyse quality of service. The Proposed Tariff Order should ideally enlist some standard data base(s)/ form/ prescription which can be relied upon by the stake holders while entering into interconnection agreements.

8. The Proposed Tariff Order prima facie comes across as a Tariff Order regulating only the Broadcasters and not the whole Broadcasting and Cable Industry. It has also failed to provide any adequate safeguard to back either the Consumer or the Broadcaster.

9. The Proposed Tariff Order is not preceded by a *de novo* empirical exercise as desired by the Hon'ble TDSAT and the Supreme Court of India. The contents of the previous proposal dated 21.07.2010 have been blindly reiterated to base the formulation of the new Proposed Tariff Order. In our view, many issues need to

be addressed which requires an in depth analysis and the same should be carried out by TRAI to base its tariff formulations on logic and rationality.

In light of the above mentioned submissions, we state that the Proposed Tariff Order suffers from various infirmities and the issues as stated herein need urgent redressal. We urge TRAI to give careful consideration to the suggestions made herein in light of past experience and the market as we know it today. We buttress our suggestion that TRAI should come out with a revised tariff order keeping in mind and incorporating various unaddressed issues as per our representation. We reiterate that the consultation paper issued in relation to the report dated 21st July, 2010 and the reports and surveys relied upon are now four years old and the broadcasting and cable industry, owing to the dynamic nature, has changed a lot since then. Therefore, the reports and surveys relied upon in the present tariff order formulation needs to be updated according to the present market trends and practices.

This response is without prejudice to any of our rights. In particular we reserve our right to challenge any direction, tariff orders, regulations, recommendations or any other order(s) that may be made/ passed by TRAI on the subject matter.