

RESPONSE OF DISH TV INDIA LIMITED
TO CONSULTATION ON
DRAFT TELECOMMUNICATION (BROADCASTING AND
CABLE SERVICES)
INTERCONNECTION (ADDRESSABLE SYSTEMS) REGULATIONS,
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Response of Dish TV India Limited to Consultation on Draft Telecommunication (Broadcasting and Cable Services) Interconnection (Addressable Systems) Regulations, 2016:

As stated in our previous response, the Interconnect Regulation is the guiding principle for the Broadcasters & DPO's – laying down the guidelines which will define the way the Broadcasting industry will operate. While TRAI is aiming to provide a comprehensive uniform regulatory regime for different delivery platforms in digital addressable systems, still, positive steps are required to be taken to provide a level playing field amongst all the operators without which no uniformity can be achieved.

It is most respectfully submitted that parity and uniformity in the Interconnection regime cannot be achieved unless the discrimination being meted out to DTH platform through Regulation and Government conditions are not considered. We reiterate that until uniformity in the business opportunity is provided, any and all attempts for uniformity in the nature of services would continue to be discriminatory for the DTH operators. As stated repeatedly in various responses and representation, the imposition of License Fee – exclusively on DTH platform, was and continues to be discriminatory on the DTH platform. Such discrimination is not being corrected even in the present set of Regulation & Tariff Order. It is an undisputed fact that the present regime for the license fee is discriminatory against the DTH Operators and is designed to provide the leveraged position to Cable Operator, HITS, IPTV, and MSO etc. in the market place as they are not required to pay any annual license fee. On account of such additional burden the DTH subscriber is discriminated who has to bear higher burden, compared to cable/HITS subscriber. The DTH industry has been raising this issue from the time the industry has come into being. It is a matter of record that in the month of March 2008, the Ministry of Information and Broadcasting had taken a decision to fix the License Fee @ 6% of the Gross Revenue which decision had the concurrence of the TRAI also. However, for reasons best known to the Government, the said decision is yet to be put into effect. The TRAI and the Ministry of Information & Broadcasting is well aware that the DTH has played a very critical role in making the Digitisation dream a success in addition to providing a world class experience to the consumers. Despite this, the DTH industry

has always been accorded a step motherly treatment. There is an urgent need to remove these anomalies and create a level playing field for the DTH operator. Dish TV seeks the support of the TRAI in rationalization of the License Fee so that even the DTH may be granted a level playing field which has all along been given step motherly treatment by the Government and the TRAI.

Regarding license fee it may be noted that on 01.10.2004, the TRAI while issuing its recommendations on 'Issues relating to Broadcasting and Distribution of TV channels' where it recommended reduction in license fee to 8% of Adjusted Gross Revenue (AGR) also recommended that the amount paid by the DTH operators to the broadcasters towards content should be deducted for the purpose of calculation of license fee. The relevant extract of the said TRAI Recommendation is extracted hereunder:

“The principle of application of license fee on Adjusted Gross Revenue (AGR) as in the case of telecom may also be followed. The AGR in case of DTH service should mean total revenue as reflected in the audited accounts from the operation of DTH as reduced by

- (i) Subscription fee charges passed on to the pay channel broadcasters;
- (ii) Sale of hardware including Integrated Receiver Decoder required for connectivity at the consumer premise;
- (iii) Service/Entertainment tax actually paid to the Central/State Government, if gross revenue had included them.”

However in a complete departure from the abovementioned view, TRAI, on its recommendation dated 23.07.2014 recommended that the license fee should be calculated @8% of AGR where AGR is to be calculated by excluding only Entertainment Tax, Service Tax & VAT. This was done when the Government did not seek the recommendation of the TRAI on the quantum of License Fee to be paid by the DTH operators and when there was huge opposition by the DTH industry. The role of TRAI towards the DTH industry is therefore not very supportive.

Applicability of DTH License Fee on the amount collected by DTH on behalf of the Broadcasters:

In the current drafts for Interconnection Framework as well the Tariff Order, where TRAI has sought to seek uniform regulatory framework, it has not considered the changes required to be recommended in the DTH License framework in the circumstance where the DTH operator is only collecting the subscription fee from the subscribers on behalf of the broadcaster. While the Tariff Order and the Interconnect Regulation has intended to place the DPOs as an agent of the broadcasters (for the purpose of collection of Subscription Fee from the Broadcasters) where the DPOs would collect the revenue on behalf of the broadcasters, TRAI needs to send a revised recommendation to the MIB allowing deduction of amount so collected on behalf of the Broadcasters.

In addition to the above, while TRAI has vowed to achieve the ultimate objective of creating an environment ensuring transparency, non-discrimination, it has completely ignored the most critical aspect creating huge disparity amongst the distributions platform i.e. taxes and levies. Dish TV has repeatedly been highlighting the disparities in the Industry. While the main reason for the same was due to preferential treatment by the broadcasters, the legal and regulatory framework also ensured that the already less privileged DTH industry had to shell out more from its pockets. This is evident that the regulations till date have allowed the MSOs and DAS operators to continue demand the carriage, marketing, placement and packaging fee from the broadcasters no such provisions have been made for the DTH operators. This, while creating a large gap between the revenue generation capacities of the MSOs vis-à-vis the DTH operators, has also caused further prejudice to the DTH operators considering the fact that the MSOs and DAS operators and also the HITS operator are not required to pay any Entry Fee, Bank Guarantee and Annual License fee which are required to be paid by the DTH operators. Clearly therefore there is no level playing field for the DTH operators and the DTH operators are competing with the operators who are much better placed. This is despite the DTH services brought transparency in the sector giving the much needed boost which was required by the sector to tackle the persisting problem of under declaration by the cable operators.

Impact: While TRAI has sought to remove the remove disparity on the regulatory front, no level playing field can be achieved without changing the statutory regime of paying differential tax/levy. The present draft regulation, being completely silent on this issues, cannot be enforced in the present form and even if the same is implemented without seriously considering the issues and impacts thereof, it might result into huge loss of the operators and the entire distribution industry might get ruined.

In the above backdrop, we provide our response as under:

CHAPTER II

INTERCONNECTION

3. General provisions relating to interconnection – Must carry obligations: It may be stated in this regard that while most of the provisions under this regulation have been brought from the existing Interconnection Regulation, TRAI has erred in ipso facto applying the provisions of DAS Regulations also under the draft Regulation without appreciating the impact of the same considering the difference in the nature and the capacity of the platforms. It is pertinent to mention in this regard that the ‘must carry’ provision as proposed in the Draft Interconnection Regulation, will force the distributors to place a channels on its network irrespective of whether such channels has any viewership or not.

Before prescription of such a provision TRAI ought to have appreciated the difference in the nature of DTH platform with the DAS and HITS platform mainly on two accounts viz. (i) capacity constraints and (ii) area of operation of the operators. There are around 880 channels available for distribution in India and it is a matter of record that while the DAS operators have a capacity of placing around 1000 channels, the same in case of a DTH operator is only 400 to 500. It is evident that a DAS operator can accommodate all the available channels without any extra bandwidth requirement which is impossible for a DTH operator. It is a known fact that most of the DTH operators are facing capacity crunch and have been trying to provide the best of the channels to the subscribers within the said capacity crunch. Due to the shortage of capacity, the

DTH operators have been trying to launch all such channels which have nationwide requirement or which are high demand channel in regional front. The obligation of must carry will force DTH to carry even those channels which have very less demand or no demand which will be highly detrimental to the DTH platforms as well as to the customer. This will impact the customer base of DTH operators who would tend to move to other Digital platforms.

Further, the “must carry” provisions read along with provisions / concept of “relevant market” creates compelling obligations on the DTH. For eg., if a channel declares a particular state as the relevant market, only such MSO’s who are operating in the said state will be required to carry the channel however since DTH is a pan India service, all the channels which are granted permission to operate in India will claim the right to be carried – no matter how small or irrelevant the consumer base be.

In such a situation therefore, making a uniform provision irrespective of the difference in nature of the platform and capacity constraints faced by them is clearly arbitrary and against the interest of DTH operators. This discrimination gets further deeper considering the fact that unlike a DAS operator which may have region based offerings, DTH operation is a PAN India operation where a DTH operator has to be selective in the choice of the channels to be placed on its platform. For example, in case of a ‘DD Kashir’, which is a Kashmiri channel, the proposed regulation will have no impact for a DAS operator which does not have any operation in the state of Jammu and Kashmir. Similarly for a Tamil channel, a DAS operator having no operation in Tamil Nadu will not be bound by this provision. However whether or not a DTH operator wishes to place any specific regional channels, it shall be bound to carry the said channels.

This very provision will further force the DPOs to place even the non-relevant channels and thereby cost a lot in its channel capacity and thereby have an adverse impact on its business as well as it will not be able to provide the desired services to the consumers. The said prescription is clearly against the interest of the DTH operators and its consumers.

In fact TRAI should make a recommendation to the Ministry of Information and Broadcasting that before issuance of any license for any channels it must consider the capacity constraints of the DPOs in order to assess as to whether any DPOs would be able to place the channels on its platform or not.

The provision in this regard should not therefore be mandated for the DTH operators and the sub-regulation 17 should be amended to include therein the sub-clauses 11 to 14 as well.

CHAPTER III

REFERENCE INTERCONNECT OFFER

5. Publication of reference interconnection offer (RIO) by broadcaster for pay television channels.

- a. Distribution Fee and discount:** The distribution fee of 20% as prescribed in the draft Interconnection Regulation, which also find place in the explanatory memorandum of the draft Tariff Order, will substantially squeeze the revenue generation capacity of the distributors and the distributors will have to be primarily and substantially be dependent upon the broadcasters for it's for its income.

The prescription of 20% of Distribution Margin – equally applicable to MSO as well as a DTH platform is in fact totally discriminatory. It is a matter of record that a DTH platform has to pay 10% License Fee annually. Further, the DTH operators also incur a cost of around 4%-5% as Collection cost. These costs are not borne by the MSO's. Accordingly, the distribution margin for the MSO would continue to be 20% however for DTH, owing to the License fee and the collection cost, it would be in the range of 5% - 6%. It is absolutely impossible for a DTH platform to operate at such low distribution margin whereas the competition to DTH will be able to collect a distribution margin of 20%. Such a prescription will further accentuate the discrimination existing between DTH and other distribution platforms.

Further, no basis or rationale has been provided for fixation of 20% as distribution margin. Therefore without being a uniform statutory regime, the distribution fee for DTH and other operators should not be made uniform and doing the same will be highly prejudicial to the DTH industry. The Sub-regulation 3 and 4 should therefore be reconsidered.

b. Reference Interconnect Offer by broadcasters: In our response we had stated as under

“The current regulatory framework prescribes for publication of RIO by the broadcasters and notification of the same by the broadcasters to the TRAI and the DPOs. This provision which is effectively an ‘intimation mode’ has resulted into a system where though the broadcasters used to notify the authority and the other parties about the publication of any RIO and amended RIO, as the case may be, neither of the notified party used to respond to the broadcasters except for few instances where the authority notified for change in pricing of the channels or in very few cases where the effected DPO had gone to TDSAT. This led to the broadcasters putting as many irrational and discriminatory clauses in the agreement as possible in their RIO. This phenomenon has also been observed in the recent RIO’s filed by the Broadcasters. However this situation cannot be improved by mandating publication of draft RIO by the broadcasters and inviting all others to raise objection in respect of the same. Doing this would be immensely unhealthy or the industry as (i) there may infinite number of the comments from the stakeholders and it will almost be impossible for a broadcaster to implement the suggestions of each and every stakeholder and this will lead to multiple disputes, (ii) the broadcaster will be mandated for following the same process for each and every change in its RIO and this will be a continuous process round the year.

To avoid this therefore, we suggest to change the present practice of ‘intimation mode’ to an ‘approval mode’ where the broadcasters should made to mandatorily

report its RIO or amended RIO as the case may be, before publication to the TRAI for the TRAI to verify the compliance of the same with the regulatory requirement and to accordingly intimate the broadcaster about approval of the same or to require the broadcaster to rework the RIO and submit for TRAI approval again. The RIO can be published and be notified to the other stakeholders only upon approval of the Authority and in no other case. This is ensure that published RIO will be complaint Response of Dish TV India Limited with the regulatory requirement and no disputes or minimum disputes are raised in respect of the same.

As regards the objections to be raised by the DPO's, we believe there should not be a provision in prescribing the time line within which the same has to be objected. Such a clause will again be impossible to perform. If such a stipulation is laid down, every time a pay broadcaster makes some change in the RIO, each and every DPO will have to have a look at the RIO to identify whether the same is in line with the Regulations or not. Such a condition or situation is neither desirable nor possible.”

However TRAI has proceeded without considering the above and has prescribed for the stakeholder to raise objections on the draft RIO to be published. This very approach is again evasive in nature for the TRAI and will lead to multiple disputes and litigations. TRAI being sectoral regulator should have taken the responsibility to approve in the RIO in order to ensure that the RIO published are in compliance of the applicable regulations and therefore minimize the disputes arising in respect of the same.

6. Publication of reference interconnection offer (RIO) by distributors of television channels:

a. Cap on Carriage fee:

The entire intent of the Regulation has to bring parity and non-discrimination in the distribution segment. The fixation of the carriage fee which a distributor can charge is a

welcome step however the Clause is ambiguous when read along with the mention of “Placement & marketing fee” in the explanatory memorandum.

On one hand TRAI seems to have made every effort to regulate carriage fee, it is surprising that it has left placement and marketing fee completely at the discretion of the parties. It is stated that the assumption drawn by TRAI for keeping the said fees from the ambit of regulation is flawed as this will open the door for the parties to have a backdoor understanding and pay/receive the carriage fee under the garb of placement and marketing fee.

As repeatedly stated by Dish TV in its various representation to the TRAI, one of the biggest factor for creating disparity between DTH and MSO was the Carriage fee being paid by the Broadcasters to the MSO (under various name and guise such as marketing fee, placement fee etc. etc.). The intelligence of the industry cannot be questioned which would keep on coming up with various terminology to continue paying carriage fee to MSO which fee is not paid to the DTH operator.

Accordingly, it is imperative that the Regulations provide that carriage fee, includes any amount paid by the Broadcaster to a DPO for the purpose of carriage of the channel on DPO’s platform whether under whatsoever nomenclature it be paid – including but not limited to marketing fee, placement fee and packaging fee. All such deals / agreements should be submitted by the parties to the TRAI. In order to ensure full transparency and ensure non-discrimination, the parties should be directed to submit all the Agreements for whatever purpose, whether Subscription / Carriage / Marketing / Support or any other name entered into them. This will ensure that no Agreement remains outside the realms of the Regulator and will also remove any possibility of providing any favourable treatment to any party. Further, the regulations should also provide the parties shall submit on quarterly basis, the amount paid to each other, duly certified by their respective Statutory Auditor.

- b. Reference Interconnect Offer by DPOs:** The issues detailed above in respect of the RIO's being published by the Broadcasters for the purpose of review by each and every DPO / Stakeholder - will also be applicable in the case of the RIO of DPOs and the provisions should accordingly be amended.

CHAPTER IV

INTERCONNECTION AGREEMENT

9. Interconnection agreement between broadcasters and distributors of television channels.

- a. Application form for making requests: Sub-regulation (4).** The mode of making request for channels through the application prescribed in the draft regulation should be not be made mandatory and it should be left at the discretion of the requesting party to place such request through mail or any other recognised and verifiable mode.
- b. Ambiguity:** Sub-regulation (1) and (2) provides written agreement for pay TV channels whereas sub-regulation (13) and (14) does not mention "pay tv channel". It is stated that the said ambiguity should be removed by done away with and the requirement for written agreement should be made mandatory for all agreement irrespective of pay or FTA.
- c. Incomplete:** Explanation to clause 7 provides that "the broadcaster shall provide signals of its pay television channel(s), within thirty days from the date of signing of written interconnection agreement, to the distributor of television channels", however there is no regulation which provides for the said provision. Similar explanation has been provided after sub-regulation (17) without any provision.
- d. Mandatory minimum clause** as provided in the existing interconnection agreement has been done away with. The clauses regarding anti-piracy, audit, should have been incorporated in the draft regulation.

CHAPTER V
SUBSCRIPTION REPORT AND AUDIT

14. Audit

The purpose of Audit is to ensure that the Broadcaster gets paid for the actual number of subscribers availing their channel as well as to ensure that the CAS and SMS of a DPO is functioning in the way prescribed under law. The Audit of subscriber numbers of a Broadcaster is an extensive and time taking exercise, which needs to be done on need basis and not as a method.

The current provisions of the Draft Interconnection Regulations prescribe that a DPO has to be get the Audit done of the CAS, SMS as well as of the subscription report of **EVERY BROADCASTER**. Effectively, this provision implies that the Auditor will have to see and verify the reports sent to each and every pay Broadcaster. The Auditor will have to conduct this exercise separately and exclusively for 15-20 pay Broadcaster at each DPO's head-end. Such a prescription does not serve any purpose, rather, it more enduring on the DPO's.

We are of the opinion that the Regulation be amended to provide that the said Auditor will conduct the Audit of CAS and SMS only. The right to conduct the Audit on subscriber numbers should be left with the Broadcaster. This will ensure that multiplicity of Audit will be reduced.
