TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL
NEW DELHI

APPEAL No. 3 (C) OF 2010

Dated : 16.12.2010

Zee Turner Ltd. ... Appellant

Vs.

Telecom Regulatory Authority of India & Ors. ... Respondents

APPEAL No. 4 (C) OF 2010

ESPN Software India Pvt. Ltd. ... Appellant

Vs.

Telecom Regulatory Authority of India & Ors. ... Respondents

APPEAL No. 5 (C) OF 2010

Star Den Media Services Pvt. Ltd. ... Appellant

Vs.

Telecom Regulatory Authority of India & Ors. ... Respondents

APPEAL No. 6 (C) OF 2010

MSM Discovery Pvt. Ltd. ... Appellant

Vs.

Telecom Regulatory Authority of India & Ors. ... Respondents

APPEAL No. 7 (C) OF 2010

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M/s. Sun TV Network Ltd., Chennai ... Appellant

Vs.

Telecom Regulatory Authority of India & Ors. ... Respondents

APPEAL No. 8 (C) OF 2010

-

Viacom 18 Media Pvt. Ltd., Mumbai ... Appellant

Vs.

Telecom Regulatory Authority of India & Ors. ... Respondents

-

APPEAL No. 9 (C) OF 2010

-

Ushodaya Enterprises Pvt. Ltd., Hyderabad ... Appellant

Vs.

Telecom Regulatory Authority of India & Ors. ... Respondents

APPEAL No. 10 (C) OF 2010

-

Neo Sports Broadcasts Pvt. Ltd. ... Appellant

Vs.

Telecom Regulatory Authority of India & Ors. ... Respondents

BEFORE :

HON'BLE MR. JUSTICE S.B. SINHA, CHAIRPERSON
HON'BLE MR. G.D. GAIHA, MEMBER
HON'BLE MR. P.K. RASTOGI, MEMBER

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: Mr. Rishi Agarwala, Advocate
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Mr. Vikram Mehta, Advocate
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For Respondents

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J U D G M E N T

S.B. Sinha

Introduction

Tariff Regulation dated 21.07.2010 made by the Telecom Regulatory Authority of India (TRAI) commonly known as Telecommunication (Broadcasting & Cable) Services (Fourth) (Addressable System Order), 2010 (the impugned tariff order) is in question in this batch of appeals.

Backdrop

The Appellants before us are broadcasters. The Telecom Regulatory Authority of India (hereinafter referred to as the 'TRAI') was originally the sole Respondent.

Some of the DTH operators with DTH Operators Association of India as also other MSOs have been impleaded as parties in these proceedings and/or permitted to intervene.

On a letter received by this Tribunal from Tamilnadu Progressive Consumer Centre praying for its being impleaded as a party to protect the consumers' interest, it was also impleaded as a party.

However, it did not file any pleadings nor did it advance any independent argument.

The impugned tariff order came into force w.e.f. 1.9.2010. De-facto, however, as amongst the parties inter-se, the impugned tariff order were to become operational on and from 01.10.2010.

Facts

We have, however, not been able to deliver our judgement for several reasons within the aforementioned period; one of these being long arguments and a clarification sought for subsequently by us with regard to inter alia, the applicability of Section 11(1)(b)(iv) vis-a-vis Section 11(2) of the Telecom Regulatory Authority of India Act (hereinafter referred to as the "TRAI Act") in respect whereof we received separate written arguments filed by Shri Maninder Singh and also due to non-filing of Written Statements by the other counsel in time. It ought to be noted that 14th and 15th September were the dates fixed for hearing, by this Tribunal. However the Written Submissions were not filed by the counsel for the Respondents even till then, forcing us to note the said delay vide an Order dated 16th September 2010.

The legal framework for guiding and regulating broadcasting in India is provided in the Indian Telegraph Act, 1885 (The 1885 Act). It has been supplemented by the Cable Television Networks (Regulation) Act, 1995 (1995 Act).

The Ministry of Information and Broadcasting by its Act No. 2 of 2003 introduced Section 4A to the 1995 Act, which reads as under:

"4A. Transmission of programmes through addressable system, etc."

(1) Where the Central Government is satisfied that it is necessary in the public interest to do so, it may by notification in the Official Gazette, make it obligatory for every Cable Operator to transmit or retransmit programme of any pay channel through an addressable system with effect from such date as may be specified by the notification and different dates may be specified for different states; cities, towns or areas, as the case may be."

However, for variety of reasons only Chennai out of the four metropolitan cities introduced the Conditional Access System ("CAS"), the other three being Delhi, Kolkata and Mumbai having been partially declared to be CAS area.

The subscription fee for CAS became a subject matter of adjudication before this Tribunal and the Hon'ble Supreme Court of India.

The rates fixed by the Broadcasters were frozen by TRAI on or about 26.12.2003. The non-CAS rates of channels, which were frozen, became the subject matter of an appeal being Appeal No. 12(C) of 2007 filed by Star India Ltd. and the same was set aside by the Tribunal by an order dated 15.01.2009. TRAI preferred appeals thereagainst, before the Supreme Court of India which were marked as Civil Appeal Nos. 829 to 833 of 2009. The said appeals are pending decision.

On 09.01.2004, the Government of India issued a Notification No. 39 bearing Order No. SO 44E whereby and whereunder the scope of the expression "telecommunication services" (defined in Section 2 of the TRAI Act, as amended) was expanded to include the `broadcasting and cable services'. Consequently, TRAI became entitled to frame regulation in respect of cable and broadcasting services in the country also.

On 28.10.2004, TRAI first issued the Draft Inter – Connect Regulations for comments of the stakeholders which mandated that all Broadcasters should provide TV Channels on a non – discriminatory basis to all distributors of TV Channels including cable networks, Direct – to – Home ("DTH") and Head – Ends in the Sky ("HITS")

TRAI notified the Telecommunications (Broadcasting and Cable Services) Interconnection Regulations, 2004 on 10.12.2004 seeking to provide non–discrimination in interconnect agreements.

It is relevant to note that when DTH services were introduced, TRAI had not laid down any tariff for the said sector.

This Tribunal vide its judgment dated 14.7.2006 in the matter of ASC Enterprise Ltd. v. Star India Ltd. (marked as Petition No. 136(C) of 2006.) fixed the rates for DTH at 50% of the rates being charged on cable platform till the time TRAI fixed the tariff for DTH. However, while directing so, this Tribunal observed that fixing the rates for DTH was the prerogative of TRAI.

The relevant part of the said judgement reads as under:

"there is logic in the statement of the petitioner that the rates laid down and being charged for the Cable TV platform cannot be made applicable to the DTH platform and we agree with this contention of the petitioner. We have no basis to lay down the actual rates per channel which we feel is the prerogative of the TRAI. However to begin with, we feel that 50% of the rates being charged for cable platform be made applicable to the DTH Platform"

Thus, the rate for DTH was fixed as 50% of the cable rates. The aforesaid arrangement was an interim one till the time TRAI fixed the tariff for the DTH sector.

On 31.03.2007, this Tribunal in a subsequent judgment being in the matter of *Tata Sky Ltd. v. Zee Turner*, opined that as in its judgment dated 14th July, 2006 i.e. ASC Enterprises Vs. Star – Petition No.136 (C) of 2006, it had fixed a norm in the interim till price fixation is done by TRAI, the broadcasters shall charge the DTH Operators only 50% of its listed price for the cable platform, stating:

"The learned counsel for petitioner also suggested that since DTH is fully addressable system, the broadcaster should fix their prices keeping this fact in mind. It is common knowledge as projected by the industry itself that in Cable, the declaration of subscribers is only about 20 per cent of the actual number of subscribers. As compared to this in DTH, the counsel suggests, the declaration would be 100 per cent. Therefore, according to the learned counsel,

the DTH operator should get the channels from the broadcaster at 20% of the rates declared by them. Today the position is that this Tribunal has already requested the TRAI to come out with price regulation in this area. Price fixation should be done by the TRAI. In the judgment dated 14th July 2006 this Tribunal had fixed a norm in the interim till price fixation is done by TRAI, that broadcaster will charge the DTH operator 50% of its listed price for cable platform. For the present we would like to continue with the said norm and we reiterate that the TRAI should come out with price fixation and regulation in this behalf as early as possible. Price regulation is a must for protecting consumer interest. Delay on the part of the TRAI in carrying out this job is prejudicial to the DTH operators while it suits the broadcasters." (Underlining is ours for emphasis)

Whilst the aforesaid interim arrangement was continuing, on or about 03.09.2007, TRAI, made an amendment to the Regulations being Telecommunication (Broadcasting & Cable Services) Interconnect (Fourth Amendment) Regulation, 2007, interalia introducing the following:

"13.2A.11- It shall be mandatory on the part of the broadcasters to offer pay channels on a-la-carte basis to direct to home operators and such offering of channels on a-la-carte basis shall not prevent the broadcaster from offering such pay channels additionally in the form of bouquets. Provided that no broadcaster shall, directly or indirectly, compel any direct to home operator to offer the entire bouquet or bouquets offered by the broadcaster to such operator in any package or scheme being offered by such direct to home operator to its direct to home subscribers"

Subsequently, on 18.04.2008, TRAI issued two Press Notes (Press Release Nos. 38 and 39 of 2008), which essentially provided that:

(i) the rates of the bouquets and the a- la – carte rates of the pay channels so offered will broadly be in consonance with the TDSAT's judgment dated 31.03.2007 in Petition No. 189(c) of 2006 and judgment dated 14.07.2006 in Petition no 136(C) of 2006 wherein the rates were to be fifty percent of the rates at which these bouquets/ channels are being offered by them for non – CAS cable distribution i.e. non – addressable platform. All bouquet rates and

a-la carte rates must satisfy the provisions of the aforesaid Interconnection regulations;

(ii) that the broadcasters will provide their channels to the DTH Operators at 50% of the rates at which these bouquets and channels are being offered to the non – CAS cable TV platform;

(iii) the bouquet rates and a- la – carte rates of broadcasters' channels for cable TV operation in non – CAS rates, voluntarily updated by them and reported to TRAI, are being placed on its website to enable the service providers to have interconnect agreements on non – discriminatory basis among themselves, which will also be beneficial for the consumers and protect their interests.

Other Proceedings

It is in this background, as has been elucidated above –the following developments arose:

(i) In October 2007, the Respondents i.e. M/s Tata Sky filed a Writ Petition in CWP No. 16097 of 2007 in the Hon'ble Punjab and Haryana High Court in Chandigarh, amongst others, against TRAI and M/s Zee Turner Ltd. in respect of the ETC Punjabi channel being distributed by M/s Zee Turner Ltd. Amongst others, a direction by the Court to TRAI was sought to ensure level playing field conditions including fixing content tariffs for DTH and to ensure that similarly placed systems, namely CAS and DTH were treated equally.

(ii) In the midst of all foregoing events/actions, TRAI, pursuant to the judgment dated 21.08.2008 of the Hon'ble Punjab & Haryana High Court, decided to go through a formal consultation process for fixing the tariff for DTH platform. As such a consultation paper on "DTH Issues relating to Tariff Regulation & new issues under reference" was issued on 06.03.2009 and two open house discussions were held on the said consultation paper on 29.04.2009 and 05.05.2009 in New Delhi and Pune respectively.

(iii) Meanwhile, Special Leave Petitions were preferred in the Supreme Court of India against the orders of Punjab and Haryana High Court passed in CWP No 16097 of 2007, by M/s Star Den Media Services Private Limited, M/s MSM Discovery India Private Limited and Indian Broadcasting Foundation (IBF). The Supreme Court of India in hearing the said Appeals, vide its Order dated 04.05.2009, directed TRAI to proceed with its consultation uninfluenced by the views expressed by the High Court.

(iv) Subsequently, in Appeal No. 10(C) of 2008 in the matter of M/s ESPN vs. TRAI, which was filed by ESPN challenging the Press Release Nos. 38 & 39, when it was mandated to follow the same by means of a TRAI Order dated 24.06.2008. This Tribunal, vide judgment dated 13.05.2009 held that the principle of 50% would be applicable only on channels available in basic packages and not on add-on packages.

(v) As the earlier consultation paper on DTH tariff dated 06.03.2009 did not explicitly raise the issues relating to add-on packages and other connected issues for consultation with stake-holders, TRAI in pursuance of this Tribunal's judgment dated 13.05.2009 considered it necessary to issue a supplementary consultation paper. Accordingly, a supplementary consultation paper covering these and other related issues was issued on 2412.2009.

(vi) An appeal [C.A. No.4139 of 2009} was filed in the Supreme Court of India against the judgment dated 13.05.2009 of this Tribunal, which was dismissed by an order dated 06.07.2009 with a direction to TRAI to take a decision on the entire matter within a period of two months without being influenced by any observation made in the impugned order of this Tribunal.

(vii) TRAI then undertook a tariff exercise for cable TV services in non-CAS areas in pursuance of the directions of the Supreme Court dated 13.05.2009 in Appeal nos. 829-833 of 2009 [TRAI vs Set Discovery].

(viii) While the matter relating to fixation of Tariff in respect of DTH services was under consideration of TRAI, HITS policy was notified on 26.11.2009 by the Ministry of Information and Broadcasting and the Ministry, vide its reference dated 10.12.2009, requested it to consider tariff issues relating to HITS services. Accordingly, another consultation paper dated 06.04.2010 was issued on "Interconnection and Tariff Issues related to HITS services".

(ix) In view of the fact that tariff for all systems other than the cable services in the notified CAS areas were under review, TRAI also decided to review the tariff for Cable TV services in CAS areas. So, a consultation paper on "Issues related to Tariff for Cable TV services in CAS notified areas" was issued on 22.04.2010.

(x) Thus, the scope of consultation exercise included tariff issues in DTH, HITS and CAS. TRAI took up these issues in discussions held on 31.05.2010, 11.06.2010, 22.06.2010 and 23.06.2010 in New Delhi for further deliberations with the stakeholders. Open House Discussions were held at New Delhi on 01.06.2010, Pune on 03.06.2010, Bangalore on 04.06.2010, and Kolkata on 08.06.2010.

(xi) Thus, to address tariff issues in the sector, TRAI issued the following consultation papers:

a. Consultation paper dated 06.03.2009 on ***'DTH** issues relating to Tariff **Regulation and new issues relating to Broadcasting and Cable Services'*** issued in light of in the light of the observations made in Appeal No. 4 of 2009***;*** In the said consultation paper issued by TRAI (No. 4 of 2009) dated 6.3.2009 all the stakeholders were asked to give their respective comments on the following :

"5.2 Tariff fixation for DTH services

5.2.1 Whether there is a need to fix tariff for DTH?

5.2.2 If yes, whether tariff regulation should be at wholesale level or at retail level or both, i.e., whether tariff should be regulated between broadcasters and DTH operators or between DTH operators and subscribers or at both the levels?

5.2.3 Whether tariff regulation for DTH at wholesale level should be in terms of laying down some relationship between the prices of channels/ bouquets for non-addressable platforms and the prices of such channels/ bouquets for DTH platform? If yes, then what should be the relationship between the prices of channels/ bouquets for non-addressable platforms and the prices of such channels/ bouquets for DTH platform? The basis for prescribing the relationship may also be explained.

5.2.4 Whether tariff regulation for DTH at wholesale level should be in terms of fixation of prices for different bouquets/ channels? If yes, then the prices for different bouquets/ channels may be suggested. The methodology adopted for arriving at the prices for such bouquets/ channels may also be elucidated. Further, the methodology to fix price for a new pay channel may also be given.

5.2.5 Whether retail regulation of DTH tariff should be in terms of maximum retail prices of various channels or is there any other way of regulating DTH tariff at retail level?

5.2.6 In case DTH tariff is to be regulated at both wholesale and retail levels, then what should be the relationship between the wholesale and retail tariff?

5.3 Comparison with CAS

5.3.1 Whether the basic features of tariff order dated 31st August, 2006 for cable services in CAS areas, namely fixing of ceiling for maximum retail prices of pay channels, at the level of the subscriber fixing of ceiling for basic service tier and standard tariff packages for renting of Set Top Boxes should be made applicable to DTH services also?

5.3.2 Whether the ceiling for maximum retail prices of pay channels for DTH should be the same as laid down for cable services in CAS areas?

5.3.3 Whether DTH operators should be mandated to provide a basic service tier of FTA channels and if so, what mechanism should be adopted by DTH operators to provide the service of unencrypted Basic Service Tier, which is available in CAS areas without having to invest in a Set Top Box?

5.3.4 Whether the DTH operators should be required to make available the pay channels on a-la-carte basis to the subscribers as the cable operators are required to do in the CAS areas?

5.3.5 Whether standard tariff packages for renting of Set Top Boxes should also be prescribed for DTH operators?"

b. Supplementary Consultation Paper dated 24.12.2009 on *'Tariff related* ***issues for DTH*** *Services';* and

The comments of the stakeholders sought for therein read as under:

"4.1 The issues for consultations are summarised below:

4.1.1 Whether there is a need to differentiate various packages for the purpose of wholesale tariff determination?

4.1.2 If yes, how to define a basic package and add-on package for the purpose of wholesale tariff differentiation in relation to DTH services? Please elaborate your comments with appropriate reasoning.

4.1.4 If the wholesale price is to be linked with packaging of the TV channels then what should be the relationship between wholesale prices of a TV channel/bouquet offered by a broadcaster to a DTH operator, if the

channel/bouquet is packaged as a part of a basic package, or as a part of add-on-package or both by a DTH operator? Please elaborate your comments with appropriate reasoning."

c. Supplementary consultation papers issued on 24.12.2009 added the issue as regards 'Add-on packages'. Although may not be very relevant but, we may place on record that three other consultation papers were issued by TRAI being paper No. 5,6 and 7 on 25.3.2010, 6.4.2010, 22.4.2010 on non-CAS areas and HITS services and Cable TV services in CAS notified areas respectively.

The System

In the aforenoticed factual backdrop, it ought to be noted that Broadcasting and Cable services in India are principally operated in two different systems known as 'Addressable' and 'Non-addressable' systems. Definition of the 'Addressable' system is contained in Regulation 2(a) of the Telecommunication (Broadcasting & Cable Services) Interconnection Regulations, 2004 made by TRAI in terms of Section 11 (1) (b) of Telecom Regulatory Authority of India Act, 1997 (the Act).

Whereas in an addressable system, the number of subscribers obtaining signals from the operators is known to the broadcasters, in non-addressable system it is not.

Essentially, an addressable system comprises of Subscriber Management System, besides providing Set Top Boxes to the subscribers.

An 'Addressable System' therefore comprises of:

(i) Conditional Access System;
(ii) Direct to Home system (DTH);
(iii) Headend in the sky;
(iv) Voluntary Conditional Access Systems.

However a complete Addressable system has not yet been achieved. A time frame has been fixed by TRAI to achieve the target by December, 2013. In some other countries like Australia, the target is to be achieved by December, 2011.

It is accepted by every stakeholder that almost all the problems would be solved if `addressability' is achieved.

We fail to understand as to why the Government of India has not taken adequate measure in this behalf. Even in the Capital town of Delhi, it has not been fully achieved.

We hope that the target fixed by TRAI shall receive adequate attention of the Government and it would implement the recommendations of TRAI in letter and spirit.

The DTH Platform, which stands out as the most popular form of an 'Addressable System' was introduced in India in 2005. There are six DTH operators in the country. It is the fastest growing addressable platform. It is said to be growing by 1 million per month. It has an estimated subscriber base of 20 million subscribers.

The impugned tariff order

TRAI notified the impugned order on the 21st day of July 2010, which came into force on the 1st of September 2010. The said order was notified by TRAI to be in exercise of the powers conferred on it by clauses (ii), (iii), (iv) and (v) of clause (b) of Sub – Section (1) and Sub – Section (2) of Section 11 of the TRAI Act.

Clause 3 of the impugned tariff order contains the Definitions clause.

The terms 'Addressable system', 'A-la-carte' 'Ala – Carte rate/charges', 'Charges' 'Distributors of TV channels' have been defined under the said Clause 3 of the impugned Notification as under.

*(c) **"**a-la-carte**"** with reference to offering of a TV channel means offering the channel individually on a standalone basis;*

(d) "a-la-carte rate" means the rate at which a standalone individual channel is offered to the distributor of TV channels or to the subscriber, as the case may be;

(n) "charges", with reference to---

(i) subscribers, means the rates (excluding taxes) payable by subscribers to distributor of TV channels, for the broadcasting services or cable services received from such distributor;

(ii) distributors of TV channels, means the rates (excluding taxes) payable by such distributors of TV channels to broadcasters for broadcasting services received, or to other distributors of TV channels for the broadcasting services or cable services received, as the case may be;

(s) "distributor of TV channels" means any person including an individual, group of persons, public or private body corporate, firm or any organisation or body retransmitting TV channels through electromagnetic waves through cable or through space intended to be received by general public directly or indirectly and such person may include, but is not limited to, a cable operator, direct to home operator, multi system operator, head end in the sky operator and a service provider offering Internet Protocol television service;

Clauses 4, 5 & 6, of the said tariff order reads as under:-

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

(1) Every broadcaster shall offer or cause to offer all its pay channels on a-la-carte basis to distributors of TV channels using addressable systems, and specify the a-la-carte rate for each pay channel:

Provided that the a-la-carte rate for a pay channel for addressable systems shall not be more than thirty-five per cent. of the a-la-carte rate of the channel as specified by the broadcaster for non-addressable systems.

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

Provided that -----

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

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

5. Charges payable by cable operator to multi system operator or HITS operator to be governed by mutual agreement between them.

The charges payable by a cable operator to a multi system operator or to a HITS operator, as the case may be, shall be as determined by mutual agreement.

TRAI, however, put the retail tariff under forbearance, as would appear from Clause 6 occurring in 'Part 3' of the impugned tariff order, which reads as under :-

6. Mandatory offering of pay channels on a-la-carte basis to ordinary subscribers and charges therefor.

(1) Every service provider providing broadcasting services or cable services to its subscribers using an addressable system shall, from the date of coming into force of this Order, offer or cause to offer all pay channels offered by it to its subscribers on a-la-carte basis and shall specify the maximum retail price for each pay channel, as payable by the ordinary subscriber:

Provided that in the case of direct to home service, a direct to home operator who is unable to offer all its pay channels to its subscribers on a-la-carte basis on the date of coming into force of this order due to any technical reason, shall offer all its pay channels on a-la-carte basis to its subscribers with effect from a date not later than the 1st day of January, 2011.

(2) It shall be open to a service provider, while offering its pay channels on a-lacarte basis and specifying a-la-carte rates for each of them under clause (1), to specify a minimum subscription period, not exceeding three months, for subscribing to a pay channel on a-la-carte basis by a subscriber.

(3) Every service provider providing broadcasting services or cable services to subscribers using an addressable system may, in addition to the offering of pay channels on a-la-carte basis under sub-clause (1), also offer bouquets of channels, in which case, it shall specify the maximum retail price for each such bouquet applicable to its ordinary subscribers.

(4) It shall be open to the service provider to specify a minimum monthly subscription, not exceeding one hundred and fifty rupees (exclusive of taxes) per month per subscriber, towards channels chosen by the subscriber, either a-la-carte or bouquet, for availing the services of such service provider.

Explanation: *It shall be mandatory for all service providers, who are providing broadcasting services or cable services to subscribers through addressable systems, to transmit or retransmit the channels of Doordarshan required to be transmitted compulsorily under section 8 of the Cable Television Networks (Regulation) Act, 1995 (7 of 1995), to each subscriber on its network.*

TRAI along with the impugned Tariff order issued an Explanatory Memorandum, some of the relevant paragraphs whereof may also be noticed by us :

"14. The Authority has considered the question as to whether there is a need for regulating tariff in addressable systems. In this context, the Authority has observed that while there is a "must provide" provision for broadcasters, each channel is unique in terms of content and in that sense the distributor is limited in his choice of channels. Secondly, while there are today six private DTH operators who are competing amongst themselves, there is an organic linkage between the addressable and non-addressable systems and the issue really is of a non-level playing field between the up-coming addressable systems vis-a-vis the incumbent analogue systems. The Authority is of the view that implementation of digitization with addressability is the road ahead for the sector and would be in the best interest of the industry as well as the consumer. In order to achieve a structured growth in this direction, a certain amount of regulatory intervention is considered necessary.

15. Having decided to regulate the tariff for addressable systems, the next issue is regarding the framework of tariff regulation. It is felt that within a single tariff framework, the different addressable systems can be accommodated with suitable provisions. Thus, the tariff dispensation can follow two frameworks – one meant for addressable systems and other meant for non-addressable systems. This approach is further supported by the extant Interconnection Regulations which deal with the overall TV market on single distinction basis. This Tariff Order is meant for addressable systems.

18. DTH operators are in favour of deriving rates for wholesale price fixation of TV channels for DTH services from the applicable rates for cable TV services in non-CAS areas. DTH operators in general state that given the subjectivity of subscriber base in non-CAS areas and the fact that the same content gets viewed on non-addressable and addressable platforms, the bouquets offered by broadcasters in non-CAS areas should be available to them at a discount. They state that the wholesale price for DTH operators should be in the range of 10%-30% of the corresponding rates applicable in non-CAS cable TV services. They also state that this rate should be without any linkage of channel/ bouquet wholesale price to the reach and placement of a channel on the

DTH platform. According to DTH operators, around 20 million DTH customers contribute more than 50% of the broadcasters' subscription revenue as compared to around 70 million of cable TV customers. Further, most agreements negotiated between DTH operators and broadcasters has the wholesale tariff on DTH platform at a much lower rate of around 15-20%. In case of long term contracts, flat-fee agreements are in effect. Broadcasters have confirmed that commercial agreements are in place with DTH operators on the basis of revenue deals which translates into 25-30% of RIO rates declared by broadcasters. They further state that in this scenario there is no need for intervention by the regulator.

20. Based on the information submitted by the stakeholders to TRAI, an analysis was carried out to assess the price at which broadcasters provided TV channels to DTH operators. Since DTH has become the predominant addressable system compared to CAS and IPTV, the related data of DTH has been considered in this exercise. It has been noticed that different methods are followed for securing content at the wholesale level. In one method, a long term contract is entered into for payment of a fixed annual fee. Various factors, including subscriber base and growth, number of channels and their reach and duration of the contract are likely to influence such contracts. In another method, the agreements are based on the unit price of a channel and the corresponding subscriber base ascertained from the subscriber management system. A percentage discount is made available by the broadcaster on the channel price depending on the target subscriber base. In both models, it is noticed that the content is made available at a discounted price by the broadcasters to the addressable platform distributor.

21. From stakeholders' data, it is also observed that the gross cost of content paid by distributors to broadcasters in 2008-09 for 68 million non-CAS subscribers was estimated at Rs.2900 cr. The corresponding amount in the same period for DTH services is estimated at Rs.1000 cr. Broadcasters pay carriage and placement fee to distributors which is estimated at Rs.950 cr. and Rs.50 cr. for non-CAS and DTH respectively. Thus the net collection of broadcasters is Rs.1950 cr. (Rs.2900-950) and Rs.950 cr. (1000-50) for non-CAS and DTH respectively. On an estimated subscriber base of 68 million of non-CAS and 13.4 million for DTH in 2008-09 the per subscriber content cost per annum would be Rs.287/- (1950 cr./ 68 million) for non-CAS and Rs.709/- (950 cr./13.4 million) for DTH. Thus, to a broadcaster a DTH subscriber or equivalent to addressable system holds a quantitative value equivalent to 2.47 (709/287) analogue cable TV subscribers. This gets translated into a discount of 59.6% for a DTH subscriber or equivalent, on the wholesale rate applicable for an analogue TV subscriber. However, this is based on gross figures of the industry.

22. The data available with TRAI for 2008-09 indicates that several agreements between DTH operators and broadcasters are of long duration and have been finalized at 30-35% of the non-CAS rates. With growth in the number of subscribers in the addressable systems, the rates are likely to reduce further. Keeping in view the above considerations, the Authority is of view that the wholesale rates of pay TV channel(s) and bouquets for all addressable systems should not be more than 35% of corresponding

channel(s) and bouquets in cable TV services in non-addressable market. The Authority will review the position as and when considered appropriate.

29. Service providers have generally expressed the view that the retail tariff should be under forbearance. Consumer groups however, are in favour of some regulation at the retail level. At present, retail tariff for the DTH platform which is the predominant addressable platform, is under forbearance. There are 6 DTH operators competing against one another and with the incumbent analogue cable system. It is observed that the retail tariffs prevailing in the market are quite competitive. As the market forces appear to be operating effectively, the Authority is of the view that there is no need for regulatory intervention in the matter of retail tariff fixation at present."

Submissions

In the Appeals before us, the one preferred by M/s. Zee Turner Ltd. was treated to be the lead matter as agreed to by the learned counsel appearing for the parties.

Primarily the paper books of Zee Turner have been referred to by the learned counsel.

The principal contentions raised on behalf of the appellants are:

1. TRAI has failed to maintain transparency, as envisaged under Section 11 (4) of the Act;

2. The impugned tariff order is liable to be set aside as there has been total absence of application of mind on the part of TRAI.

This is because:

(i) the relevant factors had not been taken into consideration; input costs in the form of increase in the cost of procurement of programmes from production houses, increase in the cost of IPR procurements, phenomenal increase in the cost of movie rights, increase in overhead costs, operational costs in the form of transponders etc.

borne the Broadcasters have not been considered. This has resulted in total imbalance as the broadcasters have to bear all the costs, and yet be subject to a price control, causing a severe dent in their revenues,

(ii) figure of 35% was based on wholly irrational criteria and, thus, is perverse as also violative of clause 7.6 of the DTH Licence Agreement.

(iii) The methodology adopted by TRAI in fixing 35% ceiling is illegal as in relation thereto, there is no linkage with non-CAS tariff.

(iv) The fixation of the ceiling was contradictory to TRAI's own affidavit dated 21.7.2010 filed before the Hon'ble Supreme Court of India in Civil Appeal No. 829 – 833, of 2009 as also Clause 34 of the Explanatory Memorandum appended to the Telecommunications (Broadcasting And Cable Services) Interconnection (Fifth Amendment) Regulations, 2009 dated 17.3.2009.

(v) Rate on Add-on packages could not have been fixed with 'Entry level package'.

(vi) The issue relating to Carriage & Placement fee has been grossly misinterpreted by TRAI.

3. The impugned tariff order is violative of the judgments passed by this Tribunal and in particular the judgment dated 13.5.2007 in Appeal No. 12 (C) titled ESPN Software Vs. Telecom Regulatory Authority of India, wherein it was observed that the principle of 50% tariff shall not mutatis-mutandis be subject to add-on packages and that the basic tier viewership cannot be compared with Add-on Viewership.

4. There was absolutely no justification for TRAI to intervene in the matter and that too without making any regulations for the retail tariff inter alia on the following:

(a) Rate regulation and price controls distort the market and lead to misallocation of resources. Artificially placed low prices deter any further investment in new channels which in turn affect consumer choices, because of the shortage of channels and lack of variety in programming.

(b) The market is already mature and equilibrium has already made its inroad into the industry. If any channel is over- priced, the market forces will naturally drive its prices down and if a channel is under–priced, the forces of demand and supply would naturally bring about an increase in its price. Therefore, in view of the fact that there are tough competitions prevailing in this sector, TRAI ought to have opined that the doctrine of *forbearance* should be taken recourse to as market forces would itself regulate the wholesale price as the same standard has been applied in relation to the retail price

5. The impugned order is discriminatory in nature in so far as it has deprived the broadcasters from a level playing field and they have been discriminated against the broadcasters vis-a-vis the other stake-holders.

6. TRAI has departed from its earlier stand namely no tariff was necessary to be framed.

7. A distinction must be drawn between a bouquet and an *a la-carte* channel in as much as the commercial considerations, the rate of profit, the contents, the preparation, the service thereof would be different from each other. It is necessary to draw such a distinction as the commercial considerations, would be distinct and different for the two and therefore two different principles would apply i.e. whereas in case of a bouquet, there is a whole volume and the

customer will have only one choice i.e. take it or leave it, so far as the a-la-carte system is concerned, the total concept is choice of the subscribers only.

8. A distinction must also be made on technological aspects of the matter between the addressable system and non-addressable system is concerned. Moreover the technology and ground realities are different in the two; namely in a non addressable system, all the available 80 or 85 channels will have to be transmitted together but in an addressable system, a person may have a passion to view only something e.g. which in case of a wrestling, may even be sumo wrestling only.

9. Right to fix the Maximum Retail Price of the channels of the Broadcasters has been given to the DTH Operators and not to the Broad casters. This is especially relevant in the context of Sports channels as DTH Operators would be unable to appreciate the cost incurred by Sports Channels.

10. In any event, the impugned order is violative of Article 14 of the Constitution of India in so far as the pricing principle for both cannot be the same, as the technology involved in the two is different. Although classification is permissible in terms of Article 14, keeping in view the objective behind the same being minimisation of under-declaration and promotion of choice in an addressable system, the impugned tariff order must be held to have no nexus with the objective it seeks to achieve. There is no semblance of reasonable classification in the instant case as the technology is radically different in two different situations, and hence rates of the one technology cannot be linked to another. In other words TRAI cannot provide for the rate of one technology at a fraction of rate of the other and therefore the means of classification, in so far as a cap is sought to be put on the rate of one technology vis–a- vis the other is an unreasonable classification not fulfilling in any way as the object of promotion of addressability in an objective way.

11. Furthermore, having regard to the fact that in one of the systems, under-declaration is rampant and in another it is nil, the principle can neither be made applicable in all situations nor can there be a possible rational nexus in

between the two and thus the possible rational categories in question being not rational must be held to be violative of Article 14 of the Constitution of India.

12. For the purpose of considering the justifiability of a tariff order, this Tribunal would be entitled to consider the legality of the processes required to be undergone by a Regulator therefor, the manner in which the same has been undertaken, the level of transparency maintained, wherefor the scope of enquiry must be held to be in broadest one being the appellate authority in respect of all the 'decisions', 'directions' and 'orders' issued by TRAI.

13. This Tribunal must be held to have wide power as it is recognised in law that legality, propriety and correctness of any order may be subject to appeal. Hence in view of the same, questions as to whether the TRAI has gone into and :-

(i) acted within the statute to take into consideration all relevant facts;
(ii) eschewd any relevant consideration; and
(iii) arrived at a correct conclusion

must be addressed.

14. In any view of the matter, while for DTH operators this Tribunal had fixed 50% of the amount, which is payable by an operator in a non-addressable system, TRAI itself having noticed that agreements are entered into at 30% to 35% thereof, it ought not to have taken away the negotiating power of the broadcaster.

15. As regards the decision making process, TRAI ought not to have

(i) treated 'add on' with 'basic tier' wherefor a minimum sum of Rs.150/- was to be charged with an add on package which is being regulated by 35% of the non-CAS tariff; and

(ii) given a go by to a complete freedom on the operator, namely liberty to put the basic tier or add on package, the placement of different channels, the vertical integration etc. and

(iii) made the capability of keeping the competitive channels out and thus make the bargaining powers unequal.

16. The purported reason assigned by TRAI in paragraphs 24 to 27 of the Explanatory Memorandum is spacious in nature and in any even defies any logic.

17. TRAI having found it impossible to distinguish the difference between the basic package and the add on package, ought to have answered the same. If it could not distinguish between an 'entry level package' and 'a-la-carte package', the concept of packaging would become irrelevant. Having regard to the fact that in the 2006 order TRAI had held that unless regulated, the a-la-carte rate would become illusory, it must be held to have misdirected itself in so far as it did not make any provision therefor.

18. The principle of price fixation only should not aim at a middle man namely DTH operator and should be for the ultimate consumer and, thus, it cannot be held to be in public interest.

19. The essence of price control being the protection of the interest of the consumers, which according to TRAI, being not necessary, the entire exercise must be held to be wholly irrational.

20. TRAI having not undertaken any cost study of the concerned player, which was imperative in character, the process of fixation of price must be held to be vitiated in law. The quantum of viewers having been considered at 68 millions in

2006 figure, which is absolutely wrong.

Submissions on behalf of Sports Channels:

We may notice the submission advanced on behalf of the 'Sports Channel' separately. Counsel appearing on behalf of the Sports Channels collectively urged that:

1. TRAI has failed to appreciate that sports broadcasters are a class of their own, as would appear from the following illustrations :-

   "A series of 5 matches (BCCI) costs = Rs.155 cr. @ Rs.31 cr. Per match)

   Addl. Cost of other marketing/overhead in this period = Rs.15 Cr.

   Total cost in this period = Rs.170 Cr.

   Advtg. Revenues from these 5 matches =
   Rs.85 Cr. (Avg. Per match Rs.17 crs – assuming that no match day is lost or no matches finish earlier than schedule)

   Additional deficit to be recovered through subscription = Rs.85 crores (best case scenario without including the profits)."

2. Keeping in view the fact that a Sports channel for all intent and purport may not be able to carry out advertisements during the live telecast and as the subscription of the channels on one of the DTH platforms is almost 10 times more in the months in which there is a popular event as compared to other months and in view of the fact that the subscriber can after a period of three months switch off a channel, their case ought to have considered separately.

3. A sports channel should have been considered on separate principles in as much as having regard to the provisions of the Sports Broadcasting Signals (Mandatory Sharing of Prasar Bharti) Act, 2007, no exclusivity can be maintained as the contents of a sports channel is required to be shared with Prasar Bharati and having regard to the fact that a sports broadcaster merely get 25% of the advertisement revenue of Door Darshan, the supply of the channel to Door Darshan would be within the purview of the 35% cap, making it very difficult for Sports Channels to operate with a flat cap of 35%.

4. DTH operators have been selling the sports channel on exorbitant margins of more than 100% and, thus, they must be held to be profiteering at the expense of 'Sports Broadcaster'.

5. Having regard to the fact that most of the DTH operators are vertically integrated, as for example Zee Turner has a Zee and Dish TV, Tata Sky and Star/ESPN, Sun and Sun Direct, fixation of MRP for a DTH operator can be abused at least by those, who are vertically linked to a broadcaster or otherwise promote their own channels at the cost of the others. Independent Sports – channels, therefore, may suffer heavy losses.

6. If complete forbearance was not found to be possible, so far as the sports channels are concerned, they should have been provided some protection as in absence thereof they may be left high and dry.

7. In any event, some flexibility ought to have been provided to the sports channels keeping in view the high event months, less event months or even dry event months.

8. It has been noticed that whereas some of the appellants sells its channel at the rate of Rs.20/- per month, DTH operator sells the same at Rs.45/- per month.

Submissions of the Respondents:

Submissions on behalf of the TRAI:

Mr. Meet Malhotra, the learned Sr. Counsel appearing for TRAI urged :

1. TRAI's recommendatory, regulatory and tariff fixation functions as provided for in Section 11 of the Act, were required to be exercised for framing the `impugned tariff order'.

2. In making `the impugned Tariff Order', TRAI came out with consultation papers and held wide deliberations with the public seeking the comments of all stakeholders. In order to provide maximum opportunity to the stakeholders to offer their comments, open house discussions were held at various places in the country soliciting comments/views from the general public and stakeholders. Therefore the allegations that there was no transparency observed by the TRAI as was envisaged by S. 11(4) of the TRAI Act, while making `the impugned order', is wholly frivolous.

3. The impugned order was not made by TRAI of its own but having regard to the directions issued by Punjab & Haryana High Court as also this Tribunal.

4. That the television broadcasts reach the viewers in the country mainly in three ways, viz, terrestrial television, cable TV through addressable system (using set top box) which includes IPTV and direct to home transmission and cable TV through non-addressable system. The terrestrial television has been around for decades and is presently an exclusive operation of Doordarshan in India. Cable TV through mandated addressable system is at present available in notified CAS areas of Chennai and in parts of Delhi, Mumbai and Kolkata. Cable TV through non-addressable system has had a much wider reach, mainly in urban and semi urban areas. DTH is a comparatively recent entrant as compared to cable transmission. The DTH is emerging as an alternative to cable television and there is a certain

degree of competition between the CAS service providers and the DTH operators apart from the competition that is existing in the non-CAS areas. However, the competitiveness of DTH depends on whether it can provide content at par with the cable operations, at comparable prices and with an acceptable level of quality of service.

5. That on 31st August, 2006, TRAI issued a separate tariff order namely the Telecommunication (Broadcasting and Cable) Services (Third) (CAS Areas) Tariff Order, 2006 for CAS areas. It was mentioned in para 4.17 of the Explanatory Memorandum appended to the Telecommunication (Broadcasting and Cable) Services (Third) (CAS Areas) Tariff Order, 2006 that TRAI is closely monitoring developments in the DTH market and will consider initiating a separate consultation process on all regulatory issues concerned with DTH in India at an appropriate time.

6. The respondent TRAI had been consistently holding the view that the DTH platform is a competitive platform to and has linkages with the non-addressable (non-CAS) platform.

7. Furthermore there is no contradiction between the stipulation of 35% ceiling limit provided for in the impugned tariff order and those contained in the affidavit dated 21.7.2010 before the Supreme Court of India.

8. Add-on packages vis-a-vis the basic tier package having been found to be not possible, keeping in view the different stand taken by different Broadcasters and the DTH operators.

9. Whereas at the retail level, there exists competition, at the wholesale level, the same is not available as has been stated in paragraph 14 and 29 of the Explanatory Memorandum appended `to the impugned tariff order'.

10. No foundational fact has been laid down to attract the principle contained in the 'Equality clause' of the Constitution of India being Article 14 thereof.

11. It is incorrect to say that the figure of 13.4 million and 21 million had been mixed up in as much as, whereas the figure of 13.4 million, as mentioned in paragraph 21 of the impugned tariff relates to the period 2008-2009, the figure 19 million relates to "implementation of digital addressable Cable TV System in India".

12. So far as the sports channels are concerned, it is incorrect to say that they fall within a class in as much as firstly for a period of three months a customer cannot discontinue with the channel and secondly if, within a period of three months, it cannot come up with an event which is worth noticing, it must be held to have no content. It is incorrect to suggest that the sports channels are seen only when a live event is presented, as in fact the same is telecast again and again for months together.

Submissions on behalf of the DTH Operators:

The learned Counsel appearing on behalf of the Association of DTH Operators, urged :-

(i) TRAI has rightly not regulated the retail tariff, as has been explained in paragraphs 28 and 29 of the Explanatory Memorandum in view of the fact that there exists enough competition in the retail market and the customer has a wide choice to make therein.

(ii) Only in four metropolitan cities, the Conditional Access System was introduced and having regard to the fact that the achievement of complete addressable system would take a long time, the impugned tariff order was necessary so as to promote the objective of addressability.

(iii) It is not to be disputed that the rate fixed by TRAI is not precise or perfect.

This is because:

a. TRAI has gone for a change as the same was in public interest;

b. Addressability was the only answer to bring about an end to all the controversies and it cannot be said that whatever has been worked out was not as a result of market force;

c. The broadcasters by reason of the addressable system would be able to mark up the under-declaration;

d. The real thrust of TRAI was to get 150 channels on a la-carte basis and unless the same is allowed, the level playing field would suffer, if the non-CAS system is required to be addressed;

(iv) The impugned order rests on broader principle of forbearance and to achieve digitalisation and addressability and it is for this reason and objective that no price has been fixed and only a percentage has been provided for namely 35% of the rate payable by the operators in a non-addressable system. If digital addressability is achieved, more people would shift thereto, which would ultimately benefit the consumers. The tariff order was thus made by TRAI in protection of consumers interest, as would be evident from part III thereof wherefrom it would appear that the same will have an huge impact on the subscribers as would be evident from Clause 6, sub-clause 4 thereof which reads as under :-

> *"(4) It shall be open to the service provider to specify a minimum monthly subscription, not exceeding one hundred and fifty rupees (exclusive of taxes) per month per subscriber, towards channels chosen by the subscriber, either a-la-carte or bouquet, for availing the services of such service provider."*

(v) From a perusal of para 21 of the Explanatory Memorandum appended to the Tariff Order, it would be evident that the figures mentioned therein were not the ones disclosed by the broadcasters but by the DTH operators.

(vi) The interim rates fixed by TRAI having not been challenged, the broadcasters cannot be allowed to give break to the addressability system which provides for better flexibility and choice.

(vii) The a-la-carte basis in respect of the channels of the Broadcaster was already available having regard to the RIOs, as they were required to be filed by the Broadcasters. The argument of the broadcasters that there has

been a notional loss of bargaining power, should not be allowed to be raised keeping in view the fact that by a reason of addressability, the dual purpose of voice and digitalization etc. would be possible to be achieved. Having regard to the consultation process, which had taken place, there cannot be any doubt, whatsoever, that the entire process was transparent in nature.

(viii) A Regulation would invariably interfere with the right of one or the other party, but the same by itself cannot be a ground for interference by the appellate authority.

(viii) The minimum sum of Rs.150/-, so far as the DTH operators are concerned, was fixed by way of maximum as would be evident from para 11 of the Explanatory Memorandum.

(ix) Only because in the year 2009, TRAI had stated that it was not necessary for it to regulate, the same would not mean that even in 2010 it would commit the same mistake.

(x) From para 14 of the Explanatory Memorandum, it would be evident that it was an industry issue and the regulatory intervention was found to be possible only through the tariff.

(xi) No forbearance should be allowed in the wholesale tariff having regard to the rival contentions issued by the broadcasters and DTH operators.

(xii) The matter relating to carriage fees and advertisement charges were wholly unnecessary and irrelevant, as what was necessary for TRAI to consider was as to what is the amount the DTH operators can pay to the broadcasters and not what was the broadcaster's stand therein.

As the discount per subscriber comes to about 60%, evidently the actual percentage of amount, which was payable for the DTH Platform, was only 40%.

(xiii) The question with regard to the 'add on package' became redundant after the impugned tariff order came to be issued.

(xiv) Having regard to the fact that one million customers are added every month, there was no necessity to regulate the retail market.

(xv) TRAI having regard to the agreements entered by and between a Broadcaster and DTH operator and the same having been found to be under 35 percent ceiling, the questions raised before this Tribunal are academic in nature.

(xvi) The commercial interest of the broadcaster being to see the hapless consumers with sub-standard channels do not suffer in as much as although there exists about 550 channels, only about 50 channels are popular and thus it must be held that there is an inherent flaw in the argument that there is an inter-se competition amongst the broadcasters.

(xvii) The broadcasters have a vested interest to sell on the add on package, which cannot be encouraged.

Submissions on behalf of the other impleaded parties supporting the Order of TRAI:

(A) This Tribunal should interpret the impugned tariff order having regard to the statutory scheme contained in the Preamble thereof in as much as one of its avowed object as also TRAI is to protect the interest of the service

providers, which would not only include the existing operators but also the potential operators on an addressable system.

(B) Clause 3.2 of Telecommunication (Broadcasting & Cable Services) Interconnection Regulations, 2004 (The Regulations), having provided for a 'must provide' clause on non discriminatory terms to all the distributors of the TV channels and the Second proviso appended thereto having provided for prohibition of imposition of terms, which are unreasonable, the impugned tariff must be held to have provided a tool to give effect to the said mandate.

(C) It is incorrect to say that the figure of 35% has been picked out of hat although it is not possible to fix a price with mathematical exactitude. In the absence of any comprehensive and broad based channel-wise informations keeping in view the fact there are 550 channels and there are around 200 broadcasters and 150 pay channels, the estimated cost based runs the risk of not accurately representing the cost base of the broadcasting sector.

(D) The mandate of TRAI was not to eliminate the important link, the chain of delivery platform through cable but it must be held that a good beginning has been made in right direction.

(E) Addressability and digitalisation can be achieved only when the platforms, on which they are served on the consumer, become competitive. For the said purpose, addressability and digitalization must be held to be competitive in the existing analogue system. No MSO/LCO would be able to make massive capital investment unless the said services are able to compete with the existing analogue system. There being a high degree of variation in monthly subscription fee ranging from Rs.65/- to Rs.250/- across towns/cities, the endeavour of TRAI to bring about some sort of parity must be held to be within its domain.

(F) TRAI has fixed the ceiling of 35% taking into account, inter alia, the following, and therefore it cannot be said to be a figure picked out of the that :-

- *Around 20 Million DTH customers contribute more than 50% of the broadcaster's subscription revenue as compared to around 70 Million of cable TV customers;*

- *Broadcasters confirmed that commercial agreements are in place with DTH operators on the basis of revenue deals which translates into 25-30% of RIO rates declared by broadcasters;*
- *With growth in number of subscribers in the addressable systems, the rates are likely to reduce further.*

(G) In absence of the rate fixed by the impugned order having been disputed by the broadcasters and furthermore having regard to the fact that all MSOs/DTH operators want addressability, TRAI committed no illegality in fixing the rate which had to be realistic in nature.

(H) TRAI had no other option but to fix the impugned rates keeping in view the fact that even broadcasters have introduced a slab system.

(I) Although non-addressable system and addressable system cannot be equated, indisputably the former would not be able to compete with the others as the operators on the addressable system must be allowed to have a lessor rate compared to the rate of non-addressable system.

(J) No appeal having been preferred by the broadcasters against that part of the order of TRAI, the impugned tariff is unassailable.

(K) Keeping in view the fact that a DTH operators enters into agreement with the broadcasters on long range basis, 30% to 35% of the a-la-carte rate of non-addressable system must be held to be justified.

(L) As of now, there is no need to regulate the retail tariff but the regulator has kept the option open, and would resort thereto if any occasion arises therefor. It was not necessary to regulate the retail tariff but only the wholesale tariff keeping in view the fact that :

(i) There are 160 pay channels and 24 content aggregators out of which 4 content aggregators control 90 pay channels and, thus, clearly the market;

(ii) Contents differ from channel to channel;

(iii) There is a monopoly of the broadcasters; and

(iv) There is an intense competition amongst the DTH operators and other MSOs as there are 6000 operators, which would enable the consumers to avail the benefit of a lower rate.

(M) Even assuming that concessions are required to be given to the basic package and not to add on package, the impugned tariff should not be interfered with in as much as :-

i. There is no uniformity as to what would constitute a basic package;

ii. The question, as to whether the same should be FTAs or pay channels, that are popular, has not been answered.

iii. The MSOs like IMCL cannot compete with non addressable system and as a law providing for addressability should be encouraged, TRAI has found out a via media;

iv. So far as carriage and placement is concerned, it is dependent on the advertisement revenue and not subscriber revenue;

v. The contention of Zee Turner in this behalf is contrary to what was stated by it before TRAI and thus this Tribunal in exercise of its jurisdiction under Section 14 A (7) of the Act should take additional evidence;

vi. So far as the classification argument is concerned, there cannot be any doubt or dispute that whereas a valid classification having a clear nexus thereof is necessary but it is also well settled that

micro or mini classification would not be required therefor. Even assuming that somebody becomes a martyr in the process, Article 14 of the Constitution of India would have no application.

vii. So far as the petitioner is concerned, it is bound by the cost of the distributor and what market force can take and therefore there was a need to regulate.

(N) From the Explanatory Memorandum issued by TRAI, it will be evident that the driving idea was level playing field as also organic linkage which would mean structured linkage;

(O) The modality and/or machinery for fixation of rate in a case of this nature must be held to be different as the organic product and the end product in this case are the same and, thus, interchangeable.;

(P) TRAI having charted out a road map namely that the addressability should be achieved within the period fixed, it must be held that non-addressability is not in the consumer's interest;

(Q) TRAI having maintained complete transparency, the only question, which arises for consideration, is as to how much could be subject to regulation. Both parties although are entitled to profit, wherefor broad margin should be given by the regulator, profiteering is not permissible.

(R) Para 12 of the Explanatory Memorandum having been provided for level playing field as also road map and furthermore keeping in view the fact that initial steps which were coming in the way thereof and furthermore keeping in view the contentions of the DTH operators that the rate should be fixed at 15% to 20%, and TRAI provided for only 35%, which was available by way of golden means and in that view of the matter, no interference in the impugned order is necessary.

(S) Keeping in view the decision of this Tribunal in Appeal No. 10 (C) of 2006 - MSM Discovery Vs. TRAI disposed on 27.2.2009, no interference with the impugned order is called for.

(T) While formulating tariff for addressable services, TRAI has rightly deducted tariff/placement fees;

(U) The revenue of broadcasters directly relate to the popularity of the channel with which the viewer-ship increases. Reference of bouquet/package is not of much relevance as a-la-carte has been mandated.

(V) By reason of the tariff order the broadcasters have not been debarred to continue to enhance their subscription charges from the MSOs as the same is only subject to ceiling, as has been recognised by even TRAI, the Consultation Paper issued on 6.3.2009.

OBSERVATIONS, ANALYSIS AND FINDINGS:

Although, as stated hereinbefore, a large number of issues have been raised by both the parties, the core question which arises for consideration, is as to whether the impugned Tariff Order is justified?

We, although have noticed the rival contentions raised on behalf of the parties in great details, are of the opinion all of them need not be dealt with being wholly unnecessary and repetitive in nature, endeavours would be made by us to deal with the principal contentions of the parties.

Analysis:

Subordinate Legislation

The learned counsel has drawn our attention to the 'Preamble' of the Act again and again for advancing their respective arguments on the construction of the Tariff Order.

Emphasis has been put both on the interest of the service providers as also the interest of the consumer. To that question we may observe that the question of providing the interest of a strong players like the DTH operators would be necessary only if they require protection and not otherwise.

Who is a service provider?

It is the Government as the service provider and the licensee.

Both Broadcasters and the MSOs including the DTH operators are service providers, whose interest is, thus, required to be protected? The Broadcaster or the MSOs?

Whose interest was to be protected – the service provider's or the consumer's?

These are some of the questions which must be answered.

Undoubtedly the interest of the 'consumers' would get a precedence. So far as the conflict of interest between the 'Broadcasters' and the 'Service Providers' is concerned, a balance has to be drawn.

Both parties are entitled to earn profit. They are also entitled to protect their own respective business interests.

Subject to any `regulation' operating in the field; unless otherwise pleaded or established, both the parties may be held to have equal bargaining power for the purpose of entering into commercial contracts.

The impugned Tariff Order is not prefaced with a statement of objects and reasons.

The Supreme Court recently recommended the same in *M/S Daiichi Sankyo Company vs Jayaram Chigurupati & Ors.* 2010 (7) SCC 449 in the following terms:-

> *"65. Before parting with the records of the case we would like to say that in arriving at the correct meaning of the provisions of the Takeover Code specially regulation 14(4) and 20(12) we were greatly helped by the reports of the two Committees headed by Justice Bhagwati. We mention the fact especially because as per the legislative practice in this country, unlike an Act, a regulation or any amendments introduced in it are not preceded by the "Object and Purpose" clause. The absence of the object and purpose in the regulation or the later amendments introduced in it only adds to the difficulties of the court in properly construing the provisions of regulations dealing with complex issues. The court, so to say, has to work in complete darkness without so much as a glimpse into the mind of the maker of the regulation.*
>
> *66. In this case, it was quite apparent that the 1997 Takeover Code and the later amendments introduced in it were intended to give effect to the recommendations of the two Committees headed by Justice Bhagwati. We were, thus, in a position to refer to the relevant portions of the two reports that provided us with the raison d'tre for the amendment(s) or the introduction of a new provision and thus helped us in understanding the correct import of certain provisions. But this is not the case with many other regulations framed under different Acts. Regulations are brought in and later subjected to amendments without being preceded by any reports of any expert committees. Now that we have more and more of the regulatory regime where highly important and complex and specialised spheres of human activity are governed by regulatory mechanisms framed under delegated legislation it is high time to change the old practice and to add at the beginning the "object and purpose" clause to the delegated legislations as in the case of the primary legislations."*

In the light of the aforementioned observations, we should take into consideration the judgment of this Tribunal and that of the High Court.

We have referred to them in extenso heretobefore. No direction was issued. No observations were even made to compel the Regulator to make a Tariff Order. As an independent Regulator, it was free to act on its own.

We have also noticed the order of the Supreme Court of India asking TRAI to proceed to carry out its exercise without in any way being influenced by the observations made by this Tribunal or the High Court.

TRAI unfortunately, did not do so and proceeded on the basis of the observations made by this Tribunal. It, on its own, opined that making of a tariff order would be imperative in view of the order of the High Court.

It , however, for reasons best known to it, completely ignored the observations of this Tribunal in the decisions rendered by it and in particular in ESPN (Supra).

It proceeded as if this Tribunal had asked it to consider the 50% of the prevailing market rate of analogue mode as the bench mark.

It noticed the market trend i.e. 30-35% of the rate prevailing in the analogue mode.

It did not, however, put the correct question unto itself as to whether the market forces were working and if so, whether any fixation of rate was necessary and whether any other or further regulation is necessary?

It did not say as to why a change became necessary all of a sudden.

We may notice that TRAI had rejected the representation of 'Tata Sky' while considering the same pursuant to the order of Punjab and Haryana High Court.

It however, started taking action after the orders were passed in the next round of litigation.

We have, thus, failed to find out any cogent reason behind the approach of TRAI in this respect.

General Observation

We may, however, at the outset, make some general observations.

The parties hereto are Broadcasters and DTH operators. In the category of DTH operators, we would also include for the time being those MSOs, who have resorted to the voluntary CAS system and are ready and willing to provide the 'Subscriber Management System', although this is yet to be done. We would, however, notice hereafter the position in regard to the *locus standi* of the operators other than the DTH operators.

Where a broadcaster supplies signals to the subscribers, each of them is bound to pay for the supply of signals received by him individually.

However, having regard to the under-declaration made by those, who provide their signals to their respective customers on analogue mode, realisation of the exact charges fixed by the MSOs/LCOs cannot be made by the Broadcasters.

There cannot be any doubt or dispute that the vices attached to the non-addressable system can be eliminated provided the addressable system is put in place completely. TRAI by reason of the impugned order has set a much desired goal therefor. We welcome the said move. In the process, however, it seeks to recognise unverifiable declaration [under declaration as stated in ASC Enterprises (supra) and Tata Sky (supra)] so far as the same constitutes the basis for the percentage of rate fixed for DTH operators are concerned. Its effect is that the broadcaster would be deprived of rightful charges from the viewers. If addressability is achieved, the same indisputably would lead to better facilities to the consumers, wherefor both the Government of India and TRAI have to make constant endeavours. They must bear in mind even in Delhi, Mumbai and Kolkata, total CAS has not yet been fully achieved.

We may now notice the steps taken by the TRAI to achieve the cause of fixing the tariff charges.

As far back as on 01.10.2004, the tariff rate was initially introduced, stating :-

"4.7 The regulation of prices as outlined above is only intended to be temporary and till such time as there is no effective competition. The best regulation of prices is done through competition. Therefore as soon as there is evidence that effective competition exists in a particular area price regulation will be withdrawn. TRAI will conduct periodic reviews of the extent of competition and the need for price regulation in consultation with all stakeholders."

Since then, however, the numbers of channels have increased from 100 to 500. The rate was increased by 7% from the one as prevalent on 26.12.2003 by an order dated 29.11.2005.

It may furthermore be noticed that by reason of the Explanatory Memorandum appended to the said tariff order, it was inter-alia stated as under:-

"Fixation of price charged for new pay channels to consumers is difficult because of large variations for these prices and of the difficulty in linking these to costs. Further, this is a localized issue which is not easily amenable to centralized regulations. Prices in different parts of the country are based on different systems using different methodologies for fixing the subscriber base. Many of these problems will get resolved if addressability is introduced, giving consumers choice and making the interconnect agreements more transparent."

Evidently, therefore the TRAI was and still is of the opinion that it may not be possible for it to work out the exact cost.

Yet again on or about 21.7.2010, in the affidavit filed before the Supreme Court of India, it stated as under :-

"Keeping in mind the views of the stakeholders, the Authority is of the view that the best option is to draw upon the features of the prevailing tariff structure as a workable solution for the analogue regime."

Yet again in the case before Supreme Court of India, it stated:-

"Given the large number of channels/broadcasters, and the various methods of accounting and information management adopted by them, the Authority is of the view that the case by case approach is not likely to provide a practical solution to the issue of wholesale tariff".

Evidently, therefore, at all material times TRAI had recommended conversion to the digital addressability system as the basic solution being the principal reason for the analysis. It is not in dispute that the DTH operators provide for the addressable system.

Furthermore TRAI lauded the tariff order to be a 'path – breaking order' in terms of ensuring flexibility, choice and affordability to the consumers. The impact of the order would enable the consumer to choose channels of his choice, un – impacted by the basic bouquets or add – on packages that were so far being offered on the DTH platform. Prior to the order, the customer was bound by the design of the basic package, add – on package, etc put together by the service providers and, in that sense limited in choice. In other words, the customer was forced to buy even such channels which he did not want.

The consumers, on the other hand, in their representations before TRAI had stated:-

(i) They are in favour of some regulation at the retail level. (See para 29 of the Explanatory Memorandum).

(ii) According to them, some DTH operators have been offering only 15 to 20 channels on a-la-carte basis and that too at about 250% to 300% of their wholesale price as the rates were under forbearance at retail level.

Submission of the learned counsel for TRAI as also other respondents was that a sum of Rs.150/- is the maximum of the minimum. TRAI, however, does not say what would be the number of channels which would be available for a sum of Rs.150/-. In its Explanatory Memorandum, TRAI has noticed that one of the participants representing subscriber group asked for 10 minimum TV channels under a-la-carte option. (See para 33 of the Explanatory Memorandum). No reason has been assigned as to why these requests of the subscriber groups have been disregarded. In a case of this nature, in our considered opinion, it was obligatory on the part of TRAI to assign sufficient and cogent reasons, particularly, in view of the fact that this Tribunal in its order dated 30.3.2007 in the case of Tata Sky (supra) observed that price regulation is a must for protecting consumer interest. Para 29 of the Explanatory Memorandum does not touch/elaborate on this issue.

Now that we have observed the approach of TRAI, and the discrepancies in what it has sought to do and what it has ultimately done, we may proceed to discuss the statutory framework within which the impugned tariff orders were brought forth.

Statute and Jurisdiction

TRAI undisputedly, under the TRAI Act has the functions which are

(a) recommendatory in nature; and

(b) Statutory in nature including, Tariff fixation functions.

It made the impugned tariff order purportedly in exercise of its power under sub-clauses (ii), (iii), (iv) and (v) of Clause (b) Sub-section 1 and Sub-section (2) of Section 11 of the TRAI Act.

The powers and functions of TRAI are contained in Chapter III of the TRAI Act. Whereas clause (a) of Sub-section 1 of Section 11 provides for the functions of the Authority so far as making of recommendations is concerned, Clause (b) thereof enumerates its functions. Sub-clause (iv) thereof provides for arrangement amongst service providers of sharing their revenue derived from providing telecommunication service.

Sub-section 2 of Section 11 of the 1997 Act provides for the power upon the Authority to notify the rates, at which the telecommunication services are to be provided for. The proviso appended thereto empowers TRAI to notify different rates for different persons or class of persons or similar telecommunication services and when such different rates are prescribed, TRAI is required to assign reasons therefor. The rates, which have been fixed by it in terms of the impugned order dated 21.7.2010, relate to the wholesale tariff.

Clause 4 of the said order, provides for the wholesale tariff.

Part 3 of the impugned order provides for the retail tariff.

However, no rate has been fixed for the benefit of the end consumers.

What would be the effect is the issue.

Source of Power

One of the questions, which arise for consideration, is in regard to the source of power of TRAI to bring about the impugned Tariff Order.

Mr. Baidyanathan would submit that the impugned Tariff Order has been made under **Sec. 11 (1) (b) (iv) of the 1997 Act.**

It reads as under :-

"regulate arrangement amongst service providers of sharing their revenue derived from providing telecommunication services."

The aforementioned provision as noticed heretobefore provides for-

(i) The Regulation of arrangement amongst service providers,

(ii) in relation to sharing of their revenue;

(iii) revenue should be derived from the telecommunication services

"Telecommunication service" has been defined in Sec. 2 (1) (k) of the said act to mean:

"telecommunication service" means service of any description (including electronic mail, voice mail, data services, audio text service, video text 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.

A plain reading of the aforementioned provision in our opinion clearly goes to show that it refers to an interconnection agreement between two service providers.

The statute contemplates an arrangement amongst the service providers. The said arrangement should be in respect of the sharing of the revenue. The revenue derived, in such an event, should ordinarily only be for the end users and not for the agents or intermediaries as we are concerned with fixing of `Tariff', the term used by TRAI in the consultation paper dated 6.3.2009. Section 11 (2) of the 1997 Act, however, speaks of rate.

When however a broadcaster transmits its contents for the end viewers of the television, it may do so–

1. by itself,
2. through a DTH Operator,
3. A Multi Service Operator who may retransmit the same to another MSO who in turn may also do the same to a Local Cable Operator, and so on and so forth.

It is, therefore, technically possible that before the contents of a channel produced by a broadcaster reaches the home of a viewer, there may be a large number of retransmissions. It may also be 1 or 2; one transmission and one retransmission as in the case of a DTH operator or a HITS operator.

The arrangement between a broadcaster and another operator i.e. the DTH operator is only one way. Broadcaster in that case will not earn any revenue from the customers save and except when it directly supplies to a consumer in which event there would not be any intermediary and thus, so called interconnection would be necessary. The DTH operators only will do it. The arrangement between a broadcaster and a DTH operator will only be a mutual arrangement by way of contract for receiving signal of channels and paying for it, which has nothing to do with the end users.

We may, however, hasten to add that the same does not mean that by reason of an arrangement entered into by and between the broadcaster and the DTH operator, the end user would not be benefited in any case. He may be. But such benefit may be indirect and not direct. It would depend upon the market force or willingness on the part of the intermediary to share a part of profit with them. But there would not be any statutory compulsion therefor. It would not be a `rate' or `tariff'.

What we intend to emphasize is that by reason of such an arrangement between the Broadcaster and the DTH operator, the element of mutuality for the purpose of earning the revenue so as to enable them to share the revenues

earned by each of them respectively from their respective customers and / or from the customers of each other (as in the case of international calls) does not exist.

The term of 'Regulation' in the context of the Act has a definite connotation, having regard to Section 2 (i) thereof.

TRAI has basically three functions; (i) to make recommendations in terms of clause (a) of sub-section 1 of Section 11 of the 1997 Act; (ii) perform the functions as enumerated in various other clauses contained in clause (b) and (iii) and make regulations as contained in Section 36 thereof.

The term 'Regulation' in the context of clause (b) of sub-section 1 of Section 11 is not comprehensive in nature. It cannot have the same broad meaning, which may extend to prohibition. The power to fix charge is primarily contained in Sub-Section 2 of Section 11 of the Act.

If we are correct in our observations that Clause (iv) of sub-section (b) of Section 11 has no application in this case, the question, which would arise, is as to whether the power exercised by TRAI was under sub-Section 2 of Section 11 would be in exercise of its Regulation making power. On a plain meaning of the term 'regulation', it would not be so.

Interpretation of the aforementioned provision, (as it stood then, namely Section 11 (1) (d) of the unamended TRAI Act) came up for consideration before a Division Bench of the Delhi High Court in MTNL Vs. TRAI reported in AIR 2000 Delhi page 208.

Variava CJ, (as his Lordship then was) speaking for the Division Bench of the Delhi High Court, stated the law thus :-

"48. Thus, it is clear that the Authority itself understood that its own function under Section 11(1)(d) was only to intervene in the event of the service providers not being able to arrive at an arrangement. It is clear that an arrangement does not necessarily imply an agreement. However, these are matters in which the service provider must be first given an opportunity to arrive at an arrangement amongst themselves. The question of regulation would only arise if the service providers are not able to arrive at an arrangement. The Authority may lay down guidelines regarding those arrangement, provided the guidelines are not contrary to the terms of a license or a policy decision taken by the Government."

In terms of the 1885 Act licenses are issued. Grant of interconnection to the seekers is mandatory. Under the 1995 Act only permission of MIB is necessary. Grant of interconnection is not mandated either under the 1995 Act or the conditions of permission.

Moreover, a bare perusal of the aforementioned decision would make it clear that basically a service provider for rendition of 'Telecommunication Services' is required to enter into a mutual arrangement and only when a mutual arrangement is not possible, TRAI may exercise that power, subject of-course, to the condition that an opportunity to the service providers must be given to arrive at the mutually settled terms and conditions contained in an agreement. For the said purpose, it may be permissible for the Regulator to lay down guidelines, but then, by reason thereof, no rate as such can be fixed.

This would give rise to a question as to whether providing for a `ceiling' would come within the purview of the 'tariff fixation'.

A tariff is a public document setting forth services of a common carrier being offered, rates and charges with respect to services and governing rules, regulations and practices relating to those services. A tariff sets forth the terms and conditions under which a service offered to the public, one of the terms being the rates i.e. the price term. The word `rate' used in Section 11 (2) of the Act should be viewed in the context of users are not for the benefit of the broadcasters are an intermediaries.

Fixation of ceiling, leaving the parties to enter into their own agreement, which would be in the nature of making a provision for forbearance subject to a ceiling, in our opinion, would not come within the purview of the term "fixation of rate" and/or "fixation of tariff".

Before, however, we consider the submissions of the learned counsel for the parties on merit, we may notice that the Central Government had issued two notifications on 09.01.2004, the first being SO 44 E whereby the Broadcasting and Cable services were notified to be the Telecommunication Services in terms of the proviso appended to Section 2 (1) (k) of the Act.

By another notification, being SO 45E, it was directed :-

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

By reason of the aforementioned notification, the Central Government has exercised its power conferred upon it by clause (d) of sub-section 1 of Section 11 providing for such other matters which TRAI would be required to perform

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 the Act.

Para 2 of the aforementioned SO 45E dated 9.01.2004 has a limited application.

It, however, is also a pointer to the fact that the Central Government was conscious that various functions parting to the 'Telecommunication Services' *stricto sensu* may not apply to the 'Broadcasting & Cable Services. In our considered opinion, clause (iv) of sub-section (b) of Section 11 is one of them.

If the Central Government was of the opinion that the relations between two different service providers, in the Broadcasting & Cable Services and others would be the telecommunication service within the broad meaning of the term for all intent and purport, as has been held by this Tribunal in Petition No.172 of 2009 Star vs. BSNL (disposed of on 29.9.2010), it would have said so explicitly.

The term `interconnection' has not been defined under the 1995 Act, 1997 Act or the Regulations.

Although, not very relevant; we may notice the said term has been defined in `The Register of Interconnect Agreement (Broadcasting of Cable Services) Regulations 2004 to mean :

> *xxx*
>
> *2 (xii) – "interconnection" means the technical arrangements under which service providers connect, including through electro-magnetic signals, their equipment, networks and services to enable their customers to have access to the customers, services and/or networks of other service providers;*

A dictionary meaning of interconnection may not be held to be applicable in the context of a `tariff order'.

In this case, sofar as addressable system is concerned, the Broadcasters can fix their own rates. The matter is, however, in CAS areas as in that case Broadcasters are to charge only Rs.5/- per channel from the customers. The rate may be different or may work out differently or it is not possible to determine the exact number of subscribers to be serviced in non-CAS area while it is possible to know the exact number of consumers in a CAS area. Even in a non-CAS area, the maximum rate that a customer has to pay in a A+ city cannot exceed Rs.260/- (see Tariff Order 6 of 2004).

This Tribunal in `Star' (supra) had to take recourse to interpretative process involved therein that it is technologically possible to converge the two services.

However, the power conferred on TRAI by the said notification dated 09.01.2004 was limited in nature. It was confined to pay channels including classification of standard norms and periodicity and/or revision of rates. While revising rates of pay channels, it was bound to consider the addressable system.

If the Central Government wanted TRAI to fix the rates of other channels and/or other matters, which are not directly connected with fixation of rate of pay channels, it could have said so very clearly and explicitly.

By way of illustration, we may notice that by reason of the said notification itself, in the matter relating to fixation of parameters for regulating maximum time for advertisement, the Central Government has used both the words 'pay channels' and 'other channels' meaning thereby the channels other than the pay channels which would include 'Bouquet', Free to Air Channels etc.

The decision of the Division Bench of the Delhi High Court has been noticed by this Tribunal in Association of Basic Telecommunication Operators and Ors. Vs. BSNL reported in 2005 (5) Company Law Journal page 334.

Section 11 (2) of the Act

It was, therefore, necessary for the Regulator to exercise its power only in terms of 11(2) of the 1997 Act, which reads as under :

"(2) Notwithstanding anything contained in the Indian Telegraph Act, 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."

The question that now arises is whether an arrangement between a Broadcaster and a DTH operator could be at the rates fixed at which telecommunication services in and outside India are provided?

In this case, the TRAI while has fixed wholesale tariff, it has not fixed retail tariff. As would appear from the discussions made hereinafter, by reason of `the impugned tariff order'; neither a `tariff' nor a `rate' has been fixed; only a ceiling has been provided. It leaves the rate in uncertainty. It is not explicit. It is required to be determined on case to case basis.

We are of the opinion that by reason of the impugned tariff order, the viewers of the television are not directly benefited in as much as the retail revenue has not been fixed. If no retail tariff has been fixed so as to enable the customer of the distributor of TV Channels to make payments thereof, the same would not come within the purview of fixation of tariff. This aspect of the matter would be considered by us a little later.

However, we may proceed on the basis that the regulator even assuming that for all intent and purport has exercised its jurisdiction under 11(2) of the Act, in which event, we have no other option but to address on the questions raised by the learned counsels for the parties which we intend to do hereinafter.

Jurisdiction of this Tribunal

Indisputably, the jurisdiction of this Tribunal is extensive. We need not dilate on this issue in view of our judgment on the IUC charges being Appeal No. 8 of 2009 and other analogous cases.

We may, however, briefly notice that Supreme Court of India in COAI v. TRAI (2003) 3 SCC 186 has held:

"It is not necessary for us to notice all the decisions cited by the learned Attorney General in order to arrive at the conclusion as to what is the extent of jurisdiction of the appellate tribunal under Section 14 of the Act. Suffice it to say, Chapter IV containing Section 14 was inserted by 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 organizations of the licensor, namely, MTNL and the BSNL were also service providers. That being the object for which an independent tribunal was constituted, the power of that 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 Telecom Regulatory Authority of India as well as the constitution of GOT-IT in April, 2001 consists of large number of eminent impartial experts and it is on their advice, the Prime Minister finally 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 though the tribunal would give due weight 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 Civil Court in relation to any matter 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 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. Since the tribunal is the original authority to adjudicate any dispute between a licensor and a licensee or between two or more service providers or between a service provider and a group of consumers and since the tribunal has to hear and dispose of appeals against the directions, decisions or order of the TRAI, it is difficult for us to import the self-contained restrictions and limitations of a Court

under the Judge made law to which reference has already been made and reliance was placed by the learned Attorney General. By saying so, we may not be understood to mean that the appellate tribunal while exercising power under Section 14 of the Act, will not give due weight to the recommendations or the decisions of the expert body like TRAI or in the case in hand GOT-IT, which was specifically constituted by the Prime Minister for redressing the grievances of the cellular operators. We would, therefore, answer the question of jurisdiction of the appellate tribunal by holding that the said tribunal has the power to adjudicate any dispute between the persons enumerated in Clause (a) of Section 14 and if the dispute is in relation to a decision taken by the government, as in the case in hand, due weight has to be attached both to the recommendations of the TRAI which consists of an expert body as well as to the recommendations of the GOT-IT, a committee of eminent experts from different fields of life, which had been constituted by the Prime Minister."

It was observed :

"*31. The rule as regard deference to expert bodies applies only in respect of a reviewing court and not to an expert tribunal. It may not be the function of a court exercising power of judicial review to act as a supermodel as has been stated in Administrative Law by Bernard Schwartz, 3rd Edn., in para 10.1, at p. 625; but the same would not be a case where an expert tribunal has been constituted only with a view to determine the correctness of an order passed by another expert body. The remedy under Section 14 of the Act is not a supervisory one. TDSAT's jurisdiction is not akin to a court issuing a writ of certiorari. The Tribunal although is not a court, it has all the trappings of a court. Its functions are judicial.*

33. The regulatory bodies exercise wide jurisdiction. They lay down the law. They may prosecute. They may punish. Intrinsically, they act like an internal audit. They may fix the price, they may fix the area of operation and so on and so forth. While doing so, they may, as in the present case, interfere with the existing rights of the licensees.

42. 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, legality or propriety of the order passed by the authority as also in relation to the dispute must be held to be a wide one.

43. The learned TDSAT should have borne in mind that its decision on fact and law is final and appeal lies to this Court in terms of Section 18 of the Act only on substantial questions of law. It, therefore, was obliged to determine the questions of law. It, therefore, was obliged to determine the questions of law and facts so as to enable this Court to consider the matter if any substantial question of law arises on the face of the judgment."

In Union of India V. Tata Teleservices (Maharashtra) Ltd. 2007 (7) SCC 517, it was stated

"*21. According to the learned Additional Solicitor General appearing for the appellant, such a dispute would also come within the purview of Section 14 of the Act going by the definition of licensee and the meaning given to it in the notice inviting tenders. The argument of the learned Senior Counsel on behalf of the respondent is that the expressions "licensor" and "licensee" are defined in the Act and the respondent had not become a licensee and the appellant had not become a licensor since the agreement was never entered into between the parties for providing telecom services in the Karnataka Telecom Circle and the attempt to rope in an intending licensee to whom a letter of intent has been issued or the entering into a contract is proposed, cannot be countenanced since the respondent has not become a licensee within the meaning of the Act and consequently this was not a dispute that came within the purview of Section 14(1) of the Act.*

22. We have already indicated that a specialised tribunal has been constituted for the purpose of dealing with specialised matters and disputes arising out of licences granted under the Act. We, therefore, do not think that there is any reason to restrict the jurisdiction of the tribunal so constituted by keeping out of its purview a person whose offer has been accepted and to whom a letter of intent is issued by the Government and who had even accepted that letter of intent is issued by the Government and who had even accepted that letter of intent. Any breach or alleged breach of obligation arising after acceptance of the offer made in response to a notice inviting tender, would also normally come within the purview of a dispute that is liable to be settled by the specialised tribunal."

The jurisdiction of this Tribunal being very extensive, we have no doubt that it has the requisite jurisdiction to consider not only the decision making process adopted by TRAI in formulating the charges but also the merit thereof.

Transparency

Indisputably, the internal process adopted by TRAI having regard to the mandatory provisions contained in Sub-section 4 of Section 11 of the 1997 Act should be transparent, being necessary for achieving effectively the objectives behind the principles of natural justice. The transparency aspect has been highlighted inter-alia on the premise that the question of fixation of rate on DTH platform vis-à-vis the non-addressable system had never been the subject matter of discussions and furthermore only one IPTV operator responded thereto.

Having regard to the definition of addressable system in the impugned tariff order, TRAI was required to inform thereabout to all the stakeholders as also MSOs providing digital services beyond CAS areas, so as to enable the stake holders to deal with those issues as well. It should have given an opportunity to the Broadcasters to place its view points in respect of non-DTH holders, who claim the same benefit as the DTH holders. The process, therefore, should have been the same, viz an opportunity to the parties to enter into agreements on their own terms.

This Tribunal in *Videsh Sanchar Nigam Ltd. Vs. TRAI* (Appeal No.5 of 2005) has held:

"When we look at the case under the Control Orders made under the Essential Commodities Act we find that certain principles have been laid down on which price can be fixed. The Essential Commodities Act was enacted to provide, in the interest of general public, for control of production, supply and distribution of, and trade and commerce in, certain commodities. The Act was enacted in 1955 and there has been thereafter numerous amendments and all these amendments gave the objects and reasons to the effect that Essential Commodities Act provides that, for maintaining or increasing supplies of essential commodities or for securing their equitable distribution and availability at fair price, the Central Government may issue orders for regulating or prohibiting the production, supply and distribution of such essential commodities and trade and commerce therein. In order to achieve these objectives Central Government has been vested with plenary powers under that Act to issue orders for regulating production, storage, transport and distribution of such essential commodities for controlling the price, etc. Essential commodities have also been defined in that Act. It may, therefore perhaps, not be useful to incorporate principles set out in the judgments under the Control Orders under the Essential Commodities Act and particularly when there is no right of appeal provided against any such Order. TRAI Act does not deal with any essential commodity and it is difficult to imagine that tariff fixation can be done under the

Act without following the principles of natural justice and functioning in transparent manner. Section 11(2) of the Act does not itself lay down any factors, principles or guidelines for fixing tariff. The only guiding principle would appear to be the preamble to the Act where the interest of service provider is also required to be protected. Can it still be argued that no right of appeal lies against the order of TRAI fixing tariff? Would not in that case Section 11(2) be struck down by the courts as conferring arbitrary powers? Only safeguard is the observance of principles of natural justice and acting in transparent manner with right of appeal. Moreover, if that was so as is contended by TRAI, there was also no need for explanation to Section 23 of the Act aforementioned. How could a legislative function be subject to any audit? It shows that the stand of TRAI is not correct.

The Section 11(2) does not lay down any guidelines on the basis of which tariff has to be fixed by TRAI. Tariff is fixed by an order of TRAI which is thereafter notified. Under sub-clause (4) of Section 11 of the Act TRAI is required to ensure transparency while exercising its powers and discharging its function. Under clause (b) of Section 14 TDSAT is empowered to hear and dispose of appeal against any direction and decision and order of the TRAI under the Act. There is no limit imposed by the Act on the exercise of power of the TDSAT as an appellate body hearing appeal from the order of TRAI made under Section 11(2) of the Act."
(emphasis added)

Basis of the Tariff Order

There cannot be any doubt that the adverse impact on the appellants' revenue is effected by reason of the impugned Tariff Order as DTH and HITS operators may cover an additional 68 million households without giving the Broadcasters the volume of subscriber numbers.

It may be true that TRAI issued two 'Press Releases' purported to be on the basis of the consensus arrived at by the broadcasters, but the same, however, was questioned by ESPN and as it now appears, not without good reasons.

This Tribunal in the case of ESPN (Supra) did not answer the question as to whether there was any firm basis for stating the rates to be 50% and also did not answer as to hold that the under-declaration by the operators on an analogue mode was to the extent of 50%.

Yet on that basis, the DTH operators were required to pay to the broadcasters 50% of the amount payable by the operators operating in a non addressable system. This Tribunal had no basis for arriving at the said opinion, and thus TRAI ipso facto could not have adopted the same as a basis for fixing the tariff/ rates. Was TRAI of the opinion that the under-declaration is to the extent of 65%?

If that was not to be the basis, the rate has been fixed without any basis.

Another question, which would arise for consideration, is that if merely a golden mean was to be arrived at, (which is the submission of the DTH operators), was the figure of 35% arrived at to maintain status quo?

If the rule of golden mean has been applied, again it was not necessary for TRAI to undergo such a huge consultative processes, and four open house discussions therefor. This is not the function of a Regulator, far less an independent Regulator.

Our attention has been drawn to the fact that Zee Turner while asking for forbearance also made a submission that status quo be maintained i.e. the rates so fixed at the existing rates of 50% of non-CAS rates. Two things have been ignored by TRAI in this behalf :-

(a) It was merely an alternative submission; and

(b) Other broadcasters did not say so.

Mr. Malhotra submits that by reason of the impugned tariff, no rate has been fixed only, a gold post has merely been sought to be achieved.

Even for that purpose, steps in the right directions were required to be taken.

The questions, therefore, which would arise now are:

(a) Is the impugned tariff order is only a vision document?
(b) Can there be a tariff only for the wholesale dealer?
(c) Did TRAI exercise its jurisdiction under Sub-section 2 of Section 11 of the Act?

If TRAI has merely fixed a percentage of rate payable to a broadcaster by the operators on a non addressable system, would it mean determination of rate? In our opinion, the answer must be rendered in the negative.

Indisputably, the prices may be different for different areas as the consumers in rural areas get rebates. In the context of the amount fixed by the Broadcasters, for selling their products, word the `rate' may not be appropriate; it would only mean `the amount' or `the charges'. Rating of viewership would not only depend upon the popularity of the channel but also the area to which the channel is broadcast.

Indisputably again, the percentage of under-declaration vary from area to area. Whereas in a posh area of a metropolitan town, the under-declaration may not be of much significance, in a small town or in a village it would be so.

When the statute provides for a rate in the context of Section 11 (2) of the 1997 Act, it would mean a definite amount.

Such a rate has to be fixed taking in view a Pan India scenario. It cannot be vague; it cannot be indefinite. The job of a regulator is to regulate; for which purpose it should have performed an empirical study.

In its Consultation Paper, TRAI had framed a large number of questions. Comments of all the stakeholders were called for, which were received. Such an elaborate exercise of the part of TRAI was necessary in order to give effect to order of this Tribunal, Punjab & Haryana High Court as also the Supreme Court of India.

If TRAI was not fixing a rate in exercise of its statutory functions, it could not have been acting under Sub-section 2 of Section 11 of the 1997 Act.

If the power under sub-section 2 Section 11 was not being exercised, how an independent regulator was regulating the charges is the question?

We have been addressed at great length by the learned Senior Counsel appearing on behalf of the respondents on the issue of a controlled economy which is needed to be adopted. Unless the rates are controlled, the theory of a regulated economy will have no relevance.

Even assuming that such a power could be exercised by TRAI having regard to the different provisions contained in Section 11 of the 1997 Act, the statements made in paragraph 22 of the Explanatory Memorandum might have been sufficient and then controversial statements and figures which have been referred to paragraph 21 of the Explanatory Memorandum were not necessary to be taken into consideration.

Mr. Malhotra would urge that the same was necessary for the purpose of checking the figures from other angle. If that be so, why merely the figures supplied by the DTH operators had been referred to and not those of the broadcasters?

Before us, the Broadcasters categorically stated and in fact demonstrated that figures quoted in para 21 of the Explanatory Memorandum are not only wrong; even the premise thereof is incorrect.

No counsel has sought to answer the aforementioned question raised by the Broadcasters, which clearly stated that the revenue collections of the broadcasters were not Rs.1950 crores i.e. Rs.2900 – 950 crores. What would happen to the advertisement revenue?

The calculation is evidently flawed. If the quantity and value stated therein being 2.47% namely 709 x 287 of analogue cable TV subscriber vis-à-vis DTH subscriber of a broadcaster is being taken into consideration, what is sought to be done for all intent and purport is legalising under declaration. We will however deal with the aspect of Advertising Revenues, Carriage Fee and other input costs separately.

In its rejoinder, one of the broadcasters Viacom18 to the counter filed by TRAI in Appeal No. 8(c) of 2010, stated in the following term :-

*"c. **In re: Issue of quantum:** The quantum arrived at by the TRAI of 35% is totally perverse and based on imagination. In Para 2.4.9 it is stated:-*

*2.4.9 There is very limited visibility on the subscriber base consuming and paying for the 129 pay channels analyzed for this consultation. In the absence of addressability, the subscription revenue transaction is being undertaken either as a fixed fee (lump sum), or on the basis of a "negotiated" subscriber base. As per data received from major national and regional MSOs during the consultation exercise, the sum of their declared subscribers is in the range of 5-6 million. **This is less than 10% of the estimated analogue subscriber base of 68 million as published in the National Readership Survey (NRS) 2006 — which is the last serve conducted to measure the size of the television population.***

The maximum connectivity (number of subscribers) declared by major broadcasters/ aggregators through interconnect agreements is in the range of 4-5 million consumers. This is also less than 10% of the estimated total base of 66 million (as per NRS) consultation paper dated 25.3.2010 the TRAI .

ii)In the same consultation paper the number of DTH subscribers is disclosed as 19 million as in the year 2009. The appellant submits that the two figures taken by the TRAI for arriving at the tariff in paragraph 21 and 22 of the impugned order are therefore totally perverse because the TRAI has used 68 million as the subscriber base for the cable operator as in the year 2009, although admittedly the figure belongs to the year 2006, and has used a figure of 13.4 million as being the subscriber base for DTH, whereas it admits a figure of 19 million as in the year 2009. The Appellant submits that the TRAI has perversely maintained the figure of analogue services as constant since 2006 though it is seen

that there has been a decrease on that service due to introduction of new services and has artificially reduced the number of DTH subscribers though having the latest data of a much higher number."

What happened to its estimation, which according to TRAI is Rs.2900 crores – Rs.950 crores in non-CAS and the DTH respectively? On what basis the estimated subscriber base of 689 million of non-CAS and 13.4 million in DTH in 2008-2009 have taken into consideration? On its showing, every month one million subscribers are joining the list of subscribers on DTH platform. It has not been explained why the latest figures were not noticed.

Carriage Fee

TRAI, in our opinion, has not taken into consideration that there does not exist any nexus between subscription revenue on the one hand and carriage/ placement fee on the other. The broadcasters have to pay a huge amount to the distributors of the channels. It has a direct nexus with the advertisement. The carriage and placement fee has nothing to do with the amount of subscription. This Tribunal has in a number of cases noticed that sometimes, some big distributors earn a huge amount from placement and carriage charges.

Furthermore one of the relevant considerations might have been as to how much amount should have been deducted towards the free to air channels having regard to the fact that TRAI was dealing with only pay channels. The figure of 950 Crores taken by it for the purpose of calculation of per subscriber content cost vis-à-vis the gross subscription revenue of 2900 Crores, in our opinion, is not permissible in law. It is in the aforementioned context, we may also notice that in paragraph 34 of the Explanatory Memorandum appended to the Telecommunications (Broadcasting and Cable) Services (Fifth) Amendment, 2009 dated 17.03.2009, TRAI advocated forbearance in relation to carriage and placement charges.

It was noticed that there is no suitable mechanism for enforcement of any regulation on carriage Fee.

The perception that carriage and placement charges have a direct relationship with the advertisement revenue as contained in sub paragraph (b) of paragraph 34 of the Explanatory Memorandum has nothing to do with the subscription fee. We cannot appreciate as to on what basis it has been reduced to 950 Crores. If any deduction was to be effected, there is no reason as to why the advertisement revenue has also not been taken into consideration. In such an event, the amount of 950 Crores mentioned by the regulator would be higher.

It will be of some relevance to notice paragraph 2.43 of the affidavit filed by TRAI before the Supreme Court of India in Civil Appeal No. 829-833 of 2009, which reads as under :

"2.43 It is also important to note that the television advertising business is closely linked to the television audience measurement system/ratings. The advertising revenue of a channel, in large part, is determined by how effective a channel is at delivering a pre-defined target audience. Thus, viewership of a channel (based on a representative sample of towns/cities – known as metered markets) plays an important role in determining the advertising revenue potential of a channel. Given the lack of addressability in the market, the dependence on viewership measurement numbers also appears to be disproportionate.

.....

4.3 For a broadcaster dependent on advertising revenue, ensuring reach is critical. This is because higher reach implies greater access to the subscriber base – thereby providing an opportunity for the channel to improve its ratings. Carriage and placement fee provides the broadcaster access to an MSO's network. Due to the bandwidth constraints in the analog transmission mode, the MSO "allocates" certain frequencies to the highest paying

channels. This phenomenon can be interpreted in simple economic terms as a "demand-supply" mismatch. With supply remaining unchanged at 80 channels and the total number of channels having risen steadily to around 550 – carriage fee reflects the entry barrier until the capacity constraint is addressed through digital services.

4.7 Each MSO provides a unique target audience based on its socio-economic mix, spending-power and audience profile. A particular market may be critical to a channel, given the channel's positioning find its advertiser base in which case it would be willing to pay higher carriage fee to reach this audience. For example, the data received from Hindi news channels (which pay high amounts of carriage fee) indicated that these channels pay minimal fee in the four southern states. This is attributed to the fact that the non-Hindi speaking target audience of these states is not relevant to discussions with stakeholders, it was reported that in certain genres like News and Hindi GEC, the entry of new players has led to an increase in competition, and a corresponding increase in the total carriage fee paid by channels in that genre.

4.11 It has been observed that carriage fee is a phenomena predominantly observed in metered markets. This is because channel and programme ratings are a key source of information for media planners, and are reported to determine spending for over 80%) of national advertisers. The following table provides a snapshot of the data on carriage and placement fee received by the TRAI from those broadcasters who had furnished a break-up of the carriage and placement fee paid by them in different markets. Together, these broadcasters paid out more than Rs.360 crores as carriage fee to distributors and they therefore account for a sizeable segment of the total market. The data supports the strong linkage of metered/TAM markets with carriage and placement fee.

Type of channel/network	**Carriage Free Distribution**

Hindi News Channel	150+networks, all TAM markets
Hindi Entertainment Channel	200+networks, all TAM networks
English News Channel	250+netoworks, all TAM markets
News Network (1)	100+networks, all TAM markets
News Network (2)	Spends given only by TAM markets, not by operators/networks
News Network (3)	200+Networks, all TAM markets
Hindi General Entertainment	100+networks, all TAM markets

Table 4.1 : Figures on carriage and placement fee provided by broadcasters, indicated that this fee is paid almost entirely in metered markets

4.18 MSOs have pointed out that globally carriage fee is not regulated. Carriage fee is very similar to the rent for using infrastructure. As per market estimates, carriage fee is approximately Rs.1000 crore which is about 10% of the advertising revenue earned by broadcasters; in any retail distribution rent of 10% can be considered reasonable. As advertising revenue is not regulated carriage fee should also not be regulated. Carriage fee collections help the MSOs to create a corpus that helps them fund digitalization. As far as the broadcasters' interest is concerned, they generally agree to pay carriage fee/placement fee so that they get good TRPs which in turn get them better advertisement revenue.

4.30 Finally, it is observed that carriage fee in India is largely driven by the advertising potential of various markets. This is demonstrated by the fact that carriage fee is only paid in markets covered by the viewership agency

TAM – as large advertisers allocate a majority of their marketing spend according to ratings published by TAM. Thus it can be argued that carriage fee should not be regulated if there are no controls on advertising revenue. This point has been made by a large number of stakeholders."

In fact, TRAI has accepted that whenever carriage and placement charges is taken into account for the purpose of computation of any rate, it would be obligated to take into account the advertisement revenue in the following terms:

".....Thus, there may or may not be "regulation" of the carriage fee, certainly, this fee needs to be taken into account while the net collection/earnings/revenues of the broadcasters are to be "calculated". Therefore, there is no contradiction between the stand of the TRAI on carriage fee as alleged. As already submitted, for calculating the 'net collection of the broadcasters', there is a need for taking into account the subscription revenue and also carriage/placement fee. Similarly, for calculating the net revenue of the broadcasters, the advertisement revenue is also to be taken into account. In view of these facts, the calculations as mentioned in paragraph 21 of the Explanatory Memorandum and as reproduced in paragraph 43 above, are absolutely justified and the calculations done by the appellants in paragraph 27 of the appeal are not only misleading but are also without any basis whatsoever and thus are arbitrary, unjustified and without any substance. No reliance can be placed on such calculations. The averments made by the appellants are, thus, baseless and have no merit."

Thus, there was no reason to take into consideration the carriage and placement fee.

Exercise by TRAI

Why has the TRAI not done enough and independent exercise to make endeavours to arrive at its own finding in this behalf?

It proceeded to base its findings without checking whatever figures were supplied by the DTH operators.

It should have undertaken an empirical study on costs. Subscriber base differs from system to system. If for the DTH operators, the rate is 35% of the one fixed for non-CAS area, some reasons therefor was required to be assigned therefor.

The Supreme Court of India in *Union of India Vs. Cynamide India Ltd.* 1987 2 SCC 720 held as under:

"7. ..... A price fixation measure does not concern itself with the interests of an individual manufacturer or producer. It is generally in relation to a particular commodity or class of commodities or transactions. It is a direction of a general character not directed against a particular situation. It is intended to operate in future. It is conceived in the interest of the general consumer public. ....

We do not agree with the basic premise that price fixation primarily affects manufacturers and producers. Those who are most vitally affected are the consumer public. It is for their protection that price-fixation is resorted to and any increase in price affects them as seriously as any decrease does a manufacturer, if not more."

Noticing the decision of a Constitutional Bench in Premier Automobiles Ltd. v. Union of India, [1972] 2 SCR 526, it stated as follows:

"The control of prices may have effect either on maintaining or ,increasing supply of commodity or securing equitable distribution and availability at fair prices. The controlled price has to retain this equilibrium in the supply and demand of the commodity. The cost of production, a reasonable return to the producer of the commodity are to be taken into account. The producer must have an incentive to produce. The fair price must be fair not only from the point of view of the consumer but also from the point of view of the producer. In fixing the prices, a price line has to be held in order to give preference or pre-dominant consideration to the interest of the consumer or the general public over that of the producers in respect of essential commodities. The aspect of ensuring availability of the essential commodities to the consumer equitably and at fair price is the most important consideration. The producer should not be driven out of his producing business. He may have to bear loss in the same way as he does when he suffers losses on account of economic forces operating in the business. If an essential commodity is in short supply or there is hoarding, concerning or there is unusual demand, there is abnormal increase in price. If price increases, it becomes injurious to the consumer. There is no justification that the producer should be given the benefit of price increase attributable to hoarding or cornering or artificial short supply. In such a case, if an "escalation" in price is contemplated at intervals, the object of controlled price may be stultified. The controlled price will enable both the consumer and the producer to tide over difficulties. Therefore, any restriction in excess of what would be necessary in the

interest of general public or to remedy the evil has to be very carefully considered so that the producer does not perish and the consumer is not crippled."

By reason of `the impugned tariff order', TRAI did not fix any rate. It has merely put a ceiling. The service operators, therefore, would be entitled to enter into the agreement even much below 35%, subject of course, to the ceiling of 35%. It is not the function of TRAI to fix a ceiling in terms of Section 11 (2) of the Act; it has to fix a rate.

The term `rate' has a definite meaning. It should be understood in the light of the provisions of the Act and in particular the definition of `telecommunication services' which would include `broadcasting and cable services'. It must be binding on all the operators. It substitutes a contract which may be entered into by and between the parties. Contracts by and between a broadcaster and service operator are entered into on the basis of a large number of factors including the location, the area, the popularity of the channel, the subscriber base, the tenure of the agreement, if the subscription fee fixed would be assured and as also other relevant factors, including placement of channels and the revenue the broadcaster can earn from advertisements etc.

The purpose, for which a rate is fixed in a case of this nature, is now well settled. The benefit of fixation of rate should directly reach the consumer. It is, thus, idle to contend that the impugned tariff order would ultimately benefit the consumer. A rate fixed for the user of the services cannot be indefinite or vague. It must be known to all and sundry.

A consumer, while making payment for availing the Broadcasting and Cable services, must know as to how much he/she should pay to the operator. Furthermore, some broadcasters although may fix one rate for non-CAS area; they may grant some discounts for the rural areas.

Such discounts are also granted for making the channel popular. In fact, it is conceded at the Bar that some Broadcasters commence transmission of its channel free and later it is converted into a pay channel after it becomes popular.

Putting a ceiling on a rate fixed by the broadcaster may vary from time to time. It, in our considered opinion, cannot be said to be fixation of rate for rendition of telecommunication services.

Consideration of Input Costs e.g. Carriage Costs

Forbearance and Legality of Wholesale and Retail Rate Fixation:

TRAI in para 6 of its Explanatory Memorandum noticed the view of a number of service providers that the wholesale rate for DTH platform have to be limited to wholesale tariff for non-CAS areas in view of the linkages to DTH and non-CAS areas. This statement in the Explanatory Memorandum has been contended by the Broadcasters to be factually incorrect.

We may, in this connection, refer to the reply by TRAI and, in particular the statements of different Broadcasters quoted therein on the issue of linkage between the wholesale tariff for non-addressable platform and DTH platform.

Zee Turner, in its rejoinder categorically stated :-

> *"It is submitted that in the consultation paper held by the TRAI, the broadcasters had submitted there is enough competition in the market which does not require any intervention by the TRAI either at the wholesale level or at the retail level in relation to the re-transmission of signals through addressable platform including DTH. Having clearly stated so, the broadcasters had further stated that in the event the TRAI comes to the conclusion, for valid, rational and justified reasons that forbearance at the wholesale as well as retail level would not deserve to be accepted at this stage, the TRAI*

may continue the existing arrangement prescribed under the judgments and orders of this Hon'ble Tribunal. In other words, the stand by the broadcasters was that intervention by the TRAI, if resorted to, would necessarily and inevitably be required at both the levels at the wholesale as well as retail level. It was further stated by the broadcasters that at the wholesale level, the regime under the orders of this Hon'ble Tribunal would deserve to be continued".

If that be so, the question as to whether the total forbearance was required to be prescribed having regard to the competition amongst various Broadcasters, was required to be addressed by the TRAI.

This issue had not been adequately addressed by TRAI. It had released a Consultation Paper on or about 22.4.2002 inter-alia on "issue related to tariff or Cable TV services in CAS notified areas".

In its reply, TRAI stated that the consumers want about 15 to 20 channels. According to it, in Delhi and Kolkata, the viewers prefer to see only 6 to 15 channels; whereas in Mumbai they intend to see about 10 channels. Out of the said channels, about 5 would be pay channels. Addressability cannot be achieved only by fixing a ceiling on the price of the contents of the products of the broadcasters.

It may not, therefore, be correct to say that the consumers will have to pay a lot if the broadcasters offer 300 channels or all the 50 to 70 popular channels.

If addressability issue can be taken care of, having regard to the fact that consumers would be masters of choice, it would be for them to offer as many as channels as they like which are pay channels. Addressability cannot be achieved by fixing the price of the contents of the products of the broadcaster.

In fact, TRAI itself in its report before the Supreme Court of India stated as under:

"2.80 Digitization with addressability of the cable TV services would result in a number of advantages to Consumers, Broadcasters, MSOs, LCOs and Government, which are brought out in the following paragraphs.

2.81 For the consumer, there would be choice of channels, enabling him to budget his bill as per his choice and affordability. Thus, he would pay only for what he wants to watch. In addition, he would have a choice of interactive services like video on demand (V0D), personal video recording (PVR), video gaming, teleshopping, broadband with additional features such as EPO (Electronic Programme Guide). He would derive value for his money with enhanced quality of service through competition among operators/platforms."

There is neither any doubt nor any dispute that DTH operators have about 20 million viewers, at present, with the number increasing everyday. According to Mr. Malhotra, 1 million viewers per month are joining the DTH platform.

If the rate of growth of DTH operators is maintained, they would in near future surpass the non-addressable broadcasting platform. Even the non-DTH operators who have a pan India presence intend to go for addressability system. Whether they can do so or not in law is a different question. But it must be noticed that in some cases parties are going for voluntary CAS. It should be encouraged by TRAI.

TRAI issued a consultation paper on 2nd March, 2007 on "Issues relating to DTH", paragraphs 1.9 to 1.12 whereof are self explanatory:-

".....1.9 Need for regulating the wholesale tariffs of pay channels payable by DTH operators to broadcasters/ distributors and the retail tariffs applicable to the end consumer for such channels is to be viewed in the context of the competitive environment prevalent in the market, the industry structure, the present levels of penetration of the service, future potential for penetration in rural and remote areas where the incumbent cable service is yet to reach such areas, etc.

1.10 Provision of satellite TV services through DTH mode of delivery in India is comparatively of a recent origin. In many parts of rural India, cable television is yet to penetrate and DTH service providing pay channels may be one such mode of reaching population in such areas. Any mandate of a-la-carte and its pricing is therefore required to be considered after taking into account the implications for penetration in rural and remote parts of country vis-à-vis the benefits to non-rural consumers of such a regulatory prescription. Further, DTH mode of delivery is the only source of competition to the incumbent cable television services, as large scale commercial launch of services like IPTV have not yet taken place in the country. In large parts of the country, the incumbent cable TV services are not required by regulatory mandate to provide their services through an addressable system. An addressable system has been mandated for cable TV services in notified areas which is a very limited geography of the country and it is too early to obtain the feedback of its implementation and its analysis with respect to the extent of its success, pitfalls if any, and the underlying factors behind such phenomena. However, the Authority would in due course of time consider initiating a process of market analysis of CAS implementation to obtain feedback of implementation which could serve as a critical input for putting in place a roadmap for future roll out of addressable systems in the country and the manner of its regulation. Till such time, throughout the non-CAS areas, the incumbent cable television operators who enjoy the dominance in the market, are not required by any regulatory mandate to introduce an addressable system to the populace. Therefore, mandating a-la-carte channel and regulation of its pricing for DTH services is likely to be interpreted to mean that the new entrant DTH operators are asymmetrically regulated against the incumbent mode of delivery which has dominant market share.

1.11 Needless to say, the retails tariffs payable by the consumers is invariably linked to wholesale tariffs payable by the DTH operators to the broadcasters/ distributors. DTH platform by virtue of being inherently an addressable system, competitive play of market forces are likely to lead to discovery of efficient prices in the market in the interest of all stakeholders. To what extent this will become a reality particularly in non-CAS areas will depend upon the pace of penetration of DTH services. Interconnection Regulation already exists which mandates non-discriminatory provision of channels to DTH operators.

1.12 Having said this, the Authority can intervene at any point of time against any retail tariff of DTH operators in any part of the country if such tariff packages are found to be not consumer friendly or are not transparent in the offer. Till such time and till the impact of the roll out of CAS can be assessed, it would be premature to initiate the consultation process on DTH tariff issues both at the retail level as well as the wholesale level.…".

TRAI, sought to explain its stand as to why no retail price has been fixed in Para. 14 of the Explanatory Memorandum, which reads as under:

> *"14. The Authority has considered the question as to whether there is a need for regulating tariff in addressable systems. In this context, the Authority has observed that while there is a "must provide" provision for broadcasters, each channel is unique in terms of content and in that sense the distributor is limited in his choice of channels. Secondly, while there are today six private DTH operators who are competing amongst themselves, there is an* ***organic linkage*** *between the addressable and non-addressable systems and the issue really is of a non-level playing field between the up-coming addressable systems vis a vis the incumbent analogue systems. The Authority is of the view that implementation of digitization with addressability is the road ahead for the sector and would be in the best interest of the industry as well as the consumer. In order to achieve a structured growth in this direction, a certain amount of regulatory intervention is considered necessary."*

Would it, therefore, be correct to contend that there would not be any necessity for tariff fixation ever? It does not mean the same. For that purpose clearly the necessity has to be spelt out. The methodologies have to be properly worked out. Benefits of rate fixation must reach the consumers.

TRAI however, contends :

(1) Although there exists a 'must provide' clause by way of clause 3.2 of the 2004 Regulations, each channel is unique in terms;

(2) There is an organic linkage between the addressable and non-addressable system and the issue therein is of level playing field between the upcoming addressable system viz-a-viz incumbent analogue system.

According to the appellants, there is no organic linkage between the two systems. It may or may not be correct.

We may, however, notice that in fact the DTH operators themselves, in their pleadings, categorically stated that the CAS system and non-CAS system do not stand on the same footing, in the following terms:

> *"The DTH platform cannot be placed on the same footing as the non-addressable cable platform since the DTH operators such as the Respondent cannot be made to pay the price for lack of addressability under-declaration in the cable industry."*

We may also notice that MSM Discovery objected to linkage, stating:

> *"4. The cable and satellite Interconnection/Tariff Regulations provide a number of examples of the market-distorting effects of compulsory licensing. There is no market based reason why operators cannot negotiate with broadcasters covering all aspects of cable and satellite redistribution. This happens every day with cable networks and satellite service providers all across the globe. Moreover broadcasters have to subject themselves to competitive bid to procure content, and have to submit to market forces to obtain rights for popular programming. Indeed, in the absence of mandatory non discriminate must provide clauses, Operators like all program providers, have every incentive to negotiate agreements for distribution of their products in as many markets and on as many platforms as possible. The only reason such rights would not be sought for cable and satellite distribution is that the must provide non discriminatory interconnection and tariff regulations take away the incentive for them to do so. In effect, such Regulations take the right to determine the terms of distribution out of the hands of market participants and places them squarely into the hands of TRAI. One might ask whether the fact that broadcast signals continue to be regulated through TRAI mandated statutory Interconnection/Distribution/Tariff clauses, rather than in the market, reflect a market failure, or whether whatever market failure may exist is in fact the outgrowth of the compulsory must provide non discriminatory clauses itself."*

Star Den Ltd. also stated as under:-

> *"5.2.2 If yes, whether tariff regulation should be at wholesale level or at retail level or both, i.e., whether tariff should be regulated between broadcasters and DTH operators or between DTH operators and subscribers or at both the levels?*
>
> - *For the reasons explained in the foregoing paragraph, we submit that there should be no tariff regulation for DTH.*

- *However, in the event Authority decides to fix tariffs, the same should be on the basis of sound regulatory principles and framework with sunset provisions.*
- *To the extent Authority determines that it will continue to regulate tariffs, STAR DEN submits it must explicitly recognize the limits and temporary nature of regulation. It is insufficient to simply refer to this in policy; there should be a clear, objective framework for deregulation.*
- *As for the levels of tariff fixation, we submit that tariff fixation will not achieve its purpose if controlled at just one level. Content owners and broadcasters face the difficult circumstances of having their revenues regulated while their costs for acquiring the Bollywood, sports and international content that Indian consumers demand have been rapidly increasing and remain unregulated. Controlling tariff at the only the wholesale level without controlling the retail level will be highly inequitable and imbalanced and will not serve the interests of the DTH operators at the cost of consumer as well as broadcasters interests. Given the regulatory protection already available to the DTH operators, controlling tariff at the wholesale level and leaving the retail pricing to market forces will only result in giving DTH operators enormous powers to dictate terms and conditions in the market. With huge incentives in the form of carriage fees and complete freedom of packaging with no a-la-carte option to the consumers, DTH operators will thrust unwarranted content at abnormally high rates to consumers.*
- *In fact, international precedent (such as in the US and Taiwan) suggests that any regulation of pay TV prices should be limited to basic tier bouquets at the retail level. The answer is not then to just regulate all programs regardless. It is completely inappropriate to fix the prices of high cost programming such as certain general entertainment, sports and movie channels. For example, rates need to reflect not only the rising cost of broadcasting professional sports, but the spiralling costs of operating professional sports teams as well."*

Viacom 18 Media Pvt. Ltd. being the appellant in Appeal No. 8 (C) of 2010 also opposed to the linkage.

We do not say that the broadcasters are correct in their views. What we intend to emphasis is that they deserved due consideration at the hands of TRAI.

Rate Fixation

Fixation of rate as a part of tariff or otherwise is invasion in one's right to contract.

Such an invasion in a citizen's right should ordinarily be resorted to, not only when it becomes necessary but also when the statute expressly provides therefor as also by laying down the mode of manner therefor.

TRAI refers to Sub-clause (ii), (iii), (iv) and (v), clause (b) of Sub-section 1 as also Sub-section 2 of Section 11 of the TRAI Act as a source of its power to frame tariff. It, however, proceeded on the basis as it was fixing a tariff and not an inter-connection charge.

If it was an interconnection charge by way of revenue share or otherwise, the specific sum must be mentioned. If no rate has been fixed for the users of the telecommunication service, as envisaged in Section 2 (1) (k) of the Act, recourse to Sub-section 2 of Section 11 was impermissible in law.

We find sufficient force in the submission of the learned counsel for the Appellants that broadcasters provide for a huge discount to the Multi Service Operators. If that be so, was it necessary to consider the entire aspect of the matter?

We may examine the relevant provisions.

Telecommunication (Broadcasting & Cable) Services Interconnection Regulations, 2004 mandates the broadcaster to provide signals of its TV channels to a distributor of TV channel on reasonable terms and on non-discriminatory basis.

Clause 3.5 of the Regulations, however, provide for some protection to the broadcasters, stating:-

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

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

The said clause applies to both addressable and non-addressable system. TRAI, therefore, should have considered this protection to give volume discount on a target basis. The charges fixed by the broadcasters would vary from case to case.

The effect of the said provision would, thus, be that some discrimination is permissible at the hands of the 'Broadcaster' in the matter of grant of volume discount, keeping in view not only the subscriber base but also the area in which the signal is sought to be supplied and various other relevant factors which may include the commercial considerations.

The discount essentially relates to volume. It does not compel a broadcaster to do so. It is applied to both the systems. Some sort of discussions were required to be made by TRAI in this behalf.

We may, however, notice that a contention has been raised by some of the learned counsel that there are number of broadcasters who do not give such discount.

It is in the aforementioned situation, we may notice para 20 of the Explanatory Memorandum:

"20. Based on the information submitted by the stakeholders to TRAI, an analysis was carried out to assess the price at which broadcasters provided TV channels to DTH operators. Since DTH has become the predominant addressable system

compared to CAS and IPTV, the related data of DTH has been considered in this exercise. It has been noticed that different methods are followed for securing content at the wholesale level. In one method, a long term contract is entered into for payment of a fixed annual fee. Various factors, including subscriber base and growth, number of channels and their reach and duration of the contract are likely to influence such contracts. In another method, the agreements are the addressable platform based on the unit price of a channel and the corresponding subscriber base ascertained from the subscriber management system. A percentage discount is made available by the broadcaster on the channel price depending on the target subscriber base. In both models, it is noticed that the content is made available at a discounted price by the broadcasters to distributor."

Although TRAI has referred to various methodologies, it principally relied on only two of them.

The first one was in relation to long term contract wherein according to it, various factors namely (i) subscriber base (ii) area (iii) number of channels; and (iv) duration of contract; are taken into consideration.

Whereas in another method, a percentage of discount is available by the broadcaster on the channel price depending on the target subscriber base.

Thus, in both the models, according to TRAI itself, discounted prices are offered by the broadcasters.

Only in the written submissions, a contention has been raised by TRAI that it could accept any of the methodologies. There is no dispute about the said proposition. However apparently in paragraph 20 of the Explanatory Memorandum, that TRAI had considered only two methodologies, namely-

(i) `A method where a long term contract is entered into for payment of fixed annual fee and various factors including subscriber base, growth, number of channels, their reach and duration of contract are taken into consideration; and

(ii) where agreements are based on the unit price of a channel and the corresponding subscriber base ascertained from the subscriber management system.'

It itself stated :

> *"Based on the information submitted by the stakeholders to TRAI, an analysis was carried out to assess the price at which broadcasters provided TV channels to DTH operators. Since DTH has become the predominant addressable system compared to CAS and IPTV, the related data of DTH has been considered in this exercise. It has been noticed that different methods are followed for securing content at the wholesale level. In one method, a long term contract is entered into for payment of a fixed annual fee. Various factors, including subscriber base and growth, number of channels and their reach and duration of the contract are likely to influence such contracts. In another method, the agreements are based on the unit price of a channel and the corresponding subscriber base ascertained from the subscriber management system. A percentage discount is made available by the broadcaster on the channel price depending on the target subscriber base. In both models, it is noticed that the content is made available at a discounted price by the broadcasters to the addressable platform distributor."*

A percentage discount is made available by the broadcaster on the channel price depending on the target subscriber base. In both models, it is noticed that the content is made available at a discounted price by the broadcasters to the addressable platform distributors. It has been noticed that on the subscriber base of 68 Million of Non CAS and 13.4 Million for DTH in 2008-2009., the subscriber content cost per annum would be Rs. 287 for Non CAS and Rs. 709 for DTH. However, the number of DTH connection has gone up to 21 Million. It is difficult for us to conceive as to why the latter figure has not been taken and had the said fact been taken into consideration, the subscriber content cost per annum would be Rs. 475 and not Rs. 709.

It furthermore appears that quantitative value equivalent to 2.47 has nothing to do with linkage. According to TRAI itself, a discount of 59.6% is given to a DTH subscriber on the wholesale rate applicable for an analogue TV subscriber. If 40% discount is given, why the figure 35% has been taken. No reason has been assigned in support thereof.

It furthermore appears that the contentions of the broadcasters have only been discussed but no reason has been assigned to reject the same.

It is, however, not correct to say that once such discount is granted, it takes away the discretion of the broadcasters to continue to grant such discount having regard to clause 3.5 of 2004 Regulations, without taking into consideration the volume, but it may not be necessary to give such discount in addressable system.

It is furthermore inconsistent with the stand of TRAI that the retail rate in the addressability system should be forborne.

We may notice that the DTH operators themselves stated :

"29. Thus it was clearly noted that:

a) The broadcasters and the distributors adopt different methodologies and that the content is available to the distributors at highly discounted rates;

(b) The subscriber content cost per annum would be Rs. 287/- for Non-CAS (Rs. 1950 Crores/68 Million) and Rs. 709/- (Rs. 950 Crores/13.4 million) for DTH."

In our opinion, it was for that reason alone, and for fixing a rate or tariff, an intensive study was required to be made in regard to the relevant factors which would be necessary for arriving at a conclusion in a situation of the riders.

The Broadcasters, as it is admitted now, have provided for the relevant information and data. It is necessary to take the same into consideration. It is, however, not possible nor desirable for us to state what those factors precisely should be. It may itself be the subject matter of deliberations at the TRAI level.

TRAI itself in the Explanatory Memorandum stated:-

> *"18. ..... Broadcasters have confirmed that commercial agreements are in place with DTH Operators on the basis of revenue deals which translates into 25-30% of RIO rates declared by the broadcasters. They further state that in this Scenario there is no need for intervention by the regulator.*
> *....*
> *20. A percentage discount is made available by the broadcaster on the channel price depending on the target subscriber base. IN both models, it is noticed that the content made available at a discounted price by the broadcasters to the addressable platform distributor."*

As indicated hereinbefore, the price has been treated as cost. It may be true that the cost of each channel may not be possible to be ascertained, but it was expected of the Regulator to proceed on a definite basis.

In Para 20 of the Explanatory Memorandum, TRAI referred to informations.

Yet again, in Para 21 it referred to stakeholders' data and in Para 22 it stated "from the data available for 2008-2009".

When the data and other informations were available, it was possible for it to undertake the exercise. It could not have avoided the same and take recourse to an easy methodology for arriving at a figure by way of golden means.

Whether, however price of channel can be determined or not is a question which was required to be considered by TRAI.

It could not have based its entire decision on the order of this Tribunal, which, as noticed heretobefore, was *adhoc* in nature and not based on any data or information.

Fixation of rate was a tedious job. Observations of this Tribunal could not have, in any event, been relied upon having regard to the directions of the Supreme Court of India made on 4th May, 2009 and 6th July, 2009 in terms whereof the order of this Tribunal as also of Punjab & Haryana High Court were not to be referred to.

There is another aspect of the matter.

The consultation process continued up to June 2010. It has not been explained as to why the regulator confined itself to the data of 2008. For the purpose of finding out the costs, it was obligatory on its part to refer to the recent data. It could have, thus, called for the same from the Broadcasters for the year 2009.

A lot of comments have been made on para 21 of the Explanatory Memorandum. It is said to be based on the gross figure of the industries. It purported to take into consideration 13 million subscribers in place of 19 millions. The appellants pointed out a large number of errors in the figures, which are contained in para 27 of the Memo of Appeal of the Zee Turner. It reads as under:-

"27. It s submitted that the methodology of computation adopted by TRAI, if considered /applied without reduction of carriage/placement fee (which in any event has nothing to do with the subscription revenue as admitted and acknowledge by TRAI itself) the following position would emerge:

"(i) Estimated Subscription Revenue : from 68 million (6.8 Cr) non-CAS subscribers in the year 2008-09 *Rs.2900 crores*

(ii)	*Estimated Subscription Revenue from 13.4 million (1.34 Cr.) DTH subscribers in the year 2008-09*	:	*Rs.1000 Crores*
(iii)	*Per subscriber content cost p.a. for non-CAS subscriber*	:	*Rs.2900 Cr / 6.8 Cr = Rs.426*
(iv)	*Per subscriber content cost p.a. for non-DTH subscriber*	:	*Rs.1000 Cr. / 1.34 Cr = Rs.746*
(v)	*Ratio of per subscriber content cost p.a. (iv/iii)*	:	*746 / 426 = 1.75 times*
(vi)	*% of discount required for a DTH subscriber in order to make it equivalent to a non-CAS subscriber. (746-426) = 320*	:	*320 / 746 = 42.90% or say 43% (suggested by the TRAI as 59.80% by deducting the so-called estimated carriage/ placement fee)*
(vii)	*Thus the ceiling should be*	:	*100-43 = 57%"*

No answer, far less than an effective answer, has been given by TRAI to the said contentions of the Broadcasters.

According to the broadcasters, the advertisement revenue payable to the DTH operators would be more than 8800 Crores. Pay channel broadcasters pay only 285 Crores as carriage/placement. Thus, from the figure of 1000 Crores taken into account by the regulator, (950 Crores in the Non-CAS Area and 50 Crores in the DTH) additional estimate revenue of 1000-1200 Crores may be effected wherefrom the following result may emerge:

"(i) Subscription in non-CAS area Rs.2900 crores.

(ii) Less proportionate carriage/placement fee of pay channel broadcasters i.e. approximately 30% of Rs.950 crores i.e. Rs.285 crores = Rs.2,615 crores (2900-285).

(iii) Add proportionate additional advertisement revenue of approx. Rs.1,000 crores to pay channel broadcasters = Rs.3615 crores (2615+1000)."

It was necessary according to us, in terms of the decision of the Supreme Court of India in Cynamide (Supra). Some guidelines, even if not exhaustive, are to be found therein. It is difficult for us to lay down as to the parameters of the same but the relevant factors, some of which have been discussed heretobefore, were required to be ascertained. It is for the TRAI to consider as to what should be the basis for laying down the rate ultimately if the object is to see that the rates fixed should be reasonable. Keeping in view the interest of the consumers, the necessary study should be aimed at that.

Furthermore, the major component of the income of the broadcasters is the advertisement. Placement/carriage fees directly relate to advertisement. Major component of advertisement is 'Free to Air channels'. Analysis of the major input cost components has been made by us heretobefore.

In its affidavit filed before the Supreme Court of India, TRAI stated:

"3.79 Channels incurring high distribution costs (on carriage and placement fee) are FTA channels that have no subscription income. Pay channels that have a dual source of income are in fact observed to have relatively higher content cost as compared to the cost of distribution. Thus an inverse relationship is observed between the cost and revenue streams suggested above – i.e. channels with high content costs are likely to earn a higher proportion of their income from subscription. In contrast, channels with high distribution costs are likely to earn a higher proportion of their Income from advertising."

The basis for arriving at 35% figure is said to be containing various elements. It may be so. But, TRAI ought to have borne in mind that there are various factors in relation thereto.

The question came up for consideration in MSO Alliance (Supra) wherein this Tribunal noticed that prescription of a ceiling of the cable charges at the subscriber level would not grant any financial benefit to the subscribers as it is likely that the operators may fill their cable capacity with lower priced channels and demand higher charges both from the broadcaster, by way of carriage fee, as also from subscribers for making available the better channels.

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Procedure of Tariff Fixation:

This Tribunal also in *MSO Alliance (supra)* while considering the question as to whether the regulator should adopt a procedure by way of a tariff order without carrying out an extensive exercise in tariff fixation held that in adopting the rates existing as on 01.12.2007 and the rate of 4% thereof, the regulator went by convenience of arriving at an easy decision rather than by considering the facts and figures opining:-

> *"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."*

It is, therefore, evident that TRAI in a case of this nature, even assuming, it had jurisdiction to regulate

arrangement between a broadcaster and a DTH operator, could not have considered the question of price fixation without making a detailed study.

TRAI, however, in the impugned order had referred to the same as 'wholesale tariff' and 'retail tariff'. We may analyse the same.

Part III of the impugned Tariff Order

A submission has been made on behalf of the first respondent herein that having regard to the proviso appended to Clause 6 of the impugned tariff order, it was obligatory on the part of the service provider to offer all the subscriber's channels on a-la-carte basis and specify the maximum retail price for each pay channels as payable by the ordinary subscriber, and, thus, in effect and substance, the retail tariff must also be held to have been laid down.

Clause 6 does not lay down any tariff or rate. It merely casts on obligation on the part of the DTH operators to make such an offer.

What should be the proportion and/or ratio of the maximum retail price for each pay channel vis-à-vis the amount payable by the DTH operators to the broadcasters in respect of the channels on a-la-Carte basis have not been stated.

A rate or tariff fixed for the subscriber cannot be left to the discretion of the DTH operators and/or on commercial considerations which would ultimately affect such a decision. Even for the aforementioned purpose, TRAI had fixed the cut off date as 1st January, 2011. The said cut off date does not synchronize with the date of coming into force of the tariff order namely 1st September, 2010.

If such a cut off date could be given to the DTH operators there is absolutely no reason why the same date had not been fixed for the purpose of coming into force of the main tariff order.

No reason has been assigned in support thereof.

No explanation has been offered. TRAI does not say that there would be any ceiling limit even for that purpose.

Sub-Paragraph 3 of paragraph 6 of `the impugned tariff order' furthermore enables the DTH operators to offer not only on a la-carte basis but also a bouquet of channels wherefor again only an obligation has been cast on it to specify the rate without laying down any guidelines therefor.

It is only in that context the Sub-Paragraph 4 of Paragraph 6 of the impugned order must be taken into consideration in respect whereof we have dealt with heretobefore.

We, therefore, for the reasons aforementioned are not in a position to accept the submission of the learned counsel for TRAI that as and when part III of the impugned tariff order comes into force the retail price shall also come within the purview of the term 'tariff'.

TRAI by a notification dated 31st August, 2006 made orders known as the Telecommunication (Broadcasting and Cable Services) (3rd) CAS areas tariff-2006 clause 6(i) & (ii) thereof reads as under :-

> **6. Ceiling on maximum retail prices for pay channels in CAS areas** :
>
> (i) It shall be mandatory on the part of the broadcaster to offer pay channels on a-la-carte basis to multi system operators, and multi system operators in turn shall offer pay channels on a-la-carte basis to cable operators. Similarly, multi system operators/ cable operators shall also offer pay channels on a-la-carte basis to the subscribers. In addition to the a-la-carte offer, pay channels can also be offered in the form of bouquets.

(ii) In CAS areas, the ceiling in respect of maximum retail prices (MRP) payable by a subscriber to multi system operator/ cable operator shall be five rupees per day channel per month (exclusive of taxes). The maximum retail price for a pay channel within this ceiling shall be fixed by the broadcaster. Provided that where the subscriber has opted for a pay channel for a period less than four months then the subscriber shall pay for four months of the MRP of the concerned pay channel.

The aforementioned provision will clearly go to show that the broadcasters and multisystem operators were obligated to offer channel to the subscribers on a la-carte basis in CAS areas. Clause (ii) of paragraph 6 refers to the same as has been provided for in the impugned tariff order. Part III of `the impugned tariff order' is merely an extension of the said notification. In CAS areas, however, the rates are fixed. Detail tariff in CAS areas is regulated. In this case it is not. Even for non-CAS areas also retail tariff is fixed.

It does not appear from the impugned tariff order or, any document placed before us to show as go to how and in what manner TRAI was monitoring the effect thereof vis-à-vis the agreements entered into by and between the broadcaster and the multiservice operator and the broadcaster and the local cable operators. We may also notice that in terms of clause 13.2A.11 of the 2004 Regulations as amended by 5th Amendment Regulations 2009 which has come into force on 17.03.2009, such a clause had been inserted. There cannot, therefore, be any doubt or dispute whatsoever that irrespective of the provisions of the impugned tariff order, the broadcasters and consequently the multisystem operators were mandatorily required to offer channel on a-la-Carte basis. This however, does not preclude the broadcaster or a multisystem operator including the DTH operators to offer the bouquet which in a given situation may consist of the newly launched channels and/or channels which have otherwise less viewership. What was, therefore, necessary according to us, was to consider the effect of that 2006 tariff order as also Clause 13.A.11 of the Regulation and the necessity to monitor the same. We say so because in effect and substance TRAI has not laid down any tariff to control the price which may be offered by the DTH operators to the subscribers.

Nothing spectacular achievement, therefore, has been made by Clause 6 of Part III of the impugned tariff order.

Rate and Tariff

The statute does not speak about tariff. Tariff is a broader term than rate. Since rate is usually contained within a tariff, it simply stated, would mean a price. It is to be noted that price stated or fixed for some commodity or service of a general need or utility supplied to the public is to be measured by a specified unit or standard. Such fixed prices are sometimes classified as contract voluntarily fixed or agreed upon between themselves by the contracting parties. Legislated rates, however, are fixed price. A legislature or its authorised agency, by way of a paramount governmental function, may fix such rates for which no consent or agreement between the parties is necessary.

'Rate' has two elements; (i) the commodity or service, which is required to be defined and (ii) the price to be paid therefor.

Fixation of rate by a statutory authority in a case of this nature should, in our opinion, be preceded by a detailed study.

Apart from the analysis of the cost of supply or product, what was necessary to be borne in mind is the interest of the consumers.

The question that arises next is whether TRAI has fixed the rates for providing interconnection by way of revenue sharing, in the case of broadcasting services, and whether it could fix only 35% of the rates by way of ceiling, which was fixed by a broadcaster for the service provider in a non-CAS area.

Mr. Malhotra, when questioned, drew our attention to an order of TRAI dated 04.10.2004 known as Telecommunication (Broadcasting & Cable Services) (2^{nd}) Tariff Order, 2004 being 6 of 2004 being at page 696 of the TDSAT Compendium Vol. II, clause 4 whereof reads as under :-

"4. Reporting requirement—*The broadcasters of such new pay channel(s) that have been introduced after 26.12.2003 or of any channel(s) that was a free to air channel on 26.12.2003 is/are converted to a pay channel subsequently, shall furnish to the Authority information in respect of charges for these channels in Schedule I of this Order. This information shall be furnished within seven days of coming into force of this order or the launch of new pay channel(s)/ conversion of free to air channel (s) to pay channels, whichever is applicable."*

The purported requirements as laid down therein, in our opinion, does not envisage fixation of 'rate'.

It is permissible in law to fix different rates for different purposes keeping in view the area in question and principally, the subscriber base.

Mr. Malhotra would further contend that this Tribunal in Appeal No. 9 (C), 15 (C) of 2006 – MSO Alliance vs. TRAI has held that framing of tariff is a function under Sub-section 2 of Section 11 of the Act.

We may notice the relevant portion of the said judgment, which is as follows :

"83. (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."

A bare perusal of the law laid down by this Tribunal would make it abundantly clear that providing for ceiling in rate is not a tariff fixation function.

The same was therefore struck down by this Tribunal.

TRAI preferred an appeal before the Supreme Court of India there against, which was marked as Civil Appeal No. 823-826 of 2009.

By an order dated 30.4.2009, the Supreme Court of India directed:

"By the impugned order, TDSAT has directed TRAI to study the matter afresh and issue a comprehensive order covering all aspects including the issue of subscription base in a non addressable system.

Learned Senior Counsel appearing for the TRAI stated that revised study would be completed within a short period after hearing the parties at the earliest.

All parties are directed to co-operate with the TRAI to file a report at the earliest. The TRAI shall also consider the feasibility of putting cap on subscription charges to the broadcasters and any other allied aspects in this regard . The TRAI may also consider the matter de novo as regards all other relevant aspects and give a report to this court by 11th August, 2009"

Pursuant to the said directions issued by the Supreme Court of India, as noticed heretobefore, TRAI has filed a report before the Supreme Court of India on 21.7.2010.

An affidavit in support of the report has been affirmed by Shri Subodh Kumar Gupta, the Advisor (Broadcasting & Cable Services) of the Respondent No.1.

We have, however, noticed that almost all the Broadcasters have provided informations and data to the respondent.

Despite availability of the same, TRAI in 2004 contended that it was impossible for it to take recourse to exercise of ascertaining the cost.

We have also noticed heretobefore that similar observations were made by it in 2007, 2008 and 2009. No doubt that it is a difficult process. But TRAI had on this occasion intended to go into the matter. Detailed informations were called for. They have been furnished. If the same was not sufficient, the stakeholders could be asked to provide the same. TRAI has indisputably jurisdiction in this behalf. It could have also issued necessary directions which the service providers were bound to comply.

There was, in our opinion, no reason to ignore the same or resort to a short cut and rely on figures which are not the recent ones.

TRAI indisputably began its exercise only after the judgment of the Punjab & Haryana High Court and the directions issued by the Supreme Court of India in the appeal filed thereagainst. It, therefore, ought to have taken its exercise to a logical or reasonable conclusion for which the same commenced.

Article 14 Issue

We have noticed heretobefore that the fact that analogue mode and the digital mode of retransmission of the signal of the channels of the broadcasters is not in dispute. The `equality clause' contained in Article 14 of the Constitution of India can be invoked where

(i) the classification is rational;

(ii) object sought to be achieved; and

(iii) there has to be a nexus.

In *Shri Ram Krishna Dalmia vs Shri Justice S. R. Tendolkar & Ors.* 1959 SCR 379, the Apex Court considered various facets of Article 14 of the Constitution by drawing five different classes.

"(i) The statute may itself indicate the person or things to whom the provisions are intended to apply;

(ii) It may direct its provisions against one individual, person or thing or to several individual persons or things but no reasonable basis of classification may appear on the face of it or be deductible from the surrounding circumstances or matters of common knowledge in which event; the law shall be struck down.

(iii) Even if no such classification is made but discretion is given to the Government to select and classify persons or things to whom its provisions are to apply in which event also the court may strike down the statute, per such scrutiny as it may be necessary, if it does not lay down any principle or policy for guiding the exercise of discretion by the government in the matter of selection or classification.

(iv) A statute may not make a classification of the persons or things for the purpose of applying its provisions and may leave it to the discretion of the government to select and classify the persons or things, but at the same time a policy or principle is laid down for exercise of discretion by the government in which event the court would uphold the law as constitutional, and

(v) In a case where the government in making the selection or classification does not proceed on or follow the principle or policy, the executive action may be condemned as unconstitutional, but not the statute."

It is also a well settled principles of law that unequals cannot be treated equally.

In *Reserve Bank of India vs. Peerless General Finance and Investment Co. Ltd. and Anr.* reported in 1996 1 SCC 642 it has been held,

> *"As regards the first ground of challenge based on the principle that discrimination may result by unequals being treated equally, it may be stated that equal treatment of unequal objects, transactions or persons is not liable to be struck down as discriminatory unless there is simultaneously absence of a rational relation to the object intended to be achieved by the law. (See : Jalan Trading Co. (P) Ltd. v. Mill Mazdoor Union (1966)IILLJ546SC)."*

Yet again in *Haryana State Electricity Board and Anr. vs. Gulshan Lal and Ors.* reported in (2009) 12 SCC 231, the law has been laid down on similar terms, observing :

> *In Deb Narayan Shyam v. State of W.B. (2005)2SCC286 , in a case involving the doctrine of equal pay for equal work, the Supreme Court of India held:*
>
> > *"A large number of decisions have been cited before us with regard to the principle of "equal pay for equal work" by both sides. We need not deal with the said decisions to overburden this judgment. Suffice it to say that the principle is settled that if the two categories of posts perform the same duties and functions and carry the same qualification, then there should not be any distinction in pay scale between the two categories of posts similarly situated. But when they are different and perform different duties and qualifications for recruitment being different, then they cannot be said to be equated so as to qualify for equal pay for equal work."*
> >
> > *{See also Union of India v. Mahajabeen Akhtar AIR2008SC435 }*
>
> *41. Same or similar nature of work, by itself, does not entitle an employee to invoke the doctrine of equal pay for equal work. Qualification, experience and other factors would be relevant for the said purpose.*

Yet again in, *State of West Bengal and Anr. v. Rash Behari Sarkar and Anr.* (1993) 1 SCC 479, the Apex Court held, thus:

> *"4. Equality means equality in similar circumstances between same class of persons for same purpose and objective. It cannot operate amongst unequals. Only likes can be treated alike. But even amongst likes the legislature or executive may classify on distinction which are real. A classification amongst groups performing shows for monetary gains and cultural activities cannot be said to be arbitrary. May be that both the groups carry out the legislative objective of promoting social and educational activities and, therefore, they are likes but the distinction between the two on monetary gains and otherwise is real and intelligible. So long the classification is reasonable it cannot be struck down as arbitrary. Likes can be treated differently for good and valid reasons. The State in treating the group performing theatrical shows for advancement of social and educational purpose, differently, on basis of profit making from those formed exclusively for cultural activities cannot be said to have acted in violation of Article 14."*

In this case the object sought to be achieved is not fulfilled. A cap is sought to be put but therefor two unequals are being treated equally in so far as has been observed heretobefore the systems are different. In the case of analogue under declaration is rampant; in another, it is nil. In one case it is difficult to find out the acted viewership; in another it is not so. In one viewers have no choice or limited choice but another the viewers can exercise their choices to the fullest extent.

The circumstances, admittedly also vary from place to place. It has not been explained as to how a rational nexus is sought to be achieved between an analogue system and a digital system. It, in a given case may also create inequity.

Price Fixation Issue

While assessing the question of legality of the Tariff fixed by the regulator, it would not be out of place to mention certain basic parameters. The decisions of the Apex Court and various High Courts dealing with the price fixation under different statutes and in particular, the Essential Commodities Act must be held to be not applicable.

Telecommunications Services have assumed importance in day to day life. It is no longer considered to be a luxury. But then, to equate the same with an essential commodity, in our opinion would be unfair both to the consumers as also the service providers.

In VSNL v. TRAI, being Appeal No. 5 of 2005, decided on 28.04.2005, this Tribunal noticing the decisions of the Supreme Court in Sri Sitaram Sugar Co. v. Union of India and Ors., 1990 3 SCC 222, Rayalseema Paper Mills and Anr. V. Govt. of A.P, 2003 1 SCC 341, opined

> *.....TRAI Act does not deal with any essential commodity and it is difficult to imagine that tariff fixation can be done under the Act without following the principles of natural justice and functioning in transparent manner. Section 11(2) of the Act does not itself lay down any factors, principles or guidelines for fixing tariff. The only guiding principle would appear to be the preamble to the Act where the interest of service provider is also required to be protected. Can it still be argued that no right of appeal lies against the order of TRAI fixing tariff? Would not in that case Section 11(2) be struck down by the courts as conferring arbitrary powers? Only safeguard is the observance of principles of natural justice and acting in transparent manner with right of appeal. Moreover, if that was so as is contended by TRAI, there was also no need for explanation to Section 23 of the Act aforementioned. How could a legislative function be subject to any audit? It shows that the stand of TRAI is not correct.*
>
> *The Section 11(2) does not lay down any guidelines on the basis of which tariff has to be fixed by TRAI. Tariff is fixed by an order of TRAI which is thereafter notified.*

Price differentiation for regulation of packages:

BASIC AND ADD – ON PACKAGES:

As has rightly been contended by the counsels for Neo – Sports and Viacom, no distinction has been made by TRAI for the channels included in the 'basic package' of the DTH Operators and those made available as 'add – on packages'.

It ought to be remembered that the content costs borne by various Broadcasters vary, and therefore eliminating the difference between the two has caused severe prejudice to the Broadcasters, especially those with high content costs.

Broadly speaking, 3 types of packages are available (i) Bouquet and/or entry level package (ii) A-la-carte channels; and (iii) Add on packages.

Channels on a-la-carte basis, however, is required to be made available to the subscribers.

This Tribunal in the case of ESPN (Supra) has directed TRAI to consider the question of add-on packages separately. It made strong observations in regard to the existence of distinction between entry level packages and add-on packages.

> *"20. Having carefully considered various aspects, we must record our observation that the judgments in ASC case and Tata Sky case were issued in July, 2006 and March, 2007 respectively, i.e. more than 2-1/2 years ago. The directions of this Tribunal in those orders were essentially meant to give a general indication as to how the tariff fixation should be approached. In the ASC Enterprises case, this Tribunal had clearly stated that this Tribunal had no basis to lay down the actual rates per channel, which is the prerogative of TRAI. It was only as an ad hoc measure that this Tribunal had indicated a broad figure of 50% in case of DTH platform. It was reasonable to expect that TRAI would thereupon fix the tariffs after due examination. We are informed that it was only recently that TRAI had initiated this exercise and circulated a consultation paper. We are further informed that the exercise is underway and a decision is likely to be taken by the Authority shortly. In this regard, we direct the Authority to take into consideration the situation arising in cases where the 'add on packages' are involved. It is clear that this Tribunal's orders in the ASC Enterprise and Tata Sky Case had no relation to add on packages, which concept itself came up subsequently. We hold that the general principle of 50% tariff applies in the general situation and that too only as an interim measure, pending the determination by TRAI. We hold that this principle of 50% tariff should not be mutatis mutandis applied in the case of an 'add on package'. We leave the exact formulation to TRAI since the exercise is already underway. We direct all interested parties including the Appellant to present its case to the Respondent as part of the consultation process and that the same shall be given due consideration.*

21. There remains the question whether the impugned direction itself should be pursued. We did not find any impropriety or irregularity in the direction issued by the Respondent. It had done so in the bona fide exercise of its powers and keeping in view the two judgements in the ASC Enterprises and Tata sky cases. As observed by us above, the directions in those two cases were keeping the general situation in mind and also as an interim measure. Nevertheless, In the light of our observation that the entire question of tariff for 'add on packages' should be re-considered, we feel it appropriate to direct the Respondent not to proceed further with any action in pursuance of the impugned direction. We would also like to make it clear that this should not be read as our endorsement of that portion of the amended RIO dealing with 'add on packages'. This is evidently a grey area. Considering that we have held that the 50% tariff is not necessarily applicable to the 'add on packages', we leave the question of 'add on packages' for negotiation between the respective parties but only till such time as TRAI issues a Regulation in this regard. Needless to state, we hope that the Authority will, having already initiated the exercise of fixing the DTH tariff, complete the same within the next 4 months."

DTH operators, however, in absence of any regulation, may make discrimination between two types of such broadcasters by placing channels or add-on packages or basic level packages at their discretion.

TRAI itself in its Consultation Paper dated 24.12.2009 raised specific issues regarding price differentiation contained on the basis of add on packages.

In its Explanatory Memorandum TRAI, however, expressed its inability to make a differentiation between 'Entry Level Package' and 'Add on Package'.

It stated :

"27. The basic pack and add-on pack(s) which are under consideration here includes pay TV channels for which broadcasters receive the content charges. Though the consultation paper outlined three possible definitions of a basic package, the views expressed by the stakeholders could not converge on any particular definition. Rather the views followed different directions altogether. The packages observed in the market are not standardized and there is a large variation from operator to operator. Nor it is possible to standardize packaging as such an effort would not capture the myriad requirements of the different markets. The

Authority is also mandating the provision of a la carte channels to the subscribers. The Authority is, therefore, of the view that it is not feasible or desirable to regulate tariff on the basis of packaging of channels."

The said Explanatory Memorandum if read with Clause 4 of the tariff order may cause serious prejudice to the broadcasters, as in terms thereof, the DTH operators may assume an unequal bargaining power. It is not much in dispute that the content of the broadcaster is made available at the discounted rate, so as to enable the DTH operator to make available to it on the basic tier. Broadcasters agree to certain arrangements keeping in view the number of viewer-ship.

It is possible for the operators to place some new channels unfavourably or price the retail channel exorbitantly so that the same can be thrown out of the market and which may cover the advertisement revenue of the broadcasters.

By reason of the impugned tariff order, the DTH operators will get content at a discounted price as a matter of right.

In that view of the matter, and in particular having regard to the observations made by this Tribunal in ESPN (Supra), TRAI ought to have addressed the issue of price differentiation for regulation on packages. Furthermore, the issue, which was a vital one for the broadcasters and which was raised in the Consultation Paper dated 24.12.2009, should have received due consideration at the hands of TRAI. If the Regulator found that there does not exist any difference between add-on package and the entry level package, it should have made an endeavour to clearly spell out what it meant. An add-on package, as contended being different from the entry level package and presumably from a-la-carte package, the same deserved a serious consideration on the part of the Regulator.

THREAT OF VERTICAL INTEGRATION:

Furthermore fixation of MRP by the DTH Operator, which results after the distinction of Basic and Add – On Packages have been removed, and there being complete forbearance at the retail level would pose the risk of Vertical Integration. Fixation of MRP by the DTH Operation and its ability to fix 'basic – packages' may be abused by the DTH

Operators particularly those who are vertically linked to a Broadcaster or otherwise intend to promote their own channels by pricing the other channels exorbitantly. It may not be conclusive but it had a very vital bearing.

ON THE ISSUE OF PROVISION OF CHANNELS ON AN ALA- CARTE BASIS:

It is of some significance to note that this Tribunal in MSO alliance (supra) has held that

> *"We, hold that while the idea of making ala carte choice of channels available to them is desirable, it must be backed up by adequate safeguards both to the consumers as well as to the broadcasters"*

It was observed:

> *"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."*

It was furthermore observed:

> *"69. ..... 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."*

It was also opined:

"70. ..... 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."

It was furthermore observed:

"80. ..... 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."

At no stage, TRAI raised the contention that the relevant informations and data had not been provided for by the broadcasters or even otherwise having regard to the power it possesses in terms of Section 12 and 13 of the said Act, it could not have obtained the same by issuing appropriate directions.

Clause 6 of the impugned order per se does not achieve addressability. It does not fully take into consideration the voice of the consumers, as canvassed by the consumer groups. What we mean that if TRAI intended to fix tariff, it should have gone

whole hog and not halfway through.

Sports Channels

The sports channels are sui-generis. They are a class by themselves. The difficulties faced by them have not been adequately addressed. We have noticed heretobefore the submissions made by the impleaded Respondents with regard to the category of Sports Channels existing as a separate category. Although at a first flush, they appear to be attractive but, on a deeper analysis, the same in our opinion cannot be said to have any basis whatsoever.

A person may be interested in any of the sports. A channel may be carrying an event in regard to a particular sport. If a person is interested in wrestling or boxing or some other event, he may seek a particular sports channel. However, even if he is interested only in a particular category of sport, the concerned channel, who air the event only a few times in the whole year, cannot, thus be, said to be a regular affair.

A special Sports event like IPL or Wimbledon or French Open or FIFA costs a huge amount for acquisition of their contents. They have to be shown live. The cost components of a sports channel cannot be compared with the general entertainment channels. Moreover the costs of procuring 'content' has been increasing over the years. We would like to state the averments made on behalf of the counsels for Neo – Sports who have stated that BCCI Rights in late 1990s were sold at Rs. 250 crores approx.; while in the year 2000 they were sold at Rs. 1500 crores and in the year 2006 sold at Rs. 4000 crores by way of examples. Furthermore, the rising content costs ought to be evaluated in the context of the fact that rates for pay TV channels have been fixed by the TRAI way back in 2003 for CAS areas and have not been allowed to revise their prices since then.

Submission of Mr. Malhotra that the tariff order has not caused any of the problems complained of cannot be accepted. When a Tariff is fixed which would have equal application irrespective of nature of broadcast, the difficulties

faced by a section of the broadcaster, namely the sportscaster is peculiar in nature should be viewed differently. It is no ground to contend that the sportscasters are aware of the tariff and, thus, they should mould their business model which should address that situation. All the viewers of T.V may not be interested in Sports Channel. Even if they are interested, they would be interested in certain type of sports for which some channels may specialize. It may also be event wise. It may be true that the entire amount involving acquisition of a special event cannot be recovered from the consumers in India. But then the proportionate expenditures incurred and particularly the fact that a sports channel like ESPN broadcasts in certain regions including India keeping in view the Indian viewers principally in mind, should have been considered by TRAI.

It has not been sufficiently answered that in given cases, no advertisement can be cast so long the live broadcast is made. It was therefore, necessary for the regulator not only to take into consideration the average cost of acquisition but also the revenue it earns from advertisements.

It is only in the written submissions filed by TRAI a contention has been raised that the sports channel, because of high viewership, attracts high advertisement rates and therefore high advertisement revenue. No material has been placed before us in support thereof. Explanatory Memorandum issued by TRAI does not also refer to any such material. Even there is no pleading in this behalf.

Indeed the question as to what would be the cost component has not been addressed by TRAI at all. Why such a contention has been made only in Written Submission, is difficult to understand, particularly when revenue for advertisement was not taken into consideration by TRAI in the impugned tariff order. It was not correct to raise such contentions which have no factual foundation and are not premised on a study or any material having been brought before the regulator in that behalf. Regulator being a statutory authority, it is expected to support the order made by it on the

basis of the materials which it had considered and not on the basis of surmises and conjectures or on mere hypothesis. It is only in that view of the matter all the more necessary for the Regulator to have a detailed study.

The Supreme Court of India held in Cynamide (supra) that subordinate legislating body is entitled to prescribe and adopt its own mode of cost of production and the items to be included and excluded in so doing, it need not follow the method that may be followed by Income Tax authorities or others. As no fact has been bought on record we also do not see any reason why we should take into consideration that ESPN and NEO Sports should not pay carriage fee.

At least, the relevant considerations should have been borne in mind. They could not have been ignored.

TRAI although ought to have addressed on itself the specific concerns of the sports channel, it did not do so and, thus, failed to take into consideration the relevant factors.

Locus Standi of the Operators other than the DTH Operators

These operators operate principally in the Non CAS area on an analogue mode. Only at certain places they have distributed set top boxes and retransmit signals on digital platform. They do not have the SMS system in place. For introduction of a complete Digital System which the DTH Operators, HITS operators are entitled, SMS system is a must. It is possible that even while transmitting signals on the analogue platform to transmit signals on the digital platform through cable but, the same would not mean that they are in a position to enter into a voluntary CAS in its entirety. Even for that purpose Regulations as amended in 2007 and 2009 are required to be complied with. It even does not come within the purview of 2006 Amendment Regulations. It is also not in dispute that the regulator acknowledges a hybrid

system which for all intent and purport is taken into consideration for the purpose of analogue mode and not the digital mode.

One of the advantages of supplying signal through digital mode is that in stead and in place of 80-85 channels, it is possible for the operators to transmit signals of 200-250 channels through the STBs. The quality of supply of signal also improves with digital mode.

A contention however has been raised that IMCL and Digi Cable, in the event the tariff order is upheld, can shift to complete digital mode within a short time. However for the said purpose, different considerations must be borne in mind including different reference interconnect orders, different type of activation of the set top boxes etc.

Order 1 Rule 10 C.P.C. is discretionary. Nobody has a right to intervene. (See Mumbai International Airport Vs. Regular Connection Centre (2010(7) S.S.C. 417)

However, we do not intend to ignore the contentions raised by the impleaded respondents, keeping in view of the facts that they were impleaded as parties and they have been heard at length.

We do not intend to enter into the other controversies raised at the Bar as ultimately even for the DTH operators, the question of validity or otherwise of the impugned tariff order must be taken into consideration.

Additional Documents

One of the questions raised as to whether the respondents should be permitted to bring on record the response of some of the appellants herein before TRAI. The said documents are intended to be brought on record (Even without filing any

affidavit in support thereof and which are voluminous in nature) only for the purpose to show one the other that one of the appellants is/are estopped and precluded from raising any contention contrary thereto or inconsistent therewith.

The said documents were sought to be filed on behalf of the DTH Operators Association of India by Mr. Mansoor Ali Shonkat on 16.09.2010. By reason of an order of the said date, the learned counsel were not permitted to file the said documents stating :

> *"Mr. Mansoor Ali Shoket appearing on behalf of DTH Operators Association of India, however, intended to place before us voluminous documents said to be the response of the Broadcasters before TRAI. We did not allow him to do so as they are not part of the Affidavits filed by the parties. Such voluminous records, or for that matter any record, could not have been allowed to be produced before us at a point of time when the appellants have already been completed their submissions. The learned counsel, however, opened his argument and indirectly placed reliance only on the documents which we did not permit him to file. It was then insisted that a written argument would be filed. We permitted the parties, therefore, to file written arguments."*

Despite the said order, Mr. Vaidyanathan, appearing on behalf of the one of the interveners, sought to place reliance on the said documents once over again.

In support of its contention that the power of this tribunal to take on record such additional documents is not prohibited by reason of the provisions of the Code of Civil Procedure, strong reliance has been placed on Section 14 A (7) of the Act.

It reads thus:

> *"The Appellate Tribunal may, for the purpose of examining the legality or propriety or correctness of any dispute made in any application under sub-section (1), or of any direction or order or decision of the Authority referred to*

in the appeal preferred under sub-section (2) on its own motion or otherwise, call for the records relevant to deposing of such application or appeal and make such orders as it thinks fit."

There cannot be any doubt whatsoever that while disposing an appeal from an order passed by the Regulator, this Tribunal has the requisite jurisdiction to call for its records. When however, a plea of estoppel is sought to be raised, the same, in our opinion should form part of the pleadings. Ordinarily, the documents are required to be filed along with the reply. It may be true that *stricto sensu*, the provisions of the CPC are not applicable in a proceedings before this Tribunal, but the principles contained in the Code and/or the provisions analogous thereto must be held to be applicable. In that view of the matter either at this stage of filing of the reply as envisaged under Order 8 Rule I A or after the pleadings are filed namely Order 13 Rule 2 of the Code of Civil Procedure, the documents should have been filed.

Had such documents been filed for the purpose of raising the question of 'estoppel', it would have been open to the appellants to explain the same. Even at a subsequent stage, namely at the stage of Order 18, Rule 17 of CPC, a party to a proceedings cannot be allowed to fill up the lacunae. A party to a proceeding can be permitted to file additional documents only if a satisfaction is arrived at that the documents in question were not in power or possession of the applicant. We may incidentally notice that the Code of Civil Procedure has been amended in the year 2002 in so far as Order 18, Rule 2 (4) and Order 18 rule 17 A have been deleted. The Supreme Court of India however in Salem Advocates Association 2005 (6) SCC 344 has held that in appropriate cases only, additional evidence can be allowed if an exceptional case is made out therefor. Following Salem Advocates Association, we are of the opinion that at least the principles contained in Order 18 Rule 17, should be satisfied.

It is also a well known proposition of law that a party to a lis cannot take advantage of its own wrong. It cannot be permitted to fill up the lacuna.

See Vadiraj Naggapa Vernekar (D) Through Lrs. v. Sharad Chand Prabhakar Gogate (AIR 2009 SC 1604)

For the aforementioned reason, the contention of Mr. Baidyanathan must be held to be wholly without any merit and must be rejected as such.

There is another aspect of the matter. We have noticed heretobefore that such a prayer has already been rejected. Reasons therefor were also assigned. The principle of *res judicata*, it is well settled, applies even at different stages of the same proceeding.

See : Satyadhyan Ghosal & Ors. v. Smt. Deorajin Debi and Anr. (AIR 1960 SC 941)

Arjun Singh v. Mohindra Kumar and Ors. (AIR 1964 SC 993) and

(Mumbai Interl. Airport v. Regency Convention Centre (2010) 7 SCC 417)

Conclusion and Findings:

In that view of the matter and the issue – wise analysis as has been done by us in the matter, we hold that:-

1. The impugned part of the Order viz the proviso appended to clause 4 of the impugned tariff Order should be set aside.
2. TRAI should start the process of Tariff fixation upon taking the relevant factors into consideration afresh.
3. TRAI should for the purpose of laying down tariffs undertake a detailed study of the same.

These appeals are allowed with the aforementioned observations but without any order as to costs.

(S.B. Sinha)
Chairperson

(G.D. Gaiha)
Member

(P.K. Rastogi)
Member

December _____, 2010

Ramesh Chawla/S.Kumar/`ns'