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PART III, SECTION 4

TELECOM REGULATORY AUTHORITY OF INDIA

NOTIFICATION

New Delhi, the 8th September, 2015.

THE TELECOMMUNICATION (BROADCASTING AND CABLE) SERVICES (FOURTH)
(ADDRESSABLE SYSTEMS) TARIFF (FIFTH AMENDMENT) ORDER, 2015
(No. 5 of 2015)

No. 1-42/2015 - B&CS. ----- In exercise of the powers conferred by sub-clauses (ii), (iii), (iv) and (v) of clause (b) of sub-section (1) and sub-section (2) of section 11 of the Telecom Regulatory Authority of India Act, 1997 (24 of 1997), read with notification of the Government of India, in the Ministry of Communication and Information Technology (Department of Telecommunications), No.39,-----

(a) issued, in exercise of the powers conferred upon the Central Government by proviso to clause (k) of sub-section (1) of section 2 and clause (d) of sub-section (1) of section 11 of the said Act, and

(b) published under notification No. 39 (S.O. 44 (E) and 45 (E)) dated the 9th January, 2004 in the Gazette of India, Extraordinary, Part II- Section 3- Sub-section (ii), ----

the Telecom Regulatory Authority of India hereby makes the following Order further to amend the Telecommunication (Broadcasting and Cable) Services (Fourth) (Addressable Systems) Tariff Order, 2010 (1 of 2010), namely:-

1. (1) This Order may be called the Telecommunication (Broadcasting and Cable) Services (Fourth) (Addressable Systems) Tariff (Fifth Amendment) Order, 2015 (5 of 2015).

(2) It shall come into force from the date of its publication in the Official Gazette.

2. In clause 3 of the Telecommunication (Broadcasting and Cable) Services (Fourth) (Addressable Systems) Tariff Order, 2010 (1 of 2010) , (hereinafter referred to as the principal Tariff Order),-----

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(a) after sub- clause (o) , the following sub-clause (oa), shall be inserted, namely:----- --

“(oa) “commercial subscriber” means a subscriber who causes the signals of TV channels to be heard or seen by any person for a specific sum of money to be paid by such person;”

(b) for the sub-clause (z), the following sub-clause shall be substituted, namely.---

“(z) “ordinary subscriber” means a subscriber who is not a commercial subscriber.

3. In clause 4 of the principal Tariff Order,---

(a) in sub-clause (1), after the first proviso, the following proviso shall be inserted, namely:-

“Provided further that nothing contained in the first proviso shall apply to the a-la-carte rate of pay channels specified by the broadcaster for commercial subscriber”.

(b) in sub-clause (2), after the first proviso, the following proviso shall be inserted, namely:-

“Provided further that nothing contained in the first proviso shall apply to the bouquet rate of channels specified by the broadcaster for commercial subscriber.”

4. After clause 4 of the principal Tariff order, the following clause shall be inserted, namely:-

“4A – Tariff for commercial subscriber. ----(1) A broadcaster shall offer all its pay channels for commercial subscribers on a-la-carte basis to distributors of TV

channels using addressable systems, and may specify separate a-la-carte rate for each pay channel:

Provided that the broadcaster may also offer all its pay channels as part of bouquet consisting of pay channels or both pay and free to air channels and specify the rate for each such bouquet of channels offered by it.

(2) A broadcaster may enter into a tripartite agreement with the distributors of TV channels and the commercial subscribers for supply of signals of TV channels to the commercial subscribers.

(3) Any tripartite agreement entered into under sub-clause (2) shall be filed with the Authority by the broadcaster within thirty days of entering into such agreement.

5. In clause 6 of the principal Tariff Order, the word “ordinary”, wherever appearing, shall be deleted.

(Sudhir Gupta)
Secretary, TRAI

Note.1-----The principal Tariff Order was published in the Gazette of India, Extraordinary, Part III, Section-4 vide notification no. 11-14/2009- B&CS dated the 21st July 2010 and subsequently amended vide notifications No.1-9/2012 - B&CS dated the 30th April 2012, No. 1-12/2012 -B&CS dated the 20th September 2013, No. 1-9/2012 - B&CS dated the 10th February, 2014 and No. 1-19/2014 - B&CS dated 18th July, 2014.

Note.2-----The Explanatory Memorandum explains the objects and reasons of the Telecommunication (Broadcasting and Cable) Services (Fourth) (Addressable Systems) Tariff (Fifth Amendment) Order, 2015 (5 of 2015).

Explanatory Memorandum

Background

1. The Telecom Regulatory Authority of India (TRAI) is a statutory body established by the Telecom Regulatory Authority of India Act, 1997 (hereinafter referred to as the TRAI Act). Since its inception some of the prime focus areas of TRAI have been, to protect the interests of consumers and service providers of the telecommunication sector and to promote the orderly growth of telecommunication services.
2. The Government of India, through a Notification dated 9 January 2004, notified “broadcasting services” and “cable services” as "telecommunication services". Accordingly, since 2004 TRAI has been regulating the broadcasting and cable TV sector in India by exercising its recommendatory as well as regulatory powers.
3. Soon after it came to be vested with regulation of broadcasting and cable TV services sector, TRAI notified, in the interim, the Telecommunication (Broadcasting and Cable) Services Tariff Order, 2004 on 15 January 2004. Vide this order charges payable by Cable subscribers to Cable Operators, Cable Operators to MSOs/Broadcasters and MSOs to Broadcasters as on 26 December 2003 were prescribed to be the ceiling for Free-to-Air (FTA) and pay channels, until final determination by TRAI. On that date, there was no categorization made amongst the cable subscribers. Thereafter, on 01 October 2004, TRAI notified the Telecommunication (Broadcasting and Cable) Services (Second) Tariff Order, 2004 (hereinafter referred to as ‘Principal Non-CAS Tariff Order’) superseding the interim tariff order issued on 15 January 2004. This tariff order also, retained the ceilings imposed on cable TV charges. In this tariff order also, no categorization was made amongst the TV subscribers.
4. On 08 August 2005, the Association of Hotels and Restaurants filed Petition Nos. 80(C) and 32(C) of 2005, before the Hon’ble TDSAT challenging the differential tariffs charged by some broadcasters. On 17 January 2006, the Hon’ble TDSAT dismissed the petition wherein it concluded that the members of the petitioner associations couldn’t be regarded as subscribers or consumers. It also asked the Authority to consider whether it was necessary or not to fix tariff for commercial cable TV subscribers.
5. On 07 March 2006, TRAI, upon considering the observations made by TDSAT in its Order dated 17 January 2006 and a representation received from Federation of Hotel and

Restaurants Association of India (FHRAI), in the interim, notified the Telecommunication (Broadcasting and Cable) Services (Second) Tariff (Fourth Amendment) Order, 2006(2 of 2006). In this order, two classes of subscribers - ordinary cable subscribers and commercial cable subscribers were defined. This order also provided that for the commercial cable subscribers, the rates (excluding taxes) payable by one party to the other by virtue of the written/oral agreement prevalent on 01 March 2006 shall be the ceiling and the principle applicable in the written/oral agreements prevalent on 01 March 2006, should be applied for determining the scope of the term “rates”. Similar provision was also made for all subscribers other than commercial cable subscribers.

6. On 21 April 2006, a Consultation Paper was issued by TRAI for detailed consultations on the issue. In the meantime, Civil Appeal No. 2061 of 2006 was filed challenging the Hon’ble TDSAT’s order dated 17 January 2006 by Associations of Hotels and Restaurants before the Hon’ble Supreme Court of India and the Hon’ble Supreme Court passed a “status quo” order on 28 April 2006. This status quo order was modified by the Hon’ble Supreme Court, on 19 October 2006, directing the Authority to carry out the processes for framing the tariff under Section 11 of the TRAI Act independently and not relying on or on the basis of any observation made by TDSAT. In the said order it was also mentioned that there is no need of issuing another consultation paper, however while issuing the Tariff Order it should be ensured that all the provisions of the TRAI Act have been complied with.
7. Accordingly in pursuance of the directions of the Hon’ble Supreme Court, draft tariff amendment orders seeking comments of the stakeholders was placed on the website of TRAI.
8. After following the due consultation process, in pursuance of the directions of the Hon’ble Supreme Court, the Authority issued two Amendment Orders on 21 November 2006, viz The Telecommunications (Broadcasting & Cable) Services (Second) Tariff (Seventh Amendment) Order, 2006 (8 of 2006) and The Telecommunication (Broadcasting and Cable) Services (Third) (CAS Areas) Tariff Order, 2006 (6 of 2006), applicable to commercial subscribers in Non-CAS and CAS areas respectively. These tariff amendment orders had the following main provisions:
 - (a) With respect to hotels with ratings of 3 stars and above, heritage hotels and hotels with a capacity of 50 or more rooms (hereinafter referred to as “the Excluded Categories of Hotels”), the charges were to be mutually negotiated.
 - (b) The charges for other categories of hotels (except excluded categories of hotels)

shall be at the same rate as for ordinary subscribers and other commercial subscribers.

- (c) In respect of programmes of a broadcaster, shown on the occasion of a special event for common viewing, at any place registered under the Entertainment Tax Law and to which access is allowed on payment basis for a minimum of 50 persons by the commercial cable subscribers, the tariff shall be as mutually determined between the parties.
9. On 24 November 2006, the Hon'ble Supreme Court of India decided Civil Appeal No. 2061 of 2006 and reversed the order of the TDSAT dated 17 January 2006 and remanded the matter back to TRAI directing it to carry on the process for fresh determination of tariff independently.
10. Hotels which formed a part of the excluded category under the Notifications dated 21 November 2006 and the Federation of Hotel and Restaurants Association of India (FHRAI), filed Appeals No.17(c) of 2006 (East India Hotel Ltd vs. TRAI and Ors) and 18(c) of 2006 (The Connaught Prominent Hotels Ltd vs. TRAI and Ors) before the Hon'ble TDSAT challenging inter alia the Tariff Order/ Notification dated 21 November 2006, issued by TRAI. The Hon'ble TDSAT, by its judgment dated 28 May 2010, allowed appeals and quashed the tariff order and, amongst others, asked the Authority to consider the case of commercial establishments afresh in a broad based manner.
11. Civil Appeal Nos. 6040-6041 of 2010 filed by one of the broadcasters (M/s ESPN) and other connected appeal Nos. 10476-10477 of 2010 and 8358-8359 of 2010 were filed before the Hon'ble Supreme Court challenging the judgment of the Hon'ble TDSAT dated 28 May 2010, wherein:
- (a) On 16 August 2010, the Hon'ble Supreme Court passed an *ad interim* order of stay on the order of the TDSAT dated 28 May 2010.
- (b) By its judgment dated 16 April 2014, the Hon'ble Supreme Court dismissed Civil Appeal No. 6040-41 of 2010 and other connected appeals. The Hon'ble Supreme Court further directed TRAI to consider the matter de-novo within 3 months and to re-determine tariff.
12. Accordingly, TRAI issued a consultation paper on 11 June 2014 and subsequently, after following the due consultative process notified the following Regulations and Orders–
- (a) The Telecommunication (Broadcasting and Cable) Services (Second) Tariff

(Twelfth Amendment) Order, 2014 (5 of 2014) on 16 July 2014.

- (b) The Telecommunication (Broadcasting and Cable) Services (Fourth) (Addressable Systems) Tariff (Fourth Amendment) Order, 2014 (6 of 2014) on 18 July 2014, that amended the Principal Addressable (Digital) Tariff Order.
 - (c) The Telecommunication (Broadcasting and Cable Services) Interconnection (Digital Addressable Cable Television Systems) (Fourth Amendment) Regulation, 2014 (9 of 2014) on 18 July 2014, that amended the Principal Addressable (Digital) Interconnect Regulation.
 - (d) The Telecommunication (Broadcasting and Cable Services) Interconnection (Eighth Amendment) Regulation, 2014 (8 of 2014) on 18 July 2014, that amended the Principal Non-CAS Interconnect Regulation.
13. The above two Tariff Amendment Orders were challenged by the Indian Broadcasting Foundation and Others, in Appeal No. 7(C) of 2014, before the Hon'ble TDSAT. A Writ Petition No. 5161 of 2014 (Star India vs. TRAI and Ors.) was filed before the Hon'ble High Court of Delhi challenging the above amendments dated 16 July 2014 and 18 July 2014, to the Tariff Orders and to the Interconnect Regulations applicable to Non-CAS areas and to DAS areas.
14. The Hon'ble TDSAT in its order dated 09 March 2015, allowed the appeal filed by the Indian Broadcasting Foundation, quashing the two tariff amendment orders dated 16 July 2014 and 18 July 2014. The Hon'ble TDSAT while allowing the appeal also, inter-alia, directed TRAI to issue fresh orders within six months from the date of the judgment. Further, it was also mentioned in the said judgment that the Authority may also take a decision with regard to any interim arrangement within one month from the date of the judgment.
15. TRAI issued a press release, dated 13 May 2015, clarifying its position with respect to the interim arrangement referred to in the Hon'ble TDSAT order dated 09 March 2015. The relevant extracts of the press release are given below-

"...an ad interim measure, the "Telecommunication (Broadcasting and Cable) Services (Second) Tariff Order 2004" (6 of 2004) dated 01.10.2004, the "Telecommunication (Broadcasting and Cable) Services (Third) (CAS Areas) Tariff Order 2006 (6 of 2006) dated 31.08.2006 and the "Telecommunication (Broadcasting and Cable) Services) (Fourth) (Addressable Systems) Tariff Order, 2010 (1 of 2010) dated 21.07.2010 respectively shall apply subject to the outcome of the civil appeal filed by TRAI before the Hon'ble Supreme Court challenging the order dated 9th

March, 2015 of the Hon'ble TDSAT.”

16. In Writ Petition No. 5161 of 2014, the Hon'ble High Court of Delhi, issued an order on 15 May 2015, holding that while determining the tariff in terms of the order of TDSAT dated 09 March 2015, TRAI shall not consider itself bound by the regulations impugned in the petition in any manner whatsoever.
17. TRAI has filed an appeal (Civil appeal No 4851 of 2015 (TRAI vs. IBF and others)) in the Hon'ble Supreme Court challenging the order dated 09 March 2015, delivered in appeal No 7(C) of 2014, of the Ld. TDSAT.
18. The Authority, as per the Hon'ble TDSAT order initiated a consultation process and issued a consultation paper (CP) titled “Tariff issues related to commercial subscribers” on 14 July 2015 seeking comments/ views of all the stakeholders. The CP took a fresh and holistic approach without being biased with previous determinations to the issue. A total of 22 comments were received, however no counter-comment was received. An Open-House discussion (OHD) was conducted on 18 August 2015 at New Delhi wherein 73 stakeholders participated. A total of 11 post-OHD comments were also received.
19. This tariff order is being issued after comprehensive study and analysis of the issues while taking into consideration comments/ views of all the stakeholders in response to consultation paper as well as discussions in OHD.

Analysis of Issues

Need for differentiation between ordinary and commercial subscribers and requirement for separate definition

20. The consultation paper sought the views of all stakeholders on the basic issue of whether there is a need to define and differentiate between ordinary and commercial subscribers for provision of TV signals. The views/opinions of the stakeholders who responded during the consultation process are summarized below.

Stakeholder comments

21. All broadcasters and their association have brought out that it is essential to define and differentiate between ordinary and commercial subscribers for provision of TV signals.
22. Most of the Distribution Platform Operators (DPOs) have stated that there is no need to define and differentiate between the ordinary and commercial subscribers. Some of the reasons put forward to justify their view are as follows:
- (a) In an addressable regime, each STB is a subscriber and is thereby fully accounted for.
 - (b) There is no difference in the TV service that is provided to an ordinary or a commercial subscriber.
23. Some DPOs also suggested that the only exception when such a differentiation must actually be made is when a commercial establishment charges separately for the TV services provided to his clients thereby exploiting the TV signals for commercial gains.
24. Almost all hotels and their associations have submitted that no differentiation is required between the ordinary and commercial subscribers. Some of the reasons put forth in support of their argument are as follows:
- (a) Television service in hotels is a necessity by virtue of the Ministry of Tourism guidelines issued vide letter no 8-TH-I93)/2013 dated 16.12.2014.
 - (b) TV service is an essential service to be provided to the guests as per the decision of the Ld. TDSAT dated 27 February 2007.
 - (c) Hotels and restaurants do not recover the cost of TV subscription from their guests.
 - (d) Commercial subscribers have no better bargaining power than residential

subscribers especially vis-à-vis the broadcasters.

25. Individuals including an industry observer and an industry association have opined that there is no need for differentiation between ordinary and commercial subscribers. However, one individual has suggested that there should be a categorization of the subscribers as ordinary and commercial and the commercial subscribers can be further categorized based on the scale and type of commercial activity that is carried out at such a subscriber's location.

Analysis

26. The penetration of TV services in the country in the last few decades has been on the rise exponentially and most of the households and other establishments in urban and semi-urban areas now have access to pay TV services. There has been paradigm shift from the way TV was looked at in 2006 when initially TRAI gave separate classification for commercial subscribers. Viewing Pay TV channels in Hotels in 2006 was considered a luxury and many a time separate rates for similar rooms with TV and without TV were quoted. Now pay TV has become ubiquitous and classifying hotels as commercial TV subscribers merely on the basis that they provide TV signal viewing facility in hotel rooms does not hold ground. Now a days, it is not only the hotels and restaurants but various other public places such as Airports, Malls, Shopping complexes, Hospitals, Doctors' Clinics etc., where one can have access to viewing of TV channels. Most of the individual visiting these establishments would have in the normal case already paid for domestic access to the TV content. Viewing of TV programs, if at all, at such places is not novelty and in no way adds to special experience. It can safely be presumed that an individual visiting these establishments cannot be doing so solely for the purpose of watching TV content. Moreover, with pervasiveness of TV services in the country and widespread availability of paid TV content, it no longer is a distinctive value proposition for these establishments to attract clientele on the basis of such TV services. In most cases, the TV services in a basic form are offered to the client akin to any other basic amenity. However, there may be instances where the establishments do charge their clients for providing premium TV content with enhanced attractiveness. In these specific cases, such establishments may be said to be exploiting the display of premium TV content to bring in additional revenues and thereby they do stand to benefit commercially by causing the TV broadcast to be heard or seen by the public on payment of charges.
27. The Authority is therefore of the view that for regulation of tariff for TV services being used at these establishments, such establishments may broadly be classified in two categories - (i) where the client does not have to pay separately to use the TV services or

where use of TV services is incidental to the primary purpose; in other words, when the TV services are not being separately charged and (ii) where the client does pay separately for use of the TV services and the establishments earn revenues from provision of such TV services. Hence, depending upon the type of the usage of TV services, there is a need to differentiate and define 'ordinary subscriber' and a 'commercial subscriber' separately.

Basis or criterion for the classification of subscribers of TV services

28. The issue raised in the consultation paper was that in case a classification of subscribers of TV services is necessary, then what should be the basis or criterion for such a classification. Consultation paper flagged various possibilities of such classification based on place of viewing TV signal, type of usage criteria for TV signals, method of provisioning of TV signals, type of content of TV signal, perceived value of TV services and also sought suggestions from the stakeholders for any other criteria which they may like to suggest. The views/opinions of the stakeholders who responded during the consultation process are summarized below.

Stakeholder comments

29. Most of the broadcasters and their association have opined that it is essential to differentiate between ordinary and commercial subscribers for provision of TV signals. Further, differentiation based on 'type of usage' and the 'place of usage' has been suggested by them as the most appropriate criteria. Broadcasters have also suggested that the commercial establishments should further be classified into the following:-
- a) Hotel rooms.
 - b) All commercial outlets that include restaurants, shops, factories and offices with exemption however being granted to the following:-
 - (i) Those with less than twenty employees.
 - (ii) Premises of area less than 2500 sq. ft. within city limits and 5000 sq. ft. outside city limits.
 - * with a caveat that exemptions under (i) and (ii) above must not apply in metropolitan cities, state capitals and class A/B cities.
 - (iii) Micro-enterprises under the MSME Act 2006.
 - c) Public viewing areas including airport lounges, banquet and party halls, hotel lobbies, theatres and auditoriums etc.

30. One of the broadcasters has suggested that the classification of TV subscribers can also be done on the basis of the fact that whether the service availed by the establishment is “incidental” or “essential” to the core area of its business. In the event that they choose to use an incidental service such as TV to enhance their businesses in any way, this will be for commercial gains. Service providers (broadcasters) of such services should have the right to charge separately as it is used for a clear commercial gain.
31. DPOs and their associations have stated that there is no need to differentiate between ordinary household subscriber and commercial establishments such as Hotels, Restaurants, Airports, Malls, Shopping complexes, Hospitals, Doctors’ Clinics, where one can have access to viewing of TV channels without being charged separately. They also mentioned that since satellite footprint is available across India, hence, possibility of shifting DTH receiver from one location to other location by subscribers can not be ruled out. Hence, any differentiation between commercial subscribers and ordinary household subscriber based on location of uses of TV signals is difficult to be implemented on ground.
32. Some of them have further suggested that the only exception when such a differentiation must actually be made is when a commercial subscriber charges his customers separately for the TV service provided to his clients thereby exploiting the TV service for commercial gains.
33. Almost all hotels and their associations have submitted that there is no differentiation required between the ordinary and commercial subscribers except in case of those subscribers who commercially exploit the TV signals by charging separate fee/entry fee.
34. An individual has opined that there is no need for any differentiation between ordinary and commercial subscribers. An industry association has however suggested that small and medium shop owners should not be considered as commercial subscribers while all organizations providing 1-5 star services should be treated as commercial subscribers.

Analysis

35. Majority of Comments/ suggestions of various stakeholders indicate that there is no need for classification of subscribers while suggesting that the only exception that needs to be made is when clients are charged separately for the provision of TV services. Broadcasters are of the view that ‘type of usage’ of the TV services as well as the ‘place of usage’ of the TV services should be the criteria for classification of subscribers. The Authority, having

come to the conclusion that while there is a need to define and differentiate subscribers of TV services into ordinary and commercial subscriber categories, is of the opinion that the classification must be simple, unambiguous, and practically implementable across the entire value chain whilst interest of every stakeholder is adequately protected.

36. The Authority has noted that in 2006, the commercial subscribers were defined by relying on “place of usage” of TV signal especially in Hotels irrespective of the type of usage, which has been contested time and again by the Hotel Industry. Broadcasters have now asked that commercial subscribers to be defined based on both “place of usage” and “type of usage”. Other stakeholders are persistently demanding that no distinction should be made either based on place of usage or on type of usage or any other criteria. They are of the view that Authority must consider only those entities for defining commercial subscribers who explicitly exploit the TV signals for commercial gains.
37. In view of above, the Authority has carefully considered various options for classification suggested by the stakeholders. It is noted that in most of the cases, the TV signal in commercial establishments is used only for the infotainment purpose without separately charging for viewing of TV signals. Pay TV channel viewing has become ubiquitous and in most of the places where such commercial establishment exists, almost every household has access to pay TV programs. Therefore, provision of TV services in such establishment does not make any value proposition for the clients visiting such establishment. Further, viewing of TV programs in such establishments is not novelty and most of the clients would have already subscribed for such content. It may not be out of place to mention here that from such viewing of TV channels Broadcasters also get advantage by way of more advertisements due to increased viewership. Further, Ministry of Tourism has mandated provision of TV services in rooms for 3 star hotels and above and in lobby for other hotels in Dec 2014. As such, considering the scenario where content is monopolistic in nature and hotels are mandated to provide such content, the regulatory framework must balance the interest of stakeholders in the value chain.
38. The Authority has noted that there may be instances where TV signals are commercially exploited by separately charging for exhibiting the TV programs. Therefore the distinguishing criteria can be the ‘type of usage of TV signals’ i.e., where the signals are commercially exploited by charging separately for its exhibition for earning revenues out of it.
39. Moreover, the Hon’ble Supreme Court in its judgment dated 24.11.2006 in appeal (Civil) 2061 of 2006 Hotel and Restaurants Association and Anr Vs Star India Pvt Ltd. and Ors has, amongst others, observed as under:

“...The owners of the hotels take TV signals for their customers/ guests. While doing so, they inter alia provide services to their customers. An owner of a hotel provides various amenities to its customers such as beds, meals, fans, television, etc. Making a provision for extending such facilities or amenities to the boarders would not constitute a sale by an owner to a guest. The owners of the hotels take TV signals from the broadcasters in the same manner as they take supply of electrical energy from the licensees. A guest may use an electrical appliance. The same would not constitute the sale of electricity by the hotel to him. For the said purpose, the 'consumer' and 'subscriber' would continue to be the hotel and its management. Similarly, if a television set is provided in all the rooms, as part of the services rendered by the management by way of an amenity, wherefor the guests are not charged separately, the same would not convert the guests staying in a hotel into consumers or subscribers.....”

40. The said judgment further quotes another judgment of the Hon’ble Supreme Court (in *The State of Punjab v. M/s. Associated Hotels of India Ltd.* [(1972) 1 SCC 472]) on similar issue, which is reproduced as under:

“.... When a traveller, by plane or by steam-ship, purchases his passage-ticket, the transaction is one for his passage from one place to another. If, in the course of carrying out that transaction, the traveller is supplied with drinks or meals or cigarettes, no one would think that the transaction involves separate sales each time any of those things is supplied. The transaction is essentially one of carrying the passenger to his destination and if in performance of the contract of carriage something is supplied to him, such supply is only incidental to that services, not changing either the pattern or the nature of the contract. Similarly, when clothes are given for washing to a laundry, there is a transaction which essentially involves work or service, and if the laundryman stitches a button to a garment which has fallen off, there is no sale of the button or the thread. A number of such cases involving incidental uses of materials can be cited, none of which can be said to involve a sale as part of the main transaction.”

41. From the observations of the Hon’ble Supreme Court, cited above, it is clear that provision of TV services in a commercial establishment is only incidental to the service that the commercial establishment is providing to its clients. Thus, it has also been settled by the said judgment that any service rendered to a guest by way of an amenity, wherefore the guests are not charged separately, the same would not constitute as sale of the said service to the guest.
42. In view of above deliberations, the Authority is of the view that the basic criteria for

classification of subscribers should be whether the TV services, irrespective of its place of provisioning, are being commercially exploited, by the subscriber to earn revenues by charging separately for such services. In other words, the criteria for classification of subscribers should be the 'type of usage' of TV signals by the subscriber and not the subscriber's 'place of usage of signals'. In view of the discussions in paragraphs above, the Authority has decided that the subscribers who charge their clients separately to use the TV services, amounting to commercial exploitation of TV services to earn revenues out of it from their clients, shall be classified as 'commercial subscribers'. And all other subscribers shall be classified as 'ordinary subscribers'. Accordingly, 'subscriber', 'ordinary subscriber' and 'commercial subscriber' have been defined in this Tariff Order.

Need for review of existing Tariff framework (wholesale and retail levels) for Commercial subscribers of TV services provided through addressable and non-addressable systems

43. The issue raised in the consultation paper was whether the existing tariff framework for commercial subscribers both at the wholesale and retail levels was adequate or a review was needed. The views/opinions of the stakeholders who responded during the consultation process are summarized below.

Stakeholder comments

44. Most broadcasters and their association have opined that there is a need to review the tariff framework as far as commercial subscribers are concerned. They have suggested that the tariffs for commercial subscribers should be brought under forbearance at the wholesale and retail levels both for the addressable and non-addressable systems as sufficient competition already exists at all levels.
45. Most distribution platform operators and their associations while offering their views on this issue have stated that there is no need to review the existing tariff framework for commercial subscribers except for those commercial establishments that charge their customers separately for the TV services provided to their clients thereby exploiting the TV signals for commercial gains.
46. Almost all hotels and their associations have submitted that there is no need to review the existing tariff framework for commercial subscribers.

Analysis

47. The Authority is of the view that a comprehensive tariff framework for commercial subscribers needs to be put in place to ensure that the interests of all the stakeholders in the value-chain are adequately protected. The framework must be practically implementable, lend itself to effective monitoring and enforcement in the field. Accordingly, a framework has been worked out and included in this Tariff Order.

Need and suggestions towards framing a separate Tariff framework (at wholesale and retail levels) for Commercial subscribers for TV services provided through addressable and non-addressable systems.

48. The issue raised in the consultation paper was whether a need exists for a separate tariff framework for commercial subscribers both at the wholesale and retail levels. In case the need does exist for such a separate framework for commercial subscribers, suggestions were invited from the stakeholders towards framing a separate tariff framework for commercial subscribers. The views/opinions of the stakeholders who responded during the process of consultation are summarized below.

Stakeholder comments

49. Broadcasters and their association in general have opined that there should be total forbearance both at the wholesale and retail levels both for addressable and non-addressable systems. Some of the reasons stated for justifying such a forbearance regime are as follows:
- (a) Commercial establishments possess sufficient bargaining powers to protect themselves.
 - (b) No price regulations exist for clients of so called commercial subscribers who are seeking TV channel price regulation.
 - (c) TV channels are a non-essential service from a constitutional point of view.
 - (d) In case the tariff regulation of ordinary subscribers is extended to commercial subscribers, then pay broadcaster will have to effectively subsidize not only ordinary subscribers but also the businesses of the commercial subscribers in a manner that results in direct losses to pay broadcasters while resulting in a

corresponding gain to the commercial subscribers and the DPOs.

50. Almost all distribution platform operators and their associations are of the view that there is no need to review the existing tariff framework for commercial subscribers except for those commercial establishments that charge their customers separately for the TV services provided to their clients thereby exploiting the TV signals for commercial gains.
51. Hotels have put forth the view that there is no need to have a different tariff framework for commercial subscribers and TRAI may only prescribe tariff for institutions charging separately or commercially exploiting the TV signals and it should be left open to the DPOs to decide the tariff rates for providing TV signals to the clients. Some of the points given in support of such an argument are given below.
- (a) If forbearance is granted, hotel customers will suffer for not being able to watch TV programs for which they have already paid.
 - (b) Room rates fluctuate with other factors whereas subscription fee remains same.
 - (c) Hotel occupancies average out over a year to around 50% whereas the hotels pay for the TV connections for 100 % of their rooms throughout the year.
 - (d) Forbearance in the past has been misused by the broadcasters.
- (a) The TV content owned by the broadcasters is monopolistic in nature. Therefore forbearance may be misused by broadcasters. Any negotiation that occurs must be between the DPO and the subscriber even in case of revenue share for the subscribers exploiting TV signals.
 - (b) The DPO in turn passes on the revenue share to the broadcasters in accordance with the mutual agreements.
 - (c) A provision should be incorporated for payment of mutually negotiated charges by the subscriber to the DPO in the event that the subscriber is charging separately from third persons by selling tickets for viewing of the TV signal being received by it.
52. An individual has opined that there is no need to have a different tariff framework for commercial subscribers.

Analysis

53. The Authority has considered the views of various stakeholders submitted during the consultation process. It is noted that broadcasters have asked for tariff to be on forbearance. The Authority has considered various issues raised in detail and after analysis is of the view

that there is a case for forbearance to be given to broadcasters in respect of commercial subscribers as defined in this tariff order. Accordingly, a framework has been worked out and included in the said tariff order. Here it may be noted that as per the “Policy Guidelines for Down-linking of Television Channels” amended from time to time, broadcasters shall provide satellite TV channel signal reception decoders only to MSOs/Cable Operators registered under the Cable Television Networks (Regulation) Act 1995 or to a DTH operator registered under the DTH guidelines issued by Government of India or to a Internet Protocol Television (IPTV) Service provider duly permitted under their existing Telecom Licenses or Authorized by Department of Telecommunications or to a HITS operator duly permitted under the policy guidelines for HITS operators, issued by Ministry of Information and Broadcasting, Government of India to Provide such service. Therefore, it shall be ensured by the broadcasters that they adhere to these guidelines while dealing with commercial subscribers as defined in these tariff orders.

Examine adequacy of the present framework for commercial subscribers so as to ensure transparency and accountability in the value chain to effectively minimize disputes and conflicts amongst stakeholders and suggestions for a practical and implementable framework in case the present framework is believed to be inadequate

54. The issue raised in the consultation paper was whether the present framework for commercial subscribers is adequate to effectively minimize disputes and conflicts amongst various stakeholders. In case the framework is believed to be inadequate, suggestions were invited from the stakeholders towards framing a practical and implementable framework for the same. The views/opinions of the stakeholders who responded are summarized below:

Stakeholder comments

55. Majority of the broadcasters and their association are of the opinion that complete forbearance at the wholesale and retail levels will minimize disputes while bringing in transparency and accountability.
56. Almost all distribution platform operators and their associations are largely of the view that there is no need to review the existing tariff framework for commercial subscribers. DTH operators have submitted that deterrent provisions must be put in place so that the commercial subscribers do not commercially exploit TV signals without acquiring a license from the broadcasters. Negotiation between a broadcaster

and the commercial establishment will ensure that no entity in the value chain is at loss.

57. Hotels and their associations feel that the present framework is adequate and there is no need to review it.
58. An industry association has opined that existing provisions of DAS if properly implemented will ensure transparency and accountability.

Analysis

59. The Authority has examined the views of various stakeholders in the light of the existing framework and suggestions received on this account. The Broadcasters have been permitted forbearance in pricing at wholesale level in respect of commercial subscribers defined in this Tariff Order. The DPO may enter into agreement with Broadcasters to declare retail tariff for commercial subscribers. Alternatively, Broadcasters may have tripartite agreements with commercial subscribers and DPO as signal can only be given through DPO. In any case, DPOs have to have an agreement with Broadcaster for provision of signals to commercial subscribers. As far as misuse of TV signal is concerned, there are adequate provisions and any case of misuse of signal shall be dealt according to extant rules. Therefore, The Authority is of the view that the existing framework is adequate to address the concerns of all the stakeholders in the value chain.

Need for engagement of broadcasters in determination of retail tariffs for commercial subscribers on a case-to-case basis.

Stakeholder comments

60. Most broadcasters along with their association are of the view that tariff forbearance must be introduced at all levels and the broadcasters must be allowed to negotiate with the commercial subscribers.
61. The DPOs have offered mixed opinions regarding this issue. While one of the DPOs has suggested that engagement of broadcasters should be limited only at the wholesale level for all kinds of subscribers, another DPO has opined that involvement of broadcasters on a case-to-case basis is acceptable.
62. All hotels and their associations are of the opinion that there is no need to engage broadcasters in the determination of retail tariff except for those cases where the

commercial subscribers do separately charge or commercially exploit the TV signals.

63. An industry association has said that there is a need to engage broadcasters as they are the content creators.

Analysis

64. The Authority having examined the views and suggestions of the various stakeholders is of the view that except for commercial subscribers as defined in this tariff order, there is no need for any tariff differentiation and involvement of broadcasters in determination of tariff at retail level. Broadcasters have been given options to have tripartite agreement with commercial subscribers and DPOs keeping in view that the broadcasters have copyrights of the content and only the DPOs can provide the TV signals as per the “Policy Guidelines for Down-linking of Television Channels”. Further, nature and scale of exploitation of TV services can be very different from case to case. Hence, this flexibility has been given to broadcasters.

Mechanism to ensure that TV signals provided for non-commercial purposes are not misused for commercial purposes.

Stakeholder comments

65. Most broadcasters along with their association have suggested that broadcasters must be allowed to conduct periodic audits of DPOs and also take action against the defaulters. They have further suggested that the Authority should levy fines and introduce a provision for cancellation of licenses in case of repeated defaults.
66. The DPOs are of the opinion that adequate safeguards do already exist in the form of conditions for license and permissions, anti-piracy laws and the legal framework that is place to prevent such misuse.
67. All hotels and their associations are of the view that due diligence is required on the part of all the stakeholders and no regulatory intervention is required. Imposition of penalties for non-compliance of regulations/orders can ensure that such misuse of TV signals is avoided.
68. An industry association has suggested that an independent monitoring body be created to ensure that no such misuse happens.

Analysis

69. The Authority has examined the comments of various stakeholders and is of the view that adequate provisions exist in present framework.