TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL
NEW DELHI

Dated 19th October, 2012

Appeal No.3(C) of 2012
(M.A.Nos.223 & 224 of 2012)

United Cable Operator's Welfare Association ...Appellant

Vs.

Telecom Regulatory Authority of India ...Respondent

Appeal No.5(C) of 2012

Indusind Media Communication Ltd. ...Appellant

Vs.

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

Appeal No. 11(C) of 2012

Delhi Distribution Company New Delhi & Ors. ... Appellants

Versus

Telecom Regulatory Authority of India ... Respondent

Appeal No.12(C) of 2012

Digicable Networks (India) Pvt. Ltd. ... Appellant

Versus

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

Appeal No.15 (C) of 2012

Udaya Shankar Roy Chouwdhury & Anr. … Appellants

Vs.

Telecom Regulatory Authority of India … Respondent

BEFORE:

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

For Appellant (In A.No.3(C) of 2012)	: Mr. Rajan Bakshi, Advocate Mr. Snigdha Sharma, Advocate
For Appellants (In A.No.5(C) of 2012)	: Mr. C.S. Vaidyanathan, Sr. Advocate Mr. Manjul Bajpai, Advocate Mr. Arun Kathpalia, Advocate Mr. Sarvajeet Kumar Thakur, Advocate
For Appellant (In A.No.11(C) of 2012)	: Mr. Navin Chawla, Advocate Ms. Nidhi Parashar, Advocate Mr. Abhishek Jha, Advocate
For Appellant (In A.No.12(C) of 2012)	: Mr. C.S.Vaidyanathan, Senior Advocate Mr. Manjul Bajpai, Advocate Mr. Arun Kathpalia, Advocate Mr. Sarvajeet Kumar Thakur, Advocate
For Appellants (In A.No.15(C) of 2012)	: Mr. Soumitra Ghose Choudhuri, Advocate Ms. Runa Bhuyan, Advocate
For Respondent-TRAI	: Mr. Meet Malhotra, Senior Advocate Mr. Saket Singh, Advocate Mr. Kumar Rajan Mishra, Advocate Mr. Ravi S.S. Chauhan, Advocate
For Respondent- I&B	: Mr. Ravinder Agarwal, CGSC Mr. Amit Yadav, Advocate

For Times Global Broadcasting: Co. Ltd. and Independent News Service Pvt. Ltd.	Mr. Tejveer Singh Bhatia, Advocate Mr. Upender Thakur, Advocate for Mrs. Prathiba M. Singh, Advocate
News Broadcasters Association & TV Today Network	: Mr. A.J. Bhambani, Advocate Ms. Lakshita Sethi, Advocate
For News 24 Broadcast India	: Mr. Nitin Bhatia, Advocate
For Media Content & Communications Services (I) Pvt. Ltd.	: Mr. Rajiv Sarin, Advocate Mr. Sooraj, Advocate
For New Delhi Television Network	: Mr. Gopal Jain, Advocate Mr. Kunal Sood, Advocate
For TV 18 Broadcast Ltd.	: Mr. Kunal Tandon, Advocate

J U D G E M E N T

Introduction

These appeals involving common questions of law and fact are directed against a Tariff Order known as The Telecommunication (Broadcasting & Cable) Services (Fourth) (Addressable Systems) Tariff Order, 2010 being dated 05.8.2010 as amended on 30.4.2012 (hereinafter called and referred to for the sake of brevity as "the said Tariff Order") as also the Telecommunication (Broadcasting & Cable Services) Interconnection (Digital Addressable) Cable Television System Regulations, 2012 (The Regulations) dated 30.04.2012.

The Prologue

2. At the outset we must place on record that all the parties hereto made

statements before us that they are not against the process of digitalization.

In fact Mr. Vaidyanathan, learned senior counsel appearing on behalf of the MSOs contended that the Appellants are in complete readiness to switch over from the analogue to digital technology. In most of the places namely Delhi, Mumbai, Kolkata etc., it was stated, even the requisite number of set top boxes have been procured/imported.

The Background

3. It is not in dispute that the Respondent herein (the TRAI) is empowered to issue directions in terms of sub-clauses (ii), (iii), (iv) & (v) of Clause (b) of sub-Section (1) of Section 1 of the Telecom Regulatory Authority of India Act, 1997 (hereinafter called and referred to for the sake of brevity as "the said Act").

In exercise of the said power, it amended the aforementioned Regulations by Regulation No.9 of 2012 and furthermore issued the said Tariff Order.

4. The Parliament enacted Cable Television Network Act, 1995.

5. The TRAI made recommendations to the Central Government on the implementation of Digital Addressable system in India on or about 05.8.2010. In its recommendations, the TRAI highlighted the necessity of digitalization of

the cable industry not only for the purpose of alleviating the difficulties expressed by the stake holders but also thereby a higher number of channels could be carried and, thus, removing the capacity constraints and creating more space for TV channels, Value Added Services on the broadband etc.

According to the TRAI, digitalization would promote transparency in business transactions and would check signal piracy.

6. Pursuant to or in furtherance of the said recommendations of the TRAI on or about 25.10.2011 the Central Government promulgated an 'Ordinance', whereby and whereunder the 1995 Act was amended. The said 'Ordinance', however, was repealed and replaced by the Cable Television T.V. Networks (Regulation) Amendment Act, 2011, pursuant whereto and in furtherance whereof various provisions in the main Act were amended/inserted.

7. We may notice the statement of "Objects and Reasons" of the said 2011 Amendment Act which reads as under :-

> *"In order to protect the interest of consumers, it was proposed to empower TRAI to specify a package of free to air channels, called basic service tier, which shall be offered by every cable operator to the consumers. It is also necessary that every cable operator should offer channels in the basic service tier on a la carte (individual) basis*

to consumers at a tariff fixed by TRAI."

We may notice Sections 4(1), 4(2), 4(5), 4(A3), 4(A4), 8(b) of the said Amending Act being relevant for our purpose.

Section 4(1) provides for registration and/or renewal of a cable operator.

Section 4(2) lays down the criteria therefor.

Section 4 (5) provides for the power of the authority to allow or reject such application as also provision for an appeal in the event the same is rejected.

For section 4A of the principal Act, the following sections shall be substituted, namely:-

'4A. (3) If the Central Government is satisfied that it is necessary in the public interest so to do, and if not otherwise specified by the Authority, it may direct the Authority to specify, by notification in the Official Gazette, one or more free-to-air channels to be included in the package of channels forming basic service tier and any one or more such channels may be specified, in the notification, genre-wise for providing a programme mix of entertainment, information, education and such other programmes and fix the tariff for basic service tier which shall be offered by the cable operators to the consumers and the consumer shall have the option to subscribe to any such tier:

Provided that the cable operator shall also offer the channels in the basic service tier on a la carte basic to the subscriber at a tariff specified under this sub-section.

(4) The Central Government or the Authority may specify in

the notification referred to in sub-section (3), the number of free-to-air channels to be included in the package of channels forming basic service tier for the purposes of that sub-section and different numbers may be specified for different States, cities, towns or areas, as the case may be.

(8) All actions taken by the Central Government or the Authority in pursuance of the provisions of this section as they stood immediately before the 25th day of October, 2011 shall continue to remain in force till such actions are modified as per the provisions of this Act.

Explanation.- For the purposes of this section,-

(b) "basic service tier" means a package of free-to-air channels to be offered by a cable operator to a subscriber with an option to subscribe, for a single price to subscribers of the area in which his cable television network is providing service."

8. The Central Government thereafter issued a notification on or about 28.4.2012 whereby and whereunder the rules framed under the 1995 Act commonly known as Cable T.V. Networks (Amendment) Rules 2012 were amended.

It was published in the Official Gazette on 28.4.2012.

We may notice Rule 11F.

"11F. Deemed Registration of Multi-System Operator in certain cases

– No multi-system operator providing cable television network services in areas as on the date when such areas are notified under sub-section (1) of section 4A shall, with effect from the date specified in that notification, continue to provide such services in such areas unless such operator is granted registration under section 11C.

Provided that a multi-system operator who has been permitted to operate in areas notified prior to the coming into force of the Cable Television Networks (Regulation) Amendment Act, 2011 (21 of 2011) shall be deemed to have been registered under rule 11C in respect of such areas for the remaining period of the validity of such permission."

9. The TRAI issued a Consultation Paper on the issues relating to digital addressable Cable T.V. System including interconnection and QOS, as also those related to the Tariff and composition of Basic Service Tier (BST), Retail Tariff, Tariff Order, Free to Air Channels and Revenue Sharing between the Multi System Operator and Local Cable Operator on or about 22.12.2011.

The Respondent, thereafter, notified the following Amending Regulations, 2012 :-

"a. Telecommunication (Broadcasting and Cable Services) Interconnection (Digital Addressable Cable Television Systems) Regulations, 2012, dated 30th April 2012.

b. *Telecommunication (Broadcasting and Cable Services) Interconnection (Digital Addressable Cable Television Systems) Regulations, 2012, dated 14th May 2012.*

c. *Telecommunication (Broadcasting and Cable) Services (Fourth) (Addressable Systems) Tariff (First Amendment) Order, 2012 (3 of 2012) dated 30th April 2012.*

d. *Standards of Quality of Service (Digital Addressable Cable TV Systems) Regulations, 2012 (12 of 2012), dated 14th May 2012.*

e. *Consumers Complaint Redressal (Digital Addressable Cable TV Systems) Regulations, 2012 (13 of 2012) dated 14th May 2012."*

Statute

10. These appeals have been filed by the local cable operators and the multi service operators.

11. In these appeals several broadcasters filed application for their impleadment. They were, however, permitted to intervene by an order dated 25.6.2012.

12. These appeals can be sub-divided in two groups –

(i) filed by the Multi Service Operators; and

(ii) by the Local Cable Operators (MSO and LCO);

whereby the legality of clause 5(d) of the Principal Tariff Order dated 21.7.2010 as amended by the Amendment Order of 2012 dated 30.4.2012 and clauses 3.5, 3(8), 3(11), 3(11-A), 6(1), 6(1A), 6(1B) and 6(1D) of the 2012 Amendment Order have been questioned.

13. With a view to appreciate the rival contentions of the parties, we may notice the relevant provisions of the 2010 Order, as amended by the 2012 Order.

Clause 3 of the said Order contains the interpretation clause.

Clause 3(m) defines the 'Cable Operator' to mean :-

> *"cable operator" means any person who provides cable service through a cable television network or otherwise controls or is responsible for the management and operation of a cable television network and fulfils the prescribed eligibility criteria and conditions."*

Part II of the said Order deals with Wholesale Tariff, sub-clauses 1 and 2 of clause 4 whereof, read as under :-

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

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

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

Provided that -----

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

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

Clause 5 provides for the charges payable by the cable operators to the Multi System Operators in the following terms :-

*"**5. Charges payable by cable operator to multi system operator or HITS operator to be governed by mutual agreement between them.**------ The charges payable by a cable operator to a multi system operator or to a HITS operator, as the case may be, shall be as determined by mutual agreement."*

Part III of the said Order deals with Retail Tariff.

Clause 6 as amended by the 2012 Order may be noticed :-

6. Mandatory offering of pay channels on a-la-carte basis to ordinary subscribers and charges therefor. *"(1) Every multi-system operator or DTH operator or IPTV operator or HITS operator providing broadcasting services or cable services to its subscribers using an addressable system shall, from the date of coming into force of this Order, offer or cause to offer all channels offered by it to its subscribers on a-la-carte basis and shall specify the maximum retail price for each channel, as payable by the ordinary subscriber:*

Provided that the a-la-carte rate of free to air channels shall be uniform."

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

" Provided further that in case a multi-system operator or DTH operator or IPTV operator or HITS operator providing broadcasting services or cable services to its subscribers, using a digital addressable system, offers channels as a part of a bouquet, the rate of such channels forming part of that bouquet shall be subject to the following conditions, namely:-

(a) the sum of the a-la-carte rates of the channels forming part of such a bouquet shall in no case exceed one and half times of

the rate of that bouquet of which such channels are a part; and

(b) the a-la-carte rate of each channel forming part of such a bouquet shall in no case exceed three times the average rate of channel of that bouquet of which such channel is a part;

Provided also that every multi-system operator or DTH operator or IPTV operator or HITS operator, providing broadcasting services and cable services, through digital addressable systems, before the date of commencement of this Tariff Order and continues to provide such services after such commencement shall, within sixty days from the date of such commencement, comply with the provisions of the second proviso."

" (1A) Every multi-system operator providing cable services to the subscribers, using digital addressable cable TV system, directly or through its linked local cable operator, shall offer a package of a minimum of one hundred free to air channels as basic service tier including the channels of Prasar Bharati, namely DD-Bharati, DD-Malyalam, DD-Podhigai, DD-Odiya, DD-Bangla, DD-Saptagiri, DD-Chandana, DD-Sahyadri, DD-Girnar, DD-Kashir, DD-NE , DD-Punjabi.

(1B) It shall be open to the subscriber to choose any combination of free to air channels up to one hundred channels, in lieu of the basic service tier offered by the multi-system operator.

Provided that it shall be open to the multi-system operator to specify a minimum monthly subscription, not exceeding one hundred rupees (excluding taxes) per subscriber, towards the basic-service tier or the free to air channels chosen by the subscriber in lieu of the basic service tier.

(1C) The basic service tier offered by the multi-system operator shall include at least five channels of the each genre namely news and current affairs, infotainment, sports, kids, music, lifestyle, movies and general entertainment in Hindi, English and regional language of the concerned region.

Provided that in case sufficient number of free to air channels of a particular genre is not available, the multi-system operator shall include in the basic service tier the channels of the other genres.

(1D) It shall be open to the subscriber of the digital addressable cable TV to subscribe to basic service tier or basic service tier and one or more pay channel or only free to air channels or only pay channels or pay channels and free to air channels.

(1E) If a digital addressable cable TV subscriber subscribes to the pay channels, in a-la-carte or bouquet or a combination of a-la-carte and bouquet, with or without free to air channels, it shall be open to the multi-system operator to specify a minimum monthly subscription, not exceeding one hundred and fifty rupees (exclusive of taxes) per month."

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

"Provided that nothing contained in sub-clause (4) shall apply to the subscribers of the digital addressable cable TV systems."

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

14. On the same day, as indicated heretobefore, the Respondent made the aforementioned 2012 Amendment Regulations known as Digital Addressable Cable T.V. System (Regulations) 2012 to the 'Telecommunication (Broadcasting & Cable Services) Interconnection Regulations, 2004', whereby and whereunder amendments were made to the Regulations made by the Respondent in the year 2004.

Clause 2 of the said Regulations provide for the interpretation clause.

15. We may notice clause 2 (n) defining 'Carriage Fee', clause 2(p) defining 'DAS Area', clause 2(v) defining 'Placement Fee'.

'(n)"carriage fee" means any fee paid by a broadcaster to a distributor of TV channels, for carriage of the channels or bouquets of channels of that broadcaster on the distribution platform owned or operated by such distributor of TV channels, without specifying

the placement of various channels of the broadcaster vis-a-vis channels of other broadcasters;

(p) "DAS area" means the areas where in terms of notifications issued by the Central Government under sub-section (1) of section 4A of the Cable Television Networks (Regulation) Act, 1995 (7 of 1995), it is obligatory for every cable operator to transmit or retransmit programmes of any channel in an encrypted form through a digital addressable system;

(v) "placement fee" means any fee paid by a broadcaster to a distributor of TV channels, for placement of the channels of such broadcaster vis-à-vis channels of other broadcasters on the distribution platform owned or operated by such distributor of TV channels."

Sub-clause 3 of clause 3 of the Regulations reads as under :-

"(3) Every broadcaster or his authorized agent shall provide the signals of TV channels to a multi system operator, in accordance with its reference interconnect offer or as may be mutually agreed, within sixty days from the date of receipt of the request and in case the request for providing signals of TV Channels is not agreed to, the reasons for such refusal to provide signals shall be conveyed to the person making a request within sixty days from the date of request."

Sub-clauses 5, 6, 7, 8, 10, 11, 11(a) and 12 of Clause 3 read thus :-

(5) A multi system operator, who seeks signals of a particular TV channel from a broadcaster, shall not demand carriage fee for

carrying that channel on its distribution platform.

(6) If a broadcaster before providing signals to a multi system operator insist for placement of its channel in a particular slot as a pre-condition for providing signals, such precondition shall amount to imposition of unreasonable terms.

(7) Every broadcaster or his authorised agent who collects payment on behalf of such broadcaster, shall issue monthly invoice to the multi system operator for providing signals to the multi system operator and such invoice/s shall clearly specify the current payment dues and arrears, if any, along with the due date for payment.

(8) Every multi system operator, operating in the areas notified by the Central Government under sub-section (1) of the section 4A of the Cable Television Networks (Regulation) Act, 1995, shall have the capacity to carry a minimum of five hundred channels not later than the date mentioned in the said notification applicable to area in which the multi system operator is operating.

Provided that a multi system operator operating in the Municipal boundary of Greater Mumbai, National Capital Territory of Delhi, Kolkata Metropolitan area and Chennai Metropolitan area shall have a capacity to carry a minimum of two hundred channels as on the 30th June, 2012 and such capacity shall be enhanced to a minimum of five hundred channels by 1st January, 2013:

Provided further that all multi system operators operating in the area referred to in the first proviso and having subscriber base of less than twenty five thousand shall have the capacity to carry a minimum of five hundred channels by the 1st April, 2013.

(10) Every multi system operator shall, within sixty days of receipt of request from the broadcaster or its authorised agent or intermediary, provide on non-discriminatory basis, access to its network or convey the reasons for rejection of request if the access is denied to such broadcaster.

Provided that it shall not be mandatory for a multi system operator to carry the channel of a broadcaster if the channel is not in regional language of the region in which the multi system operator is operating or in Hindi or in English language and the broadcaster is not willing to pay the uniform carriage fee published by the multi system operator in its Reference Interconnect Offer.

Provided further that nothing contained in this sub-regulation shall apply in case of a broadcaster who has failed to pay the carriage fee as per the agreement and continues to be in default.

Provided also that imposition of unreasonable terms and conditions for providing access to the cable TV network shall amount to the denial of request for such access.

Provided also that it shall not be mandatory for the multi system operator to carry a channel for a period of next one year from the date of discontinuation of the channel, if the subscription for that particular channel, in the last preceding six months is less than or equal to five per cent. of the subscriber base of that multi system operator taken as an average of subscriber base of the preceding six months.

(11) If a multi system operator before providing access to its network to a broadcaster insist on placement of the channel of such broadcaster in a particular slot or bouquet, such precondition shall amount to imposition of unreasonable terms.

(11A) No multi system operator shall demand from a broadcaster any placement fee.

(12) Every multi system operator shall publish in its Reference Interconnect Offer the carriage fee for carrying a channel of a broadcaster for which no request has been made by the multi system operator:

Provided that the carriage fee shall be uniform for all the broadcasters and the same shall not be revised upwards for a minimum period of two years from the date of publication in the Reference Interconnect Offer.

Rule 8 (A) and Rule 9 read as under :-

"(8A) Every Reference Interconnect Offer submitted to the Authority under sub-regulation (7) and sub-regulation (8) shall also contain the basis on which the carriage fee payable by the broadcaster has been determined."

(9) The Authority may, in order to protect the interest of the consumer and the service provider and to promote and ensure orderly growth of broadcasting and cable services, direct the service provider to modify its Reference Interconnect Offer.

"(14A) Every broadcaster shall declare the genre of its channels and such genre shall be either News and Current Affairs or Infotainment or Sports or Kids or Music or Lifestyle or Movies or Religious or Devotional or General Entertainment (Hindi) or General Entertainment (English) or General Entertainment (regional language).

14(B) The multi system operator shall place the channels of a broadcaster in the genre declared by such broadcaster.

14(C) No broadcaster shall demand from the multi-system operator to assign a particular number to its channels."

Chapter VI provides for Miscellaneous Provisions.

Clause 8 contained therein reads as under :-

8. Intervention by the Authority .- *The Authority may, in order to protect the interest of the consumer or service provider or to promote and ensure orderly growth of the broadcasting and cable sector or for monitoring and ensuring compliance of these regulations, by order or direction, intervene, from time to time."*

16. Before us, various recommendations as also Explanatory Memorandums issued by the Respondent herein have been placed.

We shall refer thereto a little later.

17. Suffice it to point out at this stage that the 2004 Regulations were framed by the Respondent herein in terms of a notification dated 09.01.2004 whereby and whereunder the Act was amended to include the Broadcasting and Cable services to be 'Telecommunication Services'.

At that point of time, the cable services were operated on an analogue mode.

18. The Parliament amended the 1995 Act by inserting Section 4(A) therein in terms whereof the Central Government was empowered to declare any area to be a CAS (Conditional Access System) area.

By reason of a notification dated 10.7.2003 the Central Government directed that a part of Delhi (South Delhi), the town of Chennai and parts of the towns of Kolkata and Mumbai shall come within the purview of CAS Area.

It is also not in controversy that the Respondent fixed Rs.5/- per channel as the maximum retail price which was to be recovered by the local cable operator from the subscriber in respect of the operations carried out in the said area.

19. The said revenue was to be shared by the Broadcasters, MSOs and LCOs in the manner specified therein that is 45%, 30% and 25%.

20. The Respondent herein amended the Tariff Order, known as Telecommunication (Broadcasting & Cable Services) 2nd Tariff Order in the year

2007 being No.3 of 2007, whereby and whereunder the rate as prevailing in the years 2004 and 2007 were directed to be frozen.

21. The Respondent herein amended the 2004 Regulation also in the year 2009 with regard to the DTH services.

22. Before proceeding in the matter further, we may notice that despite introduction of the DAS system in four aforementioned towns, no other or further notification was issued by the Central Government in exercise of its power under Section 4-A of the 1995 Act.

23. It is only in the aforementioned backdrop of events, we may notice that the Information & Broadcasting Ministry, upon eliciting the views of the industry, sought to implement the 2010 Amendments in four different phases namely; Phase I (in four Metros by 31.3.2011), Phase II (in all cities having a population of one million by 31.12.2011), Phase III (in all other urban areas (Municipal Corporations/Municipalities) by 31.12.2012); and Phase IV (in rest of India by 31.12.2013).

However, the said dates were extended upto 31.03.2012 for Phase I, 31.03.2013 for Phase II, 31.12.2014 for Phase III and 31.12.2014 for the rest of

India.

24. Yet again by a Notification dated 11.11.2011, the said dates (phase-wise) were extended up to 31.01.2012, 31.03.2013, 30.9.2014 and 31.12.2014 respectively.

The said date in the first phase, however, has since furthermore been extended up to 31.10.2012.

Contentions of the parties

25. These appeals were filed sometime in June 2012.

The principal ground on which these appeals have been filed by the MSOs, shortly stated, are as under :-

(i) The impugned Tariff Order cannot be said to have been made in exercise of its power under sub-section 2 of Section 11 of the TRAI Act;

(ii) The fixation of tariff would mean the rates/charges which are to be ultimately paid by the subscriber nor the maximum retail price of a channel having been fixed, the impugned order cannot be sustained;

(iii) There is no reason as to why the MSOs are required to

maintain a head end having a capacity to carry 500 channels, although mandatorily it is required only to carry 100 FTA channels;

(iv) Fixation of percentage of revenue share being not a tariff making exercise, the impugned tariff order is wholly unsustainable;

(v) The Respondent, on the one hand, having recommended that the MSOs can recover the investments made by them from the carriage fee, but on the other hand, having provided for a 'must carry' clause, must be held to have deprived them from the benefit thereof indirectly;

(vi) In absence of any tariff having been fixed regulating the retail price of the channels of the broadcasters whereby the retail price to be paid by the subscribers is specified, the impugned Tariff Order and Regulation create a discrimination by and between the DTH operators on the one hand and the DAS operators, on the other and, thus, the same must be held to be arbitrary, it having not conformed to a tariff fixation process.

(vii) It is not correct to contend that it was not possible for the Respondent to fix the retail tariff of the channels as not only for the CAS regime it did so, but also in its report filed before

the Supreme Court of India in Civil Appeal No.829 of 2009, the costing estimates filed by the broadcasters have been referred to.

(viii) There is absolutely no reason as to why DTH operators are not required to carry 100 FTA channels nor they having been deprived of from receiving carriage fee and placement fee, specially having regard to the fact that the claim in regard thereto has been prohibited in the case of the appellants;

(ix) In respect of the pay channels, having regard to the fact that the MSOs have to share 35 percent of its revenue not only from the income it derives, but also in respect of the amount of charges payable to the broadcasters and in that view of the matter unless the MSOs while implementing CAS would be required to mark up its subscription fee by about 54.5 percent over and above the charges which will be payable by the DTH operators to the broadcasters;

(x) The impugned Tariff Order and the Regulations are discriminatory in nature in so far as only the MSOs have been asked to fulfill various obligations; wherefor no empirical data has been collected;

(xi) Clause 6.3 of the Tariff Order does not provide for a scheme for fixation of tariff. An appropriate tariff order must take care of reasonable return at all levels and, thus, the

impugned Tariff Order is violative of Article 19 (i) (g) of the Constitution of India in so far as it does not provide for a workable business model;

(xii) In the Explanatory Memorandum issued by the Respondent, no reason having been assigned, it is liable to be set aside on that ground alone;

(xiii) The Regulations 2012 Amendment having been framed without holding any consultations, which is imperative in character in view of Section 21 of the General Causes Act, the same cannot be sustained in law.

26. In the appeals filed by the local cable operators namely Appeal No. 3 (C) of 2012 and Appeal No. 15 (C) of 2012, it was urged that :-

(i) keeping in view the fact that the LCOs despite incurring heavy expenditures for laying down the cables, attending to and rectifying the complaints of the subscribers as well as realization of the subscriber fees for the MSOs, wherefor an expenditure of Rs.148/- per subscriber would be required to be made, they would be getting only 45 percent of a sum of Rs.100/- for transmitting 100 FTA channels which is wholly inadequate;

(ii) 2006 Tariff Order notified on 24.8.2006 having provided for realization of Rs.82/- from the subscribers, and as in the present regime the LCOs would be getting only Rs.45/- per subscriber for the FTA channels and Rs.52.50 out of Rs.100/- in respect of the pay channels, the impugned Tariff Order cannot be sustained.

27. Mr. Meet Malhotra and Mr. Saket Singh, learned counsel appearing on behalf of the Respondent, on the other hand, would urge :-

(i) From paragraphs 1.47, 1.48, 1.53, 1.57 and 1.59 of the Explanatory Memorandum read with the 'Objects and Reasons' of the 1995 Act, as amended in the year 2011, it is evident that DAS can neither be equated with the Conditional Access System or the Direct to Home System;

(ii) The Tariff Order having provided for both 'Wholesale tariff' and 'Retail tariff' must be held to have taken care of the interests of both MSOs and LCOs;

(iii) The percentage of revenue sharing, having regard to clause 5 of the Tariff Orders would only come into force if negotiation between the parties fail to achieve any result and not otherwise;

(iv) Keeping in view paragraph 30 of the Explanatory Memorandum it is be evident that no further transparency in bringing about the Tariff Order was necessary having regard to the fact that it is the Multi Service Operator who fixes the retail tariff and not the broadcasters;

(v) So far as the allegation of non-compliance of sub-section 4 of Section 11 of the 1997 Act is concerned, keeping in view the fact that basis for the charges were known, the number of viewership and no under-reporting, the tariff order must be held to be fully transparent;

(vi) Although it is true that in CAS, MRP was fixed but keeping in view the difficulties faced by the Regulator to fix the Maximum Retail Price, based on the costs of the contents of the channel which may be levied on the broadcasters, the same had not been fixed for DAS;

(vii) In the areas covered in the CAS Notification, the MSOs were not to receive anything from the FTA channels and they having been provided for 55 percent of the revenue to be earned by the LCOs on that count, it together with the carriage fee may recoup its cost;

(viii) The share of the revenue fixed by the TRAI was interpolated from the CAS revenue share; namely 45 percent, 30 percent, 25 percent, it is incorrect to contend that the same is

unreasonable;

(ix) The retail tariff, being consisting of two components namely pricing and packaging, it would be evident that the subscription fee payable by the consumers must be within their reach, as for example, if for a bouquet comprising of four channels, a sum of Rs.30/- is to be charged, the individual rate cannot be more than 150 percent thereof i.e. Rs.45/-; wherefrom it would appear that each channel will cost about Rs.7.50, but in terms of the Tariff Order the same would not be more than three times of the bouquet rate;

(x) It is true that in terms of sub-clause 1(A) of Clause 6, the MSOs are required to carry 100 FTAs, but it is incorrect to contend that a great deal of permutation and combination would be necessary in the event, the subscribers opt for the FTA channels;

(xi) Keeping in view the fact that the number of FTA channels is to be specified by the MSO itself, the consumer's choice will only be limited to 100 FTAs from the available channels and, thus, it is incorrect to contend that the consumer may chose any channel out of all the FTAs which are telecast;

(xii) Keeping in view the fact that if the MSOs provide for more than 100 FTAs, it can also charge on a-la-carte basis, in which case only, the consumer can exercise its choice of 100

FTAs;

(xiii) Sub-clauses 1A and 1B of Clause 6 are required to be read with the proviso appended to Section 4-A(3) of the said Act as also the 'Objects and Reasons' therefor and when so read, it would be evident that choice of the channels both for FTAs as also pay channels must be made available to the subscribers only;

(xiv) The mandatory provisions of carriage of channels having been fixed in terms of clause 6 (1C) i.e. 5 channels for 7 genres namely 35 channels and 3 each for general entertainment in Hindi, English and regional language i.e. 15, the maximum number of channels, which are mandatory to be offered to the subscribers, is 50 out of 100 FTAs which can be a subject matter of packaging;

(xv) So far as the impugned Regulations are concerned, from sub-clause 1(D) of Clause 4; it would appear that the choice of channels has been left to the consumers;

(xvi) Sub-clause 4 of Clause 4A does not refer to any basic service tier;

(xvii) No carriage fee has been permitted in respect of the case where the MSOs/LCOs sought to invoke their right of 'must provide' clause, the carriage fee will be levied only if the broadcasters invoke their right of 'must carry' and not

otherwise;

(xviii) Keeping in view the fact that genres are known, the MSOs can place them in accordance with the scheme of placing them genre-wise and, thus, there is no scope for payment of any placement charges.

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28. Mr. Gopal Jain and Mr. T.S. Bhatia appearing on behalf of the interveners submitted that :-

(a) with the march of technology, the role of the Regulator being to balance the interests of all concerned including the broadcasters and Digital addressability having several advantages, with regard whereto only spacious contentions have been raised by the appellants, these appeals have been filed indirectly to impede and obstruct DAS, which have been brought into force to bring about a transformation and change in industry, wherefor a new regulatory regime is necessary;

(b) The revenue sharing in the ratio of 65:35 percent in respect of the 'Pay channels' must be held to be just and fair as in terms thereof effective measures have been taken by the

Regulator to provide for a fair and just solution to various concerns raised by the public in general from time to time;

(c) The Regulations impose simultaneous obligations of 'must carry' and 'must provide' on the MSOs and the Broadcasters respectively to softly counterbalance the interest of the concerned stakeholders.

The Issues

29. In view of the rival submissions of the parties, the questions which would arise for consideration of this Tribunal, are :-

(i) Whether the Appellants MSOs have been discriminated against vis-à-vis the DTH operators?

(ii) Whether in the tariff making process, the Respondent was obligated to fix the tariff payable by the broadcasters and the retail tariff payable by consumers?

(iii) Whether the fixation of sharing of the percentage of the tariff in retail and in wholesale, as provided for in clause 5 (E) of the Tariff Order, is arbitrary?

(iv) Whether clause 6(1)(B) of the Tariff Order leaving a wide choice to the consumers in terms whereof it may use to subscribe only pay channel, must be held to be arbitrary?

(v) Whether the obligation put on the MSOs to create a head

end having capacity to carry 500 channels is irrational and discriminatory vis-à-vis the DTH operators?

(vi) Whether the MSOs have been discriminated against, in so far as demand of Carriage Fee and Placement Fee as provided in Regulation 3 (5) and Regulation 3(11)(a) are concerned?

Whether CAS system and DTH are comparable with DAS (Digital Addressable system)?

30. For one reason or the other, the Central Government did not consider the question of expanding the CAS system in other parts of India.

One of the major differences between the two, however, is that whereas in the areas where CAS is operative, the LCOs used to deal with the FTA channels; under the DAS system, the FTA channels are also to be distributed by the MSOs to the customers either directly or through the agency of the LCOs; to the reason being that the signals thereof are also to be transmitted on the digital platform.

31. We, therefore, are of the opinion that there is no absolute uniformity in all the systems. We, however, while saying so, may clarify that we do not

intend to say that the level playing field is not required to be maintained.

32. We have noticed heretobefore that the Central Government in exercise of its power under Section 4 A of the 1995 Act, issued a notification declaring the town of Chennai and some parts of three other towns, namely, Delhi, Mumbai and Kolkata to be the CAS area.

It is one thing to say that the CAS, DTH and DAS provide for application of digital technology, but it is another thing to say that they are similarly placed in all respects.

With the notification issued by the Central Government introducing DAS regime, the earlier notifications under Section 4A of the 1995 Act have become imperative.

33. So far as DTH is concerned, the same is not governed by the provisions of 1995 Act or the 1994 Rules as amended; but is otherwise governed by the TRAI Act, 1997. In other words, the amendments carried out in the 1995 Act or the 1994 Rules have specifically been inserted for the DAS regime.

DTH operators are, however, also required to obtain a license from the Ministry of Information and Technology and they are bound by the terms and conditions thereof.

34. The Parliament amended the 1995 Act laying down the terms and conditions under which the DAS shall operate.

The said provisions lay down that the TRAI would make requisite Regulations in terms whereof the regime will be governed. The TRAI in exercise of the said jurisdiction issued the impugned Tariff Order as also the impugned Regulations.

It may be true that in the CAS system, apart from the subscribers, the principal stakeholders were three namely; the Broadcaster, the MSO and the LCO; whereas DTH operators deal with the subscribers directly through satellite. DTH operators do not have to supply signals to another intermediary namely, the LCOs.

35. It is, therefore, evident that the DTH operators and the appellants before us do not stand on the same footing in all respects.

The Discrimination Issue

36. One of the principal grounds for adopting the impugned Tariff Order and the Regulations is said to be causation of discrimination to the DAS operators vis-à-vis the DTH operators.

We may notice some of the distinctions between MSO and the DTH operator :-

Sr. No.	*MSO*	*DTH*
1.	*MSOs have intermediaries like LCO, with whom they share revenue.*	*DTH have no such intermediaries.*
2.	*In digital addressable cable TV system environment of MSO there is no capacity constraint to carry TV channels.*	*There is capacity constraint due to limited number of transponder capacity. Presently DTH operators carry capacity of 300 to 350 channels only; due to unavailability of KU band satellite transponders. This cannot be an enhanced till transponders become freely available to DTH service.*
3.	*MSOs digital addressable cable TV system is two-way system and is capable of offering a number of interactive and value added services, such as Internet triple play, including broadband, video on demand, real time games, etcetera. Therefore, Appellant is better placed as compared with DTH operators with respect to offering interactive and value-added services, thereby increasing their revenue raising potential.*	*DTH is a one-way system and it is not possible to provide value added services which require two-way interaction.*

	Difference Between DAS and DTH	
	Digital Cable	*DTH*
1	*Must carry 500 channels by January 1, 2013, Regulation 3(8) of the Telecommunication Interconnect Regulation 2012, Volume 1, Page 30, Para 26, Annexure T*	*No such clause*
2	*100 FTA channels basic tier at Rs. 100, Clause 6(1B) TRAI's Telecommunication Services Tariff Order 2012, Volume 5, Page 1105, Annexure 'U'*	*No such clause*
3	*Box refund plan is a must, Clause 7 Trai's Telecommunication Services (Forth) Tariff Order 2010, Volume 3, Page 705, Annexure 'I'*	*No such clause*
4	*Subscribers can pick choose ala carte FTA and make their own bouquet, Clause 6(1B) TRAI's Telecommunication Services Tariff Order 2012, Volume 5, Page 1105, Annexure 'T'*	*No such clause*
5	*MSOs to publish RIOs for Carriage Fee, Clause IV, of TRAI's Interconnection Regulation, 2012, Volume 5. Page 1065, Annexure 'T'*	*They do not have to publish RIO for carriage*
6	*Time limit for various redressal of 1 complaints under QoS Regulation Dated 14th May 2012*	*Not covered for DTH*
7	*Prohibition against Placement Fee Regulation 3(11) of the T*elecom-munication *Interconnect Regulation 2012, Volume 1, Annexure T*	*Not In case of DTH*
8	*Mo Carriage Fee, where MSO is Signal seeker Regulation 3(5) of the telecommunication Interconnect Regulation 2012, Volume 1, Annexure 'T'*	*No Such Clause for DTH*

37. It was urged with regard to serial No.1 of the first table row that the Regulator was required to ensure level playing field between the two sets of operators as also consider the effect of existence of the intermediaries while making the said regulations.

So far as the question of level playing field is concerned, the same shall be considered a little later, but in our opinion the existence of intermediaries in the case of DAS whereas the absence thereof in the case of DTH operator is not of much consequence as the tariff order/the regulations do not lay down any prohibition for the MSOs to supply signals of its channels directly to the subscribers.

As regards serial no.2 of the aforementioned table, it is submitted by the learned counsel for the Appellant that the MSOs have a capacity of 160-220 channels, and the DTH operators have 300 to 350 channels so far as their carrying capacity is concerned, are more. As this aspect of the matter shall also be dealt with at an appropriate stage, no observation is required to be made in this behalf at this stage.

With regard to serial No.3 of the said table, it was submitted that only about five percent of the network of a MSO has a two way system installed and no enhancement thereof is currently envisaged because of the cost constraint; whereas the DTH operators are in a better position to provide interconnect service, Value Added service including Internet service etc. vis-à-vis the MSOs/Cable Operators.

38. The cost constraint, to our opinion, is not a relevant consideration. The Regulator has merely pointed out that the MSOs as also consequently LCOs have a scope of changing the nature of their business and thus, their business potential can be enhanced. We do not think any exception thereto can be taken; having regard to the fact that the Appellants are governed by a different statutory regime.

So far as the difference between DAS and DTH, as contained in the second table is concerned, we may deal with the relevant objections at an appropriate stage.

Level Playing Field

39. Although we have dealt with the question of discrimination, we may notice the legal aspect of the matter.

There cannot be any doubt or dispute that under the provisions of the Act, the Regulations framed by TRAI should provide for a level playing field keeping in view the fact that the subscribers have an option with regard thereto. This aspect of matter for all intent and purport, has been settled by the Apex Court in its judgment in Reliance Energy Ltd. Vs. Maharashtra State Electricity Development Corporation Ltd. reported in (2007) 8 SCC 1.

By reason of providing such level playing field, it is essential to give equal opportunity to the concerned parties. An atmosphere must be created so as to enable the players similarly situated to compete with each other.

In Reliance Energy (supra) it was opined :-

"36. "Globalization", in essence, is liberalization of trade. Today India has dismantled licence-raj. The economic reforms introduced after 1992 have brought in the concept of "globalization". Decisions or acts which results in unequal and discriminatory treatment, would violate the doctrine of "level playing field" embodied in Article 19(1)(g). Time has come, therefore, to say that Article 14 which refers to the principle of "equality" should not be read as a stand alone item but it should be read in conjunction with Article 21 which embodies several aspects of life. There is one more aspect which needs to be mentioned in the matter of implementation of the aforestated doctrine of "level playing field".

40. The concept of level playing field, therefore, has been held to attract not only Article 14 of the Constitution of India, but also Articles 19(1) and 21 thereof. Keeping that point of view this Tribunal will have to consider as to whether by reason of the impugned Tariff Order, the Regulation is violative of the concept of 'level playing field'.

41. One of the main distinctions, so far as the operation of the DTH operators and the DAS operators are concerned, is that the DTH operators had applied for and granted satellite transponder capacitors which are being used by them to the fullest extent and, thus, it may not be possible for the Respondent to direct increase in their existing capacity. They are furthermore

required to pay transponder charges to a satellite company and ten percent of the gross revenue as licence fee. Moreover, the law applicable, as indicated heretobefore, to the DTH operators and DAS operators differ. The DTH operators operate on Pan India basis; whereas the DAS operators do not.

42. It must, however, be placed on record that keeping in view the proviso appended to clause 7 of the Tariff Order dated 21.7.2010 as also sub-clause 1 of clause 6 both in respect of DTH operators and DAS operators, a choice of channel to the subscribers are to be provided.

43. The Appellants contend that whereas the DTH operators have no intermediaries like LCOs, in the DAS regime the MSOs have intermediaries with LCOs.

There is no prohibition for the MSOs to supply the signals directly to the customers. If they employ the services of the LCOs, then and then alone, it has to share its revenue with them.

The effect of having the intermediaries, therefore, does arise only in the DAS regime and only by reason of entering into an agreement with LCOs, a part of its income will have to be shared with the later.

Moreover, for laying cable in a particular area, they do not have made any investment; even otherwise the LCOs are required to maintain the

necessary infrastructure for receiving the complaints, rectifying the defect, collection of the subscription charges etc. It must be compensated therefor.

We, therefore, do not find any merit in this contention.

44. We having regard to the said contention will deal with the relevant questions hereinafter.

However, we are of the view that two systems are although substantially different, the Respondent ought to have considered the question of level playing field.

Placement Charges

45. The MSOs' grievances, however, are not only against the broadcasters but also the percentage of revenue sharing payable to the LCOs.

We may, at the outset, notice that by reason of the impugned Tariff Orders as also the impugned Regulations, the MSOs' right to realize from the broadcasters Carriage Fee and Placement Fee has been restricted.

We may take up the question of the Placement Fee at the outset. A total ban on Placement Fee has been placed by reason of amendment carried out by the 2012 Regulations.

No material has been brought to our notice that before amending the

Regulations in the year 2012, any consultative process had been undertaken. If that is the factual position, there cannot be any doubt or dispute that the Respondent has committed an illegality.

46. The power of the Regulator to amend Regulation is not in controversy in view of the provisions of Section 21 of the General Clauses Act.

The said provision reads thus :-

> ***"21. Power to issue, to include power to add to, amend, vary or rescind notifications, orders, rules, or bye-laws*** *-*
> *Where, by any (Central Act) or Regulations, a power to (issue notifications) orders, rules, or bye-laws is conferred, then that power includes a power, exercisable in the like manner and subject to the like sanction and condition (if any), to add to, amend, vary or rescind any (notifications), orders, rules or bye-laws so (issued)."*

47. A bare perusal of the Section 21 of the General Clauses Act clearly goes to show that the Respondent was required to adopt the same procedure which has been laid down for the purpose of issuing directions as contained in Section 11(1) (b) of the 1997 Act.

48. Mr. Saket Singh would contend that the question of placement of

channel would not arise in a digital system in as much as unlike the non-CAS regime, there is no question of placing a channel in a particular frequency, having regard to technological aspect of the matter, clarity and/ or quality of the picture on the TV screen would be the same or similar for all the channels.

With a view to judge the correctness of the said submissions, we may notice the definition of 'Placement Fee'.

It reads as under :-

> *"(v) 'Placement Fee' means any fee paid by a broadcaster to a distributor of a TV channels for placement of the channels of such broadcaster vis-à-vis channels of other broadcasters on the distribution platform owned or operated by such distributor of TV channels."*

49. The Placement Fee, therefore, does not mean a fee payable only when a channel is placed on a better frequency.

It may be necessary to put a particular channel at a better place so as to attract a higher viewership.

Moreover, if the contention of the Respondent to that extent is accepted, there is absolutely no reason as to why the DTH operators have been allowed to collect placement charges.

We, therefore, are of the opinion that the restriction placed on placement charges cannot be upheld. It is set aside accordingly.

50. Charging of any 'Placement Fee' has been prohibited in terms of Regulation 3(11)(A) of the Regulations.

It is not in dispute that the Respondent herein is enjoined with the duty to follow a transparent process before making a Regulation or bringing about a change therein which would have a direct impact on fixation of tariff.

Transparency, there cannot be any doubt, is required to be maintained for the purpose of advancing the principles of natural justice.

By reason of the impugned 2012 Amending Regulations, admittedly the requirements of Section 11(4) have not been followed.

51. The Amendment has been carried out suo motu. The 2012 Regulations were notified on 30.4.2012. Only after a period of 14 days the amendment is sought to be introduced.

52. It is difficult to comprehend as to if the Placement Fee is an evil for DAS operators; why it has not been found to be so for the DTH operators? Even in viewer wise classification, Placement Fee in view of its definition cannot be said to have lost all its relevance. If that be so, there is absolutely no reason as to why the same has expressly not been done away with for the DTH operators.

Carriage Fee Issue

53. Submission of the Appellants in this behalf is so far as the Tariff Order providing for payment of Carriage Fee is concerned, the same is to be charged by the MSO in terms of the clause 3(5) of the Regulation but the same has been restricted only to a case where the broadcasters approach the MSOs so as to compel them to carry its channel. However, indisputably when the MSOs approach the broadcasters, no Carriage Fee shall be payable.

54. The only submission made by the Respondent in this behalf is that keeping in view the analogy between 'must provide clause' as contained in clause 3.2 of the 2004 Regulations whereby and whereunder the distributors of TV channels are prohibited from asking the broadcasters to pay any 'Carriage Fee', clause 3 (5) of the Regulations provide for a similar effect.

55. It is difficult to comprehend the said submission. Such a criteria has not been adopted so far as the CAS operators or the DTH operators are concerned.

56. Clause 3.2 of the Regulations may not be attracted in the case of DTH operator, but we may notice that the restrictions put therein are only limited to "at the same time".

57. Payment of Carriage Fee, therefore, cannot be put in as a condition on the 'distributor of a TV channel' for all time to come only because at one point of time it had asked the broadcaster to supply signal of its channel.

58. Perusal of clause 3.5 of the Regulations as also the proviso appended to clause 3.2 thereof would show that both the provisions would not have the same effect.

While applying the said principle in a case of 'must provide', the same would not mean that the MSOs would never be entitled to take any Carriage Fee throughout the period during which the original agreement remain valid and/or renewed. It is a privilege of the broadcasters and the MSOs.

59. It is only for that purpose, we intend to place emphasis on the words on record "at the same time".

60. It has not been disputed before us that even in a non-CAS regime Carriage Fee has been paid to the signal seekers.

We are of the opinion that there should not be any difference between 2nd proviso to clause 3.2 of "The Telecommunication (Broadcasting and Cable

Services) Interconnection Regulation 2004" (12 of 2004) as amended from time to time as applicable to non-CAS area/DTH Operator and clause 3(5) of "The Telecommunication (Broadcasting and Cable Services) Interconnection (Digital Addressable Cable Television Systems) Regulation 2012".

We, therefore, do not find justification for not giving the broadcasters and the MSOs an opportunity to enter into bilateral agreement in the matter of Carriage Fee; particularly in view of the fact that no such prohibition has been imposed on the DTH operators.

Legality and/or Validity of the Tariff Order

61. The question as to whether the fixation of a ceiling would amount to tariff making exercise has been raised. However, it is accepted that for the purpose of fixation of the price for the channels of the Broadcasters, a comprehensive exercise had been undertaken by the Respondent.

62. Relying on or on the basis of judgments of this Tribunal in the Zee Turner Vs. TRAI & Ors. (Appeal No. 3 (C) of 2010 disposed of on 16.12.2010), it was contended that the impugned Tariff Order does not satisfy the requirements of Section 11(2) of the Act as it merely provides for a ceiling and a ratio of division in the revenue between two players namely MSO and LCO.

In Zee Turner's case, it has been held as under:-

> *"Fixation of ceiling, leaving the parties to enter into their own agreement, which would be in the nature of making a provision for forbearance subject to a ceiling, in our opinion, would not come within the purview of the term "fixation of rate" and/or "fixation of tariff"."*
>
> *"In this case, the TRAI while has fixed wholesale tariff, it has not fixed retail tariff. As would appear from the discussions made hereinafter, by reason of `the impugned tariff order'; neither a `tariff' nor a `rate' has been fixed; only a ceiling has been provided. It leaves the rate in uncertainty. It is not explicit. It is required to be determined on case to case basis."*

It was observed :-

> *"By reason of `the impugned tariff order', TRAI did not fix any rate. It has merely put a ceiling. The service operators, therefore, would be entitled to enter into the agreement even much below 35%, subject of course, to the ceiling of 35%. It is not the function of TRAI to fix a ceiling in terms of Section 11 (2) of the Act; it has to fix a rate.*
>
> *The term `rate' has a definite meaning. It should be understood in the light of the provisions of the Act and in particular the definition of `telecommunication services' which would include `broadcasting and cable services'. It must be binding on all the operators. It substitutes a contract which may be entered into by and between the parties. Contracts by and between a broadcaster and service operator are entered into on the basis of a large number of factors including the location, the area, the popularity of the channel, the subscriber base, the tenure of the agreement, if the*

subscription fee fixed would be assured and as also other relevant factors, including placement of channels and the revenue the broadcaster can earn from advertisements etc.

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

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

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

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

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

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

"Furthermore fixation of MRP by the DTH Operator, which results after the distinction of Basic and Add – On Packages have been removed, and there being complete forbearance at the retail level would pose the risk of Vertical Integration. Fixation of MRP by the DTH Operation and its ability to fix 'basic – packages' may be abused by the DTH Operators particularly those who are vertically linked to a Broadcaster or otherwise intend to promote their own channels by pricing the other channels exorbitantly. It may not be conclusive but it had a very vital bearing."

63. Aggrieved by the decision of this Tribunal in the aforementioned matter, the TRAI has preferred an appeal before the Supreme Court of India. It has passed an order of stay directing, however, that in the meanwhile the ceiling shall be fixed at 42 percent on the rate fixed by the Broadcasters for non-CAS areas.

64. Having regard to the fact that the Supreme Court for the time being has fixed 42 percent of the non-CAS rates, we are of the opinion that this Tribunal need not go into the aforementioned question as at present advised.

65. The answer to the said question will depend upon the judgment and order which may ultimately be passed by the Supreme Court of India.

66. Mr. Chawla has cited a number of decisions including M/s. Kranti Asso. Pvt. Ltd. & Anr. Vs. Masood Ahmed Khan & Ors. reported in (2010) 9 SCC 496, Travancore Rayon Ltd. Vs. Union of India reported in AIR 1971 SC 862, Vasudeo Vishwanath Saraf Vs. New Education Institute & Ors. reported in AIR 1986 2105 to point out that it was obligatory on the part of the Respondent herein to assign reasons in support of the Tariff Order. The Tariff Order is a statutory function. This is not an administrative order. Similarly Regulation making is also a statutory function. Moreover, the Regulator has already given the Explanatory Memorandum which assigns sufficient reasons. We, therefore, are of the opinion that the said question need not to be considered by this Tribunal.

67. Questions have been raised with regard to the legality of provisions of the Tariff Order and the Regulations, which we intend to deal with hereafter under separate heads.

Cost of the Channel issue

68. According to Mr. Malhotra, it has been found that cost based exercise in

respect of channel pricing will not end in any meaningful result. Although it is stated before us that it is difficult to comprehend as to why the said exercise could not be carried to its logical conclusion, it may be noticed that learned counsel himself has placed strong reliance on the decisions of this Tribunal in Appeal No. 10 (C) of 2006 decided on 27.02.2007, wherein the broadcasters questioned the legality and/or validity of fixation of Rs.5/- as the maximum price for the channels which was negatived by this Tribunal.

If the Respondent itself was aware of the fact that this Tribunal has upheld such tariff fixation measure, why for all intent and purport the said exercise could not be carried out again?

Submission of Mr. Malhotra is that the broadcasters have also been regulated from time to time. It may be so but there is no doubt that the comprehensive consultative process carried out by the Respondent does not carry any fruitful result. We may notice in Appeal No.10 (C) of 2006 – SET Discovery Vs. TRAI, this Tribunal accepted the contention of the Respondent that the Tariff framed by the Respondent should be allowed to be continued for some time so as to enable all concerned to consider effect and efficacy thereof.

Mr. Malhotra submitted that on the one hand the broadcasters at that point of time questioned the validity of this order, now the MSOs intend to take recourse thereto. It is so but in our opinion but it was not for the Respondent being a statutory authority to contend that that fixation of the price of the channel is difficult to be carried out.

69. The question is as to whether on that term alone, this Tribunal would refuse to consider the question raised by the appellants. We are of the opinion that the same could not be. Incidentally the broadcasters, when the table appears to turn in their favour, have raised similar contentions adopting the submission of Mr. Malhotra that as the digitalization at transformation stage, the same should not be obstructed.

We think TRAI should consider the matter at an appropriate stage.

Analysis of some relevant clauses

Clause 6 (1A)

70. 'Basc Service Tier' has been defined in the 1995 Act to mean :-

> *" (ea) "basic service tier" means a package of free-to-air channels to be offered, with an option to subscribe, by a cable operator for a single price to subscribers of the area in which his cable television network is providing service;"*

The said definition whether is in consonance with the provisions of the impugned Tariff Order, is the question.

71. It, indisputably, is imperative in character. Provisions of the 1995 Act, as amended, provides for complete digitalization in the country.

72 Contention of the Appellant is that by reason of the said provision, the right of the Multi Service Operator to choose a package of FTA channels has been taken away.

We have noticed heretobefore the Explanation appended to Section 4 (A)(3) of the Act. The said act provides for specifying the number of channels for providing basic service tier.

In view of the aforementioned provision, the TRAI was entitled to lay down such a provision. It may be true that the local cable operators in the CAS areas were required to offer a package of minimum 30 FTA channels. The said requirement has been increased to 100 FTA channels.

By reason of the said provision, however, the right of the MSO to provide for a package of its own choice has not been taken away.

73. The Respondent in paragraphs 2 & 3 of its Explanatory Memorandum annexed to the Tariff Order dated 30.4.2012, stated thus :-

> *"2. The Government, on 25th October, 2011, issued an Ordinance amending the Cable Television Networks (Regulation) Act, 1995, enabling the implementation of digital addressable cable TV systems in India. Thereafter, the Government also issued a notification dated 11th November, 2011, which laid down the roadmap for implementation, in a four phased manner, from June 2012 to December, 2014. The Ordinance dated 25th October, 2011, subsequently, in December, 2011, became an Act. The said*

amendment Act, apart from other provisions, provides for basic service tier (BST) to be offered by the operators of digital addressable cable TV systems, having its composition and tariff prescribed by TRAI.

3. Earlier, TRAI had, on 21st July 2010, issued the Telecommunication (Broadcasting and Cable) Services (Fourth) (Addressable Systems) Tariff Order, 2010, applicable to broadcasting services and cable services provided to subscribers, through addressable systems, throughout the territory of India except cable services provided through cable television networks in the notified CAS areas. Considering the Cable Television Networks (Regulation) Amendment Act 2011, and the notification dated 11.11.2011 mentioned above, suitable amendments are required to be made in the tariff stipulations prescribed in the said tariff order, . Therefore, the Authority initiated a consultation process on the issues relating to implementation of digital addressable cable TV systems. The consultation issues include, apart from other issues related to interconnection and QoS, the issues related to the tariff and composition of Basic Service Tier (BST), retail tariff, tariff for advertisement free channels and revenue share between Multi-System Operator (MSO) and Local Cable Operator (LCO).”

74. It has been submitted by Mr. Navin Chawla that by reason of such a mandate, the discretion of the MSO has been taken away.

75. We are, however, of the opinion that the Appellants MSOs have still the

right to offer a package of 100 FTA channels out of about 250 FTA channels which are telecast.

The Multi Service Operators apart from the process of down-linking the said channel and the 45 percent of the revenue to be paid to the LCOs is not required to incur any other expenditure.

By reason of the said provision again, an option has been granted to the subscriber. According to the Respondent, the said provision has been inserted by way of clarification despite the fact that clause 6(4) in fact was existing. It has been submitted before us by the Respondent that by way of example a subscriber may take 50 FTA channels and one or two Pay Channels in which event, he has to pay a sum of Rs.150/-.

In terms of the said provision, separate rates have been prescribed for a separate BST or FTA.

We, therefore, do not see any reason to interfere with the said clause.

Clause 6(1B) :

76. The submission of the Appellants that they are bound to make a large number of permutations and combinations as a wide discretion has been granted to the subscribers to choose the package of FTA channels is not correct.

An enabling provision has been made by reason of the said clause to provide at least 100 FTA channels. It can do so. It can offer even a higher

number of FTA channels. Once the FTA channels are placed in the system, it is for the subscriber to choose the FTA channels upto 100 number in lieu of the Basic Service Tier offered by Multi System Operator.

Section 4(E)(3) of the 1995 Act clearly provides that the BST shall be offered on a-la-carte basis. Whereas a mandatory provision to make 100 FTA channels in so far as MSOs are concerned, it is necessary for the subscribers to subscribe the same, the subscriber does not accept the said offer, it can do so on a-la-carte basis out of the FTA channels which are available on the network of the MSOs.

The retail tariff, so far as the DAS regime is concerned, is under forbearance.

Section 4(A)(3) provides an option to the consumer to take the same on a-la-carte basis on the tariff specified under the said provision. Such an option can be exercised only when pay channels are available in the network of the MSO.

Mr. Saket Singh may be correct to contend that the aforementioned provision was necessary to be made so as to provide for an option to the subscriber to opt for such channels as he likes, otherwise the MSO can take unpopular FTA channels on the package.

77. The Regulator has sought to explain the situation in paragraphs 7 to 9 of the Explanatory Memorandum as to why a maximum rate of Rs.100/- has been earmarked.

78. It has also been submitted that there is no such requirement for the DTH operators. We have noticed heretobefore that whereas DTH platform covers the entire country and all the channels are to be uplinked together in the DAS regime, the MSO may form the BST for the concerned region. In any event, as has been noticed heretobefore, that even the said system was prevailing in the earlier regime also. No case has, therefore, been made out for setting aside the said clause.

Clause 6(1C)

79. By reason of the said provision the Respondent herein mandated that in the Basic Service Tier at least 45 channels of the Genres mentioned therein and few regional languages of the concerned region shall be offered to the subscribers. The proviso appended thereto, however, curtails the said obligation in so far as it provides that if sufficient number of Free to Air channels of a particular Genre is not available, in which event the MSOs may include in the basic service tier the channels of other Genres.

80. As noticed heretobefore, the source of the decision taken by the TRAI flows from the 1995 Act as amended.

81. The Appellants do not say that it is difficult to choose 45 channels out of 100 channels. We, therefore, do not see any reason as to why the same cannot be given effect to.

Clause 6(1D)

82. The Appellants contend that wide option given to a subscriber in terms whereof they are not required to subscribe any of the 'Free to Air channels' or the 'Pay Channels' must be held to be bad in law. It was furthermore submitted that the said provision is contrary to clause 6(1A) of the Tariff Order. We do not see as to how the said clause would be ultra vires the 1995 Act.

83. It may be true that in a given case having regard to the aforementioned provision, the subscriber may not subscribe any FTA channel at all, which now appears to be the main source of revenue of the MSOs, but it is difficult to accept the contention of the MSOs that such a provision could not be made at all. The said provision has been made, as we have noticed heretobefore, to give a wide option to the subscribers.

84. By reason of such an option, the subscriber would be entitled to choose such channel which according to it, would satisfy his needs.

If he asks for the BST up to 100 FTA channels, he has to pay the minimum sum of Rs.100/-. If, however, the subscription of more than Rs.150/- is required to be paid, he has to pay the actual. It is difficult to conceive that in all the cases, the nature of subscription fee to be paid by the subscribers would be the same. It would vary from person to person, place to place, region to region. The Tariff Order dated 21.7.2010 entitles the service provider to specify a minimum subscription period. Such a provision evidently has been made in terms of Section 4-A of the 1995 Act.

85. It was urged by the learned counsel appearing on behalf of the Local Cable Operators that the impugned tariff order wrongly proceeds on the basis that MSOs could downlink the channels, which would be contrary to the regulations made by TRAI.

In paragraph 3.10 of the Consultation Paper dated 22.5.2011, it was stated :-

> *"3.10 In the DAS regime, all the channels are to be carried in the digital and encrypted form which would be delivered through the MSO network as against the CAS scenario where the FTA channels in form of BST are carried directly by the LCO network bypassing the MSO network. In Digital Addressable Cable TV systems, the subscriber management system (SMS) would be maintained by the MSO, so the generation of consolidated bill to the consumer will also be through the MSO. Thus, as far as the revenue share is concerned,*

there could be a view that the subscription revenues should be apportioned between the MSO and LCO directly in proportion of the overall costs of carrying the channels in their respective networks….".

86. Mr. Saket Singh would contend that the Respondent did not receive any objection with regard thereto during the consultative process. Only in that view of the matter, in the Explanatory Memorandum it has been stated that in CAS the FTA channels are down-linked by LCOs. The objection raised on behalf of the Appellants appears to be technical in nature. By reason of the impugned tariff order, the MSOs are permitted to downlink the channels in digital form. It is beyond any doubt or dispute that LCOs in the DAS regime would be entitled to take benefit of its network so as to enable the broadcasters to reach the satellite cable T.V. homes through the digital system.

Clause 3.4 of the Standard Technical and Commercial Interconnection Agreement reads as under :-

3.4 No charges for the Basic Service Tier/ Free To Air channels shall be payable by the Affiliate to the multi system operator (MSO). Any amount collected by the Affiliate from his subscribers for the Basic Service Tier/ Free To Air channels shall be retained by the Affiliate. However, the Affiliate shall have no claim to get any share from the Carriage Fee, if any, received by the multi system operator (MSO) from any broadcaster and the entire amount so received by the

multi system operator (MSO) shall be retained by the multi system operator (MSO).”

Moreover, in paragraph 3.7 of the Consultation Paper dated 22.12.2011, it has been stated as under :-

> *“……3.7 The Regulation provided that the revenue from the basic service tier will be kept entirely by the cable operator and the carriage fee if any will be kept by MSO. However, the Hon’ble TDSAT vide its judgment dated 12th May 2009 in Appeal No.11 (C) of 2006 has struck down this clause. Therefore, at present the revenue generated from the basic service tier may be shared between MSO and LCO on mutually agreed terms…”.*

We, therefore, do not find any merit in the said contentions of the Appellants.

LCOs Vs. MSOs

87. The LCOs compared their present position vis-a-vis CAS regime, contending that whereas in the former regime, a sum of Rs.5.35 paise which was the maximum retail price payable by a subscriber to a Multi System Operator/Cable Operator, they have been obtaining 20 percent of the total revenue, so far as the Pay Channels are concerned and a sum of Rs.82/- for FTA Channels.

In terms of the impugned Tariff Order dated 30.4.2012, the maximum gross revenue of the LCOs per subscriber in respect of the basic service tier has been fixed at Rs.45/- out of Rs.100/- in the DAS regime and so far as the Pay Channels are concerned, the LCOs would be only having 35% of the Rs.150/- which comes to about Rs.52.5 as provided under clause 6(1E) of the impugned Tariff Order.

It is not in dispute that a Multi Service Operator/Local Cable Operator is to receive a minimum sum of Rs.150/- by way of monthly subscription in respect of the Pay Channel. It is also not in dispute that keeping in view the different provisions of the impugned Tariff Order although MSOs are required to offer at least 100 FTA channels for a sum of Rs.100/-, it is for the subscriber to accept the same or not.

In other words, subscription of FTA channels alone or pay channels and/or a combination of FTA and Pay Channels is within their exclusive domain.

88. It is the common case of all the Appellants herein that the Respondent before fixing the amount payable to the LCOs and/or MSOs under the DAS regime did not conduct an empirical study.

It is also a common ground that compared to the CAS regime, the broadcasters became entitled to hike their subscription charges and in comparison thereto there might have been 600% growth in their income.

The LCOs questioned the impugned Tariff Order inter-alia on the premise that clause 6(1D) of the Tariff Order 2012 is arbitrary and irrational in so far as the LCOs have not been given the right to fix their rates.

89. The said argument inter-alia is based on the premise that so far as FTA Channels are concerned during CAS regime, the LCOs were entitled to down link the channel; whereas in terms of the 2006 Tariff Order the power to downlink the pay channels has been conferred on the MSOs only. It is according to the LCOs, is in direct conflict with the legal definition of the term 'MSO'. However, it is not in dispute that in terms of the 1994 Rules as amended, the MSOs again and not the LCOs have been permitted to downlink the channels.

90. The question, which arises for consideration is, as to whether the revenue sharing between the LCO and MSO is proper?

91. It is one thing to say that the entre Tariff Order is bad in law but it is another thing to say that the percentage of shares allocated between the LCOs and MSOs is per se bad.

92. The LCOs in the DAS regime, apart from the network, are not required to maintain any head end. They are not required to maintain and/or invest or install any equipments and/or purchase thereof. The percentage of revenue share has been fixed for the entire country and not for the CAS area alone.

It is, therefore, incorrect to contend that the Respondent herein could not have fixed the revenue sharing at the rate of 55 percent and 45 percent of the FTA Channels and 65 percent and 35 percent for the Pay Channels; particularly in view of the fact that the Respondent states that the same was done having regard to the percentage of shares in the CAS regime. Whereas the LCOs evidently are not entitled to any carriage fee, they are entitled to 55 percent of the revenue share in respect of the FTA channels and/or basic tier.

93. We, therefore, are not in a position to agree with the submission of Mr. Bakshi that the LCOs continue to play the same role.

It was submitted that keeping in view the fact that ordinarily a subscriber would ask for 10 to 15 channels on an average, the income of the LCO will come down only to Rs.30/- per month per subscriber so far as the pay channel is concerned. Whereas the Appellants have accused the Respondent of making assumptions and presumptions, in our opinion, the said arguments in fact are based on assumptions. It is difficult for this Tribunal to enter into any factual aspect of the matter as to the increase in the electricity charges and other charges so as to enable it to come to a conclusion that the impugned

Tariff Order on that ground alone would violate Article 19 and/or 21 of the Constitution of India as has been submitted on behalf of the LCOs.

94. It is difficult for us to go into the factual aspects of the matter as to how the delivery and maintenance expenses can be recovered only from the cost of BST itself and, thus, the share of LCOs would make it possible for them to undertake proper services to the consumers. In the digital regime, the ultimate choice as regards the nature and number of channels subject, of-course, to availability thereof would be on the consumers. We do not find any illegality in the impugned tariff order so far as that aspect of the matter is concerned.

95. Before us, a comparative chart has been produced by Mr. Bakshi to show that compared to the CAS regime, the broadcasters have become entitled to an increase in the rate if their channel from 234 percent to 620 percent.

It reads as under :-

Revenue Realization per Channel per STB by Broadcaster in CAS & DAS

S. No.	*Name of the Channel*	*CAS Rate to Operator*	*DAS Rate to Operator*	*% Change*
01	*Star Sports*	*2.40*	*14.89*	*+620.4%*

02	*ESPN*	*2.40*	*14.89*	*+620.4%*
03	*Star Cricket*	*2.40*	*12.58*	*+524.2%*
04	*Life OK*	*2.40*	*9.21*	*+383.8%*
05	*Colors*	*2.40*	*8.99*	*+374.6%*
06	*SET*	*2.40*	*8.99*	*+374.6%*
07	*Ten Cricket*	*2.40*	*14.89*	*+620.4%*
08	*Star Plus*	*2.40*	*7.87*	*+327.9%*
09	*Set Max*	*2.40*	*7.64*	*+318.3%*
10	*Star Gold*	*2.40*	*7.42*	*+309.2%*
11	*Star Movies*	*2.40*	*7.42*	*+309.2%*
12	*Movies OK*	*2.40*	*7.14*	*+297.5%*
13	*HBO*	*2.40*	*7.01*	*+292.1%*
14	*Pogo*	*2.40*	*5.62*	*+234.1%*
15	*Discovery*	*2.40*	*6.74*	*+280.8%*
16	*SAB TV*	*2.40*	*6.17*	*+257.1%*
17	*Zee Cinema*	*2.40*	*5.83*	*+242.9%*
18	*Cartoon*	*2.40*	*5.62*	*+234.2%*
19	*Zee TV*	*2.40*	*5.83*	*+242.9%*
20	*AXN*	*2.40*	*6.52*	*+271.7%*
	Total	***48***	***171.27***	***+357%***

96. It does not appear from the record that the LCOs have placed the said facts before the Respondent herein. It is difficult for this Tribunal to opine that the contents of the said chart are correct. Moreover, the tariff order has been issued having regard to the entire country in mind and not for the CAS area alone. As of now there are more than 800 channels in the country.

Moreover, in the DAS regime the Broadcasters are not required to supply the signals of the channels @ Rs.5/- per channel.

It is for the TRAI to laydown such rates in future.

In DAS regime, the operators would be entitled only to 42 percent of the non-CAS rate.

97. On the one hand, the parties contend that 42 percent of the non-CAS rate being the maximum percentage which can be claimed by the broadcasters, in fact both the FTA operators as also DAS operators may strike a bargain at a rate on a much lower side which may even be 15 percent or 20 percent of the non-CAS rates.

98. The status of the parties certainly with regard thereto will depend upon the respective bargaining capacity of the broadcasters and the MSOs, having regard to the fact that the bargaining power as also the authority of the MSOs who charge a higher rate than Rs.150/- per month, cannot also be lost sight of.

99. By reason of the Tariff Order only a minimum amount has been fixed and thus, the MSOs and consequently the broadcasters may obtain a higher amount from the subscribers.

100. We, therefore, do not find any apparent reason to interfere with that part of the Tariff Order.

Capacity Issue

101. Contention raised in this behalf by the MSOs is that the requirement to carry 500 channels as provided for by Regulation 3(8) is arbitrary.

We were given to understand that in all situations the MSOs must carry 500 channels, but it has rightly been pointed out by Mr. Meet Malhotra that direction in this behalf only is with regard to the capacity of the head end and it is not necessary for the MSOs to carry 500 channels mandatorily.

102. There are two aspects of the matter which would require our attention. Whether keeping in view the investment, which has to be made by th MSOs for keeping themselves in readiness to carry 500 channels, according to them, the initial investment therefore to the extent would be about Rs.18 crores.

Mr. Saket Singh, however, contends that from a letter issued by IMCL to the Respondent, it would appear that the total cost for carrying 500 channels under different heads was stated to be only Rs.5,13,50,000/-.

In April 2012, the Digicable raised a contention that the investment would be much higher; whereafter only others adopted the same.

103. It is not in dispute that the DTH operators are having capacity of carrying on 300 channels. The operators operating in an analogue mode would be carrying about 80-90 channels.

104. In our opinion, what is more appropriate is that it is one thing to say that a particular system is capable of carrying maximum number of channels, but it is another thing to say that a head end with such capacity is necessary for the entire country.

It is now a well settled principle of law that unequals cannot be treated equally.

In that view of the matter, in the metropolitan towns like Delhi or in any town having more than ten million population, the choice of a customer may be a wide ranged one, but the said requirement may not serve any purpose in rural and semi-urban areas.

105. Mr. Malhotra would contend that in fact the DAS operators having been asked to have an head end having a capacity to carry 500 channels, they would have a march over the DTH operators. A large number of viewers, as it is not controverted at the Bar that most viewers prefer only a few channels. While they would have a choice to select the number of FTA channels or the number of Pay Channels, they will exercise their right of choice according to their own

need.

A direction by a Statutory Authority cannot be disproportionate.

There is, in our opinion, absolutely no reason as to why the Metros and the Rural areas would be treated equally. Moreover, no such restriction has been placed on the DTH operators and having regard to the fact that the Petitioners have to compete the DTH operators, the Respondent cannot on the one hand say that the market shall take care of the situation and at the same time issue a mandate that the capacity of the head end of the MSOs throughout the country should be to carry 500 channels.

106. Mr. Bhatia, however, has placed reliance upon a decision of this Tribunal in Petition No. 25 (C) of 2010 disposed of on 28.7.2011, wherein IMCL was the Petitioner and it was stated that they will have a capacity of 500 channels.

It was held therein :-

> *"1.56 In the hybrid model, the capacity of the system increases so that around 30-50 analogue channels (FTA channels) and 250-400 digital channels (pay/local channels) can be carried. In the notified CAS areas and many voluntarily digitized areas, this model is being used.* ***Where pay content is encrypted, only authorised subscribers can have access to the content. In notified CAS areas, the pay content is encrypted whereas in the case of voluntarily digitized areas, it is distributed without***

encryption. *This is because addressability is mandatory in notified CAS areas whereas it is not so in voluntarily digitized areas. As explained above, digitization uses compression techniques to alleviate capacity constraints, creating more space for TV channels, value added services and broadband. However, it is addressability that provides choice to the consumer, promotes transparency in business transactions and checks signal piracy."*

The said decision cannot be treated to be a precedent on the said question.

107. Reliance has also been placed both by Mr. Navin Chawla and Mr. Bhatia on MSO Alliance Vs. TRAI (Appeal No. 9 (C) of 2006 disposed of on 15.01.2009), wherein this Tribunal opined :-

"80. In our view, two principal factors still remain. Firstly, the argument that choice of channels by MSO/LCO does not translate into subscribers' choice is still valid. It is not the case of the Authority that the ground situation has changed dramatically and that the last mile monopoly has disappeared. To our specific query, counsels of both sides confirmed that even prior to the issue of the impugned Order, MSOs were receiving bundles of channels from the Broadcasters and in turn re-bundling them into their own bouquets, what was otherwise known as 'soft bundling'. They were doing so as they had to limit the number of channels to 70 because of the capacity limitation in the analogue mode. The counsels also indicated that even today, none of the MSOs has taken à la carte

choice. We are not convinced by the argument that the prescription of a ceiling on the cable charges at the subscriber level will translate into the MSOs and cable operators passing on the financial benefit to subscribers. It is quite likely, as pointed out by some stakeholders, that the MSOs may fill their cable capacity with lower-priced channels and demand higher charges both from the broadcaster, by way of carriage fee, and from subscribers for making available the better channels. There is no regulation in the impugned tariff Order to protect the subscriber from the vagaries of the MSO/cable operator. Besides, as indicated by the Authority in the explanatory memorandum, there are 6000 MSOs and 70,000 cable operators serving 78 million homes of which only a small percentage is covered by DTH/CAS. In other words, each MSO covers about 12,000 cable homes. While it can be argued that a choice of channels by an MSO, in the form of bouquet, is better than that of the broadcaster, it is unlikely that it will adequately reflect the choice of all consumers, even as a group. Secondly, in a non-addressable scenario, which is what characterises most of the cable industry, the problem of under declaration by the cable operators/MSOs persists, and the concern of the Broadcasters in this regard cannot be brushed aside. In fact, a significant percentage of the disputes in the broadcasting sector are on account of the subscriber base, a fact recognised by the Authority in Para 3.27 of the explanatory memorandum annexed to the impugned tariff Order. It is essential that this issue is addressed squarely. The Authority would be well advised to review its decision indicated in Para 3.29 of the explanatory memorandum of having decided not to determine the levels of connectivity between the stakeholders. Since digitalisation and addressability are bound to take some time, it is essential that the Authority, set up to regulate the industry, finds a way to address the issue."

108. It is, however, not in dispute that the matter is pending before the Supreme Court of India and an order of status quo has been passed therein.

109. We, therefore, do not intend to deal with the said question.

110. B. P. Sharma Vs. Union of India and Others reported in 2003 (7) SCC 309 has been cited before this Tribunal but in our opinion, the said decision has no application in the fact of these matters.

Conclusion

111. For the reasons aforementioned the Appeal No. 3 (C) of 2012 and Appeal No. 15 (C) of 2012 filed by the LCOs are dismissed.

112. So far as Appeal No. 5 (C) of 2012 and other connected appeal filed by the MSOs is concerned, we are of the opinion that :-

(a) The restriction placed on the MSO for demanding placement fees in terms of May 2012 Regulation are bad in law as the same restriction is not applicable for the DTH operator.

Placement charges, if any, will depend upon the mutual agreement between the broadcasters and the MSO.

(b) Clause 3(5) of "The Telecommunication (Broadcasting and Cable Services) Interconnection (Digital Addressable Cable Television Systems) Regulation 2012(No. 9 of 2012) " relating to demand of carriage fee by the MSO is set aside as the said provision is not there for the DTH operators and MSOs in Non-CAS areas.

(c) Clauses 6(1A), 6(1B) and 6(1C) are declared to be valid.

(d) The direction that the MSOs must set up head-ends having carrying capacity of 500 channels is set aside. If the market forces play an important and significant role in the matter of carrying capacity of the MSO, the same may not be required to be regulated. However, if the Regulator deems fit, it may consider making provision for MSOs to have capacity to carry number of channels based on different categories of area i.e. city/towns/rural area etc. in which MSO will be operating.

113. The Appeal No. 11 (C) of 2012, Appeal No. 12 (C) of 2012, and Appeal No. 5 (C) of 2012 are, therefore, allowed in part and to the extent mentioned hereinbefore.

114. In the facts and circumstances of this case, there shall be no order as to costs.

(S.B. Sinha)
Chairperson

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(P.K. Rastogi)
Member

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