

**TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL
NEW DELHI**

DATED 3rd June, 2011

Petition No. 60 (C) of 2010
(With M.A. Nos. 261 of 2010 & 136 of 2011)

Tamilnadu Progressive Consumer Center ...Petitioner

Vs.

Ministry of Information & Broadcasting & 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 Petitioner : Mr. Navin Chawla, Advocate, Amicus Curiae
Mr. Sharath Sampath, Advocate
Mr. Gaurav Kaushik, Advocate

For Respondent No.1 (M/o Information & Broadcasting) : Mr. Ravinder Agarwal, Advocate
Mr. Nitish Gupta, Advocate

For Respondent No.2 (TRAI) : Mr. Meet Malhotra, Sr. Advocate
Mr. Saket Singh, Advocate
Mr. Ravi S.S. Chauhan, Advocate

For Respondent No.3 (Tata Sky Ltd.) : Mr. Ramji Srinivasan, Sr. Advocate
Ms. Sugandha Somani, Advocate
Mr. Zeyaul Haque, Advocate

For Respondent No.4 (Dish TV India Ltd.) : Mr. Maninder Singh, Sr. Advocate
Mr. Vadivelu Deenadayalan, Advocate
For Ms. Prathiba M. Singh, Advocate

For Respondent No.5 (Sun Direct TV (P) Ltd. & Resp.) : Mr. Gopal Jain, Advocate
Mr. Kaushik Mishra, Advocate

No.6 (Bharti Telemedia Ltd.)

For Respondent No.7 : Mr. Akhil Sibal, Advocate
(Reliance Big TV Pvt. Ltd.) Ms. Sonali Jaitley, Advocate
Ms. Devika Chadha, Advocate

For Respondent No.8 : Mr. Vivek Sarin, Advocate
(Bharat Business Channel Ltd.) Mr. Ladda Sandeep Somnath, Advocate

JUDGMENT

S.B. Sinha

Technical interoperability and Commercial interoperability of the equipments supplied by Direct to Home (DTH) Operators to the customers is in question in this petition.

The Petitioner Association addressed a letter to this Tribunal, which has been treated as a Petition.

2. The Petitioner is said to be a non-profit voluntary consumer organization working in the interest of the consumers in the State of Tamil Nadu and is engaged in the activities of creating awareness amongst them on various issues and fighting for their rights in various forums.

3. Indisputably, interoperability is a condition of license issued in favour of the DTH operators by the Ministry of Information & Broadcasting. Article 7 of the terms & conditions of license in Form B, granted in terms of Section 4 of the Indian Telegraph Act, 1885 (The Act) and Indian Wireless Telegraph Act, 1933 provides therefor.

4. Indisputably, for the purpose of providing Televisions on DTH platform, a set top box is an essential equipment. The set top boxes (STBs) are supplied to the customer by way of

(1) outright purchase;

(2) hire purchase; or

(3) rental.

The commercial inter-operability of supply of STBs is governed by a Regulation made the Telecom Regulatory Authority of India (TRAI) laying down quality of service standards known as 'The Direct to Home Broadcasting Service (Standard of Quality of Service and Redressal of Grievances) Regulation, 2007 (No.8 of 2007)'.

Indisputably, the TRAI is the authority to ensure compliance of terms of the said license as also the Quality Regulations framed by it.

We may notice Clause 4 of the said Regulations :-

“4. Option to provide Direct to Home Customer Premises Equipment on outright purchase or hire purchase or rent

(1) Every direct to home operator shall give an option to every person making request under regulation 5 to make available to him, the Direct To Home Customer Premises Equipment conforming to the Indian Standard set by the Bureau of Indian Standards as applicable, on outright purchase basis or hire purchase basis or rental basis.”

5. Indisputably, apart from Door Darshan, there are 6 DTH operators, who are providing DTH Services, namely Dish TV, Sun Direct, Big TV, Airtel Digital, Tata Sky and Videocon D2H. The petitioner alleges that the cost of a DTH equipment at home would vary from Rs.1500/- to Rs.7000/- depending upon the service provider. Many DTH operators, however, apply predatory pricing to enlarge their shares in the market. The petitioner contends that about 17 lakh subscribers have been obtaining the services from the DTH operators in India.

The petitioner, in its letter, stated :-

“3.e We have come across many complaints during our interactions with consumers and our members which goes to say that if the consumer is not willing to continue with the same DTH operator and opts to have a different choice of his desire, then the hardware bought from the former DTH operator would go for scrap and the consumer is compelled to buy another new set of hardware. On enquiry we have understood that the Set Top Boxes are designed as proprietary in nature so as to suit in their DTH network alone.

f. The network locked set top boxes issued by all DTH operators has put the consumers in to great hardship and feel to have a slavery contract with the existing DTH operator, whereby creating a total dependability on the serving DTH operator. If at all the consumer needs to change the operator he has to shell out a new investment for procuring a new set of DTH equipments from the new DTH operator.

h. Our enquiry has revealed that the above issue of non interoperability is not only an unethical business practice but a gross violation of the terms and conditions of their own licenses issued by the Ministry of Information and Broadcasting and contravention of the Quality of Service Regulations of TRAI.”

6. It therein also referred to Clause 5 of the 2007 Regulations.

The petitioner furthermore contended :

“(i) A recent article in a magazine predicts the dead set top boxes to be as high as 2 million (A copy of the respective page of the article is annexed as Annexure-D in page No.36) and the main reason behind the dead set top boxes are migration of consumers from the existing DTH service platform to other DTH service. Had been there an option of Interoperability the number of dead boxes would have come to minimum.

(iii) It is well to be presumed that the said 2 million set top boxes would to the electronic junk lying in consumer homes and the fact that these silicon wastes are neither bio-degradable nor re-cycleable would add to tonnes of pollution to this country.

4. We being a voluntary consumer organization run mainly on the funds paid by our members as subscription charges, we are not in a

position to come down to New Delhi to initiate a case against those DTH operators as we need to travel one way for about 2000 kilometers with a journey of 38 hours by train. The distance and proximity has made us the Tribunal beyond reach. Hence we humbly request your good tribunal to kindly take suo motto action or consider this letter as a petition and initiate legal proceedings in the tribunal in accordance to law and thus render ;justice for the larger consumer concern. Further we request the tribunal to grant us legal aid by appointing a competent amicus curie and an exemption of court fee.”

7. It is not in dispute that in terms of the aforementioned conditions of license, the Bureau of Indian Standards (BIS), a statutory authority constituted under Bureau of Indian Standards Act, 1986 has laid down standards in regard to the digital set top boxes for DTH service specification, which is in the following terms :-

“3.1.1 The STB shall be open architecture (non proprietary) and shall ensure technical compatibility and effective interoperability amongst different DTH service providers in the country. The interoperability shall be achieved by using common interface complying to EN 50221 ‘Common interface specification for conditional access and other digital video broadcast decoder applications’ and via software download where the software download mechanism shall be transparent, interoperable and available in public domain complying with specification ETSI TS 102006. The STB must have at least one common interface slot complying with EN 50221.”

8. The Union of India, Ministry of Information & Broadcasting, the TRAI, as also the private operators, were issued notices by this Tribunal. They have filed their respective replies.

9. Indisputably, for one reason or the other, the interoperability issue has by and large remained on paper and admittedly could not be implemented. It is also not in dispute that the question as to how and in what manner and if at all, the inter-operability question should be addressed, were considered by the TRAI, but it opined that no changes thereto were necessary.

Admittedly, the primary concern of DTH equipments is antenna and other equipments like STBs.

10. We may notice that the TRAI in its 2007 Regulations inter-alia stated :

“13. Since some of the set top box related issues pertain to technical interoperability, these are covered by the licence conditions and such issues are not dealt in here.”

11. The respondent No.1 sought for recommendations of the TRAI. It made such a recommendation on or about 31.01.2008. Some of the provisions contained therein are as under :-

“ The requirement of technical interoperability of set-top boxes of DTH is incorporated in the licensing agreement for DTH.

Clause 7.1 of the DTH License Agreement stipulates that :-

“7.1 The Open Architecture (non-proprietary) Set Top Box, which will ensure technical compatibility and effective interoperability among different DTH service providers, shall have such specifications as laid down by the Government from time to time.”

3.5 Thus, commercial interoperability has been mandated for Customer Premises Equipment for DTH by the aforementioned Regulation and the subscribers have a choice to return the equipment taken on hire purchase/rental basis from DTH operators if they are dissatisfied with the service. However, it is important to note that the commercial interoperability has been mandated in addition to technical interoperability. As the commercial interoperability has been addressed separately in the Direct to Home Broadcasting Services (Standards of Quality of Service and Redressal of Grievances) Regulation, 2007 dated August 31, 2007, there is no purpose for its inclusion in the license conditions.

3.8 The comments show that the DTH licensees/applicants are divided on the issue. However, the suggestion that interoperability of Set Top Boxes should not be mandated is not acceptable. It is necessary to provide an effective exit option to the subscribers who are not satisfied with their DTH service provider for any reason to migrate to another DTH operator or to another distribution platform. As already mentioned, the Direct to Home Broadcasting Services (Standards of Quality of Service and Redressal of Grievances) Regulation, 2007

dated August 31, 2007 requires the DTH service providers to give an option to their subscribers for obtaining the DTH hardware on hire purchase or rental basis. This empowers the subscriber to exercise the exit option at a reasonable cost.

3.10 It is seen that in the present state of development of DTH market in the country, technical interoperability has not taken deep roots. The main reason for this is unavailability of Conditional Access Modules (CAM) of different DTH service providers. The BIS specifications for DTH set top boxes require each set top box to have a Common Interface (C1) slot for the purposes of technical interoperability. Technical interoperability is achieved by plugging in the CAM of new DTH operator in the C1 slot of set top box provided by the existing DTH operator. For example, a subscriber of DTH operator 'A' who wishes to switch over to DTH operator 'B' has to procure a CAM from 'B' and plug the CAM into the C1 slot of the set top box supplied by 'A'. This enables the subscriber to start receiving the services of 'B' using the existing set top box and dish antenna (although the dish antenna has to be re-aligned towards the satellite being used by 'B').

3.13 The issue of strict adherence to BIS specifications of the STBs inhibiting the advent and advancement of technology has also been considered by the Authority. The solution to this problem does not lie in discarding BIS specifications but in ensuring that the BIS specifications also reflect the advancement of technology. World over, the standardization bodies revise the standards from time to time so as to incorporate the latest developments in the field of technology.

3.14 The letter from the Ministry of Information & Broadcasting seeking recommendations of the Authority (Annexure-1) also refers to the

advancement in compression technology from MPEG2 to MPEG4 format, and its implication for technical interoperability. Para 3 of the letter is reproduced below:

“There are already two DTH operators who are operational and are using the MPEG2 compression format as per the present BIS specification provided for the same. The new operators like Sun TV Direct Pvt. Ltd., Reliance Blue Magic Ltd. and Bharati Telemedia Ltd. are wanting to go on the MPEG4 compression format and it has been said that it offers substantial video quality improvements over current compression format and with over 25% savings in the transmission bandwidth.”

12. The Ministry had also convened a meeting with the representatives of BECIL, Prasar Bharati and Bureau of Indian Standards on technical interoperability. Para 4 of the letter dated 28.9.2007 issued in this regard is reproduced below :-

“A meeting was held in the Ministry with the representatives of BECIL, Prasar Bharati and Bureau of Indian Standards on the issues of technical interoperability. It was suggested in the meeting that the guidelines be modified to incorporate the commercial interoperability of set top boxes for the following reasons :-

- (a) the interoperability between set top boxes between two DTH operators is practically not feasible to the level of completeness;*
- (b) the imposition of this clause of interoperability increases the cost of set top boxes which consumer has to bear;*

(c) the strict adherence to BIS specifications of set top boxes inhibits the advent and advancement of technology and the resulting benefit to the consumer.”

13. The TRAI did not share the apprehension outlined in sub para (c) of para 4 of the said letter provided the following steps were taken –

- (i) Time bound updating of standards by the Bureau of Indian Standards (BIS).*
- (ii) Reasonable transition time to service providers.*
- (iii) Effective commercial interoperability as additional support. (This has already been done by the Authority vide the Direct to Home Broadcasting Services (Standards of Quality of Service and Redressal of Grievances) Regulation, 2007 issued on August 31, 2007.)*

The step at (i) above is to be taken by the Bureau of Indian Standards. Assuming that the BIS changes the standard from MPEG2 to MPEG4, then the DTH licensees can be given a time frame of 6 months for the transition. Since such revisions would be there in future also. DTH licensee may, while finalizing STB vendor contracts, stipulate upgrade conditions in such contracts.

3.15 The change in compression technology means that a DTH subscriber who has been using a Set Top Box using MPEG2 compression format cannot migrate to the services of another DTH operator who is using MPEG4 compression format using the same Set Top Box, though the converse is possible. This issue can be resolved by mandating that once BIS standards for DTH Set Top Boxes are revised incorporating

MPEG4 compression format, then even the DTH operator using MPEG2 format should start supplying Set Top Boxes with MPEG4 format for his new subscribers enrolled after the revision in BIS standards. It may be noted here that change in the BIS standards for DTH Set Top Box from MPEG2 to MPEG4 would not mean that the existing DTH operator using MPEG2 broadcast stream has to start transmitting the broadcast stream in MPEG4 format. The correct position is that the DTH operator can continue to broadcast in MPEG2 format or switchover to MPEG4 format at his option, but the Set Top Boxes which he will start distributing should be based on MPEG4 standards due to revision in BIS standards and because these new Set Top Boxes using MPEG4 format can continue to receive the existing MPEG2 transmission of the existing DTH operator. This also flows from the fact that BIS standards are fixed for DTH Set Top Boxes, and not for transmission stream of DTH operators. This would ensure on one hand that the DTH operator using MPEG2 format will continue to service his new subscribers because Set Top Boxes based on MPEG4 format will be capable of receiving transmission streams based on MPEG2 format. On the other hand, it will ensure that the benefit of technical interoperability is available to all new subscribers who would be in a position to migrate to any other DTH operator using MPEG2 or MPEG4 formats. While it is so, it needs to be noted that the existing subscribers which are using STBs based on MPEG2 formats will not be able to migrate to another DTH operator using MPEG4 format. It will not be operationally feasible for a DTH operator using MPEG2 format to upgrade the MPEG2 based STBs of millions of existing subscribers to MPEG4 format. However, it is expected that the market forces would step in, and a DTH operator using MPEG4 format who wishes to take away the existing subscribers having an MPEG2 Set Top Box of another DTH operator will offer upgrades to such subscribers. Moreover, the exit route through commercial

interoperability mandated by TRAI is now available to an existing subscriber who has taken the MPEG2 Set Top Box on rent/hire purchase. Here, it is necessary to note that the existing DTH operators using MPEG 2 formats may have placed bulk orders for STBs based on MPEG2 formats in order to get best prices. In such cases, it would be difficult for such DTH operators to start supplying STBs using MPEG4 formats from the very day that the Set Top Box standards are revised by Bureau of Indian Standards and they would need to be given a suitable transition time of, say, six months from the date of revision of standards after which they must supply only such STBs which are fully compliant with revised standards.

3.16 Considering the advantages of technical interoperability as well as the need to adopt modern technology, the Authority recommends that the issue of revision of BIS standards for DTH set top boxes should be taken up by the Government with the Bureau of Indian Standards so that the standards laid down by BIS for DTH Set Top Boxes are updated for advanced technologies. It is further recommended that revision of standards should be prospective and should apply to DTH subscribers who are enrolled after six months from the date of such revision. Such revision should not compulsorily require the DTH operators to upgrade the STBs of existing subscribers to conform to revised standards, though they would be free to do so on their own.

3.17 Accordingly, the Authority recommends that clause 7.1 of the DTH license conditions should be amended to read as under :-

7.1 The Open Architecture (non-proprietary) Set Top Box, which will ensure technical compatibility and effective interoperability among different DTH service providers, shall have such specifications as laid down by the Government from time to time. However, in cases of revision of specifications such revisions will be applicable

prospectively to new subscribers, and the licensee will have a transition period of six months from the date of such revision to ensure full compliance with the revised specifications for the new subscribers.”

14. A notification was issued by the TRAI on or about 31.8.2008 to the aforementioned effect known as ‘The Telecommunication (Broadcasting & Cable) Services (Third) (CAS Areas) Tariff Order, 2006’, Clause 5 whereof reads as under :-

“5. Tariff for supply of set top boxes in CAS areas:

- i) The provisions of this clause shall be effective from 15th October, 2006 and shall remain in force until otherwise notified.*

- ii) Every multi system operator / cable operator in a CAS area shall compulsorily offer to the subscribers both Option I and Option II of the standard tariff package (STP) specified in the Schedule annexed to this Order.*

In addition, the multi system operator / cable operator will be free to offer alternative tariff packages (ATP) and the subscribers shall have the freedom to choose from amongst the tariff packages so offered including the standard tariff package specified by the Authority.

- iii) There shall be no levy or collection of any charges separately from the subscribers, either in the STP or in the ATP referred to in sub clause (ii) above, on account of*

- a) installation of set top box;*
- b) activation or reactivation of set top box;*
- c) Smart Card / Viewing Card; and*
- d) repair, maintenance or any other charges (for the first five years)*

iv) A subscriber in a CAS area who desires to receive one or more pay channel(s)/bouquets of pay channels may make an application, on or after 15th October 2006, to any one of the multi system operators/cable operators for supply and installation of one or more set top boxes in his premises as per the tariff contained in sub clauses (ii) and (iii) above.

v) A multi system operator /cable operator as the case may be, on receipt of a request under sub-clause (iv), shall ensure compliance with the request within two days of completion of all formalities as specified in the Standards of Quality of Service (Broadcasting and Cable Services) (Cable Television - CAS Areas) Regulation, 2006 (8 of 2006) dated 23rd August, 2006 issued by the Authority.

Provided that where a subscriber has already taken a STB under the STP and takes a refund after surrendering the STB, then that subscriber will not be entitled to a new STB under the STP (from the same service provider) unless he/she is shifting residence to another city or to another area in the same city where the service is not available from the same multi system operator.

vi) Without prejudice to the provisions contained in sub clauses (ii) to (v) above, a subscriber in a CAS area shall be free to buy a set top box of approved quality (as specified by Bureau of Indian Standards) from the open market, if technically compatible with

the multi system operator's system, and no multi system operator or cable operator shall force any subscriber to buy or take on rent the set top box from him/her only. The multi system operator/cable operator shall transmit the requisite pay channels through the set top box acquired by the subscriber on his own.

vii) In respect of Chennai, a subscriber shall have the option to opt for the tariff packages as per sub clauses (i) to (vi) above, or to continue with the existing rental or lease scheme.”

15. Clause 5 provides for tariff for supply of set top boxes in the CAS areas. The Schedule appended thereto provides for Standard Tariff Package (STP) for set top boxes wherein, as indicated heretobefore, various options are provided for; one of them being for rent, the quantum of rental having been fixed. However, so far as DTH operators are concerned, the TRAI did not make any regulation and left it to the market forces.

16. It is, however, of some interest to notice that with the march in technology, various improvements were affected. DTH technology comprises of :

- (i) Compression technology, both MPEG 2 and MPEG4*
- (ii) transmission technology, comprising both DVB-S and DVB-S2 and*
- (iii) encryption technology, being CoNAN, NDS, Irdeto, Nagravision.*

17. The BIS standards, indisputably, relate to MPEG2 technology and not MPEG4. The TRAI in its recommendation dated 30.01.2008, as indicated hereinbefore, recommended :

- (i) That inter-operability should be retained;
- (ii) Standards should be laid down; and
- (iii) Six months time should be granted.

18. Tata Sky, one of the private operators, however, made a representation which was referred to the BIS. It, however, till date, has not finalized the standards. Ministry of Information & Broadcasting did not accept the recommendations of the TRAI and on or about 11.5.2010 it referred the matter back to it, stating:-

(ii) Different technologies and standards (MPEG-2, MPEG-4/DVB-S, DVB-S2) are now available for signal transmission and compression and some others are being tried and developed. Such new technologies/standards provide efficient use of available spectrum and transponder space. A technology neutral policy enables the use/adoption of different technologies and standards for the benefit of the operators as well as the subscribers.

(iii) Mandating a particular technology/standard today raises a number of issues while migrating to a new standard. Issues like who should bear the cost burden of switching over to the new technology crop up. It begins to be argued that since government has mandated the new standard therefore government should subsidise the cost of switching

over. Issues of interoperability of equipment with existing customers based on old standards with those operators using new technology/standards crop up and become difficult to address every time a new standard gets developed. On the contrary if the operator is given the freedom to choose a technology, business compulsions themselves will require him to migrate to a better technology and he will himself develop strategies to retain his customer base.

(iv) If a STB is to be interoperable across various DTH technologies and standards, then the STB will have to be built to conform to all such technologies. Such stacking of technologies may increase the size and cost of the STB. Moreover, such a stipulation will benefit only a small percentage of subscribers who wish to switch from one DTH operator to another, but the disadvantages of higher cost and size would have to be borne by each and every subscriber. This defeats the very purpose of providing.”

19. It made a large number of recommendations, some of which may be noticed by us :

“(i) The present BIS specifications for STBs provide for MPEG-2 (DVB-S) standards. The interoperability is provided through a CI slot. The idea is that by inserting a CAM module provided by the DTH operator whose services are required to be received, the STB will be in a position to receive the services of the concerned DTH operator. CAM module is optional in BIS specifications as on date. The ground situation as per available information is that since the cost of CAM modules is as good as the STB itself, no DTH operator is providing CAM modules. Thus interoperability even within the operators using

the same technology and standards i.e.MPEG-2 (DVB-S) is not manifest.

- (ii) Different technologies and standards (MPEG-2, MPEG-4/DVB-S, DVB-S2) are now available for signal transmission and compression and some others are being tried and developed. Such new technologies/standards provide efficient use of available spectrum and transponder space. A technology neutral policy enables the use/adoption of different technologies and standards for the benefit of the operators as well as the subscribers.*
- (iii) Mandating a particular technology/standard today raises a number of issues while migrating to a new standard. Issues like who should bear the cost burden of switching over to the new technology crop up. It begins to be argued that since government has mandated the new standard therefore government should subsidize the cost of switching over. Issues of interoperability of equipment with existing customers based on old standards with those operators using new technology/standards crop up and become difficult to address every time a new standard gets developed. On the contrary if the operator is given the freedom to choose a technology, business compulsions themselves will require him to migrate to a better technology and he will himself develop strategies to retain his customer base.*
- (iv) If a STB is to be interoperable across various DTH technologies and standards, then the STB will have to be built to conform to all such technologies. Such stacking of technologies may increase the size and cost of the STB. Moreover, such a stipulation will benefit only a small percentage of subscribers who wish to switch from one DTH operator to another, but the disadvantages of higher cost and size would have to be borne by each and every subscriber. This defeats the very purpose of providing.*

- (v) *Some DTH operators have even started offering STBs free of cost. Provisioning of technical interoperability requirement across all DTH service providers will increase the cost of STB and free STB schemes may have to be reconsidered by the operators. The ultimate loser will be the subscriber.*
- (vi) *TRAI has also mandated commercial interoperability which gives the subscriber an option to take the STB on rent or hire purchase basis giving him enough flexibility to be able to switchover from one operator to another at least cost.*
- (vii) *Technical interoperability was relevant from the point of view of subscriber earlier since the cost of STB was high. With the cost of the STB coming down, technical interoperability may lose its relevance in the years to come. It is also being argued that there is enough competition in the market to provide the consumer with wide choice and reasonable prices.*
- (viii) *Even the requirement of Technical interoperability within DTH service providers will not provide the option to migrate from a IPTV service provider for which a different STB/CPE will be required. Commercial interoperability in that context is a better option.*
- (ix) *Limited technical interoperability within the same technology and standards is also difficult to achieve for the following reasons :-*
- a. *There are two components in STB (1) Hardware (2) Software, which includes Conditional Access System (CAS). Due to selection of different CAS by DTH operators there is no STB of open architecture. As such presence of CAS makes all STBs proprietary in nature. This goes against the requirement of technical interoperability.*
 - b. *All new technologies are usually backwardly compatible and not formally compatible. MPEG-2 and MPEG-4 are separate compression*

standards. Hence their decoding chips do not decode each other. However new MPEG-4 STBs are able to decode MPEG-2 signals if MPEG-2 decoder chip and associated software is placed on it along with MPEG-4 decoding chip on the mother board.

- c. Similarly DVB-S2 STBs can decode DVB-S signals if DVB-S chip and associated software is placed on it along with DVB-S2 chip on the mother board.*
- d. Due to the presence of proprietary CAS there is no possibility for limited technical interoperability of STB among various DTH operators.*

TRAI is requested to take into account above factors while furnishing its recommendations on, whether requirement of technical compatibility and effective interoperability among different DTH service providers needs to be continued with as it is, or in a modified form, or should be dispensed with.”

20. We may furthermore notice that the TRAI on 20.8.2010 had issued a Consultation Paper in respect of the following issues :

“2.14 Is it possible to have an Open Architecture based Set Top Box (STB) for DTH services that could ensure technical interoperability i.e. technical compatibility and effective interoperability among different DTH operators who have adopted same or different standards?

2.15 If yes, how can the interoperability be implemented and what would be the implications to the stakeholders?

2.16 *Is there a need to mandate any particular standard so that the objectives of technical interoperability can be achieved? If so, which standard?*

2.17 *If technical interoperability for STB is not possible, is there any other mechanism to safeguard the interests of the subscribers.*

2.18 *Any other relevant issue that you may like to mention or comment upon.”*

21. In the said Consultation Paper, the TRAI stated :

“DTH service providers currently follow different standards in terms of transmission, compression and encryption technologies. Resultantly, a separate Set Top Box (STB) is required for each service provider. Technical interoperability enables subscriber to receive signals from any DTH service provider using same STB. In the year 2008, TRAI had recommended that technical interoperability be part of the license conditions. However, in view of the increased number of DTH operators and standards, M/o I&B has recently requested the Authority to reconsider the issue of technical interoperability.”

22. It has furthermore noticed the technical inter-operability issue in respect of different DTH operators in the following terms :-

<i>Sr. No.</i>	<i>DTH operator (Year of starting operations)</i>	<i>Transmission standard</i>	<i>Compression standard</i>	<i>Conditional Access Services (encryption)</i>
1.	<i>Dish TV (2003)</i>	<i>DVB-S</i>	<i>MPEG-2</i>	<i>Conax</i>
2.	<i>Doordarshan (DD Direct Plus) (2004)</i>	<i>DVB-S</i>	<i>MPEG-2</i>	<i>No encryption is done.</i>
3.	<i>Tata Sky (2006)</i>	<i>DVB-S</i>	<i>MPEG-2</i>	<i>NDS</i>
4.	<i>Sun Direct TV (2007)</i>	<i>DVB-S</i>	<i>MPEG-4</i>	<i>Irdeto</i>
5.	<i>Reliance BIG TV (2007)</i>	<i>DVB-S</i>	<i>MPEG-4</i>	<i>Nagravision</i>
6.	<i>Bharti Telemedia (Airtel Digital TV) (2008)</i>	<i>DVB-S2</i>	<i>MPEG-4</i>	<i>NDS</i>
7.	<i>Bharat Business Channel (Videocon d2h) (2008)</i>	<i>DVB-S2</i>	<i>MPEG-4</i>	<i>Irdeto</i>

23. In the aforementioned backdrop of events, the Union of India states that in the present day context, it is not practically feasible to give effect to the inter-operability. It, however, also states that it would be ready and willing to abide by any direction, which may be issued by this Tribunal. We may, at this juncture, notice the submissions made by the parties hereto.

Submissions

24. We may, at the outset, notice that a preliminary objection has been taken with regard to jurisdiction of this Tribunal.

25. Indisputably, the private operators are bound to comply with the directions and orders issued by the Union of India as also by the TRAI for the purpose of ensuring compliance.

However, according to Mr. Navin Chawla, the learned Amicus Curiae, none of the six operators have been complying with the said regulations. The Dish TV (Respondent No.4), Reliance Big TV (Respondent No.7) and Bharat Business Corporation (Respondent No.8) have, however, contended that they had been complying with the requisite conditions of license as also the Regulations.

26. The other respondents did not say the same. The Respondent No.7, however, according to Mr. Chawla, stated in regard to the hire purchase agreement :-

“This offer will be given only if customer subscribes Big TV services for minimum period of one year. Smart card remains the property of company. In case Big TV service is not subscribed by customer, Big TV has right to debit Rs.100 per month in case the customer fails to pay EMI for two consecutive months during the hire purchase

tenure. Big TV has the right to re-possess all the Customer Premise equipment.”

27. According to Mr. Chawla, it has not stated anything about giving of equipments on rental basis. According to learned counsel, so far as the outright sale of STB is concerned, the respondent started charging Rs.100/- per month even in a case where the subscriber does not avail its services. In case of hire purchase, a period up to 12 months have been given but a subscriber cannot opt out to take its services within the aforementioned period up to 12 months and if it does so, it would be charging Rs.100/- per month. In the aforementioned context, our attention has been drawn to the webpage of the said respondent being at page 669 of the paper book.

So far as Dish TV is concerned, although in its reply it mentioned about a report of compliance, our attention has been drawn to its supplementary report dated 25.01.2010, wherein it has been mentioned :

“An information was received by the Commission regarding lack of interoperability amongst different DTH Service Providers. After examination of the allegations in the information, the Commission vide its order dated 30th June, 2009 directed the undersigned to conduct an investigation to be made into the matter. After investigation, the investigation report was submitted by the undersigned to the Commission on 24.9.2009. Subsequently, a supplementary report was sought by the Commission covering some

specific aspects of the information contained in the issue, vide its order dated 27.10.2009.

2. The supplementary report incorporating the issues raised by the Commission was submitted to the Commission on 03.12.2009. This supplementary report was considered by the Commission in its meeting held on 05.01.2010. After having gone through the supplementary report, the Commission, vide its order No. File 1(2) 2009-Sectt. Dated 08.01.2010, sought additional supplementary report with regard to DTH Service Providers forcing the consumers to enter into a tie-in arrangement.”

28. It is further the case of the respondents that the matter is pending consideration before the Competition Commission and as such this Tribunal has no jurisdiction. Mr. Chawla would contend that the aforementioned contention of the respondent is only misconceived being covered by the decision of this Tribunal rendered in *Sea TV Network Ltd. v. Star India Pvt. Ltd.*, reported in 2005 Cable Cases page 90.

29. The 3rd preliminary objection taken by the respondent are that one petition filed under Article 32 of the Constitution of India before the Supreme Court of India has been dismissed being *Vijay D Adhia v. Union of India*, Writ Petition (Civil) No. 116 of 2008 in the following terms:

“No ground is made out for our interference under Article 32 of the Constitution. This petition is thoroughly misconceived and is accordingly dismissed.”

30. Mr. Chawla, however, would contend that such dismissal *in limine* does not attract the principle of res-judicata. Reliance in this behalf has been placed on V. Purushottam Rao v. Union of India reported in (2001) 10 SCC page 305.

Another petition filed before this Tribunal has been permitted to be withdrawn being Petition No. 150 (C) of 2008 – Federation of Consumers Associations, West Bengal Vs. Tata Sky Ltd.) disposed of on 21.01.2010 in the following terms :-

“It is stated that TRAI has made recommendations in regard to the matter, which is subject matter of prayer (b). It is accepted at the Bar that it is Government who has to take a policy decision in this regard. In this view of the matter, Mr. Navin Chawla seeks permission to withdraw this petition.

This petition is dismissed as withdrawn.”

31. Mr. Chawla urged that the said order can also not operate as res-judicata.

Mr. Chawla would contend that having regard to the provisions contained in Section 14 and Section 14-A (i) of the Telecom Regulatory Authority of India Act, 1997 (The 1997 Act), though the petitioner is a society

and stricto-sensu not a group of consumers, any person will have locus standi to file an appropriate application, if inter-alia the nature of dispute before this Tribunal is between a group of consumers and a service provider. Our attention in this behalf has also been drawn to Sections 12, 13 & 29 of 1997 Act to contend that the TRAI is a necessary party to the petition as it has failed to discharge its functions so far as interest of the consumer is concerned; to ensure the quality of service norms, for which purpose it may

- (i) call for information;*
- (ii) conduct an inquiry in this regard;*
- (iii) issue directions from time to time; and*
- (iv) even to launch a prosecution under Section 29 of the Act.*

32. Mr. Ravindra Agarwal, the learned counsel appearing on behalf of the Union of India, however, submitted that despite Clause 7.1 of the licence agreement, till date technical inter-operability between various DTH operators has not been achieved; stating that the technical inter-operability was sought to be achieved by means of common interest between the CI slot with each of the DTH operators were required to provide in their STBs. However, in the said CI slots, a Conditional Access Module (CAM) would be fitted and through which the signals between different DTH operators could be received. The said CAM was to be supplied by the respective DTH operators, to which consumer wanted

to migrate to. The learned counsel would contend that the technical interoperability has not been able to manifest itself in as much as : -

- (i) Cost of CAM may be the same as that of STB and no DTH provider is, therefore, providing CAM module;*
- (ii) The technology since 2002-2003, when the standards were made, has evolved and newer modes of compression and transmission have developed. At the time, when the standards were laid, the technology for compressor was MPEG2 and data transmission standard was DVB-S. However, the latest technology for compression is MPEG-4 and data transmission standard is DVB-S2. Whereas MPEG-4 offers greater economy in utilization of transporter capacity, four of that existing six private DTH operators use MPEG4 technology. MPEG2 is not upward compatible with MPEG4 and DVB-S is not upward compatible with DVB-S2.*

33. According to the learned counsel, for laying down the standards by BIS, the stakeholders expressed their views as also problems in the meetings held on the implementability of the TRAI's recommendations, in which the DTH operators had cited a number of reasons as regards non viability of the proposed system. According to the learned counsel, the Ministry of Information & Broadcasting has comprehensively examined the issue. Keeping

in view the ground reality, interest of subscribers, the difficulties indicated by the DTH operators and technical & economical issues, has referred the matter to the TRAI again for its recommendations.

34. Mr. Meet Malhotra, the learned Senior Counsel appearing on behalf of the TRAI would inter-alia contend that having regard to various permutations and combinations vis-à-vis mix and match technology, Technical interoperability could not yet be achieved.

The learned counsel contends that the TRAI has been performing its duties so far as compliance of commercial interoperability is concerned.

35. Mr. Maninder Singh, the learned Senior Counsel appearing on behalf of the Respondent No.4 (Dish TV) submitted :-

- (i) The fact that ultimately the cost has to be borne by the operator, no grievance can be raised that the equipment costing Rs.2000/- should be made available at Rs.200/-. Keeping in view the legal position that the license condition must be complied with the BIS standards, only those like the respondent No.4, who are using MPEG2, must be held to have complied with the BIS standards, others have not.

- (ii) The purpose of technical inter-operability, which is to be applied in two different phases namely inter interoperability and intra interoperability keeping in view the different technologies used in MPEG2 and MPEG4 and furthermore in view of the fact that the BIS standards applies only MPEG2 technology, the Respondent No.4 is ready and willing to supply a CAM if somebody intends to shift to the respondent. However, our attention has been drawn to the fact that various new entrants have raised a hue and cry in regard thereto.
- (iii) From the reply of Dish TV, it would appear that the set top boxes supplied by Respondent No.4 had been verified by the Broadcasting Engineering Consultant India Ltd. (BECIL), which is a technical body operating under the Ministry of Information & Broadcasting, Government of India and as in view of the fact that the only condition required to be complied was to have such set top boxes to be verified by it, and as admittedly the said Respondent has complied with the standard laid down by BIS, no other or further compliance can be directed.
- (iv) The Respondent No.4 has continuously been supporting the cause of interoperability for the DTH sector in various forums including Respondent No.1 and Respondent No.2. Our attention in this behalf has been drawn to a letter dated 08.02.2008 addressed to the Secretary of the Ministry of Information & Broadcasting.

- (v) In view of the stand taken by the Union of India and the replies to some of the queries, the licences should be revoked if the licensees cannot comply with the requirements. It was further pointed out that even if the BIS laid down its standard for MPEG4, it may not work having regard to technology involving the DVB-S and DVB-S2.

36. Mr. Gopal Jain, learned counsel appearing on behalf of Respondent Nos.5 & 6 urged :-

- (i) As the petitioner is a stakeholder, it can take part in the consultative process having regard to the directions of the Competition commission that subscriber should take a package of Rs.999/-, this Tribunal should not interfere in the matter.
- (ii) Having regard to Section 21 of the Competition Act, this Tribunal may also seek for expert evidence.
- (iii) Having regard to the dismissal of the Writ Petition by the Supreme Court of India as also this Tribunal, this petition should be held to be premature and misconceived.

37. Mr. Akhil Sibbal, learned counsel appearing on behalf of Reliance Big TV, Respondent No.7, would urge :-

- (i) This Tribunal has no jurisdiction having regard to Section 14 of the Act and the terms 'any person' used in Section 14-A does not refer to the locus standi of a person but the subject matter of the dispute and in view of the fact that there is no substantial dispute between a Group of Consumers and a Service Provider, the petition is not maintainable.
- (ii) This Tribunal being a creature of statute, it cannot entertain any petition in the nature of public interest litigation.
- (iii) The petitioner is not aggrieved as it is nobody's case that the standard laid down by BIS is mandatory in nature;
- (iv) Having regard to the provisions contained in clause 7.1, the specification having not being applicable in relation to MPEG4, the respondent has not committed any violation;
- (v) Keeping in view the provisions of Clause 4 of 2007 Regulations framed by TRAI, the specifications laid down from time to time should be held to be applicable and as the same do not control MPEG4, the question of applicability thereof does not and can not arise.
- (vi) Clause 7.2.1 merely refers to Open Architecture and the Government having not laid down any specification in relation

thereto, no violation can be said to have been committed in regard to the license conditions.

- (vii) In any event, Clause 3.1.1 does not provide that CAM should be provided and, that Respondent No.7 must be held to have complied with the statutory requirements.
- (viii) The Respondent No.4 having filed a certificate issued by the manufacturer that it is technically interoperable and keeping in view the fact that MPEG4 technology can be applied to MPEG2 and not vice-versa, it is incorrect to contend, as has been done by Dish TV that only those, who have resorted to the technology of MPEG2, have complied with the legal requirements.
- (ix) So far as the MPEG4 technology is concerned, no specification has been provided and as a matter of fact if it is otherwise compliant, respondent No.4 must be held to have complied with the requirements of the regulations.
- (x) It is not correct to contend that Respondent No.4 does not offer the rental scheme to the subscribers as 100% of its subscribers have opted only for the rental scheme.
- (xi) Submission of Mr. Chawla with regard to the hire-purchase agreement is not correct. TDSAT will have to have a fresh look at

the matter keeping in view the fact that MPEG4 is a more advanced technology.

38. Mr. Ramji Srinivasan, learned Senior Counsel appearing on behalf of Respondent No.3 would urge that this issue being a policy issue, this Tribunal should not interfere therewith, particularly when the Government of India has given a guideline while referring the matter back to the TRAI.

39. Mr. Ladule Sandeep. S., Learned Counsel appearing on behalf of the Respondent No. 8 would *interalia* submit : -

(a) The services rendered by the respondent are interoperability compliant both in terms of technical as well as commercial interoperability.

(b) The respondent having been transmitting its signal on MPEG 4 Platform and it having been applying D2HV Mechanism, it vis-a-vis the Dish TV and Tata Sky, is

- (i) able to detect the Dish TV signals,
- (ii) able to scan the services,
- (iii) able to download the channel list,
- (iv) able to view all the FTA Channels,

Whereas Dish TV is unable to detect the D2H signal, unable to scan the services and, therefore, is technically incompatible.

- (c) Whereas the D2H is able to
1. Detect the Sundirect Signal
 2. To scan the services
 3. To download the channel list
 4. View all FTA channels

The Sundirect signal would be unable to

1. detect the D2H signal,
2. scan the services,
3. otherwise technically incompatible

- (d) As the said respondent had been using a software which may be termed as 'middleware' making itself fully interoperable, as would be evident from the following chart :

VIDEOCON d2h

Compatibility

Technology Compatibility	VIDEODON D2H	BIG TV	AIRTEL	SUN TV	DISH TV	TATASKY
DVB-S QPSK/MPEG-2	√	√	√	√	√	√
DVB-S						

QPSK/MPEG-4	√	√	√	√	X	X
DVB-S2 QPSK/MPEG-4	√	√	√	X	X	X
DVB-S2 8PSK/MPEG-4	√	X	√	X	X	X

- (e) For the purpose of achieving interoperability, the open architecture should be held to be mandatory for the user so that the downlink parameters of the STB based on the chosen service provider specification can be modified and flexibility is given to STB so that the same can be used with all the available security providing specific software.
- (f) For the purpose of achieving interoperability, a mandatory CI slot is necessary as per BIS standards which all the STB manufacturers must comply with and which is required to ensure that whenever a CAM Module with an activated smartcard of any service provider is inserted into the slot, the HTV should be able to decrypt the encrypted signals of that service provider without any technical glitch.
- (g) For the said purpose, a CAM module which is an electronic device and is inserted in the CI slot of the STB so as to enable it to help decryption of the encrypted video signals and is based on the encryption technique and is vendor specific but the same is not

freely available in the market although it is illegally available in the grey market at an approximate cost of Rs. 3000/-.

- (h) Supply of STB set being not a licensed condition, the same does not come within the purview of Clause 7.1.1. The set top box are provided so that the same can decode all types of signals, whether MPEG2 or MPEG4, whereas the BIS Specification prescribed the minimum, the respondent provides a CAM which is compatible not only with MPEG2 but also MPEG4.
- (i) Having regard to the recommendations made by the TRAI as far back as in January 2008, this Tribunal should direct the other broadcasters to supply STBs which are technically compatible with the respondent's interoperability.
- (j) So far as the encryption is concerned with CAM and viewing card, which is a proprietary article, the effective interoperability would be achieved.
- (k) MPEG-4 should be resorted to as not only thereby the spectrum and bandwidth are saved, there will be more clarity and the difference between the two may be compared to be that of VCD and DVD. The regulator, the Union of India should issue directions, keeping in view the consumer's interest.

40. Our attention has been drawn to the recommendations of the TRAI dated 22.7.2010 in regard to the policy issues relating to up-linking / down-linking of the Television Channels of India, wherein it was stated that the technology is continuously evolving for achieving optimal result and therefore choice of a technology is more of a periodic decision making rather than a one-time decision and in that view of the matter also this Tribunal should not entertain this petition. It was also submitted that any interference in the matter will have an economic ramification so far as stacking of technology is involved. What should be done being the primary concern of the TRAI, this petition is premature.

Jurisdiction Issue

41. The Act is a complete code in itself.

It was enacted so as to inter alia constitute a Tribunal, which can adjudicate a dispute between the parties specified in Section 14 of the Act including one between a service provider and a group of consumers.

It's jurisdiction is limited only by the proviso appended thereto. It is also entitled to hear and dispose of appeals against any direction, decision or order of the TRAI under the Act.

Section 14-A provides that Central Government or a State Government or a Local Authority or any person, as the case may be, may make an application

before this Tribunal for adjudication of a dispute referred to in Sub-section of Section 14.

42. The petitioner herein is a society registered under the Societies Registration Act. It is, therefore, a person within the meaning of Section 14-A of the Act. It is entitled to bring to this Tribunal's notice that a dispute exists between a service provider and a group of consumers. This Tribunal has a wide jurisdiction keeping in view the fact that even jurisdiction of the Civil Court is barred as provided for in Section 15 of the Act. This Tribunal while deciding a matter, is not governed by the provisions of Code of Civil Procedure, 1908 (The Code) but by the principles of natural justice.

It has powers to regulate its own procedure. It is a Civil Court within the meaning of Section 195 and Chapter XXVI of the Code of Criminal Procedure, 1973. The proceedings before it are judicial proceedings within the meaning of Sections 193 and 228 as also for the purposes of Section 196 of the Indian Penal Code. Any order passed by this Tribunal in terms of Section 19 of the Act is executable as a decree of the Civil Court and for the said purpose, this Tribunal has all the powers of a Civil Court including the power to transmit any order made by it to a Civil Court having the local jurisdiction and such Court shall execute the order as if it was a decree made by that Court.

Section 20 of the Act provides for penalty for willful failure to comply with the order of the Appellate Tribunal.

43. One of the important distinctions between a 'Court' and a 'Tribunal' is that whereas a Tribunal will have no power to execute its own order, a Court will have.

While adjudicating on an original petition, this Tribunal may take evidence. It would, therefore, be a Court within the meaning of Section 3 of the Indian Evidence Act. It can, subject to the provisions of the Act, also relax the procedure framed by it. If it is a Court, admittedly it will have inherent power. It can do anything, which is necessary to give effect to its order and/or incidental or supplemental thereto.

It is trite law that even the Tribunals will have jurisdiction, which is inherent in it, as for example even in absence of any provision, direct amendment of petition, pass an interim award or order, set aside an ex-parte decree etc.

In *Grindlays Bank Ltd. v. Central Govt. Industrial Tribunal* reported in 1980 (Supp) SCC 420; AIR 1981 SC 606, it is stated :-

“6. We are of the opinion that the Tribunal had the power to pass the impugned order if it thought fit in the interest of justice. It is true that there is no express provision in the Act or the rules framed thereunder giving the Tribunal jurisdiction to do so. But it is a well known rule of statutory construction that a Tribunal or body should be considered to be endowed with such ancillary or incidental powers as are necessary to discharge its functions effectively for the purpose of doing justice between the parties. In a case of this nature, we are of the view that the Tribunal should be considered as invested with such incidental or ancillary powers unless there is any indication in the statute to the contrary. We do not find any such statutory prohibition. On the other hand, there are indications to the contrary.”

44. In *Rabindra Singh v. Financial Commr., Coop.*, reported in (2008) 7 SCC 663, at page 669, The Supreme Court of India held :-

“18. The said decision, with respect, does not lay down the correct law. All courts in a situation of this nature have the incidental power to set aside an ex parte order on the ground of violation of the principles of natural justice.”

We will deal with this aspect of the matter a little later.

45. The Tribunal has the requisite jurisdiction to examine the legality, propriety or correctness of any dispute raised in any application under Sub-section (7) of Section 14-A of the Act on its own motion or, otherwise call for

the records relevant to disposing of such application and make such an order as it may think fit. It can pass any order keeping in view the public interest as also the interest of the consumer, as would appear from the Preamble of the Act. Wherever, thus, it is necessary to ensure orderly growth of telecom sector and protect the interest of the consumers of telecom sector, this Tribunal will have jurisdiction to act and pass appropriate orders.

46. This Tribunal, inter-alia, in the interest of consumers, and as also for giving effect to the provisions of the Act, in our opinion, should exercise its jurisdiction, inter-alia, in a case where the TRAI or the Government of India despite making a regulation or providing for terms & conditions in the license have not been taking any step.

It may, therefore, in a given case may entertain any letter issued by a person showing sufficient interest in the matter and treat the same to be a petition under Sections 14 and 14-A of the Act. Filing of an application in the manner prescribed by rules is procedural in nature. It can always be relaxed or directed to be waived. The object of creating this Tribunal is redressal of grievances of the stake holders and not to stifle the same. It is expected that the Government would initiate a proceeding whenever it comes to the conclusion that the conditions of license have been violated. Similarly, the TRAI is also expected to act in terms of its jurisdiction under Section 12, 13 & 29 of

the Act The Regulations are meant to be implemented and not remain only as a part of the statute book.

47. It is one thing to say that this petition is not maintainable. But, it is another thing to say that the reliefs as prayed for in the petition may not be granted in their entirety. While doing so, this Tribunal may also keep in mind, the provisions of Order 7 Rule 7 of the Code of Civil Procedure or the principle analogous to it.

So far as the question that the matter has been decided by the Competition Commission is concerned, we may, at the outset notice that Mr. Gopal Jain has failed to answer a query as to whether any objection had been taken to the exercise of jurisdiction of the Competition Commission. The Competition Commission, having regard to the provisions of the TRAI Act and the regulations framed thereunder cannot enforce a regulation made by the TRAI. The conditions of license are laid down under Section 4 of the Indian Telegraph Act. It is a special statute. TRAI Act is also a special statute. We do

not mean to say that the Competition Act is not a special statute. It is. But it is well settled that where the provisions of two special statutes are in conflict, one which deals with the subject matter should prevail over the other, See Ashoka Marketing Ltd. Vs. Punjab National Bank 1990(4) SCC 406 at 441 Para 59 . Moreover, the Competition Commission, in its order dated 24.03.2011 has merely come to the conclusion that there is no violation of Sec. 3 or 4 of the Competition Act. It has also mentioned that

“... the sector regulators are fully seized with the matter and at this stage, there is no competition angle involved.”

The Competition Commission may choose to wait indefinitely till the Regulators, who have been procrastinating a decision over this issue for a long time, but the same cannot be expected of this Tribunal.

47. Furthermore, the matter appears to be covered by a decision of this Tribunal in the case of Sea T.V. Network Vs. Star India Ltd. 2005 Cable Petition page 90 wherein it has been held as under :-

“The petition in hand does not involve any complaint of monopolistic, restrictive or unfair trade practice. What is alleged in the petition is the

violation of the various Regulations which control the trade in the cable sector which is involved in the present petition. From the language of Section 10 of the MRTP Act, it is crystal clear that the Commission thereunder cannot adjudicate a dispute based on violation of a Regulation made under the TRAI Act. Even if the Regulation incidentally trenches on the subject of monopoly and restrictive trade practices, it cannot be said that the dispute is one which could be adjudicated by the Commission under the MRTP Act. This is also clear from the nature of procedure to be followed by the two forums while entertaining a complaint or a dispute. Under Section 10 of the MRTP Act, the Commission is empowered to inquire into a complaint, while under Section 14 of the TRAI Act, the Tribunal is empowered to adjudicate any dispute. In our opinion there is a vast difference between inquiring into a complaint and adjudicating a dispute. This view of ours is further supported by the fact that under the MRTP Act the Commission is only empowered to grant temporary injunctions during the pendency of the inquiry (see Section 12A) and to award compensation for any loss or damaged caused to the Complainant (see Section 12B), it is not authorized to grant wider reliefs like directions like the one sought in the above petition, which can only be done by the Tribunal which is empowered to adjudicate any dispute and pass such orders thereon as it thinks fit (see Section 14A sub-clause (iv)).

Therefore, in our opinion, it is very clear that the disputes arising out of the Regulations framed under the TRAI Act cannot be adjudicated upon, and relief granted under the MRTP Act which could only be done by this Tribunal under Section 14 read with Section 14A of the TRAI Act.

We, however, make it clear that any dispute which is not based on rights and liabilities arising out of TRAI Act or the Regulations made thereunder and pertaining solely to a complaint of monopolistic trade

practice, restrictive trade practice and unfair trade practice only cannot be tried by this Tribunal. In such view of the matter, we are of the considered opinion that since the dispute involved in the petition is not in the nature of a complaint contemplated under Section 10 of the MRTP Act, this Tribunal is not barred from entertaining the above Petition.”

Moreover, the said Act is a later Act. It will, therefore, prevail over the MRTP Act. (See Bank of India Vs. Ketan Parekh (2008) 8 SCC 148.

Res Judicata Issue

48. The proviso appended to Section 14 of the Act is clear and explicit. The jurisdiction of this Tribunal had been limited only in a case where it involves any matter governed by MRTP Act and not otherwise. However, even if a matter like unfair trade practice is involved in a telecommunication matter, which would require a decision on interpretation of the provisions of the Act and the Regulations made by TRAI. In such matter, the Competition Commission will have no jurisdiction.

49. So far as the dismissal of the writ petition by the Supreme Court of India is concerned, we have noticed the contents thereof. The writ petition has been dismissed in limine.

A Writ Petition by the Supreme Court of India under Article 32 of the Constitution of India may be entertained provided the same has anything to do

with violation of any fundamental right as contained in Part III of the Constitution of India and not otherwise. The question of technical interoperability may be laid down as the condition of license and the commercial interoperability may be governed by the 2007 Regulations framed by the TRAI. The same did not attract any provision contained in Part III of the Constitution of India and on that ground alone presumably the Supreme Court of India has dismissed the petition under Article 32.

We may, however, notice that in *UPSRTC v. Omaditya Verma* reported in (2005) 4 SCC page 424, the Apex Court categorically stated that principle of res-judicata would not be applicable when a Special Leave Petition is dismissed in limine.

(See Also Fuljith Kaur v. State of Punjab, (2010) 11 SCC 455 Para 7)

50. So far as withdrawal of the petition filed before this Tribunal, being Petition No. 150 (C) of 2008 is concerned, we have noticed heretofore the same was disposed of on the submission of the counsel that it has become infructuous. As the recommendations of the TRAI was subject matter of the prayer (b) and the same could have been considered only by the Union of India having regard to Sub-section 2 of Section 11 of the Act, the petition was dismissed as withdrawn.

51. Even the same, in view of the decision of the Supreme Court in *V. Purushottam Rao v. Union of India* reported in (2001) 10 SCC page 305, would not constitute Res-Judicata. Apart from the fact that the petitioner is different, the prayers made in this petition are also different. The petitioners have brought to our notice that there exists a condition in the license with regard to interoperability of STBs. Whether the licensee has complied with the said conditions of license as also the quality regulations framed by TRAI is a matter which is required to be considered by us on merit.

52. The merit of the matter is, therefore, required to be gone into. We have noticed heretofore the provisions of the licence recommendation by the TRAI in extensio, it is accepted that despite the conditions of license having been laid down and despite Regulations having been made, the question of interoperability and in particular, the provisions relating technical interoperability have not been complied with.

If technical interoperability has not been complied with, it was necessary both for the TRAI and the Union of India to take such measures, which were appropriate and necessary therefor.

The law cannot, ordinarily be permitted to remain only on paper. If it involves the interest of the consumers, it should be implemented. Why and how it has not been possible, is another story. But only therefor, it cannot be held

that this petition is not maintainable. Any genuine attempt of society like the petitioner in this behalf should not be discouraged only on sheer technicalities.

Preamble of the Act – Effect of

53. It is a well settled principle of law that preamble forms part of the legislation. It is also, however, true that in some decisions it has been held that where the language of the section is clear and unambiguous, preamble cannot be resorted to for the purpose of interpretation thereof; but it is well settled that the said rule is subject to certain exceptions; one being that the statute has to be read as a whole.

54. A statutory scheme, it is well settled must be found out from reading the entire statute. It is also a well settled principle of law that the Act has to be read as a whole and then chapter by chapter and section by section and word by word.

(See *Reserve Bank of India v. Peerless General Finance & Investment Co. Ltd.*, (1987) 1 SCC 424)

(See Also: *Attorney General v. Prince Ernest Augustus of Hanover*, [1957] A.C. 436; [1957] 1 All E.R. 49)

55. In *Arnit Das (1) v. State of Bihar*, (2000) 5 SCC 488, the Supreme Court of India has held as under:

“22. All this exercise would have been avoided if only the legislature would have taken care not to leave an ambiguity in the definition of “juvenile” and would have clearly specified the point of time by reference to which the age was to be determined to find a person to be a juvenile. The ambiguity can be resolved by taking into consideration the Preamble and the Statement of Objects and Reasons. The Preamble suggests what the Act was intended to deal with. If the language used by Parliament is ambiguous the court is permitted to look into the Preamble for construing the provisions of an Act (Burrakur Coal Co. Ltd. v. Union of India). A Preamble of a statute has been said to be a good means of finding out its meaning and, as it were, the key of understanding of it, said this Court in A. Thangal Kunju Musaliar v. M. Venkatachalam Potti. The Preamble is a key to unlock the legislative intent. If the words employed in an enactment may spell a doubt as to their meaning it would be useful to so interpret the enactment as to harmonise it with the object which the legislature had in its view. “

56. A narrow construction defeating the object of the Act must moreover be avoided.

(See G.P Singh, *Principles of Interpretation of Statutes*, Page 127.)

57. In a recent decision in *Tata Power Co. Ltd. v. Reliance Energy Ltd.* reported in (2009) 16 SCC 659, the Supreme Court of India stated that

the long title of a section should be noticed for interpretation of a provision of the statute if the same is ambiguous. We have noticed heretofore the Preamble of the Act. The jurisdictional aspect so far as this Tribunal is concerned, in our considered opinion, must be considered keeping in view the same. It is in the aforementioned situation, the provisions of the entire Act have to be taken into consideration.

Is this Tribunal merely an administrative Tribunal?

We think that this Tribunal for all intent and purport is a Court and not a Tribunal whose jurisdiction is totally circumscribed by statutory rules.

We have no doubt in our mind that this Tribunal performs judicial functions and it for all intent and purport a Court, although may not be a Civil Court.

58. In *B. Prabhakara Rao v. Desari Panakala Rao* reported in (1976) 3 SCC 550, some of the propositions laid down therein are as under :-

“12. We may, as a result of the above discussion, set down the following five propositions:

“1. Stage-carriage permits are granted for providing an efficient public transport system.

2. *The adjudicatory content has dual elements — public interest in the best stage-carriage service and private title to better serve the public,*

3. *The procedure is flexible, free from the rigidity of court trials, and this flexibility flows from the duty of the tribunal, charged with the task of picking out him who has the best plus points for plying a good bus service, to discharge it properly. A people-conscious power cannot be pared down in a self-defeating manner.*

4. *An activist tribunal (RTA, and, in exceptional cases, even the STAT) may even collect useful information bearing on considerations set out in Section 47 and, after public exposure of such information at the hearing and reasonable opportunity to meet it, if anyone is adversely effected, put it into the crucible of judgment.”*

59. Even in the case where a tribunal may have all the trappings of a court, but stricto sensu is not a court, there cannot be any doubt or dispute that it would have all the powers conferred expressly by the statute apart from those incidental and ancillary ones which are necessary to make its orders fully effective.

60. In *Union of India v. Paras Laminates (P) Ltd.*, reported in (1990) 4 SCC 453 it was held as under:

“8. *There is no doubt that the Tribunal functions as a court within the limits of its jurisdiction. It has all the powers conferred expressly by the*

statute. Furthermore, being a judicial body, it has all those incidental and ancillary powers which are necessary to make fully effective the express grant of statutory powers. Certain powers are recognised as incidental and ancillary, not because they are inherent in the Tribunal, nor because its jurisdiction is plenary, but because it is the legislative intent that the power which is expressly granted in the assigned field of jurisdiction is efficaciously and meaningfully exercised. The powers of the Tribunal are no doubt limited. Its area of jurisdiction is clearly defined, but within the bounds of its jurisdiction, it has all the powers expressly and impliedly granted. The implied grant is, of course, limited by the express grant and, therefore, it can only be such powers as are truly incidental and ancillary for doing all such acts or employing all such means as are reasonably necessary to make the grant effective. As stated in Maxwell on Interpretation of Statutes (11th edn.) “where an Act confers a jurisdiction, it impliedly also grants the power of doing all such acts, or employing such means, as are essentially necessary to its execution”

61. The status of a Tribunal depends on the statutory scheme. Some Tribunals may not be a Court. Some may be truly and effectively substitute for a Civil Court. Some may be a Court but not Civil Court.

{See Nahar Industrial Enterprises Ltd. vs. Hongkong & Shanghai Banking Corpn. Reported in (2009) 8 SCC 646}

62. In *V. Laxminarasamma v. A. Yadaiah*, (2009) 5 SCC 478, the Supreme Court of India stated the law thus : -

“25. The Special Courts and Tribunals, indisputably are entitled to determine any question or issue including the question of title or possession in the proceedings initiated before it. Special Courts and the Tribunal not only have trappings of a court but also of a civil court and, thus, are entitled to determine complicated questions of title. Would the question of adverse possession be beyond the purview of its jurisdiction is the question.”

It was furthermore observed:

“38. No law says that if a new forum is created by a special statute in terms whereof the jurisdiction of the civil court becomes barred, the Tribunal constituted thereunder must be a substitute for a civil court, not only with regard to all its powers but also with all its deficiencies. If the Special Act satisfies substantive due process, in our opinion, the same would satisfy the legal requirements.”

63. If a Tribunal is held to be a Court, it has inherent power so as to enable it to execute its own orders or even pass interim order.

In *Allahabad Bank v. Radha Krishna Maity*, (1999) 6 SCC 755, the Apex Court held as under :-

“8. It is true that in the above case this Court was not concerned with the power of the Tribunal to pass an order of injunction or stay (or an ex parte interim order or stay) other than the type of injunction or stay enumerated in sub-section (6) of Section 19 of the Act. But that in our opinion makes no difference, for the following reasons.

9. *The scope and the extent of the powers of the Tribunal are mainly referred to in sub-section (1) of Section 22 of the Act which says that the Tribunal shall not be bound by the procedure laid down by the Code of Civil Procedure but shall be guided by the principles of natural justice. As stated in Grapco by this Court, the Tribunal can exercise powers contained in the Code of Civil Procedure and can even go beyond the Code as long as it passes orders in conformity with the principles of natural justice. We may add that Section 19(6) does not in any manner limit the generality of the powers of the Tribunal under Section 22(1). It merely states that certain types of injunction of stay orders may be passed by the Tribunal. It is to be noticed that sub-section (6) of Section 19 starts with the words — “The Tribunal may make an interim order” The provision is an enabling provision and merely states that certain types of injunction or stay orders mentioned therein can be passed by the Tribunal but such an enumeration cannot, in our opinion, be deemed to be exhaustive nor restricting the Tribunal’s powers only to those types of injunction or stay orders. The width and amplitude of the powers are to be gathered from Section 22(1) as stated in Grapco¹. In addition, Rule 18 enables the Tribunal to pass orders to secure the ends of justice.*

10. *Thus, we are of the view that the Tribunal certainly has powers to pass other types of injunction orders or stay orders apart from what is stated in Section 19(6). It may issue notice and after hearing the opposite side, pass orders. Or, it may pass ad interim orders without hearing the opposite side and then give a subsequent hearing to the opposite party and pass final orders. We may also point out that Section 22(2) too does not limit the general powers referred to in Section 22(1). All that Section 22(2) states is that in*

respect of the type of applications falling under (a) to (h), the Tribunal has only powers as are vested in a civil court.”

64. The question also came up for consideration in *Nahar Industrial Enterprises Ltd. (Supra)* in the context of making a distinction between a Court and a Civil Court in the light of the provision of Sec.25 of the Code of Civil Procedure before the Supreme Court of India, wherein upon considering a large number of cases, it was opined as under :-

“99. The court would be subordinate to the High Court in terms of the provisions of the Code only in the event it comes within the purview of the hierarchy of the court as contained in Section 3 of the Act (sic the Code). This, however, does not mean that even when the Presiding Judge or the Presiding Officer of the court exercises power conferred upon it under a statute still then it would not be a court subordinate to the High Court. A court while adjudicating a dispute under the Employees’ State Insurance Act or a Reference Court under the Land Acquisition Act, Election Tribunal or a tribunal acting as a Motor Accidents Claims Tribunal, while exercising revisional jurisdiction from an order passed by the Executive Magistrate under the Code or exercising an appellate power under special statutes like the Municipal Acts would still be a court subordinate to the High Court. However, for the aforementioned purpose the Presiding Officer must be holding a court which would otherwise come within the purview of the hierarchy of the courts.”

65. From the aforementioned decision, there cannot be any doubt or dispute that the Courts and the Tribunals will be entitled to exercise inherent powers.

In Gajendra Haldea S/o Late Shri Rao T.N. Haldea v. Central Electricity Regulatory Commission and Ors. (Petition No. 1 of 2005 and I.A. Nos. 1 and 32 of 2006, disposed on 22.12.2006), the Appellate Tribunal for Electricity posed a question whence the learned Counsel for the respondents, by way of preliminary objections, urged before it that the petition was not maintainable for various reasons including :-

“That the petition is by way of public interest litigation and there is no provision in the Act under which such a petition could have been filed.”

It was answered in the following terms :-

“12. The power under Section 121 of the Act belongs to the Tribunal and can be exercised both on the administrative and judicial sides. It is to be utilized for keeping the Regulatory Commission on the statutory track in case it deflects from the course or to prevent the danger of such deflection by an advance ruling. When a party files a petition under Section 121 of the Act he is merely acting as an informer. He has no vested right in moving the petition. It is the prerogative of the Tribunal to consider whether or not cognizance of the same should be taken. It is also for the Tribunal to decide the extent to which notice of the information contained in the petition should be taken. It is only in the rarest of the rare cases that the Tribunal is to be moved under Section 121 of the Act by a party. The provisions of Section 121 of the Act

cannot be invoked by a party unless the issue has nexus with the performance of the statutory functions of any Regulatory Commission and has far reaching implications, gravely affecting the electricity sector of the country. In the instant case, we have taken cognizance of the petition as we find that the points raised in the petition have far reaching implications affecting the electricity industry in India and the consumers of electricity.

13. *In the circumstances, the preliminary objections raised by the respondents are hereby rejected”*

66. The National Consumer Disputes Redressal Commission also in **Ajay Kumar v. Godfrey Phillips India Ltd.**, Revision Petition No. 40 of 2002, Decided On: 20.02.2006 reported in 3(2006)CPJ178(NC), opined as under :-

“34. As regards the next point urged by Mr. Desai that the complaint is not maintainable as there was no irregularity or jurisdictional error committed by the State Commission and on this ground this Commission would not be justified in passing any order interfering with the impugned order. We do agree to certain extent with the submission that in an ordinary course, this Commission should not interfere if there was no apparent jurisdictional error or any material irregularity in the order passed by the State Commission on the date when the order was passed. But, at the same time, this Commission could not be oblivious to the fact that application for withdrawal was moved before disposal of the appeal but it remained pending before the Civil Court and the withdrawal of the civil suit subsequently and still further where not only individual but the public at large is likely to be sufferer in the matter like the present one due to unfair trade practice. In such matters,

this Commission is supposed to protect larger public interest to further the aims and objects of the Consumer Protection Act.”

Extent of Jurisdiction of this Tribunal

67. What is the scope and purport of the jurisdiction of this Tribunal is the question.

68. In *Union of India v. Tata Teleservices (Maharashtra) Ltd.* reported in (2007) 7 SCC 517, it was held :

“15. *A plain reading of the relevant provisions of the Act in the light of the Preamble to the Act and the Objects and Reasons for enacting the Act, indicates that disputes between the parties concerned, which would involve significant technical aspects, are to be determined by a specialised tribunal constituted for that purpose.*

...

16. *The Act is seen to be a self-contained code intended to deal with all disputes arising out of telecommunication services provided in this country in the light of the National Telecom Policy, 1994. This is emphasised by the Objects and Reasons also.*

...

18. *If a subject-matter is capable of being raised before TDSAT by the Central Government or the State Government by way of a claim by making an application under Section 14 of the Act, it would not be logical to hold that the same claim could not be made by way of a counterclaim when the other side, namely, the licensee or consumers,*

had already approached TDSAT with a claim of their own and the Central Government is called upon to defend it.”

69. The Supreme Court of India has, thus, gone to the extent of opining that keeping in view the width of the jurisdiction of the TDSAT, a person, who is yet to become a licensee, but only the lowest bidder would be entitled to file a petition before this Tribunal. A potential licensee has, thus, been held to be a licensee for the purposes of the provisions of this Act.

70. The question came up for consideration in *Cellular Operators Association of India and Others v. Union of India and Ors* - P. No. 286 of 2007 decided on 31st March 2009 wherein also this Tribunal has noticed the wider jurisdiction of this Tribunal.

(See also– BSNL v. TRAI - Appeal No. 1 and Appeal No. 8 of 2006 decided on 21st May, 2010)

Dispute – meaning of

71. It has, however, been submitted before us that this Tribunal’s jurisdiction is limited to adjudicate any dispute, which according to Mr. Malhotra must mean assertion of a right by one person the denial thereof of the other.

Strong reliance in this behalf in has been placed on *Major (Retd.) Inder Singh Rekhi v. Delhi Development Authority* reported in (1988) 2 SCC 338.

72. The interpretation of the term 'dispute would, in the opinion of this Tribunal depend on the nature, object and purport of the statute. Indisputably, keeping in view of the statutory scheme, if a civil suit is maintainable or even in some cases a judicial review is maintainable, a proceeding in terms of section 14 of the Act would also be maintainable.

73. The word 'dispute', we may notice, has been considered differently in different statutes.

For the purpose of *Employers and Workmen Act, 1875*, in *Clemson v. Hubbard* reported in (1875) 1 Ex. D. 179 the word "Dispute" has been defined as :-

"DISPUTE IN THE EMPLOYERS AND WORKMEN'S ACT (1875) (38 & 39 Vict. C. 90) S.4, includes a complaint made by the employer as to the conduct of the workman [Clemson v. Hubbard, (1875), 1 Ex. D. 179]

The word "dispute" in S. 54, Bombay Co-operative Societies Act (21 of 1940), is not the same thing as a cause of action or the mere incurring of a liability. It cannot be altogether divorced from the connotation of a claim or demand or a question at issue. "Dispute" implies some kind of

disagreement between the parties concerned, some reference to a legal claim or liability. (48 Bom LR 104)

The term 'dispute' in its wider sense may mean the wranglings or quarrels between the parties, one party asserting and the other denying the liability. P. Neelaicanteswararaju v. J. Mangamma, AIR 1970 AP 1 at 7 (FB). [Andhra Pradesh (Andhra Area) Estates (Abolition and Conversion into Ryotwari Act) (26 of 1948), S. 56(1)1]

S. 2(j) defines 'dispute' as follows : "dispute" means any matters capable of being the subject of civil litigation and includes a claim in respect of any sum payable to or by a co-operative society whether such claim be admitted or not. Co-operative Milk Societies Union Ltd. v. State of West Bengal, AIR 1958 Calcutta 373, 375. [Bengal Co-operative Societies Act (21 of 1940), S. 2(j)]

The dispute under sub-sec (5) means the difference between the fair amount of compensation stated by the Central Govt. and the person or persons interested in the compensation. Union of India, Through the Managing Director, National Coal Development Corporation v. Borrea Coal Co. Ltd., AIR 1974 Pat 233, 238. [Coal Bearing Areas (Acquisition and Development) Act (20 of 1957), S. 14(5)]

The term "dispute" means a controversy having both positive and negative aspects. It postulates the assertion of claim by one party and its denial by the other. The term has been used in a narrower sense limited to contested claims of a civil nature which could have been decided by civil or revenue Courts, but for the provisions with regard to compulsory arbitration by the

Registrar or his nominee. Gujarat State Coop. Land Development Bank v. P.R. Mankad reported in AIR 1979 SC 1203, 1207. [Gujarat Cooperative Societies Act, 1961 (10 of 1962), S. 96]

The word, 'dispute' occurring in Sec. 30 means a quarrel between two or more rival parties laying claim over the whole or any part of the compensation money. Phogesh Misao v. Collector of Land Acquisition, AIR 1977 Gauhati 47. 50. [Land Acquisition Act (1 of 1894), S. 30]

The meaning of the word "dispute" is, "a controversy having both positive and negative aspects. It postulates the assertion of a claim by one party and its denial by the other." Canara Bank v. National Thermal Power Corporation, 2001(1) SCC 43.

A conflict of claims or rights. Wherever one party to a contract requests something from the other party under the terms of their contract and that request is not complied with, there is a dispute. Ellering Bros. Ltd. v. Klinger, (1982) 2 All ER 737. (Banking)"

74. We may furthermore notice that the word "dispute" within the meaning of the provisions of the Arbitration Act shall also depend upon the nature of the arbitration agreement contained in the contract.

75. In a given case, as for example where a bill has been submitted but has not been responded to and/or has not been paid for a long time, although no

denial thereto had been made, may itself be held to be a “dispute” within the meaning of the Arbitration Agreement.

76. In *McDermott International Inc. v. Burn Standard Co. Ltd.* reported in (2006) 11 SCC 181, in the context of an arbitration agreement only, a Division Bench of the Supreme Court of India held as under :-

“117. In Major (Retd.) Inder Singh Rekhi v. Delhi Development Authority, whereupon Mr Mitra placed strong reliance, an award made under the old Act was in issue. A dispute had arisen whether there was a claim and denial or repudiation thereof. In that context, it was held: (SCC p. 340, para 4)

“There should be dispute and there can only be a dispute when a claim is asserted by one party and denied by the other on whatever grounds. Mere failure or inaction to pay does not lead to the inference of the existence of dispute. Dispute entails a positive element and assertion of denying, not merely inaction to accede to a claim or a request. Whether in a particular case a dispute has arisen or not has to be found out from the facts and circumstances of the case.”

118. There is no dispute about the aforementioned principle but the same would not mean that in every case the claim must be followed by a denial. If a matter is referred to any arbitrator within a reasonable time, the party invoking the arbitration clause may proceed on the basis that the other party to the contract has denied or disputed his claim or is not otherwise interested in referring the dispute to the arbitrator.”

77. We must however, notice that in *Citibank, N.A. v. TLC Marketing PLC* reported in (2008) 1 SCC 481, the Supreme Court of India has distinguished *Inder Singh Rekhi* (Supra) in the factual matrix arising in the said case, stating:

“32. In support of the submission that there must be a precise dispute raised by the parties, reliance is placed on Major (Retd.) Inder Singh Rekhi v. DDA. I have the advantage of going through the said judgment in which it is held by this Court that the existence of dispute is essential for appointment of an arbitrator under Section 8 or a reference under Section 20 of the Arbitration Act, 1940. There can be a dispute only when a claim is asserted by one party and denied by other on whatever grounds. Mere failure or inaction to pay does not lead to the inference of the existence of dispute. Further, it is observed that whether in a particular case a dispute has arisen or not has to be found out from the facts and circumstances of the case. The proposition of law is well known and well settled in the cited case but the said decision does not fully advance the case of the respondents TLC and WIPL, in any manner, in the facts and circumstances of the present case.”

(Emphasis supplied)

78. The dispute in the present case, which now stands accepted by all the parties, is as to whether the interoperability clause contained in Clause 7.1 of the terms and conditions of the licence as also regulations framed by the TRAI in 2007 has been given effect to and, if not, should be directed to be given effect thereto.

79. The fact that it has not been given effect to is a hard reality and in that context, the question that arises for consideration is that whether it was obligatory on the part of the Union of India as also the TRAI to give effect thereto.

In the aforementioned context only we are required to enter into the merit of the case issue between the parties

Scope of a 'dispute' within the meaning of Section 14 of the Act vis-à-vis the jurisdiction of this Tribunal

80. For the purpose of dealing with the merit of the matter, this Tribunal is required to go into the aforementioned question.

There exists a controversy. The controversy between the parties revolve round :-

- (i) *Interpretation of Clause 7.2*
- (ii) *Interpretation of the agreement*
- (iii) *Interpretation of the advertisements made by various private operators and/or the extent and/or necessity thereof.*

81. Various other contentions which have been noticed hereinbefore also arise for our consideration in this behalf.

82. Would they not constitute a dispute which requires adjudication, is the question?

Dispute *stricto sensu* may not only be an assertion of a right and the denial thereof but also inaction on the part of a Statutory Body or the 'State'.

In our Constitutional scheme, the rule of law, it is well settled, must be given effect to. It is the heart and soul of 'Democracy' and doctrine of 'Good Governance'. It is also a trite law that the Courts and Tribunals must make all endeavours to see that the statutory rights granted in favour of the consumers are properly redressed. Access to justice as provided for in Article 39 of the Constitution of India must be held to be a fundamental right.

83. Was it necessary for a customer or a group of consumers to approach TRAI for that purpose?

84. The answer in our opinion thereto must be rendered in the negative.

The Union of India as also the TRAI have statutory duties to perform. In the event it is found in view of the allegations made in petition that the Union of India and/or TRAI have failed to perform their statutory duties, which would include monitoring of the implementation of the Regulations, which in our considered opinion, does not call for any complaint as such, would also bring

about a dispute which is required to be determined. In this case, failure is admitted. It is for the respondent to satisfy us the reasons therefor.

85. Was it justifiable legally or otherwise on the part of the Respondent No.1, Union of India not to give effect to the statutory conditions of licence? Was the TRAI justified in not performing its statutory duties?

If somebody, particularly an 'Association' looking after the interest of the consumers bring it to our notice that a 'State' within the meaning of Article 12 of the Constitution of India has failed/neglected to perform its statutory duties/constitutional obligation in our considered view a direction in mandatory form may, in an appropriate case, have to be issued.

It is, thus, not correct to contend that a dispute would constitute only an assertion and denial of a positive right.

86. As indicated hereinbefore, it also constitutes a negative right.

Be that as it may, the provisions of interoperability, both technical and commercial have been laid down both by the Union of India as also the TRAI for the benefit of the customers. It has a larger social impact.

87. There are millions of customers and, thus, millions of hardwares by way of set top boxes are distributed. If the customer, having regard to the

interoperability clause contained in the Clause 7.1 of the regulations, vis-a-vis the 2007 Regulations have been given a right to leave one operator at any point of time to another operator, would it be necessary for it purchase another set top box from the new operator and dump the old set top box is the question?

88. What would be its effect? It has ecological as also environmental ramifications. The Union of India as a welfare 'State' and the independent regulator of the status of 'the TRAI', in our opinion, must be held to have a constitutional duty to see that the actions or inactions on their part do not lead to ecological imbalances which would be violative of not only Article 21 of the Constitution of India, but also violative of the Constitutional duties as adumbrated under Article 51A, apart from Article 48-A contained in the Directive Principles of State Policies as contained in Part IV thereof.

If this Tribunal as an expert appellate authority have been conferred power, both original as also the appellate, to consider grievances on the part of a group of customers, in our opinion, it will be a specious to argue that this Tribunal will have no jurisdiction on the face of Section 14 and 14A(1) of the Act.

89. It is significant to notice that the Supreme Court of India in *L. Chandra Kumar v. Union of India* reported in (1997) 3 SCC 261, while considering the question as to whether the orders of the Tribunals constituted under the

Administrative Tribunals Act would be amenable to Judicial Review, stated that the same is a basic feature of the Constitution.

90. There exists a distinction between a situation where any person can bring to the notice of this Tribunal, any dispute involving a group of consumer and a service provider, vis-a-vis a person aggrieved and the one where only a *lis* is maintainable in the context of a statutory scheme at the instance of the person aggrieved and, thus, the locus of another person may be subject to the exception.

That distinction was noticed by the Supreme Court of India in *Duryodhan Sahu (Dr) v. Jitendra Kumar Mishra* reported in (1998) 7 SCC 273, stating:

“12. We have heard counsel on both sides at length. Several rulings have been relied on by them though in none of them, the question arose directly for consideration. The question as to maintainability of a public interest litigation before the Tribunal depends for its answer on the provisions of the Act. The Tribunal having been created by the Act, the scope and extent of its jurisdiction have to be determined by interpreting the provisions thereof. In S.P. Sampath Kumar v. Union of India it was held that the Tribunals constituted under the Act were effective substitutes to the High Courts in the scheme of administration of justice and they were entitled to exercise powers thereof. It was observed that they were real substitutes not only in form and de jure but in content and de facto. On that premise, the Court held that the power of judicial review exercised by High

Courts in service matters under Articles 226 and 227 was completely excluded. It may be noticed that the order of reference dated 15-2-1996 extracted in the earlier paragraph makes a specific mention of this aspect of the matter. If that view had continued to prevail, the approach to the question might have been different.”

The Supreme Court noticed that the Tribunals have to perform only a 'supplemental as opposed to a substitutional role' in discharge of the powers conferred by Articles 226 and 227 of the Constitution.

91. However, as it was found that the provisions of the said act limit the jurisdiction of the Administrative Tribunal, the terminology used in Section 21 vis-a-vis the definition as contained in Section 32 would not be given effect to having regard to the significance of the word 'his'.

That being not the position in the instant case, we are of the opinion that the Tribunal has the requisite jurisdiction to determine the dispute arising between the parties herein.

Locus Standi Issue

92. The petitioner, as noticed herein, is a juristic person. It looks after the interest of the consumers. This Tribunal has been entertaining petitions at the instance of various associations representing the interest of its members. The

Cellular Operators Association of India and AUSPI are examples, which day in and day out knocks the doors of this Tribunal as also the Supreme Court of India for ventilating the grievances of its members.

93. If such a strict interpretation, as has been urged by Mr. Sibbal is accepted, we cannot permit any 'Association' whatsoever to espouse the cause of its members as there would be no dispute per se between them and the licensor or the other service provider or a group of consumers.

94. Moreover even they make representations before TRAI and take part in the Consultative process. Similarly, as has been contended by one of the counsel that even the petitioner makes its representation before the TRAI.

95. In **Hotel & Restaurant Assn. v. Star India** (P) Ltd., (2006) 13 SCC 753, at page 764, it was stated : -

“21. Two questions of seminal importance arise for consideration in these appeals viz.:

(i) Whether the members of the appellant Associations are consumers and, thus, were entitled to invoke the jurisdiction of TDSAT in terms of Section 14 of the TRAI Act?

(ii) Whether the Tariff Orders issued by TRAI on 15-1-2004 and 1-10-2004 are inapplicable to members of the appellant Associations i.e. hotels on the ground that those are commercial establishments?

28. We have noticed hereinbefore that the members of Associations take TV signals either from the respondent broadcasters under their respective contracts or agreements or through cable operators. Whereas in the former case, there exists a privity of contract between the broadcasters and the owners of the hotels, the owners of the hotels admittedly would not come within the purview of definition of MSOs. The owners of the hotels take TV signals for their customers/guests. While doing so, they inter alia provide services to their customers. An owner of a hotel provides various amenities to its customers such as beds, meals, fans, television, etc. Making a provision for extending such facilities or amenities to the boarders would not constitute a sale by an owner to a guest. The owners of the hotels take TV signals from the broadcasters in the same manner as they take supply of electrical energy from the licensees. A guest may use an electrical appliance. The same would not constitute the sale of electricity by the hotel to him. For the said purpose, the “consumer” and “subscriber” would continue to be the hotel and its management. Similarly, if a television set is provided in all the rooms, as part of the services rendered by the management by way of an amenity, wherefor the guests are not charged separately, the same would not convert the guests staying in a hotel into consumers or subscribers. They do not have any privity of contract with broadcasters or cable operators. The identity of the guests is not known to the broadcasters or cable operators. A guest may not watch TV or in fact the room may remain unoccupied but the amount under the contract by the

owners of the hotels whether with the broadcasters or cable operators remains unchanged. We, therefore, are of the opinion that the members of the appellant Associations are consumers.

31. It is one thing to say that TDSAT shall not exercise its original jurisdiction in respect of a matter covered by the 1986 Act but it is another thing to say that the members of the Associations are not consumers at all. Provisions of the 1986 Act have been referred to for excluding the application under Clause (a) of Section 14 of the TRAI Act. While the jurisdiction is sought to be taken away, a strict construction thereof is essential. What is excluded is a complaint of an individual consumer and not a group of consumers. Thus, indisputably, TDSAT would be entitled to entertain a complaint by a group of consumers against a service provider.”

Functions of the Regulator

96. There is another aspect of the matter which must also be taken note of. The Supreme Court of India in *Cellular Operators Association* (Supra) has laid down the law as regard to the functions of a ‘Regulator’. Function of a regulator would also be to enforce an order as an authority of the power in relation thereto as has been conferred on it by a statute.

97. In *Central Power Distribution Co. v. Central Electricity Regulatory Commission*, reported in (2007) 8 SCC 197 the law has been laid down in the following terms :-

22.3. *As already noticed, the Central Commission has the power and function to evolve commercial mechanism such as imposition of UI charges to regulate and discipline. It is well settled that a power to regulate includes within it the power to enforce. (See *Indu Bhushan Bose v. Rama Sundari Debi*, *K. Ramanathan v. State of T.N.*, *V.S. Rice and Oil Mills v. State of A.P.* and *Deepak Theatre v. State of Punjab.*)*

98. We may also notice that in some other jurisdictions, as for example in the United Kingdom, the regulator laying down the regulation in respect of Public Utility Services including the Telecom has attracted the comments of many authors. Reference in this connection is made to H.W.R. Wade and C.F. Forsyth, *Administrative Law*, the IX edition, 2009, Pages 130 to 132.

99. In regard to the question to what would be the powers of judicial review over regulations, the learned author noticed the drastic power of the regulators which includes the power to investigate, to make rules, to impute fault and to impose penalties involve a mixture of legislative, administrative and judicial functions and pose obvious problems of administrative justice. It has also been noticed that a person aggrieved by the actions of the regulator sometimes has a right of appeal to a Tribunal and thereafter to a court. But noticing that even otherwise there will be a power of judicial review, the law has been stated in the following terms in *Central Power Distribution Co.* (Supra)

“81. If the power under Article 32 of the Constitution, which has been described as the “heart” and “soul” of the Constitution, can be additionally conferred upon “any other court”, there is no reason why the same situation cannot subsist in respect of the jurisdiction conferred upon the High Courts under Article 226 of the Constitution. So long as the jurisdiction of the High Courts under Articles 226/227 and that of this Court under Article 32 is retained, there is no reason why the power to test the validity of legislations against the provisions of the Constitution cannot be conferred upon Administrative Tribunals created under the Act or upon Tribunals created under Article 323-B of the Constitution. It is to be remembered that, apart from the authorisation that flows from Articles 323-A and 323-B, both Parliament and the State Legislatures possess legislative competence to effect changes in the original jurisdiction of the Supreme Court and the High Courts. This power is available to Parliament under Entries 77, 78, 79 and 95 of List I and to the State Legislatures under Entry 65 of List II; Entry 46 of List III can also be availed of both by Parliament and the State Legislatures for this purpose.”

100. If the statute provides for an independent regulator and an appeal before an expert tribunal, there cannot be any doubt whatsoever that the Appellate Tribunal must be free to act independently. Its power would ordinarily be akin to the power of the Regulator. Even otherwise in terms of the provision to the said Act, the legal position would be so.

101. In Wade and Forsyth's Administrative Law the learned authors noticed that in United Kingdom where Sir Andrew Leggatt, a retired Appeal Court judge was appointed inter alia to report whether 'fair, timely, proportionate and effective arrangements' were in place for handling Tribunal disputes and whether they encourage the systematic development of the area of law concerned to ensure a coherent structure for the delivery of administrative justice in Tribunals. A report was published. Following the said report submitted in the year 2007, an Act was enacted for bringing reforms in the functioning of the Tribunal. It is not necessary for us to consider in great details, the functioning of the Tribunals in United Kingdom but suffice it to say that the creation of the Tribunals as also their necessity in a democratic set up would be to act independently as has been noticed in Administrative Law : Text and Materials III Edn, by Mark Elliot, at Pages 689, 688. It was observed :

"The importance of the independence of tribunals was highlighted by the Council on Tribunals (whose role is examined below at 19.5) in its report, Cm 3744, Tribunals; Their Organisation and Independence (London 1997) at {2.2} :

Since Tribunals are established to offer a form of redress, mostly in disputes between the citizen and the State, the principal hallmark of any tribunal is that it must be independent. Equally importantly, it must be perceived as such. That means that the tribunal should be enabled to reach decisions according to law without pressure either from the body or person whose decision is being appealed, or from anyone else.

Thus, while it is clearly desirable that a constructive relationship should exist between a tribunal and the government department from whose decisions it hears appeal — eg in order that the tribunal may identify and draw to the department’s attention systemic problems with its decision-making practice — that relationship must be carefully constituted in order that independence is neither compromised nor seen to be compromised. Leggatt concluded {at 2.20} that existing arrangements, whereby tribunals are often ‘sponsored’ by the departments whose work they scrutinize (that is, where the tribunal is financially dependent on the department), are problematic :

At best, such arrangements result in tribunals departments being, or appearing to be, common enterprises. At worst, they make the members of a tribunal feel that they have become identified with its sponsoring department, and they foster a culture in which the members feel that their prospects of more interesting work, of progression in the tribunal, and of appointments elsewhere depend on the departments against which the cases that they hear are brought.”

102. It is in the aforementioned context, we may notice certain decisions of the Supreme Court of India.

103. In *Delhi Electricity Regulatory Commission v. BSES Yamuna Power Ltd.* reported in (2007) 3 SCC 33, the Apex Court in the context of Section 28(2) of

the Delhi Regulatory Commission Act even the doctrine of legitimate expectation was held to be applicable.

104. Yet again in *U.P. Power Corpn. Ltd. v. National Thermal Power Corpn. Ltd.* reported in (2009) 6 SCC 235, it was held :-

“66. Although on the question of jurisdiction the Central Commission might not have been correct, before parting with this case, we may, however, also notice a submission of Mr Gupta that the Appellate Tribunal should not ordinarily interfere with an order of the Central Commission. We do not agree. The jurisdiction of the Appellate Tribunal is wide. It is also an expert tribunal and, thus, it can interfere with the finding of the Central Commission both on fact as also on law. Both the Central Commission as also the Appellate Tribunal being expert, we do not see how the decisions of this Court in Union of India v. Cynamide India Ltd.¹⁵ and Shri Sitaram Sugar Co. Ltd. v. Union of India¹⁶ would be applicable.”

105. The same principles were reiterated in *Chhattisgarh Vidyut Mandal Abhiyanta Sangh v. Chhattisgarh State Electricity Regulatory Commission* reported in (2007) 8 SCC 208 in the following terms:

“12. We may also hasten to note that the appeal under Section 111 before the Tribunal is in the nature of first appeal. The Tribunal, therefore, must examine the entire grounds of appeal and record its reasons on each ground while disposing of the appeal.”

106. We may also notice the decision of the Apex Court on Tata Power Co. Vs. Reliance Energy Ltd. reported in 2009 (16) SCC page 659. We have referred to this judgment in view of the fact that the different benches of Supreme Court of India has clearly held that the tribunal has the jurisdiction to interfere almost against all orders passed by the TRAI.

107. We may, however, take notice that recently in the case of PTC India Ltd. Vs. CERC reported in 2010 4 SCC 603 a Constitution Bench of the Supreme Court of India has held that the Electricity Appellate Tribunal has no jurisdiction to decide the validity of a regulation framed by CERC. The question relating to the jurisdiction of this Tribunal was, however, left open. As this is not the occasion where we can go into the aforementioned question, we need not elaborate thereupon.

108. We have no hesitation to hold that from whatever angle the question is considered, this Tribunal must be held to have the jurisdiction to entertain this petition.

Suo Motu Power/Public Property Issue

109. We have, however, not gone into the question that whether having regard to the preamble and Section 14 of the Act, this Tribunal in a given situation

can take cognizance of a matter *suo motu* in view of the findings aforementioned that the petition is maintainable at the instance of the petitioner as it is a 'person' within the meaning of Section 14A of the Act.

110. Air wave is a public property. It has been so held by the Supreme Court of India in *Secy., Ministry of Information & Broadcasting, Govt. of India v. Cricket Assn. of Bengal*, reported in (1995) 2 SCC 161, has held -:

“122.

(i) The airwaves or frequencies are a public property. Their use has to be controlled and regulated by a public authority in the interests of the public and to prevent the invasion of their rights. Since the electronic media involves the use of the airwaves, this factor creates an inbuilt restriction on its use as in the case of any other public property.

(ii) The right to impart and receive information is a species of the right of freedom of speech and expression guaranteed by Article 19(1)(a) of the Constitution. A citizen has a fundamental right to use the best means of imparting and receiving information and as such to have an access to telecasting for the purpose. However, this right to have an access to telecasting has limitations on account of the use of the public property, viz., the airwaves, involved in the exercise of the right and can be controlled and regulated by the public authority. This limitation imposed by the nature of the public property involved in the use of the electronic media is in addition to the restrictions imposed on the right to freedom of speech and expression under Article 19(2) of the Constitution.”

The Regulator, Union of India as also this Tribunal must see to it that a precious commodity is effectively controlled.

111. We may notice that recently the Supreme Court of India in *Reliance Natural Resources Ltd. v. Reliance Industries Ltd.*, (2010) 7 SCC 1 has held that natural gas is a public property.

Merit of the matter

112. Both Union of India and the Regulator have to keep pace with the scientific development. It cannot act in retrograde. Improvement of technology must be encouraged.

113. The growth of the sector is of prime importance. All stakeholders have a solemn duty to see that the benefits of technical growth and scientific development reach the ultimate viewers of the channels. All players in the field including the 'Licensor' and the 'Regulator' must act for public good and in public interest.

114. It is for the aforementioned reasons and in particular to maintain the ecology, the health problems of the citizens of India, which may arise out of the

colossal waste for the obsolete STBs, which would be millions in number. It is necessary to circulate the same amongst the viewers.

In not giving effect to Clause 7.1 of Conditions of licence, the Union of India, in our considered opinion, would be leading the Society and public at large to grave consequences.

A Regulator, ordinarily, should consider these aspects of the matter with all seriousness, they deserve.

115. In Cellular Operators Association of India (Supra), the Apex Court has clearly held that the recommendations of an expert body like the TRAI would carry great weight, although in terms of Section 11 of the Telecom Regulatory Authority of India Act, 1997 it may not be binding on the Central Government. If that be so, it is also necessary to issue appropriate directions upon the concerned authorities.

Conditions of Licence

116. The licenses issued by the Government of India provides for three situations.

We may notice the same.

“12.1 a separate specific operational license shall be required from the WPC Wing of Ministry of Communications for establishment, maintenance & operation of the DTH platform/ facility under usual terms and conditions of that license. Grant of WPC operational license will be governed by normal rules, procedures and guidelines and will be subject to completion of all formalities. As may be prescribed by the WPC Wing, the Ministry of Communication for this purpose, an application shall be made to the “Wireless Advisor to the Government of India, WPC Wing, Ministry of Communications, Dak Bhavan, Parliament Street, New Delhi-110001” in a prescribed application form available from WPC Wing within one month from the date of signing of this agreement.

12.2 The Licensee shall obtain clearance/approvals, as may be prescribed or required, from the Wireless Planning Coordination Wing or from the Department of Space.

15.1 Notwithstanding any other recourse under the terms and conditions of the license or any other law, the Licensor shall have the power, after recording the reasons in writing, to revoke/ suspend the license in the event of breach of any terms and conditions of the license. However, before taking such action the licensing authority will give the Licensee an opportunity of being heard. The decision of the licensing authority shall be final.

15.2 The Licensor may, at any time, terminate the License without compensation to the Licensee in case Licensee becomes bankrupt or otherwise insolvent or applies for being adjudicated as insolvent/bankrupt, provided such termination shall not prejudice or affect any right of action which has accrued or will accrue thereafter to the Licensor.

20.1 For violation of license conditions, in addition to any other action which may include revocation of license, a penalty upto Rs.50 crores can be imposed by the Licensor on the Licensee. However, before taking such action the licensing authority will give the Licensee an opportunity of being heard. The decision of the licensing authority shall be final.”

117. Action in terms of the licence, therefore, should be taken to protect the public property or public good. Uptil now, no operator had questioned the validity of Clause 7.1. Had that been done, the matter might have been different. So far as the request of the Government of India and the TRAI is concerned, they may take actions/recommendations either way.

It is possible for the TRAI to adopt one of the three courses :-

- 1. To reiterate its earlier stand by recommending that clause 7.1 may have to be suitably amended so as to bring it within its purview the marching technology.*
- 2. to allow the market to operate on its own forces.*
- 3. to recommend deletion of Clause 7.1.*

118. Respondent No.1, however, despite the said obligations in its reply, stated :-

“(III) That clause 7.1 of DTH guidelines provide for ‘Open Architecture (non-proprietary) Set Top Box, which will ensure technical compatibility and effective interoperability among different DTH service providers, shall have such specifications as

laid down by the Government from time to time.’ This requirement of interoperability, in terms of the BIS Specification was to be provided through a CI slot in the Set Top box. In the said CI slot a Conditional Access Module (CAM) could be fit in and through which the signal of different DTH operators could be received by the ultimate consumer/ subscriber. The said CAM was to be supplied by the respective DTH operator to which the customer wanted to shift/migrate. In terms of the existing BIS specification, which as aforesaid provide for MPEG-2 (DVB-S) standards, providing CAM Module by DTH operator is optional.

(IV) That the ground situation as per available information is that since the cost of CAM modules is as good as the STB itself, no DTH operator is providing CAM modules. Thus interoperability even within the same MPEG-2 (DVB-S) operators has not been able to manifest. This has also been taken note of by TRAI. The difficulties increase with multiple technologies because MPEG-2 is not upward compatible with MPEG-4 and DVB-S is not upward compatible with DVB-S2.”

119. We have noticed heretofore that on the earlier occasion the TRAI in its recommendations of January, 2008 had asked the government to change the standard and ask all operators to supply STBs compatible with MPEG4 and that the same must have a prospective effect, wherefor six months time should be granted to everybody for the said purpose.

120. If the BIS standard had provided for MPEG2 only, the new operators had brought about the situation by its own doing. The Government should have given the necessary thought in this behalf. It was aware of the technological development. It could take up the matter with BIS. If BIS was not capable of doing the same, it could have taken some decision to entrust some other agency for this purpose. Inefficiency/Inaction on the part of any department of the Government could not have been a ground for not issuing appropriate direction in this behalf despite the recommendations of the TRAI.

121. The Government of India in its comments have inter alia contended that stacking of technology may make the boxes very expensive. Commercial hardship by itself may not be an excuse. Environment and Public Health issues for such reasons should not be compromised.

122. We are of the opinion that the customers should be made aware of their rights to opt for one technology or the other. They may have their own choice.

For one, the old technology may serve the purpose, but another may adopt the new technology. In other words, whether it is expensive or not, the same should be considered from the point of view of the consumers. But therefor they should be given an option.

123. We may notice that even the Competitive Commission has opined :-

- “5. After examination of the above mentioned interfaces, it is seen that there is nothing which causes ‘lack of interoperability’ in the agreement between the DTH Service Providers and the suppliers of Set Top Box. The set top box, as manufactured by the set top box supplier, is interoperable according to the standards laid down by Bureau of Indian Standards (BIS). With the insertion of a CAM of any other DTH Service Provider, the same set top box can start giving transmission to the customer subject to some small limitations pertaining to the technology platform used in transmission (depending on whether MPEG-2, MPEG-4 or some still higher platform is used.
6. Further, on examination of the agreement between the DTH service provider and the customer, it is noted that no such clause which directly restricts or forces the customer to enter into tie-in arrangement is there. However, on account of the lack of customer awareness and lack of availability of Set Top Boxes and other equipments in open market, the customer does end up buying all the related equipments from the DTH Service Providers only. The sale of Set Top Box, Smart Card and Dish Antenna is tied-in as all the three equipments are provided in one package and are not readily available for sale in open market-independent of each other. These three components are technically essential as each performs a specific function for availing the DTH Service transmission. Owing to the lack of practical interoperability and lack of consumer awareness, the customer has no alternative but to purchase these three equipments from the DTH Service Provider whose service he is availing. This ultimately results in tie-in arrangements of the Consumer Premises Equipment from the DTH Service Provider. Except Dish TV, no other DTH Service Provider, under investigation, has specifically and clearly mentioned in its agreement with the

customer that a customer can avail or procure compatible Set Top Box from any other source. This offer of Dish TV is also of no benefit to customer as neither the compatible Set Top Box is commercially and readily available in the open market, nor the consumer is really aware of this possibly.”

124. As of today, no such choice is available. We have noticed heretofore that according to Dish TV, the commercial viability in regard to complete interoperability is being considered. It might have supplied CAM to the Kingfisher, but then, the same should not be considered to be the model for common public. Such an option is required to be considered in the decision making process of the consumers. It does not lie in the mouth of the ‘State’ to contend that it has imposed a condition which is impossible to comply with. The Government of India should lay down a condition following the recommendations made by the TRAI or otherwise that the condition would be impossible to be complied with.

125. The contention of some of the respondents is that with the march of technology since 2003, MPEG-2 has become obsolete.

We really find ourselves in a difficult situation as even as late as in January 2008, the TRAI had made the recommendations that its earlier recommendation should be followed. It is a matter of concern that Government

of India took about 2 years and 4 months to make its comments on the said recommendations and then sent it back.

126. If the ministry had been finding some difficulty in implementing the law which it itself made, it should have come with some solutions in the interregnum. It ought to have taken into consideration the fact as to whether technically as well as commercially the interoperability clause could be enforced or not.

127. The least that could have been done was to encourage all the people who intended to shift to MPEG-4 or retain MPEG-2. They could have been persuaded to buy a box from the open market. Unhealthy competition appears to be growing.

128. In some of the queries made by the Respondent No.4 under RTI Act and the replies given thereto by the Union of India make some interesting reality. They read as under :-

“6. If the answer of the question 3 is yes, who is the officer responsible to ensure the compliance of the licensing conditions by the DTH operators. The name and the

designation of the concerned officer may please be provided to me.

7. *Whether a DTH operator, who is not in compliance with Clause 7.1 of the Licence condition, can continue to provide the DTH service.*
8. *What is the consequence of a DTH operator not complying with the DTH licensing conditions stipulated by the Ministry of Information and Broadcasting.”*

The same was answered by a Reply dated 26.03.2008 in the following terms:

- “6. *Yes, Sir.*
7. *MPEG4 STB’s specification has not been notified so far by BIS.*
8. *(i) Yes, Sir.*
(ii) Ministry is examining the issue of MPEG4 STBs.”

Commercial Interoperability

129. So far as commercial interoperability is concerned, we have noticed heretobefore that some of the operators are not providing all of the required options. It may be true that legally speaking they have not violated any law or condition of licence but such options should be made available to the consumers when an occasion arises therefor. Why then the operators are advertising only a part of options on their website? If in the brochure or

otherwise they have to provide all the three options, why they do not put the same on the website? Why some of the operators have failed to comply with the regulations? It is not necessary that a complaint should be made. Even if a complaint is made, the TRAI may exercise its jurisdiction by issuing a further direction failing compliance whereof it may initiate a penal proceeding. But in terms of the provisions of the said act, the RAI is also required to monitor. It, thus, has wide jurisdiction to see that the Regulations framed by it are not frequently breached.

Conclusion

130. Admittedly, licenses are granted in terms of Sec. 4 of the Indian Telegraph Act, 1885. The conditions of license for the said purpose, therefore, should be held to be binding on all concerned.

We have noticed heretobefore, the chart in respect of the six private operators and Doordarshan vis-a-vis the digital format and encryption. From the said chart it is evident that Dish TV, Tata Sky and DD Direct Plus operate on MPEG-2, Sun Direct, Reliance Big TV, Bharti Telemedia and Bharat Business Channel Ltd. operate on MPEG-4.

Yet again Dish TV, Tata Sky, Sun Direct and DD Direct Plus operate on DVB-S on MPEG-2, Sun Direct, Reliance operate on DVB-S, where Bharath Business alone operates on DVB-S2. We have also noticed that the encryption, except DD Direct Plus used by all operators, are different ones.

131. Admittedly, DTH Operators are in the market from 2002-2003. It is also not in dispute that the BIS specifications were made when only MPEG-2 technology was available.

132. The Union of India conceded that after the recommendations of the TRAI in January, 2008 were made, the Ministry had asked BIS to device a specification which would provide for interoperability within same technological combination as interoperability within different technological combination in DTH STBs. BIS, however, has not been able to finalise specifications due to differing views and problems involved. It has also been pointed out that meetings were held with the DTH operators on the implementability of the TRAI recommendations but thereagainst also the DTH operators had cited a number of reasons stating commercial non viability. The technical inputs were also sought from Doordrshan and Broadcasting Engineering Consultants India Limited which are awaited.

It is, thus, absolutely necessary that Union of India must take a decision in this behalf at an early date.

133. We may furthermore notice that the BIS had issued the aforementioned standards which were notified in June 2003. A question however has been raised as to whether the same meets the conditions laid down in Clause 7.1.1 of the conditions of licence which provides for laying down the specifications by the Government from time to time. Admittedly, the Government had asked the

BIS to lay down the specification in relation thereto and the same has been published. All concerned proceeded on the basis that the BIS specifications would be treated to be the specifications by the Government.

134. Furthermore, the TRAI also in its recommendations speak about BIS specifications. We have also noticed heretobefore that the Union of India while issuing the aforementioned letter dated 11th May 2010 asked the TRAI to send its recommendations on the points raised the question of standard as also stacking of technology. Should the TRAI take recourse thereto? As an Expert Body, the TRAI may think even to make recommendations in this behalf.

135. The factual matrix noticed heretobefore raises certain serious questions. If operators were still transmitting their signals on MPEG-2 platform and whose STBs has been certified by BECIL, it being a public sector undertaking, so they satisfy the statutory requirements?

The answer thereto must be rendered in the affirmative.

Would the Government be correct in allowing the march of technology in violation of the law and in particular Clause 7.1 theoretically? The answer thereto must also be in the affirmative.

Clause 7.1 being a statutory condition, as the law insists, there exists a mandate. The mandate is to provide interoperability by way of a condition of license.

It has not been amended as yet. The BIS standard lays down a standard for MPEG-2 Technology only. Both the Union of India as also the TRAI, to the aforementioned extent supports the stand of Dish TV.

We are of the opinion that Government should consider the said issue with all seriousness and take a clear stand. An anomalous situation of this nature must at all costs be avoided. It has before it even the views of an expert body. There is no reason why an appropriate decision cannot be taken.

136. If that be so, where is the hitch? Were the new operators having MPEG-4 technology violating the BIS standards and if that is so, whether the illegality should be allowed to continue? If MPEG-4 however on the other hand is not prohibited, the action of the new operators would not fall foul of the Government standards. In that event, it must be held that the Government has allowed breach of licence condition to take place without taking any active role in this behalf.

137. It is admitted that the condition of licence have been violated in so far as MPEG-2 is not technically compatible with MPEG-4 technology and the DVB-S2 Box is not interoperable with the DVB-S box.

138. These STBs, therefore, so far as the interoperability is concerned, have failed to work. Clause 7.1 of the license does not speak about the standard but interoperability. It was, therefore, required to ensure technical compatibility in an effective manner. The specifications laid down by the Government and/or BIS were required to achieve the said objective.

139. It is true that the technological advancement should not be allowed to be stalled. It is also true that the Government of India deal with spectrum and bandwidth. What would be the effect? One way of looking at things is that the Government is free to deal with it. But then it cannot act whimsically or arbitrarily. It cannot also despite technological advancement keep its hands folded.

140. It is difficult to comprehend that keeping in view the interest of the consumers the TRAI had not been keeping a watch of the websites of the operator. The Regulations having been made in this behalf as back as in 2007, it was expected that steps be taken for seeing that its recommendations are implemented.

141. We are of the opinion that the TRAI should be asked to do so.

142. We, as presently advised, do not wish to issue any direction upon the Government of India. Although Mr. Aggarwal, as noticed heretofore, has specifically stated that it shall abide by any direction that this Tribunal may issue.

In a matter like this, in our opinion it would not be proper to direct the Union of India either to cancel the licence of any operator or to initiate criminal proceedings against them. We have discussed the question only to show that various options are available to it and it should take an appropriate decision as a statutory authority in accordance with law.

143. The Central Government has an option in regard to the taking of action or deleting Clause 7.1.

If even the TRAI feels that the condition should be changed, it can issue interim recommendations in terms of Section 11(1) (a) (i) and (ii) of the Act.

144. We furthermore are of the opinion that the TRAI should consider the desirability of completing the consultation process within three months and make its recommendations within six weeks thereafter, which be considered and appropriate orders thereupon be passed by the Central Government. The Government of India should take a decision in this behalf within two months thereafter.

145. It is, however, difficult to agree with the submission of the Learned Counsel for respondent No. 8 that the supply of STB is not a statutory condition. If that be so, it was not necessary for it to supply. It could have asked the consumers to purchase it from the market. But once the conditions of license provided for end to end service and it's job is not only to decoding the signal and not only uplinking and downlinking but also render services so as to comply with the compatibility clause. It was bound to do so.

146. For the reasons aforementioned, we are of the opinion :-

- (i) This Tribunal not only in interest of the consumers but also in public interest, have the requisite jurisdiction to take cognizance of this petition and issue appropriate directions upon the concerned authorities;
- (ii) The licensor and the Regulator must take appropriate action(s) in terms of Clause 7.1 of the conditions of licence so as to enable the operators to act not only in the interest of the consumers but also with a view to maintain ecology and public health within the timeframe mentioned heretobefore;
- (iii) The future technological growth and scientific development should also be kept in mind while issuing the requisite directions;
- (iv) The Central Government with that end in view, unless any other or further policy decision is taken, must issue appropriate directions

upon the Bureau of Indian Standards to lay down the standards for MPEG-4 technology at the earliest and not later than two months from date; if any occasion arises therefor.

- (v) For the aforementioned purpose, both the Union of India as also BIS may consider the effect of the technology used by the Respondent No.9 herein.
- (vi) In case the cost of STBs is absorbed by the operator in its scheme of tariff, an appropriate amendment to Clause 7.1 of the Conditions of licence and/or any provision for relaxation of the said provision may be considered.
- (vii) The Central Government must issue appropriate order in this behalf as expeditiously as possible and not later than two months from date on the recommendations of TRAI. The TRAI, we are sure, in the event the recommendations are accepted by the Ministry of Information and Broadcasting would enforce the same in an appropriate manner, so that the public at large do not suffer owing to the consequences of delayed actions on the part of the Broadcasters to resort to the interoperability of STBs both technical and commercial.
- (viii) The contentions of the Respondent No.4 – Dish TV India Ltd. that operations of all the operators, who were using MPEG4 technology, must be held to be null and void, is rejected.

- (ix) The TRAI as also the Central Government may, while issuing requisite directions, bear in mind that a differential tariff between MPEG2 and MPEG4 technology users, may allow the usage of all the STBs without any ecological imbalances.
- (x) No separate order need be passed on the M.A. filed by Respondent No.5.

147. Before parting, we must place on record our deep appreciation for Mr. Navin Chawla, who has very ably assisted us as Amicus Curiae.

148. This Petition is allowed with the aforementioned directions, but in the facts and circumstances of this case, there shall be no order as to costs.

.....**J**
(S.B. Sinha)
Chairperson

.....
(G. D. Gaiha)
Member

.....
(P. K. Rastogi)
Member

rkc/sree