TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL
NEW DELHI

DATED 15TH JANUARY 2009

Appeal No.9(C) of 2006
(M.A. No. 103 of 2007)

MSO Alliance, Industrial Area, Delhi … Appellant
V
Telecom Regulatory Authority of India & others ... Respondents

Appeal No.10(C) of 2007

SET Discovery Private Limited, New Delhi …Appellant
Vs.
Telecom Regulatory Authority of India & 2 others ... Respondents

Appeal No.11(C) of 2007

Zee Turner ltd., New Delhi …Appellant
Vs.
Telecom Regulatory Authority of India & 2 others ... Respondents

Appeal No.12(C) of 2007

Star India Pvt. Ltd., Mumbai …Appellant
Vs.
Telecom Regulatory Authority of India & 2 others ...Respondents

Appeal No.13(C) of 2007
(M.A. No. 155 of 2007)

Intermedia cable communications Pvt. Ltd …Appellant
Vs.
Telecom Regulatory Authority of India ...Respondent

Appeal No.15 (C) of 2007

Sun TV network Ltd., Chennai …Appellant
Vs.
Telecom Regulatory Authority of India ...Respondent

BEFORE:

HON'BLE MR. JUSTICE ARUN KUMAR CHAIRPERSON
HON'BLE DR. J. S. SARMA MEMBER
HON'BLE MR. G. D. GAIHA MEMBER

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Appeal No.9(C) of 2006

For Appellants Mr. C.S. Vaidyanathan, Senior Advocate with Mr. Manjul Bajpai,
Mr. Arun Kathpalia,
Ms. Inklee Roy Barooah,
Ms. Shilpi Mehta,
Mr. Virender Singh Thakur, Advocates

For Respondent No.1 (TRAI)	Mr. Vikas Mehta Mr. Narhari Singh, Advocates
For Respondent No.2 (M/o I&B)	Ms. Divya Chaturvedi, Advocate
For Respondent No.3 (STAR)	Ms. Mamta Tiwari, Mr. Prateek Kumar, Mr. Gaurav Juneja, Advocates
For Respondent No.4 (SET Discovery)	Mr. Gopal Jain, Ms. Smriti Mishra, Mr. Kaushik Mishra, Mr. Anup Bhambani, Ms. Nisha Bhambani, Advocates
For Respondent No.5 (Zee)	Mr. Maninder Singh, Mr. Yoginder Handoo, Mr. Kunal Sood, Mr. Mansimran Singh, Advocates
For Respondent No.6 (ESPN)	Mr. N. Ganpathy
For Respondent No.7 (Sahara)	None
For Respondent No.8 (BBC)	None
For Respondent No.9 (B4U Television)	None
For Respondent No.10 (ETV, Ushodaya Enterprises & Ushakiron Televison)	Mrs. Neelima Tripathi Mr. Sugam Seth, Advocates
For Respondent No.11 (Sun TV/Gemini TV/ Udaya TV/ Channel Plus)	Mrs. Narayani K. Sibal Ms. Shruti Ranjan, Ms. Subha Chauhan, Advocates
For Respondent No.12 (Raj Televison Network Ltd.)	None
For Respondent No.13 (MAA Televison Network Ltd.)	None

Appeal No.10(C) of 2007

For Appellant	Mr. Gopal Jain, Mr. Kaushik Mishra, Advocates
For Respondent No.1	Mr. Dinesh Dwivedi, Senior Advocate, with Mr. Vikas Mehta, Advocate
For Respondent No.2	Mr. Manjul Bajpai, Mr. Arun Kathpalia, Ms. Inklee Roy Barooah, Ms. Shilpi Mehta, Mr. Virender Singh Thakur, Advocates

For Respondent No.3 Mr. Abhinav Agnihotri, Advocate

Appeal No.11(C) of 2007

For Appellant Mr. Maninder Singh, Mr. Yoginder Handoo,
Mr. Kunal Sood, Mr. Mansimran Singh, Advocates

For Respondent No.1 Mr. Dinesh Dwivedi, Senior Advocate with
Mr. Vikas Mehta, Mr. Manish,
Mr. Narhari Singh,
Ms. Pratika Dwivedi, Advocates

For Respondent No.2 Mr. Manjul Bajpai, Mr. Arun Kathpalia,
Ms. Inklee Roy Barooah,
Ms. Shilpi Mehta,
Mr. Virender Singh Thakur, Advocates

For Respondent No.3 Mr. Abhinav Agnihotri, Advocate

Appeal No.12(C) of 2007

For Appellant Mr. Ramji Srinivasan, Senior Advocate with
Ms. Mamta Tiwari,
Mr. Prateek Kumar,
Mr. Gaurav Juneja, Advocates

For Respondent No.1 Mr. Dinesh Dwivedi, Senior Advocate with
Mr. Vikas Mehta, Mr. Manish,
Mr. Narhari Singh,
Ms. Pratika Dwivedi, Advocates

For Respondent No.2 Mr. Manjul Bajpai, Mr. Arun Kathpalia,
Ms. Inklee Roy Barooah,
Ms. Shilpi Mehta,
Mr. Virender Singh Thakur, Advocates

For Respondent No.3 Mr. Abhinav Agnihotri, Advocate

Appeal No.13(C) OF 2007
(M.A.No.155 OF 2007)

For Appellant Mr. Navin Chawla, Advocate

For Respondent Mr. Dinesh Dwivedi, Senior Advocate with
Mr. Vikas Mehta, Mr. Manish,
Mr. Narhari Singh,
Ms. Pratika Dwivedi, Advocates

Appeal No. 15 (C) of 2007

For Appellant Mrs. Narayani K. Sibal,
Ms. Shruti Ranjan,
Ms. Shubha Chauhan, Advocates

For Respondent Mr. Vikas Mehta,
Mr. Narhari Singh, Advocates

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ORDER

All the Appeals above, with the exception of Appeal no. 9 of 2006, have been filed impugning the Telecommunication (Broadcasting and Cable) Services (Second) Tariff (Eighth Amendment) Order 2007 dated 4.10.2007 of the Telecom Regulatory Authority of India (hereinafter referred to as **Authority**). Appeal no. 9 of 2006 has been filed impugning the Telecommunication (Broadcasting and Cable) Services (second) Tariff (Sixth Amendment) Order 2006 (5 of 2006) dated 31st July 2006. The relief sought in Appeal no.9/2006 has relation to the provisions of the Order of TRAI dated 4.10.2007. As such, all the Appeals are being discussed and disposed of as one batch by this common Order.

2. The Appeals no.s 10, 11, 12 and 15 of 2007 have been filed by Broadcasters while Appeal no. 13 of 2007 has been filed by a Multi System Operator (**MSO**). Briefly stated, the contention of the Appellants in Appeal no.11, 12 and 15 of 2007 is that the impugned tariff Order is without jurisdiction, perverse and arbitrary. They allege that the impugned Order has been passed without following the requirements of transparency as ordained in section 11 (4) of the TRAI Act. It is also stated that the provisions of the impugned Order are at variance with the issues raised in the consultation paper dated 21.5.2007 issued by the Authority. The Appellants allege that the impugned Order has resulted only in the continuation of price freeze stipulated by the Principal Tariff Order dated 1.10.2004. Their argument is that the Authority has wrongly concluded that there is no effective competition in the broadcasting market and that even though the Authority itself favours forbearance as the best option, the Authority has wrongly prescribed, in the name of lack of effective competition, a ceiling on the rates that can be charged by the MSOs and Local Cable Operators (**LCOs**) from the subscribers. They, therefore, allege that all these stipulations would cause disorder in the cable market and adversely affect the subscription revenues of the Appellants. They also strongly object to the prescription, made in the name of offering choice of channels to the consumers, that they should offer channels on à la carte basis to the MSOs and Cable operators. The contention of the Broadcasters is that the impugned Order is so structured that it is not only discriminatory but is prejudicial to the commercial interest of the Broadcasters as it enables the MSOs and LCOs to demand a higher carriage fee from the Broadcasters while, at the same time, it does not offer any advantage to the consumers. Their contention is that while the impugned Order takes care of the interests of the MSOs, it does not address itself to the interests of either the Broadcasters or the consumers. The contention of the Appellant in Appeal no. 13/2007 is that while the impugned Order purports to be a tariff Order, it actually does not fix the prices.

3. The 1st Respondent, namely the Telecom Regulatory Authority of India, strongly denies all these contentions and argues that the impugned Order is a holistic Order meant to take care of the interests of the consumers in the non-CAS areas which are functioning in a non-addressable mode. The contention of the 2nd and 3rd Respondents in these Appeals is that the Broadcasters have been bundling the channels into bouquets

and have been insisting that the MSOs/LCOS should take the entire bouquet and thereby increasing their subscription revenues as well as advertising revenues through an inflated subscriber base. They strongly argue that the impugned Order brings about a certain discipline in the system.

4. We have heard all the parties at great length. The following issues have emerged for consideration:

A. Whether the impugned Order is without jurisdiction?

B. Whether the impugned Order violates the provisions of section 11 (4) of the TRAI Act and whether the obligation of transparency has not been fulfilled?

C. Whether instead of fixing tariffs as stipulated in the TRAI Act, the Order is only in the nature of interim Order resulting in freezing of prices?

D. Whether TRAI had wrongly concluded that adequate and effective competition in the market is lacking, despite clear evidence of substantial growth?

E. Whether the ceiling imposed on the subscription charges to be collected by LCOs from the subscribers is without basis?

F. Whether the classification of cities and towns as well as the slab system stipulated by the impugned Order is irrational?

G. Whether the stipulation that Broadcasters should provide channels on à la carte basis to the MSOs/LCOs is wrong?

H. Whether the direction, in the impugned Order, seeking information from the service providers is inappropriate?

5. Before we set out to examine these issues, it would be useful to recapitulate the background for and the salient features of the impugned tariff Order.

6. Section 2 (k) of the Telecom Regulatory Authority of India Act, 1997 as amended by the Telecom Regulatory Authority of India (Amendment) Act, 2000 defines ' telecommunication service' as follows:

"'telecommunication service' means service of any description (including electronic mail, voicemail, data services, audio tex services, video tex services, radio paging and cellular mobile telephone services) which is made available to users by means of any transmission or reception of signs, signals, writing, images and sounds or intelligence of any nature, by wire, radio, visual or other electro-magnetic means but shall not include broadcasting services;

Provided that the Central Government may notify other service to be telecommunication service including broadcasting services."

7. In accordance with the above definition, Government of India issued Order S.O.44 (E) notifying the broadcasting services and cable services to be 'telecommunication service' and issued the Notification No. 39 dated 9.1.2004. Simultaneously, by another Order S.O.45 (E) dated 9.1.2004, the Central Government entrusted the Telecom Regulatory Authority of India (hereinafter referred to as '**Authority'**), with certain additional functions. The Order entrusting these functions reads as follows:

"(1) without prejudice to the provisions contained in clause (a) of sub-section (1) of section 11 of the Act of to make recommendation regarding-

(a) ...

(b) ...

(2) without prejudice to the provisions of sub-section (2) of section 11 of the Act, also to specify standard norms for, and periodicity of, revision of rates of pay channels, including interim measures."

8. Within a week of the entrustment of these functions, the Authority, who is the first Respondent in this batch of cases, issued the Telecommunications (Broadcasting and Cable) Services Tariff Order 2004 [1 of 2004] dated 15.1.2004. It was a short Order and prescribed that the charges, payable by the cable subscribers to cable operator, cable operators to MSOs/ Broadcasters, and MSOs to Broadcasters, prevalent as on 26.12.2003 shall be the ceiling with respect to both Free To Air (FTA) and pay channels, both for CAS (Conditional Access System) and non-CAS areas until final determination by the Authority on the various issues concerning these charges. The Explanatory Memorandum annexed to this Order stated that there was considerable uncertainty about different aspects of the CAS regime and a detailed examination was required of the various issues, including the rates for the broadcasting and cable services in CAS and non-CAS areas. Noting that there were reports of an impending increase of cable charges by the cable operators, the Authority felt it was necessary to intervene in the matter and froze the charges as on 26.12.2003, which was the date of a Delhi High Court Order directing the continuance of implementation of CAS in Delhi on trial basis.

9. Subsequently, as part of its detailed examination of the issues concerned, the Authority issued two consultation papers on 15.1.2004 and 20.4.2004. The consultation paper dated 15.1.2004 raised certain issues and sought comments from various stakeholders. On their receipt, these comments were analysed and a detailed consultation paper was issued on 20.4.2004, once again seeking comments of all the stakeholders. This consultation paper, which is a very useful document, dealt with several issues. Noting that an important regulatory task has been to ensure that the prices charged to consumers are reasonable, it dealt with the different approaches to price regulation of services as also the practice worldwide.

10. The consultation paper of 20.4.2004 noted that costing of a pay channel requires details of capital and operational expenditures which is difficult on account of the pay channels being viewed in more than one country, the content not being a standardised commodity and the advertisement revenues making it difficult to determine as to what percentage of the cost should be recovered through subscription fee. Stating that a price cap form of regulation avoids the problem of measuring and controlling programming

costs, it notes that this form also introduces the problem of controlling quality. Since a common uniform price cap may not be reasonable, the consultation paper states that flexibility is provided by the price cap mechanism. Referring to an exercise carried out by the Cost Accounts Branch of the Ministry of Finance for working out the economic cost of delivery of channels in the cable network, the paper notes that the price for carriage of 60 channels worked out to Rs. 69 to 72 per household per month. Observing that there is no uniform rate in the cable TV service in the country and that the rates vary between and also within areas, the paper states that a common uniform price would be both difficult to implement and also not reasonable; it states that the flexibility in pricing enables market penetration in low-income areas. Referring to complaints about frequent hikes of cable charges, the paper notes that pay channels are generally offered in the form of a bouquet of channels with the result that if more channels are introduced within the same bouquet, the subscriber bill may still go up. The paper also lists out the issues in subscribers opting for à la carte channels vis-à-vis bouquets.

11. Dealing at length with international practices on regulating prices, the consultation paper states that in the United States of America, initially the basic service tier was subject to regulation by local franchising authorities while the Federal Communications Commission was responsible for regulating cable programming services tiers, both of them following a ‘benchmark’ rate based on certain specific factors. Pay channels and pay programme services were not regulated. Since 1996, small cable operators were not regulated while others were regulated only subject to effective competition not existing; effective competition was clearly defined. Since the year 1999, however, even the Commission's Authority to regulate the rates of cable programming services was terminated. The practice in other OECD countries also shows that in most countries, only the price of basic service tier is regulated.

12. Discussing the revenue sharing between Broadcasters, MSOs and LCOs, the paper states that these are mutually negotiated and that it would be difficult to arrive at a specific revenue share formula as the cost of programmes being broadcast is not standard. It however states that the carriage cost of each channel can be determined and the split of revenue share between MSO and LCO can be worked out on the basis of capital employed and operating expenditure by both the parties.

13. On 1.10.2004, the Authority issued the Telecommunication (Broadcasting and Cable) Services (Second) Tariff Order 2004 (6 of 2004), otherwise called the Principal Tariff Order, wherein it stipulated that the tariff at various levels, namely cable subscriber to cable operator; cable operators to MSOs/Broadcasters and MSOs to Broadcasters, prevalent as on 26.12.2003 shall be the ceiling with respect to both Free To Air (FTA) and Pay channels. It however provided that if any new pay channel was introduced after 26.12.2003 or if any channel which was free to air on 26.12.2003 was converted to a pay channel, the ceiling prescribed above can be exceeded to the extent of the rate of such channels, but only if these channels do not form part of a bouquet of channels existing on 26.12.2003. It also allowed for reduction of the ceiling in the event of number of pay channels being reduced. Consequent to this Order,

the earlier Order of 15.1.2004 stood repealed. The explanatory memorandum to this Order stated that fixation of prices charged for new pay channels to consumers is difficult because of large variations of the prices and the difficulty in linking the prices to the costs. Besides, prices in different parts of the country are based on different systems using different methodologies for fixing the subscriber base. The explanatory memorandum notes that these problems will be resolved if addressability is introduced and that in the interim period, prices will have to be regulated through the said Order. It also expressed the hope that the pay channels to be introduced after 1.10. 2004 would have rates similar to those prevalent on 26.12.2003.

14. Two and a half years later, the Authority issued, on 21.5.2007, another consultation paper on issues relating to tariff for cable television services in non-CAS areas. In its preface, the paper noted that the Order of 1.10.2004 meant a continuation of multiplicity of ceiling rates operating for different subscribers at a point of time and that in the recommendation sent to Government of India on 1.10.2004, it was stated that the regulation of prices is only intended to be a temporary measure till such time as effective competition takes roots, since the best regulation of prices is done through competition. It also dealt with the issue of annual increase in the ceiling rates, agitated before and decided upon by this Tribunal. Keeping in view the various factors, the paper speaks of the need to revisit the tariff regulation for non-CAS areas in a holistic manner and sets out the pros and cons on various issues before posing the questionnaire and seeking comments thereon from the stakeholders.

15. The consultation paper identified the following as the experience of various stakeholders:

a) The number of pay channels had more than doubled in the span of two and half years and the channels are offered to the consumers as part of new bouquets.
b) In a non-addressable system, the option of choosing a particular channel is not with the consumer.
c) Under the existing tariff regime, the individual consumer lacks control over its cable bill. The increase in the consumer bill is on account of inflation of 7% as well as emergence of new pay channels. Although the monthly bill has not gone up to the extent of the sum of the prices of new pay channels, any increase is not welcome. Monthly amounts vary in different areas and among different customers, based on their ability to pay. Non-uniformity in cable bills has been a cause for complaint against cable operators.
d) Although the Principal Tariff Order of 1.10.2004 provided for reduction in monthly ceiling with reduction in number of pay channels, enforcement of the same at the ground level has been difficult since the consumer is often not given any bill.
e) Because of the existence of an informal area-sharing arrangement at the ground level, it is not possible for the consumers to switch cable operators. Spread of DTH operations in the non-CAS areas is expected to facilitate better choice to consumers.
f) Consumers feel that the channels are changed by MSOs/LCOs without any intimation, particularly in areas with heterogeneous mix of population.

g) LCOs and MSOs complain that while their revenue realisation from subscribers is frozen, their outgo keeps increasing because of the demand from Broadcasters for a higher subscriber base. These demands are also a major ground for disputes. The subscriber base in respect of LCOs and MSOs is dependent on their ability to negotiate. The existing tariff regime does not place any ceiling on the subscriber base.

h) With increasing number of pay channels, MSOs/LCOs are forced by the Broadcasters to take large bouquets for which they have no bandwidth in the analogue mode. MSOs also feel that Broadcasters follow pricing policies which discourage individual channel selection.

i) On their part, Broadcasters feel that the ceiling on tariff is adversely affecting the flexibility of their business model. They feel that since this is not an essential commodity, tariff regulation is not justified. They also feel that there is adequate competition and that there is no justification for tariff regulation.

16. Taking into consideration the above perspectives, the consultation paper proceeds to make the following assessment:

a) There is no evidence before the Authority that the existing tariff control is adversely affecting the business interests of Broadcasters. On the other hand, there has been growth in the revenues of the Broadcasters over the last two years. Evidently, the very fact that new pay channels are being launched shows that it makes sound business sense despite the price cap, although it could also be more to continue their presence in the market in the hope of forbearance in the future..

b) Increase in the number of pay channels or bouquets of pay channels leaves little protection to the consumer against being forced with unwanted channels and consequent increase in payments.

c) While over 70 million cable and satellite households do provide adequate volume, this alone may not be sufficient for the market to work in the interests of consumers unless the market becomes adequately competitive. While there are a number of content aggregators/ providers, the choices offered may not be equally competitive.

d) An analysis of the complaints received from the consumers about violations of ceiling of charges shows that this was on account of addition of new pay channels or on account of changes in the negotiated subscriber base. The complaints from LCOs/MSOs were found to be mainly on account of increased declaration levels.

e) While there are complaints about non-uniformity in cable rates for the same content or in the same locality, it has also a positive side in that it enables cross subsidisation across different segments of consumers and has proved to be an effective tool in retaining the customers from different economic strata.

f) The problem with the Principal Tariff Order dated 1.10.2004 is the inability to gauge the extent of increase permissible on account of new pay channels, resulting in easy breaching of the ceiling on cable charges. Secondly, from the standpoint of LCOs and MSOs, the re-negotiation of subscriber base renders the enforcement of Tariff Order difficult.

g) A mere presence of the tariff regime may not mean much if it does not really serve the purpose of protecting the interests of the consumers and is capable of being effectively implemented at the ground level. What is required is a framework of regulation that facilitates market forces to work.

h) The existing tariff regime for non-CAS areas is not effective as

i. Bills are often not given to the consumer and even if given, do not indicate the apportionment between pay and FTA channels; the existing tariff regime does not provide a solution to this.

ii. Monthly cable bills can go up on account of new pay channels, on which there is no control and for which there is no choice.

iii. Consumer has no information on the interconnection agreements between LCOs, MSOs and Broadcasters and he is not aware as to which of the channels are pay channels and which are free to air channels.

iv. In the absence of addressability, consumer has little scope of translating his choice and of reducing his monthly bill.

v. Due to lack of effective decentralised enforcement mechanism at the local level, the consumer does not have an opportunity to get speedy and effective remedy.

17. Discussing the different issues that could be considered, the consultation paper proposes a uniform ceiling in tariff of Rs. 250, which is based on a figure of Rs. 176 arrived at by a market survey commissioned in the year 2004 by TRAI and after adjusting inflation at the rate of 6% a year for three years. It also proposes the choice of providing channels on à la carte basis to the MSOs to reflect the popular choice of the subscribers based on regional preferences.

18. Pursuant to consultations held with different stakeholders, the Authority issued, on 4.10.2007, the impugned Order -- The Telecommunications (Broadcasting and Cable) Services (Second) Tariff (Eighth Amendment) Order, 2007, effective from 1.12.2007. This Order prescribed that

a) The charges payable on 1.12.2007, increased by an amount not exceeding 4%, shall be the ceiling. Importantly, the Order simultaneously and additionally prescribed a ceiling on charges payable by the subscribers ranging from Rs. 132 to Rs. 260, based on the number of pay channels and the classification of cities.

b) If any new pay channel is launched after 01.12.2007 or any FTA channel is converted to a pay channel, the ceiling can be exceeded provided these channels are on a stand-alone basis or as part of new and separate bouquet. The rates of such channels must be similar to the rates of similar channels existing on 1.12.2007.

c) It also provided that Broadcasters should offer channels on à la carte basis to the MSOs/LCOs and prescribed the chargeable rates for the individual pay channels.

d) The Order also prescribed that every broadcaster shall furnish certain information to the Authority.

e) The Order prescribed every LCO/MSO/broadcaster shall furnish to every subscriber a bill every month showing the list of all pay channels and FTA channels being provided, also duly furnishing written information to the subscriber about changes, if any, in the channels. It also prescribed that receipts shall be given for all payments made by the subscriber.

19. The above Tariff Order is accompanied by an explanatory memorandum which, unlike the explanatory memorandum to the Principal Tariff Order, is very exhaustive. This explanatory memorandum gives the rationale for various provisions in the impugned Order. It sets out that the response of the stakeholders has been on the following lines:

a) The Broadcasters have made out a case of forbearance;

b) The MSOs/cable operators favoured availability of channels on à la carte basis. They also favoured the continuance of regulation and a corresponding need to determine the connectivity levels and revenue sharing among LCO/MSO/broadcaster

c) While very few consumers responded to the consultation paper, the consumers' view was that the regime of regulation should continue for some more time.

The explanatory memorandum then proceeds to set out the Authority's examination of various issues and the conclusions arrived at.

20. We have set out in detail the background and the context in which the impugned Order has been issued so as to facilitate a detailed examination of the various issues raised by the Appellants. Before we proceed to examine the issues raised by the Appellants listed at para 4 above, we must deal with some basic issues raised by the learned Counsel for the 1st Respondent, Mr. Dwivedi.

21. The first issue raised by the learned counsel, Mr. Dwivedi, is regarding maintainability of these Appeals. His contention is that the appellants are all companies and are not natural citizens of India. Accordingly, the provisions of Article 19 (1) (a) and (g) of the Constitution do not apply, as do not the provisions of Article 19 (6). Since, following from the above, the element of unreasonableness does not apply, Article 14 of the Constitution also cannot be invoked. The counsel for Respondent relies on the judgements in the case of State Trading Corporation of India V. the Commercial Tax Officer and others [AIR 1963 SC 1811]; the State of Gujarat and another V Shri Ambica Mills Ltd and another, the Arvind Mills ltd and another, the Asarva Mills Ltd and another, the Ashok Mills ltd. and others in [(1974) 4 SCC

656]; Indo-China Steam Navigation Company Ltd V. Jasjit Singh, Additional Collector of Customs, Calcutta and others [AIR 1964 Supreme Court 1140].

22. Mr. Dwivedi also argued that the scope of judicial review by the Tribunal should be focused only on

a) Whether any provision of law has been breached?

b) Whether the impugned Order is totally irrational and whether it is based on material which is totally irrelevant?

c) Whether the Order subserves the objective of the Act?

23. The learned Counsel for the 2nd Respondent- IndusInd Media communications Ltd. and 3rd Respondent- Hathway Cable & Datacom Pvt. Ltd.- in Appeals no. 10/2007, 11/2007 and 12/2007, Mr. Kathpalia, however strongly disagreed with contention of the counsel for the 1st Respondent on the issue of maintainability. The counsel stated that most writ petitions that are filed by companies, either under Article 226 or under Article 32, raise the issue of violation of Article 14 of the Constitution. Unlike Article 19, which is available only to citizens, Article 14 is available to any 'person', including a juristic person. The counsel stated that any person can come to the Tribunal under section 14 (b) of the TRAI Act, under which any Order/Direction/Decision of the Regulatory Authority is assailable. Pointing to the provisions of section 14 A (7) of the TRAI Act, the counsel stated that the extent of consideration of any case by the TDSAT is unfettered and to say that the Tariff Order could not be challenged is incorrect. He stated that the present case before the TDSAT relates to an 'Order' of the Authority and it is wholly inadmissible to state that this Tribunal cannot review the Order of TRAI except on issue of procedure. His argument is that if this stand is approved, the service providers will not have any forum for relief.

24. The learned counsel for the Appellant in Appeal no. 11 of 2007, Mr. Maninder Singh, argued that the present Appeal is under section 14 A (2)of the TRAI Act and is not a writ petition either under Article 226 before a High Court or under Article 32 of the Constitution before the Hon'ble Supreme Court and hence the principles regarding the scope of judicial review which have been laid down by the Apex Court in such cases have no applicability whatsoever to the original and appellate jurisdiction of this Tribunal. On the contrary, he argues, the Tribunal is obliged to go into each of the aspects raised by the Appellant/s in challenging the validity, rationality and correctness of the impugned Order. According to him, any argument on the plea of restricted judicial review jurisdiction is, in fact, a submission to this Tribunal not to discharge its adjudicatory function in deciding the present Appeal on merits and goes against the law laid down by the Apex Court in ***Cellular Operators of India and others Vs. Union of India and Others [(2003) 3 SCC 186)]***

25. We have carefully considered the issues. Section 14 A of the TRAI Act reads as follows:

(1) "The Central Government or a State Government or a local authority or any person 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 a 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."

26. From the above, it is clear that the power to approach this Tribunal is available to, inter alia, any person. This includes both natural as well as juristic persons. The TRAI Act is a special Act and the language of the statute is clear. Besides, this Tribunal is the only forum available for seeking redressal against the Orders of the Regulatory Authority. It is well-known that the service providers, be it in Telecom or in Broadcasting, are generally corporate entities and it surely cannot be the intention of the lawmakers that such entities cannot seek redressal before this Tribunal. The appellate jurisdiction of this Tribunal is much wider in scope than Writ jurisdiction. We do not therefore accept this contention of the counsel for 1st Respondent.

27. Insofar as the issue of the jurisdiction of the Tribunal is concerned, the matter has been very clearly settled by the Supreme Court in *Cellular Operators Association case* cited supra. In this case, the Apex Court held as follows:

"8. ....There is no dispute with the general proposition that when an Appeal is provided under a statute against the decision of an expert body, notwithstanding the absence of any restriction for the exercise of that appellate power, the appellate court would be reluctant to interfere with the findings and conclusions of the expert body unless it is so warranted either on the ground that the finding of the expert body is perverse or is based on no evidence or suffers from any glaring infirmity on account of which no reasonable man could come to that conclusion. ..... Chapter IV containing Section 14 was inserted by an amendment of the year 2002 and the very Statement of Objects and Reasons would indicate that to increase the investors' confidence and to create a level playing field between the public and the private operators, suitable amendment in the Telecom Regulatory Authority of India Act, 1997 was brought about and under the amendment, a Tribunal was constituted called the Telecom Disputes Settlement and Appellate Tribunal for adjudicating the disputes between a licensor and a licensee, between two or more service providers, between a service provider and a group of consumers and also to hear and dispose of appeal against any direction, decision or order of the Authority. The aforesaid provision was absolutely essential as the organisations of the licensor, namely, MTNL and BSNL were also service providers. That being the object for which an independent tribunal was constituted, the power of the Tribunal has to be adjudged from the language conferring that power and it would not be appropriate to restrict the same on the ground that the decision which is the subject matter of challenge before the Tribunal was that of an expert body. It is no doubt true, to which we will advert later, that the composition of the Telecom Regulatory Authority of India as well as the constitution of GOT-IT in April 2001 consists of a large number of eminent impartial experts and it is on their advice, the Prime Minister finally took the decision took the decision, but that would not in any way restrict the power of the Appellate Tribunal under Section 14, even though in the matter of appreciation the Tribunal would give due weightage to such expert advice and recommendations. Having regard to the very purpose and object for which the Appellate Tribunal was constituted and having examined the different provisions contained in Chapter IV, more particularly, the provision dealing with ousting the jurisdiction of the civil court in relation to any

matter in which the Appellate Tribunal is empowered by or under the Act, as contained in Section 15, we have no hesitation in coming to the conclusion that the power of the Appellate Tribunal is quite wide, as has been indicated in the statute itself and the decisions of this court dealing with the power of a court, exercising appellate power or original power, will have no application for limiting the jurisdiction of the Appellate Tribunal under the Act. ...

11. .... As has been stated earlier, the jurisdiction of the Tribunal under section 14 cannot be held to be a supervisory jurisdiction, in view of the language of the statute as well as the fact that it is the only forum for redressing the grievance of an aggrieved party in as much as the appellate jurisdiction to this Court is only on a substantial question of law and the jurisdiction of a civil court for filing a suit is also ousted. It has already been held by us that the Tribunal has the power to regulate any dispute but while answering the dispute, due weight has to be given to the recommendation of TRAI... A bare comparison of the provisions of Section 14, which confers jurisdiction on the Tribunal and Section 18, which confers jurisdiction on the Supreme Court, would unequivocally indicate that the Tribunal has much wider jurisdiction than the jurisdiction of this Court under Section 18, as this Court would be entitled to interfere only on a substantial question of law, which arises from the judgement of the Tribunal and not otherwise. "

28. In the same case, and through a separate but concurring judgement, Hon'ble Justice Sinha observed as follows: "Sub-section (7) of section 14-A confers a wide jurisdiction upon the Tribunal. The Tribunal being an expert body is entitled to exercise its appellate jurisdiction both on fact as also in law over a decision or order/decision/direction of the Authority. Its power to examine the correctness, illegality or propriety of the order passed by the Authority as also in relation to the dispute must be held to be a wide one."

29. Justice Sinha went on to quote the US Supreme Court in ***Permian Basin Area Rate Cases*** where the US Supreme Court held as follows: "..the responsibilities of a reviewing court are essentially three. First, it must determine whether the commission's Order, viewed in light of relevant facts and of the commission's broad regulatory duties, has abused or exceeded its Authority. Second, the court must examine the manner in which the commission has employed the methods of regulation which it has itself selected, and must decide whether the each of the Order's essential elements is supported by substantial evidence. Third, the court must determine whether the Orders may reasonably be expected to maintain financial integrity, attract necessary capital, and fairly compensate investors for the risks they have assumed, and yet provide appropriate protection to the relevant public interests, both existing and foreseeable." The Hon'ble Justice further quoted the case of **Universal Camera Corporation v. National Labor Relations Board**, where it is stated that "the board's findings are entitled to respect; but they must nonetheless be set aside when the record before a court of Appeal clearly precludes the board's decision from being justified by a fair estimate of the worth of testimony of witnesses or its informed judgement on matters within its special competence or both."

30. The Hon'ble Justice Sinha also cited the case of ***Union of India v. Dinesh Engg. Corpn***. **[(2001) 8 SCC 491]** where the Supreme Court held that *"there is no doubt that this court has held in more than one case tha where the decision of the authority is in regard to a policy matter, this Court will not ordinarily interfere since these policy matters are taken based on expert knowledge of the persons concerned and courts are normally not*

equipped to question the correctness of a policy decision. But then this does not mean that the courts have to abdicate their right to scrutinise whether the policy in question is formulated keeping in mind all the relevant facts and the said policy can be held to be beyond the pale of discrimination or unreasonableness, bearing in mind the material on record."

31. It is clear from the above that the matter relating to the scope of review by this Tribunal of the Orders /directions/decisions of TRAI has been clearly settled by the Apex Court and that this is not confined to the limited scope of judicial review as argued by the learned Counsel for Respondent. We therefore reject this argument of the Counsel for 1st Respondent. In the light of this, we do not feel it necessary to go into the other judgements cited by the learned counsel for 1st Respondent.

32. Having rejected both the preliminary objections, we now proceed to examine the merits of the various contentions raised by the Appellants. In doing so, we would be keeping in view the background of the impugned Tariff Order and examine whether this Order meets the objectives sought to be achieved and whether the terms of the Order are reasonable besides also examining the question of the adherence to the various provisions of the Telecom Regulatory Authority of India Act, 1997.

33. Our attention has been drawn extensively by the counsels for the Appellants to the tariff Order dated 1.10.2004 on the ground that the impugned Order is only an amendment of the Principal Tariff Order. In the process, the counsels have attempted to call in question some of the elements of the Principal Tariff Order. We would like to, at the outset, make it clear that while the Principal Tariff Order can come in for consideration to serve as a background for the impugned Order, that Order by itself is not called into question in the prayers for relief in any of the Appeals.

34. We now come to the various grounds on which the impugned Order namely the Telecommunication (Broadcasting and Cable) Services (Second) Tariff (Eighth Amendment) Order, 2007 has been impugned, and the issues that have been listed in Para 4 above.

35. The Appellants in 11/2007 and 15/2007 have assailed the impugned tariff Order dated 4.10.2007 on the ground that it is without jurisdiction. Their contention is that the TRAI Act clearly lays down the provisions under which the Authority can perform its functions -- recommendatory and non-recommendatory. The impugned Order is issued under the provisions of section 11 (1) (b) and section 11 (2) of TRAI Act which empowers the Authority to notify the rates, but the impugned Order goes on to issue directions which can only be issued under section 12 (4) and section 13 of the TRAI Act. They also contend that the Authority cannot

discharge its functions under section 11(1) (b) by issuing an Order under section 11(2) of the Act. Refuting this contention, the Respondent points out that regulation of tariff has several dimensions and à la carte requirements is one of them. Their contention is that the entire Order should be viewed in a holistic manner, since this is what the Order seeks to achieve.

36. The impugned Order dated 4.10.2007 reads as follows:

"No 1-1/2007-B &CS.-- -- In exercise of the powers conferred by sub-clauses (ii), (iii), (iv) and (v) of clause (b) of sub-section (1) and sub-section (2) of section 11 of the Telecom Regulatory Authority of India Act 1997 (24 of 1997), read with notification of the Government of India, in the Ministry of Communication and Information Technology (Department of Telecommunication), No. 39, --

(a) ...

(b) ...the Telecom Regulatory Authority of India hereby makes the following Order further to amend the Telecommunication (Broadcasting and Cable) Services (Second) Tariff Order, 2004 (6 of 2004), namely: -

1. (1) This order shall be called the Telecommunication (Broadcasting and Cable) Services (Second) Tariff (Eighth Amendment) Order, 2007.

………………."

37. The powers and functions of the 1st Respondent, the Telecom Regulatory Authority of India, are given in chapter III of the TRAI Act. Section 11(1) (a) refers to the functions of the Authority to make recommendations, either *suo motu* or on request from the licensor. Section 11 (1) (b) relates to the functions which the Authority is to discharge. Section 11 (1) (c) relates to levy of fee and other charges while Section 11 (1) (d) relates to administrative and financial functions. Section 11 (2) of the Act states that the Authority may notify the rates at which the telecommunication services within India and outside India shall be provided under this Act. Section 12 of the Act empowers the Authority to call for information and conduct investigations, while section 13 empowers the Authority to issue such directions to the service providers as may be necessary for discharge of its functions under Section 11 (1) of the Act. From a reading of all the sections, it is clear that the Authority has the power to fix tariff as well as to give directions to the service providers. The question however is whether in doing so, the Respondent has rightly cited the relevant provisions of the Act so that they have legislative Authority. It is seen from a reading of the Order that it was issued in exercise of the powers under sub-clauses (ii), (iii), (iv) and (v) of Section 11(1) (b) and Section 11 (2) of the Act. Admittedly, the Order purports not only to fix the tariff but also issues certain directions regarding the manner in which the channels are to be supplied to the MSOs. This is a power vested in the Authority under Section 13 of the Act. Similarly calling upon the service providers to provide information is a power vested in the Authority by virtue of Section 12 of the Act. These provisions of the Act have not been invoked while passing the impugned Order. To this extent, the Order suffers from weakness. We would however not like to take a very technical view of such omission, although it is

expected of a statutory Authority, such as TRAI, that it would take due care while passing an important Order such as this.

38. Another contention of the Appellants is that the impugned Order has been passed without the Authority having observed the obligation of transparency imposed upon it by Section 11 (4) of the TRAI Act. The Appellant's contention is that in arriving at the impugned Order, and particularly in fixing the ceiling on the subscription rate, TRAI had relied on undisclosed market studies/survey, the details of which have not been disclosed in the consultation paper. According to the Appellants, this vitiates the tariff fixing exercise as it violates section 11 (4) of the TRAI Act. Their argument is that the data must be disclosed as well as the manner of arriving at the decision. Section 11 (2) is controlled by Section 11 (4) and since these are legislative powers conferred upon the Authority, they must be exercised properly. According to the counsel for Appellants, violation of Section 11 (4) cannot be cured, even if the documents are now furnished.

39. Refuting this contention, the learned counsel for 1st Respondent stated that this argument is borne more out of prejudice than on fact and that the 1st Respondent had already indicated in their reply filed in December 2007 and January 2008 that the reports are available for perusal on request and that the reports of two agencies -- Media Partners Asia and FICCI -- are available in public domain. According to the counsel, none of the Appellants approached the Authority. He further argues that the exercise of tariff fixation under section 11 (2) is a legislative function, during which process, the Authority is required to look into the comments of the various stakeholders and such other relevant material as may be available to it to come to a final determination. His case is that after receiving the comments of various stakeholders, nothing prevented the Authority from referring to other relevant material available. The surveys and studies relied upon by the Respondent in arriving at a decision were such documents. He stated that the Authority had put all factors before the stakeholders for alternative solutions but that the Appellants did not give any suggestions. So, the Authority had to rely on the available data. According to him, the consultation paper was meant to give a broad indication but does not give any scheme because the regulator was not prejudging the issue. Various indices such as ARPU, slab system etc. were mentioned in the consultation paper. After receiving suggestions from various stakeholders, a decision may be taken which is entirely different. He stated that as long as reasons for arriving at a decision were recorded, it satisfies the test of transparency. According to him, Transparency does not mean that the Respondent has to give all the documents to the stakeholders because the Authority itself was not in the know of what documents it was going to rely on. Referring to the observations of the Hon'ble Supreme Court in ***BALCO employees' union (Regd) v. Union of India, [(2002) 2 SCC 333]***, he pointed out that transparency does not mean the conduct of government business while sitting on crossroads in the public and that it would only require that the manner in which the decision is taken is made known.

40. In order to examine this issue, we refer to the consultation paper issued on 21.5.2007. We find that chapter 2 of the consultation paper discusses in detail the issue of overall ceiling of bills and also indicates a figure of Rs.250 for 65 channels including 30 FTA channels. It also poses the question whether there should be a single overall ceiling on monthly cable charges or whether there should be different ceilings in urban and non-urban areas and the quantum of overall ceiling as well as the periodicity at which this should be reviewed. Based on the comments received, the Authority proceeded to fix the ceiling. Without examining, at this stage, the correctness or otherwise of the ceiling, suffice it to say that the Authority does not appear to have followed the procedure in an open manner. It is clear from the Explanatory Memorandum that the documents in question formed a significant basis in the Authority arriving at the decision. The documents, relied upon by the Authority while finalising the ceiling, were not available to the stakeholders prior to the issue of the impugned Order. It is not correct on the part of the 1st Respondent to blandly state, as it did in December 2007, after the Appellants raised the issue, that these documents are now available on the website or for the asking. Strictly, it is irrelevant if these documents are available after the Order has been issued and is impugned. How are the Appellants to know which documents the Authority is going to rely upon other than what was indicated in the consultation paper and the gist of stakeholders' comments put on the website? In fact, it is not the Respondent's contention that the documents are not relevant for consideration by the stakeholders. The very statement, after the event, that these documents are now available in public domain would amount to an admission that these documents ought to have been made available. The counsel for Respondent states that it is not necessary that every document relied upon by the Respondent is made available in advance to the world at large. But it is also not the contention of the Respondent that these documents were made available to the Respondent itself after the receipt of comments of the stakeholders. In fact, the study by Media Partners Asia was commissioned by the Respondent. Since this study report was given in January 2007, and was available to the Respondent even at the time of issue of consultation paper, it ought to have been made available to all the stakeholders or at least referred to in the consultation paper so that those interested would have accessed the document. There is reasonable ground, therefore, to infer that the Respondent did not, wittingly or unwittingly, make this document available but relied upon it at a later stage. It is true that in the case of *BALCO employees union case,* cited *supra*, the Apex Court held that transparency does not mean the conducting of the government business while sitting on the crossroads in public. But in that very paragraph, the Apex Court also stated that *"at every stage, the matter was looked into by the IMG and ultimately by the Cabinet committee on disinvestment. The system which was evolved was completely transparent. It was made known. .... whatever material was received was examined by the high power committee known as the IMG and the ultimate decision was taken by the Cabinet committee on disinvestment."* It is against this background that the Apex Court observed as indicated in that case. In the instant case, however, the documents that were available with the Authority were not indicated in the consultation paper. To that extent, we agree with the contention of the Appellants and hold that the principle of transparency, ordained under Section 11(4) of the TRAI Act, has been violated by the Authority.

41. We now come to the question whether, as alleged by the Appellants, the impugned Order is only in the nature of continuing the price freeze rather than tariff fixation. The learned Counsels for Appellants in Appeal no.s 10,11and 12 of 2007, M/s Gopal Jain, Maninder Singh and Ramji Srinivasan traced the various Orders that

were issued pursuant to the notification no.39 dated 9.1.04. According to the counsels, all the tariff Orders issued since January 2004 have only remained interim Orders**.** Even the impugned Order is only in the nature of a price freeze since it has frozen the prices as existing on 1.12.2007 and not fixed any specific rate. They argue that Section 11 (2) gave the Authority power to 'fix' tariff but not to paralyse the system. The counsels for Appellants pointed out that barring some ad hoc increase, the actual task of tariff fixation has never been undertaken by the Authority. According to them, inflation does not form part of tariff fixation, and that the Authority is trying to do everything other than tariff fixation.

42. The learned counsel for 1st Respondent submitted that power to fix tariff includes making the tariff in such a way that it can be implemented. Explaining the tariff Orders, the counsel referred to clause 2 (f)of the Principal Tariff Order dated 1.10.2004 which defines the term "charges" and clause 3 dealing with tariff. He traced the evolution of the tariff Orders. The Order dated 15.1.2004 was essentially an emergency Order to prevent prices from being increased suddenly. The Order of 1.10.04 stipulated that the charges as on 26.12.03 will be the ceiling with respect to both free to air and pay channels. However, since the sector was witnessing a rapid growth, TRAI had to come out with some regulatory mechanism and so left a window of opportunity, by way of proviso to clause 3, for growth of the channels. The counsel stated that consequently, the 2004 Order created two classes of service providers -- existing Broadcasters/ MSOs/ LCOs, who were governed by the freeze Order and subsequent service providers were not governed by the freeze Order. Since the major growth occurred after 1.10.04, a majority of service providers were outside the freeze Order. The proliferation led to a situation where every time a new channel was introduced, the subscriber price went up because of the proviso to clause 3 of the 1.10.2004 Order. It is primarily this fact that led to a review of the October 2004 Order. In the impugned Order, TRAI changed the date from 26.12.03 to 1.12.07 so as to bring the post-04 service providers into the tariff regime. Also TRAI wanted to go beyond the freeze order mechanism and fix a proper and rational tariff.

43. The learned counsel further mentioned that the salient feature of the Order dated 1.10.04 was that TRAI froze the market rates, which brought about a semblance of orderliness while at the same time leaving a window for growth which was regulated by the proviso. This has regulated the Broadcasters but did not bind the MSOs and LCOs. For them, the only limitation was the market. Likewise, the new subscribers were also not eligible to be covered by the ceiling. Consequently, this segment i.e., MSO, LCO and new subscribers had to be brought within the system. There was also a threat of increasing prices. So, the regulator froze the rates as on 1.12.2007 and, at the same time, evolved a ceiling to provide for those coming into the system after 1.12.2007, so that they will also be on the same footing as those that came in before. So the 2007 Order, according to the counsel for Respondent, is not another freeze Order but something which has both a ceiling as well as slabs. The cut-off date of 1.12.2007 applies to both the pre-26.12.03 operators and post-2004 operators.

44. Referring to the explanatory memorandum, the counsel stated that a cost-based study could have been attempted. But a cost-based study or market study having been opposed, market place was the only option which was the reason why the regulator froze the prices at that level; this was the price level which the market was charging. The Counsel referred to the proliferation of channels and to clause 4 (d) of the Tariff Order, and stated that one of the objectives of the Tariff Order 2007 is to nudge subscribers towards digitalization i.e. to have a set-top box. The counsel for Respondent stated that the impugned Order would be in force till effective competition was realised. He indicated that cost-based pricing is not possible. Further, the prices were so different that the regulator did not know which price to adopt and so, in public interest, the historic rate was adopted. He also stated that the key to appreciation of facts is to see the objective and to examine whether the objective has been achieved. He referred, in this context, to the judgement in ***Mafatlal Group Staff Association and others v. Regional Commissioner, Provident Fund and others (AIR 1994 Supreme Court 2271, at page 2275).***

45. The counsel for Appellants in Appeal no. 9 of 2006 generally supported the argument of the counsel for Respondent and stated that there ought to be flexibility in regulation making process and that it can only be by stages, involving certain experimentation. In economic policy, flexibility to the policymakers is assumed.

46. We have carefully considered the arguments of all counsels. For a proper appreciation, it is necessary to go into the statutory provisions as well as the background. Section 11 (2) of the Telecom Regulatory Authority of India Act, 1997 reads as follows:

"11. Functions of Authority -- (1) ...

> (2) 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 therefor".

Section 11 (1) (d) of this Act reads as follows:

> "(d) perform such other functions including such administrative and financial functions as may be entrusted to it by the Central Government or as may be necessary to carry out the provisions of this Act:
>
> *provided* that ……..."

47. As indicated in Para 7 above, by virtue of a specific Order, the Central Government entrusted certain additional functions to the Authority, which Order reads as follows:

ORDER

New Delhi, the 9th January, 2004

S.O. 45 (E). - In exercise of the powers conferred by clause (d) of Sub-clause (1) of Section 11 of the Telecom Regulatory Authority of India Act, 1997 (24 of 1997) (hereinafter referred to as the Act), the Central Government hereby entrusts the following additional functions to the Telecom Regulatory Authority of India, established under Sub-section (1) of Section 3 of the Act, in respect of broadcasting services and cable services, namely:-

(1) Without prejudice to the provisions contained in clause (a) of Sub-section (1) of Section 11 of the Act, to make recommendation regarding –

(a) the terms and conditions on which the "addressable systems" shall be provided to customers

Explanation - for the purpose of this clause, "addressable system" with its grammatical variation, means an electronic device or more than one electronic devices put in an integrated system through which signals of cable television network can be sent in encrypted or unencrypted form, which can be decoded by the device or devices at the premises of the subscriber within the limits of authorisation made, on the choice and request of such subscriber, by the cable operator for that purpose to the subscriber,

(c) the parameters for regulating maximum time for advertisements in pay channels as well as other channels.

(2) Without prejudice to the provisions of Sub-section (2) of Section 11 of the Act, also to specify standard norms for, and periodicity of, revision of rates of pay channels, including interim measures.

[F.No. 13-1/2004 – Restg.]
P.K.Tiwari
Dy. Secy (Restg.)

48. The learned counsel for Respondent drew our attention to clauses 2 (f) and 3 of the Principal Tariff Order dated 1.10.2004 which read as follows:

"2. Definitions:

(f) " **Charges**" means and includes the rates (excluding taxes) payable by one party to the other by virtue of the written/oral agreement prevalent on 26th December 2003. The principle applicable in the written/oral agreement prevalent on 26th December 2003 should be applied for determining the scope of the term "rates"

3. **Tariff**:

The charges, excluding taxes, payable by

(a) Cable subscribers to cable operator;
(b) Cable operators to multisystem operators/Broadcasters (including their authorised distribution agencies); and
(c) Multisystem operators to broadcasters (including their authorised distribution agencies)

prevalent as on 26th December 2003 shall be the ceiling with respect to walk free to air and pay channels.

Provided that ……"

49. Reading all this together, it follows that what is to be determined is the charges payable by different persons at different levels. It is true that this is an exercise involving study of costing of different elements, which is why it has been entrusted to an expert body such as TRAI. And, the Authority has on 15.1.2004, and purely as an interim measure, imposed a price freeze. This was followed, as indicated above, by the consultation paper dated 20.4.2004 which was formulated keeping in view the comments of different stakeholders received in response to the earlier consultation paper of 15.1.2004. The consultation paper of 20.4.2004 explores different methodologies in arriving at a suitable price. But, the Order of 1.10.2004 continues to rely on the prices as on 26.12.2003, which imposes a ceiling for existing channels and expects the new channels to have similar rates to those of similar channels existing as on 26.12.2003. In other words, while the consultation paper started with the promise of arriving at an appropriate 'tariff', the same did not materialise. As we stated in Para33, while this is the background, we are concerned here only with the Order that is assailed before us.

50. The consultation paper dated 21.5.2007 starts with the premise that there is need to revisit the issue of tariff regulation for non-CAS areas in a holistic manner, and that it would be useful to take stock of 'this tariff regime' (the one flowing from the Order of 1.10.2004). Chapter 2 of the consultation paper deals with the experience from the perspective of different stakeholders. As can be seen from Para 15 above, none of the stakeholders, be it subscribers/LCO/MSO/broadcaster was happy with the tariff regime. Under the circumstances, we would expect that an expert body such as TRAI, charged specifically with the task of tariff fixation, and as part of its duty to regulate the industry, would arrive at a tariff based on data. The TRAI has at its disposal the necessary means -- statutory, administrative and financial -- to call for information and study the various aspects. In fact, one can understand that in issuing the Order of 1.10.2004, the Authority did not have sufficient time to study the matter, which is no doubt complex, and arrive at a logically fixed tariff. And that, therefore, it went again by the historic prices, perhaps since it had to issue an Order quickly in an otherwise unregulated scenario. But this ground is not available in 2007, when the Authority had ample time to study the matter in depth. As already mentioned, the consultation paper of 21.5.2007 starts with the promise of taking a holistic look at the tariff regime but does not examine the possible options. It advocates the imposition of a ceiling for the cable charges (cable subscriber to cable operator) and in so far as the tariff at other levels of distribution namely, between broadcaster and MSO and between MSO and cable operator, it arrives at a judgement that such a ceiling is impractical, leaving the matter to continue to be decided by way of negotiation between the parties, within the framework of the guidelines issued by it on determination of subscriber base. In the impugned Order, the Authority stipulated that the charges existing as on 1.12.2007 would operate at all levels subject to a ceiling of Rs. 130 to Rs. to Rs. 260 which is fixed as the ceiling. There is nothing in the explanatory memorandum accompanying the impugned Order to indicate that the Authority had, through due diligence, reached a conclusion that the price as on 1.12.2007 was reasonably appropriate. Because, in Para 2.27 of the consultation paper, the Authority itself states that while one possibility is to go by historical prices, the question is which of the innumerable (emphasis supplied) historical prices operating in the current non--CAS regime could be considered as representative, given the fact that these vary widely across regions/economic strata. The explanatory memorandum accompanying the impugned Order does not also give any clue to the mind of the Authority. In para 3.18, the explanatory memorandum points out that MSOs and cable operators stated

that in order to enable them to deliver the required number of channels to the subscribers at or below the ceiling rates, it would be necessary to bring the Broadcasters within the ambit of the proposed tariff regime in an appropriate manner so as to enable them to source the content at the right prices. It also states that the Authority finds considerable merit in these suggestions. Yet, there is no indication of a tangible Action in this regard.

51. In the light of this, we conclude that the impugned tariff Order is not an exercise in tariff fixation as is ordained by section 11 (2) of the Act, in so far as it relates to fixing the prices as on 1.12.2007. Similarly there is no cogent explanation for adoption of 4% as the rate of inflation except stating at Para 4.2 (i) of the explanatory memorandum that it is the same increase 'allowed' (not fixed) by the Authority vide its Tariff Amendment Order dated 29.11.2005. A perusal of the explanatory memorandum to the Telecommunication (Broadcasting and Cable) Services (Second) Tariff (third amendment) Order 2005, (8 of 2005) dated 29.11.2005 shows that it was based on the then existing annual rate of inflation including for the week ending 5.11.2005. Now, nowhere is there an exercise by the Authority to examine whether this rate of inflation holds good even in October 2007 when the impugned Order was issued.

52. Thus, we hold that in adopting the rates existing as on 1.12.2007 and a rate of 4% thereon, the Authority merely went by convenience of arriving at an easy decision rather than straining itself to be founded on facts and figures. To that extent, we hold that the exercise carried out by the Authority is not the one envisaged under section 11 (2) of the Act, under which it has issued the impugned Order.

53. The learned Counsel for the 1st Respondent, Mr. Dwivedi, drew our attention to the observation made by the Hon'ble Supreme Court in the *Mafatlal Group Staff Association case,* cited *supra*. The relevant portion reads as follows: "*while judging the validity of such schemes, one should not pick out an individual instance -- not representing the generality of the situation -- and make it the basis. One has to take an overall view, i.e., whether it is beneficial to the class concerned as a whole or not."* We have carefully gone through the judgement. The case cited relates to an entirely different circumstance and the facts in this case are at variance with those therein. While the generality of the observation cited is no doubt relevant, the question here is not one of an individual or rare instance.

54. We now come to the next ground on which the Appellants have assailed the impugned Order, namely that the ceiling imposed on the subscription charges to be collected by LCOs from the subscribers is without basis and that the classification of cities and towns as well as the slab system stipulated in the impugned Order is irrational.

55. The first ground on which the Appellants, other than Appellant in Appeal no. 13/2007 have assailed the impugned Order in respect of the pricing is that there should not have been any regulation of pricing in the first place and that, instead, there should have been forbearance. They argue that the regulator himself had conceded that the best regulation is by the market, and that the regulation by way of the tariff Order of 1.10.2004 was only by way of an interim measure, and that the Authority had itself stated that it would be withdrawn as soon as there is evidence of effective competition. In the context of admittedly high growth, both in terms of channels as well as platforms, they argue that the case was ripe for forbearance. The counsels for Appellants argued that it is now unjustified on the part of the Authority to state that there is not enough competition to warrant deregulation/withdrawal of tariff freeze. The Counsel for the 1st Respondent argued that while it is true that there have been developments subsequent to the Principal Tariff Order of 1.10.2004, this has still not resulted in a level of competition where it can be said that the subscriber's interests are fully taken care of by the marketplace. He refers to paras 3.7 and 3.8 of the explanatory memorandum wherein it has been indicated that competition will exist only when a channel can easily substitute for another channel, which is often not the case since each channel has certain uniqueness about it. Secondly, since only a small share of the cable homes are served by DTH services, the last mile cable operator enjoys a virtual monopoly.

56. The consultation paper of 21.5.2007 deals with the issue of forbearance and states that volume alone may not be an indicator of adequate competition and states, in para 2.12 thereof, that the touchstone of effective competition is whether there are enough players, whether the conditions exist in the market to enable a few players to use their dominance; whether all the stakeholders have sufficient knowledge to play an effective role in driving the market forces; and whether fear of loss of advertising revenue on account of increased subscription charges is enough to deter price increase. While admitting, in the explanatory memorandum to the impugned Order, that there has been a steady increase in the new channels, the Authority holds that there is not adequate competition. The Authority refers to the explanatory memorandum annexed to the Tariff Order for cable services in CAS area dated 31.8.2006, wherein it was stated that historically there has been lack of effective competition and lack of choice to the subscribers. It is stated therein that the cable TV industry is characterised by fragmented cable operators and a few dominant Broadcasters and large MSOs. During the course of his arguments, the learned counsel for the 1st Respondent mentioned about the rapid growth of the cable industry in the last two and half years.

57. We have carefully considered the arguments of both the sides. We do not wish to substitute our judgement to that of the Authority in this matter. Introduction of forbearance or otherwise is a matter of judgement by the Authority keeping in view the various factors. We however find the argument of the 1st Respondent, the Authority, that forbearance is not being introduced in the context of lack of effective competition, curious. On the one hand, the Authority admits that the number of channels as well as the number of cable subscribers has grown significantly. It is admitted that number of cable TV subscribers has gone up to 78.4 million in 2007 from 50.31 million in 2003. Similarly, the number of MSOs is said to be 6000 and the

number of cable operators 70,000. Yet, going by the touchstone of the criteria listed by the Authority in the consultation paper, a conclusion was arrived at, that effective competition is lacking. If one were to go strictly by the criteria listed therein, it would always be difficult to arrive at a definitive conclusion about effective competition. The terms used therein, whether there are enough players; whether the conditions exist in the market to enable a few players to use their dominance; whether all the stakeholders have sufficient knowledge to play an effective role in driving the market forces; and whether fear of loss of advertising revenue on account of increased subscription charges is enough to deter price increase, are so subjective that it does not permit of any rational analysis. To this extent, we hold that while introduction of forbearance or otherwise is within the competence of the judgement by the Authority, it must be based on more rational analysis than what was attempted.

58. The next ground on which the price arrived at by the Authority has been assailed is about the ceiling of charges being determined at the level existing on 1.12.2007. The Appellants have stated that this fixation ignores the fact that the programming of channels is a dynamic process and that the prices need to relate to the cost of programming, and that the Tariff is hampering the interests of the Broadcasters in as much as it would cause serious loss to them. The Respondents counter this argument. Both the counsels have argued that the Broadcasters have not shown any figures to prove their point. The 1st Respondent's contention is that the so-called "freezing" of cable tariff is already contained in the Principal Tariff Order, and that it would continue even if the impugned tariff Order is set aside. Besides, TRAI changed the date from 26.12.03 to 1.12.07 so as to bring the post-04 service providers into the tariff regime. The counsels further argued that the very growth of the broadcasting industry is a clear indication that the Broadcasters are not at a loss. The Counsel for 2nd and 3rd Respondents argued that contrary to what is being argued by the Broadcasters, the costs for Broadcasters are actually coming down. The Appellants' contention that the costs are going up is belied by the fact that expenditure of Zee Entertainment in the year 2008 is less than that of 2007 by as much as 19% and that the operating income itself grew by 508% even as the costs of goods and operations had gone down by 31%. It is also pointed out that the very fact that the carriage arm of Zee Turner (Appellant in Appeal 11/2007) namely WWIL, is incurring losses shows that the Broadcasters are making profits while the MSOs are losing.

59. We find that the documents sought to be relied upon by the Counsel for the 2nd and 3rd Respondents relate to the period before the impugned Order. In any case, It is difficult in an Appeal like this, to determine whether one of the parties involved is actually incurring loss and if so the quantum. Suffice it to say that the explanatory memorandum to the impugned tariff Order does not give adequate reasons as to why the prices have been frozen at the level of 1.12.2007. We have already dealt with this aspect in paras 50 and 51 above. We would like to reiterate that the Authority would have done well to analyse the possible effects of the decision on various service providers before issuing the impugned tariff Order.

60. A significant feature of the impugned tariff Order is that it has, by way of clause 2 (f) and schedule I to the said Order, fixed a ceiling on the price chargeable by the local cable operators from the cable subscribers. This ceiling varies with the number of channels as well as the area in which the cable subscribers live, and ranges from Rs.130 to Rs.260. The contention of the Appellants is that in a non-addressable system, where the mode of transmission is analogue, and the capacity to carry signals is limited to 65 or 70 channels, the impugned Order raises several issues.

61. *Firstly*, it does not serve the interests of the consumer because it is not open to the MSO/cable operator to carry a single extra channel to go into the next slab, where he would realise extra revenue ranging from Rs. 15 to Rs. 40. Explaining this, Mr. Ramji Srinivasan, learned counsel for appellant in Appeal no. 12 of 2007, states that if an MSO/LCO were to give 20 pay channels (in addition to FTA channels), he would charge Rs. 160 in 'A1' and 'A' class cities and Rs.130 in 'other areas'; but if he were to give 21 pay channels (i.e., one channel extra), he can charge Rs. 200 or Rs.160 respectively, thereby gaining extra revenue of Rs. 40/30 for this channel. The position is likewise, in respect of other slabs. But the subscriber who does not have the power to pay as per the number of channels he is viewing, ends up paying a very high price for this extra channel. In reply, counsel for the 1st Respondent pointed out that an MSO or a cable operator cannot automatically migrate to the next slab by adding only one channel. It is explained that there are two ceilings levels in the impugned tariff Order -- one relating to the charges existing as on 1.12.2007 and the other given in schedule I. Where an MSO/cable operator was charging a certain amount on 1.12.2007, addition of another channel will entitle him to charge extra only to the extent of the rate of that channel but does not permit him to migrate to a slab in the schedule I. The Counsel for 1st Respondent also contended that the price regime given by the impugned tariff Order enables the subscribers to know whether they are being overcharged and in case the number of channels being supplied to them is less, it would enable a reduction in their monthly cable bill. He, therefore, states that this Order is very much in the interests of the consumers.

62. *Secondly*, it is contended by the Appellants that according to the Authority, the charges per channel in a non-CAS area should be higher than that of a CAS area because in the latter, thanks to addressability, the actual number of subscribers is known. But by virtue of the impugned Order, the position is reversed and the rates per channel in a non-CAS area become lower than those in a CAS area. The Counsel for Appellant in Appeal no. 11/2007 refers to the Explanatory memorandum to the interconnect regulations dated 10.12.2004 which states that *"... it should normally be expected that price in an addressable system would be lower than in a similar non-addressable system"*. He pointed out that since a sum of Rs. 77 is being charged for 30 FTA channels, when the balance amount (ceiling minus Rs.77 for 30 FTA channels), stipulated in schedule I to the impugned Order, is distributed among the number of pay channels, the per channel cost works out to Rs. 2.40 to Rs. 4.15 which is lower than the sum of Rs. 5 per channel fixed by the Authority for CAS area. Thus, he argues, this approach of the Authority is at variance and in clear conflict with its own tariff for CAS areas. The counsel for 1st Respondent states that the Appellant is trying to mislead the Tribunal. In its reply, the 1st Respondent stated that

this argument of the Appellant is based on the premise that in non-addressable systems, it is difficult to correctly assess the number of subscribers on account of under-declaration. His argument is that this problem of under-declaration is between the MSOs/LCOs and the Broadcasters and is not an issue between cable operators and consumers. It is argued that it is possible that the rates charged by Broadcasters from MSOs and by the MSOs from cable operators may be higher in non-CAS areas as compared to CAS rates but the same analogy cannot be applied to rates charged by cable operators from consumers. In fact, because of the practice of cross-subsidisation, at the consumer level, the rates may be higher or lower compared to CAS rates. Reference is made to para 4.3 (iv) of the explanatory memorandum to the impugned tariff Order where it is stated that some of the MSOs are giving discounts in CAS areas and these discounts are taken into account while fixing the price at the subscriber levels. It is argued that, after taking into account these discounts, the rates for a package of 30 FTA and 30 pay channels is Rs. 182 while the ceiling specified in the tariff Order for non-CAS areas is Rs. 200. The Respondent also states that it is not correct to compare CAS rates with non-CAS rates in other cities, since CAS has been introduced only in four metros. While noting the contention of the Respondent, it appears to us that it is in conflict with what was stated in the explanatory memorandum to the Order dated 31.8.2006 which has been brought to our attention. The Respondent has not satisfactorily explained this divergence of views at two different points of time. Secondly, and more importantly, the issue at hand is the basis on which the price slabs have been fixed. We will be dealing with this in the next few paragraphs. Another argument of the Appellant is that the consequence of stipulating a price ceiling at the retail level amounts to fixing an average price of pay channels at each level, which is wholly arbitrary, since each of the pay channels is unique in terms of content and cannot be subjected to uniform pricing. The Counsel for Respondent argues that the same position existed even prior to the issue of the Order.

63. *Thirdly*, the Appellants question the manner in which the price ceiling has been determined. The counsel for Appellant in Appeal no. 10/2007 strongly criticised the lack of an attempt by the regulator to even attempt an analysis of the costing but instead relying on historical prices. Referring to para 2.27 of the consultation paper dated 21.5.2007, he argued that what is supposed to have been done in 2004 cannot be considered to be valid even in 2007-08, particularly when the regulator states that this exercise is to review the tariff regime in the light of the developments of last two years.

64. *Fourthly*, the counsels for Appellants argued that the classification of cities, on the lines adopted by the government for the purpose of house rent allowance (HRA) is arbitrary. There is no material or rationale for the classification of cities. Classification of cities adopted by the regulator is an attempt by TRAI not to do its homework. Instead of considering indices like the consumer price index or any other index, the regulator has taken recourse to the house rent allowance for government servants, which is not appropriate. Central Government employees form a minuscule percentage of the country's population and this cannot, therefore, be a guiding criterion for price fixation. Besides, this classification did not figure in the consultation process and explanatory memorandum cannot rectify this. The counsel for 1st Respondent stated that para 4.3 of the Explanatory memorandum answers three questions -- the need for slabs, the rationale for classification cities on

the basis of HRA, and the rationale for ascribing a particular rate to each class. He justified the classification on the ground that the tariff had to be transparent and something that can be understood. The HRA classification relates to the questions raised in the consultation paper of 21.5.2007. He also stated that while everybody asked only for forbearance, no one really suggested an alternative to the HRA classification. He also stated that one advantage of the HRA classification is that in big cities, the house rent is high because of people's capacity to pay. Thus, it had some nexus with what was sought to be achieved and this was the only classification possible and that alternative to this approach would have meant fixing city-wise tariff. The counsel also stated that the regulator had to devise a scheme whereby the slabs were minimal and fixing city-wide ceilings would be a gigantic task. The learned counsel also stated that, during the consultation process, while Broadcasters asked for forbearance, the MSOs asked for a country-wide ceiling of Rs. 200 as can be seen from para 3.3 of the Explanatory memorandum. The regulator took average of three studies that were conducted and worked out an average of Rs. 168. Multiplied by 80 million cable homes, it gave the total off take and this was tried to be fitted into a structure as close as possible to the existing rates and that was how a figure of Rs. 152 was arrived at; adding 4% to this gave the figure of Rs. 158. The DTH and CAS rates were Rs. 275 and Rs. 252 respectively. Based on these, the ceilings for different cities were fixed.

65. *Fifthly,* it is argued that as a result of this Order, all the people in a given city are brought into one category, whether they are subscribers in a well-to-do locality or a poor locality, and that this eliminates the element of cross subsidisation inherent in the earlier practice and also mentioned by the regulator as a positive element.

66. *Sixthly*, the Appellant in Appeal no. 13/2007 points out that the relationship between Broadcasters and an MSO is always based on a negotiated subscriber base. There is always a demand from the Broadcasters for the subscriber base to be hiked periodically. Since the charges that can be collected from subscriber is now limited by virtue of the ceiling, any hike in the subscriber base and consequent increased payment to the Broadcaster would necessarily have to be borne by the MSO, thus imposing a higher burden on him. Counsel for Appellant stated that in the Broadcasting industry, the price is negotiated and the subscriber base is fixed accordingly; this aspect has not been attended to by the regulator, leaving this as an incomplete exercise. The Counsel for the Appellant also argued that earlier, the cable operator could cross-subsidise different segments. But this facility has been taken away by the impugned Order. Because of the tariff Order, the LCO cannot charge more than Rs.260 per month in an ‘A’ class city. But in a slum area, where the LCO was charging say Rs. 50, he cannot charge more than 4% of Rs.50 i.e. a total of Rs.52. This is leading to a totally chaotic situation and removes the earlier principle of cross subsidisation. He pleads that the market regulation should either be from the top i.e., based on the cost to the Broadcasters and going down to the consumer or it should go from bottom up; but what TRAI has done is a half-baked exercise. Referring to Para 4.2 (ix) of the explanatory memorandum to the impugned tariff Order, he points out that TRAI ‘hopes‘ that the Broadcasters would honour the arrangement and states that in a commercial matter, there cannot be a question of ‘hope’ and that this is an instance of the

Authority exercising its power in an arbitrary fashion. He also states that to determine the subscriber price only, without any reference to costs or sharing pattern is against basic economic principles.

67. The counsel for the 1st Respondent argued that the basis for Schedule I is not the costs (of which there is no record) involved in the Distribution chain but the capacity of consumers to pay. When the regulator initially froze the market rates, the market was based on the capacity to pay. He stated that the regulator had tried to tackle the price issue in two ways -- (a) by freezing the market rates and by bringing in the post-2004 providers /subscribers and (b) by placing a ceiling on them. The counsel for Respondent argued that there is nothing on record to show that any of the service providers is facing a loss because of the impugned Order. Even the only argument of Appellant in Appeal no.13/2007 is that the à la carte measure is half baked. Exercise of tariff fixation involves so many factors that need to be harmonised while at the same time ensuring that public interest at large is subserved. He contended that the rates fixed by the regulator are reasonable and correspond to the market rates and that all the three classes --pre-03, post-04, post- 07 -- are brought on par.

68. As regards the price determination, the counsel stated that there were only two alternatives -- cost-based pricing and historical pricing. Cost-based pricing was not possible and insofar as historical prices are concerned, it meant the prices prevalent in the market. Here, the rates were varying and there was no one representative price. And hence the prices were frozen in 2004 and 2007. He also stated that the regulator tried to ensure that Broadcasters also get their due share from the subscription fees, as can be seen from para 4.1 (iii) of the explanatory memorandum and para 2.27 of the consultation paper of 21.5.2007.

69. We propose dealing with all the arguments together, since the subject matter is the correctness of the price ceiling fixed in the schedule annexed to the impugned tariff Order. As regards the contention that the price fixation under the Order does not serve the interests of the consumer, we are of the view that setting a price, *per se*, is a matter of policy and cannot be said to be against consumer interests. The question is whether such fixation is reasonable to all concerned. Any price fixation affects not only the consumers but also the entire distribution chain i.e., cable operators, MSOs and Broadcasters. The very preamble to the TRAI Act reads as follows: *"To provide for the establishment of the Telecom Regulatory Authority of India and the Telecom Disputes Settlement and Appellate Tribunal to regulate the telecommunication services, adjudicate disputes, dispose of appeals and to protect the interests of service providers and consumers of the telecom sector, to promote and ensure orderly growth of the telecom sector and for matters connected therewith or incidental thereto"* **(emphasis supplied).** The function of TRAI in issuing the tariff Order therefore is to ensure that in the process of regulation, the interests of all concerned are considered and an orderly growth is assured.

70. The two principal aspects of the issue under consideration are whether the ceiling fixed is appropriate including the manner of classifying the cities; and whether this harmonises with the interests of all concerned. It

is admitted that the rates fixed are based on historic prices i.e., prices prevailing in the market. The Counsel for 1st Respondent himself has stated that the Authority took average of the three studies that were conducted and arrived at an average of Rs. 168, multiplied this by the number of cable homes, and fitted the entire revenue into a structure as close as possible to the existing rates. The manner in which the figure of Rs.168 was arrived at has also been discussed at length and has been strongly contested by the Appellants, on the ground that the concerns raised were not made available to the stakeholders. Be that as it may, the studies conducted by the Authority also showed that there is a wide variation in the charges at different places ranging from the Rs.149 in Kochi to Rs.322 in Shillong, as indicated in Para 3.9 of the explanatory memorandum to the impugned tariff Order. It is not clear from the records nor has it been brought out by the Respondent, either in the pleadings or arguments, that the studies have taken note of the variations across various tiers of cities/ economic strata, in arriving at the figures notified in Schedule 1. In other words, the figures that were arrived at and notified as Schedule 1 are, at best, assumptions made by the Authority. In classifying the cities too, the Authority appears to have taken recourse to the classification of Ministry of Finance for the purpose of house rent allowance, on the ground that it equally reflects the subscribers' capacity to pay. It is quite obvious that the house rent allowance classification used by the Ministry of Finance is for the purpose of Central Government employees. By no stretch of imagination can it be inferred that the capacity to pay of people at large, living in a given city will be the same as that of the Central Government employees. It also does not meet the contention of the Appellants that in a normal market situation, different segments of society are charged at different rates and there is an element of cross subsidisation. In para 2.22 of the consultation paper of 21.5.2007, the Authority itself had recognised this aspect. Yet, the impugned Order does not allow for any such cross subsidisation. The contention of the Respondent is that in so far as persons already covered, the ceiling fixed with reference to 1.12.2007 will operate. At the same time, for the rest, including for new subscribers who may be belonging to the lower economic strata, the ceiling figure will apply, although it is open to an MSO/cable operator to supply channels at a lower cost. These figures have apparently been arrived at from the average figure, which itself is an average of the high and low. Now, the economics of distribution will obviously not work out if the low is retained as such and if the high is brought down to the level of average. This is in addition to the problem of the rates being pegged at historic levels with a minor adjustment regarding inflation. Obviously, operating this at the ground level would be difficult particularly when the Authority itself admits in para 3.9 of the explanatory memorandum that "*the mere availability of power to regulate and intervene at any time by TRAI has not proved to be a deterrent and has not prevented market aberrations of the type mentioned above*". In such a situation, we would expect that the Authority will lay down a figure which is reasonable, which can easily be implemented and which satisfies the various levels in the distribution chain. The Respondent has also not been able to meet satisfactorily the charge of the Appellants that in fixing a ceiling based on the number of channels, they are unwittingly giving scope to the local operator to pick up channels which are less expensive. In a non-addressable scenario where the subscriber has no choice of the channels he views, the impugned Order would act as a deterrent to the development of good quality channels. We are inclined to agree with this contention of the Appellants. There is every possibility that resultantly, MSOs will try and access the channels at the cheapest price and this would in turn drive the Broadcasters to seeking a greater share of their revenue from advertisements. Already, there is enough dissatisfaction that viewing time is being occupied more and more by commercial advertisements, and this situation could only worsen. It is necessary for the Authority to keep in

view that its function is also to ensure orderly growth which includes quality growth. We find that the exercise undertaken by the Authority falls short of these requirements. Accordingly, we hold that the price ceiling fixed including for different tiers of channels/cities is arbitrary and irrational.

71. Another feature of the impugned tariff Order is clause 3C, which contains a Direction to every Broadcaster to offer all its channels on à la carte basis to the MSO/cable operator. It also lays down the rates at which each of the pay channels will be charged vis-à-vis the bouquet. The counsels for the Appellants argue that this Order is irrational, arbitrary, and deserves to be set aside. Their contention is that in so prescribing, the Authority failed to appreciate that there is a virtual monopoly of MSOs and cable operators in their respective areas. In a non-addressable system, the under declaration of the number of subscribers is extremely high and there is no mechanism to determine the actual number of subscribers viewing the channels, which is why the bouquet arrangement is resorted to. Hence, it is not possible for the Broadcasters to offer the channels on à la carte basis. If implemented, it will cause severe financial prejudice to the Broadcasters. The Counsel for Appellant in Appeal no. 11/2007 stated that Subscription revenue constitutes about 52% of the total broadcasting revenue of Zee network. The impugned Order will further reduce the already under declared subscription revenue. The sharing of the subscription at different levels has been partially and marginally addressed without addressing the viability of the same, which resulted in much litigation on the mutually agreed subscriber base. When the consumer group could not give any solution, it is pertinent to mention that the Regulator has to device its own way for the purpose of arriving at a practical and workable solution. This has not been carried out with sound reasoning or costing partially the components of various inputs driving the industry.

72. Another contention of the Appellants is that this recommendation of TRAI is actually contrary to its earlier decision when it had rejected the same request received from the MSO Alliance in their Telecommunications (Broadcasting and Cable) Services (Second) Tariff (Sixth Amendment) Order 2006. In the explanatory memorandum attached to the 2006 Order, TRAI had recorded that the consumer organisations have stated that the choice to the operator would only be a 'farce' given the scenario of area monopolisation at the last mile level and that the amendment would only give leverage to the MSOs. After analysis, it felt that this concern could be better addressed through introduction of addressability and spread of digitalisation. In their reply in Appeal no. 9 ©/2006, TRAI had submitted that that it is not technically feasible to provide choice either to the LCO or to the consumers to select individual channels. The Appellant's case is that the ground situation has remained unchanged since the Order dated 31.7.2006 and that the impugned Order, directing the Broadcasters to supply channels à la carte to the MSOs, is irrational.

73. The Appellants also argue that by enabling the MSO/cable operator to choose the channels, the Authority is encouraging the carriage fee regime and is facilitating the MSOs to seek exorbitant carriage fee. They contend that the impugned Order imposes a double strain on the Broadcasters to provide channels on à la carte basis to

MSOs/cable operators without any mechanism to ensure that they get the subscription money for actual number of subscribers in a non-addressable regime.

74. The counsel for 1st Respondent submitted that the Appellant's contentions are baseless. Merely because à la carte choice cannot be made available to consumers in non- CAS areas does not mean that à la carte transaction between Broadcasters and MSOs will not be beneficial to consumers. As indicated in the explanatory memorandum, the attempt is to prevent 'perverse pricing' of bouquets vis-à-vis individual channels. It has been the practice in the industry that bouquets are formed such that they contain only one or two popular channels and the MSOs/cable operators are forced to take the entire bouquet and they have to pay as if all the channels in the bouquet are being watched by the entire negotiated subscriber base, while only the popular channels have high viewership. In the process, the entire cost of the bouquets is borne by the subscribers who are not in a position to choose individual channels because of the non-addressable system. This is done by the Broadcasters in order to enhance their revenue from advertising, which is actually the major part of their revenue. It is to prevent this that the à la carte system has been brought in. The Respondent's case is that the question whether the benefit arising out of the financial saving from the à la carte choice of channels would be passed on to consumers by MSOs/cable operators could not have been answered satisfactorily in the previous regime but that the situation has now changed because the Authority has decided to impose a reasonable ceiling on the amount that can be charged from the subscribers and that this will compel the MSOs and cable operators to pass on the financial benefit to subscribers. It is also stated that the competition from the DTH operators will act as a further check to ensure that benefits are passed on to subscribers by MSOs and cable operators.

75. Adverting to the argument of the Appellants that the impugned Order would result in exorbitant and unregulated carriage fee regime, the counsel for 1st Respondent stated that this allegation is without basis. The total number of channels to be carried by the MSOs/LCOs will continue to be determined based on consumer demand, business feasibility and technical capacity of the network, all of which remain the same prior to and after issue of the impugned Order. The Respondent stated that the issue of carriage fee being regulated was found to be not feasible at this stage and could be considered once there is considerable spread of digitalisation.

76. Hailing the impugned tariff Order as a visionary decision, the Appellants in Appeal no. 9 of 2006 submitted that neither the consumers nor the operators could choose individual channels and the Broadcasters resorted to 'Hard bundling', meaning thereby that they would put all their channels into one or more bundles and sell them *en bloc*, leaving no choice to the operators. The result is that the consumer is forced to pay for all the channels of the broadcaster even though he may not be viewing the same. Their contention is that this is done in order to ensure advertisement revenue in respect of all the channels, adopting the viewership of the driver channel to all the channels. The learned counsel for Appellant, Mr. Vaidyanathan, stated that about 80% of the revenue of Broadcasters is from advertisement, which is why the Appellants are challenging the regulation (according to the Counsel for Appellants, of the total revenue of Rs. 10,000 crore, Rs. 8000 crore comes from

advertising and Rs. 2000 crore from subscription revenue). He stated that the real situation will be known to the advertisers if à la carte choice is given to the MSOs. Secondly, since bouquets are occupying most of all the cable space in the analogue mode, choice à la carte will enable MSOs to bring in new channels. According to him, this is a right available to the Appellants under Article 19 (1) (a) of the Constitution. He argues that if there is restriction on new channels being introduced, the freedom of expression is affected including the right of every subscriber. He says that the freedom of expression involves a corresponding right on the part of the subscriber not to be compelled to take a bouquet of channels. Adverting to the other Appellants' argument that the MSOs cannot be the representative for the subscribers choice, the learned counsel states that it cannot be a case of all or none but has to be in a phased manner. While the subscribers will have the choice once CAS is implemented, it would however take time. A phased implementation and some experimentation is necessary in economic policy.

77. Speaking on behalf of the 2nd and 3rd Respondents in Appeal no.s 10, 11 and 12/2007, the learned counsel Mr. Kathpalia pointed out that in the absence of this choice, the MSOs are forced to carry channels which are never watched by a subscriber. He pointed out that no single family or even locality would be watching each of the channels which form part of a bouquet. Admitting that it is not possible for the MSOs to send appropriate bundle of channels separately to each LCO, he stated that the choice of channels by the MSO will be better than that of the broadcaster.

78. We have considered the matter carefully. There are essentially two issues. (A). whether the direction to give channels à la carte to MSOs will translate into better choice of channels for consumers? (B). whether this arrangement will result in the MSOs being able to demand a higher carriage fee?

Appeal no. 9 (c) of 2006 was filed by a group of MSOs under the style and name of MSO Alliance and another MSO against the decision of TRAI communicated in Para 3.6 of the explanatory memorandum to the Telecommunication (Broadcasting and Cable) Services (Second) Tariff (Sixth Amendment) Order 2006, (5 of 2006) dated 31.7.2006 wherein TRAI decided against the proposal of the MSO Alliance that the tariff Order of 1.10.2004 be amended to delete the provision for new channels being part of the new separate bouquets of at least that they should have a choice to between à la carte and bouquet. The decision of TRAI was taken in the light of three factors -- that à la carte pricing could be more expensive due to higher distribution costs and that it could, in the absence of addressability and the current disparities in market power, lead to a situation where the MSOs are forced to take all the new channels and that too at a higher price; the consumer organisations had indicated that the choice to the operator would only be a 'farce' given the current scenario of India monopolisation at the last mile level and the amendment would only give leverage to the MSOs; and thirdly that in the context of the then existing regime, it would lead to three sets of regulation regime whose implementation would be difficult. In the reply affidavit filed in that case, besides reiterating the concerns of the consumer organisations, the first Respondent, TRAI, clearly stated that à la carte choice of channels in a non-addressable

system is not feasible. This was in October 2006. The Authority had raised the issue once again in the consultation paper dated 21.5.2007; para 2.25 of the consultation paper reads as follows:

> "2.25 *The existing non-CAS tariff Order of 1.10.2004 as amended by an order of 31.7.2006 does not provide an option to an MSO to choose a channel. This could be cited as a bottleneck in not providing all the popular channels. A related issue that arises is whether the MSOs who are technically equipped to receive channels on à la carte basis should be given the option to choose individual channels. This may enable the MSOs to choose channels, which may reflect the popular choices of the subscriber based on regional preferences. This may also prevent the subscribers from being burdened with the new pay channels to some extent. But the problems of disputes over subscriber base and the consumer not getting a choice to choose individual channels may however continue to remain in the absence of addressability."* (Emphasis supplied).

79. In response to the issue posed in the consultation paper, the stakeholders gave different views. While the Broadcasters and MSOs took divergent stands, the consumers too did not unanimously/totally support the proposals. The explanatory memorandum to the impugned tariff Order deals with this issue at length in paragraphs 3.20 to 3.26. In para 3.24, the changed situation has been explained through two factors -- that the Authority has now decided to impose a reasonable ceiling, which will compel the MSOs and cable operators to pass on the financial benefit of the subscribers; and that the growing competition from DTH operators will act as a further check to ensure that the benefits are passed on to subscribers by the MSOs and cable operators. Para 3.25 explains that the earlier concerns regarding differential tariff regimes no longer exist.

80. In our view, two principal factors still remain. Firstly, the argument that choice of channels by MSO/LCO does not translate into subscribers' choice is still valid. It is not the case of the Authority that the ground situation has changed dramatically and that the last mile monopoly has disappeared. To our specific query, counsels of both sides confirmed that even prior to the issue of the impugned Order, MSOs were receiving bundles of channels from the Broadcasters and in turn re-bundling them into their own bouquets, what was otherwise known as 'soft bundling'. They were doing so as they had to limit the number of channels to 70 because of the capacity limitation in the analogue mode. The counsels also indicated that even today, none of the MSOs has taken à la carte choice. We are not convinced by the argument that the prescription of a ceiling on the cable charges at the subscriber level will translate into the MSOs and cable operators passing on the financial benefit to subscribers. It is quite likely, as pointed out by some stakeholders, that the MSOs may fill their cable capacity with lower-priced channels and demand higher charges both from the broadcaster, by way of carriage fee, and from subscribers for making available the better channels. There is no regulation in the impugned tariff Order to protect the subscriber from the vagaries of the MSO/cable operator. Besides, as indicated by the Authority in the explanatory memorandum, there are 6000 MSOs and 70,000 cable operators serving 78 million homes of which only a small percentage is covered by DTH/CAS. In other words, each MSO covers about 12,000 cable homes. While it can be argued that a choice of channels by an MSO, in the form of bouquet, is better than that of the broadcaster, it is unlikely that it will adequately reflect the choice of all consumers, even as a group. Secondly, in a non-addressable scenario, which is what characterises most of the cable industry, the

problem of under declaration by the cable operators/MSOs persists, and the concern of the Broadcasters in this regard cannot be brushed aside. In fact, a significant percentage of the disputes in the broadcasting sector are on account of the subscriber base, a fact recognised by the Authority in Para 3.27 of the explanatory memorandum annexed to the impugned tariff Order. It is essential that this issue is addressed squarely. The Authority would be well advised to review its decision indicated in Para 3.29 of the explanatory memorandum of having decided not to determine the levels of connectivity between the stakeholders. Since digitalisation and addressability are bound to take some time, it is essential that the Authority, set up to regulate the industry, finds a way to address the issue.

81. We, therefore, hold that while the idea of making à la carte choice of channels available to them is desirable, it must be backed up by adequate safeguards both to the consumer as well as to the broadcaster. As we indicated above, it is the responsibility of the Authority to regulate the industry such that consumers as well as service providers are adequately secured even as orderly growth is ensured.

82. Another issue on which the Appellants are aggrieved is clause 4 (para 7) of the impugned Order wherein direction is given to every broadcaster to furnish certain information to the Authority. The grievance is twofold: that the direction cannot be issued under a tariff Order; and that considerable information, including confidential information, is sought which imposes additional burden on the Broadcasters and violates their commercial confidentiality. The Authority has stated that this information is essential to maintain transparency. Since this is part of routine regulatory functions of the Authority, we do not wish to go into the matter except suggesting that the Authority may have a second look regarding this issue.

83. In conclusion, we hold as follows:

1. On the issue of whether the impugned Order is without jurisdiction, we do not wish to take a too technical view of the omission of relevant provisions of law while issuing the impugned Order; we however feel that a statutory Authority, such as TRAI, should have taken due care while passing an important Order such as this.
2. On the issue of whether the impugned Order violates the provisions of section 11 (4) of the TRAI Act and whether the obligation of transparency has not been fulfilled, we hold that the principle of transparency has been violated by the Authority.
3. On the issue of whether instead of fixing tariffs as stipulated in the TRAI Act, the Order is only in the nature of interim Order resulting in freezing of prices, we hold that the impugned tariff Order is not an exercise in tariff fixation as is ordained by section 11 (2) of the Act, in insofar as it relates to fixing the prices as on 1.12.2007.
4. On the issue of whether TRAI had wrongly concluded that adequate and effective competition in the market is lacking, despite clear evidence of substantial growth, we hold that while introduction of

forbearance or otherwise is within the competence of the judgement of the Authority, it must be based on a more rational analysis than what was attempted.

5. On the issue of whether the classification of cities and towns as well as the slab system stipulated by the impugned Order is irrational, we hold that the price ceiling fixed in Schedule I to the Tariff Order, including for different tiers of channels/cities is arbitrary and irrational.
6. On the issue of whether the stipulation that Broadcasters should provide channels on à la carte basis to the MSOs/LCOs is wrong, we hold that while the idea of making à la carte choice of channels available to them is desirable, it must be backed up by adequate safeguards both to the consumer as well as to the broadcaster.
7. On the issue of whether the direction, in the impugned Order, seeking information from the service providers is inappropriate, we hold that this is part of routine regulatory functions of the Authority; we do not wish to go into the matter.

84. With these findings, we set aside the Telecommunication (Broadcasting & Cable) Services (Second) Tariff (Eighth Amendment) Order 2007 dated 4.10.2007 of the Telecom Regulatory Authority of India. We direct the TRAI to study the matter afresh in the light of our observations and issue a comprehensive Order covering all aspects including the issue of subscription base in a non-addressable system. We expect the Authority to complete this Study in six months for which they may call for such relevant information as is required from the service providers. We also direct all the service providers that non-cooperation in this exercise including non-furnishing of information will be viewed as a violation of this Tribunal's orders.

85. We would once again like to make it clear, by way of abundant caution, and as already mentioned in Para 33 above, that none of the Appeals under consideration seek to impugn the Principal Tariff order dated 1.10.2004; even if they did, it would not be admissible since that Order has been in force for the last four years. As such, the judgement in this case does not in any way, affect the operation of the Tariff Order dated 1.10.2004.

86. The Appeals are disposed of accordingly. No costs. M.As also stand disposed of.

........................J
(ARUN KUMAR)
Chairperson

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(J.S. SARMA)
Member

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(G.D. GAIHA)
Member