

New Delhi, the June 24, 2008

DIRECTION

Subject: Direction, under section 13, read with sub-clause (ii), (iii) & (iv) of clause (b) of sub-section (1) and sub-section (2) of section 11 of the Telecom Regulatory Authority of India Act, 1997 (24 of 1997) to M/s. ESPN Software India Pvt. Ltd. to modify its Reference Interconnect Offer for Direct to Home platforms

No. 4-31/2008 (B&CS). ----- Whereas the Telecom Regulatory Authority of India, [hereinafter referred to as the Authority], established under sub-section (1) of section 3 of the Telecom Regulatory Authority of India Act, 1997 (24 of 1997) (hereinafter referred to as the TRAI Act, 1997) has been entrusted discharge of certain functions, *inter alia*, to regulate the telecommunication services, protect the interests of service providers and consumers of the telecom sector, fix the terms and conditions of inter-connectivity between the service providers, ensure technical compatibility and effective inter-connection between different service providers, regulate arrangement amongst service providers of sharing their revenue derived from providing telecommunication services, lay-down the standards of quality of service to be provided by the service providers and ensure the quality of service and conduct the periodical survey of such service provided by the service providers so as to protect interest of the consumers of telecommunication service;

2. And whereas the Government of India, in the Ministry of Communication and Information Technology (Department of Telecommunications), vide its notification No.39, --

(a) issued in exercise of powers conferred upon the Central Government by the proviso to clause (k) of sub-section (1) of section 2 of the TRAI Act, and

(b) published under notification number.S.O.44(E) dated the 9<sup>th</sup> January, 2004 in the Gazette of India, Extraordinary, Part III, Section 4,

has notified broadcasting services and cable services to be telecommunication services;

3. And whereas the Authority, in exercise of the powers conferred upon it under section 36, and paras (ii), (iii) and (iv) of clause (b) of sub-section (1) of section 11 of the Telecom Regulatory Authority of India Act, 1997, read with the notifications No.39 (S.O No. 44 (E) and 45 (E)) dated 09.01.2004 issued from file No.13-1/2004-Restg by the Government of India under clause (d) of sub-section (1) of section 11

and proviso to clause (k) of sub-section (1) of section 2 of the Telecom Regulatory Authority of India Act, 1997, made the Telecommunication (Broadcasting and Cable Services) Interconnection Regulation, 2004 (13 of 2004) (hereinafter called the principal regulation) on the 10<sup>th</sup> December, 2004;

4. And whereas the principal regulation has been amended, *inter alia*, by the Telecommunication (Broadcasting and Cable Services) Interconnection (Fourth Amendment) Regulation, 2007 (9 of 2007) published under notification of the Telecom Regulatory Authority of India No. F. No. 4-54/ 2007 - B&CS dated the 3<sup>rd</sup> September, 2007 in the Gazette of India, Extraordinary, Part III, Section 4;

5. And whereas clause 13.2A.1 of the principal regulation, as inserted by the Telecommunication (Broadcasting and Cable Services) Interconnection (Fourth Amendment) Regulation, 2007 (9 of 2007) requires every broadcaster, to intimate its Reference Interconnect Offer to all Direct to Home Operators, specifying, *inter-alia*, the technical and commercial terms and conditions for interconnection for the direct to home platforms and the said clause 13.2A.1 reads as under:-

**“13.2A.1** Every broadcaster, providing broadcasting services before the date of commencement of the Telecommunication (Broadcasting and Cable Services) Interconnection (Fourth Amendment) Regulation, 2007 (9 of 2007) and continues to provide such services after such commencement shall, within ninety days from the date of such commencement, intimate to all the direct to home operators existing on that date and coming into existence within the said period of ninety days, its Reference Interconnect Offer specifying, *inter-alia*, the technical and commercial terms and conditions for interconnection for the direct to home platform, including the following terms and conditions, namely:-

- (a) rates of the channels on a-la-carte basis and the rates of bouquets offered by the broadcaster to the direct to home operator;
- (b) details of discounts, if any;
- (c) payment terms;
- (d) security and anti-piracy requirements;
- (e) subscriber reports based on subscriber management system and audit;
- (f) tenure of agreement;
- (g) termination of agreements.”;

6. And whereas clause 13.3 of the principal regulation, as substituted by the Telecommunication (Broadcasting and Cable Services) Interconnection (Fourth Amendment) Regulation, 2007 (9 of 2007), *inter alia*, confer power upon the Authority to require the concerned broadcaster, after giving an opportunity of being heard to the concerned broadcaster, to modify its Reference Interconnect Offer if the Authority is of the opinion that such Reference Interconnect Offer requires modifications so as to protect the interests of service providers or consumers of the

broadcasting sector and cable sector, or to promote or ensure orderly growth of the broadcasting sector and cable sector or the Reference Interconnect Offer has not been prepared in accordance with the provisions of the said regulations and the said clause 13.3 of the principal regulation reads as under:-.

“13.3 In case the Authority is of the opinion that the Reference Interconnect Offer requires modifications so as to protect the interests of service providers or consumers of the broadcasting sector and cable sector, or to promote or ensure orderly growth of the broadcasting sector and cable sector or the Reference Interconnect Offer has not been prepared in accordance with the provisions of these regulations, it may, after giving an opportunity of being heard to the concerned broadcaster, require the concerned broadcaster to modify the said offer and such broadcaster shall make such modifications and publish, within fifteen days of receipt of requirement for the modifications, the said offer after incorporating such modifications.”;

7. And whereas M/s ESPN Software India Private Limited, having its registered office at F-40, South Extension, Part-I, New Delhi-110 049 (hereinafter referred to as the M/s. ESPN Software India Pvt. Ltd.) filed its Reference Interconnect Offer (herein after referred to as RIO) for the direct to home (herein after referred to as the DTH) platforms with the Authority vide their letter dated the 3<sup>rd</sup> March, 2008 (copy annexed as **Annexure-I** to this Direction), which contained a-la-carte rates and bouquet rates and discounts as mentioned in clauses A and B of the said RIO;

8. And whereas, in view of representations received from DTH operators about difficulties faced by them in procuring content and in order to understand the point of view of the broadcasters in the matter, the Authority held a number of interactive discussions with various broadcasters and the representatives of the M/s ESPN Software India Pvt. Ltd. were also invited by the Authority for an interactive discussion in the office of the Authority on the 28<sup>th</sup> March, 2008 wherein the attention of M/s. ESPN Software India Pvt. Ltd. was invited to the difficulties as raised by the DTH operators in procuring content and also to the norm laid down by the Hon'ble Telecom Disputes Settlement and Appellate Tribunal (TDSAT) for providing channels by broadcasters to the DTH platform at fifty per cent. of the non-CAS rates, as referred to in paragraph 13 hereunder;

9. And whereas subsequent the interactive discussion with the Authority, as referred to in the preceding paragraph, a letter dated 28<sup>th</sup> March 2008 was received by the Authority from M/s. ESPN Software India Pvt. Ltd. (copy annexed as Annexure-II to this Direction), stating, *inter alia*, that it had received information about the meeting on the 28<sup>th</sup> March, 2008 recently and that it had not had sufficient time to place on record all relevant material and sought three weeks time to place on record all the relevant material in support of their contentions and a response thereto was sent by the Authority to M/s. ESPN Software India Pvt. Ltd. vide the Authority's letter dated the 22<sup>nd</sup> April, 2008 (copy annexed as Annexure-III to this Direction) clarifying that the meeting on the 28<sup>th</sup> March, 2008 was a part of a series of interactions with the broadcasters individually to understand their point of view against the backdrop of representations received from the DTH operators about difficulties faced by them in procuring content and that the Authority's action road map will be strictly in accordance with the relevant regulations;

**10.** And whereas, upon consideration of the Reference Interconnect Officer filed by M/s. ESPN Software India Pvt. Ltd., as referred to in paragraph 7 above, it was felt by the Authority that the rates and packaging of channels being offered to the direct to home platforms by M/s ESPN Software India Pvt. Ltd. required modification so as to protect the interests of service providers and consumers of the broadcasting sector and cable sector, and, to promote and ensure orderly growth of the broadcasting sector and cable sector;

**11.** And whereas, in terms of provisions of Clause 13.3 of the Telecommunication (Broadcasting and Cable Service) Interconnection Regulation, 2004, as substituted by the Telecommunication (Broadcasting and Cable Services) Interconnection (Fourth Amendment) Regulation, 2007 (9 of 2007), M/s ESPN Software India Pvt. Ltd was afforded an opportunity of being heard by the Authority, vide its letter dated the 5<sup>th</sup> May, 2008 (copy annexed as Annexure-IV to this Direction) before a final decision is taken by the Authority on the requirement to modify the Reference Interconnect Offer of the M/s ESPN Software India Pvt. Ltd as referred to in paragraph 7 ;

**12.** And whereas, in response to the letter of the Authority dated the 5<sup>th</sup> May, 2008, as referred to in the preceding paragraph affording an opportunity of being heard, as required by clause 13.3 of the Telecommunication (Broadcasting and Cable Service) Interconnection Regulation, 2004 to the M/s. ESPN Software India Pvt. Ltd., a letter dated the 14<sup>th</sup> May, 2008 has been received from M/s. ESPN Software India Pvt. Ltd. (copy annexed as Annexure-V to this Direction), wherein the said M/s. ESPN Software India Pvt. Ltd. has stated, *inter alia*, that -----

(a) it has been executing agreements with the existing DTH operators in the past and those agreements still continue and that these agreements are within the broad parameters of TRAI's regulations;

(b) it proposed to provide its channels at a rate which shall be 50% of its non CAS rate to any DTH operator who would pay M/s. ESPN Software India Pvt. Ltd. for all the channels of M/s. ESPN Software India Pvt. Ltd. for 2.5 Million subscribers or above;

(c) it will also provide special incentives and discounts upto 40% of its non-CAS rate and was further willing to work with the DTH operators to work different slabwise discounts on a mutually agreeable basis;

(d) it will accordingly amend the tariff structures in its RIO to reflect the above mentioned accommodation in prices to apply them to any DTH operator which wants to operate with these terms

(e) the cost of content is very high for sports channels;

(f) there is reduced demand for sports channels when there are no major sporting events;

(g) it is mandatory for sports channels to share their content with the National Broadcaster;

(h) there is a time limit on advertisements,

and subsequently, a revised Reference Interconnect Offer has also been submitted by M/s. ESPN Software India Pvt. Ltd. vide their letter dated the 15<sup>th</sup> May, 2008 (copy annexed as Annexure-VI to this Direction) incorporating the said amendments;

**13.** And whereas the Authority has carefully considered the contentions of M/s. ESPN Software India Pvt. Ltd. contained in their reply to the opportunity afforded to them under clause 13.3 of the Telecommunication (Broadcasting and Cable Service) Interconnection Regulation, 2004 to the M/s. ESPN Software India Pvt. Ltd., and has found the contentions made by the M/s. ESPN Software India Pvt. Ltd. in the said reply to be not acceptable for the following reasons, namely:-

(a) the contention of M/s. ESPN Software India Pvt. Ltd. that they have been executing agreements within the broad parameters of TRAI's regulations with the existing DTH operators in the past and those agreements still continue, and, therefore, no external intervention is warranted has not been found to be acceptable for the reason that there are only a handful of DTH operators in the country and the existence of contractual arrangements with some of them is not a valid ground for giving any special treatment to M/s. ESPN Software India Pvt. Ltd.. and a Reference Interconnect Offer is meant for facilitation of interconnection agreements and prevention of imposition of unilateral conditions by any service provider in the broadcasting sector so as to protect the interests of service providers and consumers of the broadcasting sector and cable sector, and, to promote and ensure orderly growth of the broadcasting sector and cable sector and the broad norms applicable to the Reference Interconnect Offers of all broadcasters are also applicable to M/s. ESPN Software India Pvt. Ltd. and there is no valid ground for making any exception for M/s. ESPN Software India Pvt. Ltd. ;

(b) the contention that -----

- (i) the cost of content is very high for sports channels;
- (ii) there is reduced demand for sports channels when there are no major sporting events;
- (iii) it is mandatory for sports channels to share their content with the National Broadcaster;
- (iv) there is a time limit on advertisements,

cannot be a valid ground for exempting M/s. ESPN Software India Pvt. Ltd. from application of the principles laid down by the Hon'ble TDSAT (in its judgment dated the 31st March, 2007 in petition no. 189(C) of 2006 and judgment dated the 14th July, 2006 in petition no. 136(C) of 2006) wherein the rates for DTH platforms were to be fifty per cent. of the rates at which the bouquets/ channels are being offered for non-CAS cable distribution, i.e., non-addressable platform;

(c) various factors including high cost of content, reduced demand for sports channels when there are no major sporting events, mandatory sharing of content with

the National Broadcaster and time limit on advertisements are the factors which are generally taken into consideration while arriving at non CAS prices of the sports channels and, therefore, these factors do not necessitate any special treatment for sports channels in the matter application of the regulatory principles in regard to the Reference Interconnect Offers of all broadcasters; and

(d) the contention that there is rampant piracy by cable operators/ MSOs during popular events which allegedly robs M/s. ESPN Software India Pvt. Ltd. of its legitimate dues, cannot be accepted as a justification for not following the regulatory principles in the matter of price fixation for an addressable platform like DTH and the contention of the M/s ESPN Software India Pvt. Ltd. merely reinforces the case for availability of such content on DTH platforms at reasonable price as the DTH is a fully addressable system and M/s. ESPN Software India Pvt. Ltd. will get paid for its content for all the subscribers viewing its channels;

**14.** And whereas clause 13.2A.11 of the principal regulation, as inserted by the Telecommunication (Broadcasting and Cable Services) Interconnection (Fourth Amendment) Regulation, 2007 (9 of 2007), *inter alia*, provides that it shall be mandatory on the part of the broadcasters to offer pay channels on a-la-carte basis to direct to home operators and that no broadcaster shall, directly or indirectly, compel any direct to home operator to offer the entire bouquet or bouquets offered by the broadcaster to such operator in any package or scheme being offered by such direct to home operator to its direct to home subscribers and the said clause 13.2A.11 reads as under:-

**“13.2A.11** It shall be mandatory on the part of the broadcasters to offer pay channels on a-la-carte basis to direct to home operators and such offering of channels on a-la-carte basis shall not prevent the broadcaster from offering such pay channels additionally in the form of bouquets:

Provided that no broadcaster shall, directly or indirectly, compel any direct to home operator to offer the entire bouquet or bouquets offered by the broadcaster to such operator in any package or scheme being offered by such direct to home operator to its direct to home subscribers.”;

**15.** And whereas upon scrutiny of the revised Reference Interconnect Offer submitted by M/s. ESPN Software India Pvt. Ltd. vide their letter dated the 15<sup>th</sup> May, 2008 and as referred to in paragraph 12 above, it has been observed by the Authority that the said revised Reference Interconnect Offer contains a provision in clause C.1 thereof which requires that the DTH operator shall keep all the channels/services of M/s. ESPN Software India Pvt. Ltd., i.e., ESPN, STAR Sports and STAR Cricket channels in the entry-level pay tier and the said clause C.1 of the said Reference Interconnect Offer which is found to be in contravention of the said clause 13.2A.11 of the principal regulation (and its proviso), as inserted by the Telecommunication (Broadcasting and Cable Services) Interconnection (Fourth Amendment) Regulation, 2007 (9 of 2007) as referred to in paragraph 14 above and said clause C.1 of the said Reference Interconnect Offer submitted by M/s. ESPN Software India Pvt. Ltd. vide their letter dated the 15<sup>th</sup> May, 2008 reads as under:-

“C. Payment Terms

1. DTH Operator agrees to keep the all the channels/services i.e. ESPN, STAR Sports and STAR Cricket (hereinafter referred to as the “Channels” or as “Services”) in the entry-level pay tier.”

16. And whereas a letter dated 11<sup>th</sup> June, 2008 was received by the Authority from M/s ESPN Software India Pvt. Ltd. (copy annexed as Annexure-VII to this Direction), stating, *inter alia*, that M/s ESPN Software India Pvt. Ltd. are withdrawing their RIOs and shall be filing fresh RIOs very shortly and a response thereto was sent by the Authority to M/s ESPN Software India Pvt. Ltd. vide the Authority’s letter dated the 19<sup>th</sup> June, 2008 (copy annexed as Annexure-VIII to this Direction), clarifying, *inter alia*, that provisions of the Telecommunications (Broadcasting & Cable Services) Interconnection Regulation, 2004, as amended from time to time, do not provide for a situation where an existing RIO is withdrawn without simultaneously making available the fresh RIO. Accordingly, M/s ESPN Software India Pvt. Ltd. were advised to file the fresh RIOs by 23<sup>rd</sup> June, 2008 and they were also informed that in case of failure to file the fresh RIOs by 23<sup>rd</sup> June, 2008, the failure may entail appropriate follow-up action based on the existing RIOs in accordance with the Regulations. In response to Authority’s letter dated 19<sup>th</sup> June, 2008, a letter dated 21<sup>st</sup> June, 2008 was received by the Authority on 23<sup>rd</sup> June, 2008, from M/s ESPN Software India Pvt. Ltd. (copy annexed as Annexure-IX to this Direction), stating, *inter alia*, that M/s ESPN Software India Pvt. Ltd. are unable to present the said RIOs within the stipulated time limit. In the letter of the M/s ESPN Software India Pvt. Ltd. it was also stated that the Authority may, therefore, consider the previous RIOs to be effective till such time the fresh/amended RIOs are filed by M/s ESPN Software India Pvt. Ltd.;

17. Now, therefore, in exercise of the powers conferred upon it under section 13, read with clause (b) of sub-section (1) and sub-section (2) of section 11 of the Telecom Regulatory Authority of India Act, 1997 (24 of 1997) and clause 13.3 of Telecommunication (Broadcasting and Cable Services) Interconnection Regulation, 2004 (13 of 2004), as substituted by the Telecommunication (Broadcasting and Cable Services) Interconnection (Fourth Amendment) Regulation, 2007 (9 of 2007), so as to comply with the norm laid down by the Hon’ble TDSAT (in its judgment dated the 31st March, 2007 in petition no. 189(C) of 2006 and its judgment dated the 14th July, 2006 in petition no. 136(C) of 2006) wherein the rates for DTH platforms were to be fifty per cent. of the rates at which the bouquets/ channels are being offered for non-CAS cable distribution and to protect the interests of service providers and consumers of the broadcasting sector and cable sector, and to promote and ensure orderly growth of the broadcasting sector and cable sector and for the reasons mentioned in the preceding paragraphs, the Telecom Regulatory Authority of India hereby directs, without prejudice to any order or direction or judgment of any court or tribunal (including any order or direction or judgment of any court or tribunal on any proceeding pending before such court or tribunal) , that M/s. ESPN Software India Pvt. Ltd. shall, within fifteen days from the date of issue of this Direction, ----

(a) modify its Reference Interconnect Offer referred to in paragraph 12 for Direct to Home platforms so as to-----

- (i) offer to the Direct to Home (DTH) operators the same bouquets which are being offered by M/s. ESPN Software India Pvt. Ltd. for non-CAS cable distribution, so that the above norm laid down by the Hon'ble TDSAT is followed in letter and spirit ;
- (ii) offer to the DTH operators the bouquets/ channels at fifty per cent. of the rates at which such bouquets/ channels are being offered for non-CAS cable distribution, i.e., non-addressable platform so as to comply with the above norm laid down by the Hon'ble TDSAT in letter and spirit; and

(iii) not to impose conditions mentioned at clause C.1 of the said revised Reference Interconnect Offer dated the 15<sup>th</sup> May, 2008; and

(b) submit to the Authority a report of compliance with the directions contained in items (i), (ii) and (iii) of sub-paragraph (a) above, along with a copy of its modified Reference Interconnect Offer.

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To,

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