June 10, 2016

Telecom Regulatory Authority of India ('TRAI')
Mahanagar Doorsanchar Bhawan,
Jawaharlal Lal Nehru Marg, New Delhi – 110002

Ref: Consultation paper dated May 04, 2016 on Interconnection framework for Broadcasting TV Services distributed through Addressable Systems ("**Consultation Paper**").

Dear Sir,

At the outset, we thank the Hon'ble authority for providing us an opportunity to submit our views on this consultation paper and the cause thereof.

With best determination and effort to support TRAI in establishing a uniform environment by way of Interconnection framework in the Broadcasting and Cable TV industry with efficient and effective competition, we would like to bring our observations/response to the attention of TRAI.

In context of the same, we hereby attach our comments on the issues raised in this Consultation Paper for your kind perusal.

For any further clarification you may write to us or contact us.

Yours Sincerely,

For IndiaCast Distribution Private Limited

IndiaCast Distribution Pvt. Ltd. MUMBAI

Authorized Signatory

COMMENTS

OF

INDIACAST DISTRIBUTION PRIVATE LIMITED TO THE CONSULTATION PAPER

ON

INTERCONNECTION FRAMEWORK FOR BROADCASTING TV SERVICES DISTRIBUTED THROUGH ADDRESSABLE SYSTEMS

DATED MAY 04, 2016

RESPONSE ON BEHALF OF INDIACAST DISTRIBUTION PVT. LTD. TO THE CONSULTATION PAPER PROMULGATED BY TRAI ON 04.05.2016 ON INTERCONNECTION FRAMEWORK FOR BROADCASTING TV SERVICES THROUGH ADDRESSABLE SYSTEMS.

Before we respond to the issues highlighted in the Consultation Paper, we find it pertinent to bring to your attention to the following.

It is imperative of the regulatory interventions for an accelerated growth of the broadcasting and cable TV service ("B&CS") industry, and with the final date for implementation of the phase IV digitization fast approaching, we are looking at a complete platform shift in the industry, progressing optimistically towards the ultimate benefit of the general public and that the Indian market leading the industry across the globe. Nevertheless, at this insubstantial phase, the authorities should be prudent and not to over regulate which may stunt growth. The need for the hour is a strong collaboration between the stakeholders in the value chain and ensuring benefits, which should be the main objective of any regulatory reforms.

As rightly pointed out by TRAI, the first interconnection regulation, for B&CS namely the Telecommunication (Broadcasting and Cable Services) Interconnection Regulation, 2004 (13 of 2004), were notified by TRAI on 10.12.2004 and 9 amendments have been carried out in the Interconnection Regulations, 2004 regulating interconnection arrangements between service providers of B&CS for re-transmission of signals in analogue mode and later expanded its scope including addressable platforms such as Direct to Home (DTH), Head-end In The Sky (HITS), Internet Protocol Television (IPTV) etc. Similar features are entailed in the Telecommunication (Broadcasting and Cable Services) Interconnection (Digital Addressable Cable Television Systems) Regulations, 2012 (which again has undergone 7 amendments till date). The objective of fostering competition, reduced disputes, maintaining transparency efficiently and sustainable orderly growth can be achieved only through a liberated market.

Further, a myriad of regulation would only restrict accelerated progress and also off-track primary objective of implementation of digital addressable system in the B&CS industry.

RESPONSES TO THE ISSUES RAISED BY TRAI

Issue 1:- COMMON INTERCONNECTION FRAMEWORK FOR ALL TYPES OF ADDRESSABLE SYSTEMS

1.1 How a level playing field among different service providers using different addressable systems can be ensured?

1.2 Should a common interconnection regulatory framework be mandated for all types of addressable systems?

The interconnection regulations promulgated by TRAI and amended from time to time, cover the basic structure of arrangement between the parties with respect to the different aspects of interconnection, revenue share between the service providers. The principle of "non-discrimination" has been considered to be the main feature driving these regulations. The Regulations provide that every service provider should get access to the signals on similar terms and on non-discriminatory basis. The mandate of the regulations is that all the service providers should be given a level playing field, irrespective of the system they use.

In order to address this issue, it is pertinent to understand the brief history of the Regulations regarding provisioning of signals. We note below the main provision as it existed in 2004 and subsequent amendments that have been made to it with the changing times.

TRAI vide Notification dated 10.12.2004 issued the Telecommunication (Broadcasting and Cable Services) Interconnection Regulations, 2004 (hereinafter referred to as Principal Regulations, 2004") and introduced the provisions relating to non-discrimination in interconnect agreements. Clause 3.2 of the Principal Regulations provided that-

3.2 Every broadcaster shall provide on request signals of its TV channels on non-discriminatory terms to all distributors of TV channels, which may include, but be not limited to a cable operator, direct to home operator, multi system operator, head ends in the sky operator; Multi system operators shall also on request re-transmit signals received from a broadcaster, on a non-discriminatory basis to cable operators.

Provided that this provision shall not apply in the case of a distributor of TV channels having defaulted in payment.

Provided further that any imposition of terms which are unreasonable shall be deemed to constitute a denial of request"

The relevant extracts from the Explanatory Memorandum appended to the 2004 Regulations are extracted below in order to set out as to what has been the understanding of TRAI since the introduction of broadcasting sector within the ambit of TRAI.

'Must Provide' through whom

11. There is high cost involved in the distribution of TV channels if the market is fragmented. To reduce the distribution costs broadcasters/ multi system operators should be free to provide access in the manner they think is beneficial for them. The 'must provide' of signals should be seen in the context that each operator shall have the right to obtain the signals on a non-discriminatory basis but how these are provided - directly or through the designated agent/distributor- is a decision to be taken by the broadcasters/multi system operator. Thus the Broadcaster/multi system operator would have to ensure that the signals are provided either directly or through a particular designated agent/distributor or any other intermediary.

12. In order to expedite the interconnection process the Authority has further provided that in case an agent does not respond to the request for providing signals within one month of the request, then the applicant would be free to approach broadcaster to obtain signals directly.

Volume Discounting Schemes

15. An important aim of non-discriminatory conditions is to ensure that a vertically integrated supplier does not treat itself in a way that benefits itself, its subsidiaries or its partners and has material effect on competition. The broadcaster/multi system operator must offer the required channels on terms that are no less favourable than those on which it provides equivalent services to its own affiliated operators.

16. Broadcasters and multi system operators are also offering discounting schemes including volume or bulk discounts. Such discounts are not considered anti-competitive if these are consistently available to similarly based distributors of TV channels. However such discounts will be treated as anti-competitive if provided on preferential basis to one or select group of operators. The Authority has identified three factors which may not be exhaustive relating to the subscriber base, technology of the distribution of TV channels and geographical region and neighbourhood.

Discrimination in providing TV Channel signals

17. In case any distributor of TV channel feels he/she has been discriminated on terms of getting TV signals compared to a similarly based distributor of TV channel, then a complaint must be filed with the broadcaster or multi system operator, as the case may be. In case the complainant is not satisfied with the response, he/she may approach the appropriate forum for relief."

By way of amendment dated 04.09.2006, TRAI notified the Telecommunication (Broadcasting and Cable Services) Interconnection (Third Amendment), 2006 introduced sub clause 5 to Regulation 3 of the Principal Regulations of 2004, which reads as:

> *"3.5 Any broadcaster/multi system operator or any agent/ any other intermediary of the broadcaster/multi system operator to whom a request for providing TV channel signals is made, should either provide the signals on mutually agreed terms to the distributor of TV channels who is seeking signals, or specify the terms and conditions on which they are willing to provide TV channel signals, in a reasonable time period but not exceeding sixty days from the date of the request. In case, the broadcaster/multi system operator or any agent/ any other intermediary of the broadcaster/multi system operator to whom a request for providing TV channel signals is made, turns down the request for TV channel signals, the reasons for such refusal must also be conveyed within sixty days from the date of the request for providing TV channel signals so as to enable the distributor of TV channels to agitate the matter at the appropriate forum.*
>
> *Explanation*
>
> *The time limit of sixty days shall also include time taken by the broadcaster to refer the distributor of TV channels, who has made a request for signals, to its agent or intermediary and vice versa"*

The Regulation, however, nowhere define the term "discrimination" or give the criterion to identify the cases which would amount to discrimination, except for Clause 3.6 of the Interconnect Regulations, 2004, which reads as-

"3.6 The volume related scheme to establish price differentials based on number of subscribers shall not amount to discrimination if there is a standard scheme equally applicable to all similarly based distributors of TV channel(s)."

An explanation has also been appended to Clause 3.6 which defines "similarly based distributor of TV channels" in order to further clarify as to what would amount to discrimination.

The said Explanation reads as,

"Similarly based distributor of TV channels" means distributors of TV channels operating under similar conditions. The analysis of whether distributors of TV channels are similarly based includes consideration of, but is not limited to, such factors as whether distributors of TV channels operate within a geographical region and neighbourhood, have roughly the same number of subscribers, purchase a similar service, use the same distribution technology.

For the removal of doubts, it is further clarified that the distributors of TV channels using addressable systems including DTH, IPTV and such like cannot be said to be similarly based vis-à-vis distributors of TV channels using non-addressable systems."

Apart from this, as noted above, the Explanatory Memorandum appended to the Principal Regulation, 2004 notes that in cases where a distributor of TV channel feels he/she has been discriminated on terms of getting TV signals compared to a similarly based distributor of TV channel, then a complaint must be filed with the broadcaster or multi system operator, as the case may be. In case the complainant is not satisfied with the response, he/she may approach the appropriate forum for relief.

Hence, the basic tenet of non-discrimination is provisioning of signals to all distributors on similar terms in order to ensure that no discrimination is being done against a particular distributor of TV channel.

Further, the Hon'ble TDSAT in a batch of petitions being *Star Sports India Pvt. Ltd., Mumbai Vs. Hathway Cable & Datacom Ltd., Mumbai* [M.A. No. 29 of 2014 in Petition No. 47 (C) of 2014]; *Hathway Cable & Datacom Ltd. Vs. Star Sports India Pvt. Ltd.* [Petition No. 210(C) of 2014]; *Hathway Cable & Datacom Ltd., New Delhi Vs. Star Sports India Pvt. Ltd., Haryana* [Petition No. 214(C) of 2014]; *Hathway Cable & Datacom Ltd. Mumbai Vs. Star India Pvt. Ltd., Mumbai* [Petition No.319(C) of 2014]; *Hathway Cable & Datacom Ltd., Mumbai Vs. Taj Television (India) Pvt. Ltd., Mumbai* [MA Nos.218 & 223 of 2014 in Petition No.335(C) of 2014] (hereinafter referred to as "**Hathway Judgment**"), observed that the conditions of reasonableness, parity, non-exclusiveness and non-discrimination stipulated in regulation 3 of the DAS Regulations commence from the stage a seeker makes request for provision of signals and goes right up-to the execution of the agreement followed by the actual provision of signals. The Hon'ble TDSAT made an attempt at reaching to valid definitions for the terms, as "reasonableness", "parity", "non-exclusiveness", definition of various terms as provided in the DAS Regulations. The Hon'ble TDSAT however, expressly left open the question as to the extent of freedom of negotiation enjoyed by the provider and the seeker of signals and the extent to which the RIO of the provider regulates, limits or expands the area of negotiation.

That Hathway judgment also observed that-

> "*The "Reference Interconnect Offer", as defined under the Regulations, is a positive concept and if framed properly it should go a long way in ensuring a level playing ground. In Europe, and in an increasing number of jurisdictions worldwide, incumbent operators and/or those with significant market power are required to produce a*

Reference Interconnect Offer. "This Specimen offer provides a common and transparent basis for all agreements for the provision of interconnection services subject to regulation. It also helps to ensure that new entrant operators can be confident of gaining terms which will not be less favourable to those applied to others (including the interconnection provider's own retail operation)". Seen thus the RIO may be said to define the parameter of negotiations for arriving at an agreement on mutually acceptable terms. It may be argued that the RIO must contain the details and rates relating to all the bases on which the maker of the RIO intends to enter into a negotiated agreement"

The Hon'ble TDSAT's judgment in *M/s Noida Software Technology Park Ltd. Vs. M/s Media Pro Enterprise India Pvt. Ltd. & Ors.* [M.A. No.166 of 2015, M.A. Nos. 223-232, 240-245, 256, 261, 266 of 2015 in Petition No. 295 (C) of 2014] and *Noida Software Technology Park Ltd. Vs.Taj Television India Pvt. Ltd. & Anr*. M.A. Nos. 167, 206 of 2015, 233-237, 246, 247, 257 of 2015 in Petition no. 526(C) of 2014] (hereinafter referred to as "**NSTPL judgment**") went a step ahead of the Hathway judgment and decided the extent of freedom of negotiations enjoyed by the provider and seeker of signals and the extent to which the RIO of the provider regulates, limits or expands the negotiation. The NSTPL judgment totally rejects the arguments that the regulations recognize the negotiated agreements as a valid arrangement between the provider and seeker of signals. The Hon'ble TDSAT in NSTPL judgment observed that-

"*A proper RIO, true to its nature as envisaged in the Regulations, is meant to go a long way in introducing/bringing about fairness, reasonableness and non-discrimination in interconnect arrangements between a broadcaster and distributors. But what is passed off by the broadcasters as RIO, instead of doing away with non-discrimination actually becomes a device to perpetuate discrimination*."

The NSTPL judgment also notes that-

> *"As the Regulations stand in its present form, we are clearly of the view that the RIO must reflect not only the rates of channels but also the different formations, assemblages and bouquets in which the broadcaster wishes to offer its channels for distribution along with the rates of each of the formation or bouquet. Further, the a-la-carte rate and the bouquet rates must bear the ratio as mandated in clause 13.2A.12. The RIO must also clearly spell out any bulk discount schemes or any special schemes based on regional, cultural or linguistics considerations that would be available on a non-discriminatory basis to all seekers of signals. To sum up the RIO, must enumerate all the formats, along with their respective prices, in which the broadcaster may enter into a negotiated agreement with any distributor. To put it conversely, the broadcaster cannot enter into any negotiated deal with any distributor unless the template of the arrangement, along with its price, consistent with the ratio prescribed under clause 13.2A.12 is mentioned in the RIO. In addition, any volume-related price scheme must also be clearly stated in the RIO so as to satisfy the requirement of clause 3.6 of the Interconnect Regulations.*"

In light of the above, it can be inferred that the provisions with respect to the protection of the rights of the distributors to seek access of the signals of TV channels on non-discriminatory basis has been in place since the inception of the regulatory framework. The principle of non-discrimination has also been protected, upheld by the Hon'ble TDSAT from time to time.

It is pertinent to mention here that in light of the must provide obligation of the broadcaster, the level playing field is bound to be provided to the seeker of signals. Similar is the case with the relationship between the MSOs and LCOs, where the MSOs are also under a must provide obligation to provide access to its network to the LCOs on non-discriminatory basis.

We would also like to analyse the different provisions relating to RIOs.

In terms of the Regulation, the broadcasters are allowed to publish their Reference Interconnect offer (RIO) for different addressable platforms, having different terms and conditions. The terms and conditions of the RIOs should however be such that there is no disparity between the different service providers operating on different addressable platforms.

The requirement of RIO was introduced for the first time vide The Telecommunication (Broadcasting and Cable Services) Interconnection (Fourth Amendment) Regulation, 2007 dated 03.09.2007. The 4th Amendment mandated publication of the RIOs by the broadcasters for DTH operators. The RIOs so published by the broadcasters must enumerate in it the following:-

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

The 4th Amendment also provided that the RIO published by the broadcasters shall form the basis for all interconnection agreements to be entered into between the broadcaster and direct to home operators. It also provided that the broadcaster may enter, on non-discriminatory basis, into agreements with different direct to home operators modifying the Reference Interconnect Offer on such terms and conditions as may be agreed upon between. Hence the element of mutual negotiation between the broadcasters and DTH operators was duly permitted by TRAI.

Vide amendment dated 17.03.2009 titled The Telecommunication (Broadcasting and Cable Services) Interconnection (Fifth Amendment) Regulation, 2009 extended the requirement of RIOs for addressable systems other than DTH operators also.

The Explanatory Memorandum appended to the 5th Amendment to Principal Regulations, 2004 notes the understanding of TRAI. The relevant portion from the Explanatory Memorandum is reproduced below:-

> *"27. The Authority noted that with the advancement of technology the market share of addressable systems for distribution of TV channels is set to rise in coming years. Apart from DTH, the HITS and IPTV platforms are already present in the pay TV market. Digitalization of cable TV networks and introduction of voluntary CAS has also started in different pockets in the country. Therefore, the Authority felt that the interconnection regulations should facilitate interconnection agreements for addressable systems. Further, most of the stakeholders are in favour of having RIOs for all addressable platforms. Accordingly, the Authority has mandated publishing of RIOs for all addressable platforms by the broadcasters (other than cable service in CAS notified areas). At the same time, the Authority has permitted the broadcasters to have different RIOs for different addressable systems. This flexibility has been given to the broadcasters to customize their RIOs depending upon different characteristics of different addressable systems.*"

Hence, it is the understanding of TRAI itself that there are different characteristics associated with different addressable platforms and hence, mandating one common regulatory framework would not serve the purpose and/or address the concerns of the respective addressable platforms.

Further it is also the law of the land that level playing field has to be maintained. The Hon'ble TDSAT has held accordingly in its judgment dated 19.10.2012 in *United Cable Operators Welfare Association Versus. Telecom Regulatory Authority of India*, in the following lines:-

"***Level Playing Field***

39. Although we have dealt with the question of discrimination, we may notice the legal aspect of the matter. There cannot be any doubt or dispute that under the provisions of the Act, the Regulations framed by TRAI should provide for a level playing field keeping in view the fact that the subscribers have an option with regard thereto. This aspect of matter for all intent and purport, has been settled by the Apex Court in its judgment in Reliance Energy Ltd. Vs. Maharashtra State Electricity Development Corporation Ltd. reported in (2007) 8 SCC 1.

By reason of providing such level playing field, it is essential to give equal opportunity to the concerned parties. An atmosphere must be created so as to enable the players similarly situated to compete with each other.

In Reliance Energy (supra) it was opined:-

> *"36. "Globalization", in essence, is liberalization of trade. Today India has dismantled licence-raj. The economic reforms introduced after 1992 have brought in the concept of "globalization". Decisions or acts which results in unequal and discriminatory treatment, would violate the doctrine of "level playing field" embodied in Article 19(1) (g). Time has come, therefore, to say that Article 14 which refers to the principle of "equality" should not be read as a stand-alone item but it should be read in conjunction with Article 21 which embodies several aspects of life. There is one more aspect which needs to be*

mentioned in the matter of implementation of the aforestated doctrine of "level playing field"

40. The concept of level playing field, therefore, has been held to attract not only Article 14 of the Constitution of India, but also Articles 19(1) and 21 thereof. Keeping that point of view this Tribunal will have to consider as to whether by reason of the impugned Tariff Order, the Regulation is violative of the concept of "level playing field".

While the present regulatory framework allows the broadcasters to have different RIOs for different platforms, however, in light of the NSTPL judgment, the authority may decide to bring in a common regulatory framework for all the addressable systems. However, the common regulatory framework, if so finally decided to be implemented by TRAI, should also take note that the terms and conditions for different addressable systems and different terms should be specified for different addressable systems accordingly, depending on their specific characters.

However, it is also correct that pricing of pay channels are uniform and non-discriminatory across all digital distribution platform. In fact the parameters of interconnection between the service providers are transparent and directly linked with the number of subscribers subscribing channels/ bouquet, for deciding subscription fee is common across all digital platform except where agreements are executed on fixed fee basis. Hence, to such an extent common regulatory framework may be derived.

Issue 2:-TRANSPARENCY, NON-DISCRIMINATION AND NON-EXCLUSIVITY

2.1 Is there any need to allow agreements based on mutually agreed terms, which do not form part of RIO, in digital addressable systems where calculation of fee can be based on subscription numbers? If yes, then kindly justify with probable scenarios for such a requirement.

2.2 How to ensure that the interconnection agreements entered on mutually agreed terms meet the requirement of providing a level playing field amongst service providers?

2.3 What are the ways for effectively implementing non-discrimination on ground? Why confidentiality of interconnection agreements a necessity? Kindly justify the comments with detailed reasons.

2.4 Should the terms and conditions (including rates) of mutual agreement be disclosed to other service providers to ensure the non-discrimination?

2.5 Whether the principles of non-exclusivity, must-provide, and must-carry are necessary for orderly growth of the sector? What else needs to be done to ensure that subscribers get their choice of channels at competitive prices?

2.6 Should the RIO contain all the terms and conditions including rates and discounts, if any, offered by provider, for each and every alternative? If no, then how to ensure non-discrimination and level playing field? Kindly provide details and justify.

2.7 Should RIO be the only basis for signing of agreement? If no, then how to make agreements comparable and ensure non-discrimination?

2.8 Whether SIA is required to be published by provider so that in cases where service providers are unable to decide on mutually agreed terms, a SIA may be signed?

2.9 Should a format be prescribed for applications seeking signals of TV channels and seeking access to platform for re-transmission of TV channels along with list of documents required to be enclosed prior to signing of SIA be prescribed? If yes, what are the minimum fields required for such application formats in each case? What could be the list of documents in each case?

2.10 Should 'must carry' provision be made applicable for DTH, IPTV and HITS platforms also?

2.11 If yes, should there be a provision to discontinue a channel by DPO if the subscription falls below certain percentage of overall subscription of that DPO. What should be the percentage?

2.12 Should there be reasonable restrictions on 'must carry' provision for DTH and HITS platforms in view of limited satellite bandwidth? If yes, whether it should be similar to that provided in existing regulations for DAS or different. If different, then kindly provide the details along with justification.

2.13 In order to provide more transparency to the framework, should there be a mandate that all commercial dealings should be reflected in an interconnection agreement prohibiting separate agreements on key commercial dealing viz. subscription, carriage, placement, marketing and all its cognate expressions?

The Regulation so far has allowed the parties to mutually negotiate the terms and conditions of their agreement for a distributor to commence distribution of signals of TV channels so provided by the broadcaster. TRAI has by way of different amendments, allowed the parties to mutually negotiate the terms and conditions of their respective agreements. It is pertinent to note here the various provisions that would substantiate the argument that mutual negotiation has been in existence since the beginning of the regulatory regime and its validity has been duly recognised by the Hon'ble TDSAT so far.

Vide amendment dated 04.09.2006 titled The Telecommunication (Broadcasting And Cable Services) Interconnection (Third Amendment) Regulation, 2006, TRAI introduced Clause 3.5 to the Principal Regulation which recognised and allowed the agreements that were based on mutual negotiation. The inserted Clause 3.5 reads as-

"3.5 Any broadcaster/multi system operator or any agent/ any other intermediary of the broadcaster/multi system operator to whom a request for providing TV channel

signals is made, should either provide the signals on mutually agreed terms to the distributor of TV channels who is seeking signals, or specify the terms and conditions on which they are willing to provide TV channel signals, in a reasonable time period but not exceeding sixty days from the date of the request. In case, the broadcaster/multi system operator or any agent/ any other intermediary of the broadcaster/multi system operator to whom a request for providing TV channel signals is made, turns down the request for TV channel signals, the reasons for such refusal must also be conveyed within sixty days from the date of the request for providing TV channel signals so as to enable the distributor of TV channels to agitate the matter at the appropriate forum.

Explanation

The time limit of sixty days shall also include time taken by the broadcaster to refer the distributor of TV channels, who has made a request for signals, to its agent or intermediary and vice versa."

Further, the 3rd Amendment to the Principal Regulation also recognises that at the time of renewal of the agreement, the parties may undergo negotiations to discuss the terms and conditions of the fresh agreement, including the commercial terms. Accordingly, Clause 8 was inserted in the Principal Regulation. Clause 8 is reproduced as below:-

"*8. Time Period for Renewal of existing agreements*

"8.1 Parties to an interconnection agreement for supply of TV channel signals shall begin the process of negotiations for renewal of existing agreement at least two months before the due date of expiry of the existing agreement.

Provided that if the negotiations for renewal of the interconnection agreement continue beyond the due date of expiry of the existing agreement then the terms

and conditions of the existing agreement shall continue to apply till a new agreement is reached or for the next three months from the date of expiry of the original agreement, whichever is earlier. However, once the parties reach an agreement, the new commercial terms shall become applicable from the date of expiry of the original agreement.

Provided further that if the parties are not able to arrive at a mutually acceptable new agreement, then any party may disconnect the retransmission of TV channel signals at any time after the expiry of the original agreement after giving a three weeks' notice in the manner specified in clause 4.3. The commercial terms of the original agreement shall apply till the date of disconnection of signals."

The Explanatory Memorandum appended to the 3rd Amendment also support in the following words the argument that mutual negotiation is well within the realm of regulatory framework:-

"***Renewal of agreements***

13. Renewal of agreements is smooth in most of the cases, but the problems arise when the negotiations for renewal extend beyond the date of expiry of the original agreement. To govern the terms and conditions for continuation of signals beyond the expiry date of the original agreement, the original agreement can be extended till an agreement is reached regarding the terms and conditions for renewal. However, it must be recognized that the new commercial terms will apply retrospectively from the date of expiry of the original agreement. If however, no agreement is reached, then either party can disconnect the signals after giving the statutory notice as provided in Regulation 4 of these regulations.

The terms and conditions of original agreement would govern the relationship between the two parties till the date of disconnection of signals. It is believed that the parties should be able to reach a new agreement within three months of expiry of the old agreement (after five months of negotiations). However, in case negotiations carry on beyond this period, then some new interim arrangement regarding terms and conditions should be worked out between the parties and terms and conditions of the old agreement would not get automatically extended beyond this period."

Hence it is evident from the above that the right of the parties to mutually negotiate the terms including the commercial terms is well recognised by TRAI.

However, with the advent of digitalization in the cable the requirement of negotiating the subscriber base has been addressed and the only rates of the respective channels need to be negotiated basis the RIO published by the broadcaster. In this regard it is pertinent to take note of the Clause 3.2 of the DAS regulations, 2012 (as amended)-

"***"3. General Provisions relating to interconnection.-****(1) No broadcaster of TV channels shall engage in any practice or activity or enter into any understanding or arrangement, including exclusive contract with any multi system operator for distribution of its channel which may prevent any other multi system operator from obtaining such TV channels for distribution.*

(2) Every broadcaster shall provide signals of its TV channels on non-discriminatory basis to every multi system operator having the prescribed channel capacity and registered under rule 11 of the Cable Television Networks Rules, 1994, making request for the same.

Provided that nothing contained in this sub-regulation shall apply in the case of a multi system operator who is in default of payment.

Provided further that imposition of any term which is unreasonable shall be deemed as a denial of request.

(3) Every broadcaster or his authorized agent shall provide the signals of TV channels to a multi system operator, in accordance with its reference interconnect offer ***or as may be mutually agreed****, within sixty days from the date of receipt of the request and in case the request for providing signals of TV Channels is not agreed to, the reasons for such refusal to provide signals shall be conveyed to the person making a request within sixty days from the date of request*."

Hence, it could be seen that TRAI has recognised the aspect that mutual negotiations, as far as they are within the realm of regulations, are allowed. The RIO should form the basis for all the mutually negotiated deals.

However, the NSTPL judgment prescribes otherwise. The Hon'ble TDSAT vide its judgment dated 07.12.2015 has observed that-

"*As the Regulations stand in its present form, we are clearly of the view that the RIO must reflect not only the rates of channels but also the different formations, assemblages and bouquets in which the broadcaster wishes to offer its channels for distribution along with the rates of each of the formation or bouquet. Further, the a la carte rate and the bouquet rates must bear the ratio as mandated in clause 13.2A.12. The RIO must also clearly spell out any bulk discount schemes or any special schemes based on regional, cultural or*

linguistics considerations that would be available on a non-discriminatory basis to all seekers of signals. To sum up the RIO, must enumerate all the formats, along with their respective prices, in which the broadcaster may enter into a negotiated agreement with any distributor. To put it conversely, the broadcaster cannot enter into any negotiated deal with any distributor unless the template of the arrangement, along with its price, consistent with the ratio prescribed under clause 13.2A.12 is mentioned in the RIO. In addition, any volume-related price scheme must also be clearly stated in the RIO so as to satisfy the requirement of clause 3.6 of the Interconnect Regulations.

A proper RIO would, thus, form the starting point for any negotiations which would be within the limits allowed by the ratio between the a la carte and the bouquet rates as stipulated under clause 13.2A.12 and the margins between different negotiated agreements would be such as they would hardly be any requirement for disclosures."

Hence, NSTPL judgment having attained finality as a law of the land and, hence, in terms of the NSTPL judgment, mutual negotiation beyond the scope of RIO is out of the window. Once all kinds of deals/proposed agreements arise out of the RIOs, then the issue under consultation will not assume much importance, as the deal will be based on the details provided under the RIO itself, which will be filed with TRAI in any circumstance.

Further we may also note The Telecommunication (Broadcasting And Cable) Services (Fourth) (Addressable Systems) Tariff Order, 2010 dated 21.07.2010, which provides that the charges payable by cable operator to MSOs is to be governed by the mutual agreement between them. Clause 5 is reproduced herein below for the sake of brevity:-

> ***"5. Charges payable by cable operator to multi system operator or HITS operator to be governed by mutual agreement between them.*** *------ The charges payable by a cable operator to a multi system operator or to a HITS operator, as the case may be, shall be as determined by mutual agreement."*

However, if TRAI decides to allow mutual negotiations that do not form the part of RIO, it may consider the aspect that the need of the different addressable platforms vary from one another and the characteristics are also different, and hence the parties must be allowed to mutually negotiate the terms of the agreement on the basis of area of operation, number of subscribers catered by any operator, technological differences, etc. Of course the principle of non-discrimination is the mandate of the Regulation, however, the authority must determine in the first place the criterion for reasonable classification in order to set at rest the debate relating to "similarly based distributors".

As discussed above, once all kinds of deals/proposed agreements arise out of the RIOs, then the issue under consultation will not assume much importance, as the deal will be based on the details provided under the RIO itself, which will be filed with TRAI in any circumstance. Hence, the authority having access to all the information with respect to any dealing between two parties, the duty is now cast upon the authority to ensure that no stakeholder is being discriminated against and ensure implementation of the principles of parity, reasonableness and non-discrimination and compliance thereby by the respective parties.

In terms of the NSTPL judgment, which primarily echoes the principles of parity, reasonableness and non-discrimination, there is hardly any chance left that any party will be discriminated against other. The NSTPL judgment now determines that the difference can only be between an addressable system and a non-addressable system.

Within a particular system, there cannot be any difference of any sort and every operator, irrespective of any technological or regional difference. Hence, NSTPL judgment appropriately takes care of the non-discriminatory treatment to all the stakeholders.

Any information (including the commercial terms) if made available to third party, will open the flood gates and the element of privacy and confidentiality will be disregarded, which is a sine qua non for any transaction, off course maintaining the basic facet of parity and non-discrimination. Any information made available to the third party will put the confidential information to constant abuse and will take away the element of primacy between the parties.

The TRAI Regulations also recognise that the information relating to the respective agreement between the parties should be protected from the abuse. Accordingly, TRAI notified The Register of Interconnect Agreements (Broadcasting and Cable Services) Regulations, 2004 as amended from time to time. The said Regulation has also provisions with respect to the confidential portion of the register. In order to better understand the aspect as to why confidentiality of an interconnect agreement is a necessity, it is important to understand the history of the register of interconnect regulations and its subsequent amendments.

TRAI vide Notification dated 31.12.2004 issued The Register of Interconnect Agreements (Broadcasting and Cable Services) Regulations, 2004 ("Regulations dated 31.12.2004") which provided for the modalities for the maintenance of the register of interconnect agreements entered into by broadcasters, multi service operators and cable operators.

The major feature of the Regulation dated 31.12.2004 were-

i. maintenance of a register (either in print form as a register or in electronic form or in any other medium that the authority may decide from time to time);

ii. all broadcasters to register their interconnect agreements entered into by them, including any modifications/amendments thereto;

iii. 'Interconnect Agreements' meant to include all standard affiliation agreement/service contract, memorandum of understanding and al its grammatical variations and cognate expressions providing, inter alia, also the commercial terms and conditions of business between the parties to the agreement;

iv. register to be maintained in two parts- Part A to contain details of all the interconnect agreements with the names of the interconnecting service providers, service are of their operation and dates of executing of such agreements and such other information which are not declared confidential in terms of Clause 4 of the Regulation dated 31.12.2004; and Part B- to contain information which the authority may direct to be kept confidential and it shall not be open to inspection by the public.

v. With regard to the confidential portion of the register-

a) Either on the request of any party of *suo motu* is satisfied that there are good grounds for so doing, the authority may direct that any part of the agreement be kept confidential. (The Regulation did not differentiate between commercial information and other information);

b) While declining the request to keep any portion confidential, the authority was required to record the reasons thereof and give a copy of the order to the concerned party in order to enable him to make a representation before the authority against such order;

c) The authority may disseminate any confidential information if in the opinion of the authority, dissemination of such information would be in public interest, after

affording an opportunity of hearing to the party to the interconnect agreement at whose request such information had been kept confidential;

d) When any request is made to keep any information confidential, such part of the agreement was to remain confidential till the authority decides otherwise.

vi. The register was open to access by any member of the public on the payment of the prescribed fee and on his fulfilling such other conditions as may be provided in the Regulation, subject to the limitations prescribed in Clause 3 & 4.

The understanding of the authority was that the standard affiliation agreements varied from group to group and between MSOs/broadcasters depending upon the nature and type of arrangements. Besides the volume in terms of number of agreements expected to be registered was also expected to be very large if the MSOs/broadcasters were to submit arrangements individually. Hence if all the agreements were required to be registered, the existing regulations would have required extensive amendments and hence, there was a need felt to introduce separate set of regulation for the registration of interconnect agreements.

On 04.03.2005, TRAI introduced The Telecom Regulatory Authority of India (Access to Information) Regulation, 2005 (No. 3 of 2005), whereby provisions were introduced with respect to the request made for keeping any portion of the interconnect agreement in the confidential portion of the register and access to the confidential information thereof.

Simultaneously with The Telecom Regulatory Authority of India (Access to Information) Regulation, 2005, TRAI vide notification dated 04.03.2005 promulgated

The Register of Interconnect Agreement (Broadcasting and Cable Services) (First Amendment) Regulation, 2005 (12 of 2005), thereby amending Clause 4 of the Regulation dated 31.12.2004 to provide that where any party to the interconnect agreement requests the authority to keep the whole or any part of the agreement as confidential, the authority shall take a decision thereon in accordance with the relevant provisions of The Telecom Regulatory Authority of India (Access to Information) Regulation, 2005.

Thereafter, the broadcasters made representations to the authority with respect to the difficulty faced by them in filing the voluminous agreements at the end of each quarter owing to the number of agreements, renewals, modifications and amendments that take place and happen throughout the year. Basis the representations, TRAI vide its notification dated 02.12.2005, brought in The Register of Interconnect Agreement (Broadcasting and Cable Services) (Second Amendment) Regulation, 2005 (12 of 2005), thereby amending Clause 6 of the Regulation dated 31.12.2004 in order to enable the authority to specify a particular procedure in regard to the manner of filing of data or information; the form or format of filing, number of copies to be filed, and such other procedural issues connected to the filing of the details on interconnect agreements through a simplified process instead of the need to amend the regulation every time whenever a change in procedure in necessitated.

The main reason for the TRAI to change its mind and provide filing of agreements once a year is provided in the explanatory memorandum to the Second Amendment, which is as under:

"*2. A proposal for amendment to the above regulation was received from a broadcaster expressing difficulties in filing in print form of part B at the end of every quarter. It was indicated that new agreements are entered /renewed/modified continuously throughout the year. In view of a large number of agreements involved, the process of tracing amendments /changes becomes laborious and time consuming and the filing in print form at the end of every quarter becomes very voluminous. It was pointed out that it is easier to file the entire updated details of agreements at the end of every quarter in Electronic form and requested for amendment to the above regulation to provide freedom to the broadcasters to file details of part B in Electronic Format at the time of quarterly updation.*

3. The request for amendment and options for facilitating filing in Electronic format without compromising on authenticity and security of data was examined in consultation with major broadcasters/distributors of TV channels. It has been experienced during the implementation of above regulations that the filing in print form, in view of the large number of agreements, becomes very voluminous. It was noted that various options of filing in electronic form ranging from filing in CD-ROM bearing the signature of the authorized representative of the service provider to e-filing with digital signature have distinct merits and demerits and could become a viable option over a period of time. While examining the proposal it was also viewed from a broader angle that the regulations would need to be made flexible enough to facilitate adopting a particular procedure not only with reference to a particular form in which the filing is to be done but also with reference to a number of other procedural matters, through a simplified process, instead of resorting to the need to amend the regulations time and again.

4. Accordingly TRAI has decided to amend the existing clause 6 of the above regulation so as to enable the Authority to specify a particular procedure in regard to the manner of filing of data or information; to the form or formats of filing; to the number of copies to be filed; and, to such other procedural issues connected to the filing of details of interconnect agreements through a simplified process instead of the need to amend the regulation every time whenever a change in procedure is necessitated. Consequential amendment in clause 5 of the regulation has also been made to give effect to the proposed change. The Authority would separately be specifying the procedure to be adopted by the broadcasters for the filing(s) due after amended regulations are notified."

TRAI vide Notification dated 10.03.2006 brought in The Register of Interconnect Agreement (Broadcasting and Cable Services) (Third Amendment) Regulation, 2005 (12 of 2005) thereby mandating Direct To Home Operators (DTH Operators) to furnish to the authority a duly authenticated copy of each of the agreement/contract/MOU entered into with the broadcaster signed by the parties to the contract/agreement/MOU with all its annexures containing, all relevant details, including but not limited to the addresses of the parties, contract number, number of subscribers including the minimum number of subscriber guarantee, number and details of names and details of names channels/bouquets, price of each individual channel.

This amendment was necessitated due to the limitation contained in Clause 5(a) of the existing regulation, limiting the filing to broadcasters only, and further the authority's

understanding was that the broadcasters may avoid compliance on the ground that they are operating from outside the country and therefore not governed by Indian laws.

On 18.03.2009, TRAI introduced The Register of Interconnect Agreement (Broadcasting and Cable Services) (Fourth Amendment) Regulation, 2005 (5 of 2009) brought in certain further changes to the existing regulation as on that date. The new introductions by way of the said amendment were-

a) The reporting of the interconnect agreements to the authority should be on annual basis rather than on quarterly basis. Authority decided to receive the annual filing for period 1st July to 30th June by 31st July every year.
b) Pursuant to the introduction of the provision vide amendment dated 17.03.2009 to The Telecommunication (Broadcasting and Cable Services) Interconnection Regulation, 2004 (13 of 2004), whereby it is the responsibility of the broadcasters and MSOs to hand over such written agreements after execution to the distributor of TV channels, a provision of submitting a certificate was brought in the regulation relating to register of interconnect agreement.
c) With respect to the notice period for responding to any notice of the authority calling upon the service provider to furnish any detail relating to the interconnect agreement, the authority decided that the time frame for submission of such information/details may be specified in the communication calling for such information/detail, based upon need and urgency.
d) The authority decided that the information may be retained for a period of three years from the date of their filing or till the expiry of the validity period of the agreement.

e) The regulation was also amended to enable the new platform such as HITS operators or IPTV operators to file their interconnect agreements with the broadcasters on annual basis to the authority.

Reasoning for this change is also provided in the explanatory memorandum of 4th Amendment, which is as under:

"4. The Authority discussed the issue of periodicity of filing the agreements in the consultation paper titled "Consultation paper on Interconnection Issues relating to broadcasting & Cable Services" issued on December 15, 2008. A majority of stakeholders are in favour enlarging the periodicity of filing these agreements with the Authority. Based on the analysis of the written comments received, and open house held at Kolkata on February 06, 2009, the Authority has come to the conclusion that the filing of the interconnection agreements should be on annual basis. The Authority has decided to receive annual filing for period 1st July to 30th st July of every year. The period is chosen to cover the industry practices of agreements on calendar year basis or financial year basis.

5. The Authority has also decided that all the interconnection agreements should be in written form by the broadcasters. Accordingly, a provision has been made by an amendment dated March 17, 2009 to the Telecommunication (Broadcasting and Cable Services) Interconnection Regulation 2004 (13 of 2004) whereby it is the responsibility of the broadcasters and MSOs to hand over such written agreements after execution to the distributor of TV channels. Correspondingly, a provision of submitting a certificate in this regard has also been incorporated in the present regulation.

6. Though the Authority is empowered under Section 12 of the TRAI Act, 1997 as amended to call for information from the Service providers, the issue of notice period to be given to a service provider for any specific interconnection agreement was discussed in above mentioned consultation paper. The stakeholders were of the view of having 15 to 30 days' notice period for furnishing such information. Upon careful consideration of the issue, the Authority has decided that the time frame for submission of such information/details may be specified in the communication calling for such information/detail, based upon the need and urgency.

7. The Authority has also discussed the period for retention of the details of interconnection filing with the Authority in the above mentioned consultation paper. The comments for retention period varied from 3 to 5 years. Based on the inputs from the stakeholders and considering large volume of data being filed by various service providers, the Authority is of the view that these filings may be kept for a period of three years from the date of their filing or till the expiry of the validity period of the agreement, whichever is later and accordingly the regulations have been suitably amended for this purpose.

8. These regulations have also been amended to enable the new platform such as HITS operators and IPTV service providers to file their interconnection agreements with the broadcasters on annual basis to the Authority."

TRAI vide notification dated 10.02.2014 introduced The Register of Interconnect Agreements (Broadcasting and Cable Services) (Fifth Amendment) Regulations, 2014 (No. 3 of 2014, which provided for the definition of 'authorized agent' and amended the definition of 'broadcaster' and 'multi service operator', and thus, set out the difference between a broadcaster and its authorized agents. The said amendments provide that only broadcasters can publish the RIOs and file the same with the authority.

As narrated above, the documents, agreements, modifications, amendments to the agreements are already being filed on a yearly basis, and there has never been any complaint regarding non-compliance of the principles of parity, reasonableness and non-discrimination.

Further, in the event there is any complaint to the authority or the authority *suo-moto* takes cognizance of any of the violations of the TRAI Regulations, the authority has the requisite powers under Section 12 of the TRAI Act, 1997, which reads as-

"***12. Powers of Authority to call for information, conduct investigations, etc.***

1) *Where the Authority considers it expedient so to do, it may, by order in writing -*
    a. *call upon any service provider at any time to furnish in writing such information or explanation relating to its affairs as the Authority may require; or*
    b. *appoint one or more persons to make an inquiry in relation to the affairs of any service provider; and*
    c. *direct any of its officers or employees to inspect the books of account or other documents of any service provider.*

2) *Where any inquiry in relation to the affairs of a service provider has been undertaken under sub-section(1),-*

   a. *every officer of the government department, if such service provider is a department of the government;*

   b. *every director, manager, secretary or other officer, if such service provider is a company; or*

   c. *every partner, manager, secretary or other officer, if such service provider is a firm; or*

   d. *every other person or body of persons who has had dealings in the course of business with any of persons mentioned in clauses (b) and (c), shall be bound to produce before the Authority making the inquiry, all such books of account or other documents in his custody or power relating to, or having a bearing on the subject-matter of such inquiry and also to furnish to the Authority with any such statement or information relating thereto, as the case may be, required to him, within such time as may be specified.*

3) *Every service provider shall maintain such books of account or other documents as may be prescribed.*

4) *The Authority shall have the power to issue such directions to service providers as it may consider necessary for proper functioning by service providers*"

Hence, Section 12(4) of the Act vests with the authority the power to issue directions to the service providers as it may consider necessary for the proper functioning by service providers.

Whether the information including commercial portion of register should be made accessible or not would really depend upon the tariff model that TRAI proposes to adopt pursuant to the Consultation Paper dated 29.01.2016. This is more so since the Hon'ble TDSAT vide Judgment and Order dated 07.12.2015 in *Noida Software Technology Park Ltd. vs. Media Pro Enterprise India Pvt. Ltd.* (Petition No. 295(C) of 2014) and *Noida Software Technology Park Ltd. vs. Taj Television India Pvt. Ltd. & Anr.* (Petition no. 526(C) of 2015) (hereinafter referred to as "NSTPL matters") has already made it clear that all agreements proposed to be executed between the parties shall be based on the principle of (i) parity and non-discrimination, (ii) twin conditions contained in Clause 13.2A.11 of the Interconnect Regulations, including applicability of the same for Discounts, (iii) all agreements shall be based on the RIO, including any negotiated deal. The relevant portion from the NSTPL judgment are quoted below:-

> "A*s the Regulations stand in its present form, we are clearly of the view that the RIO must reflect not only the rates of channels but also the different formations, assemblages and bouquets in which the broadcaster wishes to offer its channels for distribution along with the rates of each of the formation or bouquet. Further, the a la carte rate and the bouquet rates must bear the ratio as mandated in clause 13.2A.12. The RIO must also clearly spell out any bulk discount schemes or any special schemes based on regional, cultural or linguistics considerations that would be available on a non-discriminatory basis to all seekers of signals. To sum up the RIO, must enumerate*

all the formats, along with their respective prices, in which the broadcaster may enter into a negotiated agreement with any distributor. To put it conversely, the broadcaster cannot enter into any negotiated deal with any distributor unless the template of the arrangement, along with its price, consistent with the ratio prescribed under clause 13.2A.12 is mentioned in the RIO. In addition, any volume-related price scheme must also be clearly stated in the RIO so as to satisfy the requirement of clause 3.6 of the Interconnect Regulations.

A proper RIO would, thus, form the starting point for any negotiations which would be within the limits allowed by the ratio between the a la carte and the bouquet rates as stipulated under clause 13.2A.12 and the margins between different negotiated agreements would be such as they would hardly be any requirement for disclosures.

"*.....Thus, in the interpretation that we have placed on the Regulation, there is the obligation to frame a meaningful RIO in which all bouquet and a la carte rates are specified, and there is also some room for mutual negotiation (even on rates) within certain specified parameters. This will achieve the objective of introducing a transparent non-discriminatory regime whereby distributors can obtain access to content, while still retaining some latitude to mutually negotiate the terms and conditions of access. It will also make the nexus between a la carte and bouquet rates, which the regulator thought fit to introduce, applicable to all mutually negotiated agreements. Negotiations must be within the parameters to those mandatory conditions specified in the Regulations that cannot be avoided or waived, and the mutual negotiation course cannot be used as the means to completely step out of the Regulations. It would be plainly opposed to any common sense principle to first set out*

an elaborate cumbersome regulatory architecture, only to allow parties to opt out of it at will."

Once all kinds of deals/proposed agreements arise out of the RIOs, then the issue under consultation will not assume much importance, as the deal will be based on the details provided under the RIO itself, which will be filed with TRAI in any circumstance.

The Judgment dated 07.12.2015 having come into effect from 01.04.2016, all the broadcasters are mandated to come out with their respective RIOs within the deadline set out in the said Judgment i.e. one month, expiring on 30.04.2016.

The TRAI must also consider that pursuant to the Register of Interconnect Agreements (Broadcasting and Cable Services) Regulations, 2004 (as amended upto date), the Broadcasters are already filing the requisite information including the RIOs, and the other forms of subscription agreements, from time to time. Hence, all the information required by TRAI is already available with TRAI for scrutinizing the same, and developing the basis for regulation in the broadcasting industry.

However, at this stage it is pertinent to point out that there are a lot of complexities that come hand in hand with the concept of RIO. The varied terms and conditions that a broadcaster is bound to incorporate in its RIO, burden the broadcaster with certain additional obligations, which makes it imperative for a broadcaster to keep a constant vigil to avoid any inadvertent non-compliance and consequential penalties. In this regard, TRAI may seek comments from the various stakeholders so that all such complexities may be sorted out.

With regard to the principle of exclusivity, the understanding of TRAI can be seen from the Explanatory Memorandum appended to the Principal Regulations, which reads as-

"*5. Generally TV channels are provided to all carriers and platforms to increase viewership for the purpose of earning maximum subscription fee as well as advertisement revenue. However, according to some opinions, if all platforms carry the same content it will reduce competition and there will be no incentive to improve the content. Some degree of exclusivity is required to differentiate one platform from the other.*

6. Exclusivity had not been a feature of India's fragmented cable television market. However the rollout of DTH platform has brought the question of exclusivity and whether it is anti-competitive to the forefront. Star India Ltd and SET Discovery Ltd do not have commercial agreements to share their contents with ASC Enterprises on its DTH platform and at present are exclusively available on the Cable TV platform. ASC Enterprises claims that the future growth will remain impacted by the denial of these popular contents. Space TV a joint venture of Tata's and Star, is also planning to launch its digital DTH platform. It has applied for license to the government for the same. The DTH services have to compete with Cable TV. If a popular content is available on Cable TV and not on the DTH platform, then it would not be able to effectively give competition to the cable networks.

7. The issue has to be seen primarily from the consumer's perspective. If all channels are not available on one DTH platform then the consumer may have to install more

than one dish to view his favourite channels. If the content is not available on all platforms then they would not be treated as the same and would be presented as different products having different content. If content, especially popular content, is exclusively available on one DTH platform then there may not be effective competition. The consumers would also have limited choice as subscribing to one particular DTH platform may not ensure the availability of content of his/her choice."

This understanding of the Authority was at a time when the Authority felt that the entry of DTH operator in the market would be limited if the content of the broadcaster is made available exclusively only to cable operators. Further, the advent of digitisation led to the introduction of a number of addressable platforms like, HITS, IPTV etc. Any restriction on the availability of the content would deprive the consumers of the best available services in the market.

The concept of non-exclusivity and must provide are intertwined. If a distributor is denied access to the signals of TV channels, he will be a victim at the hands of the broadcasters, upon whom there is an obligation to make available the signals on "must provide" basis.

The NSTPL judgment also deals with the concept of non-exclusivity on the following lines-

"*Section 39(A) of the Copyright Act does not make section 31 applicable to "broadcast reproduction rights" and it is thus true that under the scheme of the Copyright Act, "broadcast reproduction rights" do not come under compulsory licensing. However, exclusion from compulsory licensing under the Copyright Act by no means suggests that provisions requiring "must provide" of the broadcasting content on "non-exclusive and non-discriminatory" terms may not be mandated in a different set of*

statutes, aimed at regulating the broadcasting service. It needs to be borne in mind that under the Copyright Act there is an omission and not a prohibition or bar against compulsory licencing for "broadcasting content rights.

Thus, contrary to the submissions made by Mrs. Singh, the matter of compulsory licencing of "broadcasting content rights" is left open to be dealt with in a different context, by a different set of laws, regulating another area of societal demands. In case of broadcasting service the Regulator felt, and very rightly so, that "must provide' of the broadcasting content is the first step towards any meaningful regulation of the service and the omission of such a condition would give unmatched monopolistic power to the broadcaster and would leave the broadcasting service completely at its mercy. It is well settled that two central legislations may overlap on the same subject matter. And as long as there is no doubt as regards the legislative competence or the source of legislative power, the courts have consistently upheld any action taken under a certain Act in regard to a matter that may be primarily covered by another legislation. Other sectoral regulators have also rejected the argument that a compulsory licensing regime can only be created under the Copyright Act and that creation of a virtual compulsory licensing regime under some other statute would be ultra vires."

Further, deliberating on the aspect of "must provide" the Hon'ble TDSAT in NSTPL judgment held that-

"*The provisions of an ancillary set of Regulations cannot be left out for being interpreted in a manner as to set at naught the very soul of the primary Regulations that form the mainstay of the regulatory regime for the broadcasting service. Mr. Saket*

Singh, appearing for TRAI, submitted that the non-discriminatory provision in Clause 3.2 is the essence of the Regulations. The Written Submissions filed behalf of TRAI describes Clauses 3.1 and 3.2 as the "most essential conditions of the interconnection regulations". We are in full agreement with this view of the Interconnect Regulations, 2004 and in that view the commercial terms of the interconnect agreement cannot be held to be exempt from disclosure under the Access Regulations. In view of the "must provide & non-discrimination" obligation there can be no secrecy in the commercial terms, because they cannot be permitted to be the source of any comparative or competitive advantage. In our considered opinion, therefore, the broadcasters cannot hide behind the Access Regulations on the plea that the distributor must first obtain an order of disclosure from TRAI."

In terms of Clause 3(12) of the DAS regulations, 2012 an obligation has been cast upon the MSO to carry the channels of the broadcasters on non-discriminatory basis. Clause 3(10) of the Regulation reads as-

"(*10) Every multi system operator shall, within sixty days of receipt of request from the broadcaster or its authorised agent or intermediary, provide on non-discriminatory basis, access to its network or convey the reasons for rejection of request if the access is denied to such broadcaster.*

Provided that it shall not be mandatory for a multi system operator to carry the channel of a broadcaster if the channel is not in regional language of the region in which the multi system operator is operating or in Hindi or in English language and the

broadcaster is not willing to pay the uniform carriage fee published by the multi system operator in its Reference Interconnect Offer.

Provided further that nothing contained in this sub-regulation shall apply in case of a broadcaster who has failed to pay the carriage fee as per the agreement and continues to be in default.

Provided also that imposition of unreasonable terms and conditions for providing access to the cable TV network shall amount to the denial of request for such access.

Provided also that it shall not be mandatory for the multi system operator to carry a channel for a period of next one year from the date of discontinuation of the channel, if the subscription for that particular channel, in the last preceding six months is less than or equal to five per cent. of the subscriber base of that multi system operator taken as an average of subscriber base of the preceding six months".

The Telecommunication (Broadcasting and Cable Services) Interconnection (Digital Addressable Cable Television Systems) Regulations, 2012 dated 30.04.2012 provided for Clause 3.5 and Clause 3.8 in the following terms:-

"*(5) A multi system operator, who seeks signals of a particular TV channel from a broadcaster, shall not demand carriage fee for carrying that channel on its distribution platform."*

8) Every multi system operator, operating in the areas notified by the Central Government under sub-section (1) of the section 4A of the Cable Television Networks (Regulation) Act, 1995, shall have the capacity to carry a minimum of five hundred channels not later than the date mentioned in the said notification applicable to area in which the multi system operator is operating."

These two provisions were challenged before the Hon'ble TDSAT. The Hon'ble TDSAT while addressing the concerns of the different stakeholders, set aside these two provisions, in the following terms;-

"53. Submission of the Appellants in this behalf is so far as the Tariff Order providing for payment of Carriage Fee is concerned, the same is to be charged by the MSO in terms of the clause 3(5) of the Regulation but the same has been restricted only to a case where the broadcasters approach the MSOs so as to compel them to carry its channel. However, indisputably when the MSOs approach the broadcasters, no Carriage Fee shall be payable.

54. The only submission made by the Respondent in this behalf is that keeping in view the analogy between „must provide clause" as contained in clause 3.2 of the 2004 Regulations whereby and whereunder the distributors of TV channels are prohibited from asking the broadcasters to pay any "Carriage Fee", clause 3 (5) of the Regulations provide for a similar effect.

55. It is difficult to comprehend the said submission. Such a criteria has not been adopted so far as the CAS operators or the DTH operators are concerned.

56. Clause 3.2 of the Regulations may not be attracted in the case of DTH operator, but we may notice that the restrictions put therein are only limited to "at the same time".

57. Payment of Carriage Fee, therefore, cannot be put in as a condition on the "distributor of a TV channel" for all time to come only because at one point of time it had asked the broadcaster to supply signal of its channel.

58. Perusal of clause 3.5 of the Regulations as also the proviso appended to clause 3.2 thereof would show that both the provisions would not have the same effect. While applying the said principle in a case of "must provide", the same would not mean that the MSOs would never be entitled to take any Carriage Fee throughout the period during which the original agreement remain valid and/or renewed. It is a privilege of the broadcasters and the MSOs.

59. It is only for that purpose, we intend to place emphasis on the words on record "at the same time".

The Hon'ble TDSAT further held that-

"*The direction that the MSOs must set up head-ends having carrying capacity of 500 channels is set aside. If the market forces play an important and significant role in the matter of carrying capacity of the MSO, the same may not be required to be regulated. However, if the Regulator deems fit, it may consider making provision for MSOs to have capacity to carry number of channels based on different categories of area i.e. city/towns/rural area etc. in which MSO will be operating.*"

Perusal of the aforementioned clauses and the judgments cited hereto above, it can be noted that the principles of non-exclusivity, must provide and must carry are necessary for orderly growth of the sector. In order to maintain level playing field for all the stakeholders, and also to ensure effective competition, these principles play an important role and form the backbone of the broadcasting industry. However, we also note that TRAI must also take note that while mandating must carry, the factors like regional channels, defining target market of a particular area need to be given utmost importance.

Further, TRAI should consider implementing a free enterprise model to enable the industry to evolve to a subscriber oriented market where the choice of channels are available to the subscribers on a competitive pricing. Free enterprise model should be where the enterprises shall be allowed to be driven only by market forces which will develop a balance system based on mutual benefits and interest which will be extended to society as well. TRAI should let the market forces decide the pricing of channels and there should be complete forbearance from any type of regulation on channel pricing. TRAI's role is that of facilitator of the industry, it should ideally regulate the "conduct" and not the "economics" of the industry and thus follow the "soft touch" rule on tariff regulations by allowing the market forces to determine price discovery and shape the pricing regime. Also, bearing in mind the fact that there is hardly any instance of channel price regulation in any country apart from India. Given TRAI's own finding that television channels fulfil only "esteem needs" of consumers and are as such non-essential, there is all the more no reason whatsoever for regulating channel prices. Freedom of pricing in favour of the broadcaster will lead to better content production amongst the broadcasters, leading to better variety and quality of content, increase in investor confidence. If the broadcasters receive better advertisement fee, the subscription fee and prices of the channels will surely go down for the following reasons:

1. Broadcasters know the rates at which their channels will sell best and to a higher number of subscribers. The prices, will go lower than the current prices, as effective competition will keep the prices under check. The rates of the channels will be market and competition driven, and actual demand and supply will control the pricing. It could lead to effective price reduction in the rates, with innovative offers from the broadcasters.
2. The market as it exists today thrives only on bouquets and no other innovative offering is available. Consumers simply opt for bouquet and tend to take the entire bunch of channels in the bouquets. Hence, no independent mind is applied to the offers or offering on a-la-carte channels.
3. Transparency and non-discrimination shall maintain the level playing field. Vertical integration is also an aspect which has been taken care of by providing policing clauses for discrimination and non-transparency.
5. Forbearance of tariff would lead to reduction of price due to competition and choice of subscribers. It may also lead to conversion of many channels from "pay Channel" to "Free to air Channel" to reach out to customers. Thus, lead to an environment of consumerism where consumer choice will determine tariff of channels.
6. There will be higher degree of investment as certainty and lower prices will increase.
7. The Price forbearance would also be beneficial for new entrant as it allow them to determine the price of channel in accordance with consumer demand.
8. The market forces will not only reduce the uncertainty of the business at distribution level but also control the price of channels at real level thus encourage the investment both at broadcaster and distribution level .
9. TRAI may at least test this model of forbearance for at least a period of one year under broader regulatory framework and review the same periodically to evade any misuse by any stakeholder. 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.

TRAI should also consider mandating the retransmission of pay channels by all DTH, IPTV and HITS under "must carry" provision as the number of pay channels are not more than 262 channels which is much lesser than the channel carrying capacity of DTH, IPTV and HITS platform. One important aspect that the CP dated 03.01.2005 discussed was the issue of Must Carry of TV Channels issue. It discussed that –

"4.4 "Must Carry" is an important regulatory issue. Although it promotes competition, yet it is closely linked to digitalization of Cable networks. The MSOs/cable operators would have incentive to digitalise in case 'must carry' obligations do not affect their business model. The arguments in favour and against the 'must carry' obligations are discussed below:

Arguments in favour of 'must carry'

4.5 The programming and broadcasting industry is facing a growth constraint due to capacity limitation on cable networks. There is space for many niche and other channels in the market. Such channels would be launched in case they have an assurance that they would be carried on the cable networks. The 'must carry' obligations on Digital Cable Networks would provide such assurance and confidence to the industry. Presently most of the channels are being launched from already established players.

4.6 There are strong vertically integrated Broadcasters and MSOs in the industry. The 'must carry' regulation would ensure that refusing carriage of channels of rival broadcasters does not scuttle competition.

4.7 Competition amongst broadcasters would increase. The consumer would be a direct beneficiary in terms of quality of programming and perhaps pricing. Arguments not in favour of 'must carry'

4.8 It has already been discussed in chapter 2 that many countries have adopted national plans to digitalise TV broadcasting. However complete digitalization remains a long drawn process. Even in the most developed countries there has been no city that has been able to convert 100% to digital transmission- except Berlin. Operators do simultaneous transmission in analogue and digital mode. Thus it is quite obvious that it would also take a considerable time for complete digitalization in India. Operators for a long period of time would have to transmit signals in both digital and analogue mode. Considerable bandwidth would be used to continue transmission of TV channels in an analogue mode and 'must carry' of all channels will be only restricted to these being carried in digital mode which will, at least to start with, have limited membership.

4.9 Digitalization is a capital intensive technology. Operators recoup this cost from various revenue streams like interactive services, internet services etc. Some bandwidth is also kept for the reverse path for such services. An operator may have a business plan to allocate more bandwidth for such services. Therefore considerable bandwidth would be required for analogue transmission and providing interactive services. The 'must carry' obligation may therefore act as a disincentive to digitalise networks. Further, at any point of time capacity even on a digital network will be limited. If more channels came up additional investment will have to be made and therefore the "must carry" obligation may not be able to be complied with immediately.

4.10 For DTH operators it is obligatory under license conditions to provide access to various content providers/channels on a non-discriminatory basis. For level playing field it may be argued that such condition should also applied on cable operators.

However the two platforms may not be comparable as cable operators would have to simulcast i.e carry same channels in two modes - analogue and digital but DTH operators would transmit in digital mode only.

Further, the CP also discussed the 'Must Carry' Rules in India as below-

4.15 As per section 8(1) of the Cable Television Network (Regulation) Act, 1995, Cable operators must carry 2 Doordarshan terrestrial channels and one regional channel of a state in the prime band. So far as DTH is concerned clause 7.6 of the DTH license says that the " The Licensee shall provide access to various content providers/channels on a non-discriminatory basis".

4.16 The Authority had earlier also recommended that there should be legislation on the lines of clause 31 of the Convergence Bill, according to which events of general public interest to be held in India will have to be carried on the network of the public service broadcaster."

During the consultation process for CP dated 22.12.2011, it was also suggested by majority of the stakeholders that the provision of "must carry" should be mandated in order to balance the obligation on the broadcasters to "must provide". Further the manner of offering should be on non-discriminatory listing of channels and all channels should feature genre-wise in the EPG of the DPO. The authority after considering the suggestions, brought into force the clause 3(12) of The Telecommunication (Broadcasting and Cable Services) Interconnection (Digital Addressable Cable Television Systems) Regulations, 2012 dated 30.04.2012 which mandated the publication by the MSO in its RIO the carriage fee for carrying the channel of a broadcaster for which no request has been made by the MSO, which shall be uniform for all the broadcasters and not to be revised for a period of 2 years from the date of publication of the RIO. However, this clause has been misused by the DPOs by resorting to the limited bandwidth excuses, and

in fact, no one till date has exercised the RIO option for carriage fee, as the rates were exorbitant.

Clause 5 of the 2nd Amendment to the principal Regulations, 2004 provided for Standard Interconnection Agreements. It provided that-

"Standard Interconnection Agreements

5.1 All broadcasters, multi system operators and cable operators shall mutually negotiate and finalise their interconnection agreements in respect of areas notified by the Central Government under section 4A (1) of the Cable Television Networks (Regulation) Act, 1995 (7 of 1995) vide notification no. S.O. 1231(E) dated 31.7.2006.

5.2 In case any of the service providers in the areas as notified by the Central Government vide notification no. S.O. 1231(E) dated 31.7.2006, are not able to arrive at a mutually acceptable interconnection agreement within a time-period to be specified by the Authority through a direction, then they shall enter into interconnection agreements in terms of the standard interconnection agreements as specified in Schedule I (between broadcaster and multi system operator) or in Schedule II (between multi system operator and cable operator) to this Regulation, as the case may be, within a time period to be specified by the Authority for entering into standard interconnection agreements.

Explanation

For removal of doubts, in respect of areas notified by the Central Government referred to in clauses 5.1 and 5.2 above, it is clarified that if the service providers have already entered into mutually acceptable interconnection agreements by such date as specified

in the direction issued by the Authority, then they need not take recourse to standard interconnection agreements specified in Schedules I and II. Further, those service providers, who have a pre-existing interconnection agreement as on the date of issue of this regulation, will also have the option, after the expiry of their existing agreement, to either enter into a mutually acceptable interconnection agreement, or failing which to enter into interconnection agreements as per the standard agreements specified in Schedules I & II, within a period to be specified by the Authority in the direction.

5.3 If the provisions of the standard interconnection agreements in Schedule I and II are in conflict with any Act, rule, regulation, direction or order of the Government, TDSAT or TRAI, as the case may be, then the provisions of such Act, rule, regulation, direction or order shall prevail."

After the NSTPL judgment, where all the broadcasters have been mandated to publish their RIOs on their website, there does not seem any reasoning as to why there still needs to be a SIA. However, if the Authority decides to mandate publication of SIA, it is suggested that only the general terms and conditions to be applied in cases where there is no agreement between the parties on the terms and conditions should be mandated to be published and not the commercial and technical terms, which is specific in nature. Mandating the broadcasters to publish its commercial or technical terms, will only encroach upon the parties' freedom of contract.

A standard application form shall be made available on the website of the broadcaster clearly mentioning the list of requisite documents/information at the time of application to ensure that the signals of the channels are not denied for any want of information. The following

details/information/documents needs to be mandated for a seeker of signals to furnish in order to enable the broadcaster to process the request:-

A. MSO basic information:

1. Registered name of the MSO:
2. Registered office address:
3. Address for communication:
4. Name of the contact person/Authorized Representative:
5. Telephone:
6. Email address:
7. City:
8. State:
9. The names of Owners/Directors/Partners:
10. List of channels:
11. Particulars of Service Tax registration:
12. Entertainment Tax number: _____
13. PAN - _____ (attach copy).

B. Specific information for providing services in DAS areas:

1. Copy of the valid registration certificate issued by the Ministry of Information and Broadcasting, under the Cable Television Network (Amendment) Rules, 2012 or as amended to date.
2. Proposed areas of operations: a. State: b. District: c. Town:
3. Seeding plan.
4. Location of the Headend along with the particulars of CAS & SMS.

5. In case, the MSO is desirous of entering into an interconnect agreement based on a mutually negotiated deal, kindly provide details of subscriber base.

Further, such other additional documents that may be required by the broadcaster in order to process the request considering the different technologies for different platforms. Also, the Authority should similarly prescribe a detailed format and an exhaustive list of documents/information required for a broadcaster seeking access to a DPO's platform which may be mentioned in the application form available on the website of the DPOs.

Clause 3.10 of the DAS Regulation 2012 provides that:

> "*Every multi system operator shall, within sixty days of receipt of request from the broadcaster or its authorised agent or intermediary, provide on non-discriminatory basis, access to its network or convey the reasons for rejection of request if the access is denied to such broadcaster.*
>
> *Provided that it shall not be mandatory for a multi system operator to carry the channel of a broadcaster if the channel is not in regional language of the region in which the multi system operator is operating or in Hindi or in English language and the broadcaster is not willing to pay the uniform carriage fee published by the multi system operator in its Reference Interconnect Offer.*
>
> *Provided further that nothing contained in this sub-regulation shall apply in case of a broadcaster who has failed to pay the carriage fee as per the agreement and continues to be in default.*
>
> *Provided also that imposition of unreasonable terms and conditions for providing access to the cable TV network shall amount to the denial of request for such access.*
>
> *Provided also that it shall not be mandatory for the multi system operator to carry a channel for a period of next one year from the date of discontinuation of the channel,*

if the subscription for that particular channel, in the last preceding six months is less than or equal to five per cent of the subscriber base of that multi system operator taken as an average of subscriber base of the preceding six months."

In light of the above Clause 3.10 of the DAS Regulation 2012, DPOs have been provided with the provision under which a channel may be discontinued if the subscription for that particular channel, in the last preceding six months is less than or equal to five per cent of the subscriber base of that multi system operator taken as an average of subscriber base of the preceding six months.

Issue 3:- EXAMINATION OF RIO

3.1 How can it be ensured that published RIO by the providers fully complies with the regulatory framework applicable at that time? What deterrents do you suggest to reduce non-compliance?

3.2 Should the regulatory framework prescribe a time period during which any stakeholders may be permitted to raise objections on the terms and conditions of the draft RIO published by the provider?

3.3 If yes, what period should be considered as appropriate for raising objections?

As discussed above, the commercial terms of all the interconnect agreements executed by the parties are to be filed with TRAI. TRAI upon examination of the commercial terms of the interconnect agreements, has to ensure that the requirements of the Regulations are met with. TRAI may also consider publishing on its website a check list so that the concerned party may ensure that its RIO meets with all the requirements and compliances so required in terms of the Regulation.

"13. ***Powers of Authority to issue directions****.*

The Authority may, for the discharge of its functions under sub-section (1) of section, issue such directions from time to time to the service providers, as it may consider necessary:

[PROVIDED that no direction under sub-section (4) of section 12 or under this section shall be issued except on the matters specified in clause (b) of sub-section (1) of section 11]

14A. ***Application for settlement of disputes and appeals to Appellate Tribunal****.*

(1) The Central Government or State Government or a local authority or any persona may make an application to the Appellate Tribunal for adjudication of any dispute referred to in clause (a) of section 14.

(2) The Central Government or State Government or a local authority or any person aggrieved by any direction, decision or order made by the Authority may prefer an appeal to the Appellate Tribunal.

(3) Every appeal under sub-section (2) shall be preferred within a period of thirty days from the date on which a copy of the direction or order or decision made by the Authority is received by the Central Government or the State Government or the local authority be accompanied by such fee as may be prescribed:

PROVIDED that the Appellate Tribunal may entertain any appeal after the expiry of the said period of thirty days if it is satisfied that there was sufficient cause for not filing it within that period.

(4) On receipt of an application under sub-section(1) or an appeal under sub-section (2), the Appellate Tribunal may, after giving the parties to the dispute or the appeal an opportunity of being heard, pass such orders thereon as it thinks fit.

(5) The Appellate Tribunal shall send a copy of every order made by it to the parties to the dispute or the appeal and to the Authority, as the case may be.

(6) The application made under sub-section (1) or the appeal preferred under sub-section (2) shall be dealt with by it as expeditiously as possible and endeavour shall be made by it to dispose of the application or appeal finally within ninety days from the date of receipt of application or appeal, as the case may be:

PROVIDED that where any such application or appeal could not be disposed of within the said period of ninety days, the Appellate Tribunal shall record its reasons in writing for not disposing of the application or appeal within that period.

(7) The Appellate Tribunal may, for the purpose of examining the legality or property or correctness of any dispute made in any application under sub-section (1) or of any direction or order or decision of the Authority referred to in the appeal preferred under sub-section (2), on its own motion or otherwise, call for the records relevant to disposing of such application or appeal and made such orders as it thinks fit.

19. ***Orders passed by Appellate Tribunal to be executable as a decree***

(1) An order passed by the Appellate Tribunal under this Act shall be executable by the Appellate Tribunal as a decree of civil court, and for this purpose, the Appellate Tribunal shall have all the powers of a civil court.

(2) Notwithstanding anything contained in sub-section (1), the Appellate Tribunal may transmit any order made by it to a civil court having local jurisdiction and such civil court shall execute the order as it were a decree made by that court."

Thus from perusal of these provisions, it becomes abundantly clear that the steps to deter a violator of Regulation from non-complying the various provisions of the Regulation are already there. Section 13 gives TRAI the power to issue directions in discharge of its functions provided under Section 11 of the TRAI Act.

Further, Section 19 provides that any order passed by the Appellate tribunal, *i.e.* the TDSAT, in adjudicating any disputed referred before in terms of Section 14A of the TRAI Act is to be executable as a decree. All the powers of a civil court have been vested with the TDSAT in order to enable the Tribunal to execute its orders.

In *Jaswant Singh Mathura Singh Mathura Singh & Anr. vs. Ahmedabad Municipal Corporation & Ors.* 1991 AIR 385, the Hon'ble Supreme Court has held that-

*"It is settled law that before depriving a person of his property or imposing any further liability, the principl**es** of natural justice require prior notice and reasonable opportunity to him to put forth his claim or objections."*

Similarly, in *Sri Hanuman Steel Rolling Mill & Anr. vs. C.E.S.C. Ltd***.** AIR 1996 Cal 449, the Hon'ble Calcutta High Court has held that-

"*From the discussions made hereinbefore it is clear that principles of natural justice are required to be complied with by issuing a prior notice unless a situation comes into being as a result whereof it is not possible to comply with such principles as for example a case of emergency or where there is a chance the evidence being lost although the authorities concerned take all steps in that regard i.e. by seizure of the offending articles etc.*."

Apart from the above, there are a catena of judgments where it has been categorically held that the principles of natural justice should not be denied in any circumstances and no adverse steps be taken against any party without giving an opportunity to the party of being heard and present his claims and counter the objections so raised.

Hence, it is noted here that provisions relating to deterrence are already there in the TRAI Act. It is for the authority to adjudicate upon any complaint received from any party who feels aggrieved by the published RIO. However, in terms of the principles of natural justice, the provider publishing the RIO must be given a notice to comment upon the complaint so received by TRAI. The authority must not use its powers under Section 13 and 19 of the Act without giving an opportunity to the provider publishing RIO.

The suggestion of TRAI that the provider should publish its draft RIO and invite objections/comments on it from the different stakeholders, is not feasible. It is to be noted that publication of RIO in itself is a cumbersome task and a lot of resources are involved. If the exercise is to be repeated twice over (if the draft RIOs are to be published), then the provider will have to bear unnecessary additional cost. It is also to be noted that there could be situations

where different stakeholders will have different objections and all the objections have to be considered simultaneously so that there does not remain any inconsistency therein.

It is the understanding of TRAI that if any stakeholder feels that the terms and conditions of an RIO contravene the provisions of the regulatory framework then that stakeholder is at liberty to raise his objection with the provider publishing the RIO or at an appropriate forum. Any objection that a stakeholder may have may be raised within a period of 30 days from the publication of RIOs. Once all the objections have been received by the provider publishing the RIO, the provider shall take into due consideration all the objections and make amends to the RIO accordingly. In case, the provider feels that the provision with respect to which the objection has been raised, does not violate any of the conditions of the Regulation, it may not amend the said provision. It will be open to the parties to challenge the said provision before the appropriate forum (TRAI) in accordance with law.

Since it is the general principle that an appeal intra-court against any order is to be filed within a period of 30 days and any appeal inter court against any order is to be filed within 90 days, TRAI should also prescribe a period of 30 days for preferring any appeal against the order of the appropriate forum.

Issue 4:- TIME LIMIT FOR PROVIDING SIGNALS OF TV CHANNELS /ACCESS TO THE PLATFORM

4.1 Should the period of 60 days already prescribed to provide the signals may be further sub divided into sub-periods as discussed in consultation paper? Kindly provide your comments with details.

4.2 What measures need to be prescribed in the regulations to ensure that each service provider honour the time limits prescribed for signing of mutual agreement? Whether imposition of financial disincentives could be an effective deterrent? If yes, then what should be the basis and amount for such financial disincentive?

4.3 Should the SIA be mandated as fall back option?

4.4 Should onus of completing technical audit within the prescribed time limit lie with broadcaster? If no, then kindly suggest alternative ways to ensure timely completion of the audit so that interconnection does not get delayed.

4.5 Whether onus of fixing the responsibility for delay in individual cases may be left to an appropriate dispute resolution forum?

Vide amendment dated 04.09.2006, TRAI inserted Clause 3.5 in the Principal Regulations which reads as follows:-

"3.5 Any broadcaster/multi system operator or any agent/ any other intermediary of the broadcaster/multi system operator to whom a request for providing TV channel signals is made, should either provide the signals on mutually agreed terms to the distributor of TV channels who is seeking signals, or specify the terms and conditions on which they are willing to provide TV channel signals, ***in a reasonable time period but not exceeding sixty days from the date of the request****. In case, the broadcaster/multi system operator or any agent/ any other intermediary of the broadcaster/multi system operator to whom a request for providing TV channel signals is made, turns down the request for TV channel signals, the reasons for such* ***refusal must also be conveyed within sixty days from the date of the request*** *for providing TV channel signals so as to enable the distributor of TV channels to agitate the matter at the appropriate forum.*

Explanation

The time limit of sixty days shall also include time taken by the broadcaster to refer the distributor of TV channels, who has made a request for signals, to its agent or intermediary and vice versa

The Telecommunication (Broadcasting and Cable Services) Interconnection (Third Amendment) Regulation, 2006 dated 4th September, 2006:

Explanatory memorandum

"Access to content

7. The purpose of laying down a time limit for responding to a request for signals gets defeated if the distributor of TV channels making a request for signals is referred by the broadcaster/ multi system operator to its agent/ intermediary or vice versa just before the expiry of the time limit and the time limit starts afresh. Moreover, it is easy for a service provider to respond to the request before the expiry of the time limit by asking for some details and then prolong the process by asking for supplementary details. Hence, it is necessary to lay down a time limit wherein either the signals are provided to the distributor of TV channels or the specific terms & conditions are informed on fulfilment of which the signals are to be provided."

Annexe to Explanatory Memorandum on "The Telecommunication (Broadcasting and Cable Services) Interconnection Regulation 2004" (13 of 2004) (The Regulation), and TRAI has responded to the queries raised by the stakeholders in the following manner:

"The time taken to respond will vary from platform to platform depending on the technology and other factors. Rather than prescribe different periods for different types of requests/problems clauses 3.4 and 3.6 are being amended to say that the

request/complaint must be responded to in a reasonable time period but not exceeding thirty days (clauses 3.4 and 3.6 have been amended accordingly)"

Prescribed time period of 60 days under the Clause 3 of the Telecommunication (Broadcasting and Cable Services) Interconnection (Digital Addressable Cable Television Systems) Regulations, 2012, as amended relating to Broadcasters, MSOs, LCOs, etc.

Clause 3.3 provides the provision relating to Broadcasters as:

"Every broadcaster or his authorized agent shall provide the signals of TV channels to a multi system operator, in accordance with its reference interconnect offeror as may be mutually agreed, within sixty days from the date of receipt of the request and in case the request for providing signals of TV Channels is not agreed to, the reasons for such refusal to provide signals shall be conveyed to the person making a request within sixty days from the date of request."

Explanatory memorandum – point 13 provides:

"To allow the multi system operator to provide the access to its cable network smoothly, a time frame of sixty (60) days has been provided for in the regulations which is equivalent to the time frame given to the broadcaster under the must provide provisions. In no case this time period be more than sixty days (60 days) from the date of request seeking access to the network of the multi system operator."

[**Emphasis Supplied**]

Hence, the understanding of TRAI has been since the very beginning that the provider of signals should be given sufficient and reasonable time in order to take a call on the request made by the seeker for signals. The reasonable time, according to TRAI is 60 days, within which period the provider either give his signals or state the reasons for refusals thereof.

This provision necessarily mandates that no seeker of signals should be discriminated against by the provider in the garb of negotiation/consideration of the request so made by the seeker of signals.

However, the suggestion of the authority to further sub-divide the time period, is not feasible. There are different stages before signals are provided, which cannot be clubbed. The seeker has to make a request along with all the relevant information/document, the information/document so provided have to be verified by the provider, in case of addressable system, the system has to be audited in order to check that the system is in compliance with the requirements of Schedule I of the Interconnect Regulations, 2012. The time taken in fulfilment of a particular stage may vary on case to case basis and the any prescription on the time limit for the completion of a particular stage, will only lead to hurried approach by the parties. The suggestion of the authority, that the signals may be provided within 15 days from the date of request and then other formalities may be completed, is not tenable. It is pertinent to note that the proviso to Clause 3.2 of the Regulations provide for the conditions in which the signals may be denied to the seeker of signals. Signals cannot be provided without any qualification.

There are situations where the signals are delayed, because the seeker does not furnish the necessary information/documents to the provider. In the absence of the information that are pertinent to be verified, it will be unjust to the broadcasters to provide the signals. Since there are already deterrent provisions existing in the TRAI Act, there is no need to prescribe any other deterrent provisions, including financial incentives. It is always open to the parties to approach the aggrieved parties for redressal of its grievances.

In terms of NSTPL judgment, every broadcaster has been mandated to publish its RIO in terms of the judgment, on its website. The signals therefore has to be provided basis the agreement so published and interconnect regulations also have to be executed accordingly. As has been

discussed above, mandating SIA is not required at this stage. However, if the authority decides to mandate publication of the SIA, only general terms and conditions should be prescribed to be published and not the commercial and technical terms. Pertinent to bring to the attention the authority to the following:

Point 20 of the Explanatory Memorandum to the Telecommunication (Broadcasting and Cable Services) Interconnection (Digital Addressable Cable Television Systems) Regulations, 2012, provides:

> *"The Authority is of the view that as the interconnection regulations already provide for the necessary regulatory framework for addressable systems, in the form of RIO, which were not there in the year 2006 when SIA was prescribed for CAS, there is no need for prescribing Standard Interconnect Agreement between Broadcaster and MSO and also between MSO and LCO in the Digital Addressable Cable TV System. The Authority is of the view that the RIO based prescription should prevail in DAS also."*

Clause 3.4 of the DAS Regulation 2012 inter alia stipulates the requirement of technical compliance as prescribed under the Schedule of the DAS Regulation 2012, which states as:

> *"Every multi system operator while seeking interconnection with the broadcaster, shall ensure that its digital addressable system installed for the distribution of TV channels meets the digital addressable system requirements specified in Schedule I to these regulations:*
>
> *Provided that in case the broadcaster finds that the digital addressable system being used by the multi system operator for distribution of TV channel does not meet the requirements specified in the Schedule I, it shall inform such multi system operator who shall get its digital addressable system audited by M/s. Broadcast Engineering*

Consultants India Ltd., or any other agency as may be specified by the Authority by direction issued from time to time and obtain a certificate from such agency that its system meets the requirements specified in Schedule I to these regulations :

Provided further that the findings of the agency referred to in the first proviso shall be final."

Thus the onus of the being compliant with the technical specifications vest with the DPOs. Again, the purpose of conducting a technical audit is to ascertain if the technical system is in compliance of the Regulations or not. If any discrepancy is found in the system, the signals cannot be provided. Further, there are situations where the seeker delays the audit on one ground or the other in order to fetch some more time to make its system compatible with the Regulations. There are also situations when upon being intimated of the audit to be conducted by the broadcaster, the seeker changes its system completely and on this ground seeks delay of the audit. Another situation is also not out of question that there may be different head-ends of the seeker and all the head-ends have not been disclosed to the broadcaster. In such a situation, verifying the compatibility of the system by the broadcaster cannot be conducted in a time bound manner since some time is also elapsed in transit. The provisioning of signals in time bound manner cannot be made without giving due consideration to the other relevant factors affecting the rights of the stakeholders. It should be left to the adjudicatory bodies to decide on case to case basis the responsibility for delay in provisioning of signals.

Issue 5:- REASONS FOR DENIAL OF SIGNALS / ACCESS TO THE PLATFORM

5.1 What are the parameters that could be treated as the basis for denial of the signals/ platform?

5.2 Should it be made mandatory for service providers to provide an exhaustive list in the RIO which will be the basis for denial of signals of TV channels/ access of the platform to the seeker?

The amended Clause 3.2 of the TRAI Regulations provides as under:-

"*3.2 Every broadcaster shall provide on request signals of its TV channels on non-discriminatory terms to all distributors of TV channels, which may include, but be not limited to a cable operator, direct to home operator, multi system operator, head ends in the sky operator; HITS operators and multi system operators shall also, on request, re-transmit signals received from a broadcaster, on a non- discriminatory basis to cable operators.*

Provided that this provision shall not apply in the case of a distributor of TV channels having defaulted in payment.

"Provided also that the provisions of this sub-regulation shall not apply in the case of a distributor of TV channels, who seeks signals of a particular TV channel from a broadcaster, while at the same time demanding carriage fee for carrying that channel on its distribution platform."

Provided further that any imposition of terms which are unreasonable shall be deemed to constitute a denial of request.

"Explanation 1.

The applicant distributors of TV channels intending to get signal feed from any multi-system operator other than the presently-affiliated multi system operator, or from any agent/ any other intermediary of the broadcaster/multi system operator, or directly from broadcasters shall produce along with their request for services, a copy of the latest monthly invoice showing the dues, if any, from the presently-affiliated multi

system operator, or from any agent/ any other intermediary of the broadcaster/multi system operator who collects the payment for providing TV channel signals."

"Explanation 2. The stipulation of "placement frequency" or "package/ tier" by the broadcaster from whom the signals have been sought by a distributor of TV channels, as a "pre-condition" for making available signals of the requested channel(s) shall also amount to imposition of unreasonable terms."

"3.3 Any broadcaster/multi system operator or any agent/ any other intermediary of the broadcaster/multi system operator, who collects the payment for providing TV channel signals to any distributor of TV channels, shall issue monthly invoices to the distributor of TV channels.

The monthly invoice shall clearly specify the arrears and current dues along with the due date for payment of the same.

Explanation

Any claim for arrears should be accompanied by proof of service of invoices for the period to which the arrears pertain"

Further the Explanatory Memorandum to the 3rd Amendment to the Principal Regulations, 2004 discusses the necessity of access to content and the reasons for denial of request as under:-

"Access to content

"*7. The purpose of laying down a time limit for responding to a request for signals gets defeated if the distributor of TV channels making a request for signals is referred by the broadcaster/ multi system operator to its agent/ intermediary or vice versa just before the expiry of the time limit and the time limit starts afresh. Moreover, it is easy*

for a service provider to respond to the request before the expiry of the time limit by asking for some details and then prolong the process by asking for supplementary details. Hence, it is necessary to lay down a time limit wherein either the signals are provided to the distributor of TV channels or the specific terms & conditions are informed on fulfilment of which the signals are to be provided.

Default in payments

9. Sometimes LCOs switch from their affiliated MSO when they are either unable or unwilling to pay their outstanding dues to their affiliated MSO. This results in bad debts for their affiliated MSOs leading to the latter's inability to pay broadcasters for the LCOs portion of dues. Broadcasters are also unable to recover these dues from the MSO to whom such defaulting LCO gets affiliated. On the other hand, in the absence of regular issue of invoices, the LCOs are suddenly confronted with huge arrears, which they have no means of paying. The problem can be tackled by ensuring that the LCOs are issued invoices on a monthly basis clearly showing the arrears as well as the current dues. In such a situation, if an LCO wants to switch to a new MSO, then the latest invoice would clearly show the level of arrears outstanding against the LCO. At the same time this will protect the LCO from unexpected and unforeseen arrears being suddenly thrust upon him."

At the first stage itself, the following details/information/documents needs to be mandated for a seeker of signals to furnish in order to enable the broadcaster to process the request:- .

A. MSO basic information:

1. Registered name of the MSO:
2. Registered office address:

3. Address for communication:
4. Name of the contact person/Authorized Representative:
5. Telephone:
6. Email address:
7. City:
8. State:
9. The names of Owners/Directors/Partners:
10. List of channels:
11. Particulars of Service Tax registration:
12. Entertainment Tax number: _____
13. PAN - _____ (attach copy).

B. Specific information for providing services in DAS areas:

1. Copy of the valid registration certificate issued by the Ministry of Information and Broadcasting, under the Cable Television Network (Amendment) Rules, 2012 or as amended to date.
2. Proposed areas of operations: a. State: b. District: c. Town:
3. Seeding plan.
4. Location of the Headend along with the particulars of CAS & SMS.
5. In case, the MSO is desirous of entering into an interconnect agreement based on a mutually negotiated deal, kindly provide details of subscriber base.

Further, the authority should also take note of the fact that due to difference in technologies, there will be certain additional documents that may be required by the broadcaster in order to process the request. The authority may prescribe publishing an exhaustive list of

documents/information that a broadcaster would require in order to process the request that would include the documents pertaining to each addressable system.

The Hon'ble Authority seems to have framed issue no 5.2 erroneously. The context would be more relevant in case, if the exhaustive list of documents were sought rather than a list of reason for denial of signals/access. Enlisting a plausible list of reasons for denial of signals/access would be vague. Now TRAI may prescribe the list of documents/information to be made available on the website of the provider enclosed with the application form rather than the RIOs.

Issue 6:- INTERCONNECTION MANAGEMENT SYSTEM (IMS)

6.1 Should an IMS be developed and put in place for improving efficiencies and ease of doing business?

6.2 If yes, should signing of interconnection agreements through IMS be made mandatory for all service providers?

6.3 If yes, who should develop, operate and maintain the IMS? How that agency may be finalised and what should be the business model?

6.4 What functions can be performed by IMS in your view? How would it improve the functioning of the industry?

6.5 What should be the business model for the agency providing IMS services for being self-supporting?

In our considered opinion, the broadcasting sector in India is not that technologically strong in order to bring in a system such as IMS. Moreover, there are multiple levels of execution of interconnect agreements that a broadcaster has to go through and hence any prescription on managing an IMS is not feasible. Further, developing a system as IMS will involve a lot of investment of resources like money and manpower. The authority should also take note of the fact that every stakeholder will not be in a position to enable itself to have access to such

technology, and hence is not a feasible suggestion. It is also important to note that due to complexity of information, common features may not be developed. Further, due to difference in billing parameters development of IMS it may not be feasible option. It is also submitted that due to difference of various parameters integration of company specific finance system is also a challenge. Similarly, the number of users for such IMS shall become too big to handle. Further, in the ordinary course of business, company maintains certain back up data for exigencies which finds no place in IMS. The issue of confidentiality is also one of the aspect that needs to be addressed before development of IMS.

In our opinion, any check on the execution interconnection agreement should be self-regulatory and must be out of the any sort of regulation or development.

Issue 7:- TERRITORY OF INTERCONNECTION AGREEMENT

7.1 Whether only one interconnection agreement is adequate for the complete territory of operations permitted in the registration of MSO/ IPTV operator?

7.2 Should MSOs be allowed to expand the territory within the area of operations as permitted in its registration issued by MIB without any advance intimation to the broadcasters?

7.3 If no, then should it be made mandatory for MSO to notify the broadcaster about the details of new territories where it wants to start distribution of signal a fresh in advance? What could be the period for such advance notification?

In our considered opinion, it is important to define the territory in the interconnect agreements in order to enable the parties to have a check on the abuse of signals by the other party. If the territory is not defined, this will give absolute power to the distributors to extend their area of operation without having to account for the same to the broadcaster, and hence the broadcasters will not be able to prevent piracy. In the event piracy is allowed to happen, it will be a huge loss to the broadcasters and in return loss to the exchequer as well.

The Hon'ble TDSAT have had the occasions in the past where the distributor was found to be using different head-ends about which the broadcaster was not informed and hence, the accounting of the subscriber base of the distributor could not be appropriately done, as the distributor was under reporting its subscriber base. Cases have also come before the Hon'ble TDSAT where different sets of technologies were being used by the distributor of the signals, without having it verified/ audited. In situations where parties execute interconnect agreements for providing services pan India also in order to avoid multiplicity of execution of agreements, there must be a mandate that the parties give out a detailed list of the areas, so that the distributor does not get out of the territories and provide its services without getting the prior approval from the broadcaster and executing interconnect agreement thereof.

The understanding of the authority that the legacy business practices of executing interconnection agreements for each territory is interrupting the execution process and is causing delay and hampering ease of business is only a misnomer, and without study thereof. If the distributor is to take the plea of having obtained requisite license granted to operate in the addressable system, it must execute interconnect agreement with the broadcaster accordingly prior hand and thereafter start the retransmission of signals. The mandate of the Regulation is that the signals must be provided on non-discriminatory basis, but while complying with the same, it must also be ensured that in turn, no prejudice is being caused to the broadcasters.

It is not out of context to mention that there is a need to understand the difference between the registration and the rights granted for retransmission of signals. The operators may procure the registration for any territory, but the rights of territory granted under subscription agreement for retransmission of broadcasters channel(s) shall be more significant as broadcaster shall have all checks and balances provided under the regulations including anti-piracy measures and audit. In the event MSO/ IPTV service provider wish to extend the area of operations, it may

seek permission from broadcasters and after necessary formalities including submission of information relating to network/ operators/ headend / retransmission mode / audit and due execution of subscription agreement such rights may be granted.

The mandate of Clause 3.5 of the Regulations is that signals of TV channels should be given to the seeker within a reasonable time period of 60 days or reasons rejecting the request, must be communicated to the seeker within a period of 60 days. This provision may also be extended to such situations where, the distributor of signals wishes to extend his area of operation and every such request needs to be considered as a fresh request in terms of the regulation.

Issue 8:- PERIOD OF AGREEMENTS

8.1 Whether a minimum term for an interconnection agreement be prescribed in the regulations? If so, what it should be and why?

The authority should grant freedom to parties to determine the minimum term for an Interconnection agreement and no minimum period may be prescribed by the Regulations. However , in case of any dispute between the parties on the minimum term, an interconnect agreement may be allowed to continue to be in force for a minimum period of one (1) year or lesser considering the financial year of the companies i.e., March 31st of each year . Hence, In case the agreement is executed later than the starting date of the financial year, the agreement should be executed only for remaining period of the financial year or for any later date as the parties by mutual consent agree.

Issue 9:- CONVERSION FROM FTA TO PAY CHANNELS

9.1 Whether it should be made mandatory for all the broadcasters to provide prior notice to the DPOs before converting an FTA channel to pay channel?

9.2 If so, what should be the period for prior notice?

Free to Air channel means a channel for which no fees is to be paid to the broadcaster for its retransmission through electromagnetic waves through cable or through space intended to be received by the general public either directly or indirectly, pursuant to Clause 2(g) of Tariff Order 2004, Clause 3(t) of the Tariff Order 2010 and Clause 2(r) of the Regulations, 201

TRAI vide amendment dated 04.09.2006 to the Principal Regulation, 2004 inserted for the first time the provision relating to the conversion of Free To Air Channel (FTA) to a pay channel and the manner in which it should be done. The inserted Clause 7 reads as:-

> ***"7. Conversion of a Free To Air channel/ Pay Channel***
>
> *7.1 The nature of any channel, i.e., Free To Air or Pay will normally remain the same for a period of one year. Any broadcaster of a Free To Air channel intending to convert the channel into a Pay Channel or any broadcaster of a Pay channel intending to convert the channel into a Free To Air channel shall inform the Authority and give public notice in the manner specified in clause 4.3, one month before the scheduled date of conversion."*

It is pertinent to discuss here all the relevant provisions relating to FTA vis-a-vis Pay channel in order to address the issue raised

Clause 2(zd) of Interconnect Regulations, 2012 is reproduced as below:

> *"2(zd). "TV channel" means a channel, which has been registered under-*
>
> *(i) the guidelines for uplinking from India, issued vide No.1501/2/2002-TV(I)(Pt), dated the 2nd December, 2005; or*
>
> *(ii) policy guidelines for downlinking of television channels, issued vide No. 13/2/2002- BP&L/BC-IV, dated the 11th November, 2005,*

As amended from time to time, or such other guidelines for uplinking and downlinking of television channels, as may be issued from time to time by Government of India (Ministry of Information and Broadcasting) and reference to the term channel shall be construed as a reference to "TV channel";

The Regulation 2004, and 2012 provides that all agreements pertaining to channels should be in writing. Clause 4A of the Regulation 2004, and Clause 5(6) of Regulation 2012 are reproduced hereunder:

"4A. Interconnection Agreements to be in writing.

4A.1 It shall be mandatory for the broadcasters of ***pay channels*** *and distributors of TV channels to reduce the terms and conditions of all their interconnection agreements to writing.*

4A.2 No broadcaster of ***pay channels*** *or distributor of TV channels, such as multi system operator or headend in the sky operator, shall make available signals of TV channels to any distributor of TV channels without entering into a written interconnection agreement.*

4A.3 Nothing contained in regulations 4A.1 or 4A.2 shall apply to any supply of signals or continuance of supply of signals of TV channels by a broadcaster or distributor of TV channels, such as multi system operator or headend in the sky operator, in pursuance of or in compliance with any order or direction or judgment of any court or tribunal, including any order or direction or judgment of any court or tribunal on any proceeding pending before such court or tribunal.

4A.4 It shall be the responsibility of every broadcaster of ***pay channels*** *who enters into an interconnection agreement with a distributor of TV channels to hand over a copy of*

signed interconnection agreement to such distributor of TV channels and obtain an acknowledgement in this regard within a period of 15 days from the date of execution of the agreement and, similarly, it shall be the responsibility of every multi system operator or headend in the sky operator, as the case may be, who enters into an interconnection agreement with a cable operator to hand over a copy of signed interconnection agreement to such cable operator and obtain an acknowledgement in this regard within a period of 15 days from the date of execution of the agreement."

Similar provision is contained in Clause 5 (6) of the Regulation 2012, as under:

***"Clause 5**. General Provisions relating to interconnection agreements.-*

*(6) It shall be mandatory for the broadcasters of **pay channels** to reduce the terms and conditions of the interconnection agreements into writing.*

Explanation: It shall be mandatory for the broadcaster to enter into written interconnection agreement with the multi system operator for retransmission of its pay channels including those pay channels for which no subscription fee is to be paid by the multi system operator to the broadcaster."

Interestingly, the obligation to execute the written agreement lies upon the Broadcasters of pay channels as can be seen from the clauses reproduced above**.**

As far as the Regulation 2004 applying to analog cable system is concerned, the Regulations recognize the concept of RIO was least prevalent, and introduced for the first time in 2007 but the same did not fly with the stakeholders, as the subscriber numbers in the non-addressable systems is unknown.

As far as the Regulation 2004 applying to DTH, IPTV, HITS, and other addressable systems except digital addressable cable system are concerned, the concept of RIO was introduced in

the year 2007 itself, and applied to the stakeholders with all its rigours, introduced vide Clause 13.2A.

As regards the RIO for digital addressable cable systems is concerned, the concept of RIO has been introduced pursuant to Clause 5 of the Regulation 2012.

The relevant portion of The Tariff Order 2004 is reproduced hereunder:

"*3C. Manner of offering channels by broadcasters.—*

(1) Every broadcaster shall offer or cause to offer on non-discriminatory basis all its channels on a-la-carte basis to the multi system operator or the cable operator, as the case may be, and specify an a-la-carte rate, subject to provisions of sub-clause (2) of this clause and clauses 3 and 3B, for each pay channel offered by him.

(2) In case a broadcaster, in addition to offering all its channels on a-la-carte basis, provides, without prejudice to the provisions of sub-clause (1), to a multi system operator or to a cable operator, pay channels as part of a bouquet consisting only of pay channels or both pay and free to air channels, the rate for such bouquet and a-la-carte rates for such pay channels forming part of that bouquet shall be subject to the following conditions, namely:-

(a) the sum of the a-la-carte rates of the pay channels forming part of such a bouquet shall in no case exceed one and half times of the rate of that bouquet of which such pay channels are a part; and

(b) the a-la-carte rates of each pay channel, forming part of such a bouquet, shall in no case exceed three times the average rate of a pay channel of that bouquet of which such pay channel is a part and the average rate of a pay channel of the bouquet be calculated in the following manner, namely:-

If the bouquet rate is Rs. 'X' per month per subscriber and the number of pay channels is 'Y' in a bouquet, then the average pay channel rate of the bouquet shall be Rs. 'X' divided by number of pay channels 'Y':

Provided that the composition of a bouquet existing as on the 1st day of December, 2007, in so far as pay channels are concerned in that bouquet, shall not be changed:

Provided further that nothing contained in the first proviso shall apply to those bouquets of channels existing on the 1st day of December, 2007, which are required to be modified pursuant to the commencement of the Telecommunication (Broadcasting and Cable Services) Interconnection (Seventh Amendment) Regulation, 2014 and the rate of such modified bouquet of channels shall be determined in the following manner:-

---

The rate of the modified bouquet = [rate of the existing bouquet] x [sum of a-la-carte rate of pay channels comprising the modified bouquet/sum of a-la-carte rate of all the pay channels comprising the existing bouquet],

and if after modification of the bouquet, there remains only one channel in such bouquet, the broadcaster shall be free to offer such channel at its published a-la-carte rate in its Reference Interconnect Offer.

Provided also that no pay TV channel shall be added to or removed from the modified bouquet of TV channels referred to in the second proviso:

Provided also that---

(i) in cases where the broadcaster ceases to make available a pay channel existing as on the date of coming into force of the Telecommunication (Broadcasting and Cable) Services (Second) Tariff (Fourteenth Amendment) Order, 2015 (1 of 2015) or for

distribution, the rate of the bouquet containing such a pay channel existing on that date shall be reduced in the same proportion which the a la-carte rate of the said pay channel bears to the aggregate sum of the a-la-carte rates of all pay channels comprised in the said bouquet;

(ii) in cases where a bouquet existing on the date of coming into force of the Telecommunication (Broadcasting and Cable) Services (Second) Tariff (Fourteenth Amendment) Order, 2015 (1 of 2015) consists of both free to air and pay channels, and if any free to air channel is converted into pay channel after that date, the said existing bouquet (excluding the free to air channel) shall be offered at or below the rates prevailing as on that date for such bouquet;

(iii) in cases where a bouquet existing on the date of coming into force of the Telecommunication (Broadcasting and Cable) Services (Second) Tariff (Fourteenth Amendment) Order, 2015 (1 of 2015) consists of both free to air and pay channels, and if any pay channel is converted into free to air channel after that date, the said existing bouquet shall be offered, with or without such free to air channel so converted after reducing the rate prevailing as on that date for such bouquet, by an amount not less than the amount which bears the same proportion the a la carte rate of the said pay channel bears to the aggregate sum of the a-la-carte rates of all pay channels comprised in the said bouquet."

Clause 4 of the Tariff Order 2010 is reproduced hereunder:

"Part II: Whole sale tariff

4. Manner of offering pay channels by broadcasters to distributors of TV channels using addressable systems.-----

*(1) Every broadcaster shall offer or cause to offer all its **pay channels** on a-la-carte basis to distributors of TV channels using addressable systems, and specify the a-la-carte rate for **each pay channel**: Provided that the a-la-carte rate for a **pay channel** for addressable systems shall not be more than thirty five per cent of the a-la-carte rate of the channel as specified by the broadcaster for non-addressable systems.*

(2) In case a broadcaster, in addition to offering all its channels on a-la-carte basis, offers, without prejudice to the provisions of sub-clause (1), pay channels as part of a bouquet consisting only of pay channels or both pay and free to air channels, such broadcaster shall specify the rate for each such bouquet of channels offered by it:

Provided that -----

(a) the composition of the bouquets offered by the broadcaster to distributors of TV channels using addressable systems shall be the same as those offered by such broadcaster for non-addressable systems; and

(b) the rate for a bouquet of channels for addressable systems shall not be more than thirty-five per cent of the rate for such bouquet as specified by the broadcaster for non-addressable systems.

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

The words thirty five percent shall be read as forty two percent pursuant to the order of the Supreme Court of India.

Analysing the Telecommunication (broadcasting and Cable Services) Interconnection (Digital Addressable Cable Television Systems) (Sixth Amendment) Regulation, 2016 dated 07.01.2016 adds an explanation to sub regulation 6 as under:

"*Explanation: It shall be mandatory for the broadcaster to enter into written interconnection agreement with the multi system operator for retransmission of its* ***pay channels*** *including those* ***pay channels*** *for which no subscription fee is to be paid by the multi system operator to the broadcaster*"

Explanatory memorandum explains the above explanation as follows:

"*3. The Telecommunication (Broadcasting and Cable Services) Interconnection (Digital Addressable Cable Television Systems) Regulations, 2012 (9 of 2012) dated 30th April, 2012 provides a framework for interconnection between Broadcasters & MSOs and MSOs & LCOs. Based on this framework, the service providers are required to enter into a written agreement before providing signals of TV channels for re-transmission to consumers...*

6. Therefore, strong need is felt to make it clear in the regulation that re-transmission of TV Signals should not take place between service providers without a valid written interconnection agreement and new agreement is entered between them well before the expiry of the existing written interconnection agreement.

12. In view of the above, the present amendment has incorporated mainly the following:

a. For more clarity and to understand the spirit of the sub-regulation (6) of Regulation 5, it is explained that it shall be mandatory for the broadcaster of pay channel to enter into written interconnection agreement with the multi system operator for the retransmission of its pay channel including those pay channels for which no subscription fee is to be paid by the multi system operator to the broadcaster as per their mutual agreement. It will ensure that the broadcaster signs an interconnection

agreement for TV Channels, declared as pay TV Channels by the broadcaster to the Authority under the requirement specified in the relevant tariff order, are distributed by the broadcaster to the MSOs only after signing of written interconnection agreement even if nil amount is paid by the MSO to the broadcaster of pay channel..."

Sub-regulation 12 of Regulation 5 of the Regulation 2012 reproduced hereunder for ready reference:

"*Every multi system operator shall publish in its Reference Interconnect Offer the carriage fee for carrying a channel of a broadcaster for which no request has been made by the multi system operator:*

Provided that the carriage fee shall be uniform for all the broadcasters and the same shall not be revised upwards for a minimum period of two years from the date of publication in the Reference Interconnect Offer."

Clause 13.2A.1 of the Regulations, 2004 is reproduced as under:

"*Every broadcaster, providing broadcasting services before the date of commencement of the [Telecommunication (Broadcasting and Cable Services) Interconnection (Sixth Amendment) Regulation, 2010] and continues to provide such service after such commencement shall, within 30 days from the date of such commencement, intimate to all the Direct to Home Operators existing on that date and coming into existence within the said period of 30 days, its reference interconnect offer specifying, inter-alia, the technical and commercial terms and conditions for interconnection for the direct to home platform, including the terms and conditions listed in Schedule III to these regulations:*

Provided that no broadcaster shall, directly or indirectly, compel any direct to home operator not to make available its direct to home service to any class of subscribers including commercial subscribers....."

Hence, perusal of the existing regulations with respect to the FTA channels, it is to be seen that provisions already exist that guide the conversion of a FTA channel to Pay channel. However, it is to be seen that the similar analogy also applies when the pay channel is converted to FTA channel. In our considered opinion, when a Pay channel is converted to FTA, or if a channel is launched as pay Channel and soon thereafter a decision is taken to convert the said channel to FTA, these provisions should not be attracted since, there is no subscription is to be paid to the broadcaster by the DPO and hence, no prejudice would be caused if the intimation is not given to the DPO and also for the reason that the viewership of the consumer does not get affected.

Issue 10:- MINIMUM SUBSCRIBERS GUARANTEE

10.1 Should the number of subscribers availing a channel be the only parameter for calculation of subscription fee?

10.2 If no, what could be the other parameter for calculating subscription fee?

10.3 What kind of checks should be introduced in the regulations so that discounts and other variables cannot be used indirectly for minimum subscribers guarantee?

The 2nd Amendment to the Principal Regulation prohibited the any service provider to charge a minimum guaranteed amount as subscription fee for the services provided.

"6. Prohibition of minimum guarantee clause

Where a distributor of TV channels is using a technology by which pay channels can only be seen through an addressable system, then no service provider shall stipulate, insist or provide for any clause in an interconnection agreement with such a distributor

which would require such distributor to pay a minimum guaranteed amount as subscription fee for the services provided."

The Explanatory Memorandum appended to the 2nd Amendment notes that-

"5. Minimum Subscriber Guarantee

In accordance with the decisions taken by the Authority and contained in the recommendations on issues relating to broadcasting and distribution of TV channel of October 1st, 2004 (paragraph 6.30) a clause has been added in the Interconnection Regulation prohibiting minimum subscriber guarantee where the distribution of signals is through an addressable system. In the draft this had not been specifically made applicable to all addressable platforms. It is now being made clear so as to be applicable to all addressable platforms including DTH, IPTV and such like and is also in accordance with the rationale of the earlier decision of the Authority as contained in the aforesaid recommendations. Some stakeholders have objected to such a clause on the ground that this would adversely affect their commercial freedom and that such issues should not be regulated or standardized. The reasons for imposing this restriction have been spelt out in the aforesaid recommendations in para 6.26 and the same are reiterated. Incentives for higher performance can always be given through volume discounting but the imposition of a minimum subscriber guarantee can defeat the introduction of new addressable platforms. This would adversely affect the subscribers who can get choice in an addressable platform. It would also adversely affect the industry which is plagued by disputes on subscriber base in the current non-addressable regime: with addressability the scope for such disputes would become negligible if not vanish totally. Thus, it is in no one's interest to put any hurdle in the way of the introduction of such addressability. Accordingly, such a regulation is

necessary to speed up the very slow introduction of addressability in the market. The TDSAT in its judgment in Petition No. 136© dated July 14 2006 (ASC Enterprises vs. Star India) has also taken a similar view. Accordingly, the Authority sees no reason to change its earlier view and has decided that there should be such a prohibition of minimum guarantee clauses in all interconnection agreements where addressable systems are in place. The definition of addressable systems has been changed to cover all addressable platforms."

[Emphasis Supplied]

Further, the 3rd Amendment to the Principal Regulation incorporated Clause 3.5 in the Principal Regulations, as:-

"*3.5 The volume related scheme to establish price differentials based on number of subscribers shall not amount to discrimination if there is a standard scheme equally applicable to all similarly based distributors of TV channel(s).*

(*Explanation: "Similarly based distributor of TV channels" means distributors of TV channels operating under similar conditions. The analysis of whether distributors of TV channels are similarly based includes consideration of, but is not limited to, such factors as whether distributors of TV channels operate within a geographical region and neighbourhood, have roughly the same number of subscribers, purchase a similar service, use the same distribution technology.)*

Hence, in our considered opinion, subscriber base should be taken as the base criterion for calculation of the subscription fee. Apart from the above, the other factors like reach of the channel, demand of the channel in the market and other factors that may become relevant with

time may also be considered while prescribing the formula for the calculation of the subscription fee.

Further, the NSTPL judgment dated 07.12.2015 also records that-

> *"As the Regulations stand in its present form, we are clearly of the view that the RIO must reflect not only the rates of channels but also the different formations, assemblages and bouquets in which the broadcaster wishes to offer its channels for distribution along with the rates of each of the formation or bouquet. Further, the a la carte rate and the bouquet rates must bear the ratio as mandated in clause 13.2A.12. The RIO must also clearly spell out any bulk discount schemes or any special schemes based on regional, cultural or linguistics considerations that would be available on a non-discriminatory basis to all seekers of signals. To sum up the RIO, must enumerate all the formats, along with their respective prices, in which the broadcaster may enter into a negotiated agreement with any distributor. To put it conversely, the broadcaster cannot enter into any negotiated deal with any distributor unless the template of the arrangement, along with its price, consistent with the ratio prescribed under clause 13.2A.12 is mentioned in the RIO. In addition,* ***any volume-related price scheme must also be clearly stated in the RIO so as to satisfy the requirement of clause 3.6 of the Interconnect Regulations****."*
>
> ***[Emphasis Supplied]***

Hence, in light of the above noted provisions and the judgment of the Hon'ble TDSAT, the service providers are not prohibited from granting volume related discounts, however the same shall not amount to discrimination towards others.

However, in our opinion, providing incentive based discounts based on the performance of the distributor should not be taken to be covered under the provisions mentioned hereto above. The authority should also consider and allow different levels to be introduced for granting incentives. The party must also be allowed to mutually negotiate on the performance based incentives schemes that may be allowed to be given to distributors, subject of course to revision by the authority from time to time.

Issue 11:- MINIMUM TECHNICAL SPECIFICATIONS

11.1 Whether the technical specifications indicated in the existing regulations of 2012 adequate?

11.2 If no, then what updates/ changes should be made in the existing technical specifications mentioned in the schedule I of the Interconnection Regulations, 2012?11.3 Should SMS and CAS also be type approved before deployment in the network? If yes, then which agency may be mandated to issue test certificates for SMS and CAS?

11.4 Whether, in case of any wrong doing by CAS or SMS vendor, action for blacklisting may be initiated by specified agency against the concerned SMS or CAS vendor.

TRAI should amend the requirements including the following technical specifications:

Fingerprinting

- Fingerprint font color and background color should be changeable from headend.

Messaging (OSD)

- ECM/EMM base Forced messaging -scroll (ticker mode) should be available. STB should be able to run scroll from the headend in addition to On Screen Display messaging.

Network logo

- Water mark logo of MSO should be available on all channels and should not be removable. It should appear on all types of STBs used by the headend. This will help in tracing the signal in case of piracy. The logo should not cover more than 5% of the screen and should have 70% transparency.

STBs (both SD & HD)

The STBs outputs should have the following copy protections

- Macro vision 7 or better on Composite video output.
- Macro vision 7 or better on the Component Video output.
- HDCP copy protection on the HDMI & DVI output.
- DTCP copy protection on the IP, USB, 1394 ports or any applicable output ports.

DVR / PVR STBs should be compliance of following;

- Content should get recorded along with FP/watermarking/OSD & also should display live FP during play out.
- Recorded content should be encrypted & not play on any other devices.
- If STB is capable to content recording / time shift recording, content stored in STB/USB/external hard drive should have "Copy Protect" feature.
- In the even a customer is deactivated by the MSO the recorded content available on the STBs should not play.
- Content should get recorded along with entitlements and play out only if current entitlement of that channel is active.

- User should not have access to install third party application/software.

CAS System:

- CAS System should be able to maintain logs of date of activation and deactivations.

- In CAS System, whenever the package is modified (channel added / deleted) the CAS system should capture the date of modification and with details of changes made in packages. Such modification log should be maintained by MSO/ CAS Provider for 2 years. It should be mandatory on MSO to maintain such trail logs and present them to broadcasters on demand during audits.

- CAS should be able to generate log of all activities i.e. activation/deactivation/FP/OSD/package logs/package modification logs.

- Affiliate to declare by undertaking the number of encryptions systems (CAS) he is using at the head end and in future if he is integrating any additional CAS/SMS, same should be notified to the Broadcasters by means of a fresh undertaking.

- No activation / deactivation from direct CAS, it must be routed via SMS client only.

- Certificate from CAS provider(s) should include details of CA ID, Service ID, N/w ID, version and no. of instances installed. Also confirmation with respect to history of hacking.

- All channels originating from a Digital headend should have all channels encrypted for both DAS & Non DAS area. All TS from MUX should be encrypted for non DAS & DAS area, in case the MSO is serving both areas.

- Forensic watermarking should be implemented by the MSO at his HE & STB's.

Further, SMS and CAS should be marked approved before deployment in the network and BECIL / DOT should issue test certificates after validation as per regulation in case of any wrong doing by CAS or SMS vendor. CAS and SMS should be secure in a way that subscriber data cannot be manipulated at operator end. In case of any wrong doing by CAS or SMS vendor, CAS and SMS should be secure in a way that the subscriber data may not be manipulated at operator end.

Issue 12:- TECHNICAL AUDIT OF ADDRESSABLE SYSTEMS

12.1 Whether the type approved CAS and SMS be exempted from the requirement of audit before provisioning of signal?

12.2 Whether the systems having the same make, model, and version, that have already been audited in some other network and found to be compliant with the laid down specifications, need not be audited again before providing the signal?

12.3 If no, then what should be the methodology to ensure that the distribution network of a DPO satisfies the minimum specified conditions for addressable systems while ensuring provisioning of signals does not get delayed?

12.4 Whether the technical audit methodology prescribed in the regulations needs a review? If yes, kindly suggest alternate methodology.

12.5 Whether a panel of auditors on behalf of all broadcasters be mandated or enabled? What could be the mechanism?

12.6 Should stringent actions like suspension or revocation of DPO license/ registration, blacklisting of concerned SMS and CAS vendors etc. be specified for manipulating subscription reports? Will these be effective deterrent? What could be the other measures to curb such practices?

Systems having the same make, model, and version, that have already been audited in some other network and found to be compliant with the laid down specifications, needs to be audited again on each headend installation.

Reason 1: It is very important to establish proper integrations of CAS and SMS at each headend.

Reason 2: Functionality of CAS and SMS anti-piracy features depend on STB compatibility.

Reason 3: Manner of offering of channels may differ from MSO to MSO

Since CAS and SMS installation are completed (for Phase I and II such installations has happened in 2012), MSOs should be required to get system health checkup done by their respective CAS and SMS vendor periodically (at least after one year).

CAS and SMS vendor should highlight the shortcomings during health check-up and such reports may be furnished mandatory to BECIL / TRAI on completion of health checkup and to broadcaster on demand during the conduct of audits.

CAS and SMS vendor should suggest upgradation of system if required to resolve shortcomings found during health checkup. SMS and CAS vendor should provide declaration at the time of installation that their system is secure for manipulating any data at user end i.e. MSO.

Hence it is important for TRAI to prescribe measures or step like suspension or revocation of DPO license/ registration, blacklisting of concerned SMS and CAS vendors etc. be specified for manipulating subscription reports.

TRAI may also consider appointment / recognition of panel of auditor on behalf of broadcaster who may be mandated to conduct periodic audit of all the DPOs.

Any manipulation of subscriber report should necessary called for stringent action including penalty, suspension, blacklisting etc. Such practice may also be curbed by putting it as a regulatory obligation on the DPOs to submit channel wise report to TRAI on monthly basis. This may act as a deterrence upon the MSO and the chances of maneuvering the report shall be reduced.

Issue 13:- SUBSCRIPTION DETAILS

13.1 Should a common format for subscription report be specified in the regulations? If yes, what should be the parameters? Kindly suggest the format also.

13.2 What should be the method of calculation of subscription numbers for each channel/ bouquet? Should subscription numbers for the day be captured at a given time on daily basis?

13.3 Whether the subscription audit methodology prescribed in the regulations needs a review?

13.4 Whether a common auditor on behalf of all broadcasters be mandated or enabled? What could be the mechanism?

13.5 What could be the compensation mechanism for delay in making available subscription figures?

13.6 What could the penal mechanism for difference be in audited and reported subscription figures?

13.7 Should a neutral third party system be evolved for generating subscription reports? Who should manage such system?

13.8 Should the responsibility for payment of audit fee be made dependent upon the outcome of audit results?

As has been suggested by TRAI, a common standard format of the audit may be prescribed to be maintained by all the stakeholders in order to enable the parties to keep a check on the subscriber base of a particular distributor and also to verify from time to time if the technical and other requirements are met with by the DPOs. The regulation as on date mandate that the SMS, CAS, Fingerprinting STB meet the minimum requirements as enumerated in the Schedule I of the Regulations, 2012. However, at times, the basic dispute between the parties is that whether these requirements are met or not. Since these requirements are technical in nature, and sometimes the technology is so complicated that it is hard to prove that the requirements are not met with. In order to address this issue, the primary obligation that must be cast upon the DPOs is that only standard equipment, technology that is prior approved by the authority must be used. The purpose of conducting audit is to ascertain that the system so used meets with the Schedule I requirements. However, at times the situation so arises that after the audit is conducted, the DPO changes its system completely, and thereby defeating the whole purpose of conducting audit. The number of audits that is allowed to a broadcaster also gets exhausted and the broadcaster is left with no other option but to approach the Tribunal for effective adjudication of the disputes.

Further, there are issues also with respect to the format in which the reports should be made available with the broadcaster to verify the details so furnished. Sometimes the DPOs do report the details in their own format which does not meet the standard format that is followed by the broadcaster and is suggested to its distributors. This causes unnecessary snag for the broadcaster, who is then burdened with converting the reports in the standard format and then verify its authenticity. Hence, it is advised that a common format is prescribed by the authority for all the DPOs for reporting their details to the broadcasters.

There are also cases where the distributor does not account to the broadcaster its true subscriber report as to how many subscribers he has catered during a particular month. The distributors

while accounting the subscriber base to the broadcasters, take into account the subscriber number at the beginning and at the end of the month. They however, do not account for the subscriber numbers that it has catered to during the middle of the month. The Hon'ble TDSAT had the occasion to determine this issue in one of the cases. The TDSAT in *Dish TV India Ltd. Vs. ESPN Software India Pvt. Ltd.* (Petition No. 836(C) of 2012 along with M.A.Nos.707 of 2012, 107 of 2013, 3 & 4 of 2014) and *Dish TV India Ltd. Vs. ESPN Software India Pvt. Ltd.* Petition No.382(C) of 2011 along with M.A.No.108 of 2013) (hereinafter referred to as "ICP Judgment") held as under:-

> "*We are, however, unable to agree with this submission. The offer made by the petitioner is not for a particular program but for a limited period. We may note that specific programs are offered on demand basis to the subscriber, and on the subscriber's authorizing the same using the remote control, SMS or any other means, the particular program is activated and the subscriber billed for the same. The same mechanism is also followed for services, such as 'Video on demand'. In this case, some movies or video programs are offered on payment basis and charged for when the subscriber authorizes the same. Such kind of offering programs is commonly called "pay per view". In the ICP pack being offered by the petitioner, the whole channel is offered albeit for a short duration when the Indian cricket team is participating in a cricket match and is certainly different from "pay per view" arrangement"*

The Hon'ble TDSAT further held that-

> "*Though we cannot agree with Mr. Saikrishna that the petitioner is prevented from offering "ICP", which in our view is an innovative package, to its subscribers , we however, agree with the submission that if subscribers, joining or leaving in between the month are not accounted for, it may lead to an undue loss of revenue for the*

respondent. We partly agree with the submission of Mr. Vaidyanathan that if a-la-carte channels are offered in packages, then the payment to the broadcaster for each of the a-la-carte channel shall be calculated on the basis of subscriber base of the package in which such opted a-la-carte channel has been placed but we do not agree that it should be for the full duration of the package.

Hearing the contentions of the rival parties, we find that interest of justice will be sub-served if it is directed that for any month or part thereof, when the respondent's channel is showing cricket matches in which Indian team is participating and the same is activated as part of the ICP, the calculation of subscribers of such a channel shall be based on the total number of subscribers subscribing to all such bouquets that offer "ICP" for the whole month irrespective of the fact when the channel is activated or de-activated. Further, the calculation will be on the calendar month basis and if the matches being played on the channel, due to which the channel is activated as part of ICP, spill over to the next calendar month, the subscribers will be counted for both the months. Let us clarify this with an example. Supposing the matches in which Indian cricket team is playing start on 15th of a month and end on 25th of the same month and the channel of the respondent showing these matches is activated as part of the ICP, the total number of subscribers subscribing to the bouquets which contain 'ICP' shall be counted for this channel for one full month. However, if these matches start say on 25th of a month and continue till 7th of the next month and the channel of the respondent showing these matches is activated as part of the ICP, the total number of subscribers subscribing to the bouquets which contain 'ICP' shall be counted for this channel for two full months. Needless to say that it will be in addition to the subscribers of such channel of the respondent who subscribe to it separately on a-la-carte basis."

Hence the same principle should continue to exist and the DPOs must be held liable to account for the entire subscriber base in terms of the ICP judgment.

Another issue that is of prime concern is at what time of the day should the opening number of the subscriber base for a particular day should be counter. It may argued that since the day opens at 0000 HRS, the opening number should be taken as the number that is active as on 0001 HRS, and accordingly the closing number at 0000 HRS. However, this methodology fails to appreciate the fact that the purpose of accounting is to consider the active subscriber base and the active subscriber base can only be considered as the one active during the prime hours of the day. Hence, the subscriber base active during the prime hours of the day should only be considered for the purpose of defining the opening and closing number of subscriber base.

Further the opening and closing number for the whole month, apart from the formula devised in the ICP judgment should be calculated in the manner, that the first 2 days of the month, middle 2 days of the month and the last 2 days of the month should be taken into consideration in order to calculate the accountable number of subscriber base for the whole month. This method would actually take into account average of the active subscriber base during the whole month.

In our opinion the suggestion of the authority to appoint a neutral third party auditor is a good initiative. However, subscriber details being very specific in nature and confidential from the consumer point of view, the notion of third party auditor will not be of any help. Further, the burden of the DPO remains the same even if a third party auditor is given the responsibility of generating subscriber reports. We alternatively suggest that-

- A panel of 5-6 big CA firms be maintained by IBF

- All the disputes of various broadcasters can be referred to IBF which would based on the disputes/issues so referred would finalize the scope of audit on the basis of the disputes/issues between the parties.

- Any one of the panel CA firms can be assigned to carry out the audit

- Two representatives of IBF would also accompany the audit team

These audits can be subject to the final audit by BECIL.

Issue 14:- DISCONNECTION OF SIGNALS OF TV CHANNELS

14.1 Whether there should be only one notice period for the notice to be given to a service provider prior to disconnection of signals?

14.2 If yes, what should be the notice period?

14.3 If not, what should be the time frame for disconnection of channels on account of different reasons?

With regard to the disconnection of signals, the 3rd Amendment inserted the following clause in the Principal Regulations, 2004 as:-

*"**4. Disconnection of TV channel signals***

4.1 No broadcaster or multi system operator shall disconnect the TV channel signals to a distributor of TV channels without giving three weeks notice to the distributor clearly giving the reasons for the proposed action.

Provided that a notice would also be required before disconnection of signals to a distributor of TV channels if there was an agreement, written or oral, permitting the distribution of the broadcasting service, which has expired due to efflux of time.

Provided further that no notice would be required if there is no agreement, written or oral, permitting the distribution of the signals.

4.2 No distributor of TV channels shall disconnect the re-transmission of any TV channel without giving three weeks' notice to the broadcaster or multi system operator clearly giving the reasons for the proposed action.

4.3 A broadcaster/ multi system operator/ distributor of TV channels shall inform the consumers about such dispute to enable them to protect their interests. Accordingly, the notice to disconnect signals shall also be given in two local newspapers out of which at least one notice shall be given in local language in a newspaper which is published in the local language, in case the distributor of TV channels is operating in one district and in two national newspapers in case the distributor of TV channels is providing services in more than one district. The period of three weeks mentioned in sub-clauses 4.1 and 4.2 of this regulation shall start from the date of publication of the notice in the newspapers or the date of service of the notice on the service provider, whichever is later.

Explanation

1. In case the notice is published in two newspapers on different dates then the period of three weeks shall start from the latter of the two dates.

2. Broadcaster/multi system operator/ distributor of TV channels may also inform the consumers through scrolls on the concerned channel(s). However, issue of notice in newspapers shall be compulsory.

4.4 The notice in the newspapers must give the reasons in brief for the disconnection.""

The Explanatory Memorandum appended to the 3rd Amendment reads as-

"***Disconnection of TV channel signals***

2. The two notice periods prescribed in the regulation led to a number of disputes regarding the notice period applicable in specific cases. By having a single notice period, these disputes can be avoided. Moreover, there would be no advantage by way of a shorter notice period, in suppressing the true reasons for issue of notice to disconnect signals and the consumers would get to know the real issues in the dispute. The notice period should be sufficient for the affected parties to be able to approach the appropriate forum to plead for intervention and to give the consumers an opportunity to approach the necessary forum to ensure that their interests do not suffer on account of the dispute. At the same time, no notice need be provided in the cases of theft of signals as is already the case.

3. Moreover, the interests of consumers as well as the broadcaster/ multi system operator also get adversely affected if the distributor of TV channels decides to switch off signals of a particular channel due to some dispute with the broadcaster/ multi system operator. Accordingly, to protect their interests it is necessary that they get similar advance notice regarding discontinuation of TV channel signals. Therefore, the requirement of giving advance notice to disconnect signals has been extended to the distributors of TV channels also.

4. The purpose of having a public notice is to give the consumers an opportunity to approach the necessary forum to ensure that their interests do not suffer on account of a dispute to which they have not contributed in any way. However, the very purpose gets defeated if the public notice is not issued at the time of giving notice to the service provider and is issued much later leaving very little time for consumers to agitate the

matter at appropriate forum. Accordingly, it is necessary that the consumers get the notice before the notice period begins. Considering the fact that cable TV has reached even remote parts of the country, the notice period should be sufficient to enable the affected parties to approach the appropriate forum.

5. The reach of vernacular language newspapers in the country is more than the reach of English language newspapers. To have the maximum coverage, it is necessary that the public notice should be published in the local language in a local language newspaper also.

6. The notice to the service provider concerned should clearly inform the service provider about the reasons for proposed disconnection. The notice should specify the terms & conditions of the agreement which have been allegedly violated and the details of such violation rather than cryptically mentioning violation of the agreement as the reason for issue of the notice. This is necessary so as to pin point the issues of dispute, so that the affected service provider can take steps either for rectifying the violation or to approach appropriate forum for redressal. Similarly, the public notice should also have the reasons for proposed disconnection in brief."

Though the provision with respect to the notice before disconnection is clear however there is no logical reasoning of keeping the notice period as 21 days. The regulation does not provide any methodology to protect the cost of content during the notice period and exposure of cost has increased with the notice period of 21 days and hence the notice period needs to be revisited and bring it down to 7 days. The basic purpose of giving notice is to inform the distributor and its subscriber that services are going to be disrupted. The reason for disconnection is to be stated in the said notice only with the objective of providing an opportunity to the distributor

to make good the shortcomings and thereby comply with the terms of the agreement and at the same time information to public for making alternative arrangements.

Issue 15:- PUBLICATION OF ON SCREEN DISPLAY FOR ISSUE OF NOTICE FOR DISCONNECTION OF TV SIGNALS

15.1 Whether the regulation should specifically prohibit, the broadcasters and DPOs from displaying the notice of disconnection, through OSD, in full or on a partial part of the screen?

15.2 Whether the methodology for issuing notice for disconnection prescribed in the regulations needs a review? If yes, then should notice for disconnection to consumers be issued by distributor only?

15.3 Whether requirement for publication of notices for disconnection in the newspapers may be dropped?

As discussed herein above, the sole purpose of giving our a notice for disconnection is to inform the distributor and its subscriber that the signals are going to be disrupted owing to the specific reasons stated in the said notices. The mode of public notice prescribed is that the service provider should give out notices in two newspapers of wide circulation, one in English and another in regional language of the region. However, it has been seen from time to time that these public notices often go unnoticed and the distributor comes at the last moment to the court pleading that he is not aware if any public notice has been published by the service provider or not.

Service providers as on date are not prohibited from publishing On Screen Displays (OSD) on the network of the distributor in order to inform the consumer about the disconnection or in certain cases, as an anti-piracy measure. In cases where signals are being pirated by the distributor, there should not be any limit on the size of the OSD being run. However, if the case is otherwise, the authority should continue to allow the service provider from publishing the

OSD in such size and manner that the view of the channel is not disrupted, till the period of the notice. After the period of the notice expires, the said restriction should not become applicable, since any retransmission after the notice period, in the absence of any cure by the distributor of the said default, will be an unauthorized retransmission and the same will be counted as pirating the signals of the service provider.

Giving out Public Notices in Newspaper is also a costly affair, and hence giving scrolls on the screen may help in reducing uncertainty in mind of consumers and reducing avoidable expenses.

The authority may also consider allowing the service providers in publishing the notices on their websites. Websites have wider approach than newspapers. Further, for accessing any information relating to the service provider, people generally tend to go to their websites and hence, probabilities of notices being seen by people are much higher than newspapers. The authority should accordingly, consider dropping the requirement of publishing the notices on newspapers. TRAI may also consider some public place in its website where broadcasters/ MSO may upload the information about the network which it has issued disconnection notice

Issue 16:- PROHIBITION OF DPO AS AGENT OF BROADCASTERS

16.1 Whether the Regulations should specifically prohibit appointment of a MSO, directly or indirectly, as an agent of a broadcaster for distribution of signal?

16.2 Whether the Regulations make it mandatory for broadcasters to report their distributor agreements, through which agents are appointed, to the Authority for necessary examination of issue of conflict of interest?

The Hon'ble Supreme Court of India in Star India Pvt. Ltd. vs. Sea TV Network Pvt. Ltd. had the occasion to deal with this issue. The Supreme Court while holding that appointment of DMSOs as agent by the broadcaster, amounts to discriminatory behaviour, observed as under:-

"*Firstly, we do not find any error in the judgment which has held that in providing signals to a distributor through an agent who is also in turn a distributor is per se discriminatory. We agree with the contention of Mr. Rohtagi learned senior counsel that in the case of overlap of functions to be performed by each entity under the Interconnection Regulations like a Distributor, MSO, agent/ intermediary, one has to go by the facts of each case and the terms of Agreement between the broadcaster and his agent cum distributor. Every contract under the Interconnection Regulations has two aspects. One concerns the commercial side whereas the other concerns the technical side. There is no difficulty for the commercial side. If the broadcaster appoints an agent on the commercial side to collect the statistics of the number of subscribers or for distribution of Decoders there is no dispute. On the commercial side when an agent is appointed by the broadcaster that agent need not be from the Operation Network. Such an agent normally is not a technical service provider. The difficulty arises when the broadcaster as in the present case appoints or enters into an agreement with a distributor, who in turn is an MSO and who in turn has his own business because in such a case such an agent-cum-distributor is also a competitor of the MSO who seeks signals from the broadcaster. We are living in a competitive world today. If under the Interconnection Regulations an MSO is entitled to receive signals directly from a broadcaster, if directed to approach his competitor MSO then discrimination comes in. The reason is obvious. The exclusive agent of a broadcaster has his own subscriber base. His base is different from another MSO in the same territory. If that another MSO has to depend on the Feed to be provided by the exclusive agent of the broadcaster then the very object of the Interconnection Regulation stands defeated*."

Further it is also pertinent to deal here with the provisions introduced by the amendments dated 10.02.2014 (known as "Content Aggregator Regulation"). The Content Aggregator Regulation, introduced the definition of authorized agent/intermediary and broadcaster as:-

> *"(c) "authorised agent or intermediary" means any person including an individual, group of persons, public or private body corporate, firm or any organization or body authorised by a broadcaster or multi-system operator to make available its TV channels to a distributor of TV channels and such authorised agent or intermediary, while making available TV channels to the distributors of TV channels, shall always act in the name of and on behalf of the broadcaster or multi-system operator, as the case may be*"
>
> "*(g) "broadcaster" means a person or a group of persons, or body corporate, or any organization or body who, after having obtained, in its name, uplinking permission or downlinking permission, as may be applicable for its channels, from the Central Government, provides programming services;"*

Further, in order to prevent any abuse by the authorised agent/intermediary, TRAI introduced the obligations of the broadcaster as:-

> "***10. Composition of bouquet by the broadcasters.----*** *(1) Every broadcaster shall, within six months of the commencement of the Telecommunication (Broadcasting and Cable Services) Interconnection (Digital Addressable Cable Television Systems) (Third Amendment) Regulation, 2014, ----*
>
> *(a) ensure that bouquet of TV channels, contained in its Reference Interconnect Offer, is provided to the distributors of TV channels without any modification in its*

composition and such bouquet of TV channels, at the wholesale level, are not bundled with the bouquet or channels of other broadcasters:

Provided that a broadcaster may, while making a bouquet of TV channels, combine TV channels of its subsidiary company or holding company or subsidiary company of the holding company, which has obtained, in its name, the uplinking permission or downlinking permission, as may be applicable for its TV channels, from the Central Government and the broadcaster or any of such companies, authorized by them, may publish Reference Interconnect Offer for such bouquet of TV channels and sign the interconnection agreement with the distributors of TV channels;

Explanation: *For the purpose of these regulations, the definition of "subsidiary company" and "holding company" shall be the same as assigned to them in the Companies Act, 2013(18 of 2013).*

(b) publish its Reference Interconnect Offer to ensure compliance of the provision of clause (a);

(c) enter into new interconnection agreement; and

(d) file the Reference Interconnect Offer, referred to in clause (b) and interconnection agreement, referred to in clause (c) with the Authority.

(2) Every broadcaster, who begins its operations six months after commencement of the Telecommunication (Broadcasting and Cable Services) Interconnection (Digital Addressable Cable Television Systems) (Third Amendment) Regulation, 2014, shall ensure that the bouquet of channels, contained in its Reference Interconnect Offer, is provided to the distributors of TV channels without any modification in its composition

and such bouquet of TV channels, at the wholesale level, are not bundled with the bouquet or channels of other broadcasters".

It is pertinent to note here that principally there are two factors which determine the choice exercised by broadcasters; (i) the financial analysis of capital cost of providing IRDs vs. the subscription revenue expectation; and (ii) the potential impact of unfettered territorial expansion. In either case, the service providers would have to provide non-discriminatory terms and the commercial offer to the applicant-distributor would be the same. It follows that the agent/intermediary providing signal feed could be an MSO operating within the area of operations applied for. Where the authorized agent of the broadcaster denies signals to the broadcaster, the liability will now be on the broadcaster, since the authorized agent is now said to be acting in the name of the broadcaster. Further, the market should be allowed to operate in its own course. Should a broadcaster choose to appoint an MSO as its authorized agent, it would only do so with the interest of expanding their share of the market. Given the huge costs involved in setting up a distribution network, it is likely that the agents appointed by a broadcaster would be from the cable trade. Hence, any restriction on the appointment of DPO as authorized agent cannot be terms ad discriminatory, unless proved otherwise.

Issue 17:- INTERCONNECTION BETWEEN HITS/IPTV OPERATOR AND LCO

17.1 Whether the framework of MIA and SIA as applicable for cable TV services provided through DAS is made applicable for HITS/IPTV services also.

17.2 If yes, what are the changes, if any, that should be incorporated in the existing framework of MIA and SIA.

17.3 If no, what could be other method to ensure non-discrimination and level playing field for LCOs seeking interconnection with HITS/IPTV operators?

The present issue does not relate to us. However, it is being answered since the issue being raised is related to other players in the cable industry.

In our opinion, regulatory framework by way of 7th Amendment to DAS Regulations, 2012 provides as under:-

> *"(13) The multi system operator shall enter into a written interconnection agreement with the local cable operator for providing signals of TV channels to the local cable operator, on lines of the model interconnection agreement as set out in the Schedule IV of these regulations, by mutually agreeing on the clauses 10, 11 and 12 of the said agreement:*
>
> *Provided that the multi system operator and the local cable operator, without altering or deleting any clause of model interconnection agreement, may add, through mutual agreement, clauses to the model interconnection agreement, provided that no such addition shall have the effect of diluting any of the clauses as laid down in the model interconnection agreement:*
>
> *Provided further that in case the multi system operator and the local cable operator fail to enter into interconnection agreement as provided above in this sub-regulation, the multi system operator and the local cable operator shall enter into standard interconnection agreement as specified in Schedule-V of these regulations.*
>
> ***Explanation:** for removal of doubts it is clarified that in the event of any conflict between the terms and conditions of the prescribed model interconnection agreement and new terms and conditions added through mutual agreement by the parties, the terms and conditions of the prescribed model interconnection agreement shall prevail"*

The 7th Amendment has introduced the following clauses:-

> "*(13A) Every multi-system operator shall, within thirty days from the date of commencement of the Telecommunication (Broadcasting and Cable Services)*

Interconnection (Digital Addressable Cable Television Systems) (Seventh Amendment) Regulations, 2016, give a written option to all linked local cable operators to modify their existing agreements in accordance with the model interconnection agreement or standard interconnection agreement, as the case may be, and it shall be open to the linked local cable operator to modify their existing agreement within thirty days from the date of receipt of such option or continue with the existing agreement till its expiry and enter into the model interconnection agreement or standard interconnection agreement, as the case may be, thereafter.

(13B) Every multi-system operator shall, within a period of thirty days from the date of receipt of request from the local cable operator to provide the signals of TV channels, enter into an interconnection agreement in accordance with the terms and conditions of the model interconnection agreement or standard interconnection agreement, as the case may be."

The NSTPL judgment notes that-

"*Dr. Singhvi and some other counsel submitted that the HITS operator was different from other distributors of TV channels because it worked on a different distribution technology and referring to the Explanation to clause 3.6 sought to justify the different rates offered to the petitioner as compared to other distributors of channels. The explanation referred to is intended to clarify the expressions "all similarly based distributors of TV channels" occurring in clause 3.6 of the Regulations. According to the explanation, the factors on the basis of which similarity may be judged include geographical region and neighbourhood, having roughly the same number of subscribers, purchase of similar service, using the same distribution technology. It is contended that the HITS operator uses a distribution technology different from both the*

MSO and the DTH operator. The contention, however, ignores the second part of the Explanation that puts the difference based on distribution technology in two broad categories as under:

> *"For the removal of doubts, it is further clarified that the distributors of TV channels using addressable systems including DTH, IPTV and such like cannot be said to be similarly based vis-à-vis distributors of TV channels using non addressable systems."*

From the above it is clear that the difference based on technology relates to addressable systems and non-addressable systems and not between different technologies among the addressable systems."

Hence, in light of the above, we feel that the provisions relating to SIA and MIA should also be extended to interconnection between HITS/IPTV and LCOs as well in order to ensure that level playing field is maintained at all levels of broadcasting sector.

Issue 18:- TIME PERIOD FOR PROVIDING SIGNALS OF TV CHANNELS

18.1 Whether the time periods prescribed for interconnection between MSO and LCO should be made applicable to interconnection between HITS/IPTV operator and LCO also? If no, then suggest alternate with justification.

18.2 Should the time period of 30 days for entering into interconnection agreement and 30 days for providing signals of TV channels is appropriate for HITS also? If no, what should be the maximum time period for provisioning of signal to LCOs by HITS service provider? Please provide justification for the same.

In terms of the reference to the NSTPL as above specifically with respect to principle of parity, we feel that similar treatment should be extended to extended to HITS/IPTV operators for providing signals to the LCOs, since only an additional requirement of certain technical requirement is to be fulfilled which may be adjusted within the stipulated time period of 60 days only.

Issue 19:- REVENUE SHARE BETWEEN HITS/IPTV OPERATOR AND LCO

19.1 Whether the Authority should prescribe a fall back arrangement between HITS/IPTV operator and LCO similar to the framework prescribed in DAS?

19.2 Is there any alternate method to decide a revenue share between MSOs/ HITS/IPTV operators and LCOs to provide them a level playing field?

The mandate of the NSTPL judgment is that level playing field needs to be maintained at all times in order to comply with the principles of parity and non-discrimination. Since regulatory framework are already there that guide the relationship between the MSOs and the LCOs when it comes to revenue sharing, we feel that the similar arrangement may also be extended for relation between HITS/IPTV operator and LCO, when it comes to revenue sharing between the parties.

Issue 20:- NO-DUES CERIFICATES

20.1 Whether a service provider should provide on demand a no due certificate or details of dues within a definite time period to another service provider? If yes, then what should be the time period?

The regulatory framework provide for the issuance of invoices clearly indicating the arrears in order to inform the distributor about its liability. However, at times, the service provider does not mention the arrears in the invoice and this causes a problem to the distributor when it shifts to other service provider. In this light, we feel that a service provider should be mandated to provide No Dues Certificate within a period of 15 days from the date of request. However, there might be situations where due to issues in reconciling of the accounts, some delay may occur, in such circumstances, the service provider should give an undertaking to the effect that subject to reconciliation of accounts, there are no dues as on the date of expiry of 15 days. If

after the reconciliation accounts, any amount is found to be due to be paid by the distributor, then the service provider may approach the authority for redressal of its grievance.

Issue 21:- PROVIDING SIGNALS TO NEW MSOs

21.1 Whether it should be made mandatory for the new MSO to provide the copy of current invoice and payment receipt as a proof of having clear outstanding amount with the last affiliated MSO?

21.2 Whether the broadcaster should be allowed to deny the request of new MSO on the grounds of outstanding payments of the last affiliated MSO?

Proviso to Clause 3.2 of the DAS Regulations, 2012 provides that any MSO who is in default of payment is not entitled to signals. Clause 3.2 along with the Proviso reads as:-

> "*3.2 Every broadcaster shall provide signals of its TV channels on non-discriminatory basis to every multi system operator having the prescribed channel capacity and registered under rule 11 of the Cable Television Networks Rules, 1994, making request for the same.*
>
> *Provided that nothing contained in this sub-regulation shall apply in the case of a multi system operator who is in default of payment*."

There are also situations where sometimes LCOs break away from their affiliated MSO to start MSO business of their own, when they are either unable or unwilling to pay their outstanding dues to their affiliated MSO. This results in bad debts for their affiliated MSOs leading to the latter's inability to pay broadcasters for the LCOs portion of dues. On the other hand, in the absence of regular issue of invoices, the LCOs are suddenly confronted with huge arrears, which they have no means of paying. The problem can be tackled by ensuring that the LCOs are issued invoices on a monthly basis clearly showing the arrears as well as the current dues. In such a situation, if an LCO wants to switch to a new MSO, then the latest invoice would

clearly show the level of arrears outstanding against the LCO. At the same time this will protect the LCO from unexpected and unforeseen arrears being suddenly thrust upon him. Apart from this, additional litigation cost is also to be borne by the party who has been defaulted against.

In order to ensure that the liability of one defaulter is not borne by any other party, TRAI must clarify the Proviso to the Clause 3.2 of the Regulations.

Further, it should also be clarified in the regulation that the various incentive scheme that a broadcaster might offer, will not be available to the defaulter of payments.

Issue 22:- SWAPPING OF SET TOP BOX

22.1 Whether, it should be made mandatory for the MSOs to demand a no dues certificate from the LCOs in respect of their past affiliated MSOs?

22.2 Whether it should be made mandatory for the LCOs to provide copy of last invoice/ receipts from the last affiliated MSOs?

In our opinion, it should be made mandatory for the MSOs to demand a no dues certificate from the LCOs in respect of their past affiliated MSOs and obligation should be cast upon the LCOs to provide copy of last invoice/ receipts from the last affiliated MSOs.

Issue 23:- ANY OTHER RELEVANT ISSUE THAT THEY MAY DEEM FIT IN RELATION TO THIS CONSULTATION PAPER.

None