TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL
NEW DELHI

DATED 12TH May 2009

APPEAL NO.11(C) OF 2006

Wire & Wireless India Limited ..... Appellant
(Earlier known as Siti Cable Network Ltd.)

Versus

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**

For Wire & Wireless India Limited	:Mr Maninder Singh, Mr Yoginder Handoo, Mr Kunal Sood, Mr Manisimran Singh, Advocates
For Telecom Regulatory Authority of India	:Mr. Rakesh Dwivedi, Sr. Advocate with Mr. Vikas Mehta, Advocate
For Cable Operators' Federation of India (COFI)	:Mr. Vibhav Srivastava, Advocate *(Amicus Curiae)*

ORDER

The Appellant in this case has challenged certain provisions of the "Telecommunication (Broadcasting and Cable Services) Interconnection (Second Amendment) Regulation 2006 (9 of 2006)"dated 24th August, 2006 (hereinafter referred to as the **Amendment Regulation**). On 10.12.2004,the Telecom Regulatory Authority of India (hereinafter referred to as the **Authority**) issued the Telecommunications (Broadcasting and Cable Services) Interconnection Regulation 2004 (13 of 2004) (hereinafter called the **Principal Regulation**).Pursuant to the Notification of implementation of Conditional Access System (hereinafter referred to as **CAS**) in the cities of Mumbai Kolkata and Delhi, the Authority was required to issue Standard Interconnection Agreements (**SIA**) to guide the relationship between the Broadcasters, Multi System Operators (hereinafter referred to as **MSOs**) and the Local Cable Operators (hereinafter referred to as **LCOs**). Accordingly, the Authority issued the

Amendment Regulation incorporating therein a Standard Interconnection Agreement which, inter-alia ,included revenue sharing provisions for the CAS areas amongst the Broadcasters, MSO and LCOs. The SIA between a Broadcaster and a Multi System Operator (MSO) was appended to the Amendment Regulation as Schedule I, and that between a MSO and LCO as Schedule II. One of the provisions of schedule II provided that the subscriber fee in respect of the Basic Service Tier (**BST**) comprising of Free To Air (**FTA**) channels is to be retained by the affiliates (Cable Operators) and that no portion of this fee shall be payable by the affiliates to the MSOs. The present Appeal seeks to challenge this clause of the Amendment Regulation.

2. The background of the impugned Regulation and the present Appeal is as follows. Ministry of Information & Broadcasting issued a Notification dated 10th July, 2003 under the Cable TV Act for the introduction of Conditional Access System (CAS) in the cable TV network in certain specified areas. This Notification envisaged that within six months from 1.3.2003, it shall be obligatory for every cable operator to transmit/re-transmit programmes of every pay channel through an addressable system in the specified areas. In pursuance of the order of the Delhi High Court dated 20th January, 2006, Ministry of Information & Broadcasting issued a further Notification on 31st July, 2006 for implementation of the Conditional Access System in the notified areas w.e.f. 31.12.2006. On 10.3.2006, the Delhi High Court had directed that CAS be implemented in the three Metros of Mumbai, Kolkata and Delhi. Union of India filed an Appeal before a division bench of the Delhi High Court for extension of time for implementation up to 31.1.2007. In its order dated 20.7.2006, the Division Bench of the Delhi High Court permitted time up to 31.12 2006. Pursuant to this order, Government of India issued a Notification on 31.7.2006 notifying the areas in the three cities of Mumbai, Kolkata and Delhi where CAS would be implemented with effect from 31.12.2006. Subsequent to this order, a series of meetings were held in the Ministry of information and Broadcasting wherein the stakeholders – Broadcasters, MSOs and LCOs -- expressed the view that there should be a standard form of Interconnection Agreement between Broadcasters, MSOs and LCOs and that TRAI should formulate the same in consultation with the stakeholders. Accordingly, TRAI had, on 12.6.2006, issued a Press Release containing a draft of the Standard Interconnection Agreement (SIA) along with the two Schedules indicated in Para 1 above, which, inter alia, contained provisions relating to revenue sharing between the different stakeholders. Thereafter the Authority received the comments from the stakeholders and held discussions with different stakeholders in the month of July and August 2006. In the meanwhile, the Delhi High Court had passed an order on 20.7.2006 wherein it directed that CAS be implemented in the notified areas of Delhi, Mumbai and Kolkata by 31.12.2006 pursuant to which Government of India had issued the requisite Notification on 31.7.2006. After due process, the Authority issued the Amendment Regulation by virtue of the powers conferred upon it vide Section 13 of the TRAI Act. The Explanatory Memorandum to the impugned Regulation states that the Authority has, after carefully considering the feedback received from the stakeholders, finalised the SIAs which are being mandated through the impugned Regulation.

3**.** When the matter came up for consideration on 8.1.07, this Tribunal remitted the matter back to TRAI requesting it to reconsider the matter and take a decision afresh including on the revenue sharing arrangement amongst the stakeholders. This order is reproduced below:

"This Appeal is directed against a direction of the TRAI dated 24.8.2006 followed by a Notification bearing the same date amending the Interconnection Regulations, 2004. The main grievance of the Appellant is that as a result of the impugned order of the TRAI, the entire revenue from free-to-air/basic tier has been allowed to be kept by the cable operators. The plea of the Appellant is that for the said amount there should be revenue sharing between the MSOs and cable operators. In this Appeal the cable operators are not represented before us. The Appeal is by one of the MSOs. The issue raised in the present Appeal in our view is of great importance and has wide repercussions on the MSOs as well as on the cable operators. We would, therefore, like that the cable operators be also heard before the issue is decided. We feel that the TRAI should hear all the stake-holders in this behalf. Let the TRAI give a hearing to all concerned stake-holders and take a decision on the issue. The TRAI will call all the stake holders before it and after giving them a proper opportunity of hearing, take a decision. The facts demand that the decision has to be taken expeditiously and, therefore, the TRAI is requested to complete the exercise within six weeks. We would expect the stake holders to co-operate with the TRAI in expeditiously deciding the matter."

4. On 16th April, 2007, the Authority filed an affidavit, where it stated that after having re-visited the entire issue, it had come to the conclusion that the revenue share formula given in the Standard Interconnection Agreement does not warrant any change. The Appellant filed their response to this compliance affidavit of TRAI on 22nd May, 2007, wherein it countered the view of the Respondent and prayed that its Appeal should be allowed on the basis of the reasons given in its response dated 22.05.2007 to the compliance affidavit of the Respondent.

5. We will now take up the contentions of both the Parties. Briefly stated, the Appellant's contention is that the Amendment Regulation itself is illegal, because it seeks to regulate the Carriage Fee which is not a 'service' and simultaneously, it violates the obligation to fix the revenue sharing between the different players in respect of the 'service' which includes the Basic Tier/Free To Air channels. Its contention is also that the Regulation is contrary to the stipulation in sub-section 9 of section 4-A of the Cable Act. The Appellant has pleaded that TRAI erred in not taking into consideration the fact that Carriage Fee can only be by way of mutual understanding and that there is no regularity regarding the same. It is contended that the stipulation that MSOs are not entitled to any share in BST fee is arbitrary and unreasonable and that the Authority did not take into consideration the submissions of the Appellant dated 28.6.2006 and that of the MSO Alliance dated 31.7.2006. It is further pleaded that allocation of 30% revenue from pay channels alone is insufficient to meet the expenditure incurred by the MSOs and that, in denying any share of the Basic Service Tier (**BST**) fee to the MSOs, the Authority has erred in not taking into consideration the expenses incurred by MSOs in setting up of the control room; laying of optic fibre network; and O&M expenditure thereon.

6. Adverting to the decision of the Authority dated 13.4.2007, reiterating the arrangement whereby the entire Basic service Tier is allowed to be retained by the cable operators, the Appellant contended that it was

arbitrary, discriminatory, unreasonable, and iniquitous; that it was in complete disregard of the material placed on record and responses submitted by various stakeholders on the issue; and it was also based on irrelevant considerations. The contention of the Appellant is that it is incumbent on the Authority to ensure that the material supplied at the stage of consultation should be thoroughly analysed and if required detailed information may be sought further, in regard to the relevant factors like digitalization in the CAS area and Carriage Fee received by MSOs after digitalization. The Appellants have pleaded, that the Respondent's contention that the disputes will increase in case the sharing of Carriage Fee and basic tier service charge is allowed amongst Multi Service Operators (MSOs) and Local Cable Operators (LCOs), is irrelevant. The Appellant's prayer is to quash and set aside the impugned Regulation dated 24.8.2006 and direct TRAI to undertake a specific exercise of determining the revenue share for the BST fee to be divided between the MSOs and LCOs.

7. Countering the contentions of the Appellant, the Respondent's case is that Carriage Fee constitutes income of MSOs which is derived from providing cable television services and as such the impugned Regulation is very much within the mandate of TRAI. Stating that while the revenue share formula is part of the Standard Interconnection Agreement, it is pointed out that MSOs and LCOs are free to negotiate and arrive at any other mutually acceptable interconnection agreements and revenue sharing formula. Besides, the terms of the Standard Interconnection Agreement (SIA) is intended only for one year and that it could be reviewed if considered necessary after taking into consideration the way cable industry evolves in the CAS areas. The case of the Respondent is that the impugned Regulation has been issued by taking into consideration the three distinct groups i.e. Broadcasters, Multi System Operator (MSO) and Local Cable Operator (LCO). Its case is that the revenue sharing arrangement has been considered as a single common package and it is based on several elements like pay channel charges, advertisement charges, Carriage Fee etc. It is also stated that this Appeal need not be considered since 20 of 21 MSOs have found the revenue sharing arrangement acceptable and that it is only this Appellant who is aggrieved. Its contention is that the Appellant is trying to misrepresent that its own business model is applicable to all other MSOs.

8. On merits of the Case, the Respondent's case is that despite being requested, the Appellant did not furnish copies of its annual accounts, business model and other calculations on the basis of which the revenue sharing proposal has been made by it and that instead of furnishing the reply, and awaiting the decision, the Appellant has chosen to approach the TDSAT. It is contended that sharing of revenue of BST would mean also sharing of Carriage Fee which would lead to several disputes as there is no transparent way of knowing their revenue from the Basic Service Tier or the Carriage Fee. Referring to the plea of the Appellant that investment made by MSOs has not been taken into consideration, it is stated that the cable networks in the CAS and non-CAS areas have been put to use for long periods and that the initial costs have been significantly recovered by most of the MSOs and cable operators. Besides, it is contended that the carriage of BST signals primarily utilises the cable network installed by cable operators within their area for which investments have been made by the cable operators. The Respondent has also contended that sharing of revenue of BST channels would mean also sharing of Carriage Fee which would lead to several disputes as there is no transparent way of knowing the revenue from the basic service tier and the Carriage Fee. The Respondent contends that the impugned

Regulations do not mandate digitalisation of pay channels in the CAS areas and as such the BST channels could be carried in analogue mode even in these areas. Finally, the Respondent prayed that the Appeal be dismissed.

9. Based on the contentions of both the parties, the following issues arise for determination:

A. Whether this Appeal is not maintainable?

B. Whether the impugned Regulation is contrary to the mandate given to TRAI?

C. Whether the impugned Regulation is arbitrary and irrational?

D. Whether the Appellant is entitled to any relief? If so, the relief.

10. The Case having come up for hearing, we have heard at length the counsels for both parties. We will first deal with the issue of maintainability of this Appeal. The Respondent has advanced the argument that this Appeal is not maintainable on the grounds that (a) that it was filed by only one of the several MSOs; and (b) that the Appellant has approached the Tribunal prematurely.

11. On the first ground, the learned senior counsel for the Respondent, Mr. Dwivedi, argued that of the 26 approved MSOs, only 10 MSOs are active of which only the present Appellant has filed this Appeal. His case is that the balance nine MSOs are happy and content with the determination done by TRAI. He pointed out that the leading MSO i.e. M/s Hathway had expressly stated in their response that they want the BST charges to be retained by the LCOs. When the matter was referred back to TRAI by this Tribunal, Hathway did not file any response. According to him, two other MSOs – IndusInd Media Communications Ltd. and MSO Alliance -- filed responses broadly on the same lines as that of the Appellant but did not file any Appeals. According to him, this itself clearly shows that the determination done by TRAI is reasonable, fair and just. The learned counsel referred in this context to the judgement of the Supreme Court in the case of **Hotel and Restaurant Association of India and Another v. Star India Pvt. Ltd and Others [(2006) 13 SCC 753],** wherein the Apex Court held that the interest of one of the players in the field would not be taken into consideration throwing the interest of others to the wind. The counsel for Respondent also objects to the maintainability of this Appeal on the grounds that the Appellant has prematurely sought relief from this Tribunal without furnishing information to TRAI.

12. Refuting the contention of the Respondent that only the Appellant has a problem and the other MSOs do not have any problem with the revenue share indicated in the amendment Regulation, the learned counsel for Appellant, Mr. Maninder Singh, pointed out that this is not so and that the MSO Alliance, which is a registered society representing the interests of Siti cable, IndusInd Media & Communications Ltd and Hathway, had submitted a detailed Representation dated 31.7.2006 to the Respondent representing the views of all major MSOs. This Representation clearly wanted a share of the BST charges to the MSOs besides 100% of the carriage charges. This is acknowledged by the Respondent itself.

13. The learned counsel further pointed out that of the 26 improved MSOs, only 7 MSOs or operational as of now in CAS areas and the remaining 19 MSOs have decided not to undertake the CAS operations because of economic non-viability of the same. The counsel invited attention to a statement submitted by the Appellant showing that only seven MSOs are operational in CAS areas. This statement has not been rebutted by the counsel for Respondent. He also invited attention to the Direction dated 14.12.2006 issued by the Authority to the Appellant wherein it was stated that 4 MSOs of Delhi had not operationalised the CAS infrastructure. The counsel for Appellant stated that the MSO Alliance, consisting of 3 MSOs and Indian Cablenet company, i.e. 4 of the 7 MSOs have objected to the stipulated revenue share of the Authority and had demanded a share in the BST revenue.

14. The learned counsel for the Appellant argued that it would be wrong to consider all the MSOs as belonging to one category. According to him, in the 'Deliberations and Reasons for Decision on Revenue Sharing amongst service providers', appended to the decision dated 13.4.2007 of the Authority, filed along with the Affidavit dated 16.4.2007, the Respondent itself had admitted to there being more than one category by stating that "each service provider has a different business model and that some of the MSOs have a large proportion of direct points in the subscriber base while some MSOs do not have a single direct point". The counsel argued that the revenue share stipulated by the Authority is heavily skewed in favour of the MSO having direct points, which is grossly unfair and inequitable to the MSOs who do not have direct points. As such, for the Respondent to state that all MSOs fall in the same class and category, and that since other MSOs are satisfied with the impugned Regulations, the present Appeal need not be considered, is incorrect. According to him, clubbing together of two separate classes or categories of MSOs is violative of the principle of under classification as laid down by the Supreme Court which held it to be violative of Article 14 of the Constitution. He referred in this context to the case of **A.L. Kara v. Project and Equipment Corporation of India Ltd. [(1984) 3 SCC 316]**, wherein the Apex Court held that "one need not confine the denial of equality to a competitive evaluation between two persons to arrive at the conclusion of discriminatory treatment. An action per se arbitrary itself denies equal of (*sic*) protection by law."

15. We have carefully considered the arguments of both the learned counsels. It does not appear to us reasonable to argue that a person cannot appeal against an order of the Authority on the ground that other similarly placed persons have no objection whatsoever. This is an aspect that can be considered when the merits of the issues are being decided. But the very admissibility of an Appeal cannot be questioned on the ground that only one person among a category of persons is aggrieved. As per Section 14 (b) of the TRAI Act, this Tribunal is established to "hear and dispose of Appeal against any direction, decision or order of the Authority under this Act". Section 14 A (2) of the same Act states that "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." Thus the Act itself states that an Appeal can be preferred by 'any person'. In other words, it is immaterial whether the Appeal is by a single person or a category of persons. In our view, it is not essential, at this stage, to go into the case law cited by both the learned counsels. We will do so, if

necessary, at the stage of determining the main issue identified by us. We therefore hold that an Appeal by even a single person would need to be addressed, heard and disposed of by this Tribunal.

16. We now come to the second ground taken by the Respondent that the Appellant has prematurely approached this Tribunal without furnishing the requisite information to the Authority. The counsel for Respondent contended that the revenue sharing framework having become effective from 31.12.2006, it is premature to challenge the basic tenets outlined by the Authority at this stage. If the MSOs and cable operators present verifiable actual data, it could persuade the Authority to re-evaluate the revenue sharing framework. The counsel for Respondent pointed out that the draft SIA put out for consultation did not envisage any sharing either of the BST charges or the Carriage Fee. Various terms and conditions including the revenue share formula may be reviewed after taking into account the way the cable industry evolves in the CAS notified areas. The counsel for Appellant argued that even according to the Respondent itself, the SIA was to be valid for one year and that even though one year has passed, there is no attempt on the part of the Authority to review the same.

17. Having considered all the aspects, we find that firstly, the Appellant has filed this Appeal only after the impugned Regulation was issued. Secondly, we note from the record that the Appellant has presented certain facts to the Authority on 12.6.2006, on 31.7.2006 and also on 18.9.2006. Thirdly, the matter was remitted back by this Tribunal to the Authority which subsequently filed an affidavit along with its decision in April 2007, after giving due opportunity to the Appellant and having received material from it. As such, this contention also does not, in our view, merit consideration. We accordingly hold that this Appeal is maintainable before this Tribunal.

18. We now turn to the issue whether the impugned Regulation is contrary to the mandate given to TRAI. The case of the learned counsel for Appellant is that a perusal of Rules 9 and 10 of the Cable Television Network Rules, notified on 31.7.2006, clearly shows that only the Pay Channel Service and the Basic Tier Service have been contemplated for CAS areas and accordingly the Authority has been granted the power to notify the Standard Interconnection Agreement and revenue share for these two services only. His contention is that TRAI does not have any Authority to regulate the sharing or otherwise of Carriage/Placement Fee, which is purely a commercial arrangement between the Broadcaster and MSO. The counsel's case is also that the statutory obligation of TRAI is only to fix revenue sharing between different players in respect of the 'service' which does not cover Carriage Fee since it cannot be classified as 'service'. The counsel for Respondent, on the other hand, argued that Carriage Fee is a source of revenue and, therefore, it cannot be ignored while deciding the issue of revenue sharing amongst various stakeholders. His contention is that that to arrive at equitable and just distribution of the revenue, factors like Carriage Fee, advertisement charges, pay channel charges have all to be taken into account in a comprehensive manner before deciding the revenue sharing arrangement.

19. According to the learned counsel for Appellant, Carriage Fee does not constitute 'Service', which includes only the Pay Channels as well as BST (FTA channels) and only these services are contemplated by the interconnect Regulations/agreements. According to the counsel, the Carriage Fee is not part of interconnection agreement among service providers and therefore it does not constitute service as contemplated either by the interconnect Regulations or by the Cable Network Regulation Act, 1997. Carriage Fee is out of the purview of section 4A of the Cable Network Regulation Act and the rules notified thereunder. According to the counsel, Rules 9 and 10 of the amended rules give the Authority the power to notify Standard Interconnection Agreement and revenue share for the only the pay channel services and BST. He pointed out that in the Recommendations on issues relating to Broadcasting and Distribution of TV channels dated 1.10.2004, the Authority itself had observed that "since digitalisation is a long-term goal no fresh Regulation on ' must carry obligations' was proposed and that for the present there would be no Regulation on carriage charges".

20. The counsel for Respondent pointed out that as per Section 11 (1) (b) (iv) of the TRAI Act, the Authority is required to regulate arrangements among service providers for sharing their revenue derived from providing broadcasting services. According to him, Carriage Charges are paid by some of the FTA channel broadcasters to MSOs to carry the signals to subscribers and as such constitute income of the MSOs which is derived from providing cable television services.

21. We have carefully considered the arguments of both the learned counsels. We note that the term 'Service' has not been defined either in the TRAI Act or the Cable Television Networks Act or the Rules thereunder or any other Regulation issued by a competent Authority. A perusal of the Notification dated 31.7.2006 issued by the Ministry of Information and Broadcasting indicates that Rule 9 of the Cable Television Networks Rules, 1994 stood substituted as follows:

"**9. Standard Interconnection Agreements, tariffs and quality of service standards for the service providers in the areas notified under section 4A of the Act**.- The Authority may, on issue of any Notification under section 4A of the Act by the Central Government, take appropriate decisions on the following aspects and duly notify the –

a) Standard Interconnection Agreement to be used for entering into commercial arrangements for distribution in the notified areas, of pay or free to air channels among (i) Broadcasters and multisystem operators; and (ii) multisystem operators and local cable operators;

b) the maximum limits of security deposit and monthly rental for supply, maintenance and servicing of Set Top Boxes of prescribed specifications to the subscribers on rental basis by multisystem operators in the notified areas;

c) tariff for the basic service tier along with the minimum number of free to air channels to be provided by the multisystem operators or local cable operators to the subscribers in the notified areas;

d) Regulations for quality of service to be provided by the multisystem operators or local cable operators to the subscribers in the notified areas;"

22. The main question is whether TRAI has the Authority to prescribe a Standard Interconnection Agreement laying down the commercial arrangement between the various stakeholders. A perusal of the impugned Regulation shows that it has been issued in exercise of the powers conferred by section 36 and sub clauses (ii), (iii) and (iv) of clause (b) of subsection (1) of section 11 of the TRAI Act and has the effect of amending the Principal Regulation. Section 11 (1) (b) (iv) stipulates that the functions of TRAI would be to "regulate arrangement among service providers of sharing their revenue derived from providing telecommunication services;". The term 'Telecommunication services' includes 'Broadcasting services.' So, while Rule 9 of the Cable Television Networks Rules, extracted above, does not expressly provide for the laying down of commercial arrangements between the service providers, it must be noted that the substantive power to do so emanates from the provisions of the TRAI Act. The Notification dated 31.7.2006 should only be seen as an entrustment of additional functions.

23. As regards the question whether the impugned order should only be concerned with charges other than Carriage Fee, we are of the view that Carriage Fee would need to be taken into consideration. To argue that the Carriage Fee is not part of 'service' would not be appropriate. When dealing with Interconnection issues having a bearing on revenue distribution, obviously all the revenues arising in the normal course of business of transmission of signals should be taken into consideration. It is a different matter whether the Carriage Fee is significant or not. For both the above reasons, we hold that the Authority was competent in issuing the impugned Regulation and that it is not contrary to the provisions of the TRAI Act.

24. We now address ourselves to the main issue whether the impugned Regulation is arbitrary and irrational. This issue has been dealt with at length by all the three learned counsels – Mr. Maninder Singh for the Appellant, Mr. Dwivedi for the Respondent and Mr. Vibhav Srivastav who, as *amicus curiae,* assisted us and put forward the case of the Cable Operators of India (COFI).

25. At the outset, the learned counsel for Respondent pointed out that the revenue share framework under the SIA is not mandatory but is only a facilitating arrangement for the Parties to arrive at an agreement. According to him, the stakeholders can arrive at any other revenue sharing framework on a mutually agreed basis for interconnection agreement. It is only if such negotiations fail within the prescribed time that they have to abide by the SIA. Countering this argument, the learned counsel for the Appellant refuted the contention that the Standard Interconnection Agreement is not mandatory but only a facilitating arrangement. His contention is that in the face of a prescribed SIA, the cable operators would never agree to a revenue share which is lower than that stipulated in the SIA. As such, the Appellant and other MSOs have no option but to abide by the SIA which provides no share for the MSOs in the BST charges.

26. The next argument of the counsel for Respondent is that the SIA would be valid for only one year so that there is enough time for service providers to work out their mutually acceptable long-term arrangements. He also pointed out that the objective of having SIA is to ensure that implementation of CAS does not get delayed on account of inability of service providers to enter into mutually acceptable interconnection agreements through negotiation. The counsel for Appellant pointed out that not only has the Authority not reviewed the matter, *suo motu*, at the end of one year, it has not reviewed the same even today. He states that as long as the SIA is in operation, it would be difficult to enter into mutually acceptable arrangements. His contention is that, in fact, the SIA is actually serving to impede free commercial agreements between parties in the CAS areas.

27. The learned counsel for Appellant, Mr. Maninder Singh, argued that the Authority had taken into account irrelevant considerations and, at the same time, failed to take into account relevant considerations. Referring to what he termed as 'irrelevant considerations', he pointed out that TRAI had put forward two grounds for refusing the MSO its share in BST charges-- (a) that MSOs have been given 100% share of the Carriage Fee; and (b) that giving a share in the BST charges will give rise to disputes as there is no means of knowing the actual subscriber numbers.

28. The counsel for Appellant contested the contention of the Respondent that since under the SIA, MSOs get to keep the entire Carriage Fee, they are not entitled to any share in the BST charges. According to him, it is a ground reality that the CAS areas involve addressability through digitalisation, when 600-700 channels can be carried in a digitalised system. Since the channels will be delivered digitally, there will not be any carrying capacity constraints as is prevalent in the analogue cable system and as such there may not be any Carriage Fee at all. Carriage Fee was being negotiated between the MSOs and Broadcasters in the analogue system where the number of channels that could be carried was limited to 60 to 70. This is the reason why the Authority used the term 'if any' when talking of Carriage Fees in the impugned Regulation. But just one week later, in the Telecommunications (Broadcasting and Cable Services) Interconnection (Third Amendment) Regulation, 2006 (10 of 2006) dated 4.9.2006, the Authority itself states that Carriage Fee is a temporary phenomenon and is likely to disappear with the advent of digital cable systems. According to the counsel, the Authority, which has been regulating this field for a long time, ought to know that with digitalisation there will be no Carriage Fee. He pointed out that the exercise for the Regulation dated 4.9.2006 started on 21.3.2006 and the facts were already available to the Authority since March 2006. In the light of this, the Authority cannot claim that the Carriage Fee will be kept by the MSOs. According to him, Carriage Fee is a non-existent premise. And as such, the regulator cannot deprive the MSO (Appellant) of its share by using the words 'if any' when it fully knows that there is no possibility of Carriage Fee.

29. The learned counsel for Appellant pointed out that even in respect of analogue system, it is a matter of common knowledge that only when a new channel is launched that the Broadcaster makes payment of Carriage Fee/Placement Charges by making certain payments to the networks to carry those channels. There is no standard yardstick for such charges which are paid by the Broadcasters on an *ad hoc* basis. He stated that at any given point of time, it is only for a very few channels that the cable networks are paid Carriage Fee and that this

may not exceed 15 to 20% of the new channels. Besides, there is neither regularity nor fixity of such *ad hoc* payments that are made to the MSOs. It is for this reason that TRAI had used the words –'if any' in the Regulations. According to him, it is totally arbitrary on the part of the Authority to now deprive the MSOs of the revenue in BST on the ground that they get Carriage Fee. Thus, the counsel argued, the contentions of the Respondent are not based on any ground reality.

30. The learned counsel for Respondent refuted the contention of the Appellant that Carriage Fee does not exist in the CAS areas in view of digitalisation. His argument is that the Appellant has ignored the response of various stakeholders to the Consultation Paper which admitted of the existence of Carriage Fee. The contention of the counsel for Respondent is that clause 3.1.6 in schedule I to the impugned Amendment Regulation, which is the SIA between Broadcasters and MSOs, provides for an agreement between broadcasters and MSOs regarding payment of Carriage/Placement Fee. He stated that this clause has been inserted because Carriage/Placement Fee exists and is substantial. He also pointed out that in its response dated 28.6.2006 to the draft Regulation, the Appellant itself had stated that "regarding the Carriage Fee, it may be mentioned that in CAS regime when the pay channels would be distributed through digital mode, lot of frequencies would be available to carry the FTA channels and as such the amount of carriage/placement fee is likely to be much less than the one prevalent in analogue distribution ...". His case is that this statement itself contradicts the assertion of the counsel for Appellant that there would be no Carriage Fee in the CAS areas.

31. The counsel for Respondent also pointed out that in response to a fresh Consultation Paper issued by TRAI pursuant to the order dated 8.1.2007 of this Tribunal, one of the broadcasters pointed out that "payment of Carriage Fee has become a recognised reality for FTA channels. In fact, even several pay channels are paying huge Carriage Fee. Therefore, the revenue stream from Carriage Fee for MSOs is substantial". The counsel for Respondent also argued that in the CAS notified areas, it is even likely that some of the MSOs provide pay channels in the analogue mode. The Regulations issued by the Authority did not mandate digitalisation of pay channels in the CAS areas. According to him, Carriage / Placement Fee is likely to remain in vogue for some time as the BST channels would continue to be carried in analogue mode. In fact, there is a likelihood of getting Carriage Fee from more FTA broadcasters who may want their channels to be carried in digital unencrypted mode after introduction of CAS. The counsel for Appellant responded to this argument by stating that while a small complement of Carriage Fee may be there in respect of section of subscribers who may opt only for Basic Service Tier, this would be negligible since even here, sufficient capacity would be available in a digital system to carry the BST channels.

32. Referring to the arguments of the counsel for Appellant on the expression 'if any' in clause 3.4 of the Standard Interconnection Agreement between MSO and LCO, the counsel for Respondent stated that this expression is not indicative of doubts entertained by TRAI with respect to Carriage Fee in CAS areas as has been misinterpreted by the Appellant. Referring to the tariff order for CAS areas issued by TRAI on 4.9.2006, he pointed out that this was the result of an independent consultative process. He stated that both the Regulations – dated 24.8.2006 and 4.9.2006-- were issued before CAS was rolled out. His contention is that the

expression ' if any' was used to indicate variation in quantity of the Carriage Fee and not to express any doubt about its existence.

33. The counsel for Respondent further argued that even in the CAS areas, it is not as if the whole system is completely digital. To state that Carriage Fee is a temporary phenomenon and is likely to disappear has relevance only when complete digitalisation of the cable system is achieved. According to the counsel, even today the STB penetration is only of the order of 40% and the analogue system still prevails to the extent of about 60%. Even in this 40% STB domain, the Basic Service Tier is provided in the analogue mode as mandated by Section 4A (6) (and Explanation to the Section) of the Cable Television Networks Act, 1995.

34. The second ground taken by TRAI was that there would be frequent disputes between the MSOs and LCOs if the MSOs are provided a share in the BST fee. The counsel for Appellant argued that this is clearly an irrelevant consideration which is not only unsustainable but is also contrary to Regulations. He stated that the possibility of under declaration in respect of the subscribers in the non-addressable system is well known. The Authority's responsibility is to regulate in a fair manner and it cannot lay down anything just to prevent disputes as disputes are bound to arise in several cases. According to him, TRAI is not concerned with dispute resolution. If the idea is to prevent disputes, the counsel asks as to why is TRAI providing for revenue share in respect of pay channels? After all, disputes can arise there also. According to the counsel, the contention of TRAI that sharing of BST revenue would lead to disputes between MSOs and cable operators is not founded on facts. Besides, the industry practice of settlement through negotiated subscriber base is explicitly recognised by the Authority in the Regulation dated 4.9.2006.

35. Referring to the contention of the Authority that it does not know the number of subscribers that do not have Set Top Boxes in the CAS areas, the counsel for Appellant referred to sub-section 9 (iii) of Section 4-A of the Cable Television Networks Act, which lays down that every Cable Operator shall submit a report to the Central Government in the prescribed form and manner containing information regarding the number of subscribers receiving programmes transmitted in Basic Service Tier or particular programmes transmitted on pay channels and that such report shall be submitted periodically at such intervals as may be prescribed. The counsel also referred to the Standards of Quality of Service (Broadcasting and Cable Television – CAS areas) Regulation 2006 dated 23.8.2006, wherein TRAI has instituted a mechanism to have the details in non-CAS areas. This was just a day before the date of the impugned Amendment Regulation. He questions as to how it is that on 23.8.2006, TRAI lays down a mechanism to know the number of Set Top Boxes but on 24.8.2006, it states that there is no mechanism to know the number and makes it a ground to deprive the MSOs of its share.

36. The argument of the counsel for Respondent is that the submissions of the counsel for Appellant ignored the fact that the Authority is competent to make efforts to minimise disputes and to avoid them as far as possible. He pointed out that in the preliminary meetings, all the stakeholders including the MSOs had desired that the SIA should be notified by TRAI failing which there would be disputes.

37. We now turn our attention to what the counsel for Appellant terms as 'relevant factors' overlooked by the Authority while issuing the impugned Amendment Regulation. It is the contention of the Respondent that notwithstanding several requests, the Appellant had furnished neither its accounts nor information in order to take into consideration its business model. We will also consider simultaneously the contention of the counsel for Appellant that the details furnished by the Appellant were not taken into consideration by the Respondent while determining the contested clause of the Amendment Regulation.

38. The contention of the counsel for Respondent is that the Appellant had been requested to furnish copies of its annual accounts, business model and other calculations on the basis of which revenue sharing proposal has been made by it. According to him, the request was first made by letter dated 1.5.2006 and then again in June 2006 as well as in July 2006. Although a request was also made in September 2006 to furnish the information, the Appellant failed to do so. Instead of furnishing the reply and awaiting a decision from the Authority, the Appellant has chosen to approach the TDSAT.

39. The counsel for Appellant refuted this contention and argued that the Respondent had conveniently overlooked the letter dated 31.7.2006 of the MSO Alliance which contained comprehensive details of the revenue model. The details were once again given in the letter dated 18.9.2006 of the Appellant to the Authority. It was clearly pointed out that the MSOs would be losing in the first three years since they had to incur considerable expenditure on digital Headends and Set Top Boxes, which are to be supplied only by the MSO. The counsel for Appellant pointed out that not only were the details furnished earlier but again on 6.2.2007, the Appellant had submitted a comprehensive response to the consultation paper along with various documents and Annexures thereto including audited financial statements for the year 2005-2006. It was pointed out to the Respondent that with zero investment by cable operators, they would get approximately 80% of the revenue share and the Broadcasters, again with zero investment, would get approximately 11.5% of the revenue share whereas the MSOs with an investment of Rs. 71 crore will only get approximately 8.5% of the revenue share. Besides, there would be operational losses every year. These details were furnished to the Authority vide the letter dated 18.9.2006 of the Appellant. Prior to that too, discussions were held with the Respondent from time to time as reflected in the minutes of the meeting dated 17.7.2006. The counsel also stated that letters were also written on 27.11.2006, 22.1.2007 and 6.2.2007 wherein information/documents as desired by the Authority have been furnished.

40. The counsel for Appellant also pointed out that copies of the financial statements desired by the Respondent are not relevant as they pertain to the operations of the Appellant in analogue cable distribution when there is no addressability. Besides, there is no concept of distribution margin and revenue share in the analogue business model. The settlement between the various stakeholders is done on a negotiated subscriber bases and the customer is charged on a lump-sum basis. The issues in the analogue distribution mode are entirely different from the issues in the CAS regime where there is complete transparency through addressability and also a clear-cut distinction between the different streams of revenue. The counsel stated that the details of the suggested revenue models were already furnished by the MSO Alliance in their letter dated 31.7.2006 and also the letter dated 18.9.2006 of the Appellant to the Authority.

41. The next contention of the counsel for Appellant is that the Authority had not taken into consideration the investment made by the MSOs. His argument is that in all CAS areas, the entire investment is to be borne by the MSOs. According to the counsel, digitalisation also involves modernisation of the entire network including laying of optic fibre, providing digital Headends and control rooms for delivery of channels etc., all of which involves a very high degree of investment. According to him, the Quality of Service Regulations for CAS areas issued by TRAI on 23.8.2006 stipulate that the MSO would be responsible to ensure the quality of service conditions which are quite stringent. The counsel also points out that the Set Top Boxes must not only be supplied to subscribers but also replacements furnished within 24 hours in the event of malfunctioning. The case of the counsel is that all this entails the MSO to maintain the requisite infrastructure in terms of establishment of Subscriber Management System, Call Centres etc as well as sufficient technical manpower to take care of all quality issues. All the operating expenses such as electricity, manpower, repair and maintenance in setting up the network are also incurred and borne by MSOs only. The contention of the counsel for Appellant is that all the leading MSOs have established Subscriber Management System (SMS) costing hundreds of crores and consisting of items and equipment which are required for implementation of the CAS system. He argued that every MSO is entitled for a percentage of revenue sharing of the BST as the entire infrastructure is owned by it.

42. The counsel pointed out that the total investment in the first year for a MSO would be Rs. 71.34 crore comprising of Rs. 65.34 crore towards Set Top Boxes and Rs. 6 crore towards digital Headends. The learned counsel also pointed out that as against this investment, the income accruing to the MSO would be only Rs. 5.33 crore in the first year. The case of the counsel is that of the total subscriber revenue, the cable operator receives 80%, the Broadcaster 11.5% whereas the MSO receives only 8.5%. On the other hand, neither the local cable operator nor the Broadcaster make any investment on either Set Top Boxes or digital Headends. His case is that in the entire value chain, the Appellant MSO would be earning the least besides having to invest Rs. 71 crore and that such an earning is completely inadequate and insufficient to meet even the direct variable costs which is clearly reflected in the profit and loss account of the Appellant. The counsel drew attention to the profit and loss account of MSO submitted to TRAI vide its letter dated 18.9.2006 wherein it was indicated that the MSOs would be incurring a loss of Rs. 19.86 crore in the first year, Rs. 21.75 crore in the second year and Rs. 25.11 crore in the third year. The learned counsel argued that in the event the cable operators declared even 20% of the subscribers without STB, the percentage of revenue accruing to the MSO would be 15% and in the event they do not declare these subscribers, the percentage of subscriber revenue accruing to the MSO would only be 8%. He stated that this is the bare minimum percentage to recover the return on the huge infrastructure incurred by the MSO and also to meet the operational expenditure.

43. The learned counsel for Appellant pointed out that in the Explanatory Memorandum to the tariff order dated 31.8.2006, the Authority itself had stated that generally subscribers do not watch more than 15-20 channels *including* Free to Air channels. That being the Case, the iniquity and arbitrariness in allocating the entire BST revenue of Rs. 77 to the cable operators is clearly reflected by the fact that the MSOs get 15 or 17%

of the total revenue whereas the Broadcasters get between 22.2% or 25.4% of the revenue and the cable operators get between 63% or57.6% of the revenue, depending upon whether the number of pay channels is taken as 15 or 20 respectively. The counsel pointed out that the Authority has completely ignored the detailed revenue models submitted by the Appellant wherein the Appellant had indicated revenue projections for three years in the CAS notified areas of Delhi, Mumbai, and Kolkata.

44. The learned counsel for Appellant pointed out that in response to the consultation paper issued by the Authority in February 2007, seven persons furnished their comments of which two were cable industry experts and both of them had indicated that the MSOs should get a share of the BST revenue. While Col. Khare recommended a share of 30% with the entire Carriage Fee being given to the MSOs, Shri Basak's recommendation was for 40% in the BST revenue with 15% of the Carriage Fee accruing to the LCOs.

45. The counsel for Respondent pointed out that the stipulation of revenue share was decided in a spirit of give-and-take amongst all players. It is the totality of revenue which is to be looked at and it is not possible to look at any one revenue stream in isolation. His stand is that investments made by one MSO or one cable operator cannot be taken as a model for determining the revenue share among a large number of MSOs and cable operators. The Authority took a holistic view of the implications of total revenues emanating from all states. On the other hand, he contended that the Appellant has selectively picked revenue streams to strengthen its case. According to the counsel, the very fact that only one MSO has approached the tribunal is ample proof that the revenue share has been found satisfactory by all the stakeholders. The counsel for Respondent pointed out that the there are not only important issues of investment but equally important is the data relating to return on investments including future revenue potential of investment already made on account of an extended coverage over and above the present notified areas of CAS. It is not advisable to evolve a revenue share model for compartmentalised and narrow base for investments already made.

46. The counsel for Respondent also pointed out that each service provider has a different business model. For example, some MSOs have a large proportion of direct points in the subscriber base, while some MSOs do not have even a single direct point. Besides, the number of subscribers being served cannot be correctly ascertained in respect of BST in view of non-addressable nature of BST. The counsel further stated that while it may be possible to work out the all-inclusive cost-based price for consumer for delivery of BST, it is not possible to split up costs between MSO and cable operator for each MSO and each cable operator. Revenue share derived from cost-based exercise which suits all 26 MSOs and nearly 2000 cable operators is impossible. Getting audited cost data is not possible, particularly for small MSOs and most of the cable operators, which are small proprietary concerns and hence not subject to statutory audit. To this, the learned counsel for Appellant argued that non-receipt of audited cost data for small MSOs cannot be ground to deny the legitimate revenue share to the MSOs out of the Basic Tier Services. He stated that there are standard quotes for establishing the infrastructure such as digital Headends, encryption systems, SMS etc and the cost of procurement of STB for CAS operations. He also stated that the information regarding investments provided by

the Appellant and the MSO Alliance was only in respect of additional investment required and does not pertain to the optical fibre cables and co-axial cables etc which were laid earlier.

47. The counsel for Respondent stated that there are differences in extent of use of optical fibre cables and coaxial cables in different networks. The networks were laid out at different points of time. The prices of network elements have been falling sharply over the years and the costs have been recovered to different extents.

48. The contention of the counsel for the Respondent is also that the costs given by the Appellant in the illustrative calculations have been given without substantiating them. As an example, he pointed out that the cost of Bill printing and dispatch has been taken as Rs. 10 per subscriber per month, whereas it would not exceed even Rs. 5. Secondly, the counsel for Respondent pointed out that the cost of providing Headends for 80 Pay channels at the rate of Rs. 8 lakh per channel should amount to Rs. 6.4 crore whereas it has been shown as Rs. 64 crore. He also pointed out that the investment of Set Top Boxes has been taken as Rs. 3000 whereas not only the cost of STB is less than of Rs. 3000 but also it ignores the cases of outright sale made to subscribers.

49. The counsel for Respondent pointed out that even though additional investments are being made primarily by the MSOs, the long-term benefit of retention of customers will also accrue to them. Moreover, modernisation/digitalisation coupled with addressability is likely to enable a host of value-added services in future. These benefits will also accrue to the MSO. In any case, the investments made by the MSOs have been taken into account while laying down a higher revenue share for them from the Pay channel revenue.

50. The counsel for Respondent pointed out that TRAI in fact proceeded on the assumption that there are in principle three service providers in the delivery chain -- Broadcasters, MSOs and cable operators and has accordingly stipulated the revenue share to be received by each of the three service providers. According to him, it is irrelevant whether or not an MSO has direct points. In the case of an MSO having direct points, it would enjoy the stipulated revenue share both for cable operators as well as for MSO. According to him the revenue share stipulated by the Authority favours MSOs having direct points as such MSO would be able to have not only 55% of revenue share from pay channel (30% as MSO and 25% as cable operator) but also the entire BST revenue. On the other hand, those MSOs who do not have direct points have to make do with just 30% revenue from the Pay channels, which is grossly insufficient.

51. The learned counsel for Respondent also pointed out that according to Rules 9 and 13 of the Cable Television Network Rules, a duty is cast on TRAI. Rule 9 states that TRAI is the Authority to specify the Standard Interconnection Agreement, to be entered into between the Broadcasters and MSOs as well as the MSOs and LCOs. This SIA can only be given for the group as a whole and cannot be given for each individual Company. Referring to Rule 9 (B), the counsel pointed out that the STBs are to be sold/hired and so there was no question of the MSOs incurring expenditure of Rs. 65 crore on STBs. Referring to Rule 13 of the Cable Television Network Rules, he pointed out that the STB is a burden entirely on the subscriber and so the question of the investment by the MSO does not arise.

52. Referring to the contention of the Respondent that the initial cost of investments made by MSOs and control rooms and cable networks been significantly recovered, the learned counsel for Appellant pointed out that this is a baseless statement since no material in this regard exists with the regulator. The counsel for Appellant stated that if the logic of the Authority were to be adopted, then the entire investment made by the cable operators would also have been amortised and the cost completely recovered by them. This makes it patently inequitable on the part of the Authority to allocate the entire BST revenue to the cable operators whose investment already stands recovered, denying the MSOs, who have invested afresh, any share in the BST revenue. Besides, for implementation of CAS, a large number of MSOs have made huge fresh investments for setting up of digital Headends, encryption systems and optical fibre networks besides Set Top Boxes. In order to recover such heavy investments, the 30% revenue from pay channel revenue stream is insufficient. The learned counsel for Appellant stated that 30% of the revenue share out of the pay channel revenue for MSOs is not enough to meet even the associated variable cost in the CAS regime. According to him, a MSO incurs a loss of Rs. 8.50 per subscriber per month and it is therefore necessary that there should be sharing of BST revenue to meet the deficit. The learned counsel also stated that it is infrastructure laid out by the MSO that is utilised for delivery of Basic Service Tier and therefore it is inequitable on the part of TRAI to deny a share to MSOs out of the revenue earned from the Basic Service Tier.

53. The learned counsel for Appellant stated that it is incorrect on the part of the Authority to suggest that the MSOs are using the same infrastructure for serving their subscribers in CAS as well as non-CAS areas. He referred to the specific provisions contained in the Standard Interconnection Agreement between Broadcasters and MSOs which clearly provides that feed of CAS areas cannot be diverted or used in non-CAS areas as otherwise it would lead to widespread piracy.

54. The counsel stated that there was no application of mind by TRAI. As stated above, the counsel's stand is that even a 30% share in the pay channels is not sufficient for the MSO to cover the costs. If really TRAI wanted to give adequate compensation, then it should have gone by the costs involved. But instead of doing so, TRAI did not even consider the data submitted to it. Relevant statistics were being given to TRAI since July 2006 including in the Appeal affidavit before this Tribunal, but TRAI did not consider this data. The counsel pointed out even in the revisitation exercise, the Authority did not carry out an exercise as to what should correctly be the share of MSOs.

55. Referring to the averments made by the two independent observers, the counsel for Appellant pointed out that that despite the views submitted by the Appellant as well as the independent observers, TRAI did not feel it necessary to deal with any issue but stuck to its point. Further, while the Authority stated that the SIA is only for one year and that it would be reviewed, no review had taken place.

56. The learned counsel for Respondent stated that while MSOs provide the feed for BST to cable operators without getting any share out of the BST revenue, similarly the cable operators carry the FTA channels, local channels of the MSO, value-added services like video on demand, interactive games, Internet etc on the last

mile network without getting a share out of the Carriage Fee or advertisement revenue generated from local channels from the MSO. Refuting this, the learned counsel for Appellant pointed out that the Appellant or any other MSO is not providing any value-added services such as video on demand, interactive games, Internet etc and that there is no material available with the Authority to state that MSOs providing the services without sharing their revenue derived from the services with the cable operators. He stated that as and when such services are classed with MSOs, the necessary commercial arrangement can always be worked out with the local cable operators. He further stated that the scope of the Consultation Paper or for that matter the Standard Interconnection Agreement does not take within its ambit the revenue share from the advertisement income at all. If this be the case, he stated, the advertisement income earned by the Broadcasters should also be taken into consideration and should form the basis for determining the revenue share between the Broadcasters, MSOs and the cable operators. Further, he pointed out that most of the cable operators themselves are running their local channels. He stated that it is misconceived and untenable for the Authority to put forward this as the reason since the revenue share in respect of advertisements had not been discussed at all.

57. Finally, the counsel for Respondent reiterated that the term of the Standard Interconnection Agreement has been stipulated for one year only and that various terms and conditions including the revenue sharing formula may be reviewed if considered the necessary, after taking into account the evolution of the cable industry in the CAS areas.

The learned counsel Mr. Vibhav Srivastav performed, at our request, the function of *amicus curiae* and presented the case of the Cable Operators Federation of India (COFI). He drew attention to the presentation made by the COFI before TRAI in their submission dated 6.2.2007. According to the counsel, the cost of the basic package including FTA channels was fixed at Rs. 72 in the year 2003 since when many changes have taken place necessitating reworking of this cost. According to him, COFI had worked out an amount of Rs. 180 per subscriber per month as the cost of operating a cable network. The cost of operating the last mile cable network at Rs. 77 is being wrongly perceived by the Appellant as the actual cost of the BST/FTA package.

58. According to the counsel, the main revenue of MSO comes from Carriage Fee/placement fee/marketing fee. He referred to the Appeal affidavit wherein the Appellant states that the Carriage Fee is likely to be much less than the one prevalent in analogue distribution, and pointed out that the Appellant itself is admitting that they are receiving Carriage Fee. He also stated that the MSOs do not give the LCOs any share in local advertising or in the SMS service.

59. The learned counsel also stated that the MSOs have not challenged Schedule I of the Amendment Regulation but have only challenged that clause of Schedule II, as per which the LCOs get to keep the entire sum of Rs. 77. According to him, the Appellants are not challenging schedule I because they are getting a share of revenue therein. His case is that the Appellant should either challenge the entire order or accept the same. Also, he pointed out that only one constituent of the MSO Alliance has argued against this schedule. He supported the effort made by TRAI.

60. We have carefully considered the arguments of all the learned counsels. As mentioned in Para 18 above, the principal issue involved is whether the impugned clause of the Amendment Regulation is arbitrary and irrational. From the arguments of the counsels as well as the pleadings, it is clear that this will have to be examined from the point of view whether sufficient data was available, whether it was taken into consideration, and whether based on such consideration, the Authority had come to the right conclusion.

61. On consideration of the record before us and the averments, the following facts emerge. To start with, consequent upon the meetings in the Ministry of Information & Broadcasting, where the stakeholders desired the Authority to lay down a SIA, a Consultation Paper was issued in June 2006 in the form of a press release no. 53/2006 dated 12.6.2006 enclosing therewith the draft of the Telecommunication (Broadcasting and Cable Services) Interconnection (Second Amendment) Regulation 2006. The press release states that the Delhi High Court on 10.3.2006, had directed that CAS be implemented in the three Metros of Mumbai, Kolkata and Delhi and that subsequent to this order, a series of meetings were held in the Ministry of information & Broadcasting wherein the stakeholders had expressed the view that there should be a standard form of Interconnection Agreement between Broadcasters, Multisystem Operators and Local Cable Operators and that TRAI should formulate the same in consultation with the stakeholders. Accordingly, TRAI formulated a draft of the Standard Interconnection Agreement (SIA), which, inter alia, contained provisions relating to revenue sharing between the different stakeholders.

62. The questions raised in the press release, seeking comments of the stakeholders, included the question whether there should be a uniform revenue share percentage between Broadcasters and MSOs and all MSOs and LCOs and if so, what should be the revenue percentage, along with the methodology, data and principles on which these are based. It is important to note that TRAI itself laid emphasis on methodology, data and principles underlying the revenue sharing percentages to be proposed by different stakeholders. The consultation paper also raised the question whether revenue share percentage should be different from what was being adopted in Chennai or whether there was any other alternative method of arriving at the percentages; if so, the percentages to be indicated along with the methodology. Thereafter, the Authority received the comments from the different stakeholders and held discussions in the month of July and August 2006. In the meanwhile, the Delhi High Court had passed an order on 20.7.2006 wherein it directed that CAS be implemented in the notified areas of Delhi, Mumbai and Kolkata by 31.12.2006 pursuant to which Government of India had issued the requisite Notification on 31.7.2006. The Explanatory Memorandum to the impugned Regulation states that the Authority has, after carefully considering the feedback received from the stakeholders, finalised the SIAs which are being mandated through the impugned Regulation. Aggrieved by the same, the Appellant filed the present Appeal. In this Tribunal's order dated 8.1.2007, the Authority was directed to hear all the stakeholders and take a decision on the revenue share for the Basic Service Tier fee, to be divided/shared between the MSO and the affiliate cable operators. Pursuant to the directions of this Tribunal, the Authority had issued a consultation paper on 22.1.2007 wherein it raised the question as to what should be the share of the MSOs and LCOs out of the subscription charges for BST and the Carriage Fee and the basis for arriving at the proposed distribution. Based on the comments received from the stakeholders, and after holding meetings with them, the Authority came to the conclusion that the revenue share formula as given in the Standard Interconnection Agreements at present does not warrant any change. We have therefore to examine

the rationality of the Amendment Regulation as well as the decision dated 13.4.2007, keeping in view the original objective of finalising the revenue share percentage based on methodology, data and principles as well as in keeping with the directions of this Tribunal dated 8.1.2007.

63. We will first take up the question whether sufficient data was available to the Respondent. The claims and counter claims of the Appellant and Respondent have been amply narrated above. We notice that the Appellant, other MSOs, and COFI have placed before the Authority fairly voluminous material including statistical and financial data. The appellant has submitted its response on 28.6.2006 to Consultation Paper dated 12.6.2006 and vide letter dated 31.7.2006 from MSO Alliance before the issuance of impugned regulations of 24.8.2006. The appellant has responded on 28.6.2006, expressing their view that the ratio of 40:60 should be adequate to meet the proportionate expenses for FTA channels between MSOs and LCOs respectively. On 31.7.2006, MSO Alliance has submitted model calculations for revenue share between MSOs and LCOs on the basis of prevalent level of declaration and also where LCOs may only limit declaration to the number of subscribers going to STB or present highest declaration (say 20%). whichever is higher. The revenue share in first scenario between MSO and LCO has been projected as 15% and 85% while in the second scenario it has been projected as 8% and 92% respectively. There is no comment by respondent on these model calculations submitted by the MSO Alliance. It is worthwhile that these model calculations should have been considered by the respondent before it finalized the revenue sharing arrangement.

64. Immediately after the issue of the amendment Regulation, a representation was submitted by the Appellant to the Respondent on 18.9.2006. The revenue sharing arrangement as per the impugned regulation has been used to demonstrate the proportion of earning amongst various stake holders in different scenarios. These presentations show that the revenue sharing between the MSOs and LCOs did not appear to be on equitable grounds.

65. Again on 27.11.2006, the Appellant, based upon the projections of per subscriber revenue model as mentioned in letter dated 18-9-2006, has extrapolated total projected revenues and expenditures by estimating the total universe and likely penetration of STBs in initial three years and both direct and indirect expenditures to depict in detail, the loss likely to be suffered by MSOs in CAS notified areas. The summary sheets attached clearly bring out the revenue earned by broadcasters, MSOs and Cable Operators vis-à-vis the investments by each of the stake holders. This was not been contested by the respondent.

66. On 22.1.2007, in response to the consultation paper floated by the respondent as part of the revisitation exercise, the appellants again brought out a detailed analysis while projecting the carriage fee earnings from the audited financial statements. This analysis has projected losses to MSOs in CAS areas. All the relevant information from the stage of consultation by respondent for issuing the impugned regulation of 24.8.2006 and subsequent representation, have been placed before the respondent as a compilation in its response of 22.1.2007. All this material was relevant from the point of view of deciding the revenue sharing arrangement and needed to be considered by the respondent, at least at the stage of re-visitation exercise. This was

particularly so considering that the entire exercise was initiated with the view of determining the respective shares of the stakeholders based on data, methodology and principles.

67. A perusal of the Explanatory Memorandum to the impugned Regulation shows that it does not give any indication of the entire material having been considered in detail. It does state the respective positions taken by the MSOs and the LCOs. It notes that there is no standard formulation of the share between the MSOs and the LCOs and assumes that the three cities of Delhi, Mumbai and Kolkata will have a higher penetration of the STBs in the CAS areas as compared to Chennai. It accordingly gave 45% of the Pay Channel revenue to the Broadcasters, dividing the rest between the MSOs and the LCOs. The share of 30% and 25% (of the 55%), between the MSO and the LCO is not explained except stating that this is the formula suggested by the COFI. As regards the BST revenue, the Authority decided to retain it entirely with the LCOs on the ground that sharing would lead to disputes; that MSOs get to keep the entire Carriage Fee; and that the share of MSOs from the Pay Channel Revenue is being increased to 30% from 25%.

68. We observe that the tariff so fixed by the Respondent Authority is not based on any computation. It is the case of TRAI that in the Consultation Paper itself it had pointed out that there would be no revenue sharing of the BST between MSOs and LCOs. This indicates that the Authority had already come to some tentative conclusion. But the consultation paper does not indicate the basis on which TRAI had come to such tentative conclusions. Nor has TRAI asked the stakeholders to indicate their revenue and expenditure items. And, as we pointed out, information was provided to the Authority. There is nothing on record to show that TRAI had considered these representations before issuing the impugned order. The Explanatory Memorandum does not state that the information was either inadequate or unreliable. Even if it was, by virtue of the provisions of the TRAI Act, the Authority is entitled to seek any information from the stakeholders. In the absence of this information, it can only be inferred that the what the Authority was really doing was not tariff fixation but more a process of consensus building for a tariff arrangement that it had already tentatively arrived at.

69. Even after this Tribunal remitted the matter back to the Authority to take a decision after hearing all the stakeholders, and even after receiving the material from the appellant and others, we notice that the Authority did not consider this material in detail and in the proper perspective. In our view, the respondent should have considered the analysis made by the appellant through its presentation in various communications. Material submitted on 22.1.2007 by appellant was relevant, as well as fairly comprehensive and one would have expected that the decision of re-visitation exercise would have been taken after considering this material.

70. The Respondent explained that the data furnished by the Appellant was unreliable on the ground that the calculations given regarding investment to provide Headends for 80 Pay channels@ Rs. 8 lakh should work out to Rs. 6.4 crore whereas the Appellant had indicated, according to the Authority, a sum of Rs.64 crore. However, we find from the record that the Appellant claimed an investment level of Rs. 6 crore for Digital Headends and Rs. 65.34 crore for STBs, besides a further investment, for STBs, of Rs. 15.36 crore in the 2nd year and Rs. 15.09 crore in the 3rd year. No additional investment is claimed for the Digital Headends. The

Appellant also explained that in arriving at the investment figures, the expenditure for each item was actually taken at a lesser amount than was available in the records of the Authority.

71. We have therefore to conclude that the Authority did not take into consideration the material and figures placed before it by the Appellant, either at the time of formulating the impugned clause of the Amendment Regulation or in the revisitation exercise. To this extent, we hold that the impugned clause of the Amendment Regulation suffers from a serious lacuna.

72. It is the case of the Respondent that the revenue share prescribed for the MSOs and LCOs is fair as the MSOs get to keep the entire Carriage Fee. It is noteworthy that nowhere in the Regulation or the pleadings or the arguments has the amount of Carriage Fee been quantified. It is the case of the respondent that all the stakeholders have admitted to the existence of the carriage fee. While the broadcasters favoured a ceiling on carriage fee as long as there was a ceiling on price, the appellant has contended that advertisement and carriage fee are governed by market forces and vary from case to case. The respondent has admitted that in non-CAS areas carriage fee is very substantial while in the CAS areas the carriage fee exists and, therefore, it cannot be anybody's case that the carriage fee does not exist and is negligible. The contention of the respondent is that since STB penetration in CAS areas is only about 40%; the balance 60% subscribers would still receive both Pay Channels and BST in the analogue mode, which gives the MSO adequate Carriage Fee.

73. The respondent has further argued that the FTA channels have to be necessarily carried out in analogue mode under the statutory provisions of Section 4A(6) of the Cable TV Regulation Act, 1995 and as amended on 31.08.2007. This Section reads as follows:

> *"Notwithstanding anything contained in this section, programmes of basic service tier shall be receivable by any subscriber on the receiver set of a type existing immediately before the commencement of the Cable Television Networks (Regulation) Amendment Act, 2002 without any addressable system attached with such receiver set in any manner."*

As can be seen, this Section does not proscribe or restrict the usage of the digital technology which enables carrying a larger number of channels with better quality. The respondent has further contended that other MSOs such as M/s. IndusInd Media and Communications Ltd. (IMCL) have confirmed the existence of the carriage fee/ placement fee/ market promotion amount. The same MSO has also claimed that when the pay channels are distributed in digital mode, considerable frequency would be available to carry the FTA channels. We however notice that while stating so, the MSOs have also claimed a share in BST charges in CAS areas to cover their operational expenditure, while retaining the entire Carriage fee. From the above, it is clear that while admitting that Carriage Fee exists, the need for sharing of BST charges was also expressed by other MSOs.

74. In so far as existence of Carriage Fee is concerned, we note that it does exist even in the CAS areas since a substantial number of subscribers in the CAS areas do not have Set Top Boxes. There is evidence supporting the existence of Carriage Fee even as the exact quantum is not known. We however do not find any

material on record to determine whether the quantum of Carriage Fee is sufficient or not to warrant a share for the MSOs in the BST charges. Neither the Explanatory Memorandum to the impugned Amendment Regulation nor the affidavit filed in April 2008 gives any indication as to the quantum of Carriage Fee. This is because the Authority evidently did not carry out any cost-based exercise. As mentioned by the Respondent, Schedule I to the SIA contains a clause providing for a separate agreement between the Broadcaster and MSO regarding payment of Carriage/Placement Fee. The impugned clause under discussion in schedule II providing the entire BST charges for the LCO does not however refer to the clause in schedule I. The Explanatory Memorandum to the Amendment Regulation mentions that there could be disputes in the total carriage charges since there is no transparent way of knowing the subscriber base for subscribers without STBs. Accordingly, it is noted, it would be simpler to allow for no revenue sharing for both the Components i.e. BST charges and Carriage Fee. In our view, this does not answer any of the issues raised by the Appellant and leaves wide open the question as to why a share in BST charges is sought to be denied to the MSO. We therefore hold that the conclusion arrived at by the Authority, that there should be no sharing of the BST charges on the ground that the MSOs get to keep the entire Carriage Fee and that they have 30% share of the Pay channel revenue, is not rationally explained.

75. We now turn to the contention of the Respondent that the impugned clause of the Amendment Regulation was made with a view to avoiding disputes. The relative arguments of the counsels were narrated above. Having considered the arguments, we are of the opinion that it is perfectly in order for the Authority to make efforts in drawing up Regulations to do so in such manner as to minimise the scope for disputes. The existence of this Tribunal should not obliterate the need for judicious Regulation making it which in turn provides the maximum satisfaction the maximum number of stakeholders and minimise the number of disputes. Notwithstanding the best of Regulation, disputes are bound to arise and the TRAI Act has already provided for a mechanism to deal with dispute resolution. We are however not in agreement with the contention of the counsel for Respondent that the raison d'être of not providing a share in the MSOs in the BST charges is to avoid disputes. The anxiety to avoid disputes, however well placed, cannot override the obligation to provide a strong basis for any Regulation. If avoidance of disputes were to be the sole concern, then most of the Regulation would not be made. In our view, the counsel for Appellant was quite right when he stated before us that had this been the concern throughout, the 'must carry' clause would not have been provided in the Principal Regulation dated 10.12.2004.

76. It appears to us that the principal concern of the Authority was to lay down a reasonable framework in order that CAS can be rolled out in the three cities of Delhi, Mumbai and Kolkata in an orderly fashion and within the time prescribed by the Delhi High Court. As submitted by the counsel for Respondent, the SIA is not mandatory but is only a facilitating arrangement for the Parties to arrive at an agreement, and that the stakeholders can arrive at any other revenue sharing framework on a mutually agreed basis for interconnection agreement. It is only if such negotiations fail within the prescribed time that they have to abide by the SIA. It was also stated that the SIA would be valid for only one year so that there is enough time for service providers to work out their mutually acceptable long-term arrangements. It was further pointed out that the objective of having SIA was to ensure that implementation of CAS did not get delayed on account of the inability of service providers to enter into mutually acceptable interconnection agreements through negotiation. Given the

circumstances and objectives, we feel that the SIA as originally drafted was perhaps in the right direction. But at the same time, given the fact that the exercise was started with the idea of arriving at the revenue share based on 'data, methodology and principles', we hold that the impugned clause in the SIA created avoidable concerns. The lack of attention to the data submitted by the Appellant to the Respondent, as indicated above, made this arrangement of revenue sharing between the MSO and the LCO an arbitrary and irrational exercise. The need for determining the revenue share as part of the interconnection agreement was also not clearly explained.

77. Admittedly, the SIA was to be valid only for one year. In the event, this period has long since passed, the Amendment Regulation having been issued in August 2006. We therefore direct that the impugned clause 3.4 in the Telecommunication (Broadcasting and Cable Services) Interconnection (Second Amendment) Regulation 2006 (9 of 2006) dated 24th August, 2006 will no longer be valid. It shall be open to the MSOs and the LCOs to enter into mutual agreements without being bound by the impugned clause. It shall be open to the Respondent to notify any revenue sharing arrangement if it feels necessary, but in doing so, such an arrangement will be based on a cost-based exercise.

78. The Appeal is disposed of accordingly. No Costs.

.....J
(Arun Kumar)
Chairperson

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(J.S. Sarma)
Member

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(G.D. Gaiha)
Member