TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL
NEW DELHI

Dated 28th May, 2010

APPEAL No.17(C) OF 2006
(M.A. Nos.24 of 2007, 8 & 13 of 2008 and Caveat No.4 of 2006)

East India Hotel Ltd. … Appellant

Versus

Telecom Regulatory Authority of India & Ors. …Respondents

AND

APPEAL No.18(C) OF 2006
(M.A.Nos. 65, 66 of 2008 and Caveat No.5 of 2006)

The Connaught Prominent Hotels Limited … Appellant

Versus

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

For Appellant **(In Appeal No.17(C) of 2006)**	:	Mr.Ramesh Singh, Advocate Mr. Nikhil Goel, Advocate
For Respondent No.1 (TRAI)	:	Mr. Meet Malhotra, Advocate Mr. Ravi S. S. Chouhan, Advocate
For Respondent No.2 (Star Den Media Services Pvt. Ltd.)	:	Mr. Maninder Singh, Senior Mr. Gopal Jain, Advocate Mr. Prateek Kumar, Advocate Ms.Garima Sharma, Advocate
For Respondent No.3 (SET Discovery Pvt. Ltd)	:	Mr.Aditya Narain, Advocate
For Respondent No.4 (Zee Turner Limited)	:	Mr. Maninder Singh, Senior Advocate Mrs.Prathiba M. Singh, Advocate Mr.Nikhil Mehra ,Advocate Mr.Arjun Natarajan,Advocate Ms. Nitya Thakur, Advocate
For Respondent No.5 (ESPN)	:	Mr. N. Ganpathy, Advocate
For Respondent No.6(HAI)	:	Mr.Ayushya Kumar,Advocate
For Appellants (**In Appeal No.18(C) of 2006)**	:	Mr.Ramji Srinivasan,Senior Advocate Mrs.Rukmini Bobde,Advocate
For Respondent No.1	:	Mr. Meet Malhotra, Advocate

Mr. Ravi S. S. Chouhan, Advocate

For Respondent No.2 : Mr.Gopal Jain,Advocate
Mr. Prateek Kumar, Advocate
Ms.Garima Sharma, Advocate

For Respondent No.3 : Mr.Aditya Narain,Advocate

For Respondent No.4 : Mr. Maninder Singh, Senior Advocate

Mrs.Prathiba M. Singh,Advocate
Mr.Nikhil Mehra,Advocate
Mr.Arjun Natarajan,Advocate
Ms. Nitya Thakur,Advocate

For Respondent No.5 : Mr.N. Ganpathy,Advocate

For Respondent No. 6 : Mr.Arjun Garg,Advocate

JUDGMENT

S. B. Sinha

1. These two appeals involving common questions of law and fact were taken up for hearing together and are being disposed of by this common judgment.

2. The petitioners herein are owners of hotels. They are aggrieved by a determination made by the Telecom Regulatory Authority of India (TRAI) purported to be in terms of Section 11(1)(a)(ii), (iii) & (iv) of the Telecom Regulatory Authority of India Act, 1997 (the Act).

The brief factual background involved in this matter is not in controversy.

3. The Parliament enacted the said Act to provide for the establishment of the TRAI and this Tribunal to regulate the telecommunications services, adjudicate disputes, dispose of appeal and to protect the interests of the service providers of the consumers of the telecom sector to promote and ensure orderly growth of telecom sector or the matters connected therewith and incidental thereof.

Section 2 provides for the interpretation section. Section 2(j) defines service provider to mean the Government as a service provider and includes a licensee.

Section 2(k) defines telecom services. By reason of the provisions of the said definition of telecom services, the broadcasting services were excluded. However, by reason of Section3 of the Amended Act of 2003, a proviso was appended thereto in terms whereof the Central Government was empowered to notify other services to be telecommunication services including the broadcasting services.

4. It is beyond any dispute that such a notification was issued on 01.09.2004 pursuant whereto and in furtherance whereof the broadcasting and cable services were brought within the ambit of telecommunication services. By reason of an order

known as the Telecommunication (Broadcasting & Cable Services) Tariff Order 2004, the TRAI sought to freeze the cable subscription charges i.e. the tariff prevalent on 26.12.2003, till final determination by it on the various issues concerning those charges.

5. A new tariff order was issued on 01.10.2004 by the TRAI, inter alia, laying down the definition of various terms such as 'multi service operator', 'broadcasting and cable operator', 'broadcasting services', 'cable service', 'cable television network' and reiterated the ceiling/freeze prescribed by the former tariff order. In regard to the tariff, it was stated:-

"The charges, excluding taxes, payable by –

(a) Cable subscribers to cable operator;

(b) Cable operators to multi system operators/ broadcasters (including their authorized distribution agencies); and

(c) Multi system operators to broadcasters (including their authorized distribution agencies)

prevalent as on 26 December, 2003 shall be the ceiling with respect to both free-to-air and pay channels."

6. By reason of the said tariff order dated 01.10.2004 no distinction was made between a commercial and non-commercial subscribers.

7. The Hotel Association of India and Hotel Federation & Restaurant Association of India intervened before TRAI. They filed petitions before this Tribunal on or about 08.08.2005 praying inter alia, for a declaration that the actions of the respondent asking them and its members to execute fresh agreements with the broadcasters and/or authorized distributors subject to payment of increased subscription fee beyond that was prevalent on 26.12.2003 was illegal and arbitrary and

violative of the 2004 Tariff Order read with the Interconnection Regulations. The said applications were registered as Petition Nos.32(C) of 2005 and 80(C) of 2005.

By an order dated 17.01.2006, this Tribunal disposed of the said applications, inter alia, holding:-

> "31. We, therefore, quite easily conclude that members of Petitioner Associations are not subscribers as contemplated under the Cable TV Network Regulations Act.
>
> ……..
>
> 33. In view of the above, we are of the considered opinion that the management of the hotels in Petition Nos. 32(C) and 80(C) cannot be termed as subscribers. Similarly, various restaurants using cable service for public viewing cannot be treated as consumers. There is no gain saying that this use is entirely different from the domestic use of cable service. The use of cable service at a public viewing place is to attract more customers / clients which gives it the colour of use of its service for commercial purpose.
>
> ……..
>
> 36. Now we come to the question whether the tariff laid down by the TRAI notification of 26th December, 2003 is applicable to the members of the petitioner associations. The said Tariff order covers the following in its ambit – the charges payable by (a) Cable subscribers to cable operator; (b) Cable operators to multi service operators/broadcasters (including their authorized distribution agencies); and (c) Multi service operators to broadcasters (including their authorized distribution agencies). In the petition before us we find that the commercial

relationship is between the members of the petitioner associations (viz., hotels, restaurants etc.) on the one hand and either cable operators or broadcasters on the other. We have already concluded that the members of the petitioner associations cannot be regarded as subscribers or consumers. As such we are of the view that the above tariff notification of the TRAI would not be applicable. It seems that TRAI has found it necessary to fix the tariff for domestic purpose. We think the Regulator should also consider whether it is necessary or not to fix the tariff for commercial purposes in order to bring about greater degree of clarity and to avoid any conflicts and disputes arising in this regard.

37. In view of the above, we are of the opinion that the respondents are well within their rights to demand the members of the petitioner associations to enter into agreements with them or their representatives for the receipt of signals for actual use of their guests or clients on reasonable terms and conditions and in accordance with the regulations framed in this regard by the TRAI."

8. The matter was carried in appeal to the Supreme court of India. During pendency thereof, however, the TRAI issued a 4th Amendment Order in the second tariff order on or about 07.03.2006 whereby and whereunder commercial consumers were defined. A further declaration was made that that the commercial cable subscriber would pay subscription fees at rates prevailing on 01.03.2006. The petitioners herein contend that the said notification was issued in line with the judgment of this Tribunal in the aforementioned petitions Nos.32(C) of 2005 and 80(C) of 2005, as noticed hereinbefore.

9. We may, however, notice the Explanatory Memorandum appended thereto. Clause 4 of the Explanatory Memorandum reads as under:

"4. In the meanwhile keeping in view the observations of Hon'ble TDSAT and the representation of FHRAI, the Authority has considered appropriate, in the interim, to extend the protection of ceiling to the commercial consumers as well……"

10. The Supreme Court admitted the appeals on 28.04.2006 and an order of status quo as existed on that date was directed to be maintained until further orders. It may, however, be noticed that prior thereto, namely, on 21.04.2006, the TRAI had issued a Consultation Paper in line with the directions issued by this Tribunal. We may furthermore notice that on 31.08.2006 TRAI issue tariff for CAS areas called the Telecommunications (Broadcasting & Cable Services)(3rd)(CAS Areas) Tariff Order 2006 in terms whereof the ceiling in respect of maximum rental price payable by a subscriber to a multi-service operator/cable operator as Rs.5 per pay channel per month (exclusive of taxes) was determined. The said tariff order came into effect on and from 31.12.2006. In terms of the aforementioned notification therefor, the price ceiling as on date applied to all consumers.

11. We may furthermore notice that after hearing the counsels for the parties, the Supreme Court of India while reserving the order said to be on an application filed by TRAI itself directed as under:

"We in modification of our said order dated 28.4.2006 direct the TRAI to carry out the processes for framing the tariff. While doing so, it must exercise its jurisdiction under Section 11 of the Act independently of the Act and not relying on or on the basis of any observation made by the TDSAT to this effect."

12. In terms of the said order dated 19.10.2006, TRAI inviting the comments of all stakeholders on 02.11.2006, by reason whereof two notifications dated 21.11.2006 (the impugned notifications) were issued.

13. By reason of the said amendment, the hotels with rating of three stars and above, heritage hotels and other hotels, motels and inns and commercial establishments providing for boarding and lodging and having 50 or more rooms were excluded from the protection of price regulation which was extended to millions of commercial establishments and minor cable subscribers across the country. On or about 24.11.2006, the Supreme Court of India delivered its judgment in Cable Operators' Association of India & Ors. Vs. UOI & Ors. - 2003(3) SCC 186. We would refer to the relevant portions of the said judgment at an appropriate stage.

14. These appeals were filed questioning the legality and/or validity of the said impugned notifications dated 21.11.2006.

15. Mr.Ramji Srinivasan, the learned senior counsel appearing on behalf of the petitioners in Appeal No.18(C) of 2006 would contend:

(i) The impugned orders are contrary to and inconsistent with the judgment of the Supreme Court in so far as the TRAI failed and/or neglected to apply its own independent mind as would appear from various paras in the Explanatory Memorandum and simply followed the judgment of this Tribunal which was set aside.

(ii) The TRAI was under a statutory obligation to protect the consumers, particularly, having regard to the provisions contained in Section 11(1)(b), Section 12 and Section 13 of the Act.

(iii) The TRAI, keeping in view of the fact that it has role of a Regulator to play, has committed an illegality by refraining from regulating the tariff in respect of the specific categories of hotels.

(iv) The purported clarifications made by TRAI amongst the consumers and one group of commercial consumers with the other was illegal and without jurisdiction.

(v) The TRAI, for the purpose of determining the said order, has failed to state any rationale therefor. In doing so, it has failed to consider that broadcasters being the monopolistic, the prices cannot be left to free market forces.

(vi) No reason has been assigned as to why other similarly situated commercial establishments like five star nursing homes, executive class airport lounges, shopping malls, large corporate offices would be left out from the purview of Regulations.

(vii) The explanation offered in relation thereto purported to be Clause 3.2.5, 3.2.6 and 3.2.7 are based on wholly irrelevant considerations not germane for the purpose of taking the same into consideration and failed to take into consideration the relevant factors.

(viii) The hotels having the star ratings and other heritage hotels have no other options but to enter into the subscription agreement with the respondent broadcasters on their dictate.

(ix) The arbitrary and unreasonable discrimination being not based on any intelligent differentio must be held to be ultra vires Article 14 of the Constitution of India.

(x) Tariff being not a tax, the socio economic approach or grant of cross-subsidies to the broadcasters is against the concept of the power to regulate tariff.

(xi) TRAI in passing the impugned directions have failed to take into consideration that the broadcasters and distributors have acted in an unreasonable and high-handed manner.

16. Mr.Ramesh Singh, the learned counsel appearing on behalf of the respondent in Appeal No.17(C) of 2006, urged:

(a) Section 11(2) of the TRAI Act providing for a power on TRAI in terms whereof it may undertake the exercise for fixing different tariffs for different classes but, cannot refuse to fix tariffs for a particular class and it thus, must be said to have committed an illegality in passing the impugned orders.

(b) The judgement of this Tribunal excluding the commercial establishments for the purpose of making the aforementioned tariff could not have been followed by TRAI and thereby directing a forebearance in the matter.

(c) Despite the order of the Supreme Court, the TRAI while going into the aforementioned exercises found that there was need therefor, it failed to consider that it could not have refused to extend the protection to a particular class.

(d) Sub-section (2) of Section 11 providing for making tariff for different persons or different classes of persons clearly go to show that although TRAI was entitled to fix different rates for different classes, it could not have directed forebearance in respect of a particular class.

17. Mr.Meet Malhotra, the learned counsel appearing on behalf of first respondent herein, on the other hand, urged:

I. It is wrong to contend that the TRAI in its impugned orders failed and/or neglected to determine the tariff independently and merely followed the decisions of this Tribunal. Keeping in view the fact that the owners of the Hotel Associations came before TRAI, it started with their case and if necessary, undoubtedly would consider to bring in the cases of others, if any occasion arises therefor progressive steps for protection are being taken by it. The TRAI upon considering the cases of all concerned as also the viewpoints of the

appellants, the broadcasters, arrived at its own view which, in the facts and circumstances of this case cannot be considered to be unreasonable or violative of Article 14 of the Constitution of India.

II. A bare perusal of the impugned orders would clearly go to show that not only the TRAI was not influenced in any manner by the judgment of this Tribunal but had considered the criteria for need of protection and inter alia in view of the fact that the appellants can negotiate on their own having the requisite bargaining power and furthermore they can afford to pass on the burden to their customers, prescribed forebearance for them.

18. Mr.N.Ganpathy, the learned counsel appearing on behalf of the ESPN would urge:

A. It is wrong to say that the broadcasters have been charging the hotels on the basis of 100% occupancy and the agreement entered into by and between the ESPN and the appellant, The Connaught Prominent Hotels Limited, would clearly go to who that the same was entered into for 76 rooms although the appellant had 87 room situated in a very busy area of New Delhi and, thus, has about cent per cent occupancy.

B. The broadcasters considered the areas in question for the purpose of fixing tariff as for example, in the hill areas occupancy may be lesser but in metropolitan town occupancy would be more than 70 to 75%.

C. Only two hotels being before this Tribunal and their associations having been relegated to the position of the respondent, the hotel owners as a class cannot be said to be aggrieved by the order of the TRAI. The consultation process being not over even they can participate therein.

19. Mr.Maninder Singh, the learned senior counsel appearing on behalf of the two of the broadcasters, namely, M/s Zee Turner Ltd. And M/s Star Den Network, submitted:

1. Associations being not parties in their appeal, they cannot take the benefit of any judgment of this Tribunal.
2. The petitioners having not made any factual averments as to how classification can be said to be invalid cannot be granted any relief. The classification being a broad one is not hit by Article 14 of the Constitution of India nor can it be stated to be wrongful classification as similar establishments cannot be said to have been left out.
3. Classifications on the basis of income status and other relevant factors can be the basis for making valid classifications by a legislature and the same by itself would not lead to a conclusion that the same is illegal.
4. TRAI being a Regulator, it was for it to consider as to who would require protection and who would not and having regard to the fact that it in order to arrive at a conclusion had undertaken a detailed exercise, the classification cannot be faulted.

20. Mr.Aditya Narain, the learned counsel appearing on behalf of the MSM Discovery in a written submission filed before us state that in view of the several decisions of the Supreme Court of India, it is evident that the petitioners holding status of a definite class having the rating of three-star and above cannot be heard to contend that the classification is bad in law. The appellant, East India Hotel Ltd., being a part of a big group of hotels, which are 815 in number, cannot be said to be representing all the Hotels.

21. The principal questions which arise for consideration are:

(i) Whether the TRAI having regard to Section 11(2) of the Act has the requisite jurisdiction to direct forebearance in relation to a class of commercial consumers;

(ii) Whether the TRAI was justified in treating hotels having the category of three-star and above, the heritage hotels and the hotels above 50 rooms in a separate category;

(iii) Whether the classification is legal and valid.

Before, however, adverting to the aforementioned questions, we may notice the statutory scheme.

22. We have noticed the preamble of the Act in terms whereof TRAI is required to protect the interest of the service providers as also the consumers of the telecom sector. As a Regulator, the TRAI has a very significant role to play. Its recommendations carry a great weight, and ordinarily should be accepted by the Government of India. It was so held in Cable Operators' Association of India & Ors. Vs. UOI & Ors. – 2003(3) SCC 186.

23. It was obligatory on its part to consider all aspects of the matter and cover its recommendations from all angles including the plight of the ultimate viewers. It started exercising its jurisdiction within a period of two weeks from the date of issuance of the notification by the Government of India by promulgating a freeze order which continued. The TRAI in regard to the charges excluding taxes stated:

"The charges, excluding taxes, payable by –

(d) Cable subscribers to cable operator;

(e) Cable operators to multi system operators/ broadcasters (including their authorized distribution agencies); and

(f) Multi system operators to broadcasters (including their authorized distribution agencies)

prevalent as on 26 December, 2003 shall be the ceiling with respect to both free-to-air and pay channels."

24. It only increased the tariff by 7% by an order dated 01.12.2004 and 4% more by an order dated 29.11.2005. The definition of consumer in 2004 Regulations was a broad one being whosoever a subscriber of the broadcaster in the country. By and large even the broadcasters adhered thereto. There appears, however, to be some dispute in regard to the stand taken by the parties hereto as to whether the petitioners came within the purview thereof. Our attention in this behalf has been drawn to a letter issued by M/s Zee Turner to the appellant in Appeal No.17(C) of 2006 which reads as under:

"Zee Turner

16 November 2004

THE OBEROI TOWERS
VIKRAM CHAUBAL
NARIMAN POINT
MUMBAI
MAHARASHTRA

Dear Vikram Chaubai,

As you may probably be aware, recently, the TRAI announced an amendment of allowing for a 7% increase in subscription rates on account of inflation.

We'd like to inform you that effective January 1, 2005 incorporating a hike of 7% the price of Zee Turner's existing bouquet would stand at Rs.181.90. We request you to get in touch with the nearest Zee Turner Regional Office to sign the Agreement for the revised rate of your existing package.

Thank you for your interest and support for Zee Turner.

With kind regards,

sincerely,

Zee-Turner Ltd."

25. However, the broadcaster contends that the said freeze order was never applied to the petitioners. In fact, submissions have been made before us that the broadcasters in their agreement with the local cable operators always kept the subscribers, where public viewing is permitted, outside the purview of the agreements. The TRAI, however, does not appear to have taken this aspect of the matter in its consideration. It is, however, not much in dispute that whereas some of the big hotels have put head-ends on their roof-top upon entering into agreements in this behalf with the respective broadcasters, a large number of hotels like any other commercial establishments take supply only from the local cable operators. Although, it has vehemently been suggested by the learned counsel appearing on behalf of the broadcasters that most of the owners of the hotels have acted contrary to the said agreements by taking supplies of signals from the local cable operators, we think that at this stage, we are not concerned therewith.

26. There cannot, however, be any doubt or dispute that the owners of the hotels of the categories mentioned in the impugned order of the TRAI are indisputably dependent only upon the broadcasters. They exercise monopoly. It is in the aforementioned situation, the justifiability and workability of impugned order issued by TRAI must be considered. This Tribunal in the aforementioned Petitions No.32(C) of 2005 and 80(C) of 2005, were of the opinion that the commercial subscribers do not come within the purview of the provisions of the orders made by the TRAI. It was so held in the following terms:-

> "35……On facts, we have noticed that the hotel managements, who are members of the petitioner associations, receive signals either from the broadcaster or their agents directly or from the cable operators directly which is further transmitted to rooms and parlours for the purpose of viewing by their guests or clients, it is at that stage that the signals actually get consumed. Therefore, as per the judicial and dictionary definition of the consumer referred to hereinabove, we have no doubt that the members of the petitioner associations are not the end-users of the signals received by them. Hence, these members of the petitioner associations on the facts of this case cannot be treated as either subscribers or consumers for the purpose of relief sought in this petition.
>
> 36. Now we come to the question whether the tariff laid down by the TRAI notification of 26th December, 2003 is applicable to the members of the petitioner associations. The said Tariff order covers the following in its ambit – the charges payable by (a) Cable subscribers to cable operator; (b) Cable operators to multi service operators/broadcasters (including their authorized distribution agencies); and (c) Multi service operators to broadcasters (including their authorized distribution agencies). In the petition before us we find that the commercial

relationship is between the members of the petitioner associations (viz., hotels, restaurants etc.) on the one hand and either cable operators or broadcasters on the other. We have already concluded that the members of the petitioner associations cannot be regarded as subscribers or consumers. As such we are of the view that the above tariff notification of the TRAI would not be applicable. It seems that TRAI has found it necessary to fix the tariff for domestic purpose. We think the Regulator should also consider whether it is necessary or not to fix the tariff for commercial purposes in order to bring about greater degree of clarity and to avoid any conflicts and disputes arising in this regard."

27. We have also noticed heretobefore, however, for all intent and purport TRAI while undertaking fresh exercise in the matter as directed by the Supreme Court of India was directed to do so afresh wholly independently, without in any way being influenced by the order passed by the TDSAT. As directed by us, the concerned file of TRAI was produced before us. The perusal of the same shows that two draft tariff orders were issued on 2.11.2006 and the same were put on website also seeking comments of stakeholders by 10.11.2006. TRAI conducted a meeting also with broadcasters and Hotel Associations on 9.11.2006.

28. We may at this juncture also notice the impugned order dated 21.11.2006 of the TRAI which at page 70 of the compilation of documents. By reason of the said order the TRAI made the following amendment in the 2006 order, clause (ii) whereof reads, thus:-

"Provided that the provisions of this sub-clause shall not apply to the following types of commercial subscribers:

i) Hotels with rating of three star and above

ii) Heritage hotels (as described in the guidelines for classification of hotels issued by Department of Tourism, Government of India)

iii) Any other hotel, motel, inn, and such other commercial establishment, providing board and lodging and having 50 or more rooms."

By a reason of the said order, inter alia, in place of sub-clause (f) of Clause 2 and the entries relating thereto, the following was added:

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

Amended

"(f) 'Charges' means and includes

(i) for all ordinary cable subscribers and commercial cable subscribers except those specified in (ii) below, the rates (excluding taxes) payable by one party to the other by virtue of the written/oral agreement prevalent on 26th December, 2003. The principle applicable in the written/oral agreement prevalent on 26th December 2003, should be applied for determining the scope of the term "rates".

(ii) for hotels with a rating of three star and above, heritage hotels (as described in the guidelines for classification of hotels issued by Department of Tourism, Government of India) and any other hotel, motel, inn, and such other

commercial establishment, providing board and lodging and having 50 or more rooms, the charges specified in (i) above shall not be applicable and for these subscribers the charges would be as mutually determined by the parties.

Explanation: It is clarified that in respect of programmes of a broadcaster, shown on the occasion of a special event for common viewing, at any place registered under the Entertainment Tax Law and to which access is allowed on payment basis for a minimum of 50 persons by the commercial cable subscribers, the tariff shall be as mutually determined between the parties."

29. By reason of Regulation 3, sub-clause(a) of clause 3 was substituted:

"3. Tariff:

The charges , excluding taxes, payable by

(a) Cable subscribers to cable operator;"

Amended

"3. In the Principal Order, the existing sub-clause (a) of clause 3 and the entries relating thereto shall be substituted with the following sub-clause (a) and entries relating thereto;

"(a) Ordinary cable subscribers and commercial cable subscribers (except hotels with a rating of three star and above, heritage hotels (as described in the guidelines for classification of hotels issued by Department of Tourism, Government of India) and any other hotel, motel, inn, and such other commercial establishment, providing board

and lodging and have 50 or more rooms) to cable operators, multi system operators or broadcasters as the case may be."

30. By reason of clause 4, after the clause 3 two explanations were added:

Original

"(c) Multi system operators to broadcasters (including their authorized distribution agencies) prevalent as on 26th December 2003 shall be the ceiling with respect to both free-to-air and pay channels."

Amended

"4. In the Principal Order, after the existing clause 3(c) and entries relating thereto, the following explanations and entries relating thereto, namely Explanation –1 and Explanation –2 shall be inserted:

"Explanation 1: for the purpose of clause 3(a) above the question whether the commercial cable subscriber will pay the cable operator/ multi system operator/the broadcaster will be determined by the terms of agreement(s) between the concerned parties, namely

i) broadcaster(s)

ii) MSO(s) and cable operator(s) who have been authorized to provide signals to the commercial cable subscribers on the one hand, and the commercial cable subscribers on the other.

Explanation 2 : for the purposes of clause 3(b) and (c) above the charges will be modified to take into account the payments to commercial cable subscribers where appropriate""

31. By reason of clause 5, the existing second proviso below clause 3(c) was added:

"Provided further that in case a multi system operator or a cable operator reduces the number of pay channels that were being shown on 26.12.2003, the ceiling charge shall be reduced taking into account the rates of similar channels as on as on 26.12.2003."

Amended

"5. In the Principal Order , after the existing second proviso below clause 3(c) the following proviso shall be inserted

"Provided further that in the case of a commercial cable subscriber, the charges in respect of whom by virtue of clause 2(f)(ii) read with clause 3(a), is determinable as per mutual agreement between the parties, having facilities to get broadcasting services directly from the broadcaster, the later shall at the option of the commercial cable subscriber be obliged to provide channels on ala carte basis. For such consumers whenever bouquets are offered, these shall be subject to the following conditions:

I The maximum retail price of any individual channel shall not exceed three times the average channel price of the bouquet of which it is a part;

Explanation: if the maximum retail price of a bouquet is Rs.”X” per month and the number of channels is “Y” then the average channel price of the bouquet is Rs. X dividedby Y.

II The sum of the individual maximum retail prices of the channels shall not be more than 150% of the maximum retail price of the bouquet.”

32. Clause 6 directs deletion of existing clause 3A and the entries relating thereto:

“3. In clause 3 of the Telecommunication (Broadcasting and Cable) Services (Second) Tariff Order 2004, (6 of 2004), the existing subclause (a) and the entries relating thereto shall be substituted with the following: -

“(a) Ordinary cable subscribers to cable operator.””

Amended

“6. In the Principal Order, the existing clause 3A and entries relating thereto shall be deleted.”

33. Clause 7 provides for the Explanatory Memorandum as contained in Annexure A thereto:

“7. Explanatory Memorandum:

This Order contains an Explanatory Memorandum attached as **Annex- A.”**

The Explanatory Memorandum contained several heads.

Section 1 provides for Introduction and Background, clause 1.1 whereof reads as under:

> "1.1 The Authority had issued a Tariff Order on 15th January 2004, which provided that the ceiling of cable charges shall be at the levels prevailing on 26th December 2003.for both FTA and Pay channels. This interim order was subject to final determination. Subsequently after extensive consultations a detailed Tariff Order was issued on 1.10.2004 (hereinafter referred to as Principal Tariff Order) which maintaining the sanctity of the ceiling of cable charges prevailing on 26.12.2003 provided a window for introduction of new pay channels and conversion of existing FTA Channels to pay subject to certain conditions. The underlying objective in both these orders was to provide relief to the cable subscriber who has no mechanism to protect himself against the hike in cable television charges."

32. We may notice that in terms of the order issued on 21st April, 2006, the TRAI provided for a uniform ceiling of cable charges. The said philosophy had been continuing. The last sentence of clause 1.1 provide for the underlying objective which indisputably, the petitioners were satisfied. The matter relating to consultation process starts at Section 2, the relevant portions whereof read as under;

> "The consultation paper also pointed out that the question of categorization and having a separate definition for commercial cable subscribers is closely linked to the question of approach to tariff regulation ie. Whether it is necessary to have tariff regulation at all or a differential set of tariff regulation for different categories of cable subscribers. The question of categorization depends and comes after the decision on the need or otherwise to have different sets of tariff regulation."

33. We may notice that no answer thereto has been attempted to be given as to why a change in the freeze order was contemplated. In Sections 2.3, 2.4 and 2.5, TRAI had noticed the directions in the appeals by the Supreme Court of India. Section 3 provides for definition of commercial cable subscribers and issues relating thereto. Clause 3.1.1 provides for the history and the subsequent changes made in relation thereto. We may, at this juncture, also notice that there is nothing on record to show as to on what materials the TRAI had arrived at a conclusion that the commercial establishments had the mechanism and wherewithal to protect themselves.

34. The TRAI had taken into consideration in paragraph 3.1.1 one major issue for the purpose of arriving at its conclusion in the aforementioned order that the question for a separate distinction or otherwise for those establishments who avail broadcasting and cable services not for their own domestic use but for the benefit of his/her clients. This sentence, it has not been disputed, before use has been lifted from the judgement of the TDSAT.

35. We will consider hereinafter as to whether the said question was a right question or the same should have been an objective of the TRAI.

Clause 3.1.2. reads as under;

> "3.1.2 However, subsequently the question of need for categorization and applicability of the principal tariff order of 1.10.2004 arose in respect of hotels before the TRAI when representations from a hotel association seeking relief against the hike in cable charges by broadcasters was received well before the matter came up before hon'ble TDSAT. While examining the issue it was felt that the principal tariff order of 1.10.2004 needed clarity on the real intent of applicability or otherwise to establishments who do not use the broadcast and cable services for their own

use. However, before the decision could be taken matter had become sub-judice. There were also a couple of references from establishments (other than hotels) seeking clarification on the issue of applicability of tariff regulation and as to the interpretation."

36. One of the questions which would arise for our consideration, was it meant to be applicable to the petitioners? The use of availing the broadcasting services, in common parlance, may not also have any relevance.

The views of the TRAI have been stated in Clause 3.1.5 from which we have to notice in extenso:

"3.1.5 The comments received from the stakeholders on the issue of need or otherwise of a separate definition and retention of the existing definition has been analyzed and the Authority's views are given below:

i) TRAI had noted that there are bound to be more disputes between establishments who received signals for the use of clients etc and the service providers including broadcasters and therefore the need to bring in clarity to the interpretation of the principal tariff order. But the TRAI before taking a final view decided to deliberate in detail through a consultation process as envisaged under Section 11(4) of the TRAI Act 1997, on the various issues relating commercial tariff for cable television services. Considering that the principal tariff order of 1.10.2004 required clarity in regard to its applicability to the commercial establishments in the context of the underlying objective stated above there is a necessity to identify the commercial establishments and provide for the manner of regulation of cable charges for these establishments. In either case whether to extend the protection of ceiling on

cable charges in any form or not to extend protection at all, would require such establishments to be identified separately. Therefore, the need to define the terms ordinary cable subscriber and commercial cable subscriber. The views of the hotel and its associations stating that there is no need for a separate definition is therefore not acceptable.

ii) The distinction sought to be made in the existing definition between an ordinary cable subscriber and commercial cable subscriber is justified from the point of view of the underlying premise that the need and extent of protection for a commercial establishment compared to that of an ordinary cable subscriber is not the same.

iii) It is an admitted fact that particularly hotels who had given details of prices paid by them that the charges paid by them is different and higher than the ordinary cable consumer. Thus even at the ground level the commercial establishments particularly the hotels and such other similar establishments, as a prevailing business practice, are treated differently.

iv) In regard to the approach one option is to adopt a definition which is wide in scope cum inclusive in nature as done in the existing definition which uses the criterion of usage as the basis to categorise the cable subscribers. In this approach the task of identification of specific categories of commercial cable subscribers is done for the purpose of extending or otherwise of the tariff regulation depending upon the assessment of the need for protection. The other approach is to adopt a definition, which is exhaustive identifying specific categories and sub-categories for the purpose of tariff regulation and indicating the type

of regulation intended for each such defined category. The Authority has chosen to adopt the first approach for the reason that it is extremely complex to evolve objective criterion for categorization. Even in the approach to the categorization the Authority has used the method to exclude certain categories of commercial cable subscribers for the purpose of keeping out of the ambit of tariff regulation thereby leaving the residual category of commercial cable subscribers within the fold of the tariff regulation. Any approach to define specific category is bound to leave out some and include certain unintended ones. The stakeholders in their responses have also echoed similar views on the difficulty in evolving criterion for categorization of cable subscribers. It would be simpler and better to identify specific broad groups within this generic definition while providing for the differential dispensation in tariff regulation. Such an approach would also minimize the scope for disputes. Having a wide approach in defining a commercial cable subscriber would ensure that all are covered; those that do need protection could be specifically excluded. The Authority has therefore adopted this approach of having a definition, which is wide in scope and to identify specific groups for the purpose of tariff regulation based on the need for protection.

v) It is not denied that the product is same whether is a ordinary cable consumer or commercial establishments but the value derived from the product in the case of TV channels may not be the same in the situations where it is put to self use compared to a situation where it is meant for the purpose of its clients, customers. The television channels or programmes, even though may not be sold as a standalone service by commercial establishments particularly like hotels, etc. but as a means of entertainment do possess the potential to give an enhanced value to their packaged services. Therefore, the manner how the broadcasting services are being used becomes relevant for differentiating between an ordinary cable subscriber and a commercial cable subscriber.

vi) In regard to the suggestion of identifying specific categories within the group of commercial cable subscribers for definition or extending protection it is viewed that existing definition based on the type of use is wide enough and would cover such specified categories as well.

vii) Considering the ground realities where 99% of the subscribers are receiving signals through the multi system operators or cable operators the suggestion of broadcasters that the commercial subscribers would be required to indicate the place where the signal is required to only to broadcasters and not to operators is not acceptable. The existing definition gives flexibility as otherwise the restriction as suggested would create difficulties in regard to the vast majority of current arrangements of hotels etc with the operators.

viii) The amendments suggested for inclusion of the word agent and intermediary (of the broadcaster) has been examined and is not considered necessary as such intermediary would be acting only under authorization and would representing the broadcaster even otherwise.

ix) As also expressed by some of the stakeholders the Authority is of the view that no single approach to categorization will be ideal and attempts of micro management will only add to the distortions in the market, creating fresh grounds for raising disputes. On the other hand the vast majority of commercial establishments would fall within the scope of the existing definition yet would require protection as that of an ordinary cable subscriber

x) It has been pointed out that pay TV broadcasters for commercial usage should have separate interconnect agreements and that the Authority should direct the broadcasters that such agreements are entered into at the price that is being charged in the locality for an ordinary cable consumer. The Authority has noted that largely the broadcasters entering into interconnect agreements with the MSOs and independent cable operators exclude specified establishments such as hotels etc from the applicability and stipulates a prior permission requirement. Thus the issue of separate arrangement is in place and no change is warranted in this aspect of the present arrangements.

xi) One suggestion is that the product being same the license fee cannot be different for different consumers and that it should be determined on the basis of cost plus margin. Ideally a uniform price for a product of similar quality could be a situation if there is definite functional relationship between the cost of content and the value attached for the content and the cost of content itself is easily amenable to evolve a standard set of cost. In the case of broadcasting industry it may not be so. More importantly the argument is not based on proper appreciation of the prevailing system of determination of margin particularly in a non-CAS
environment and without considering the complexities involved, as stated above, in costing of content.

xii) Contrary to the claims of the hotel association, the Authority is of the view that big hotels providing variety of services have the capacity to protect their interests and cannot be treated at the same level as that of an ordinary cable consumer or even as that of large variety of commercial establishments which may require protection as that

of the ordinary cable consumer. Many from this type of establishment may not be putting to use such services for the benefit of clients, customers etc. It was pointed out by the broadcasters that the cable charges as a portion of the revenue of the hotels forms a very insignificant portion and this has not been contested by the groups representing the hotels during the consultation process. In other words the impact of keeping this identified category out of the ambit of protection is unlikely to hurt their interests adversely.

xiii) It is noted that that the suggestion of categorization based on the source of feed will not be a reflection of ground realities and there can be situation where it is not possible to have head end to receive the television signals and that such an approach would force the hotels to go to cable operators to receive signals instead of entering into contract with the broadcasters."

Paragraph 14 of the said Section refers to the definition of consumer under the Consumer Protection Act which admittedly is irrelevant.

37. Clause 3.1.6, however, may be noticed:

"3.1.6 The Authority has after examining the views put forth and for the reasons indicated above has come to a conclusion that an approach to definition based on specifically identifying categories would be more complex and problematic to implement and is bound to give rise to new grounds for dispute. Therefore, an exhaustive approach to the question of definition would be more desirable. Those groups who may not need protection can be excluded from the applicability of the tariff protection and group the rest as a residual category requiring protection.

Therefore, the Authority has decided to retain the existing definition of 'commercial cable subscribers' contained in the tariff amendment order of 7th March. 2006"

38. Section 3.2 provides for the conclusion. It reads "note for fixation of commercial tariff and related issues, types of commercial establishment to be covered and method of identification of such commercial establishments for regulations".

39. Clauses 3.2.1 and 3.2.2 read as under:

"3.2.1 In terms of the facility to choose channels of choice under a non-addressable regime the commercial cable subscribers are in the same position as that of the ordinary cable consumer excepting that they have the potential to settle for a negotiated settlement with the broadcaster albeit the level of potential may not be the same across all types of commercial cable subscribers**.**

3.2.2 But the difference is that the former, particularly the hotels and other big commercial establishments who receive the broadcasting and cable services as a value addition to their own package of services have the potential to pass on the burden to their own clients. There may not be a direct functional relation between add on services such as that of the television channels and the business strength in as much as a client of a hotel or pub or club may not come to a hotel or club or pub etc with the sole objective of watching TV channels. But is it to be largely admitted, despite the claims to the contrary by the stakeholders representing the hotels, that such value added services definitely help to sustain and strengthen business relationship of such commercial establishments with their clients.

If it had not been so, there was perhaps no need for the hotels to go to the appellate authority or the apex court or for TRAI to be deliberating on this issue of tariff for commercial cable subscribers particularly the hotels."

40. Different viewpoints of the representative of the petitioners and broadcaster have also been noted therein. The view of TRAI reads as under:

"3.2.6 The Authority is of the view that it would be incorrect to draw a strict analogy between the identified group of commercial cable subscribers comprising hotels above a given grading etc, and hospitals as the former as a group need to be treated on a different footing. Most importantly, the Authority has taken conscious decision for the present not to club hospitals, educational institutions, big or small, along with the group consisting of hotels etc above a particular grading from the perspective of the socio economic causes such institutions are expected to serve. Moreover it may be more difficult to evolve a reasonable objective criterion to differentiate between two luxury hospitals. While the Authority is clear that the intention of protection is not to facilitate profit making by even such commercial hospitals, for the present and to begin with the Hospitals need to be given protection.

3.2.7 The Authority is however not closed to the option of revisiting the issue of categorization for the purpose of tariff regulation on the basis of experience gained if necessary. It is also to be recognized that there are a vast majority of establishments which do not receive the signals of television channels for their own use but they may not be commercially exploiting the services for furtherance of their own business. In this category would come educational institutions, Government hospitals, religious charitable and other philanthropic institutions, small shops, dhabas etc and this is not exhaustive list. During the interactions with the broadcasters it was clear that these

commercial establishments, though in terms of the contract are not to be given signals without the prior permission of the broadcaster have not been targeted by the broadcasters due to sheer volume and difficulties in enforcing the agreements. Though some of the broadcasters have appointed agents to prevent and monitor of the giving signals by the MSOs to commercial establishments, it was still clear that this group is not the target of the broadcasters."

Clause 3.2.8 refers to specific comments/suggestions made by the stakeholders as also the specific findings of TRAI. We would only notice clauses 1,3,5,7 of the said paragraph:

"3.2.8 The Authority has also examined the various specific comments/ suggestions made by the stakeholders and has found that

i) The approach to identify each category of establishment for exclusion or inclusion for the purpose of tariff regulation is extremely complex and no such list can be exhaustive.

iii) In regard to the request for inclusion of clubs, malls, cinema halls, the proposal has not been agreed to for the reasons already indicated earlier. The proposal for reduction in the number of rooms from 50 to 25 has not been found to reasonable.

v) As was noted during the consultation process the vast majority of commercial establishments in the group of commercial establishments other than the identified categories are actually not being targeted by the broadcasters

perhaps for the reason of difficulties in enforcement of the clause of prior permission.

vii) The hotels as a group particularly big hotels in the view of the Authority do not need protection. These are large subscribers and the broadcasters too would stand to lose large sums of money if their negotiations with them are not successful."

41. The directions which were based on the said findings, are as under:

"3.2.9. In view of the above it has been proposed that there would be one category of commercial cable subscribers consisting of hotels with a rating of 3 star and above, heritage hotels, and any other hotel, motel, inn, and such other commercial establishment providing board and lodging and having 50 or more rooms. The Tariff in respect of this group would be as per the mutual agreement. For all other commercial establishments which is outside this identified category the ceiling shall be the charges as prevailing on 26.12.2003. However for the both categories of commercial cable subscribers, the tariff for showing programmes on special event in public viewing area shall be as per mutual agreement.

3.2.11 The group representing the hotels have expressed concerns particularly those who fall in the identified category of commercial establishments that the broadcasters would use the mutual agreement route to arbitrarily increase prices. The Authority believes that the category of commercial establishments which have been identified for forbearance would ordinarily be in position to deal with the broadcasters on an even keel in the negotiations. Yet the Authority is also not impervious to their concerns. Therefore the Authority would be closely watching the

movement of prices in respect of this segment and would review its decision if considered necessary on the basis of inputs received. Similarly, there could be a number of similar institutions, which in terms of capacity to negotiate a mutual agreement may be similar, and these could be revisited later and if necessary the identified list could be reviewed. The Authority would separately be asking the broadcasters to report their tariffs for the commercial cable subscribers, to start with on a monthly basis, to gauge the extent of the increase in the rates. If found necessary the Authority would intervene in this matter

3.2.12 One of the issues raised by the Hotel Associations and their response to the Draft Tariff Order is that TRAI has to necessarily to fix a tariff in terms of the order of the Hon'ble Supreme Court. This point has been examined. The Supreme Court has only directed the TRAI to carry out the process for framing the tariff. The Tariff Order that has been proposed by the Authority includes the fixation of tariffs for certain categories whereas for the hotels above particular grading this has been left to mutual negotiations. It has also been indicated elsewhere that the outcome of mutual negotiation would be closely watched and if necessary, intervention would be made later. The Consultation Paper that had been issued in April 2006 also clearly provides one of the alternatives as excluding certain categories from the ambit of tariff regulations. One of the specific questions that had been framed was whether commercial tariff should at all be brought under the ambit of tariff regulation. Further, it was specifically asked whether the tariff regulation should cover all kinds of commercial establishments or whether some categories should be left out. Thus, this objection is not valid at all."

42. We are not concerned with the method for fixing the rates for commercial consumers. We have referred to the said Explanatory Memorandum in great details only because the parties have referred thereto before us with their respective comments again and again.

It succinctly stated the reasons for putting the petitioners' hotels in a separate class and excluded the same from the purview of the regulatory regime are inter alia based on the following reasonings:

(i) The process of excluding others would be a complex one.

(ii) There is likelihood of more disputes between establishments who receives signals for the use of clients and the broadcasters;

(iii) It was needed for bringing in clarity.

(iv) The usage of the service is different.

(v) They do not require any need for protection although the code value of the contents are the same as the television channels cannot be sold as a stand alone programme, having regard to the commercial purpose for which the supply is taken there for more value.

(vi) A macro management may only add to the distortions in the market creating fresh grounds for raising dispute.

(vii) Uniform pricing is not possible as there is no defined functional relationship between the cost of content and the value attached thereto.

(viii) The hotels providing valued service have the capacity to pay.

(ix) The cable charges as a portion of revenue of the hotels forms a very insignificant portion as has been contended by the broadcasters.

(x) The petitioners have the potential to settle for a negotiated settlement.

43. So far as issue relating to the complexities involved in the exercise for the purposes of framing of tariff is concerned, the same in our considered opinion, cannot be said to be a good reason. The first respondent is an expert body. It was required to take into consideration very complex issues.

44. Mr.Meet Malhotra would contend that this Tribunal should keep in mind the fact that where the regulatory regime in relation to the telecommunication services grew with the market and, thus it was not a very difficult task for the TRAI to lay down regulations regulating the industry as and when need arose therefor; but so far as the broadcasting and cable services industry is concerned, it was not so in view of the fact that only in the year 2004, the Central Government came out with a notification and thus the TRAI had no other option but to issue the first freeze order within a couple of weeks therefrom. Although it has been conceded that for all intent and purport, the TRAI apart from issuing the freeze orders had not been able to lay down any tariff in respect of the channels of various broadcasters, Mr.Malhotra would point out that TRAI had made its best efforts to so do so firstly by laying down the maximum charge per channel and also by responding to the need of the broadcasters for increase thereof by issuing two notifications in terms whereof the rate of the pay channel had been increased by 7% and 4% respectively. According to Mr.Malhotra, TRAI had also laid down the ceiling for the free-to-air channels.

45. It may be true that having regard to the contents of different broadcasters may be valued differently but it appears to us, with all respect to the TRAI, that no serious attempt appears to have been made in relation thereto. The TRAI in a matter like the present one, was required to apply its mind more thoroughly as to whether it was necessary to provide for a regulatory regime be it for their domestic consumers or the commercial consumers. The Act provides therefor. But the need and extend therefore was required to be considered. One cannot compare selling a piece of bread in a dhaba with the one in a five star hotel. All selling the same product may have to spend differently on a large number of things including hygiene. There cannot, however, be any doubt or dispute that different rates could be fixed for the different consumers. There cannot however, be any doubt or dispute that different types of rates can be provided for different categories of consumers. The consultation paper itself proceeds on the basis that even as on 17.01.2006, the TRAI noticed from the documents furnished by the Hotel Associations that rates per room charged vary from as low as from Rs.20/- to as high as Rs.1300/- per room per day. It has specifically been noted in paragraph 3.6 that the Authority had indicated that price control will be lifted once there is effective competition.

46. Before, however, we proceed to consider the other and further submissions of the learned counsel appearing on behalf of the parties, we may place on record that ESPN Software India Pvt.Ltd. has in its written submissions categorically stated that although the broadcasters charge from 35 to 85% of the occupancy, the agreement entered into by and between it and the appellant in Appeal No.18(C) of 2006 would go to show that out of 86 rooms in the said hotel, in terms of the said agreement the said appellant is required to pay for about 76 rooms. It has furthermore been accepted that in the event the

hotels offered for 62 pay channels of Star, MSM, ESS, ZEE TV, BBC, Neo TV, CNN, Star News Bouquet and ZEE, the appellants are required to pay for about Rs.2099/- per month, the cost for all pay channels per day would be Rs.68.82.

47. It is, therefore, evident that although according to Mr.Meet Malhotra that there are several safeguards provided for TRAI itself to keep an eye over the development in the market, nothing has been brought on record to show that in fact the same had been carried out. Had it been so, it was expected of TRAI to bring on records some materials before us to show that in fact, it had been doing so. It could not have also become oblivious of the fact that according to broadcasters the upper limit has gone upto Rs.2099/- for all the 62 channels. What has been missed by Mr.Ganpathy in the aforementioned submissions is that admittedly there are about 500 channels in India. It may be true that some of the channels are regional ones and/or the local ones but there cannot be any doubt or dispute that the owners of all categories of hotel try to cater to the need and taste of all types of customers.

48. Although, it has been contended by the learned counsel appearing on behalf of the respondents that in terms of the guidelines issued by the Ministry of Tourism, it is not obligatory on the part of the appellants and/or other hotels to subscribe to the pay channels as the only requirement prescribed therefor is to provide TV which requirement would be met by providing even free-to-air channels. We are, however, of the opinion that the said submission is too simplistic to be accepted in as much as the ground reality from which we cannot shut our eyes is that all hotels worth its name whether it has been placed in the category of star hotel or not, cannot afford not to provide the channels of the major broadcasters and that too the popular ones. It is, therefore, idle to contend that for the purpose of meeting the requirements of the guidelines fixed by the Ministry of Tourism, the appellants and/or the other hoteliers need not for all intent and purport

arrive at any negotiated settlements with the broadcasters whatsoever. The very nature of submissions made by the learned counsel for the respondent clearly goes to show that they cannot afford to do so. It is in fact an agreement in desperation. Whereas on the one hand, the respondents talk of market force vis-à-vis the bargaining power of the hoteliers, it is beyond any controversy now that depending upon the need of each category of hoteliers there exists such an inconsistency in the rate, meaning thereby from Rs.20 to Rs.2100/-. This in our considered opinion, may not lead to a conclusion that the appellants had been very successful in utilizing their so called bargaining power and/or their position to fend for themselves.

49. We may now consider some of the other issues on which TRAI had relied upon to arrive at its aforementioned decision. It is not necessary, particularly, in the manner it has been sought to be done to bring in more clarity to avoid any dispute. TRAI has also while emphazising only underlying objective to identify the commercial establishment, in our opinion, has not assigned any cogent reason as to why a necessity was felt to change the definition. On the one hand the TRAI thought it to provide to some sort of a relief to the cable service operators as would appear from clause 1.1 of the Explanatory Memorandum, it failed to take into consideration that no prohibition had been laid down from the regime of the first freeze order framed by TRAI.

50. TRAI has also not made any serious effort to identify different establishments separately. It reiterated the old reasons for the purpose of considering the cases of the appellants. In fact, the viewpoint of the Supreme Court of India had not been taken seriously. Although it had provided on an underlying premise as contained in clause(ii) of Section 3.1.5, it is obviously not the case of the TRAI that all commercial establishments are situated similarly. No basis for taking the said purported underlying premise has been spelt out.

51. The manner of usage, in our opinion, although may not be very relevant for the purpose of putting a clause of users of the cable and broadcasting services as out of the purview of the regulatory retime, any assessment of the need for protection should have, in our considered opinion should have been supported by other cogent and valued reason.

52. We appreciate that all types of service providers cannot be put in water-tight compartments for the purpose of evolving the objective criteria of categorization. Evidently the approach of the TRAI had not been very clear in this behalf. From clause (iv) of Section 3.1.5, it is evident that the broadcasters themselves wanted a wider definition. Although according to TRAI the need for protection did not exist for the appellants, there is nothing to show as to how the said need was assessed.

53. So far as the micro-management vis-à-vis macro management aspect is concerned, we are of the opinion that the question of requirement of protection having been felt so far as the cable subscribers are concerned which is evident from clause 9, we are of the opinion that no basis had been laid down therefor. It is true that functional relationship between the cost of content and the use thereof may be different. But in our opinion it cannot be said that as the task is difficult, therefore, no serious attempt in that behalf need be resorted to.

54. Capacity to protect their own interests which have been attributed by the TRAI so far as the appellants are concerned, we may only point out that it is not the case that others are not in a position to do so.

55. Whether the contention that the appellants may pass on their portion of the revenue, in our opinion, may not be valid act in as much as even otherwise the payment of charges for the cable services by almost every subscriber may be except a few, had been a major part of the total expenditures incurred by it.

56. The economic interest, we would assume, matters. But whether or not a turnover would do is a matter of serious debate in a situation of this nature. We find force in the submissions made on behalf of the appellants that others who fulfill the said criteria were not brought within the net.

57. Similarly, any existing potential to settle a negotiated settlement by itself cannot be a ground as cable services cannot be said to be an essential services. It is true that for a sizeable section of the people having regard to the number and nature of programmes that are broadcasted, it is almost a household affairs and thus, may be held to be very necessary, but constitutionalism, if taken into consideration, must lead to a legal conclusion that it is not an essential commodity or essential service so as to consider as to whether the same would come within the purview of the statues specifically framed by the Parliament in this behalf.

58. TRAI bringing out the commercial hospitals and other commercial establishments have referred to socio-economic causes. Luxury hospitals which may be costlier than three to five star hotels, in our opinion do not serve any socio-economic purpose apart from the fact that such a consideration in the context of fixing the tariff for cable service may be irrelevant. Even assuming that the hospitals required protection on the ground of socio-economic causes, we fail to see any reason as to why the luxury clubs, malls, other commercial establishments have been found to be belonging to the different class on that ground alone.

59. It is difficult to understand as to why the clubs, malls and cinema halls, where the viewers again are different from the owners of the premises were to be treated differently and bracketted together with the hospitals/nursing homes. Why the restaurants have been kept out of the purview of the order is difficult to comprehend.

60. Even for the purpose of having headends in their own establishments which admittedly some of the hotels have admitted, require agreements with the broadcasters.

61. We, however, have no doubt in our mind that the TRAI in exercise of its provisions contained in the said Act is entitled to directed forebearance in respect of a particular service or for a particular category of consumers. We may, however, notice the submissions of Mr.Malhotra that the hotels came up for consideration of TRAI for the purpose of excluding them from the regulatory regime as they came to it first. This, with the greatest of respect cannot be a valid ground. They represented to the TRAI because they had some grievances. Only because they had grievances, the same cannot by itself be a ground for placing them outside the regulatory regime. We, therefore, reiterate that only because the appellants had a deep pocket or they can bargain or they can pass on their burden to their customers may not by itself be a ground for keeping them outside the protective regime.

62. We may notice that the Supreme Court of India in State of Kerala v. T.M. Peter, (1980) 3 SCC 554, held as under:

"16. The more serious submission pressed tersely but clearly, backed by a catena of cases, by Shri Viswanathan merits our consideration. The argument is shortly this. As between two owners of property, the presence of public purpose empowers the State to take the lands of either or both. But the *differential nature of the public* purpose does not furnish a rational ground to pay more compensation for one owner and less for another and that impertinence vitiates the present measure. The purpose may be slum clearance, flood control or housing for workers, but how does the diversity of purposes warrant payment of differential scales of quantum of compensation where no constitutional immunity as in Article 31-A, B or C applies? Public purpose sanctions compulsory acquisition, not discriminatory compensation whether you take A's land for improvement scheme or irrigation scheme, how can you pay more or less, guided by an irrelevance viz. the *particular* public purpose? The State must act equally when it takes property unless there is an intelligent and intelligible differentia between two categories of owners having a nexus with the object, namely the scale of compensation. It is intellectual confusion of constitutional principle to regard classification good for one purpose as obliteration of differences for unrelated aspects. This logic is neatly applied in a series of cases of this Court.

18. In *Durganath Sharma case*[4], a special legislation for acquisition of land for flood control came up for constitutional examination. We confine ourselves to the differentiation in the rate of compensation based on that accident of the nature of the purpose where the court struck a similar note. In *Nagpur Improvement Trust case* and in *Om Prakash case*, this Court voided the legislation which provided differential compensation based upon the purpose. In the latter case the court observed: (SCC p. 633 para 15 and pp. 633-34, para 16)

"There can be no dispute that the Government can acquire land for a public purpose including that of the mahapalika or other local body, either under the unmodified Land Acquisition Act, 1894, or under that Act as modified by the Adhiniyam. If it chooses the first course, then the land-owners concerned will be entitled to better compensation including 15% solatium, the potential value of the land etc. nor will there be any impediment or hurdle such as that enacted by Section 372(1) of the Adhiniyam in the way of such land-owners, dissatisfied by the Collector's award, to approach the court under Section 18 of that Act.

63. Adequacy of difference or validity of difference may also not be a ground for the said purpose has been stated by the Supreme Court of India in Om Kumar v. Union of India,(2001) 2 SCC 386, in the following terms:

"32**.** So far as Article 14 is concerned, the courts in India examined whether the classification was based on intelligible differentia and whether the differentia had a reasonable nexus with the object of the legislation. Obviously, when the courts considered the question whether the classification was based on intelligible differentia, the courts were examining the validity of the differences and the adequacy of the differences. This is again nothing but the principle of proportionality. There are also cases where legislation or rules have been struck down as being arbitrary in the sense of being unreasonable [see *Air India* v. *Nergesh Meerza* (SCC at pp. 372-373)]. But this latter aspect of striking down legislation only on the basis of "arbitrariness" has been doubted in *State of A.P.* v. *McDowell and Co."*

It has further been held:

"58**.** Initially, our courts, while testing legislation as well as administrative action which was challenged as being discriminatory under Article 14, were examining whether the classification was discriminatory, in the sense whether the criteria for differentiation were intelligible and whether there was a rational relation between the classification and the object sought to be achieved by the classification. It is not necessary to give citation of cases decided by this Court where administrative action was struck down as being discriminative. There are numerous."

64. The learned counsel for both the parties have referred to a large number of case laws on the question as to whether there can be as to whether macro classification is permissible be it on the ground of income, the need for protection, the amount of rent and so on and so forth.

65. While concealing that such micro classification is permissible in law, we must not forget that the macro classification or sub-classification is permissible when those who are sought to be put in different categories and classified separately must form a homogenous group, unless all the requisite classes forming commercial establishments, be it on any of the grounds noticed hereinbefore are said to be not forming a homogenous group, the classification may be permissible. Furthermore for such classification, nexus and object sought to be achieved must be taken into consideration.

66. We, however, as at present advised need not delve deep into the matter. Suffice to say that this Tribunal while exercising its jurisdiction under Section 14 read with Section 14A of the Act need not confine itself to the ingredients of judicial review, this Tribunal exercises an appellate power. The power of judicial review of administrative action and legislation

and the power of the appellate authority are different. The later confers a wider power. It has been so held in Cellular Operators Association (supra).

With regard to jurisdiction of this Tribunal it was stated in COAI (supra):

> "34. Statutory recommendations made by it are normally accepted by the Central Government, as a result of which the rights and obligations of the parties may seriously be affected. It was in the aforementioned premise the Parliament thought of creating an independent expert tribunal which, if an occasion arises therefore, may interfere with the finding of fact, finding of law or a mixed question of law and fact of the Authority. Succinctly stated the jurisdiction of the tribunal is not circumscribed in any manner whatsoever."

It was also held:

> "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……"

67. The Supreme Court of India on the appeals preferred thereagainst by the respondents' association reversed the said findings to which we may refer a little later.

So far as the jurisdiction of this Tribunal, the Supreme Court of India in Hotels & Restaurant Association Vs. Star India 2006(13)SCC753 stated as under:

> "28. The learned Attorney General has relied upon a decision of this Court in Union of India v. Parma Nanda - (1989)II LLJ 57 SC but the said decision has no application at all to the fact of the matter.
>
> 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 super-model as has been stated in Administrative Law by Bernard Schwartz, 3rd edition in para 10.1 at page 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.
>
> 32. In 'Jurisdiction and Illegality' by Amnon Rubinstein a judicial power in contrast to the reviewing power is stated thus:
>
> > A judicial power, on the other hand, denotes a process in which ascertainable legal rules are applied and which, therefore, is subject to an objectively correct solution. But that, as will be seen, does not mean that the repository of such a power is under an enforceable duty to arrive at that solution. The legal rules applied are capable of various interpretations and the repository of power, using his own reasoning faculties, may deviate from that solution which the law regards as the objectively correct one.

34. Statutory recommendations made by it are normally accepted by the Central Government, as a result of which the rights and obligations of the parties may seriously be affected. It was in the aforementioned premise the Parliament thought of creating an independent expert tribunal which, if an occasion arises therefore, may interfere with the finding of fact, finding of law or a mixed question of law and fact of the Authority.

Succinctly stated the jurisdiction of the tribunal is not circumscribed in any manner whatsoever.

40. Even in West Bengal Electricity Regulatory Commission v. C.E.S.C. Ltd.- AIR 2002 SC 3588 whereupon the learned Attorney General has placed reliance, this Court specifically stated:

> "102. We notice that the Commission constituted under Section 17 of the 1998 Act is an expert body and the determination of tariff which has to be made by the Commission involves a very highly technical procedure, requiring working knowledge of law, engineering, finance, commerce, economics and management. A perusal of the report of the ASCI as well as that of the Commission abundantly proves this fact. Therefore, we think it would be more appropriate and effective if a statutory appeal is provided to a similar expert body, so that the various questions which are factual and technical that arise in such an appeal, get appropriate consideration in the first stage also. From Section 4 of the 1998 Act, we notice that the Central Electricity Regulatory Commission which has a judicial member as also a number of other members having varied qualifications, is better equipped to appreciate the technical and factual questions involved in the appeals arising from the orders of the Commission. Without meaning any disrespect to the judges of the High Court, we think neither the High Court nor the Supreme Court would in reality be appropriate appellate forums in

dealing with this type of factual and technical matters. Therefore, we recommend that the appellate power against an order of the state commission under the 1998 Act should be conferred either on the Central Electricity Regulatory Commission or on a similar body. We notice that under the Telecom Regulatory Authority of India Act 1997 in Chapter IV, a similar provision is made for an appeal to a special appellate tribunal and thereafter a further appeal to the Supreme Court on questions of law only. We think a similar appellate provisions may be considered to make the relief of appeal more effective.""

It was held

"36. It is one thing to say that TRAI recognizes the need for making such a distinction probably pursuant to or in furtherance of the observations made by TDSAT but therefor a final decision is yet to be taken. The Notification dated 7-3-2006 has been issued as an interim measure. By reason of the said notification, broadcasters have been injucted from increasing the rates. So long as a final determination in the matter does not take place, not only the members of the appellant Associations but also a vast number of similar commercial subscribers would remain protected.

37. It is not disputed that the nature of supply of TV signals is not distinct and different, It is same both for domestic consumers and commercial consumers."

It was observed

"50. We, therefore, are of the opinion that it would not be correct to contend that the commercial cable subscribers would be outside the purview of regulatory jurisdiction of TRAI. If such a contention is accepted, the purport and object for which the TRAI Act was enacted would be defeated. TDSAT, with great respect, therefore, was not correct in opining that the regulators should also consider whether it is necessary or not to

fix the tariff for commercial purposes in order to bring greater degree of clarity and to avoid any conflicts and disputes arising in this regard.

53. We are, however, sure that TRAI while exercising its jurisdiction under sub-section(2) of Section 11 of the TRAI Act shall proceed to e53. We are, however, sure that TRAI while exercising its jurisdiction under sub-section(2) of Section 11 of the TRAI Act shall proceed to exercise its jurisdiction without in any way being influenced by the said observations. It must apply its mind independently.

54. It may be true that TRAI in its Tariff order dated 7.3.2006 sought to define ordinary cable subscribers and cable subscribers separately but the same is yet to be adopted finally. It is not conclusive. It must while laying down new tariff take into consideration all the pros and cons of the matter. It must apply its mind afresh as regards not only the justifiability thereof but also the workability thereof.

56. The role of a regulator may be varied. A regulation may provide for cost, supply or service on non-discriminatory basis, the mode and manner of supply making provisions for fair competition providing for a level playing field, protection of consumers' interest, prevention of monopoly. The services to be provided for through the cable operators are also recognized. While making the regulations, several factors are, thus required to be taken into account. The interest of one of the players in the field would not be taken into consideration throwing the interest of others to the wind.

59. It is nowo also not in dispute, as would appear from the explanatory memorandum issued by TRAI, that the interim protection has been extended also to commercial consumers."

68. This Tribunal, thus, is entitled to go into the question not only of legality or procedural irregularity and/or reasonableness part of which but also may go into the question inter alia in a case of this nature with regard to the justifiability. It is entitled to see not only the justifiability of the order of TRAI but also the workability thereof.

69. We appreciate the Authority for the great effort it had made but then it, in our opinion, in determining the issues between two groups of consumers have failed to take into consideration relevant factors and took into consideration irrelevant one not germane for arriving at a decision.

70. We have also pointed out heretobefore that the Authority in arriving its opinion has posed unto itself a wrong question.

71. We again with utmost respect may observe that the TRAI appears to have acted in a bit haste.

72. It floated a consultation paper only on 21.04.2006 and for long period namely from 28.04.2006 to 19.10.2006 in view of the order of stay passed by the Supreme Court of India, it had not been able to proceed and advisedly at its opinion within a period one month. We, however, hasten to add that expedition is needed in the matter of decision of TRAI. We, however, are of the opinion it would have been in a situation of this nature could have waited for a few days more with a view to note the reasonableness of the Supreme Court of India. We have no doubt in our mind that the TRAI did so with best of an intention but we have made those observations only because a peculiar situation involved in these matters.

73. We have noticed heretobefore the comments made by Mr.Ramji Srinivasan that TRAI was greatly influenced, although ordained by the Supreme Court of India not to do so, by the decision of TDSAT. In fact, Mr.Srinivasan has pointed out various paragraphs to show that the TRAI in arriving at its decision at a number of places had either used the same language which has been used by this Tribunal or merely paraphrased the same.

74. We appreciate the comments made by Mr.Malhotra that even assuming that in the action of TRAI there was a method of madness but it was a bonafide exercise of power and it acted in accordance with law, although, we do not see that the Authority did not do so nor its approach could have been casual.

75. The appellant approached the TRAI only because it thought that it would be protected by it. It a matter of record that various criminal cases were instituted by the cable operators and/or agents of the broadcasters. The Supreme Court no doubt did not make any comment about the criminal cases as it was concerned with an appeal preferred from the decision of this Tribunal who had proceeded on the basis that the orders framed by the TRAI were not applicable to the case of the commercial establishments and, thus, the appellants herein were not entitled to any protection. The said reasoning did not find favour to the Supreme Court. It dealt with all the reasonings of this Tribunal.

76. In that view of the matter and that too in retrospect, we have made an observation that it would have been better if the TRAI would have taken into consideration a reasonings of the Apex Court.

77. Two other questions which have been canvassed before us may also be taken note of.

(i) The alleged non-compliance of the order of the Supreme Court of India.

So far as the same is concerned, it is accepted at the Bar that the broadcasters had filed a contempt of court application before the Supreme Court. Notice was issued in relation thereto. Cause having been shown by the hotel owners that there has been a substantive compliance, the contempt petitioner was dropped. Notice was also taken that those who had not furnished the details as per the directions issued by the Supreme Court, have been expelled from the membership of the Association.

We, therefore, are of the opinion that no direction in this behalf is required to be issued as at present advised.

(ii) The learned counsel appearing on behalf of the broadcasters as also Mr.Meet Malhotra have raised a contention that keeping in view the orders passed by this Tribunal relegating the associations to the position of the respondent as they failed and/or neglected to pay the due court fee and thus, only two individual hotels are before us in whose favour, no order need be passed, particularly as they have been entering into agreements with the broadcasters.

78. The two associations had been agitating the case of their members form the very beginning. They preferred appeals from the decisions of the TRAI. They preferred appeals also in the Supreme Court of India. They along with present appeals also filed these appeals. However, at a later stage, at the instance of registry of this Tribunal or at the instance of the TRAI, admittedly, an objection was raised that the said associations having more than 3500 members, court fees should be paid as if all of them are parties before us. An objection was taken in relation thereto by the associations. Only, however, at a later stage, they filed an application for relegating themselves to the category of the respondents which according to Mr.Srinivasan was done for avoiding time lapse. Before us, the counsels of their associations were also present, although they have not addressed us separately but we have satisfied ourselves thereabout.

a. As the associations are still supporting the case of the appellants, we are of the opinion that the contentions raised by the learned counsel for the respondents have no merit. They are rejected accordingly.

b. It matters not as to whether the associations are in the category of the petitioners or the respondents but it matters that they continue to support the appellants, whether directly or indirectly the case of the members of their respective associations. It is, therefore, not a case where either the associations had ceased to represent the members and they have lost all interest in the matter.

c. It also is not a case where the majority of the hotels are not interested in the subject matter of the present dispute.

d. We, therefore, would direct that the associations concerned may be permitted to represent their members before TRAI, in the future proceedings.

e. Another contention has been raised as noticed hereinbefore by Mr.Ganpathy that the appellant in Appeal No.18(C) of 2006 cannot be permitted to raise any contention as even for the financial year 2010-2011, it has entered into an agreement with ESPN.

f. It is not in controversy that this Tribunal although did not pass any interim order staying the operation of the impugned orders/directions issued by TRAI, but nearly directed the broadcasters not to take any coercive steps against the appellants. It is not in controversy that whereas the broadcasters have by and large entered into the

agreements with the owners of the hotels, they have not taken any coercive steps in the sense that they have not disconnected the supply on one ground or the other.

g. We have noticed heretobefore, however, that the parties had negotiated for arriving at a rate which is ordinarily three to five times higher than the normal market rates offered by the domestic consumers. As indicated hereinbefore, TRAI itself has noticed that the rates vary from Rs.20 to Rs.1300/-.

h. Keeping in view the limited nature of contentions and furthermore having regard to the nature of necessity of the owners of the hotels for the purpose of obtaining the supplies of signals of the pay channels from various broadcasters, we are of the opinion that neither the principle of acquiescence nor the principle of estoppel would be applicable in this case. The submission of Mr. Ganpathy to the aforementioned effect is rejected.

i. We, therefore, are of the opinion that it is a fit case where the impugned orders are required to be set aside. We direct accordingly. We, however, do not wish to issue any direction with regard to the refund of any amount but we would request the Authority to consider the case of commercial establishments once over again in a broad based manner.

j. These appeals are allowed but in the facts and circumstances of the cases, there shall be no order as to costs.

……J
(S.B. Sinha)
Chairperson

…….
(G.D. Gaiha)
Member

…….
(P.K.Rastogi)
Member