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COUNTER COMMENTS ON BEHALF OF ALL INDIA DIGITAL CABLE FEDERATION TO TRAI CONSULTATION PAPER ON ISSUES RELATING TO UP-LINKING AND DOWNLINKING OF TELEVISION CHANNELS IN INDIA DATED 19.12.2017

10th February 2018

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Respected Sir,

One of the Broadcasters (Star TV) in its response to your Consultation paper on "Issues related to Up-Linking and Down-Linking of Television Channels in India has in its preliminary submission stated that the Broadcasters are not licensees within the meaning of Section 4 of the Indian Telegraph Act, 1885.

We dispute and deny this position and submit that, as per law, the broadcasters are "licensees". In this regard, we would like to submit as under:

In terms of Section 2(e) of The Telecom Regulatory Authority of India Act, 1997 [hereinafter, "the TRAI Act"], a licensee means any person licensed under Section 4(1) of the Indian Telegraph Act, 1885 [hereinafter, "the ITA"] for providing specified public Telecommunication Services. Section 2(k) of the TRAI Act defines "Telecommunication service" which, after the notification dated 09.01.2004, included broadcasting services. Star had challenged this proposition in the Delhi HC which in a detailed judgment in Writ Petition 24105/2005 had dismissed the petition. SLP filed by Star in SC was rejected.

The definitions under the ITA are subject to the context providing otherwise [See Section 3 of ITA]. In other words, they are to be read contextually. Section 3(1AA) of the ITA

defines *"Telegraph" as meaning "any appliance, instrument, material or apparatus used or capable of use for transmission or reception of signs, signals, writings, images, and sounds or intelligence of any nature by wire, visual or other electromagnetic emissions, radio waves or Hertzian waves, galvanic, electric or magnetic means..."*

Section 4 of the ITA vests the exclusive privilege of establishing, maintaining, and working telegraphs with the Central Government. The proviso to section 4(1) provides that the Central Government may grant a license on such conditions and in consideration of such payments as it thinks fit, to any person to establish, maintain, or work a telegraph within any part of India.

A conjoint reading of the aforesaid provisions of the TRAI Act and the ITA makes it clear that a person engaged in broadcasting services would necessarily be a licensee.

This is further evidenced by the definition of "broadcaster" and "broadcasting services" under the Broadcasting and Cable Services Interconnection Regulations, 2004, and the DAS Regulations, 2012, as detailed below.

(a) "broadcaster" means any person including an individual, group of persons, public or body corporate, firm or any organization or body who/which is providing broadcasting service and includes his/her authorised distribution agencies;

(b) "broadcasting services" means the dissemination of any form of communication like signs, signals, writing, pictures, images and sounds of all kinds by transmission of electromagneticwaves through space or through cables intended to be received by the public either directly or indirectly and all its grammatical variations and cognate expressions shall be construed accordingly;

The argument of the said Broadcaster proceeds on a complete misreading of the phrase "licensee". It proceeds on a narrow, technical and literal meaning of that phrase. Also, importantly, it completely overlooks the meaning of the phrase "license". All this just to escape from being what it is, i.e. a licensee.

A "license" is not to be narrowly or technically understood as a document formally nomenclature as a "license". It simply means an authorization.

A license is a power or an authority to do some act which, without such authority, could not lawfully be done [See: Black's Law Dictionary (9thEdn., pg.1002); andPuran Singh Sahni vs. SundariBhagwandasKripalani, (1991) 2 SCC 180]. Such an authority can be given by way of an agreement evidencing such permission.

The phrase "license" has, thus, to be understood meaningfully and contextually. In the present circumstances, this would mean a permission from the Central Government to do an act, which cannot be done without such permission.

Therefore, the question that said Broadcaster deliberately avoids to answer is *whether it needs permission from the Central Government for its broadcasting services?* **The answer is an obvious "Yes". In other words, without the permission of the Central Government, the said Broadcaster can neither commence nor continue its broadcasting services.**

The Downlink Regulations of 2005 were challenged by Broadcasters in the Honourable Bombay High Court and was upheld by the Honourable Bombay High Court.

The definition of "Broadcaster" under the Interconnect Regulations (both, 2004 and 2012) means a person or a group of persons, or body corporate, or any organisation or body who, after having obtained, **in its name, uplinking permission or downlinking permission, as may be applicable for its channels, from the Central Government,** provides programming services. These permissions are granted by the Central Government under the Uplinking/ Downlinking Guidelines, 2011.

Those Guidelines provide for permission of the Central Government and the mode and procedure for grant of such permission. It is axiomatic that without such permission, there cannot be any uplinking or downlinking of a channel. Importantly, the said Guidelines also prescribe the format of the agreement for grant of permission in Form 2. Clause 5 of Form 2 reads as follows:

"The Permission shall be governed by the provisions of the Telecom Regulatory Authority of India Act, 1997, Indian Telegraph Act, 1885 and Indian Wireless Telegraphy Act, 1933 as amended from time to time, and any other law as applicable to broadcasting which has or may come into force."

Surely, it is not and cannot be said Broadcaster submission that it can operate its broadcasting services without complying with the aforesaid Guidelines.

The reliance placed by said Broadcaster on the judgment of the Hon'ble Supreme Court in the case of *BSNL v. Union of India, (2003) 6 SCC 1,* is, therefore, completely misplaced. The said judgment arose in the context of taxation and not in the context at hand.

To allow said Broadcaster argument to succeed would mean that any broadcaster can hire a teleport from a third party to uplink its channel and claim to be not governed by the ITA, arguing that it is only a hirer and not the owner of the Teleport.

That is neither the scheme nor the purpose of the ITA. In fact, such an interpretation would amount to gross abuse of the ITA. Importantly, the words used in Section 4 of the ITA are "establishing, maintaining and working" telegraphs. The phrase "working" would take within in its fold "using" a telegraph.

Conscious of the above legal position, said Broadcaster makes another wrong submission. It claims that the Uplinking Guidelines do not have any statutory basis or legal force. This is completely misconceived.

The said Broadcaster cannot unilaterally assume or declare them to be unconstitutional. These Guidelines have been in place for over 18 years now.

Lastly, we may also reiterate that the understanding of the Hon'ble Courts as well as all stakeholders, which too is an important factor for consideration by this Authority, is that the broadcasters are, by necessity, licensees.

This license is the permission granted to them by the Central Government to uplink and/or downlink their channels.

This is precisely what the Hon'ble TDSAT has held in *Star India Pvt. Ltd. v. BSNL,* wherein the Hon'ble Tribunal was pleased to hold that *"...Petitioner, thus, by reason of the said Notification must be held to be telecommunication services. But the same would not mean*

that it would be required to obtain license strictosensu under the Telegraph Act. A permission obtained for broadcasting *from the competent authority of the Union of India would serve the purpose.*"Thus, the judgment of the Hon'ble TDSAT, which the said Broadcaster misreads, was not that it was not a licensee, but that it was not required to obtain *strictosensu* a license under the ITA, since the permission from the Central Government for broadcasting would be as good. In other words, the Hon'ble TDSAT compared the license to a permission for broadcasting and held that once the latter was obtained, there was no need for the former.

We respectfully submit that in view of the above the contention of the said Broadcaster is misplaced, misconceived and is an attempt to mislead the Authority and hence should be rejected in totality.

For All India Digital Cable Federation

(Authorized Signatory)