

**RESPONSE BY DISH TV INDIA LIMITED TO THE DRAFT “THE
TELECOMMUNICATION (BROADCASTING AND CABLE)
SERVICES (SIXTH) (THE DIRECT TO HOME SERVICES) TARIFF
ORDER, 2015”**

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PRELIMINARY SUBMISSIONS

1. At the outset, it is submitted that Dish TV is of the considered view that any person / entity distributing / providing / making the CPEs in an open market is neither a Service Provider nor a Licensee as contemplated under the provisions of TRAI Act, 1997 and the regulations made thereunder. It is further submitted that such an activity will also not fall within the purview of providing Broadcasting Service and / or Cable Services. The definition of Broadcasting Services and Cable Services, as provided for in the TRAI Interconnect Regulations dated 10.12.2004 is as under:

*“**broadcasting services**” means the dissemination of any form of communication like signs, signals, writing, pictures, images and sounds of all kinds by transmission of electromagnetic waves through space or through cables intended to be received by the general public either directly or indirectly and all its grammatical variations and cognate expressions shall be construed accordingly*

*“**cable service**” means the transmission by cables of programmes including re-transmission by cables of any broadcast television signals*

Accordingly it is submitted that the provisions of the TRAI Act, 1997 and the regulations made thereunder do not apply to an entity/person engaged in the business of distribution of the CPE's.

2. The provision of the CPE by the DTH operators is not a licensed activity hence the TRAI cannot issue any tariff order in respect of the CPE, whether provided by the DTH operators or any third person. Under the scheme of the applicable regulations, TRAI has the power to regulate the services being provided by the DTH operators which include

provision of the channels and related service. The provision of CPE is an ancillary to the DTH service hence no tariff order can be issued in respect of the CPE. Under the DTH License issued to the operators, there is no stipulation to compulsorily provide the CPE to the subscribers by DTH operators only. The CPE can be provided by any entity, whether a License holder or not. Accordingly, TRAI is not empowered or authorised to amend the terms of the License issued by the Ministry of Information and Broadcasting which does not impose any obligation on the DTH service provider to mandatorily provide the CPE to the subscribers directly.

3. In this regard, it is important to note that Dish TV has already preferred an appeal against the order dated October 01, 2014 of the Hon'ble TDSAT passed in the petition no. 2 (C) of 2013 on the jurisdiction aspect specifically contending that the TRAI does not have the jurisdiction to issue any Regulation/Tariff stipulations in respect of the Consumer Premises Equipment.

Without prejudice to the preliminary submissions hereinabove, the response to various issues raised in the consultation paper and the provisions of draft tariff order is being submitted hereinafter.

RESPONSE TO DRAFT TARIFF ORDER

4. At the outset, we would like to state that while issuing the draft Tariff Order, TRAI has ignored to consider the relevant factors and inputs provided by Dish TV. The stipulations / conditions of the draft tariff order are without any basis and merit. It is stated that the TRAI, in the proposed order, has made unverified, unsubstantiated and hypothetical self-serving assumptions without any basis whatsoever regarding various aspects including but not limited to installation, activation, repair & maintenance etc of the CPE. The notification of draft tariff order in the present form, will have a severe impact on any DTH company's ability to operate as a financially viable entity. The submissions made hereunder are without prejudice to the contention of Dish TV that the TRAI does

not have the jurisdiction to issue any regulation / tariff order in respect of the CPE. The submission made hereunder are also without prejudice to the contention of Dish TV that no Tariff Order should be issued by the TRAI in respect of the CPE as the same will be detrimental to the interests of Dish TV and the entire DTH industry.

NON - CONSIDERATION OF VARIOUS CONTENTIONS RAISED IN APPEAL NO. 2(C) of 2013

5. TRAI has not considered the contentions of Dish TV as raised in the Appeal No. 2 (C) of 2013 in relation to the earlier tariff order which contentions were upheld by the Hon'ble TDSAT in its judgment dated 01.10.2014. It is matter of record that the Hon'ble TDSAT vide the said judgment had set aside the earlier Tariff Order published by TDSAT by holding that the while passing the earlier tariff order, TRAI did not address the concern raised by the DTH operators. The relevant portion/extract of the judgment is reproduced as under:

*Assuming that it is able to recover the CPE, will it be able to use a second hand CPE again and will a customer accept a second hand CPE? In our opinion, one way to address this issue can be to permit the DTH operators to supply recovered/refurbished CPE **under the standard tariff order** and the subscribers may not insist on new CPE if they want this tariff. However, we may clarify that this is just one example and the respondent is free to address the various issues as it may deem fit. Though all these issues have been raised by the appellants, in our view the same have not been satisfactorily addressed by the respondent.*

38. In view of the above, we find that some elements of cost have not been taken into account and issues raised by the appellants have not been fully addressed by the respondent while passing the impugned tariff order and the same is, therefore, not tenable. The impugned tariff order is accordingly set aside. However, we make it clear that it will be open to the respondent-TRAI to issue a

fresh tariff order after taking into consideration the inputs provided by the appellants and addressing the issues raised by them.

6. It is apparently clear from the above judgment that while notifying the Telecommunication (Broadcasting and Cable) Services (Sixth) (The Direct to Home Broadcasting Services) Tariff Order, 2013 (No. 2 of 2013), some elements of the costs were not taken into account and issues raised by the stake holders were not fully addressed by the TRAI while passing the said Tariff Order and hence the same was set aside with a direction to the TRAI to issue a fresh tariff order after taking into consideration the inputs provided by the DTH operators addressing the issues raised by them. Accordingly, any such exercise has to be undertaken after considering all the relevant factors / inputs and also addressing all the issues raised by the DTH operators. However, we believe this Authority has proposed the present draft Tariff Order without considering the relevant factors and the inputs provided by the DTH Operators. According we believe the present draft tariff order is not in compliance with the order dated October 01, 2014 of the Hon'ble TDSAT judgement.
7. TRAI, admittedly, has not gone in appeal against the said order and it is also not the case of the TRAI that it has not accepted the observations made by the Hon'ble TDSAT. But the present draft tariff order, ostensibly, does not reflect that the TRAI has taken into consideration all the issues and concerns raised by the DTH operators in respect of the earlier tariff order which was set aside by the Hon'ble TDSAT.
8. The obvious example of this is the fact that again in the draft tariff order, the DTH operators have been mandated to provide the repair and maintenance charges completely free of cost for a period of five years from the date of activation of the connection. While no rationale/ justification has been provided by the TRAI for this, it is a failure on the part of the TRAI to assume and conclude that the grounds as mentioned in para 7 of the explanatory memorandum are the only grounds on the basis of the

which the earlier tariff order was struck down by the Hon'ble TDSAT. It is stated that the said grounds were merely indicative. A bare perusal of the judgment makes this amply clear from the following observation made by the Hon'ble TDSAT in the abovementioned judgment:

In view of the above, we find that some elements of cost have not been taken into account and issues raised by the appellants have not been fully addressed by the respondent while passing the impugned tariff order and the same is, therefore, not tenable. The impugned tariff order is accordingly set aside.

ACTIVITY OF PROVISION OF CPE BY DTH OPERATOR IS OUTSIDE THE JURISDICTION OF TRAI

9. The provision of the CPE by the DTH operators is not a licensed activity hence the TRAI cannot issue any tariff order in respect of the CPE, whether provided by the DTH operators or any third person. Under the scheme of the applicable regulations, TRAI has the power to regulate the services being provided by the DTH operators which include provision of the channels and related service. The provision of CPE is an ancillary to the DTH service hence Regulation no tariff order can be issued in respect of the CPE. Under the DTH License issued to the DTH operators, there is no stipulation to compulsorily provide the CPE to the subscribers by the DTH operators only. The CPE can be provided by any entity, whether a License holder or not. Under a circumstance where the CPE is provided by an entity which is not a Licensee, the current tariff order proposed by the TRAI will not be applicable. Further, it is also pertinent to state that the TRAI is also a Regulator for the mobile industry which is older and bigger than the DTH industry however till date the TRAI has not come out with any Regulation/Tariff Order regulating the price of the mobile hand sets and / or any other telecom equipment being made available to the subscribers.

10. The proposal to lay down the current tariff order so proposed by the TRAI clearly amounts to breach of Article 19(1) (g) of the Constitution of India. The proposed Regulations intends to restrict the freedom to conduct the business by DTH operators. Taken together, the measures proposed by TRAI will impose a crippling burden on the DTH companies' finances and as such will render them incapable of carrying on their lawful business. Such actions tantamount to denying the DTH industry the right to carry on a lawful business and profession and fly in the face of the fundamental right to business and profession enshrined under article 19(1)(g) of the Constitution of India.

REPAIR AND MAINTENANCE FREE OF COST FOR 5 YEARS

10. In this regard, it is also important to state the TRAI cannot obligate the DTH operators to provide free service and maintenance for a period of 5 years. Such stipulation is without any basis and merit. The repair and maintenance is normally carried out through third party agencies and considerable cost is incurred in carrying out the said activity. In none of the electronic products, such a long period of warranty is provided qua repair and maintenance. The normal warranty applicable in almost all the similar products is **one year**. It is entirely unjustified on the part of TRAI to impose the obligation of maintaining CPE free of cost for 5 years.

It is stated that the requirement to provide the repair and service free of cost is totally unacceptable. Dish TV is no position to accept that repairs and service and installation can be undertaken free of cost. All these services cost the company money and it is an unjustified and arbitrary suggestion that seeks to force DTH companies to make these available free of cost to the customers. The cost of servicing the customer is expensive, DTH unlike cable has subscriber in far flung areas and to provide free maintenance and no replacement cost is not commercially and practically feasible and the same has also not been even considered in the costings. It is stated that as submitted hereinabove the repair and maintenance services are being undertaken by the third parties on behalf of

the DTH operator and the DTH operator is required to pay to all such third parties irrespective of any tariff order prohibiting charging repair and maintenance charge.

It was brought to the notice of TRAI that the damages in the CPEs can be caused due to various factors like voltage fluctuation, electrical failure, bad handling of the remote etc. and the fault in the CPE cannot be attributed only to the fault in the hardware. It was submitted that each services visit due to any problem in the connection of a customer cost around Rs. 150/- to a DTH operator. Further any repair work to be done in the STB or other parts of the CPEs results into additional cost to be incurred by the DTH operator.

However in the present draft tariff order also, TRAI has not considered this aspect and has made the repair and maintenance completely free of cost. It is surprising that the TRAI has not provided any reasoning for this and such a condition in the draft tariff order would only result in the additional cost to be incurred by the DTH operators.

This is completely unworkable and would cause severe financial detriment to DTH operators. It is therefore suggested that the cost free repair and maintenance obligation be limited to 1 year only instead of 5 years as proposed in the Tariff Order.

MANDATE OF STANDARD SCHEME

11. The draft Tariff Order seeks to mandate the provision of CPE on outright purchase basis by terming it as Standard Scheme. It is submitted that there are various business models adopted by DTH operators and in certain “service based models” no amount is recovered/charged towards CPE and these remain the property of DTH operator. Such schemes are based on the premise of long term association with the subscribers and recovery of CPE costs over a period of time through continuous and regular subscription. Mandating an outright scheme directly interferes with such business

models and seeks to change the same which is not permissible. In such circumstances it is entirely unjustified on the part of TRAI to force such DTH operators to mandatorily offer the Standard Scheme of outright purchase. It should be the prerogative of DTH operator to offer its services including provision of CPE to the consumers on such terms and under such scheme(s) as deem fit as per its business model. There should not be any compulsion to offer any kind of so-called "Standard Scheme".

NON CONSIDERATION OF DISTRIBUTION MARGIN AS ELEMENT OF COST

12. It is stated that while prescribing the mentioned parameters for calculation of the refund amount to be payable by the DTH operator to a subscriber, the TRAI has once again ignored and not considered various relevant factors and has considered only the written down value of the CPE.

It is a matter of record and also known to the TRAI that a DTH operator has to pay distribution margin which is around Rs. 600 per connection. This cost is incurred for sale / distribution of each CPE. The DTH operator is able to recover/recoup this expenditure/cost only when the customer stays with the platform for a long duration. The draft tariff order prescribes for a lock in period of only 3 months. It is stated that in such cases or even when the customer refunds the set top box within a period of 6-12 months, it would not be possible for the DTH operator to recover this amount from the monthly charges payable by the subscriber. Accordingly, while prescribing the refund amount, the DTH operators should be allowed to deduct the distribution margin i.e. distributor/dealer commission paid to the third parties.

It is matter of record that Dish TV, in its response vide letter dated 21.06.2013 to the letter dated 18.06.2013 of the TRAI, had elaborately mentioned about these parameters as forming part of the total cost incurred by Dish TV on a CPE. Since the commission is paid upfront to the trade partners, it is obvious that the DTH operators would never be

able to recover the said amount from the trade partners and doing this would only jeopardize the business of the DTH operators. Accordingly, it is reiterated that while prescribing the refund amount, the DTH operators should be allowed to deduct the distribution margin paid to the third parties

NON CONSIDERATION OF VARIOUS COST COMPONENTS WHILE FINALISING THE AMOUNT TO BE REFUNDED BY DISH TV TO THE CONSUMER

13. Further, the draft tariff order has also failed to consider that certain elements/components of the CPE like wire, connectors and dish antenna, which once installed, cannot be reused. In case of refund by the subscribers, these equipment are of no use and cannot be installed at any other premise. The cost of the wire, connectors and dish antenna is in the range of Rs. 550 per unit.

As stated above, the DTH operator is able to recover these costs only when the subscribers stays active with the platform for a longer duration. In case the subscriber returns the connection to the DTH operator, the DTH operator should be allowed to deduct the cost of these elements as the said elements are not reusable.

In view of the above, it is apparently clear that the draft tariff order has to consider all the relevant factors including the cost of such components which cannot be reused and the cost incurred thereon becomes irretrievable while arriving at the amount to be refunded by the DTH operator to the customer. The TRAI has also failed to consider various costs including but not limited to refurbishment cost, call center cost, re-packaging cost etc. It is also a matter of record that the TRAI did not seek any information from Dish TV in relation to such costs and accordingly any decision made in absence of the inputs from Dish TV will be without any basis.

LOCK IN PERIOD

15. Regarding the lock in period, Dish TV is of the opinion that the period of 3 months as lock-in period is completely inadequate. Such a short lock in period will have huge adverse impact on the DTH business. The TRAI has provided no justification in the draft tariff order for keeping the lock in period as 3 months. It is stated that for the reasons mentioned hereinabove of this response, i.e., long period needed to recover the distribution margin and non-usability of certain components of CPE, the lock in period of only 3 months is not feasible. Evidently, therefore, the DTH operator would be at a huge loss if the lock in period is not increased. Dish TV is of the opinion that the period of lock-in period should be increased to at least 12months as against the proposed period of 3 months in the draft tariff order.

INSTALLATION AND ACTIVATION CHARGES

16. As stated in para 11 hereinabove, it is entirely unjustified and inequitable on the part of TRAI to mandate the provision of CPE on outright purchase basis under Standard Scheme. Since the TRAI proposes to mandate the said scheme, consequently a limit/cap on installation and activation charges is also sought to be fixed ignoring the ground realities and business model of various DTH operators. As already pointed out some DTH operators are following pure service model wherein nothing is charged towards CPE and the same is provided as “subsidy” on the premise of recovering the same by way of subscription charges through long term association with customer. However in order to cover the various costs in acquiring the customers which inter alia include installation, distribution margin, activation, call centre charges, and other such incidental expenses, certain upfront amount is being charged. It would be entirely unjustified on the part of Authority to put cap on and to restrict such amount being charged from consumers. However, Dish TV would like state that this cap may be stipulated in case a DTH operator also offers CPE on outright purchase basis as sought to be done through the

standard scheme proposed by TRAI and should not be extended in any other scheme. Any action in this regard would clearly amount to interference by the TRAI in the business model of the DTH operators which is against the constitutional rights of the DTH operators as granted by Article 19(1)(g) of the same.

COST OF COLLECTION

17. The draft Tariff Order offers no rationale for fixing the collection charges at Rs. 150/-. It is stated that the cost of collection should also include the cost of de-installation. The figure of Rs. 150 is an arbitrary figure without any rationale & basis and without considering the cost to be incurred towards de-installing the connection. Accordingly, it is suggested that the cost of collection should not be less than Rs. 450 (which shall include the cost of de-installation).

COLLECTION CENTRE AT EVERY DISTRICT HEADQUARTER

18. Regarding the condition pertaining to having one collection center at every district head quarter, it is stated that the same is not only onerous but would also result in additional cost to the DTH operators as it has to engage agencies in each of such places and pay them accordingly. As a natural corollary, the DTH operators would be required to incur additional cost towards this end. This factor/cost component has been completely ignored by the TRAI in the draft tariff order. It is therefore suggested that a minimum amount should be charged towards this and the same may be allowed to be deducted from the cost of the CPE while providing the refund.

PROVISION OF REFURBISHED CPE

19. As regards the provision regarding the provision to offer refurbished CPEs to the subscribers, it may be stated that the Hon'ble TDSAT in its judgment dated 01.10.2014

had opined that only the refurbished STBs should be offered by the DTH operators in case a subscriber wishes to avail the standard tariff dispensation. However in the present draft tariff order, the TRAI has mandated that all the types of the CPE are to be offered under the standard scheme. The TRAI has also ignored the fact that a subscriber who wishes to avail a DTH connection by paying the offer price will never agree to have an old or refurbished set top box in which case, all set top boxes returned by the subscribers under the provisions of the proposed tariff order will entail further losses to the operators.

APPLICABILITY OF DRAFT TARIFF ORDER TO ALL KINDS OF CPES INCLUDING HD STB

20. It is stated that through the proposed Tariff Order, commercial interoperability is sought to be introduced even in respect of CPE specially STBs with advanced features such as HD boxes, DVR etc. and the so-called Standard Scheme is proposed to be made applicable to these kinds of STBs also. It is stated that the Regulation of HD services including HD STBs has never been in the contemplation. Only a niche segment of subscribers and that too after completely satisfying themselves about the features of these advanced STBs consciously opts for the same. The TRAI itself is aware that the tariff of HD channels/services is under forbearance. In such a circumstance, it is entirely inexplicable as well as unjustified on the part of TRAI to propose the Regulation of CPE for the HD and such like advanced CPEs through the draft tariff order. It is suggested that the provision of the proposed tariff order be limited to only the vanilla STBs and should not be extended to niche/premium services such as HD boxes, DVRs etc.

REPORTING REQUIREMENTS

21. Dish TV is of the opinion that the reporting requirement should be made quarterly instead of 15 days as proposed in the draft tariff order. DTH operators are already

furnishing quarterly Performance Monitoring Report to the TRAI and this reporting requirement under the proposed tariff order can be merged in the same.

While TRAI, in the explanatory memorandum, observes that the DTH operators are growing at a rapid pace and has a total accumulated registered subscriber base of more than 73 million. But the TRAI is also aware of and states in the same explanatory memorandum that around 45% of the total subscribers are also deactive/ completely. It is submitted that the TRAI ought to have considered this factor also while specifying the terms of the draft tariff order because such high churn has impacted the DTH operators heavily and the DTH operators have suffered huge losses in respect of the subsidy provided on such churn CPEs.

While TRAI has evidently shown its empathy towards the broadcasters and giving them price raise on regular intervals, we request that a similar approach may be adopted by the TRAI towards the DTH operators who are all running in heavy losses and none of the DTH operators have been able to reach to breakeven despite the industry having crossed 10 years of its operations.

We would reiterate that the proposed tariff order is unwarranted and unnecessary and that the provision of CPE be entirely the prerogative of DTH operators.