April 28, 2010

To The Hon'ble Authority
The Telecom Regulatory Authority of India
New Delhi

Kind Attention: Mr. Subodh Kumar Gupta, Advisor, TRAI (B&CS)

Dear Sir,

Please find enclosed herewith our response to Consultation Paper No. 5 /2010 , dated 25th March 2010 on Tariff Issues related to Cable TV Services in Non-CAS Areas together with five (5) Annexures.

Your kindself shall surely appreciate that an exercise of such wide extent and nature having profound implications for the entire industry requires a well calibrated response duly backed by adequate research work in order to be helpful, meaningful and relevant, hence delay, if any, may kindly be condoned.

We respectfully submit that we are filing this preliminary response without prejudice to our rights and contentions in the Special Leave Petitions (SLPs) filed by the Authority before the Hon'ble Supreme Court in Civil Appeal Nos. 829-833 of 2009 together with Civil Appeal Nos. 1166 -1169 of 2009. We further submit that the instant response be kindly read harmoniously with our earlier communications with your kindself on the subject. We also reserve our right and take your kind liberty in submitting any further representations or findings for the Hon'ble Authority's kind consideration.

We look forward to the day when the industry shall achieve its full potential and well deserved glory with the required support and enablement from the Hon'ble Authority after overcoming and resolving all issues in a participative spirit of cooperation.

A hard copy of this instant, shall be duly reaching your good offices.

We remain,

Yours Truly

Pulak Bagchi

Vice President: Legal and Regulatory Affairs.
Star India Private Limited.

Schematic Arrangement:

1. Back Ground
2. Regulatory Impact Analysis
3. What makes a good regulation
4. A Primer on the situation prevailing today:
    - The Non Exclusivity conundrum
    - The Inefficiencies of Tariff Fixation
5. A Critique of the Consultation Paper
    - Non Addressability as a basis for greater intervention
    - Not considering the issue of Subscriber Base
    - Holding that there is no competition interse platforms
    - Misconceived conclusions on advertising revenues and cost
    - The Purported Clarifications through the Minutes
    - Other Anomalies
6. Detailed Response to the Issues.

I. BACKGROUND:

(1) The instant Consultation Paper ("CP") has been issued in pursuance to the Orders of the Hon'ble Supreme Court, reproduced as hereunder:

> ***"In super session of the order passed by this Court on 13.04.2009, the following may be read:***
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> ***By the impugned order, TDSAT has directed TRAI to study the matter afresh and issue a comprehensive order covering all aspects including the issue of subscription base in a non-adverssable (sic) system. Learned senior counsel appearing for the TRAI stated that a revised study would be completed within a short period after hearing the parties at the earliest. The TRAI may however consider the matter de novo as regards all aspects and give a report to this Court by 11th August, 2009. All parties are directed to co-operate with the TRAI so as to enable them to***

> ***file a report at the earliest. The TRAI shall also consider the feasibility of putting a cap on carriage and placement charges……..”*** [1]

(2) TRAI (“Authority”) on 7th August 2009, had come up with questionnaires seeking data from various stakeholders. We in Star India had welcomed the move and had extended full cooperation to the Authority by furnishing all relevant data.

(3) We had also met the Authority on several occasions to answer queries pertaining to the data that had been submitted. On our concerns that the bulk of the questionnaire was directed towards broadcasters we were told that data was being collected from other stakeholders as well. We were further told that M/S. Ernst and Young had been roped in to assist the Authority in the exercise. We were also assured during the pre-consultation meetings that the Authority shall share the methodology of data collection, sampling and analysis together with conclusions thereof with all stakeholders in a transparent manner. The Authority published the first set of the purported “***representative operational figures”*** on 10th November 2009, whereupon several stakeholders including ourselves had expressed serious concerns and reservations. A written representation to the Authority, dated November 26, 2009, was also made to that effect seeking several clarifications.

(4) Even after the publication of the purported representative operational figures, the Authority had extended the time lines on 20th November 2009 and again on 21st January 2010 for stakeholders to submit their respective data. Thereafter the Authority filed an application before the Hon'ble Supreme Court seeking extension of time to file the report. The said application also admitted the limited participation of LCOs and

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[1] Order dated 13th May 2009 passed in Civil Appeal Nos. 829-833 of 2009 together with Civil Appeal Nos. 1166 -1169 of 2009.

MSOs in the data collection exercise. The Authority, on 15th February 2010, came up with a subsequent set of questionnaires directed at LCOs having less than 500 subscribers.

(5) The Authority issued the CP on 25th March 2010. On perusal of the CP, we had sought some clarifications from the Authority and had also put in a request for grant of an additional two weeks time to submit our responses vide our letter dated 19th April 2010. While the Authority had been kind enough to hold a meeting on 22nd April 2010 we noted that the dead line had been extended till only 28th April 2010. The minutes of the said meeting had however been circulated by the Authority on April 23, 2010 which, as will be explained during the course of our response, did not help.

(6) It may be pertinent to mention that the CP has commendably raised several pertinent queries that call for a thorough research if answers to them have to be meaningful. A serious exercise like the one being undertaken thus requires a reasonable time frame for it to be purposeful and relevant. The bulk of the calculations in the CP revolve around broadcaster data. Even if the date of issue of the CP is counted i.e. 25th March 2010, only 5 weeks had been given to prepare and submit our take. This, we respectfully submit, is contrary to regulatory practices abroad where stakeholders are allowed a minimum time frame of 12 weeks for making their submissions.[2]

(7) Be that as it may, we believe that at this juncture, as a precursor, TRAI should first and foremost determine, through a regulatory impact

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[2] In UK, the House of Lords Select Committee on Regulators has recommended that "***wherever possible regulators allow for at least a 12 week consultation period in their forward planning to give industry a reasonable amount of time to respond to their papers***" and the Cabinet Office's "***Five Principles of Good Regulation***" state that "[s]***takeholders should be given at least 12 weeks, and sufficient information, to respond to consultations***". (Emphasis Ours)

analysis, whether there is at all any need to regulate tariff in Non CAS areas.

II. REGULATORY IMPACT ANALYSIS:

(1) It has been accepted in a majority of countries that a Regulatory Impact analysis has to precede any Regulatory formulation. It is requested that such efforts and analyses be also undertaken by the Authority to determine whether at all any tariff dispensation is called for in Non CAS areas. It is also requested that the findings consequent to this exercise be shared with the industry as well, to ensure transparency so that all the stakeholders' interests are duly taken care of and the regime that the Regulator seeks to usher in is equitable, fair, acceptable and just for all stakeholders concerned.

(2) In the United States for more than a quarter century, agencies have been required to perform detailed regulatory impact analyses before issuing major regulations. Under E.O. 12291 (issued in February 1981 by President Reagan) and E.O. 12866 (issued by President Clinton and still in effect), government agencies must analyze the expected benefits and costs of major regulatory proposals, as well as potential alternative policies.[3]

(3) E.O. 12866 describes the specific criteria such analyses must meet, including:

"(i) An assessment, including the underlying analysis, of benefits anticipated from the regulatory action (such as, but not limited to, the promotion of the efficient functioning of the economy and private markets . . . .) together with, to the extent feasible, a quantification of those benefits;

[3] See E.O. 12291 (February 17, 1981) and E.O. 12866 (September 30, 1993).

(ii) An assessment, including the underlying analysis, of costs anticipated from the regulatory action . . . together with, to the extent feasible, a quantification of those costs; and

(iii) An assessment, including the underlying analysis, of the costs and benefits of potentially effective and reasonably feasible alternatives to the planned regulation. . . ."

(4) The specific analytical techniques to be used in such evaluations are further described in guidance from the Office of Management and Budget ("OMB"). Specifically, OMB Circular A-4, issued September 17, 2003, presents ***"guidance to Federal agencies on the development of regulatory analyses."***[4] Circular A-4 requires that regulatory analyses include ***"(1) a statement of the need for the proposed action, (2) an examination of alternative approaches and (3) an evaluation of the benefits and costs…."*** It also requires agencies to ***"Identify a baseline….normally a 'no action' baseline: what the world will be like if the proposed rule is not adopted."***[5] Most importantly, OMB requires that ***"Before recommending Federal regulatory action, an agency must demonstrate that the proposed action is necessary,"*** and ***"if the regulation is designed to correct a significant market failure, [the agency] should describe the failure both qualitatively and (where possible) quantitatively. You should show that a government intervention is likely to do more good than harm."***[6] The Moot question to be asked is whether the hypothesized benefits to some consumers represent a welfare gain or, alternatively, a transfer payment namely a

[4] Office of Management and Budget, Circular A-4 (September 17, 2003) (available at http://www.whitehouse.gov/omb/circulars/a004/a-4.pdf). The circular updates and refines prior OMB guidance. See Office of Management and Budget, ***Economic Analysis of Federal Regulations Under Executive Order 12866*** (January 11, 1996) (available at www.whitehouse.gov/omb/inforeg/riaguide.html) and Office of Management and Budget, ***Memorandum for the Heads of Executive Departments and Agencies: Improving Regulatory Impact Analyses*** (June 19, 2001) (available at www.whitehouse.gov.omb/memoranda/m01-23.html)

[5] Circular A-4, p. 2.

[6] Circular A-4, p. 3-4. Emphasis added.

"robbing Peter to pay off Paul" scenario. The OMB guidelines specifically prohibit counting transfers from one economic group to another as a benefit or cost of a government regulation.[7] To meet the OMB Standard any regulatory formulation would need to explain whether the benefits received by "***some***" consumers represent net benefits to society or, alternatively, simply transfers from other economic actors (e.g., consumers, producers, or both).

III. WHAT MAKES A GOOD REGULATION:

(1) Irrespective of the objectives of regulation, there are certain common principles that have been held to apply in framing new regulation as well as reforming older frameworks. The UK's Better Regulation Task Force sets out five Principles of Good Regulation:[8]

· ***Proportionality :***

Policy solutions should be appropriate for the perceived problem or risk: you don't need a hammer to crack a nut!

· ***Accountability :***

Regulators/ policy officials must be able to justify the decisions they make and should expect to be open to public scrutiny

· ***Consistency :***

Government rules and standards must be joined up and implemented fairly and consistently

· ***Transparency :***

Regulations should be open, simple and user-friendly. Policy objectives including the need for regulation, should be clearly identified and effectively communicated to all stakeholders

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[7] See Circular A-4, p. 38 ("Transfer payments are monetary payments from one group to another that do not affect total resources available to society….A net reduction in the total surplus (consumer plus producer) is a real cost to society, but the transfer from buyers to sellers resulting from a higher price is not a real cost since the net reduction automatically accounts for the transfer from buyers to sellers….***You should not include transfers in the estimates of the benefits and costs of a regulation.***" ***Emphasis added.***)

[8] See Principles of Good Regulation available at: http://archive.cabinetoffice.gov.uk/brc/publications/principlesentry.html

· ***Targeting :***

Regulation should be focused on the problem. You should aim to minimize side-effects and ensure that no unintended consequences will result from the regulation being implemented.

(2) The Task Force also noted that alternatives to regulation should always be considered and consulted on:

· ***No intervention :***

Is it really necessary or feasible to intervene?

· ***Information and Education :***

It may be more effective and cost effective to provide users with information, for example through advertising or media campaigns.

· ***Self Regulation :***

Will introducing voluntary codes of practice be as - or more - effective than implementing compulsory regulation?

· ***Incentive-based Structures :***

Can you introduce targets, financial or trading incentives to achieve better standards instead of introducing regulation?

IV. A PRIMER ON THE SITUATION PREVAILING TODAY:

A. The Non Exclusivity Conundrum:

(1) Governments whose basic policies have been designed to increase consumer choice and to maintain a free market in which buyers and sellers of products freely negotiate the terms of sale, would be prudent to avoid broad and complex intervention, which will in the long run make their consumers worse off. Programme content is not a rare product in today's world – there is no scarcity which needs to be regulated. And in the past two years, a wide array of new channels has also begun broadcasting. Channels in the marketplace vary widely in subject matter, and quality of production. Similarly, the cost of these channels varies.

(2) The situation is not unlike the automobile market, which features many different types of car. Many people might like Mercedes, but the government does not intervene to set the prices for Mercedes, or to tell the manufacturer that it cannot sign an exclusive distribution contract with a single car distributor, if the firms can agree.

(3) Rather, the government believes that other distributors, and consumers, if they do not like or cannot buy a Mercedes, can nevertheless buy a Toyota, or a Ford, a Maruti or a Tata, or any other make or brands of cars.

(4) In a similar way, a cable TV company that cannot buy a channel has access through the marketplace to hundreds of other channels, provided it is willing to pay the fair, market-determined price for those channels. That price ranges from zero for so-called "free-to-air" channels to relatively high prices for high-value sports, infotainment and movie channels, which invest substantial sums to ensure the channels remain of high quality to maintain consumer interest. Suggestions of content "unavailability" frequently come down to questions of price. In India, argumentation against exclusive carriage has frequently been used by those who do not wish to pay the fair price for the content. But in light of the huge and growing number of satellite TV channels available in India today, there is an ample supply of programming for potential competitors.

(5) In India, broad regulations were adopted in 2004, requiring that all content must be made available by channel suppliers on non-discriminatory terms to all cable operators (i.e. banning exclusivity). The principle of "Non Discriminatory" "Must Provide" has been stretched to the point of "Indiscriminate" "Must Provide" whereby Broadcasters

irrespective of the known antecedents and prior history of Operators are having to provide signals to them.

(6) The Indian regulation is the broadest and the most sweeping in effect anywhere in the world, and it is actively enforced. It has had the following effects:

• There has been a huge caseload of disputes and appeals between cable operators and channel suppliers; to ensure "non-discriminatory" treatment of each cable operator a special Act was passed in the Parliament and the TRAI was constituted which has been obliged to specify detailed provisions for commercial contracts,

• Thousands of disputes are being litigated, with content owners having to expend substantial resources on litigation which could have been more meaningfully deployed towards generating quality content (litigations have been going on in Courts of Criminal Jurisdiction and also in a specialized Tribunal formed for the purpose viz. the Hon'ble TDSAT). This has become a huge burden both on the administrative/justice system and the pay-TV industry.

• As all programming is available to all cable and satellite platforms, the content market has become homogenized and commoditized. The same TV content is available everywhere in India for relatively low prices. Programming diversity has been altogether stymied. With piracy being wide spread and the law not affording much protection as a result, the pay-TV industry has been led to move down-market and rely increasingly on advertising revenue.

• Channels do not seek "niche" markets; they all compete for high ratings (and more advertising income) in the mass market. Creative content aimed at "niche" markets does not appear in India; there is no vehicle for it to reach its audience. Introduction of new channels not having mass appeal has been made much more difficult. New entrants into the broadcasting market complain they are prevented from using content to attract new customers. They are unable to offer a differentiated service to allow them to compete more effectively with existing platforms.

B. The Inefficiencies Of Frozen Tariff

(1) Today the consumer has a choice through the existence of multiple platforms (analogue/terrestrial and digital). This inherently ensures that there is no monopolization or cartelization. Even if there is, there are specific legislation on Competition issues that have the required remedies. The time has come to ask the question whether continued existence of the current Tariff regime is justified or one ought to look beyond existing Regulatory formulations. It is submitted that regulatory strictures that partake the character of mandatory standardized off the shelf terms for Distribution through either a "Must Provide" or "Tariff Ceiling", cast a duty upon owners/licensees of copyright to compulsorily give away their property to other commercial entities for the latter to profit at the cost of the former and are thus exceptions to the rules of exclusivity embodied in the Copyright Act. They are market distorting and act in derogation of the legal principles that the public's interest in access to expressive works is best served by the market-based incentives that result from clearly-defined and meaningful exclusive rights. While such standardized formulations for tariff may be seen as a means of lowering transactions costs in cases of inefficient or failed markets, government rate-setting and administration are traditionally inefficient, involve higher transactions costs, and are far less flexible than private-sector negotiations in functioning markets.[9] As a result, TRAI should review the question whether the policy justifications, that formed the basis for enactment of the "Must Provide" Regulations and the "tariff

[9] ***See*** Robert P. Merges, ***Compulsory Licensing vs. the Three "Golden Oldies: Property Rights, Contracts, and Markets"*** (Cato Policy Analysis No. 508, 2004)

ceilings", continue to exist today as there is no evidence of any market failure or abuse of market power by any stakeholder.

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

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

(4) In an environ where underdeclaration of subscriber base is the norm the cable and satellite Interconnection/Tariff Regulations provide a number of examples of the market-distorting effects. The most glaring of such examples ***inter alia*** are (i) the largescale evasion of taxes that occurs at the ground level (ii) the disincentives for digitization with addressability (iii) the emergence of Carriage/Placement fees and (iv) the huge case load of disputes between analog cable operators and

broadcasters requiring the latter to divert costly funds towards even more expensive litigation. There is no market based reason why operators cannot negotiate with broadcasters covering all aspects of cable and satellite redistribution. This happens every day with cable networks and satellite service providers all across the globe. Moreover broadcasters have to subject themselves to competitive bid to procure content, and have to submit to market forces to obtain rights for popular programming. Indeed, in the absence of mandatory non discriminatory must provide clauses and frozen tariffs, Operators like all program providers, have every incentive to negotiate agreements for distribution of their products in as many markets and on as many platforms as possible. The only reason such rights would not be sought for cable and satellite distribution is that the must provide non discriminatory interconnection and tariff regulations take away the incentive for them to do so. In effect, such Regulations take the right to determine the terms of distribution out of the hands of market participants and places them squarely into the hands of TRAI and the courts. One might ask whether the fact that broadcast signals continue to be regulated through TRAI mandated statutory clauses, rather than in the market, reflect a market failure, or whether whatever market failure that may exist is in fact the outgrowth of over regulating the broadcasting space through "must provide" and frozen tariffs.

(5) In another example of market distortion, cable and satellite rates determined through the TRAI run rate-setting process are consistently below those that would have been negotiated in the market.[10] The end result is a statutorily-mandated and sizeable subsidy for cable and satellite providers paid for by broadcasters who in most cases are

[10] ***See also*** Merges, supra (noting the problem that compulsory licenses or ceiling of rates "can easily become outdated and unreflective of supply and demand" and that "[i]n practice, ... compulsory licensing/ceiling of rates has led to price stagnation.").

copyright owners/licensees. The Must Provide clauses perpetuate a regime of compulsory licensing that exacerbates such market distortion.

(6) Even where TRAI attempts to reflect the market in its Regulatory formulations, the enactments tend to make assumptions that may or may not be reflected in fact. For example, the Regulations inter alia assume that citizens all over the country have an economic hierarchy that closely reflects the HRA paid to government employees or that an ala carte mandate to Operators shall in some ways or means translate into choice and enablement for the consumers or that the SLR provided by Operators to broadcasters are sacrosanct and inviolable, notwithstanding lack of addressability and admitted underdeclaration. These reflect a common defect of the Regulations as currently drafted, which is that the existing Interconnection/Tariff regime increasingly involves the TRAI in deciding the terms of carriage for television networks and affiliates without an opportunity for the people who invest Crores of Rupees in the provision of those signals to negotiate over where and how those signals are used by others. Whether it is TRAI deciding that "must provide, non discriminatory" clauses shall apply to Broadcasters thereby enabling Operators who claim abysmally low subscriber bases to avail signals; provisions crafted to ensure ceiling of rates; or even the persistent refusal to (a) lay down minimum eligibility criteria for MSOs/LCOs, (b) ensure quality of service and Must Carry as a precondition to Must Provide, (c) stipulate basic documentation for MSOs/LCOs - the over reaching Interconnection/tariff regime continues to expand its scope in supplanting the rights of broadcasters, by controlling how their products are used by other commercial entities.

(7) We do not envisage any need to fix tariff for Non CAS areas. Motion pictures and cricket are immensely popular in India, yet the government has not stepped in to regulate the pricing of such films or cricketing

events or their distribution terms for that matter. There is no regulation deciding the pricing of a ticket for a film or a cricketing event. The same is entirely left to market forces. This should also be the approach for the Broadcasting Sector. Even multiplexes charge higher than stand alone Cinema Halls for the same film. Ticket rates for cricketing events are way higher than what a subscriber pays for watching the matches within the comfortable confines of his home. Very recently there was a standoff between Multiplexes on the one hand and Producers and Distributors of Motion Pictures on the other, yet the government had done well not to intervene in a commercial dispute and instead it had left the dispute resolution entirely to market forces. The impasse eventually got resolved with all stakeholders leveraging on their respective bargaining powers. Subsequent disputes of like nature between Multiplexes and Producers/Distributors have been taken to the Competition Commission for adjudication. There is no reason why broadcasting should be treated any differently.

V. A CRITIQUE OF THE CP

(1) ***Non Addressability as a basis for greater intervention*** : At the outset we felicitate the Authority for having correctly identified the maladies in the Non CAS space, what however is disconcerting is the overarching premise that these admitted shortcomings in a non addressable environment are indicative of market failure and hence provide justification for greater regulatory intervention. The line of thought that has taken precedence is forbearance and light touch regulation is something which can be pursued in addressable jurisdictions only and not in non addressable ones owing to supposed lack of effective competition in the latter. The Authority has done a commendable job in mapping the international regulatory practices and identifying the areas and extent of regulatory intervention across multiple geographies, yet the conclusion that such international best practices can only be replicated

in an addressable environment is unfortunate.[11] Inspite of clearly holding that in the international arena "there are no direct regulations at the whole sale level (be it for whole sale rates or for placement and carriage fee…." [12] yet the Authority has concluded that ***" If sellers (broadcasters and distributors) do not know how many buyers (subscribers) are ultimately purchasing their product (channel), retail prices and revenue arrangements amongst stakeholders cannot be negotiated on any scientific basis and hence cannot be left up to free market forces."[13]***

(2) ***Not considering the issue of Subscriber Base***: While the Authority relies upon lack of addressability to justify direct intervention, it unfortunately steers clear of laying down a methodology for determining levels of connectivity amongst stakeholders. This inspite of specific directions to that effect by both the Hon'ble Supreme Court and the Hon'ble TDSAT vide Orders dated 13th May 2009 and 15th January 2009 respectively. The relevant portion of the Hon'ble TDSAT Judgment reads as follows:

"Secondly, in a non-addressable scenario, which is what characterises most of the cable industry, the problem of under declaration by the cable operators/MSOs persists, and the concern of the Broadcasters in this regard cannot be brushed aside. In fact, a significant percentage of the disputes in the broadcasting sector are on account of the subscriber base, a fact recognised by the Authority in Para 3.27 of the explanatory memorandum annexed to the impugned tariff Order. It is essential that this issue is addressed squarely. The Authority would be well advised to review

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[11] Paragraphs 4.1.7, 4.1.8 read with Paragraph 4.10 of the CP gives out unmistakably the Authority's penchant for regulating non addressable markets in India. The argument that has been made out is because of non addressability in Indian markets, there can be no effective competition and hence the need for direct regulation.

[12] Page 61 , para 4.1.18 (2) of the CP

[13] Para 4.1.10 page 58 of the CP

its decision indicated in Para 3.29 of the explanatory memorandum of having decided not to determine the levels of connectivity between the stakeholders. Since digitalisation and addressability are bound to take some time, it is essential that the Authority, set up to regulate the industry, finds a way to address the issue."[14]

(3) ***Holding that there is no competition interse platforms*** : The presence of multiple platforms namely DTH, IPTV, etc. has not convinced the Authority that there is today sufficient competition in the distribution space. The Authority regrettably holds[15] :

> ***"Third, an important observation across countries has been that regulators continually adapt their policies to ensure that they promote every platform equally through 'platform agnostic' regulation. It is pertinent to mention that regulations should be platform agnostic only when the platforms themselves are comparable (i.e. when platforms compete with each other on similar parameters). Thus the regulators have to play a balancing act of (1) developing each platform to a stage where it can compete on its own (2) ensuring that the regulations at this stage are equal to all parties."***

It is submitted that such a regulatory thought-process will only serve to perpetuate the continuance of analog systems and an eventual transition to digitization with addressability by mandating a Sun Set Date for analog shall remain ever elusive. Today analog platforms clearly have a definite advantage over their digital counterparts owing to admitted underdeclaration and huge carriage fees, this asymmetry in comparative

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[14] Paragraph 80 of Judgment rendered by the Hon'ble TDSAT dated 15th January 2009 in Appeal No. 12 © of 2007

[15] Page 61, Paragraph 4.1.18 (3) of the CP

advantages which acts as a dis incentive to digitize has not been touched upon in the CP.

(4) ***Misconceived conclusions on advertising revenues and costs***: The Authority has found[16] :

"2.4.2 The size of the television advertising market – which was estimated at INR 8,800 Crore in 2009 – appears to be low compared to global benchmarks. ASSOCHAM's report on the "Future of Advertisement Industry in India" provides the following comparison: ...."

And

"2.4.3 The average contribution of advertising (total advertising, all mediums) to GDP for the markets analyzed is 0.94%, with the US peaking at 1.3%. India, in comparison, is at 0.52%. This implies that there is potential for the market to nearly double in size, from the current estimate of INR 20,000 Crore."

The stated premise is that broadcasters have a huge revenue potential through advertising. It may be pertinent to mention that the Assocham figures that have been relied upon pertain to total advertising in all mediums and not merely that of television. What the CP fails to address is the global phenomena of a shrinking advertising pie qua the broadcasters. As will be demonstrated through the response, the share of the broadcasters in the advertising revenues have been systemically coming down over the years owing ***interalia*** to increased audience fragmentation brought about by growing number of channels and further because of emergence of new media and other alternatives namely the internet, print media, out of home advertising, etc. Also technological innovations like PVR have undermined traditional concepts of "prime

[16] Page 25 and 26 of the CP

time" thereby aggravating the dwindling share of broadcasters in the total advertising revenues. The CP also does not factor in the recessionary trends that have resulted in a downfall of over-all advertising revenues since 2008 whereas subscription revenues and ground collections have been largely inelastic to the downturn. The CP has not deliberated on the rising production and programming costs brought about by increasing demands on production facilities resulting from the growing number of channels. Inflation and the upward spiral in the cost of funds have been similarly neglected; instead costs have been assumed to be flat on a year on year basis. Neither has it considered that production and programming costs, as will be seen in the course of the response, bear a direct correlation with audience reach. Nor has it considered that several broadcasters have had to drastically cut down on costs in order to survive.

(5) ***The Purported Clarifications through the Minutes***: The following grid lays down (i) some of the issues that were raised ***inter alia*** in the meeting on 22nd April 2010, (ii) the Authority's take on the same vide its Minutes dated 23rd April 2010 and (iii) our response to the Authority's take.

Sl. No.	Issues raised	Clarification provided by TRAI	Our take on the clarifications.
1.	- Certain calculations have been made and some figures have been arrived at Annexures B3, B5, B7 and B9. However the assumptions that have gone into their making are not apparent. It has been said that "certain filtration criteria" have been used "to remove the impact of aberrations".	- No assumptions have been made - Annexure B is based on data provided by stakeholders - Filtration criteria have been used to remove aberrations such as the impact of early stage companies and partial or inconsistent information provided by companies	- No clarity given on what filtration criteria was actually used and how, - There is no finding on the qualitative and quantitative extent of aberrations that were encountered. - This clarity was needed to understand how the Authority could make the transition from huge negative EBITDAs in Annexure B1 and B2 to outright large and positive EBITDAs in Annexure B3. - No clarity on how B3 figures could be arrived at for GEC English and Regional movie genres

			when there are no corresponding figures in B1 or B2. In B1 and B2, English GEC and Regional Movie genres have been marked as N/A. - No clarity on how the weightages and index values used in Annexure B2 were arrived at to allocate company level data to each of the genres. - No clarity on the components of "Total Operating Costs". - Summation of subscription revenues of all the genres does not match up to Aggregator/MSO pay out.
2.	- The genre and channel that has been considered for arriving at the final figures (in Annexure E) is not apparent.	- Annexure E is only an illustration of the methodology - No specific channel or genre has been used in Annexure E - The figures used are only for illustration and are not linked to any specific genre or channel - Stakeholders can use the model, substitute with their own figures and see the corresponding impact on tariff	- We note that this is in contradiction to what has been stated in page 71 para 5.2.20 under the heading ***"Wholesale Tariff determination using the Cost Plus Approach"***: ***"A 'Cumulative Cash Flow' Model to determine the appropriate level of wholesale tariff was deployed. The model was developed at a genre-level, with the intent to generate channel-wise prices for various genres. A detailed methodology note and sample calculation is provided in Annexure E. <u>The inputs for the Cumulative Cash Flow model were derived from the genre-level representative figures published in Annexure B.</u>" (Emphasis Ours)*** - Para 5.2.21 at page 71 states ***"A sample tariff calculation using the "Cumulative Cash Flow Approach" <u>and the Representative Figures is illustrated below</u>."*** (Emphasis Ours)

			- Also Annexure E (from page 149 – 153) makes innumerable references to Annexure B hinting on the linkages between the two. - Broadcasters are thus in no position to simulate the model by substituting their own figures in the absence of clarity on linkages between Annexure B and E. Accordingly there is no scope for broadcasters to replicate the cost plus model with their own figures and gauge the impact of the same.
3.	- How is average connectivity calculated	- Average connectivity can be derived from the Inter Connect filings - It is calculated as follows: (Sum of connectivity of all pay channels in a genre, as per interconnect filings)/ (No. of pay channels in that genre)	While Annexure B5 gives out genre wise connectivity, it is however silent on average connectivity. There is no clarity on the number of Pay channels considered in each genre. Accordingly there is no scope for broadcasters to replicate the cost plus model with their own figures and gauge the impact of the same.
4.	- Why have year-on-year costs been taken to be the same in Annexure E? - Why has a year-on-year rate of growth of flat 35% been assumed in Annexure E?	- The calculation from Year1 to Year 5 refers to channels at different stages of the lifecycle. - Thus Year 1 refers to a channel in its first year of operations and Year 5 to a channel is (sic) its fifth year of operations – at a single point in time, e.g. in the year 2006 - In a given year, the cost structure is observed to be similar across channels at different stages of the lifecycle – hence costs are flat from Year 1 to Year 5 - In a given year, the revenues of channels differ significantly	- We note that this again is in contradiction to what has been stated in Annexure E at page 149 – 153. - It has been categorically stated here that only one representative channel within a genre has been used to cover different stages of its lifecycle starting from Year 1 to Year 5. - It has been asserted that benchmark P&L and Cash Flow has been used to "remove(s) variations due to the high variance in the lifecycle of various channels. - It is clearly stated that : ***"The model is***

		depending on what stage of the lifecycle they are at. Thus it is not a year-on-year revenue growth of a flat 35%. Instead, it reflects the changing total revenue and revenue mix – for channels in Year 1 of operations and channels in Year 5 of operations – at a single point in time	***constructed in a way that the cumulative inflows over five years set off the cumulative outflows over five years. Thus at the end of five years, the channel is assumed to enter a "steady" or "mature" state."***
5.	- Whether foreign income has also been included in Annexure B3?	- Foreign income is not included, revenue pertains to domestic revenue only	Figure 2.4 at page 14 however states that "***the subscription revenue for ZEEL includes contribution from international markets as well."*** Also during the data collection exercise, foreign income figures were specifically asked for. There is no clarity on the bifurcation of total revenue into domestic and Foreign. Annexure B says "Total Revenues" have been considered.
6.	- Whether the subscription revenues considered in the calculations pertain to analog or both analog and digital, in Annexure B3?	- The subscription revenue pertains to both analog and digital	This is a matter of concern; As stated, Annexure B3 figures have been carried forward to Annexure E for deriving cost plus tariff in Non CAS areas. A mis-match is thus bound to occur.
7.	- No allowances have been made for a downturn in Annexure E	- Tariff related to subscription cannot be expected to account for downturns in other sources of revenue	Likewise, Tariff related to subscription cannot be expected to always reflect a "Boom" without accounting for "Busts"
8.	- The figures that have been taken for cost of debt and equity in Annexure E are conservative	- These figures are based on data provided by the industry	- This is the main issue with Annexure E (i.e the cost plus tariff) as the Authority has correctly pointed out in page 72 : ***"5.2.23 The current connectivity is a derived number based on the target subscription revenue of a channel and the applicable tariff. <u>An attempt to</u>***

			calculate the tariff using the subscription revenue requirement (derived from current costs and collections) and the observed connectivity – is likely to lead to a ceiling that approximates the current tariff. (Emphasis Ours) ***5.2.24 Use of current connectivity figures is likely to perpetuate the mismatch between (1) the per subscriber cost of content to the MSO and, (2) the per subscriber retail price of television services. Thus it is unlikely to lead to the alignment of business models across the value chain, which is identified as a key concern in non-CAS markets." (Emphasis Ours)*** - The present state of affairs is thus preventing the broadcasters from realising a credible "real rate of return" in these times of high inflation;

(6) Other Material Anomalies: These are summarized thus:

Sl. No.	Observations in the CP	References in the CP	Anomalies
1.	Subscriber base of Analog at the retail level has been taken to be 68 million based on NRS data of 2006 whereas connectivity levels of broadcasters/aggregators/MSOs i.e. subscriber base at the whole sale level have been inferred from Interconnect filings of December 2008 and June 2009. This usually ranges between 4-5	Para 2.4.9, page no. 28	- While the retail rates will be applied to the 68 million subscribers, the Cost Plus Tariff will be applied on 4-5 millions subscribers. - Further, TRAI's reliance on NRS data for LCOs' subscriber base indicates that LCOs have not been very forthcoming with

	million for broadcasters and 5-6 million for MSOs		subscriber base data. - The NRS data should have been further subjected to an extrapolation in order to arrive at the total subscriber base prevailing at the retail level as on June 2009. Accordingly the total subscriber base at the retail level shall not be less than 80-85 million.
2.	***"There is no reliable information on the number of subscribers receiving cable TV services. Subscription revenue transactions are being conducted on the basis of a "negotiated" subscriber base. Based on information received from stakeholders and inter-connect filings – it is observed that the "negotiated" base is less than 10% of the estimated base of 68 million analog cable homes. It is reported to TRAI that the most widely distributed channels reach around 40 million homes – thus the connectivity is approximately 1/6th of the reach. This mismatch is absorbed by the channel/ bouquet pricing, which is approximately 6 times higher than the retail price."***	Para 2.4.11 at page 28 and Para 3.2.3 at page 48	- Whole sale rate has thus been held to be 6 times of retail rate and it has been contended that this offsets the underdeclaration by LCOs. - However Figure 2.11 at paragraph 2.4.7 shows MSO/LCO collection to be almost Rs. 13500 Crores out of which only Rs. 2900 Crores (21 percent) end up with the broadcaster/aggregator. - The broadcaster has to incur considerable expenses for engaging aggregators to distribute its offerings.
3.	Annexure E	Pages 149-153	- See anomalies identified in (5) ***supra,*** - There is a mathematical error in the calculations of Return on Capital at Page 153 of the CP. - The cost of funds locked in inventory and in Sundry Debtors has not been considered. - Historical costs have been taken as a basis for future tariff. - Approach taken is conservative, socialistic

			and utilitarian, this inspite of TRAI specifically finding that Pay TV is only an "Esteem" and "Cognitive" Need as opposed to "Physiological" Needs and is akin to consumer durables. (Annexure F) - No econometric analysis or models have been deployed to ascertain a series of whole sale prices whereby demand and supply for Pay TV would interact and achieve equilibrium. The tilt is more on Cost Accounting than Economics.
4	Annexure B7 – MSO Data	Page 130	- Subscription revenue paid to broadcasters/aggregators: Rs. 144 Crores whereas Subscription Revenue received from LCOs: Rs. 122 Crores) - The MSO pay out does not match with Broadcaster/Aggregator receipt. - No clarity on "Other Revenues" (10%) and "Other Costs" (48 %) - No clarity on Revenue break up for Regional MSOs
5	Annexure B9 – LCO data	Page 133	- Infrastructure maintenance and Collections costs have been shown to be disproportionately higher (roughly 60 – 70 percent) - Content Cost has been shown to be Rs. 40 per subscriber per month; the yearly pay out inferred from Annexure B 9 does not tally with the MSO receipts as shown in Annexure B7. - Data for LCOs having less than 500 connections were collected on and

			from 15th February 2010, yet purported filtration criteria applied on the same resulted in conclusions exactly identical to those published earlier on 10th November 2009. - Reliability of LCO data suspect as per TRAI's own admission. (Page 41 of CP)
6.	***"It is observed that the average increase in subscription revenue of some large broadcasters is in the range of 15%-20%[44] p.a. ....Any increase in revenue can thus be realized through an increase in the number of subscribers, and no corresponding increase in price is required."***	Page No. 28 , para 2.4.10	- Increase in revenue is primarily achieved through (a) Launch of New Pay Channel (b) Conversion of Free to Air Channel into Pay Channel (c) TRAI mandated Tariff increase because of inflation (d) Normal year on year business phenomena - In a non addressable environment it is altogether misconceived to contend that increase in revenue is achieved through increase in subscribers. - To say that no corresponding increase in price is required and if accordingly the inflation induced increments are discontinued then such discontinuation shall result in Tariff stagnation.
7	Digitization and Licensing yet again identified as Long Term goals	Para 3.2.15, page no. 52; Para 6.4, page no. 97; Para 2 page no. 3.	This shall only help in preserving status quo.
8.	***"......this is in contrast to the profit margins declared by several publicly listed broadcasters. These companies***	Para 3.1.6, page no. 34-35	- Generalizations have been made about the profitability of the broadcasting sector.

	have declared profits, such as TV Today Network Ltd. (28%), Zee Entertainment Enterprises Ltd. (39%), Zee News Ltd.(16%) and Sun TV Network (47%). Secondly, this is also in contrast to the growth trends projected by industry research (such as the FICCI Frames report released in March 2010). Thirdly, these negative figures do not provide a logical explanation for the recent growth in the number of channels and the number of applicants awaiting approval for a broadcast license.		- Reliance has been placed on figures of 3 Indian broadcasters to conclude that the sector is profitable. - The 3 broadcasters that have been chosen display unique traits that are not visible in so far as other broadcasters are concerned. While one is a dominant regional player with practically no ground competition, the other is a pan India Media power house which has a huge presence in the media landscape of this country. The last one is a broadcaster which has limited but powerful genres, is a pioneer and first mover in its respective field, and also has a significant presence in the print media thereby enabling it to leverage on the economies of scale. - Multinational Broadcasters in particular are severely disadvantaged owing to lack of level playing fields in so far as investment options are concerned. Regulatory bottlenecks in FDI prevent multinational broadcasters from diversifying away their risks. They are in no position to hold a wide portfolio of investments but their Indian counterparts have the liberty to square off risks through multiple presences across sectors. - TRAI's Recommendations on Issues relating to entry of certain entities into

			Broadcasting and Distribution activities dated 12th November 2008, explores the reasons behind the sudden spurt in the number of channels which has nothing to do with profitability. - Trends estimated by reputed consultants of the likes of FICCI, et al, are no substitute for actual statistical data; 2008-2009 was a timeframe when all estimates had failed as none had seen the recession coming. Several companies in India and abroad including major broadcasters had taken a severe hit and were left with no other alternative but to cut down on costs. Many firms had to shut shop. A reputed broadcasting firm had to issue marching orders to a sizeable chunk of its top management.[17]

VI. DETAILED RESPONSE TO THE QUERIES

1. Are the figures in Annexure B3 representative for the different genres of broadcasters? What according to you are the correct representative figures? When providing representative figures, please provide figures for the genre, and not of your company.

2. Are the figures in Annexure B5 representative for aggregators? What according to you are the correct representative figures?

[17] See "Mass Exits from Sony TV, 50 Top Managers Leave", Indian Express, Saturday March 7, 2009. available at http://www.indianexpress.com/news/mass-exits-from-sony-tv-50-top-managers-lea/432013/

When providing representative figures, please provide figures for the category, and not of your company.

3. Are the figures in Annexure B7 representative for the national MSOs? What according to you are the correct representative figures? When providing representative figures, please provide figures for the category, and not of your company.

4. Are the figures in Annexure B7 representative for the regional MSOs? What according to you are the correct representative figures? When providing representative figures, please provide figures for the category, and not of your company.

5. Are the figures in Annexure B9 representative for the LCOs with > 500 subscribers? What according to you are the correct representative figures? When providing representative figures, please provide figures for the category, and not of your company.

6. Are the figures in Annexure B9 representative for the LCOs with =< 500 subscribers? What according to you are the correct representative figures? When providing representative figures, please provide figures for the category, and not of your company.

RESPONSE

(1) We have serious objections and reservations with regard to the purported Representative operational figures contained in the Annexures B3, B5, B7 and B9. We have specifically highlighted the same in V(5) and V(6) ***supra***. The concerns expressed vide our letter dated 26th November 2009, with regard to these data, when they were first published on 10th November 2009, continue to hold good.

(2) Further, in view of:-

(a) wide divergence in figures among the three Annexures;

(b) absence of any clarity on:

(i) how the individual figures were arrived at

(ii) the types of aberrations that were encountered

(iii) the modus of allocation/disaggregation of combined data

(iv) the nature of filtration criteria that were adopted and

(v) the manner of deploying the said filtration criteria,

(vi) the sample sizes and sample constituents.

we are in no position to comment on the individual merits of Annexure B1 and B2. Suffice it to say that on an overall basis without going into individual parts and pieces, the dismal picture that emerges at a macro level on a joint perusal of Annexure B1 and B2 does not augur well for the broadcasting sector at all.

(3) We shall however refrain from commenting on Annexure B4 and B5 as we are not privy to Aggregator data and accordingly are in no position to comment on the same. We have however noted some lack of information in Annexure B5 as already stated, that has prevented us from fully grasping the working of the cost plus model in Annexure E to which we have serious objections and reservations.

(4) Again owing to lack of clarity in MSO and LCO data as already stated we are in no position to comment on the veracity, credibility, and reliability of the models developed per Annexure B 6, and B8.

(5) Be that as it may, if some of the figures published in the CP are taken as a basis after some necessary adjustments on a rational but admittedly heuristic basis the following emerges:

<u>Table 1.</u>

Sl. No.	Particulars	Data	Source
A	No. of Subscribers at retail level	68 m	NRS data of 2006
B	Growth rate of population	3 m	Assuming 1.5 percent growth rate of population p.a. (2006-2007-2008-2009)
C	Total Non CAS homes	71 m	= A+B (At the very least. Other estimates put the Non CAS homes at around 80m[18])
D	Average cable Bill	275/-	ARPU[19]
E	Annual Ground Collection by LCOs	INR 23,430 Crores	C*D*12
F	Amount received by Broadcasters/Aggregators	INR 2,900 Crores	Fig 2.11 at page 27, para 2.4.7
G	Amount retained by MSO/LCOs	INR 20,530 Crores	= E-F
H	Percentage pass through to Broadcasters	12%	F/E * 100
I	Reported Subscription Revenue pertaining to Non CAS	INR 13,500 Crores	Fig 2.8, para 2.3, page 25
J	Revenue leakage/Unaccounted collections at Retail level	INR 9930 Crores	= E-I
K	Declared Connectivity of Broadcasters/Aggregators	4-5 m	Paragraph 2.4.9 page 28
L	Extent of Declaration - Broadcasters/Aggregators (as a percentage of retail level subscriber base)	6 percent	K/C *100
M	Declared connectivity of MSOs	5-6 m	Paragraph 2.4.9 page 28
N	Estimated Amount obtained by MSO from LCO: INR 2900 Crores * 1.22	INR 3538 Crores	The CP does not shed light on this particular aspect of pricing. While the extant Regulations mandate a price to be charged by Broadcasters to MSOs and by LCOs to Subscribers, it is silent on MSO pricing. However given that declared connectivity of broadcasters/aggregators is 4-5 million(K) and that of MSOs is 5-6

18 MPA, Asia Pacific Pay TV & Broadband Markets 2009.

19 See Response to Issue 7 ***infra***

			million(M), it can be said that MSOs are well off than broadcasters/aggregators by about 22% on an average.[20] This "better off" argument would obviously be a heuristic assumption; One could argue on the squeezed margins of MSOs given that there are a plethora of MSOs today both on a Pan India and regional basis with some of them even coming up with IPOs. This approach could thus be unduly generous to the MSOs but will nevertheless help in shedding some light on how the coin spins across the value chain. Also it must be remembered that a substantial chunk of the MSOs also double up as an LCO at the last mile. Over the years the dividing lines between the MSO and the LCO has blurred.[21] It is being seen that LCOs at the regional level also have an incentive to convert into an MSO, as that would enable it to partake a share of the carriage/placement pie, while retaining hold over its respective last mile.
O	Percentage of Ground	15%	N/E * 100 or H * 1.22

[20] Working Note : Mean declaration of MSOs is 5.5m (5m+6m/2), whereas that of broadcasters/Aggregators is 4.5m (4m+5m/2), thus 5.5./4.5 – 1 = 0.22

[21] Page 17-18, Para 2.2.24 of the CP – "One of the ways in which MSOs have tried to expand to new regions is by buying out LCOs. This has led to huge premiums being paid for LCO operations in markets where the MSO perceives value in reaching out directly to the consumer." Also Page 20 Para 2.2.30.

	Collection received by MSO i.e. Percentage pass through to MSOs		
P	Estimated Amount retained by LCO	INR 19892 Crores	E-N
Q	Extent of Declaration - MSOs (as a percentage of retail level subscriber base)	7.5%	M/C*100 or K*1.22 (average of both)
R	Estimated Amount retained by MSO after Pay Out to Broadcaster/Aggregator	INR 638 Crores	N-F
S	Percentage of Ground collection retained by LCO	85%	P/E *100
T	Percentage of Ground Collection retained by MSO	3%	R/E*100

(6) We therefore believe that the LCO data at Annexure B9 should be recast as follows:

Table 2

Sl No.	Particulars	Data (INR)	Source
A	ARPU	275	Response to Issue 7 ***infra***
B	Costs:	(118.25)	C+D
C	Content	41.25	Pay Out to MSOs (15%) (i.e. "O" of Table 1)
D	Collection & Infrastructure	77	Given that an LCO is to receive INR 77/- per subscriber per month, if it retransmits FTA channels only and that this was deemed to be sufficient to cover all its expenses (collection and infrastructure) and further secure a decent profit.[22] However this was a figure fixed way back in 2006. We can thus safely assume that as on today the entire INR 77/- would perhaps be just sufficient to cover costs for retransmitting FTA channels only; Content cost for Pay channels will only be incremental, i.e. over and above this figure of 77/-

[22] See Para 3.5, page 17 of The Telecommunication (Broadcasting and Cable) Services (Third) (CAS Areas) Tariff Order, 2006 (6 of 2006) 31st August 2006.

E	Profit/Margin	156.75	= A-B
F	EBITDA	57%	E/A*100

(7) This could perhaps serve as a basis for better understanding the realistic revenue share that takes place across the distribution chain and the extent of underdeclaration, under reporting and revenue leakage that occurs at the MSO – LCO level. Thus as per the above data:

Broadcaster (12%)	MSO (3%)	LCO (85%)

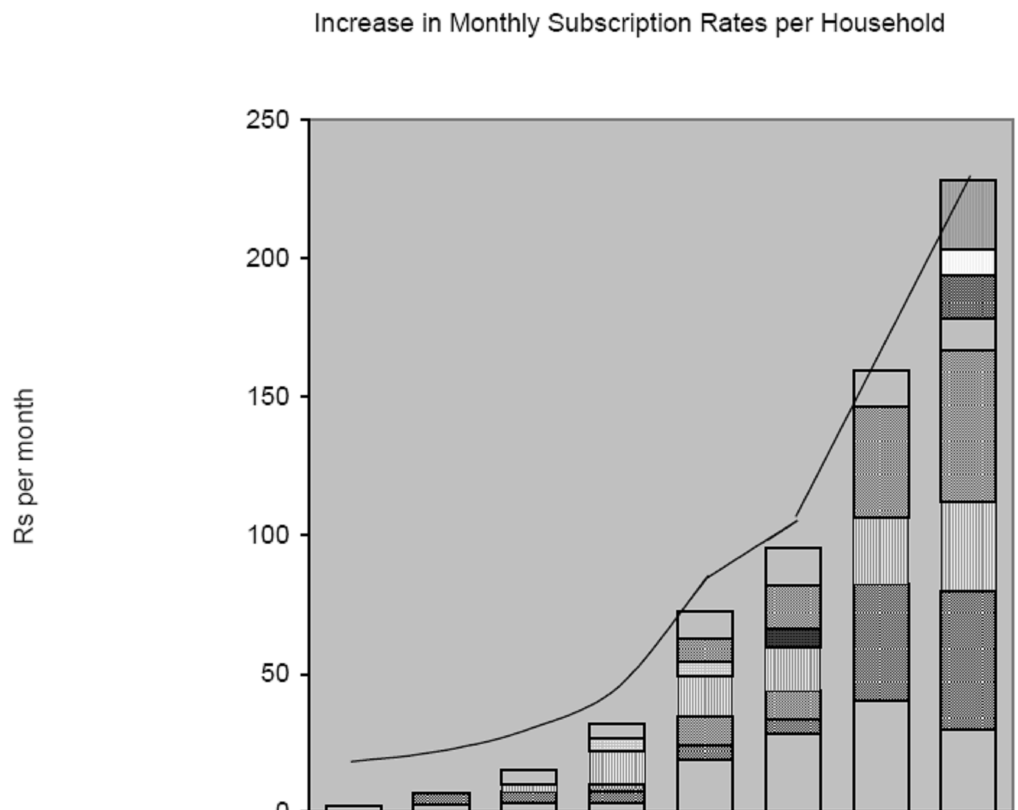
(8) The CP would have done well if it could have shed some light on other qualitative aspects of the Non CAS market, for eg. the extent of DTH penetration in Non CAS areas. The extent of substitutability between platforms and their degree of responsiveness to a range of prices could have elicited a measure of inter platform competition.

7. What according to you is the average analog monthly cable bill in your state or at an all India level?

RESPONSE:

(1) The following is a chart published by COFI[23]

[23] See page 33 of Consultation Paper No. 9/2004 Telecom Regulatory Authority of India Consultation paper On Issues relating to Broadcasting and Distribution of TV Channels New Delhi, April 20, 2004



	Mar-96	Mar-97	Mar-98	Mar-99	Mar-00	Mar-01	May-02	Jan-03
Local Channels	-	-	-	-	-	-	-	25
B4U Movies	-	-	-	-	-	-	-	9
Ten Sports + FTV	-	-	-	-	-	-	-	15.5
MEN Bouquet	-	-	5	5	10	13.25	13.25	11.5
Set Bouquet	-	-	-	-	8.35	16	40	55
Discovery Bouquet	-	-	-	5	5	6.25	-	-
ESPN /Star Sports	-	-	2.85	11.55	14.75	16	24	32
Turner Bouquet	-	-	-	2.9	10.5	10.5	-	-
Zee Package	-	4	4	4	5	5	42	50
Star Package	2.5	3	3.5	3.5	19.25	28.5	40.5	30

Source COFI

(2) This clearly brings about that even as on January 2003, average retail cable prices on an All India – Time Series basis was INR 228/-, (Summation of the figures under January 2003). It may be noted that in the earlier years, Broadcasters directly negotiated with LCOs, the

emergence of MSOs and resulting audience fragmentation was only a later phenomena[24].

(3) TRAI had commissioned a market survey in 2004 whereby it had found the all India average cable bill to be Rs. 176 excluding taxes.[25] Six years have elapsed since and TRAI has also allowed inflation induced increments from time to time ranging from 4- 7 percent per annum. New Channels/bouquets have also since come into existence. Accordingly we are not in a position to accept Rs. 165/- as ARPU. The said figure might have been propounded by stakeholders including consumers who could have a vested interest in reporting abysmally low retail prices in the hope that the retail freeze shall be in and around this level.

(4) In 2006, in another Paper[26] TRAI had held: ***"In the current scenario in non CAS environment information as available in the market shows that an average price for 25-30 pay channels along with 30 free to air channels is around Rs 175-200/-."***

(5) There can thus be no doubt today that taking into account year on year growth allowed by the Authority, together with the entry of new Pay channels in the fray, the Average All India Cable Bill today is in the range of Rs. 250 – 300/- per month.

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[24] Page 16, Para 2.2.17 of the CP "In the early days of cable, there were no MSOs and the broadcasters negotiated directly with LCOs as the number of broadcasters were limited and most channels were Free to Air."

[25] Paragraph 2.27, Page 15, of Consultation Paper No. 6/ 2007 dated May 21, 2007, On Issues relating to Tariff for Cable Television Services in Non - CAS areas.

[26] See Para 5.13, page 37 of The Telecommunication (Broadcasting and Cable) Services (Third) (CAS Areas) Tariff Order, 2006 (6 of 2006) 31st August 2006.

(6) Accordingly the ARPU should be taken as 275/- being the average of the higher and lower limits.

8. Is the market for cable services in non-CAS characterized by the following issues:

(i) Under-reporting of the analog cable subscriber base
(ii) Lack of transparency in business and transaction models
(iii) Differential pricing at the retail level
(iv) Incidence of carriage and placement fee
(v) Incidence of state and region based monopolies
(vi) Frequent disputes and lack of collaboration among stakeholders

9. Are these issues adversely impacting efficiency in the market and leading to market failure?

RESPONSE

(1) We agree that what has been stated above could be weaknesses and deficiencies that characterize Non CAS markets, but having said that, we don't agree that these weaknesses are leading to market failure necessitating high handed regulations through a tariff ceiling. We submit that the Non CAS market is plagued more with structural issues and the rate regulations have only aggravated matters. The need of the hour is thus structural reforms rather than an all pervasive tariff formulation. A tariff stricture at this juncture will only serve to exacerbate the asymmetries that are prevalent in the market as we know it today.

(2) We believe that the structural issues can be better addressed if we identify the maladies in Non CAS markets holistically; Accordingly

in addition to what has been suggested above the following issues also need to be looked into and resolved:

I. Lack of enforcement across the entire value chain
II. Absence of minimum eligibility/documentation criteria for Operators
III. Must Provide not backed by Must Carry
IV. MSOs resorting to arbitrary change in "Band" placements and "Black Outs".
V. Lack of proper billing systems/record keeping by LCOs/MSOs
VI. Interconnect Regulations promoting largescale default by LCOs/MSOs
VII. Unauthorised Cable Casting, area transgressions and Piracy
VIII. Courts asking broadcasters to supply signals on arbitrary subscriber bases
IX. Quality of Service Regulations not made applicable uniformly to LCOs and MSOs and not tied up with Must Provide.
X. Lack of an "Audit" culture.

(3) No amount of tariff prescription, be it at the whole sale or at the retail, can resolve these structural defects.

(4) While digitization with addressability and licensing will go a long way in resolving most of these issues, a solution needs to be found in the interim.

(5) We further submit that for "Market Failure", there has to be a first and foremost ascertainment of "Market Power". The instant CP has unfortunately interpreted the systemic defects in Non CAS markets as an instance of Market failure, whereas in regulatory parlance Market failure is actuated only when there is clear evidence of abuse of Market Power or Dominant Position by a

particular stakeholder. Negotiated deals between willing parties and resultant differential pricing are norms in Non CAS markets. These norms owe their emergence to lack of addressability. To say that these are indicative of market failure would be misconceived. Paying a higher price is not unnatural. Offerings by Operators will also vary from one place to another, particularly with reference to regional channels and so will the quality of service. Accordingly, it is but natural that price differentiation will be a logical concomitant of product differentiation. Had it been a case of a one size fit all Tariff being levied by Operators across the length and breadth of the country irrespective of their offerings or quality of service, a legitimate question with regard to abuse of market power could have risen.

(6) Incidence of carriage/placement fees have emerged on account of limited capacity in analog platforms. The issue is more technical than to have anything to do with market failure. Accordingly it is incentive based digitization with addressability alone that will enable an Operator to overcome such capacity constraints, laying down a tariff ceiling will be no answer. Likewise frequent disputes between stakeholders result from lack of clarity in connectivity levels, for which both the Hon'ble TDSAT and the Hon'ble Supreme Court have urged TRAI to come up with a solution. A mere tariff ceiling will not solve this problem either. Further in view of TRAI's admitted inability to determine whether there are conditions of adequate competition or monopoly in the absence of addressability[27], we fail to comprehend the Authority's contention

[27] Para 3.2.15, Page No. 53 of CP "It is important to mention here that in the absence of addressability – it is logically not possible to establish the presence or absence of effective competition. Thus definitions of monopoly or effective competition become relevant only where the base is measurable and dependable."

with regard to the incidence of state and regions based monopolies.

(7) A regulatory impact analysis together with the precautions to be taken as stated in II ***supra*** will clearly bring about the fact that Non CAS markets have to be reformed through structural changes rather than through invocation of an all pervasive high handed tariff regulation.

10. Which of the following methodology should be followed to regulate the wholesale tariff in the non-CAS areas and why?

i) Revenue share
ii) Retail minus
iii) Cost Plus
iv) Any other method/approach you would like to suggest

11. If the revenue share model is used to regulate the wholesale tariff, what should be the prescribed share of each stakeholder? Please provide supporting data.

12. If the cost plus model is used to regulate the wholesale tariff, should it be genre wise or channel wise?

13. Can forbearance be an option to regulate wholesale tariff? If yes, how to ensure that (i) broadcasters do not increase the price of popular channels arbitrarily and (ii) the consumers do not have to pay a higher price.

RESPONSE:

(1) Please refer to IV ***supra*** ("A Primer on the situation prevailing today") on the twin issues of Non Exclusivity and Frozen Tariff and how they have been skewing the field in favour of carriers vis – a vis broadcasters.

(2) Over the years we have been sadly witnessing:

- a continuing and growing threat from content piracy,
- the continuing and growing commoditisation as new players enter the value chain, and
- Regulatory intervention that makes content creation a less attractive business.

If these forces are not addressed, the consequences could be both serious and corrosive. Weakened commercial incentives would mean lower levels of investment, a diminution in range and quality, and increased reliance on the public sector. As professional broadcasters, we are a long-term believer – and investor - in content. The business was founded on a belief that people wanted a better choice of TV and would be prepared to pay a fair price for it. Equally, we believed that companies which recognised that opportunity would, if successful, be rewarded. And that those financial returns would, in turn, help to fund continued provision of more high-quality programmes. Those beliefs remain just as strong to this day. And they are backed up by actions. We want to invest more than ever before. Continual improvement in the range and quality of our on-screen offering is central to our ambition as a business. We want not only to satisfy existing customers, but to reach out to more and more new customers over time. This means that we have a keen interest in a durable and sustainable economic model for investment in quality content. Of course, that interest is shared widely. And not just by all the other companies with a stake in the business of content creation. It is in the interests of consumers, and of society as a whole, that content creators should be able to secure a fair and profitable return. The argument - usually heard from publicly-funded organisations with no need to make a return on investment - is that content is too important for social or cultural reasons to be reduced to a mere commercial transaction. In response, it can be said that it is precisely because content is important that it is necessary for us to understand and preserve the incentives for commercial investment. The fact that the availability of high-quality content is socially desirable is not enough to guarantee its continued existence. Without investment by the commercial sector, consumers would not enjoy anything like the same range of quality content that they receive today, which connects them to the wider world and provides enjoyment, information and inspiration. That's why there is nothing permanent or unchanging about the value of content. Like the value of anything else, it is constantly subject to a variety of forces – economic, technological and political – which can destroy as well as create. The way in which broadcasters - as an industry – recognise and respond to these opportunities and threats will determine our ability to maintain a virtuous cycle of investment, creativity and reward.

(3) Looking ahead, we don't see any reason why the long-term growth in pay TV penetration should not continue. A key factor in this will be the increasing ability of subscription-funded broadcasters to invest in quality content, widening further the gap between what's available free and what more one can get if one chooses to subscribe. We understand that, at the heart of it, our customers choose us for the content. Their willingness to pay for the programmes they really care about is vitally important. That's what opens up the potential for increased investment and, in turn, the continued broadening of the pay TV offering. From mobile devices to IPTVs, our channels are making 'TV anywhere' a reality and helping us to

make our content investments work even harder. This isn't about replacing cable or satellite. It's about ensuring that customers can access our content on their terms.

(4) So far, so good. But if changes in technology and consumer behaviour have the potential to enhance value, there are even more powerful forces working in the opposite direction. Unconstrained, they are capable of sucking value out of the system with dramatic consequences. We enumerate these forces as hereunder:-

i) PIRACY : Piracy or underdeclaration, of course, is not a new problem for content owners. But the stakes today are higher, given audience fragmentation, emergence of new media and the resultant hit on the advertising revenues, thereby calling for a more emphatic reliance on subscription revenue. We need to see underdeclaration for what it is: theft, pure and simple. It is often thought of as a victimless crime, but that couldn't be further from the truth. If we allow piracy to weaken the business case for content investment, it will ultimately hurt the interests of creators, distributors and consumers of content.

ii) COMMODITISATION: A second, very real risk to the long-term value of content – and a flipside to the positive opportunity that comes with new distribution channels - is the threat of commoditisation. And it is all too easy to see how this can happen. The arrival of new players in the value chain will create a greater number and variety of routes to reach consumers. But the choice of which partner, or partners, to work with must be weighed with great care. While all Operators are engaged superficially in the same activity, it would be wrong to assume that there is a uniformity of strategic interest. For some, content is far from the core of their business; it is the means to an end rather than an end in itself. As a consequence, there are operators who are happy to retail content at the lowest possible cost in order to earn their profits through underdeclaration and other revenue streams which could be through the sale of hardware (digital but non addressable boxes), broadband connections or the delivery of targeted advertising through their local unlicensed channels. For these entities, cheap access to quality content is the magic formula. But here's the problem: creating quality content costs money and is inherently risky. If the value out of content is stripped out to take a handsome margin elsewhere, we risk undermining the long-term future of quality content altogether. That may not be an issue for the operator. But it's a big problem if broadcasters want to go on earning a return from content investment. Or, for that matter, if consumers want to go on watching the very best TV programmes they wish to. So all stakeholders with an involvement in content creation will need to think carefully about the alignment of long-term interests when we consider our approach to distribution in the future. This is why non exclusivity needs to be over hauled and frozen tariffs derailed.

iii) REGULATORY DISTORTION: Regulators in the past, in the pursuit of their own policy agenda to promote the growth of analog cable operators, moved value from one part of the chain to another through the "Must provide" and the "frozen rates". These regulations particularly those on the rates were an onslaught on the value of content as they materially undervalued the offerings of broadcasters and failed to reflect the level of risk and investment in the broadcasting business. This is why broadcasters were compelled to mount a legal challenge before the courts. The Regulators admittedly with good but perhaps misplaced intentions sought the promotion of investment in analog delivery platforms. But what they perhaps did not realize was that these platforms would be operated by businesses having very little interest in direct content investment. But to make content retailing a more attractive business the Regulators squeezed the margins available in the considerably riskier and more expensive business of content creation. Regulators then, seem to have had convinced themselves that the consequences of intervention will be universally benign, that everyone wins when content becomes cheaper. Broadcasters disagreed fundamentally with that analysis and continue to do so now along with many other owners of valuable content who fear a catastrophic decline in the value of their respective rights. Such interventions were examples of the erstwhile regulators pursuing its own subjective vision of how the market should work, above that of rights owners who have decades of experience in how best to secure returns from investment in content creation.

(5) It is for these reasons that we believe "Forbearance" is the only answer today; in a market characterized by so many unknown variables and parameters, the Authority in its perspicacity would do well to allow the parties to address all issues and find all answers through negotiated contracts in the market. It could however hold a periodic review say once in every three years to evaluate the state of the markets. In any event if there is a proven market failure the Authority can always intervene and this fear of intervention shall itself create necessary checks and balances within the system that will address all tariffs and structural issues till such time licensing and digitization (with addressability) sets in.

(6) Self Regulation among stakeholders brought about by market dynamics and the inbuilt fear of Regulatory intervention is bound to usher in the required hygiene in Non CAS markets.

(7) Even today, TRAI has been doing a commendable job by intervening in appropriate cases where it has reason to suspect that there has been a market failure or in instances where it sees a just cause for its intervention. Directions have been passed on several stakeholders on many instances and those have been abided by, as well. There is no reason why such a practice cannot be continued, with the Authority perhaps taking a more pronounced step than before in settling disputes

between parties rather than the parties approaching courts in the very first instance.

(8) Forbearance shall work because of the fact that the distribution space today has acquired a level of maturity over the years. This is primarily due to:

- multiplicity of channels (both FTA and Pay) that are available
- multiplicity of platforms that a subscriber has access to
- equal bargaining power between stakeholders
- the indispensable requirement for "reach",
- Cable television being admittedly only an "Esteem Need" rather than a "Physiological need".[28]

(9) The Authority it is respectfully submitted, needs to interpret the Orders of the Hon'ble Supreme Court and the Honble TDSAT in true letter and spirit. The Orders are not a mandate upon the Authority to affirmatively come up with a Tariff formulation. Rather, on the contrary, TRAI has only been asked to study the matter afresh by undertaking a ***de novo*** exercise and then take an informed decision on what should be the way forward. The Courts have in no way fettered TRAI or circumscribed its remit to compulsorily come up with a Tariff ceiling. All that the courts have said as an unstated premise is that in case it chooses to do so, it should be mindful of the lacunaes that the impugned Tariff order perpetuated and the same should not be repeated.

(10) The Authority has itself acknowledged, that neither Cost Plus, nor Revenue Share, nor Retail minus, are feasible in a non addressable environment. In any event historical costs cannot be a basis for future tariff in a dynamic industry like broadcasting. It is the Authority's own

[28] Annexure F of the CP

finding, after analysing Regulatory practices in 11 countries, that there is hardly any precedent for regulating the wholesale[29]. The position was the same even 14 years back when cable and satellite television was at its infancy in the world stage. The following Table 3 illustrates this[30]:

[29] Page 61 , para 4.1.18 (2) of the CP

[30] Page 48 of Consultation Paper No. 9/2004 Telecom Regulatory Authority of India Consultation paper On Issues relating to Broadcasting and Distribution of TV Channels New Delhi April 20, 2004

Table 3.2 Regulation of Cable Television Pricing

	Are cable television prices for subscription service specifically regulated by government	Additional comments or major reasons for regulation.
Australia	No	Cable companies must operate in a manner, which is consistent with the Trade Practices Act (1974), which specifically prohibits misuse of market power and anti- competitive behaviour.
Austria	No	
Belgium	Yes	Regulated by the Ministry of Economic Affairs.
Canada	Yes	Basic Services regulated but not discretionary services
Denmark	No	
Finland	No	
France	No	
Germany	Yes	
Greece	Service yet to commence	
Iceland	N/A	
Ireland	N/A	
Italy	Service yet to commence	
Japan	No	
Luxembourg	N/A	
Mexico	N/A	
Netherlands	No	
New Zealand	No	
Norway	No	
Portugal	No	
Spain	N/A	
Sweden	No	
Switzerland	No	
Turkey	Yes	Regulated with reference to inflation.
UK	No	

Source: OECD paper on Current Status of Communication Infrastructure Regulation Cable Television, Paris 1996 (Table 9)

(6) Costing of pay channel like any other costing requires details of capital expenditure and operational expenditure but cost determination for pay channels become difficult because:

• Some Pay Channels are broadcasted and viewed in more than one country making it difficult to apportion cost to a specific country/region.

• It is difficult to cost the contents being broadcasted, as it is not a standardized commodity. Video services are highly differentiated, programming quality is very difficult to measure objectively, and both services and their costs are changing rapidly.

(7) Regulation of price of pay channels leads to lack of innovation by programmers resulting in stagnation or decline in overall quality, variety of programmes and other television offerings. Being a creative media, the contents of Television channels have unique programming and quite often comprises of copyrightable material and other intellectual property which cannot be standardized like telecom, electricity and water and thus cannot be priced in a standardised manner.

> 14. What is your view on the proposal that the broadcasters recover the content cost from the advertisement revenue and carriage cost from subscription revenue? If the broadcaster is to receive both, advertisement and subscription revenue, what according to you should be the ratio between the two? Please indicate this ratio at the genre levels.

RESPONSE

(1) The proposal that advertising revenue should cover content cost and subscription revenue should cover carriage cost is preposterous, fallacious, is altogether unworkable and shall spell a disaster for the industry. In the Indian context, this will destroy innovation and stifle

creativity. There is no correlation between advertising revenues and content costs. This will only lead to micro managing business models of broadcasters through high handed regulations.

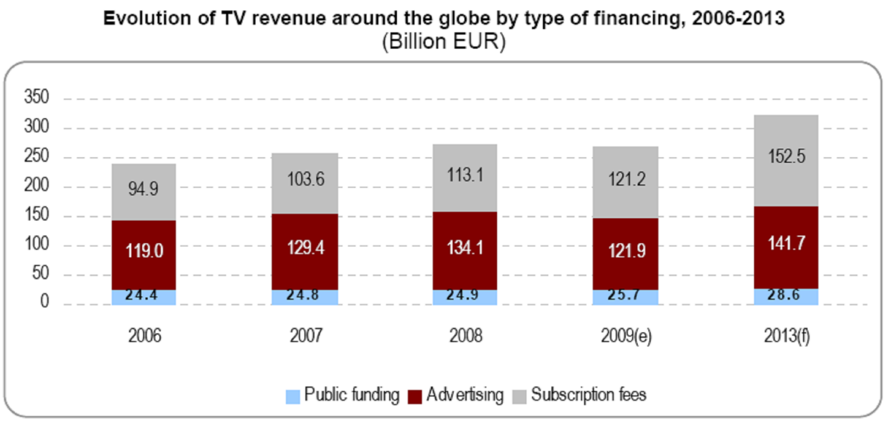
(2) The argument seems to be that broadcasters have a huge revenue potential through advertising. It may be pertinent to mention that the Assocham figures that have been relied upon pertain to total advertising in all mediums and not merely that of television. What the CP fails to address is the global phenomena of the shrinking advertising pie in so far as broadcasters are concerned. The share of the broadcasters in the advertising revenues have been systemically coming down over the years owing ***interalia*** to increased audience fragmentation brought about by growing number of channels both in the FTA and Pay domain and further because of emergence of new media and other alternatives namely the internet, print media, out of home advertising, etc. Also technological innovations like P/DVR have undermined traditional concepts of "prime time" thereby aggravating the dwindling share of broadcasters in the total advertising revenues. The CP also does not factor in the recessionary trends that have resulted in a downfall in over-all advertising revenues since 2008 whereas subscription revenues and ground collections have been largely inelastic to the downturn. The CP has not deliberated on the rising production and programming costs brought about by increasing demands on production facilities resulting from the growing number of channels. Inflation and the upward spiral in the cost of funds have been similarly neglected; instead costs have been assumed to be flat on a year on year basis. Neither has it considered that production and programming costs in most cases bear a direct correlation with audience reach. Nor has it considered that several broadcasters have had to drastically cut down on costs in order to survive. Today there is a meltdown on over all TV advertising spend the world over, and India is perhaps beginning to catch the cold. Ad spends

in India were projected to grow at a mere 7-8 percent in 2009 compared to 15 percent growth rate recorded in 2008 [31]. The contraction in the growth of ad spends was projected to pull down the Media and Entertainment Industry's revenue growth to 4 percent.

(3) The World Television Market in 2009 represents a total amount of 268.9 billion EUR, declining 1.2% [32]compared to 2008. The worldwide television market was, in 2009, primarily affected by the decline in advertising revenue of 9.2%, which could not be compensated for by paid television or public funding; these two sources of revenue increased 7.2% and 3.5% respectively. Up until 2008, advertising was by far the primary means of funding for the industry, generating about 50% of the sector's revenue, compared to 40% for paid television and 10% for public funding. In 2009, the weight of advertising and subscriptions each accounted for about 45% of the sector's revenue. By 2010, revenue from paid television should exceed overall advertising revenue worldwide, reaching a ratio of approximately 47%/44% by 2013. "Industry did not escape the consequences of the global economic crisis; the crisis particularly affected television advertising revenue. Nevertheless, IDATE predicts that the market will exceed its 2008 level in 2010", comments Florence Le Borgne, project leader of the World Television Markets report.

[31] Crisil Research, Media and Entertainment, Annual Review, Srptember 2009 available at http://www.crisil.com/research/research-industry-information-report-media-entertainment.pdf

[32] IDATE News item dated 25.01.2010 available at http://www.idate.org/en/News/World-Television-Market-2010_617.html



Source : IDATE

(4) There is no methodology by which content cost can be determined ***ex ante*** and advertising revenues driven ***post facto*** to neatly square off in a ledger account. There is always a time lag between content production, content exhibition and spot sales. There can be no certainty that advertising revenues will cover content cost in as much as there is no surety that extant declaration levels will ensure covering carriage costs. In most cases differentiating carriage and content costs itself is a formidable puzzle. Advertising and Subscription have traditionally been two revenue streams for Pay broadcasters. That is how the industry has evolved. If Subscribers are to avail quality content, they must be expected to part with a reasonable sum of money. Unlike telecom where the basic driver is carriage alone; content is the main driver that pulls carriage in Broadcasting. Rather than being viewed in isolation, both thus have to be seen as one concrete whole.

(5) Off late there has been a surge in HD services. Equipments used in high definition content production are 20% more expensive. The additional post-production costs (since high definition images requires more editing and storage capacity) are from 0 to 100% higher, depending on the requested quality of the final product. The high definition services imply more intensive use of infrastructure capacity and, therefore, higher

costs of packaging and distribution. Production of such quality content is naturally more accurate: staging, lighting, filming and even artistic production (e.g. makeup of actors) has to be more detailed and rigorous, given that high definition highlights the imperfections of the object being filmed. All these factors imply higher prices of production, transmission and reception, which possibly expand the barriers to entry of smaller producers and programmers unable to bear higher initial investment and operational costs.[33] The abundance of channels provided by the digitalization of TV would therefore aggravate the devaluation of transmission activities in the TV value chain, thus inducing a process of value shift where part of the profitability of transmission goes to other value chain activities, especially to the production of content. [34] New technologies also open up the possibility of "disrupting the structure of older media and communications markets" [35] . Also the historical trend points to a sharp drop in prices paid by advertisers to broadcast advertisements, a fact that is usually attributed to the Internet boom. [36] Given the expected emergence of new channels, which should reduce the average audience per channel, the downward trend in advertising revenues shall persist in the long term. The individual audience of a free-to-air network is still greater than the individual audience of the main Pay TV channels. Therefore, the value of advertising time on free-to-air

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[33] BAJON, J., Villaret, S., (2004). ***High-Definition TV: Technological transition or new market?*** IDATE, Montpellier.

[34] TODREAS, T., (1999). ***Value creation and branding in television's digital age***. Westport (CT): Quorum Books.

[35] MANSELL, R., (2004). Political economy, power and new media. ***New Media & Society***, 6 (1), pp. 96-105.

[36] RAVEN, J., Hoehn, T., Lancefield, D., Robinson, B. (2004). ***Economic analysis of the tv advertising market***. [Internet] PriceWaterhouseCoopers. Available at: http://www.ofcom.org.uk [Accessed 05 January 2005].

TV is still higher, which suggests that advertisers still prefer such vehicle rather than pay TV channels. [37]

(6) The effect of PVRs/DVRs[38]:

DVR-Driven Impact	Main Effect in Programming Choice Decisions	Programming Choice Literature / Model
Shift away from linear TV watching	Reducing importance of scheduling and program timing	Horen 1980; Kelton and Schneider 1998; Reddy, Aronson, and Stam 1998; Danaher and Mawhinney 2001
Content copying and redistribution outside the scope of TV stations	Neglecting broadcast repetitions and increasing cost of first copy	Wildman and Lee 1989; Spence and Owen 1977; Steiner 1952; Beebe 1977
Skipping commercials and thus setting the cost of advertising to zero	Shifting to pay TV and other non-advertising revenues	Spence and Owen 1977, Wildman and Owen 1985; Steiner 1952; Beebe 1977
Ad customization	Reevaluating and exchanging program modules (Assessing different viewers as being of different value to advertisers and same viewers as being of different value to different advertisers)	Beebe 1977; Spence and Owen 1977; Wildman and Owen 1985

Table 1: DVR-Driven Impacts on Programming Choice Decisions

A. Shift Away from Linear TV watching: Reduced Importance of Scheduling and Program Timing

While digitization and broadband connectivity have enabled TV distribution across traditional geographical and political barriers, DVRs reduce the need for temporal coordination between programmers and viewers. They encourage consumers to shift away from linear TV watching and thus reduce the importance of scheduling focused programming choice decisions. The time at which programs run during the day will not be as important as the specific program itself. The importance of 'prime time' or 'live shows' is likely to diminish. Further,

[37] LEVY, J., Ford-Livene, M., Levine, A., (2002). Broadcast television: Survivor in a sea of competition. ***FCC Office of Plans and Policy Working Papers Series***, 37. [Internet] Washington (DC): FCC. Available at: http://www.fcc.gov [Accessed 27 October 2006].

[38] Business Models and Programming Choice:Digital Video Recorders Shaping the TV Industry by Claudia Loebbecke and Stefan Radtke

with increasing time-shifting options for the audience, Channels will need to change the way they do cross promotion and program line-ups / lead-ins. Similarly, programs that rely on viewers' calls will need to adjust because many people will no longer be watching at the time the program is being shown. Nevertheless, people will still prefer to watch certain programs such as sporting events live, because knowing the result prior to watching a game reduces its entertainment value.

B. Content Copying and Redistribution: Neglecting Broadcast Repetitions and Increasing Cost of First Copy

Programming choice models investigating the impact of program repetitions need to be revisited. Once people have access to the content, they are expected to barely care where they get the content from (see experiences with peer-to-peer platforms). As soon as the content can be easily and conveniently copied and redistributed outside the scope of the cable / satellite service providers, this could reduce subscriptions or VOD interest. As the convenience factor is provided by the DVR at no additional expense, neither additional pay TV costs nor additional advertising cost, the cost of the 'first' less frequently ordered copy will have to be increased. Thus, allowing customers to redistribute content with DVRs (not yet possible with all DVRs in the market) should have direct consequences for cable /satellite service providers' revenues generated by pay-per-view, VOD, or subscriptions for pay channels.

C. Skipping Commercials: Shifting to Pay TV and Other Non-Advertising Revenues

From the perspectives of cable / satellite service providers, several models (e.g., Spence and Owen 1977[39]; Wildman and Owen 1985[40]) have

[39] Spence, A., Owen, B. (1977) Television Programming, Monopolistic Competition and Welfare, *Quarterly Journal of Economics*, 91, 1, 103-126.

translated 'watching commercials' into one of the costs of watching TV. Technically allowing end-consumers to reduce this cost to zero, implies that (1) the subscription or the 'on-demand' share of TV costs for viewers has to be increased and that (2) programming based on traditional advertising only would not be affordable for providers. Those viewers who take that options are of zero value to the advertisers and thus to the solely advertising-supported program providers. Taking into account the possibility of skipping commercials, advertisers in conjunction with program developers will have to find alternative means to promote products and services. For instance, advertising could take place in the form of product placement or sponsoring within the programs themselves (e.g. Mandese 2004[41]; Zeisser 2002[42]). Concerning the relationship between viewers, distributors, channels, and advertising industry, this has another interesting implication: The advertising industry would probably pay the content providers, but not the channels nor the distributors. Regarding the transfer prices along the TV industry value chain, one may speculate that providers may charge channels the same price as before although they already received advertising / PR money from brand manufacturers. In such a scenario a shift from TV commercials to product placement in actual shows (1) carries an additional revenue opportunity for content providers, (2) is of hardly any importance for the advertising industry, but (3) negatively impacts channels and distributors.

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[40] Owen, B., Wildman, S. (1992) Video Economics, *Harvard University Press*, Cambridge.

[41] Mandese, J. (2004) How much is product placement worth?, Broadcasting & Cable, December 13, www.broadcastingcable.com/index.asp?layout=articlePrint&articleID=CA487188 (accessed Nov 11,2004).

[42] Zeisser, M. (2002) Marketing in a Post-TiVo World, *McKinsey Quarterly*, Special Edition Technology, 89-92.

D. Ad Customization: Reevaluating and Exchanging Program Modules

Currently most commercials are targeted at rather broad segments such as adults between 18 and 49 or women between 25 and 54 years of age. Therefore, viewers see many commercials about products they will never purchase or are not ready to purchase soon. In programming choice terms this means that at least many viewers are valued equally by TV stations, cable and satellite service providers and the respective advertising industry in the back. Increased deployment of DVRs allows better information about viewers and offers advertisers greater granularity and precision for more targeted advertisement. Improved knowledge about viewer behavior should be modeled as a reduced number of commercials broadcast to smaller audience groups with higher prices per contact for better selected audiences. The potentially higher price per audience contact needs to be balanced against lower viewer figures, if viewers will be less exposed to commercials. As DVR users surf less through the channels (C-Cubed 2002[43]), even without exploiting the adskipping feature, their behavior limits the likelihood of stumbling over programming (or advertising) that they did not directly target in the first place. Also, when knowing the audience better, DVR technology also permits to send different ads to different households. Thus the improved customization or even personalization of commercials may also change content itself (see also Picker[44] 2004).

(7) Trends in Europe:[45]

[43] C-Cubed (2002) The DVR Monitor - Wave III, Springfield, AUS, C-Cubed Corp.

[44] Picker, R. (2004) The Digital Video Recorder: Unbundling Advertising and Content, *The University of Chicago Law Review*, 71, 1, 205-222.

[45] See Annexure I Press Release by Zenith Optimedia

• Television ad expenditure in Western Europe shrank 10.3% in real terms between 2000 and 2003

• Expenditure grew only 0.3% in real terms in 2005.

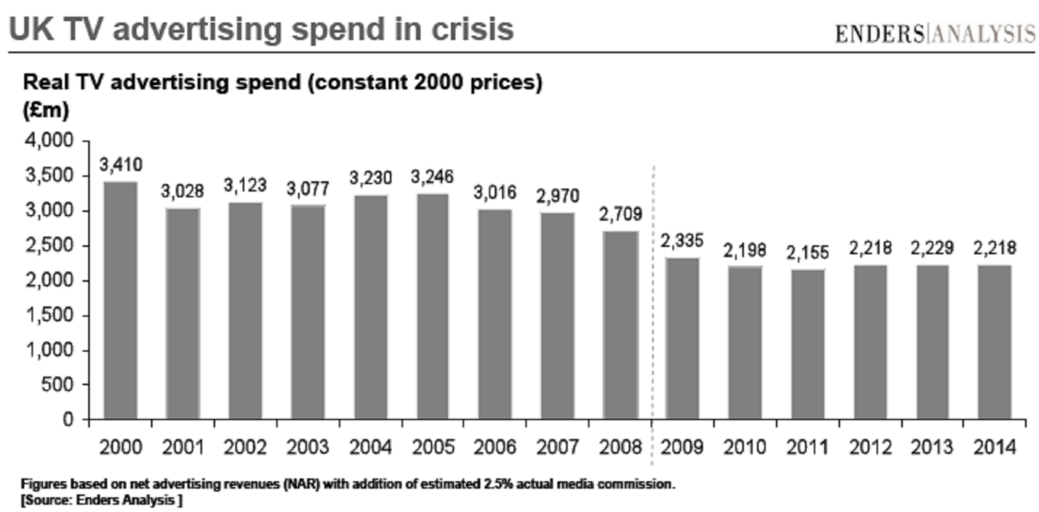
• In the long run, television advertising is expected to grow 3% a year in real terms, or 6% in current prices – the same rate as the market as a whole

• Pay-TV subscription revenues continue to grow strongly – penetration is still rising and subscribers are paying more for better services

• Subscription revenues exceeded ad expenditure for the first time in 2005

(8) Situation in UK:

(A) Decline of Ad Spend in real terms in UK:



- Real prices show a medium in decline even before the recession
- Inflation based on RPI, assume 1.5% inflation in 2009, average 2.0% inflation thereafter

(B) The transition from TV to New Media viz. Internet in UK:

Impact of online display on TV advertising expenditure ENDERS|ANALYSIS

Top Ten online display categories – growth on internet versus TV, 2004-2008

(£m)	TV	Internet
Entertainment & media	-32	58
Telecoms	-129	53
Finance	-56	47
Travel & transport	6	35
Business & industrial	3	26
Motors	-76	23
Government/political/social	8	15
Retail	-12	11
Online retail	12	9
Computers	18	8
Total Top 10 Internet growth categories	-258	284
Other categories	81	25
Total all categories	-172	309

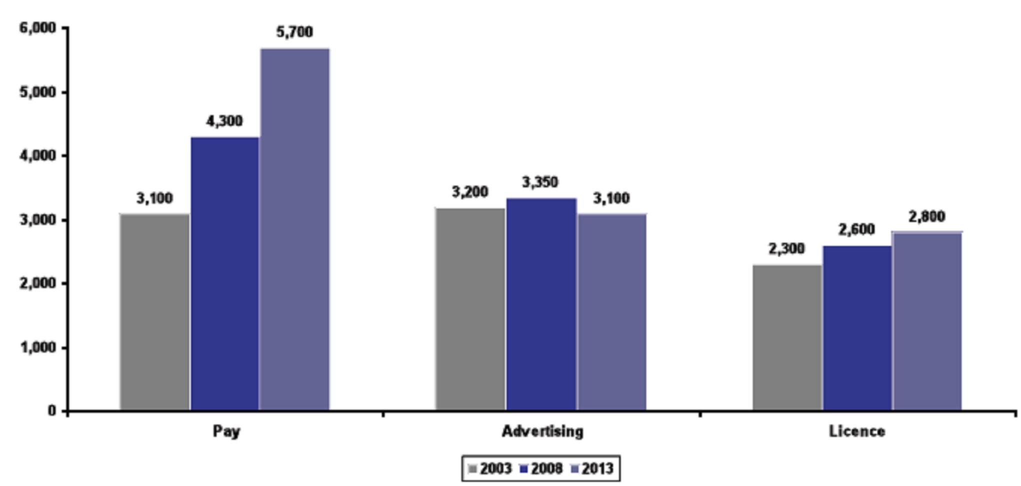
[Source: Enders Analysis based on Nielsen]

- Online display advertising trends indicate significant negative impact on TV
- The top ten growth categories in online display accounted for 95% of total online display advertising spend in 2004 and still held 94% share in 2008
- The top 10 online display categories also represented 53% of TV advertising expenditure in 2008
- The other 47% of TV advertising expenditure includes all the FMCG sector
- The negative structural impact of online display on TV display spend shows in the sharp contrast between the **negative** overall growth in TV advertising spend across the top ten online categories **(-£258 million)** and the **positive** overall growth in TV advertising spend across all the other categories that saw least online advertising growth **(+£81 million)**

(C) Pay/Ad Revenue Trade Off in UK:

Changing balance in the funding mix ENDERS|ANALYSIS

- **Pay revenues are climbing fast with boost of HD, licence funds assigned to television rising steadily while spot advertising revenues fall**



[Source: Enders Analysis, based on industry data]

(9) Situation in US[46]: In 2009, the US has seen a plunge in advertising to the tune of 13 percent. The analysts cut their 2009 estimate for broadcast-network TV ad revenue to a decline of 17.5% from the previous forecast of a 10% drop. "Revenue at the networks should rise by 1% in 2010," they said. At TV stations -- which have been severely hurt by declines in automotive and retail advertising since the financial downturn intensified last fall -- Barclays now expects ad revenue to plummet 21.5% this year, compared with the earlier forecast of a 15.5% decline. TV-station ad revenue is seen dropping 3.2% in 2010.

10. In order to demonstrate through econometric models that in a lot of cases the production cost rises with audience reach. We hereby submit "The relationship between program production costs and audiences in the media industry By Marc Bourreau*Michel Gensollen** Jérôme Perani***January, 2003 as Annexure III.

> 15. What is your view on continuing with the existing system of tariff regulation based on freezing of a-la-carte and bouquet rates as on 1.12.2007; and the rate of new channels based on the similarity principle at wholesale level? You may also suggest modifications, if any, including the periodicity and basis of increase in tariff ceilings.

RESPONSE

[46] Available at http://www.marketwatch.com/story/us-advertising-revenue-plunge-13-2009
Given here in as Annexure II

First priority is "Forbearance" but as an Interim Measure till Digitisation/licensing regime does not set in, existing Tariff Order may be allowed to continue subject to the following modifications:

a. Announce Sun Set Date for switching Off Analog
b. Lay down a road map for Digitisation and Licensing
c. Removal of clauses pertaining to Ala Carte
d. Forbearance in Retail or as an interim measure till digitization with addressability and licensing does not happen, it could be linked to affordability
e. Laying down Minimum Eligibility Criteria/Documentation requirements for MSOs/LCOs and laying down grounds for disqualification from Must Provide, this could include:
   (1) Basic documentation requirement. It has to be appreciated that broadcasters extending signals to operators are more like financiers extending credit to borrowers, accordingly broadcasters like financiers should be allowed to do a due diligence on the Operator and call for as much information as may be required.
   (2) All eligibility/ineligibility criteria for borrowing in the finance sector should be made equally applicable in the broadcasting sector.
f. Suggest a methodology of determining Connectivity levels among subscribers or existing practice could continue but with (1) broadcasters having a right to call for records and (2) broadcasters doing a pre audit/pre inspection by an independent third party auditor/inspector if necessary to examine total receipts/connectivity, lay out of optical fibre, etc; Adverse opinion if any by auditor or non cooperation with auditor, or not presenting data to auditor should disqualify Operator from Must Provide. The

Auditor/Inspector shall be appointed by Broadcaster. The Operator should pre deposit the cost with the broadcaster. It is submitted that negotiations will be meaningful only when there is sufficient clarity on the total subscriber base of an Operator.

g. Allow year on year inflation adjusted increment
h. Must Provide should mean Must Carry, it must be presumed that if an Operator is asking for a particular offering it has the requisite infrastructure to carry it.
i. Placement deals could however be concluded after Negotiations
j. Enforcement of Placement contracts
k. Stringent penalty on Black Outs/Band change extending to disqualification from Must Provide
l. Mandate availing unitary feed, ban availing multiple feed by LCOs
m. LCOs should be franchisees of MSOs
n. Billing should be shifted from LCO to MSO
o. Periodic Audit rights should be given to broadcasters
p. QOS obligations should be linked to Must Provide, QOS obligations should be uniform for LCOs and MSOs
q. Stringent record keeping/billing obligation on LCOs/MSOs
r. Stringent penalties on area transgression/unauthorized cable casting/piracy extending to disqualification from Must Provide
s. Bringing down the Notice period to 7 days for Non CAS areas in particular. For the time being the 21 day notice period could continue in so far as digital addressable platforms are concerned, but it is imperative that the notice period be brought down for Non CAS areas.

t. Stringent penalty on default extending to disqualification from Must Provide
u. An over all culture of enforcement needs to be brought in, and this could perhaps be facilitated by the state level officers to whom TRAI has delegated some of its powers but obviously with proper checks and balances.

16. Which of the following methodologies should be followed to regulate the retail tariff in non-CAS areas and why?

i) Cost Plus

ii) Consultative approach

iii) Affordability linked

iv) Any other method/approach you would like to suggest

RESPONSE

We believe forbearance is the only way forward. The hard question that needs to be asked is whether there is at all any necessity to regulate retail tariff in Indian Non CAS markets. Given the fact that broadcast channels have been admittedly identified as one falling under esteem or cognitive needs, we do not see any reason for the Regulator to step in and regulate retail tariff for a product that is admittedly akin to any other consumer durable. In any event the customer is adequately empowered with affordable alternatives and there is already enough evidence of DTH/IPTV, et al effectively competing with Analog Cable within the retail space.

17. In case the affordability linked approach is to be used for retail tariff then should the tariff ceilings be prescribed (i) single

at national level or (ii) different ceilings at State level or (iii) A tiered ceiling (3 tiers) as discussed in paragraph 5.3.23 or (iv) Any other

RESPONSE

Please refer to our response in 17 ***supra.***

18. In case of retail tariff ceiling, should a ratio between pay and FTA channels or a minimum number of FTA/pay channels be prescribed? If so, what should be the ratio/number?

RESPONSE

Packaging should be left to market forces, more so in analog platforms. Operators should have freedom in packaging what it procures. Also such a regulation would amount to micro management and there would be difficulties in its implementation/enforcement.

19. Should the broadcasters be mandated to offer their channels on a-la-carte basis to MSOs/LCOs? If yes, should the existing system continue or should there be any modification to the existing condition associated with it?

20. How can it be ensured that the benefit of a-la-carte provisioning is passed on the subscribers?

21. Are the MSOs opting for a-la-carte after it was mandated for the broadcasters to offer their channels on a-la-carte basis by the 8th tariff amendment order dated 4.10.2007. If not, why?

RESPONSE

We do not recommend an Ala Carte mandate. The Authority has not found a single instance of an ala carte mandate even in addressable jurisdictions where consumer choice is supposed to be prevailing. This affords all the more reason why it should not prevail in Non CAS markets where consumer choice is totally absent. There are however global instances where channels have been offered ala carte, but then there was no retail or a wholesale cap accompanying such arrangements which were purely contractual in nature. The Hon'ble TDSAT vide its Judgment dated 15th January 2007[47] has also demonstrated how an ala carte mandate skews the pitch in favour of Operators and how it works to the disadvantage of both the broadcasters and the consumers. We hereby submit some additional economic literature to drive home the point that the fraternity of economists is more or less unanimous that ala carte is consumer unfriendly and that bundling is pro competition.

1. TheWelfare Effects of Bundling in Multi-Channel Television Markets by Gregory S. Crawford and Ali Yurukoglu Dept. of Economics Dept. of Economics University of Warwick Stern School of Business New York University........ANNEXURE IV

2. Telecommunications & Electronic Media A La Carte Regulation of Pay TV: Good Intentions vs. Good Economics ***By Jeffrey Eisenach & Adam Thierer........***ANNEXURE V

22. Should the carriage and placement fee be regulated? If yes, how should it be regulated?

[47] Appeal 12 C of 2007

23. Should the quantum of carriage and placement fee be linked to some parameters? If so, what are these parameters and how can they be linked?

24. Can a cap be placed on the quantum of carriage and placement fee? If so, how should the cap be fixed?

RESPONSE:

In continuation to our holding that forbearance is the only way forward, we accordingly do not support any regulation on Placement. Having said that, we believe that the issues have more to do with enforcement of contractual arrangements and obligations. Accordingly enforcement of placement contracts is the major issue. Towards this end, if an Operator is found to be violating contractual arrangements, suitable consequences should follow including disqualification from the "Must Provide" regime. Also a "Must Carry" should inevitably follow a "Must Provide". It must be presumed that if an Operator is asking for a particular offering from a broadcaster, it has then the requisite infrastructure to carry it. However if an Operator has not asked for a product, but if a broadcaster is nevertheless desirous of carrying its offering in the former's platform, then the terms of contract should guide the parties and regulations should step in only for enforcement by stipulating the consequences in case of violations. Denial of Carriage should however not be unreasonable and the Operator should communicate his refusal in writing within a stipulated time frame with proper reasoning.

25. Is there a need for a separate definition of commercial subscriber in the tariff order?

26. If the commercial subscriber is to be defined in the tariff order, then does the existing definition of 'commercial subscriber' need to be revised? If yes, then what should be the new definition for the commercial subscriber?

27. In case the commercial subscriber is defined separately, then does the present categorization of identified commercial subscribers, who are not treated at par with the ordinary subscriber for tariff dispensation need to be revised? If yes, how should it be revised?

28. Should the cable television tariff for these identified commercial subscribers be regulated? If yes, then what is your suggestion for fixing the tariff?

RESPONSE

Only residential/ordinary subscribers need to be defined, and all those not being a residential/ordinary subscriber should fall within the meaning of "commercial subscribers". Broadcasters should be allowed to differentiate between commercial and ordinary subscribers. Even several Utilities have tariff structures that do make such distinctions, for example the Power sector applies different rates to commercial subscribers. Accordingly we agree with the proposition that there is today an urgent need to jettison the existing categorization of subscribers. Commercial subscribers across the board do not require tariff protection. Accordingly the tariff dispensation that has been carved out for residual and non residual categories of commercial subscribers by way of a deeming provision that commercial subscribers not falling within the excluded category will be treated as ordinary subscribers, should be withdrawn. We believe that even forbearance is a form of regulation, accordingly the tariff dispensation for commercial subscribers should not even be under forbearance, it has to be completely deregulated. Therefore all the enactments that pertain to commercial subscribers in our view should be repealed primarily because (1) Cable television is not an essential commodity and (2) commercial entities do not require regulatory support and specialized treatment for availing such services. Even within the present system, the Authority has not found any instance of abusive pricing in so far as the commercial subscribers coming under the forbearance regime is concerned.[48] There is accordingly no room to suspect that in a deregulated environment, broadcasters shall be unfair in their dealings with commercial subscribers.

29. Do you agree that complete digitization with addressability (a box in every household) is the way forward?

RESPONSE

Yes, but with phased timelines over a 10-year period ending in 2020.The digitization of analogue cable infrastructure must also come with a tacit stipulation that :

(1) Billing points must be moved from local cable operators (LCOs) to multi system cable operators (MSOs);

(2) Free-to-air (FTA) and pay cable & satellite channels are able to be viewed through a set-top box (STB);

(3) Analog is switched off entirely in cities and zones switching over to DTV therefore ensuring that all popular pay and FTA channels must be viewed through the STB.

[48] Page 91, Para 5.6.22 "…….the rates for commercial subscribers are typically in the range of 3 to 5 times than the rates charges for the ordinary subscribers for different pay channels distributed by various broadcasters. This has been observed since 2007. However, this ratio has been more or less the same over the past 3 years, which indicates that there has been stability in these negotiations"

30. What according to you would be an appropriate date for analog switch off? Please also give the key milestones with time lines.

RESPONSE

A ten year time framework with switch off occurring by December, 2020; target complete 100% digital TV ("DTV") conversion in metropolitan cities. National time-lines should be set as follows:

(i) 20% DTV conversion or 20 million DTV cable homes by December, 2012

(ii) 55%-plus DTV conversion or 60 million DTV cable homes by December, 2015

(iii) 100% DTV conversion or 110 million DTV cable homes by December, 2020

City / market wise time-lines could be as follows:

(i) Metropolitan cities Mumbai, Kolkata, Delhi, Bangalore, Chennai and Hyderabad in Phase 1 (to 2012)

(ii) Phased out conversion in key people-meter cities and markets to 2015 and 2020.

31. What is the order of investment required for achieving digitization with addressability, at various stakeholder levels (MSOs, LCOs and Customers)?

RESPONSE

(1) According to consensus estimates from TAM Media Research, NRS, Media Partners Asia and FICCI – KPMG, there were approximately 133 million TV homes in India at the end of calendar year 2009. Out of these

homes, analogue cable took up 84 million; digital cable 3 million; digital DTH pay-TV, 17 million (net, as opposed to gross numbers).

(2) The industry's immediate concern must be the digitization of 84 million cable homes in a phased manner. Exit subscription revenues from these 84 million homes amount to approximately 157 billion rupees per annum, a large portion of which is leaked and not fairly distributed to MSOs, broadcasters and the government via tax.

(3) A gradual phased-in conversion would cost the cable industry more than 130 billion rupees or USD 2.6 billion in cumulative capital expenditure over the next decade, according to an economic analysis from Media Partners Asia. The cost would need to be borne by both MSOs and LCOs with MSOs bearing the brunt as the corporate link in the cable industry.

(4) Key cost items in the capEx analysis include:

(1) One-way CAS-enabled STBs, costing Rs 1,600 today on average, dropping to Rs 1,000 over the next five years and Rs 850 over the next decade;

(2) Network, head-end and billing costs, currently Rs 200 per subscriber today, dropping to Rs 130 over the next five years and Rs 80 by 2020.

(5) At the customer level, basic monthly fees for DTV would average Rs 200 per month, rising progressively to Rs 300 over a ten-year time frame.

(6) The MSO would, in Year One be investing Rs 1,800 – 2,000 per new digital customer (STB, CAS, H/E , network, billing, labor) and this would be given to the subscriber for an upfront Rs 250 plus a rental of Rs45 per month for 60 months. Alternatively, as in China, the government can prescribe that the first STB must be provided free to the consumer but that the cable operator's monthly fees for recurring DTV fees could be Rs250 or higher.

32. Is there a need to prescribe the technology/standards for digitization, if so, what should be the standard and why?

RESPONSE

No standards should be prescribed. India DTV deployment across cable and DTH platforms is already using a DVB standard, which is cost effective and efficient as opposed to the standard used in Korea (OCAP and Open Cable). Mandated standards typically slow the deployment of DTV in large scale markets. China, for instance, never fully mandated a standard though the authorities did recommend the DTV standard for cable deployment. The technology should be mandated as set-top box and CAS as both these technologies are the best suited to encrypting a large amount of television channels while advanced STB technology can also provide a foundation for interactive services.

33. What could be the possible incentives that can be offered to various stakeholders to implement digitalization with addressability in the shortest possible time or make a sustainable transition?

RESPONSE

There are some clear precedents from China, Korea and Japan to drive DTV transition:

(1) Remove sectoral restrictions and the ban on vertical integration, allow established and experienced broadcasters to invest in distribution set ups. There is no overwhelming economic proof that vertical integration is anti consumer, rather a vertically integrated distributor will incure huge economic costs if it indeed carries out perceived restrictive practices because the market itself is organically growing with numerous players in the fray ensuring effective competition. In international markets there is ample definitive economic proof of consumer welfare being augmented

because of vertical integration as it allows for greater economies of scale resulting in efficient offerings.

(2) Usher in a liberal FDI regime. FDI limits in MSO business should be raised in investments. to 74 percent.

(3) Offer MSOs final incentives with favorable terms for bank loans and debt syndication;

(4) Classify DTV cable conversion as an India Infrastructural Initiative and set up a Mandatory Digital Fund for the financing and development of new digital content and new HDTV content; marketing and consumer education for DTV services; develop of indigenous DTV hardware facilities

(5) Allow MSOs to raise the rate chargeable for DTV services by 10 – 15% per annum over the first five years of migration

(6) Remove all duties on the import of STBs

34. What is your view on the structure of license where MSOs are licensed and LCOs are franchises or agents of MSOs?

RESPONSE

We welcome the move, this is an industry structure that will not be easily bypassed or eradicated – most MSOs are building up strong positions in the industry at the last mile through primary points and secondary joint ventures. The regulator must stipulate that as a condition of a license for DTV and therein, all billing points must be moved from the LCO to the MSO.

35. What would be the best disclosure scheme that can ensure transparency at all levels?

Make available subscriber rolls and billing information to all parties after DTV is deployed.

36. Should there be a 'basic service' (group of channels) available to all subscribers? What should constitute the 'basic service' that is available to all subscribers?

RESPONSE

This is common in the United States and most other developed markets – a basic service should contain as per regulations, the two Doordarshan channels and various local community channels.

37. Do you think there is a need for a communication programme to educate LCOs and customers to ensure effective participation? If so, what do you suggest?

RESPONSE

We believe that Consumer education is vital and shall support both private and public initiatives in this regard.