Response to

TRAI Consultation Paper on

Issues relating to Uplinking and Downlinking of Television Channels in India

31/1/2018

Evolution of the Indian Broadcasting Sector

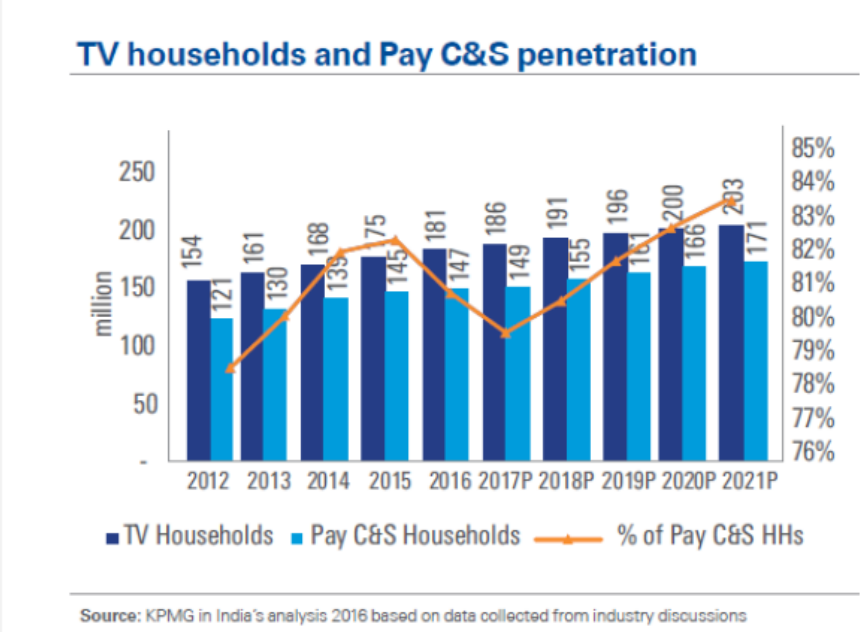
The Indian Television market is the second largest in the world with Rs. 247 million television households as per 2011 census. Till 1992, Indian television majorly comprised of Doordarshan terrestrial television channels. With the advent of cable television in 1992, and the availability of private TV channels, the broadcast industry witnessed a rapid growth.

Subsequently with the introduction of licensing of DTH services in 2003, the Pay TV industry rapidly transformed with an estimated 70 Million households opting for free or pay DTH services.

The Television industry accounts for 46% of the revenues of the Media and Entertainment (M&E) industry and will be Rs. 1165.6 Billion by 2021 with a CAGR of 14.7% as per FICCI KPMG Indian Media Entertainment Report 2017.

As per FICCI-KPMG Report 2017 :

> "Television is expected to grow at a CAGR of 14.7 per cent over the next five years as both advertisement and subscription revenues are projected to exhibit strong growth at 14.4 per cent and 14.8 per cent, respectively. The long term forecast for the television segment remains robust due to strong economic fundamentals and rising domestic consumption coupled with the delayed, but inevitable, completion of digitization".



Accordingly, the need of the hour is that the growth and development of the broadcasting sector which is on the verge of becoming a global industry should be catalysed by streamlining the process of issuing permissions by doing away with multiple approvals whilst issuing Uplinking and Downlinking permissions by MIB in the spirit of the Government of India's much lauded "Ease of Doing Business", "Digital India", "Make in India" and "Start-up India".

The regulatory framework for satellite broadcasting was first introduced in 1999 and the Ministry of Information & Broadcasting notified the "Guidelines for uplinking from India" in July 2000. This was followed by "Guidelines for Uplinking of News and Current Affairs TV Channels from India" in March 2003. In 2005, the Government amended these guidelines and they were consolidated into one set of guidelines and the consolidated uplinking guidelines were notified on 10 December 2, 2005 which were further amended and notified in 2011.

In the last two decades the number of satellite TV channels grew exponentially. As on 31st June 2017, the Ministry has issued permissions for 883 private satellite TV channels.

The 2011 Guidelines for the first time introduced a special clause to encourage foreign broadcasters to use India as a teleport hub to uplink channels meant for foreign audience. MIB has also given permission for 18 channels channels to be uplinked from India which are not permitted to be downlinked in India.

The clause 12 of the Uplinking and downlinking guidelines of 2011 specifically highlights that such channels do not require to comply with the program and advertisement codes of India.

Is Broadcasting a Section 4 licensee?

TRAI's interpretation that the permission granted to the broadcasters under the Uplinking and Downlinking Guidelines are a license issued under Section 4 of the Telegraph Act, 1885 is perceived very differently in the broadcast industry. We reproduce the relevant paras below :

> *"2.10…The facilities set up for broadcasting of satellite TV channels requires wireless operating license under the India Telegraph Act 1885, before its setup and made operational. Further, as per up-linking permission granted by MIB for a TV channel, up-linking of signals of satellite TV channels having valid permission from MIB, requires separate permission/ endorsement from WPC. The section 4 of Indian Telegraph Act states that the Central Government has the exclusive privilege of establishing, maintaining, and working telegraphs within India."*

"2.11. It is evident that the Indian Telegraph Act 1885 and its subsequent amendments define "telegraph" very broadly to include most modern communication systems irrespective of their underlying technology. Accordingly, the statutory basis of up-linking and downlinking policy can be traced to the India Telegraph Act 1885. Further the permissions issued under policy guidelines for up-linking and downlinking of TV channels comes under the ambit of Section 4 of the Indian Telegraph Act, 1885."

It simplifies into understanding that as broadcasters use Teleports that are licensed under Section 4 of the Telegraph Act, and the fact that the Wireless Planning and Coordination Wing (WPC) endorses the use of satellite spectrum allocated to such operators in the name of the TV channels, then broadcasters too shall be termed as the Section 4 licensees. It further takes the line that as the Uplink and Downlink Guidelines trace their origin to the Telegraph Act, 1885, therefore, any and all permissions issued thereunder ought to be construed as licenses under the Telegraph Act.

FICCI, would like to submit TRAI's proposition is not properly justified.

Section 4 of the Telegraph Act

Section 4 of the Telegraph Act entails a license for establishing, maintaining and operating "telegraph" in India which otherwise is an exclusive domain reserved for the Government. The relevant part of Section 4 of the Telegraph Act reads as follows:

"Within [India], the Central Government shall have exclusive privilege of establishing, maintaining and working telegraphs: Provided 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]: [Provided further that the Central Government may, by rules made under this Act and published in the Official Gazette, permit, subject to such restrictions and conditions as it thinks fit, the establishment, maintenance and working – (a) of wireless telegraphs on ships within Indian territorial waters [and on aircraft within or above [India], or Indian territorial waters], and (b) of telegraphs other than wireless telegraphs within any part of [India]."

Section 4 of the Telegraph Act is also the governing licensing provision for "wireless telegraph" under the Wireless Telegraphy Act, 1933 (hereinafter, Wireless Telegraphy Act), Section 5 of which refers back to Section 4 of the Telegraph Act for the purposes of licensing:

"—The telegraph authority constituted under the Indian Telegraph Act, 1885 (13 of 1885), shall be the authority competent to issue licenses to possess wireless telegraphy apparatus under this Act, and may issue licenses in such manner, on such conditions and subject to such payments, as may be prescribed"

Both the abovementioned provisions are meant for licensing of "Telegraph" which has been defined under Section 3 (1AA) of the Telegraph Act as follows:

"'telegraph' means any appliance, instrument, material or apparatus used or capable of use for transmission or reception of signs, signals, writing, images and sounds or intelligence of any nature by wire, visual or other electro-magnetic emissions, radio waves or Hertzian waves, galvanic, electric or magnetic means.

Explanation.—'Radio waves' or 'Hertzian waves' means electromagnetic waves of frequencies lower than 3,000 giga-cycles per second propagated in space without artificial guide"

Also, Section 2(1) of the Wireless Telegraphy Act defines "wireless communication" as:

"wireless communication' means any transmission, omission or reception of signs, signals, writing, images and sounds, or intelligence of any nature by means of electricity, magnetism, or Radio waves or Hertzian waves, without the use of wires or other continuous electrical conductors between the transmitting and the receiving apparatus;

Explanation.—'Radio waves' or 'Hertzian waves' means electromagnetic waves of frequencies lower than 3,000 gigacycles per second propagated in space without artificial guide"

From the above it is clear that a telegraph is either an "appliance, instrument, material, apparatus" that is established for the sole purpose of transmission of communications (signs, signals, images and sounds or intelligence) either through wired or wireless means. Any entity engaged in the establishing and operating of such telegraph has to obtain a license under the Telegraph Act for the same.

In so far as the Uplinking and Downlinking Guidelines are concerned, a broadcaster merely receives permission to either uplink and downlink a TV channel from a teleport located within India for distribution in India or downlink a satellite TV channel into India which is uplinked from a teleport located abroad.

The said guidelines also list out criteria for granting the permission for entities who want to set up teleports in India to use the same for uplinking of satellite TV channels subject to the criteria

laid thereunder, for which such entities also have to obtain a "Wireless Operating License" ("WOL") under Section 4 of the Telegraph Act from Wireless Planning and Coordination wing (WPC) of Department of Telecommunications (DoT).

The requirement of the Broadcaster to get their channel endorsed by WPC, is both for the purpose of record keeping and to ensure that the teleport operator only uplinks permitted channels using their teleport within their "Bandwidth". This amply proves that this requirement is only for the Teleport Operator than the Broadcasters and for hiring of a licensee under Section 4 for performing licensed services would not make the Broadcaster a Licensee under Section 4 of the Telegraph Act.

We would like to draw the Authority's attention to the case of BSNL Vs. Union of India – (2003) 6 SCC 1 that the Supreme Court of India while deciding the term "Telecom Services" regarding Sales Tax, it had held that merely by permitting a consumer to use the services of a Telecom Service Provider does not put the consumer in the control and possession of the equipment of Telecom Service Provider. The judgement of the Hon'ble Supreme Court makes it amply clear that the manner in which a teleport/up-link facility is being used differs from a television channel that is being up-linked using such facility.

Furthermore, in the matter of *Star India Pvt. Ltd. v. BSNL,* the Hon'ble TDSAT went into greater detail on the question of whether a broadcaster such as Star India is a "service provider" for the purposes of the TRAI Act, to determine the TDSAT jurisdiction to determine the issue before it, the Hon'ble Tribunal categorically held that petitioner (i.e. the Broadcaster, Star) was a "service provider", however, it was not a licensee of the Department of Telecommunications. The Hon'ble TDSAT also clarified that the petitioner was not a licensee in the same manner as the respondent (i.e. BSNL –a licensee under the Telegraph Act).

Auctioning of Satellite Spectrum

FICCI would like to submit that the use of a particular satellite spectrum and the corresponding satellite transponder capacity are interlinked, whereby the satellite transponder capacity allocated by a satellite operator to a broadcaster cannot be used without corresponding up-linking satellite spectrum, and similarly, a particular up-linking satellite spectrum, beamed toward a particular satellite, cannot be of use if the corresponding right to use of that satellite transponder capacity is not available with the same broadcast entity.

The broadcast cycle requires a coordinated use of the uplinking Space Spectrum, Satellite Transponder Capacity and Downlinking Space Spectrum, which cannot be auctioned together as they are not controlled by the same entity or even by a government. The introduction of an auction route for channels would necessarily require the auction of the spectrum bundled with

the satellite transponder allocation, complexity of process would not justify the negligible revenue that may be anticipated from such auction.

In addition is the involvement of myriad international regulatory complications that arise with the decision of auctioning of satellite spectrum. Further there are other complications that might arise if the auction of satellite spectrum is resorted as the same is an International transaction, subject to International Community rules, unlike terrestrial spectrum.

FICCI urges the Authority that they should not introduce auctioning of satellite TV broadcast by comparing it with the FM radio broadcast as it would amount to comparison between unequals. FICCI would like to draw the Authority's attention to para 2.29 of the instant consultation paper :

> *"The FM radio broadcasting is a terrestrial form of broadcasting wherein for each Radio channel, 800 KHz bandwidth spectrum in the frequency band starting from 88 MHz to 108 MHz is allocated by WPC. So theoretically there can be maximum 25 radio channels in a given area. However, the risk of interference from the adjoining area transmitters further limits the maximum number of FM Radio channels in a given area. Further, the reach of FM radio transmission is limited, and it depends upon the transmitted power and height of the transmitter antenna. Thus in a given geographical area, the maximum number of FM Radio channels are limited by design, and auction for FM Radio channels is carried out geographical area wise."*

As correctly highlighted the Authority, FM radio stations utilize that part of the overall spectrum which is earmarked for terrestrial communications as opposed to satellite communications where a teleport is used to reach satellite antenna. This simple differentiation means that per FM radio station requirement of spectrum is high and therefore per circle, given the present allocation in National Frequency Allocation Plan – 2011 (NFAP), only maximum of 25 stations per circle can operate (as has been affirmed by the Authority as well). Moreover, FM radio stations have to deploy their own terrestrial transmitter capacity which has to necessarily be licensed as an "apparatus" under the Telegraph Act.

Such is not the case with satellite broadcasters as they can simply hire teleport and satellite transponder capacity from commercial operators of the same. This to say that satellite broadcasters do not require to own the transmission infrastructure as is the case with FM radio stations.

FICCI believes that the Governments should only resort to auctioning process when there is a clear scarcity of a particular resource and the item being auctioned is free from any encumbrances. Satellite spectrum (and associated orbit locations) has multiple encumbrances.

As satellite spectrum is not scarce and unamenable to auctioning any such move to do so otherwise would harm an important service sector like the broadcasting industry which is the backbone of the Indian Media & Entertainment Sector.

Here FICCI would like to draw a parallel by highlighting the state of the Indian telecom sector. It is under severe stress because of irrational and excessive bidding for spectrum, although in the telecom sector itself, there's no auctioning of licenses. Therefore, it is hard to see the reasoning for bringing the auction route in broadcast sector when the same has failed in a big sector like telecom.

Auction would lead to de-growth of the sector

The TRAI recommendations such as increased license fee on fixed, variable or semi-variable basis; introduction of entry fees; auctioning of satellite spectrum and calculation of AGR based license fee that would not only discourage the foreign investors to invest in the Indian broadcasting sector. This will also lead to the permission holders granted permission under clause 12 of the Uplinking and Downlinking guidelines of 2011 to migrate from India to other jurisdictions, resulting in loss of employment opportunities and revenue to the exchequer. In other words rather than help growth and consolidation of an young and evolving industry like the broadcasting sector, the proposed policy measures would create roadblocks resulting in de-growth of the sector. When the Government of India under the leadership of the Hon'ble Prime Minister Shri Narendra Modi is seriously working to create more opportunities and improving India's ranking in the Ease of Doing Business category, it does not augur well for the sectoral regulator to introduce additional burden or road block for the growth of the sector.

Has the number of TV channels increased post 2011?

According to the data shared by MIB on the number of permitted private satellite TV channels in India, the TV channels permitted from the year 2005 to 2011 was 515. However, after the revision of uplinking and downlinking guidelines in December 2011 and till November 2017, the number of private TV channels granted permission was only 256. This clearly shows a steady decline in the number of permitted private TV channels post the introduction of uplinking and downlinking guidelines of December 2011.

Further, introduction of entry fee will act as an entry barrier and will be an impediment in making India as the media and entertainment hub of the world. Additionally, this will only help large media and distribution houses to further consolidate their stranglehold on the sector by elbowing out small and regional broadcasters. As a result, television audience will be denied freedom of choice and pluralistic views, which may turn out to be completely contrary to the Indian Constitution and democratic ethos.

As regards the introduction of entry fee, FICCI would like to submit that the extant uplinking and downlinking guidelines of 2011 have the necessary checks and balances which includes the necessary eligibility criteria, permission fees for both uplinking and downlinking and submission of Performance Bank Guarantees (PBG) to ensure timely operationalization of the channels. In view of this, there is no need to introduce any new requirements such as entry fee, license fee on fixed, variable or semi-variable basis.

As seen in the case of Telecom sector, the AGR based license fee has been a burden as well as an impediment to the growth of the telecom service providers (TSPs). The larger impact has been on TSPs when it comes to increasing CAPEX on infrastructure rollout in the interiors of the nation. Further, TRAI has sought comments in a separate consultation paper regarding removal of AGR based license fee structure. Therefore, FICCI is of the view that introducing AGR based license fee structure in the broadcast sector would not only undesirable but not in the interest of the Media and Entertainment sector as a whole.

Presently the Television industry accounts for over 45% of the revenues of the Media and Entertainment (M&E) industry. It is expected that this industry will expand to the value Rs. 1,165.6 Billion by 2021 growing at a CAGR of 14.7% as per FICCI KPMG Indian Media Entertainment Report 2017.

In view of the reasons enumerated above, FICCI's Media and Entertainment Committee strongly advises Telecom Regulatory Authority of India (TRAI) to take a holistic view of the issues involved – as the broadcasting sector is one of the strong pillars of the Indian Media and Entertainment sector which is on the threshold of becoming a global industry – and streamline and liberalise the process of issuing licenses by doing away with multiple approvals whilst issuing Uplinking and Downlinking permissions in the spirit of the Government of India's much lauded "Ease of Doing Business", "Digital India", "Make in India" and "Start-up India".