# TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL
# NEW DELHI

**DATED 27TH FEBRUARY, 2007**

## Appeal No.10(C) of 2006

SET Discovery Private Limited …Appellant
Interface, Building No. 7
3rd Floor, Malad Link Road
Malad (West), Mumbai-400064

Vs.

1. Telecom Regulatory Authority of India
Mahanagar Door Sanchaar Bhawan,
Jawahar Lal Nehru Marg,
Old Minto Road, New Delhi-110002. …Respondent No. 1

2. Indus Ind Media and Communications Limited
Through its Executive Director
49/50 MIDC, In Centre, Marol,
Andheri(East), Mumbai-400093. …Respondent No. 2

3. Hathway Cable & Datacom Private Limited
Through Mr. Vijay Mandhayan
Head – Legal
"Rahejas", 4th Floor,
Corner of Main Avenue & V.P. Road
Santa Cruz (West), Mumbai-400 054 …Respondent No. 3

**BEFORE:**

**HON'BLE MR. JUSTICE ARUN KUMAR, CHAIRPERSON**
**MR. VINOD VAISH, MEMBER**
**LT.GEN.D.P.SEHGAL(RETD.),MEMBER**

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| For Appellant | : | Mr. Iqbal Chagla, Senior Advocate, with<br>Mr.ASPI Chenoy, Senior Advocate,<br>Mr.Gopal Jain,<br>Mr.Anup Bhambhani,<br>Ms.Mridul Sharma,<br>Ms.Divya Kesar,.Advocates |
| For Respondent No. 1 | : | Mr. Rakesh Diwedi, Senior Advocate with<br>Mr.Meet Malhotra,<br>Mr.Raghvinder Singh,Advocates |
| For Respondent No. 2 | : | Dr. Abhishek M. Singhvi, Sr. Advocate with<br>Mr.A.N.Haksar, Sr. Advocate<br>Mr.Manjul Bajpai,<br>Mr.Arun Kathpalia,<br>Mr.Aditya Awasthi,<br>Ms.Payal Kakra,Advocates |

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| For Respondent No. 3 | : | Mr.Ramji Srinivasan with<br>Mr.Vibhav Srivastava,<br>Mr. Kunal Tandon<br>Mr.Arjun Suresh,<br>Ms. Darakshan Tarannum<br>Mr.Vikas Mehta,Advocates |

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**With**

**Appeal No.12(C) of 2006**

1. M/s ESPN Star Sports
151, Lorong Chuan
# 03-01, New Tech Park
Singapore – 556741
Through its Constituted Attorney
Mr. Vijay Rajput …Appellant No. 1

2. M/s ESPN Software India Private Limited
7th Floor, Tower C, Infinity Towers,
DLF Phase-II, Gurgaon-122 002 …Appellant No. 2

Vs.

1. Telecom Regulatory Authority of India
Mahanagar Door Sanchaar Bhawan,
Jawahar Lal Nehru Marg,
Old Minto Road, New Delhi-110002. …Respondent No. 1

2. Hathway Cable & Datacom Private Limited
Through Mr. Vijay Mandhayan
Head – Legal
"Rahejas", 4th Floor,
Corner of Main Avenue & V.P. Road
Santa Cruz (West), Mumbai-400 054 …Respondent No. 2

3. M/s Indus Ind Media and Communications Limited
315 G, New Charni Road,
Next to Hinduja College
Mumbai-400004. …Respondent No. 3

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| For Appellants | : | Mr..N.Ganpathy,Advocate |
| For Respondent No. 1 | : | Mr. Rakesh Diwedi, Sr. Advocate with<br>Mr.Meet Malhotra<br>Mr.Raghvinder Singh,Advocates |
| For Respondent No. 2 | : | Mr.Ramji Srinivasan with<br>Mr.Vibhav Srivastava, Mr.Arjun Suresh,<br>Mr. Kunal Tandon,<br>Ms. Darakshan Tarannum,<br>Mr.Vikas Mehta,Advocates |

For Respondent No. 3 : Dr. Abhishek M. Singhvi, Sr. Advocate with
Mr.A.N.Haksar, Senior Advocate
Mr.Manjul Bajpai, Mr.Arun Kathpalia,
Mr.Aditya Awasthi,
Ms.Payal Kakra,Advocates

**With**

**Appeal No.13(C) of 2006**

1. M/s ESPN Star Sports
151, Lorong Chuan
# 03-01, New Tech Park
Singapore – 556741
Through its Constituted Attorney
Mr. Vijay Rajput …Appellant No. 1

2. M/s ESPN Software India Private Limited
7th Floor, Tower C, Infinity Towers,
DLF Phase-II, Gurgaon-122 002 …Appellant No. 2

Vs.

1. Telecom Regulatory Authority of India
Mahanagar Door Sanchaar Bhawan,
Jawahar Lal Nehru Marg,
Old Minto Road, New Delhi-110002. …Respondent No. 1

2. Hathway Cable & Datacom Private Limited
Through Mr. Vijay Mandhayan
Head – Legal
"Rahejas", 4th Floor,
Corner of Main Avenue & V.P. Road
Santa Cruz (West), Mumbai-400 054 …Respondent No. 2

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3. M/s Indus Ind Media and Communications Limited
315 G, New Charni Road,
Next to Hinduja College
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For Appellants : Mr.N.Ganpathy,Advocate

For Respondent No. 1 : Mr. Rakesh Diwedi, Sr. Advocate with
Mr.Meet Malhotra
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For Respondent No. 2 : Mr.Ramji Srinivasan with
Mr.Vibhav Srivastava, Mr.Arjun Suresh,
Mr.Vikas Mehta,Advocates

For Respondent No. 3 : Dr. Abhishek M. Singhvi, Sr. Advocate with
Mr.A.N.Haksar, Senior Advocate
Mr.Manjul Bajpai, Mr.Arun Kathpalia,
Mr.Aditya Awasthi,
Ms.Payala Kakra,Advocates

## ORDER

These appeals have been filed under Section 14(b) of the Telecom Regulatory Authority of India Act, 1997 (hereinafter referred to as TRAI Act) challenging the notifications dated 24.8.2006 and dated 31.8.2006 issued by the Telecom Regulatory Authority of India (for short TRAI). The impugned notification dated 24.8.2006 amends the Interconnection Regulations dated 10.12.2004. By virtue of the amendment, the broadcasters get 45% share in the revenue while Multi System Operators (MSOs for short) and Local Cable Operators (LCOs for short) get the balance 55%. Further, a standard Interconnect Agreement has been provided for, which is to operate if the parties fail to arrive at interconnect agreement mutually within the stipulated period. By the impugned notification dated 31.8.2006, the TRAI has prescribed a maximum retail price of Rs. 5/- per pay channel per month per subscriber.

The appellant in Appeal No. 10(C) of 2006 (SET Discovery Pvt Ltd) claims to be a company engaged in the business of distributing television channels while the respondent is the Telecom Regulatory Authority constituted under the TRAI Act. The appellant in the other two appeals, namely Appeal No. 12(C) of 2006 and Appeal No. 13(C) of 2006 are common, i.e., M/s ESPN Star Sports and Anr. In Appeal No. 12(C) of 2006, the notification dated 24.8.2006 has been challenged while in Appeal No. 13(C) of 2006 the notification dated 31.8.2006 has been challenged. Thus, all the three appeals challenge the notifications dated 24.8.2006 and 31.8.2006 respectively issued by the TRAI. Therefore, they can be disposed of by this common Order.

At the outset, it may be mentioned that though the appellants have challenged the power and jurisdiction of the TRAI to issue the impugned notifications, yet in these appeals this aspect has not been agitated and the case is confined to the challenge to the notifications on merits. The challenge in these appeals is regarding the manner of exercise of power by the TRAI while issuing the impugned

Notifications. The learned Counsel appearing for the appellants fairly stated that the issue of power and jurisdiction of the TRAI to issue the impugned notifications was the subject matter of writ petitions filed before the Delhi High Court and therefore this was not being agitated before us.

The appellant in Appeal No. 10(C) of 2006 claims to be engaged in the business of distribution of television channels while the appellants in Appeals Nos. 12(C) of 2006 and 13(C) of 2006 are the broadcaster and distributor of television channels – ESPN and Star Sports. The appellant in Appeals Nos. 12(C) of 2006 and 13(C) of 2006 claims that its channels enjoy high popularity in India and today it has over 26 million subscribers across India, although it receives payments for only about 5 million subscribers.

The Ministry of Information & Broadcasting, Govt. of India issued a notification dated 31.7.2006 under Section 22 of the Cable Television Networks (Regulation) Act, 1995 to amend Cable Television Network Rules, 1994 to provide for implementation of the Conditional Access System (CAS). Broadly the notification required:

(i) Broadcaster to declare the channel as "Pay" or "Free to Air" and the maximum retail price of each of their channels to be charged either by the MSOs or local cable operators (LCO) from the subscribers in the notified areas.

(ii) Subscribers desiring to receive Set Top Boxes shall apply for the same directly to the MSO or through the LCO. In connection with implementation of CAS, the respondent issued the impugned notification dated 24.8.2006 which seeks to amend the Interconnection Regulations of 10.12.2004. This notification provides :

  (a) Prohibition of minimum guarantee clause in an interconnection agreement with a distributor providing services through an addressable system.

  (b) Standard forms of Interconnection Agreement to be executed between the broadcasters and MSOs on the one hand and between MSOs and LCOs on the other when they are unable to arrive at mutually agreed terms and conditions within the stipulated time.

  (c) Revenue sharing between the broadcasters, MSOs and LCOs in the proportion of 45%, 30% and 25% respectively.

On August 31, 2006, the respondent issued another notification in exercise of powers conferred upon it under Section 11(1)(b) of the TRAI Act titled, "The Telecommunication (Broadcasting And Cable) Services (Third)(CAS Areas) Tariff Order, 2006". The salient provisions of this order are :-

(i) It shall be mandatory for the broadcasters to offer pay channels on a-la-carte basis (offering channel on a stand alone basis). In addition to the a-la-carte offer, pay channels can also be offered in the form of bouquets (bundle of channels).

(ii) In CAS, the ceiling in respect of maximum retail prices payable by a subscriber to MSO/LCO shall be Rs. 5/- per pay channel per month (exclusive of taxes).

(iii) A subscriber shall pay the maximum retail price of the pay channel for four (4) months if he subscribes to a pay channel for a period of less than four (4) months.

(iv) The broadcaster is obliged to file a report by October 12, 2006, declaring the maximum retail price, effective from December 31, 2006 fixed by it for its pay channels.

The appellants allege that the impugned notifications have the effect of destroying their business model by rendering their business unviable. They are particularly aggrieved by fixation of Rs. 5/- per month per subscriber as the maximum retail price per pay channel. The appellants are also aggrieved by the revenue sharing order under which they get 45% of the revenue while the rest 55% is shared between the MSOs and LCOs. The appellants urge that their share in revenue ought to have been more as they provide the content for the channels.

Before we proceed to examine the points raised by the appellants in support of their challenge to the impugned notifications, we would like to place on record that the impugned Notifications pertain only to the areas where the conditional access system has been introduced. The learned counsel appearing for the appellants stated at the Bar that the appellants are not opposed to introduction of the Conditional Access System (CAS). They are aggrieved of the impugned notifications, in so far as they affect their right to prescribe rates for their channels and to decide about revenue sharing with MSOs and LCOs.

The notification dated 31.8.2006 is challenged on the following grounds :

(i) Section 11(2) of the TRAI Act under which the impugned notification has been issued is a general provision while Section 4A of the Cable Television Networks (Regulation) Act, 1995 is a special provision which does not talk of such regulation. Section 4A is a subsequent

legislation. Therefore, in the presence of Section 4A of the Cable Television Networks (Regulation) Act, 1995, Section 11(2) of the TRAI Act, which is a general provision, could not be invoked.

(ii) The fixation of tariff at Rs.5/- per pay channel per month per subscriber was perverse, arbitrary, unreasonable and was in violation of principles of natural justice.

So far as the challenge to notification dated 24.8.2006 is concerned, the following points were raised:

Cable service is neither essential commodity nor an essential service and therefore the freedom to contract in a free trade and business regime should not have been curtailed or interfered with. The notification dated 24.8.2006 provides a short time of 10 days for negotiating and arriving at mutually acceptable interconnection agreement and it prescribes that in the event of failure to do so within 10 days, the standard Interconnection Agreement in Schedule-I (between broadcaster and MSO) and in Schedule-II (between MSO and Cable Operators) shall be entered into. The period of 10 days allowed for freedom to contract is too short and it virtually amounts to compelling the parties to adopt the standard Interconnection Agreement prescribed under the Notification.

In support of the argument that Cable broadcasting is not an essential commodity and unless there is specific legislative intent to regulate it, there should have been no regulation, the submission is that there is no clear and specific legislative intent permitting regulation. We are unable to accept this submission. Cable broadcasting may not be an essential commodity in the sense that it is not an item of food without which one cannot survive, yet looking to the figures of TV viewership in this country its importance cannot be underestimated. Available figures suggest a TV viewership of 68 million for the whole country. This shows that television viewing has almost attained the status of an essential service in this country. This viewership figure brings in the need for protection of consumer interests. The Parliament realizing this importance and the need to regulate the industry, amended the TRAI Act to enable the Regulatory Authority to bring broadcasting within the sweep of the Act. After the amendment of the Act in the year 2000, broadcasting has been included within the definition of "telecommunication services" under the act which enables the TRAI to regulate the broadcasting service. Section 11 (2) of the Act empowers the Authority to prescribe rates for telecommunication

service. This provision is very clear and leaves no scope for the argument that there is absence of clear intent to regulate. Section 11 (2) reads as under:

> "Notwithstanding anything contained in the Indian Telegraph Act, 1885 (13 of 1885), the Authority may, from time to time, by order, notify in the Official Gazette the rates at which the telecommunication services within India and outside India shall be provided under this Act including the rates at which messages shall be transmitted to any country outside India:
>
> Provided that the Authority may notify different rates for different persons or class of persons for similar telecommunication services and where different rates are fixed as aforesaid the Authority shall record the reasons therefore."

In our view the legislative intent is clear and it recognizes the need to regulate this particular service. Therefore, we are unable to accept the argument that there is no clear legislative intent which enables the authority to issue impugned notifications.

The invocation of Section 11 (2) of the TRAI Act for issuing the impugned notification is under attack on yet another ground. It was argued on behalf of the appellants that Section 11 (2) of the TRAI Act is a general provision and while Section 4A of the Cable Television Network (Regulation) Act, 1995 (CTN Act for short), is a special provision for broadcasting service. Therefore, Section 11(2) stands ousted. It is to be noted that the doctrine "Generalia Specialibus Non-derogant" i.e. special excludes the general, is attracted only in the event of conflict between the two provisions. In the present case this doctrine is not attracted because there is no conflict between the two provisions. Rather the two statutes complement each other. Section 11 (2) empowers the Telecom Regulatory Authority to notify the rates at which telecommunication services within India and outside India are provided. The words 'telecommunication services' include broadcasting services in view of notification of the Central Government which it is authorized to issue under proviso to clause (k) of sub-section (1) of Section 2 of the TRAI Act. On the other hand Section 4A of the CTN Act, does not contain any such provision. It only contains a provision in sub-section (4) of Section 4A whereby the Central Government can specify maximum amount which a cable operator may demand from the subscriber for receiving programmes transmitted in the basic service tier (free to air channel) provided by such cable operator. The present is a case of prescribing rates chargeable by the broadcasters for pay channels. There is no provision in the CTN Act which regulates the service rendered by the broadcaster and the MSO in the pay channels regime. Moreover, Section 2(k) of the TRAI Act was amended with effect from 24.1.2000 whereas Section 4A was inserted in the CTN Act, w.e.f. 31.12.2002. Thus Section 4A is a subsequent legislation. Section 4A does not tread the field

occupied by Section 11(2). Both the statutes complement each other. We are unable to accept the argument that the impugned notifications could not have been issued under Section 11 (2) of the TRAI Act.

It was also argued that Section 4A was introduced in the CTN Act in 2002, i.e., subsequent to the amendment of the TRAI Act in the year 2000 which enables the inclusion of cable broadcasting service within the sweep of the Act. From this the argument was sought to be developed that Section 4A deals with only Free to Air Channels (FTA) and this means that there was no intention to regulate pay channels. The submission is that Section 4A is a subsequent legislation, which covers only the free to air channels. This shows that the Parliament never intended to regulate the pay channels. In our view the argument appears to be too far fetched. Section 11(2) of the TRAI Act was already there which provided for regulation of telecommunication services by the TRAI. Pay channels are part of such services. There was already a provision at least from the year 2000 onwards when the TRAI Act was amended, permitting inclusion of cable broadcasting service within the meaning of the word 'telecommunication services'. This provision permitted regulation of pay channels by the Authority. When there was already a provision for regulation of pay channels, there was no need for provision being made under Section 4A of the CTN Act for same purpose. Thus, we find no merit in this argument.

Introduction of a standard format of the interconnect agreement as prescribed by the Authority has been seriously challenged. It was argued that this it curtails freedom to contract. The learned counsel for the appellants submits that in the contractual regime there is complete freedom for the parties to agree upon mutually accepted terms and conditions and there is no scope for interference by way of prescribing a standard format of agreement. So far as this argument of complete freedom to contract is concerned, first we have to note that the prescribed interconnect agreement comes into play only after the parties fail to reach an agreement on their own for which they have complete freedom. Ten days time has been allowed to parties to negotiate. If they fail to arrive at an agreement within ten days, the prescribed agreement has to be entered into. The appellants argued that this period of 10 days is too short. We need not go into whether this period is short or whether it is sufficient. Parties may approach the TRAI for extension of the period. Secondly, Rule 10 (4) of the CTN Rules, 1994 requires prescription of a standard interconnect agreement by the Authority which the broadcasters and the MSOs have to enter into in case they fail to arrive at a mutually accepted agreement. The TRAI has carried out the mandate of the Rule. The Rule is not challenged.

Coming to the argument regarding curtailment of freedom to contract, Article 19 (1) (g) of the Constitution gives the parties a freedom to trade which includes freedom to contract. However, this freedom is subject to reasonable restrictions. Even at the Common Law, there was never any absolute freedom to contract, for instance, nobody could enter into a contract to do an illegal act. As the society grew, need for regulation gradually increased and inroads were made in the freedom to contract. Article 19 permits 'reasonable restrictions' being imposed in the domain of freedom of contract. The TRAI Act and the CTN Act are both primary legislations which purport to regulate the broadcasting service. They provide for reasonable restrictions. The regulation is in the interest of society. There is no challenge to these statutes. The legislation permits curtailment of freedom to contract. It is settled law that freedom of contract is not available in absolute terms and it can be curtailed by legislation for justifiable reasons. Power to regulate allows reasonable restrictions on freedom to contract. The argument, therefore, is without any merit and, therefore, has to be rejected.

The main grievance of the appellants about the standard agreement prescribed by the TRAI is about revenue sharing proportion contained therein which is 45% for broadcasters and remaining 55% to the MSOs and LCOs. The broadcasters say that their share should have been more. The respondents as well as those who were impleaded as parties in these appeals have given global figures showing that the share of the broadcasters elsewhere in the world is less than 45%. The figures of viewership in this country are so enormous that they give a huge revenue to the broadcaster even if the percentage of revenue sharing is not as per the desire of the broadcasters. The vast population of this country gives a big financial benefit to the broadcasters. Moreover, the broadcasters have themselves admitted that 70-80% of their revenue comes from advertisements which income is entirely theirs and which they are not liable to share with anybody. The dispute remains about sharing of remaining 20%. For this 20% of the total revenue, the broadcasters are forgetting that in the CAS regime they will have 100% declaration of the subscriber base as against 20% declarations, as per their own case, in the non CAS regime. Thus, the broadcasters stand to gain from every angle. Besides the advertisements revenue, the broadcasters also generate revenue from SMSs and sale of world rights of their programmes outside the country. Such incomes are not being affected. The decision about revenue sharing was taken by the TRAI after detailed consultation in which all the stakeholders in the industry had participated. This is also to be noted that the impugned standard form of interconnect agreement is applicable only in the CAS areas which is hardly 2 – 3% of the total country-wide viewership. All this shows that the argument of the appellants in this behalf is one-sided as it conceals the real position. We venture to say that the appellants are intentionally

trying to mislead. The facts are being held back in order to project a totally misleading picture. We reject these arguments.

The main attack of the appellants is directed towards fixation of tariff at the rate of Rs.5/- per channel per subscriber per month by the TRAI vide the impugned notification dated 31.8.2006. The argument is that the process by which the Authority arrived at the figure of Rs.5/- is wholly arbitrary, perverse and violative of principles of natural justice. It is also alleged that there is total non application of mind on the part of the Authority in this behalf. Besides arguing that there has been no sufficient discussion between the Authority and the various other stakeholders, the appellants have tried to demonstrate that the figure of Rs.5/- notified by the Authority could not have been reached by any reasonable method, therefore, it is said that the figure is without any basis. According to the appellants, the Authority has not disclosed any methodology by which this figure was arrived at. In the same light the argument of violation of principles of natural justice and fair play has been raised. The appellants tried to demonstrate by attempting different modes of calculation that the figure of Rs.5/- was not possible to reach. The appellants spared no effort in criticizing the rate fixed by the TRAI for pay channels at Rs.5/- per channel per subscriber per month. It was agreed that except criticizing the decision of the TRAI and the manner in which it was reached through bald statements, the appellants and other broadcasters did nothing to help the TRAI in its exercise. There was total non-cooperation on the part of broadcasters before the TRAI at the stage of discussions which preceded issuance of the impugned notifications. It is the same approach before us. It is a purely negative approach. No positive suggestion was forthcoming from their side which could enable the TRAI to reach a better or more practical solution to the problem. The broadcasters failed to produce before the TRAI any material to suggest what could be a reasonable rate for the pay channels. So much so that when the TRAI required the broadcasters to place before it their respective MRP (maximum retail prices) for the pay channels, they did not respond. Some broadcasters gave wholesale prices of their channels which could not be a guide for the exercise undertaken by the TRAI for fixing rate for pay channels for the subscribes. The TRAI had to keep the consumer interest in mind. The appellants insisted before the TRAI as also before us that there should be no regulation at all and the matter should be left to the market forces which would find proper prices. In a situation of the present kind, we do not think that the matter could be left to the market forces. The TRAI was, in our view, right in regulating the trade for areas where Conditional Access System (CAS) was being introduced. As per statistics available, at present there are more than 68 million TV viewers in

India. The CAS was being introduced in specified areas of metropolitan cities of Delhi, Kolkata and Mumbai which will cover roughly 1.5 million viewers. These viewers could not be left at the whims and fancy of the broadcasters. The appellants have been vehemently suggesting that Chennai model of CAS should have been followed as in Chennai there is no regulation. The TRAI had gone into this aspect and found the Chennai model would be unworkable because in Chennai the ground realities were different. In Chennai, 4 out of 5 channels popularly viewed by the viewers were free to air channels. The pay channels had very limited, rather nominal viewership because they were very expensive. The pay channels through CAS had less than 4% of viewership and the main reason given for this was the high price of the pay channels. A very important factor is that consumer preferences in Chennai are different as compared to consumer preferences in the North. Pay channels are very popular in North while it is not so in South.

Respondent, TRAI has explained everything by attaching an Explanatory Note to the impugned Notification. According to the Note, in the given circumstances certain amount of guess work was essential. The Regulator explains that it has done its best in making an objective assessment of the rates for the pay channels. It had to strike a balance between the interest of the broadcasters and of the consumers. About the Chennai model it has observed that it does not offer a fair solution because Chennai rates are very high. Moreover, the retail prices of the popular pay channels had so much variation in range that a workable figure could not be reached. The following table shows the procedure followed by the TRAI before issuing the impugned notification:

| Date | Particular |
|---|---|
| 14.06.2006 | Press Release No.56 of 2006 and draft consultation paper on proposed Tariff Order for CAS areas |
| 05.07.2006 | Last date for submission of comments on the proposed Tariff Order for CAS areas. |
| 11.07.2006 | Press Release No.65 of 2006 and Gist of 15 Comments received *inter-alia,* from various stakeholders and consumer organizations. |
| 20.07.2006 | Last date for the broadcasters to submit wholesale/ retail prices of channels both on |

| | |
|---|---|
| | an a-la-carte basis and bouquets of channels for the CAS areas. |
| 27.07.2006 | Open House in Delhi was organized by TRAI. |
| 31.07.2006 | Government of India issued Notification amending Cable Television Networks (Second Amendment) Rules, 2006 (**"Amended Cable TV Rules"**). |
| 15.08.2006 | Last date for submission of a-la-carte price by broadcasters for CAS notified areas. |
| 31.08.2006 | Tariff Order for CAS notified areas. |
| Sept., 2006 | Directions issued by TRAI under Sec 13 of the TRAI Act. |

Even the Central Government through its nodal Ministry i.e. the Ministry of Information and Broadcasting, periodically called meetings of various stakeholders including the appellants herein in connection with implementation of CAS. Every effort was made by the respondents to elicit the views of the broadcasters.

It may be seen from the above table that the TRAI sought various information and suggestions from the broadcasters, particularly about the reasonable prices for their pay channels. Despite such requests, the broadcasters, including the appellants, refused to come forward and give reasonable prices. They did not even supply figures of MRP they proposed to charge from the consumers. They gave wholesale prices which were much higher than the prevailing prices. Without regulation the effort to introduce CAS would have derailed. The broadcasters were evasive in their response before the TRAI. It is obvious that they did not want to commit themselves and, therefore, they adopted such a negative approach. Ultimately, the TRAI had to fix the MRP taking into consideration several factors and keeping the consumer interest in view.

In fact, the entire argument on behalf of the appellants about the rate for pay channels fixed by the TRAI being low is difficult to accept. The broadcasters have at several places and in several forums stated that 70% to 80% of their total revenue comes from advertisements. Besides this they make money from SMSs and sale of international broadcasting rights of their programmes. Secondly, and more importantly out of the figure of 68 million TV viewership in the entire country, the impugned notifications for CAS areas affect only 1.5 million viewers which is not even 3% of the

total viewership in the country. Therefore, the impugned notification affects a miniscule of total viewing population in the country and cannot be said to be having much impact on the total income of the broadcasters. Thirdly, in the CAS regime there will be 100% declaration of the number of subscribers. This is to be contrasted with the figure admitted by the broadcasters themselves of 20% declaration of subscriber base in non-CAS regime. Thus whatever revenue they will now earn from viewership will be 100% as against 20% in the non CAS regime. The appellants' statement that their business model is likely to get wiped out is totally incorrect. Except that a bald statement has been made, no facts or figures have been stated in support of this plea. For all these reasons the argument by the broadcasters about losses is only intended to mislead. We find no merit in the argument and reject the same.

When a new system is being introduced and there is total lack of experience of past practice, some element of guesswork is bound to be there. The TRAI has done its best to reduce the guesswork which is clear from the steps it undertook before issuing the impugned Notifications. The TRAI is conscious of this difficulty and it has at several places in the Explanatory Note as well as in the affidavit filed before us, stated that the exercise was experimental and it has to undertake a review in the light of experience gained. The TRAI admits that the data available for the present was not very reliable and actual operation of CAS would furnish more accurate data and the TRAI would revisit the issue. It is a transient provision which will be open for review. The appellants should have had patience and waited for the TRAI's review.

It appears that the TRAI has proceeded to fix Rs.5/- per channel per subscriber per month on the basis of a market survey commissioned in the year 2004 which showed that an average monthly cable bill per household was Rs.176/-. The monthly price of basic tier service (free to air channel) was fixed at Rs.77/-. Survey shows that people watch on an average about 20 channels which includes free to air channels. In non CAS areas viewers watch only one Free to Air channel out of five channels. This shows that in all about 16 Pay channels are normally watched. 16 Pay channels @ Rs.5/- per channel gives the figure of Rs.80/- per month. Thus Rs.5/- per pay channel per subscriber per month appears to be reasonable for the present, keeping in view the fact that a subscriber will have to pay at least Rs.30/- per month for service tax and will also pay rent for the set top box.

Before we refer to certain portions from the explanatory note appended to the notification dated 31.08.2006 by the TRAI to show the justification for the measure contained in the impugned notifications, we would like to note that the Authority has repeatedly observed that several attempts were made to elicit responses from various stakeholders on the matter under consideration but there was complete lack of cooperation from the side of the broadcasters, so much so that they were not even prepared for the MRP for the pay channels. It is only the broadcasters who would know their cost and what they would like to charge for their respective pay channels. This information was exclusively within their possession which they failed to give. Even in these appeals or in the course of oral arguments, the appellants never came out with any facts and figures about their cost and about what minimum they were willing to charge for each pay channel.

On the need for regulation the TRAI has observed that:

> "The fundamental principle of regulation is to allow the market forces to work and to ensure a level playing fields amongst various service providers at the same time whenever the Regulator considers that there is not enough competition in the market, regulatory intervention is required to protect the interests lf the subscribers. This fundamental principle has been kept in mind by the Authority while finalizing this tariff order. The Authority would closely monitor the developments in the market and as the level of competition increases a review of the tariff regime would be considered.
>
> Price regulation is justified when markets fail to produce competitive prices. When markets are competitive and are said to function smoothly, they will lead to "efficient" prices that maximize value to consumers. For this efficient ideal competitive situation to be realized, the market must meet a number of conditions. These conditions include that the market must have several suppliers and consumers with none so large as to affect prices. There should also be free entry to and exit from the market. Where all these conditions are not present, the market will not generally produce optimal results. In such a situation, there is justification for intervention by the Regulator to improve social welfare. The introduction of price regulation in any market is one such intervention necessitated on account of lack of adequate competition in the market. Such market failures are caused by a number of factors.
>
> In the case of cable television sector in India, historically, there has been lack of effective competition and lack of choice to the subscribers. Cable services, particularly the last mile operations, are in the nature of monopoly market in India. Although, the cable TV industry is fragmented, it is characterized by a few dominant broadcasters and large Multi System Operators (MSOs) with some of them having vertically integrated operations, resulting in unequal bargaining powers amongst various players in the supply chain.
>
> The slow pace of growth of the alternative modes of delivery of television services is one of the major factors responsible for the lack of competition in the market. Coupled with the unequal bargaining powers amongst various players as explained above, the sector witnessed rampant disconnection disputes, numerous billing and payment disputes, allegations of discriminatory practices in pricing and unfair trade practices in the last few years resulting in considerable litigation in the courts of law. This affected the interests of subscribers as they did cot nave effective choice of delivery platforms, choice of operators of choice lf channels.
>
> The introduction of CAS provides subscribers with a degree of choice that they did not have so far. The CAS also brings in the transparency in the system and meets the ultimate objective of bringing in addressability in the system. However, the effectiveness of the CAS to the consumer largely depends upon the manner in which the channels are made available to the consumers by the broadcasters/operators. In a market which is considered to be lacking in competition, it is necessary to

ensure that choice of individual channels is available to the subscriber within this addressable system i.e CAS. With this end in view, the Ministry of Information and Broadcasting vide their Notification sated 31st July, 2006 have mandated transmission/ re-transmission of the programmes of every pay channel through an addressable system in the notified arcas."

As per the Note, in making the transition from non CAS to CAS as smooth as possible, the Authority has been guided by the following considerations:

"a) The subscribers should have the option of viewing the free to air channels at an affordable price without making any other payment for set top box, etc.

b) The subscribers who wish to see the pay channels should be able to get a STB on reasonable terms and also have an option to exit the service if they find it not satisfactory.

c) The subscribers having spent their money on acquiring a STB should in return get the freedom to choose individual pay channels rather than buy a large bouquet of channels that contains channels that he / she does not wish to watch. Further, the tariff applicable to such pay channels should be affordable to the subscriber.

d) The need to facilitate the industry to move to a new era where there is greater transparency and reduction tin the scope of disputes amongst the stakeholders particularly between broadcasters / distributors and MSOs / cable operators ( COs).

Thus, the Authority believes that the framework of tariff regulation for the basic service tier ( FTA channels), STB rental scheme and pay channel prices should be to the benefit of not just the consumers but also the industry as a whole."

While considering the pricing aspect of pay channels, the TRAI understood that the choice of watching select pay channels did not actually rest with the consumer on account of the market practice of bundling channels in a manner where the subscribers did not have a real option to choose channels on a-la-carte basis. The consumer groups and the operators brought to the notice of the TRAI the fact of proliferation of pay channels and the system of bundled services wherein subscribers were forced to pay for channels they did not wish to watch. It was said that popular channels were packaged with less popular channels on 'take it or leave it' basis. The Respondent, TRAI noted that one of the main reasons for failure of earlier efforts to implement CAS was the absence of a predictable mechanism to regulate the prices of pay channels in CAS scenario. Therefore, it was felt that at least in the initial stages there should be some form of regulation of prices of individual pay channels. For this purpose the TRAI initiated a consultation process of ascertaining the views of the stakeholders, subscribers, on tariff related matters for CAS areas. The consultation paper was issued on 14.6.2006. The gist of comments received from stakeholders was placed on the TRAI's website

on 11th July, 2006. An open house discussion was held in Delhi on 27th July, 2006 followed by series of meetings with different stakeholder groups. The TRAI then requested all the broadcasters to provide certain information. According to Rule 10(2) of the Cable Television Network Rules, 1994, the broadcasters were required to furnish the information within 15 days of the issue of the notification (issued on 31st July, 2006), the maximum retail prices of all their pay channels on a-la-carte basis. Further sub-Rule (3) of Rule 10 authorises the TRAI to fix a maximum retail price of any pay channel, if in its opinion the price of that pay channel as disclosed by the broadcaster is too high. These rules permit TRAI to regulate the price of pay channels and in discharge of its function it has done so. There is no challenge to the rules. Determination of rates of pay channels is a prerogative of the Respondent. Some of the broadcasters disclosed wholesale price of their pay channels in response to the query floated by the TRAI. Even the wholesale prices were considered to be too high. Declaration of wholesale prices means that these were prices meant for the MSOs or LCOs which means that the price payable by the subscriber would be still higher. The prices disclosed by the broadcasters were higher even to the prices of pay channel prevailing in Chennai. Thus, the TRAI was of the view that the broadcasters were not at all prepared to consider the interest of the consumers. On the other hand, the TRAI was conscious of the concern of the consumers that with the implementation of the CAS regime they may not have to pay more. Unless the CAS regime was to be consumer friendly, CAS would have been again a failure.

The Respondent also took note of the fact that there was overwhelming view of the consumer organizations and different tiers of service operators (other than broadcasters) that implementation of CAS would require some kind of intervention by the Authority over the prices, at least for a limited period. This led the Authority to fix a ceiling of maximum retail prices of pay channel in order to ensure smooth transition to CAS in notified areas. While fixing a ceiling of maximum retail price, the TRAI observed that it was expected that the operation of the regulation would be for a limited period and would enable it to revisit the subject and consider regulation on the basis of emerging market trends in future.

On price fixation the TRAI has this to say:

> "It is acknowledged that any methodology of determining pricing based on cost and revenues has complex implications as the reliable data will not be easily forthcoming. Therefore, the Authority has relied upon:
>
> a) The prices made available by the stakeholders during the process of consultation.
>
> b) Inference drawn from the agreements between the broadcasters and the MSO.

c) Available data from CAS areas in Chennai.

d) Offers made by DTH operators. The determination methodology adopted by TDSAT in its judgment in the case involving ASC Enterprises Limited and Star India Pvt. Ltd.

e) Reported mismatch between the actual subscriber and chargeable subscriber (inference drawn from the prevailing practices)

f) Arrangements of revenue sharing with a reference to advertisement, carriage and revenue generated from the subscribers.

It may be seen from Annexure V that the individual retail prices of different channels of the three major broadcasters have varied from Rs.4.30 to Rs.26.75 in Chennai .Evidently the market has failed to throw up any solution and a just and fair price did cot find its level. Assuming that in the current non-CAS environment, a subscriber on an average is getting 25-30 pay channels, the sum of the individual channel prices (using a mix of high priced. Average priced and low priced channels) at the rates prevalent in Chennai would work out of over Rs.350/-per subscriber per month. This coupled with the cost of basic service tier plus taxes would lead to a monthly cable bill lf more than Rs.450/-per subscriber per month. Even assuming that a subscriber chooses the ten lowest priced individual channels and one popular channel, the bill for the pay channels would work out to more than Rs.100 including taxes besides the cost of basic service tier. The total cable bill could exceed Rs.200 even for such 11 pay channels. In comparison, DTH service providers have already announced tariff packages which lead to a monthly bill of Rs.180- 200/-per subscriber per month with more than 30 pay channels. In the current scenario in con CAS environment information as available in the market shows that an average price for 25-30 pay channels along with 30 free to air channels is around Rs.175-200/- In this situation, it is clear that, the extension of the individual channel prices of Chennai may not give a just and fair solution."

We agree that price fixation for pay channels was a very difficult and laborious exercise which was undertaken by the TRAI. Of course, the Chennai example was before the TRAI but it was not found to be a good guide. Chennai market is different from the other markets. The subscribers have regional preferences. In the Northern States entertainment channels in Hindi languages are very popular whereas in Chennai, 6 popular Hindi channels are watched by a small number of subscribers. Thus the value of a channel would vary from region to region. It is also true that popularity of a channel could vary from time to time. We note that these considerations make the exercise of the TRAI all the more difficult. We observe that the TRAI has tried to balance the interests of subscribers as also of different players in the industry. At the same time, the TRAI had to ensure that introduction of CAS should be in a smooth and acceptable manner and it should not fail. Therefore, it felt that maximum retail price in CAS areas had to be so determined to enable the subscribers to watch the channels to which they had been accustomed to without any 'price shock'. The prices have to be kept

at an affordable level. The following observations of the Respondent, TRAI in this connection is very pertinent:

> "As the market matures and the consumers realize the advantages of the CAS regime, there would be a case for revisiting the price related decision so as to provide greater flexibility and choice to both the industry and the subscribers, including deregulation."

> "Keeping all these considerations in mind and the need to have a uniform ceiling in all the major four cities, the TRAI has decided that the maximum price for an individual channel would be Rs.5/- per subscriber per month per pay channel exclusive of applicable taxes".

We have carefully considered the procedure undertaken by the TRAI for conducting the exercise. We have also considered the justification for the regulation. We find that the approach of the TRAI in regulating the CAS regime at its introductory stage in the notified areas is fully justified. We find nothing wrong in the process undertaken by the Authority. In this connection we note that the TRAI was conscious of its difficulties and the problems which it had to face while conducting the exercise. It was a virgin field and the Chennai model could not serve as a good guide. The exercise was complex and it was made all the more difficult by the non-cooperative attitude of the broadcasters. In the given circumstances, the TRAI, in our view, has acted fairly by balancing the competing interests. The Authority has promised to revisit the issue including consideration of deregulation if the circumstances so warrant. The experience to be gained after introduction of CAS would enable it to reconsider everything. This being a transitory phase, the appellants ought to have had patience and ought to have waited till the TRAI was able to revisit the issue. The hurry on their part to raise the issue before this Tribunal was not necessary. We also cannot help observing that the broadcasters are either unmindful of the fact that they stand to gain in the CAS regime or they are intentionally feigning lack of knowledge of this fact. To say the least they have not been fair in placing their case before us. We find no merit in these appeals. They are liable to be dismissed. We order accordingly. Appellants will bear the costs of the Respondent, TRAI which we quantify at Rs.50,000/- for each appeal. Costs are awarded only in favour of the TRAI.

**……J**
**(Arun Kumar)**
**Chairperson**

**……..**
**(Vinod Vaish)**
**Member**

**…….**
**(D.P.Sehgal)**
**Member**