Date : 31.01.2009

To
The Principal Advisor (B&CS)
Telecom Regulatory Authority of India

Dear Sir,

We are thankful to the Hon'ble Authority to afford us an opportunity to tender our views with regard to the Consultation Paper on Interconnection Issues relating to Broadcasting and Cable Services.

Our Response to the same is enclosed herein for the Hon'ble Authority's kind perusal and consideration.

In the event of any clarification being required, kindly revert.

Thanking You
For MSM Discovery (P) Ltd
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Contact: 09769541616

RESPONSE TO THE Consultation Paper No. 15/ 2008

RESPONSE TO

Consultation Paper on Interconnection Issues relating to Broadcasting & Cable Services

31ST January 2009

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TABLE OF CONTENT			
Chapter I	**Page Nos.**	**Paragraph Nos.**	**Queries Answered at**
I. Freedom to Contract	**1-3**	**1-9**	
II. The Regulatory World of Interconnection	**4-6**	**A-G**	
Chapter II			
A. Interconnection for Addressable Platforms	**6-53**	**A1 – A17**	**Para A16, pages 21-48**
B. Interconnection for Non Addressable Platforms	**53-60**		**53-60**
C. General Interconnection Issues	**60-73**		**60-73**
D. Registration of Interconnection Agreements	**73-79**		**73-79**
E. Conclusion	**79-81**		
I. Regulatory Impact Analysis	**79-80**		
II. What makes a Good Regulation	**81**		

CHAPTER I. INTRODUCTION:

I. FREEDOM TO CONTRACT

(1) General international practice is to accept the "freedom to contract" of content owners to distribute their television content as they believe best according to market forces, this includes contracts providing for exclusive carriage of a given channel or piece of content.

(2) Exclusive carriage contracts are an important pro-competitive feature of contract relationships in our industry in most world markets. They are pro-competitive because it is by means of securing exclusive carriage of premium content that new entrants have been able to rapidly secure the market share to become economically viable. One prominent Asian example of this was PCCW's use of exclusive content to build its market share in Hong Kong to equal that of the incumbent Hong Kong Cable TV. Other new platform operators are making active use of exclusive content contracts to build new markets in places such as Singapore, Indonesia, and Korea.

(3) With technological innovations and the development and deployment of new delivery mechanisms, most notably DTH, and IPTV, all operators are faced with increased competition to provide a differentiated service which in turn benefits consumers from a greater selection of content, as well as more competitive packaging. In Asia, there are only two Countries that curtail use of exclusivity to develop pay-TV business models: India and the Philippines. These examples demonstrate the disadvantages of such general prohibitions.

- **Both markets are locked into a situation of underdevelopment worsened by commoditization of content. In India, for example, there is a "must-provide" requirement that all content must be provided to all cable/satellite operators in a non discriminatory manner.**

- **This has led to a long, unresolved series of disputes between channel owners and cable companies, with Regulations stepping in to prescribe the wholesale price of content, the conditions of sale, and even standard contract provisions. More often than not the Regulatory Authority also unfortunately find themselves being dragged into litigations on subjects which could have been very well left in the contractual domain of private parties.**

- **These provisions have led to a situation which has impeded necessary investments in digital platforms by cable operators who have no incentives to upgrade systems. As a result, India's cable industry is**

still largely underdeveloped, using slow, one-way and dated analogue technology, and content providers are reluctant to invest in production of quality local content. The Cable Industry has been availing two way revenues for carrying signals, one by way of subscription fees - a small fraction of which they pass on to Broadcasters, the other by way of Carriage fees levied against broadcasters which has hitherto been unregulated. Cable Operators have no incentives whatsoever to upgrade technology or adopt advanced compression techniques, further piracy and unauthorized cable casting are rampant and a bane to the industry. New Broadcasters who have joined the fray are not in a position to garner advertisement revenue, nor are they in a position to cough up carriage or placement fees.

All other Asian countries, as well as countries in North America and Europe, allow exclusive carriage contracts. In contrast to this general rule, it is a fact that there has been significant international discussion and regulatory action with regard to specific categories of market failure.

(4) The essential difference between this set of policies and general regulation of exclusivity is between countries whose authorities have engaged in narrow, focused intervention to address specific questions of market failure, and those who have engaged in broad, undifferentiated intervention to ban exclusive contracts.

(5) The latter category of action has resulted in a substantially weakened pay-TV industry as well as a reduction in consumer choice. Inspite of there being an unprecedented number of new channels coming up, the number and type of channels available to consumers have been held down, particularly in India by allowing Distributors of TV Channels in some cases to avail channels on ala carte with a ceiling on rates also in place. Further, there are some Broadcasters who hold a financial interest in some Distributors i.e. MSO/DTH/HITS; or both are found to be within the same Group. Some of these Distributors of TV Channels directly or indirectly promote their own inhouse Channels at the cost of other Broadcasters by ensuring that all such inhouse channels are carried in all entry level packages (the Basic Tier) while demanding exorbitant carriage fees for carrying channels of other Broadcasters. Popular content of Broadcasters are taken on ala carte by Distributors and the latter is allowed to package and price the same in a manner that maximizes his profits by extracting the real value of such Channels from subscribers while the Broadcaster is made to compulsorily supply the same at administered prices that are well below what the customer is willing to pay thereby subsidizing the Distributors' activities and operations. This is what results in "transfer payments" in regulatory parlance. Off late Distributors with addressable platforms are being encouraged, however the efficaciousness of their systems and reporting leave a lot to be

desired, accordingly under-declaration continues unabated in Digital platforms as is the case with Distributors in analogue mode. Last Mile Monopoly of Cable Operators both in Addressable and Non Addressable Systems continue unhindered and a recent suggestion by TRAI to the Government to initiate a grievance redressal system for Subscribers with regard to the same has been shot down by the latter citing difficulties in implementation.

(6) Governments whose basic policies have been designed to increase consumer choice and to maintain the free market in which buyers and sellers of products freely negotiate the terms of sale, would be prudent to avoid broad and complex intervention, which will in the long run make their consumers worse off. Programme content is not a rare product in today's world – there is no scarcity which needs to be regulated. And in the past two years, a wide array of new channels has also begun broadcasting. Channels in the marketplace vary widely in subject matter, and quality of production. Similarly, the cost of these channels varies.

(7) The situation is not unlike the automobile market, which features many different types of car. Many people might like Mercedes cars, but the government does not intervene to set the prices for Mercedes, or to tell the manufacturer that it cannot sign an exclusive distribution contract with a single car distributor, if the firms can agree.

(8) Rather, the government believes that other distributors, and consumers, if they do not like or cannot buy a Mercedes, can buy a Toyota, or a Ford, a Maruti or a Tata, or many other types of cars.

(9) In a similar way, a cable TV company that cannot buy a channel has access through the marketplace to hundreds of other channels, provided it is willing to pay the fair, market-determined price for those channels. That price ranges from zero for so-called "free-to-air" channels to relatively high prices for high-value sports, infotainment and movie channels, which invest substantial sums to ensure the channels remain of high quality to maintain consumer interest. Suggestions of content "unavailability" frequently come down to questions of price. In India, argumentation against exclusive carriage has frequently been used by those who do not wish to pay the fair price for the content. But in light of the huge and growing number of satellite TV channels available in India today, there is an ample supply of programming for potential competitors.

II. THE REGULATORY WORLD OF INTERCONNECTION/DISTRIBUTION

Though "Interconnection" may not be the right terminology as has been explained later in the response and may be the term "Distribution" would perhaps reflect the actual business practice of the industry, be that as it may following below is a list of countries which have taken regulatory action with regard to Interconnection/Distribution - compulsory or otherwise. (The list is in roughly chronological order.)

A. The United States focuses its regulation of exclusive contracts on the corporate linkages between content suppliers (channels) and broadcasting platforms (cable and satellite operators). U.S. antitrust law applies to pay-TV systems. In addition, since 1993 there have been specific regulatory provisions that prevent vertically-integrated cable/satellite operators and content suppliers from signing exclusive/restrictive agreements. (This means that content providers and cable/satellite operators in the same corporate group cannot sign exclusive/restrictive carriage contracts.)

B. The European Union has recognized in 1999 that exclusive agreements between suppliers and distributors may generate economic benefits, and that a measure of exclusivity may be indispensable to enable recovery of investments in content. General competition law regulates these agreements. More recently, the European Commission has taken action against exclusive agreements only in certain narrow market segments (specifically, English football, with a final decision in 2005).

C. The Philippines' National Telecommunications Commission in 2003 adopted a regulation that in principle banned all exclusive carriage agreements. However, existing contracts were "grandfathered" and the regulation has never been enforced.

D. In India, broad regulations were adopted in 2004, requiring that all content must be made available by channel suppliers on non-discriminatory terms to all cable operators (i.e. banning exclusivity). The principle of "non discriminatory" "must provide" has been stretched to the point of "indiscriminate" "must provide" whereby Broadcasters irrespective of the known antecedents and prior history of Operators are having to provide signals to them. The Indian regulation is the broadest and most sweeping in effect anywhere in the world, and it is actively enforced. It has had the following effects:

- **There has been a huge caseload of disputes and appeals between cable operators and channel suppliers; to ensure "non-discriminatory" treatment of each cable operator a special Act was passed in the**

Parliament and the TRAI was constituted which has been obliged to specify detailed provisions for commercial contracts,

- **Thousands of disputes are being litigated, with content owners having to expend substantial resources on litigation which could have been more meaningfully deployed towards generating quality content (litigations have been going on in Courts of Criminal Jurisdiction and also in a specialized Tribunal formed for the purpose viz. the Hon'ble TDSAT). This has become a huge burden both on the administrative/justice system and the pay-TV industry.**

- **As all programming is available to all cable and satellite platforms, the content market has become homogenized and commoditized. The same TV content is available everywhere in India for relatively low prices. Programming diversity has been altogether stymied. With piracy being wide spread and the law not affording much protection as a result, the pay-TV industry has been led to move down-market and rely increasingly on advertising revenue.**

- **Channels do not seek "niche" markets; they all compete for high ratings (and more advertising income) in the mass market. Creative content aimed at "niche" markets does not appear in India; there is no vehicle for it to reach its audience. Introduction of new channels not having mass appeal has been made much more difficult. New entrants into the broadcasting market complain they are prevented from using content to attract new customers. They are unable to offer a differentiated service to allow them to compete more effectively with existing platforms.**

E. Singapore examined the question of exclusivity carefully and at length, beginning in 2003, before deciding in 2006 (and reaffirming in 2007) that there were no grounds to regulate exclusive contracts. Singapore's MDA (Media Development Authority) conducted a detailed review of the markets for four separate kinds of content (sports, education, news and movies). Singapore noted that 20 different satellites cover Singapore, and concluded that "competitors retain the ability to obtain comparable channels from other content providers on reasonable prices, terms and conditions." Singapore retains the ability to regulate such agreements in the future, if it concludes that specific content markets no longer offer competitive access.

F. Indonesia has adopted a policy of case-by-case examination of specific types of content. Otherwise, the general rule is that channel exclusivity is permitted (and it is a key competitive element for the media groups serving Indonesia's dynamic and competitive market.) The most recent action on exclusivity came in 2007 in the specific case of English football,

where the government required the pay-TV operator with exclusive rights to make available two games per week for broadcast over a free-to-air terrestrial broadcaster. (Within that mandate, the pay-TV operator was able to negotiate its own contractual provisions with an FTA broadcaster of its choice.)

(G) Other countries and regions in the Asia-Pacific region have no wide-ranging laws regulating exclusive carriage contracts, including Australia, China, Hong Kong, Japan, Malaysia, New Zealand, South Korea, Taiwan, and Vietnam.

CHAPTER II SPECIFIC RESPONSES TO ISSUES RAISED

A. Interconnection for Addressable Platforms :

A.1. The Authority is requested to take into account the major concern of the Broadcasters vis a vis addressability. Since the advent of addressable platforms, Broadcasters have had to contend with a proposition which no other industry in all known realms of Commercial Jurisprudence has ever had to reckon with. The proposition that it shall be the prerogative of the buyer (Distributor of TV Channels) to tell the seller (The Broadcaster) the basis (the subscriber base) of his payment and that too at prices set by a tariff order or a formulae mandated by the Regulator, is unique to a broadcaster in addressable markets in India alone. It is this proposition that the broadcasters have been trying to come to terms with. Broadcasters today have neither any control over the pricing, nor packaging nor any transparency in what they are being paid, for the content produced, generated and supplied by it.

A.2. Addressability in theory is the technological measure that seeks to Protect Content and restrict access thereto only to users who have paid for the same.

In the United States, Europe and to a substantial extent even East Asia, Addressability is ensured at the following levels:

a. The first level or layer is copyright law which provides general protection.

b. Technological measures are second level of protection in that they provide technical protection to the work or control of the access thereto.

c. Article 11 of the WIPO Treaties cleared the way for a third level of protection, as it sets up protection of the technological measure, thus the work is henceforth protected both by law and technology and the technology itself is protected as such by the law. However this requires institutional and above all governmental support, together with formulations of an exhaustive Code of Ethics.

As a result the user who performs an act requiring permission from the author relating to a work protected by a technological system commits two offences, one against copyright and the other against provisions regarding technological measures.

In India however, it is only the glorification of the theoretical redeeming facets of "b", above that is hogging the limelight, without appreciating its

inherent potential of failure and shortcomings particularly in a country like India with a. and b. above being practically non existent. It is because of these inherent shortcomings that MSMD requests the Authority that freedom to contract be allowed to the Broadcasters.

A.3. The Regulatory discourse in India seems to be veering around the premise that addressability is a panacea for all ills that prevail in the Cable and Satellite industry. It is not. Broadcasters are thrust with a fait accompli that entail administered rates which are again abysmally low coupled with underdeclarations not very different from that in the non addressable scenario. The degree and extent of Piracy or underdeclarations in non addressable markets are however much greater than what we find in the addressable markets, however that is not to say that Addressable markets are sacrosanct or inviolable.

A.4. In India the concept of addressability is at its nascent stage. Thus it is necessary to fall back upon the collective experiences of countries that have adopted addressability for quite some time now, prior to drawing up any regulatory formulations for addressable systems. It is imperative to appraise and analyse how addressable systems have been functioning, their shortcomings, the mechanisms that have evolved to overcome them, and how they have been shaping themselves up for the future. This is essential so that mistakes are not repeated and their supposed "virtues" are not blown out of proportion. Expectation from Addressable Systems in India need to be tempered with reality, integrated and tuned with ground situations and also be informed of international experiences so that local considerations and special needs are duly and meaningfully addressed by the introduction of such systems. This is not to say that Regulatory provisions of a foreign country have to be verbatim reproduced in Indian enactments, as the context and ground realities shall vary and so shall the accompanying complexities, however an effort may be undertaken to make out a "best fit" from the sundry best practices prevailing and apply the same to India keeping in mind the special requirements that this country merits.

A.5. At present Channels all over the world are encrypted by mainly 12 different conditional access systems the popular ones being viz. Power Key, Videoguard, Mediaguard, Viaccess, Irdeto; Betacrypt Cryptoworks; Nagravision, Conax. Each of them have their own drawbacks and redeeming features. In United States, Europe as well as in India, the advent of pay television has heralded the start of a flourishing commercial piracy industry. Illicit access to a service protected by conditional access has several adverse effects on the service/content provider. By depriving providers of remuneration, piracy poses a direct threat to the economic viability of the service/content providers, to the competition between them and, hence, to the diversity of services offered

to the public. Technology alone cannot provide a full and comprehensive answer to the piracy problem. In order to combat piracy, some States have introduced new legislation, in parallel with the technical countermeasures put in place by service providers. Others have tried to apply existing provisions of criminal law, unfair competition law or copyright or tort law. There are substantial differences in legal protection among States in terms of scope, prohibitions and sanctions. In Europe after a wide-ranging consultation process The Commission of the European Communities proposed harmonising the legal protection of all electronically provided services using any form of conditional access to ensure the remuneration of the service. At the end, 1998 Directive 98/84/EC was adopted, which marked a milestone in the realm of content protection. This popularly came to be known as the "Conditional Access Directive". Soon after, this was followed up with The Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, commonly known as the Copyright Directive or the Information Society Directive, (Infosoc Directive) which is a European Union directive in the field of copyright law, made under the internal market provisions of the Treaty of Rome. It is intended to implement the WIPO Copyright Treaty, to which the European Union is a party and also contains provisions on technical protection measures and anti-circumvention and is considered complementary to the Conditional Access Directive. It includes only very narrow exceptions to anti-circumvention measures and exclusive rights. This is perhaps to date the biggest victory for copyright-owning and licensing interests like broadcasters.

A.6. In the United States, The Digital Millennium Copyright Act (DMCA) is a copyright law that implements two 1996 treaties of the World Intellectual Property Organization (WIPO). It criminalizes production and dissemination of technology, devices, or services intended to circumvent measures (commonly known as Digital Rights Management or DRM) that control access to copyrighted works and it also criminalizes the act of circumventing an access control, whether or not there is actual infringement of copyright itself. In addition, the DMCA heightens the penalties for copyright infringement on the Internet. Passed on October 12, 1998 by a unanimous vote in the U.S. Senate and signed into law by President Bill Clinton on October 28, 1998, the DMCA amended Title 17 of the United States Code to extend the reach of copyright in a manner that was unprecedented.

A.7. The Copyright Directive prevailing in Europe addresses some of the same issues as the DMCA. Unlike Section 1201 of the Digital Millennium Copyright Act, which only prohibits circumvention of access control

measures, InfoSoc Directive also prohibits circumvention of copy protection measures,

A.8. In India there is practically no protection that is afforded to service providers or content owners/providers. The Copyright Act is the only statute that is supposed to protect content providers. Lacking in efficacious remedies, coupled with very little sensitization among the general public and a tendency to undermine whatever little statutory protection is afforded for the sake of "greater pubic good", India poses a unique challenge for Content/Service providers namely broadcasters or even for that matter genuine DTH/HITS/CAS Operators. In India the problem is compounded by the fact that there are ample incentives for Operators to resort to what is famously known as the "Analog Hole" i.e. to resort to acts of piracy at the wholesale (MSO) or retail (LCO) stage itself to the detriment of Broadcasters who are mostly owners of Copyright in the content they generate. The extent and degree of piracy in India is perhaps unmatched as it occurs more at the whole sale distribution level rather than at the end user stage through what is known popularly as the Analog hole.

A.9. State Of Protection Afforded In India:

I. In India amendments were proposed to the Copyright Act by inserting Section 65A and Section 65B which read as follows:

"Section 65A. Protection of Technological Measures.

(1) Any person who circumvents an effective technological measure applied for the purpose of protecting any of the rights conferred by this Act, with the intention of infringing such rights, shall be punishable with imprisonment which may extend to two years and shall also be liable to fine.

(2) Nothing in sub-section (1) shall prevent any person from:

(a) doing anything referred to therein for a purpose not expressly prohibited by this Act: Provided that any person facilitating circumvention by another person of a technological measure for such a purpose shall maintain a complete record of such other person including his name, address and all relevant particulars necessary to identify him and the purpose for which he has been facilitated; or

(b) doing anything necessary to conduct encryption research using a lawfully obtained encrypted copy; or

(c) conducting any lawful investigation; or

(d) doing anything necessary for the purpose of testing the security of a computer system or a computer network with the authorization of its owner or operator; or

(e) doing anything necessary to circumvent technological measures intended for identification or surveillance of a user; or

(f) taking measures necessary in the interest of national security.

Section 65 B. Protection of Rights Management Information. –

Any person, who knowingly

(i) removes or alters any rights management information without authority, or

(ii) distributes, imports for distribution, broadcasts or communicates to the public , without authority , copies of any work, or performance knowing that electronic rights management information has been removed or altered without authority, shall be punishable with imprisonment which may extend to two years and shall also be liable to fine; Provided that if the rights management information has been tampered with in any work, the owner of copyright in such work may also avail of civil remedies provided under Chapter XII of this Act against the persons indulging in such acts described above."

II. Even these miniscule legislative provisions which could have provided atleast some succour to the Content/Service providers viz. broadcasters in India have been gathering dust in Parliament. No one is in a position to hazard a guess when these provisions shall see the light of the day if at all.

III. Instead the recent amendments to the Criminal Procedure Code have considerably whittled down the punitive provisions for offences that earlier carried imprisonment for terms upto 7 years. Now offences under the Copyright Act, which had always traditionally carried imprisonment for terms far lesser than seven years may now under the forthcoming dispensation call for no arrests to be made at all.

IV. Earlier broadcasters/Service Providers had a very hard time in initiating prosecution for content theft, in the revised scenario, there is no way a meaningful prosecution can be initiated at all.

V. Section 41 of the Cr P C lays down certain conditions on the police officer for arresting a person accused of committing a cognisable offence that carries imprisonment that can be extended up to seven years.

VI. The amendment surprisingly proposes that the police officer may, in some cases instead of arresting the person concerned, issue a notice of appearance, asking him to cooperate in the probe.

VII. Accordingly in the absence of legal or regulatory safeguards MSMD requests the Authority to allow broadcasters to rely upon Contractual frameworks, as that would at the very least ensure protection in terms of the laws of Contract.

A.10. PIRACY METHODS AND TOOLS:

(1) In India, in a majority of cases piracy occurs at the distribution level itself which is of considerable concern. A combination of one or more devices like polyvalent receivers, decoders, converters, amplifiers and modulators are mainly used to transform encrypted feed into analog unencrypted feed for onward transmission to unauthorized areas. In India as shall be described later, piracy is more through the Analog hole at the Distribution level itself.

(2) Though not very prevalent in India, as addressability here is at an embryonic stage, yet something which cannot also necessarily be overlooked in the long run are Pirate smart cards that are often based on the original smart cards issued by pay-TV operators. Disabled cards, or cards only giving access to the basic service offering, are modified (so-called MOSCs) and turned into cards giving full access to the whole package of services. Digital pirate smart cards, often called DPSCs, are either functionally identical "clones" of original cards or newly programmed smart cards.

(3) In Europe and the United States professional pirates are well-equipped and produce large quantities of MOSCs and DPSCs. The quasi-industrial production and distribution of these pirate cards requires highly "professional" business-type working methods, often involving organised crime.

(4) Less industrial, but nevertheless no less damaging, is the "local' production on a much smaller scale of pirate cards on the basis of publicly available empty smart cards. This kind of pirating uses "do-it-yourself" hardware and information mainly available via the Internet. Profits are made from selling blank cards and programmers or complete satellite reception installations, including a counterfeit access card at attractive

prices. These pirates are also used by organised crime as a distribution channel for the pirate cards produced by professional pirates. Often the commercial nature of this form of piracy is difficult to establish because calculating perpetrators reduce their "penal" exposure to the maximum.

(5) Increasingly, technically savvy viewers themselves are producing pirate cards for their own private use. All they need to do is to acquire the necessary know-how from hacker sites and to make a one-time modest investment in the basic hardware.

(6) Two relatively new and extremely dangerous forms of piracy that are developing rapidly at present which India shall also have to address in the long run are as follows:

The first is based on the use of ordinary PCs equipped with DVB TV cards and software decoders. These powerful software decoders, which emulate the conditional access hardware module and the smart card, are distributed over the Internet.

The second form centres on the possibility of modifying commercially available common interface conditional access modules (CAMs) by applying specialised software "patches", with the result that a valid smart card is no longer necessary (so-called FreeCams).

(7) All pirates, except maybe the most professional ones, depend for the availability of keys, circumvention tools and instructions, etc., on private hacker websites. A small excerpt of a presentation highlights just one facet of the gigantic probem

"All smart cards and decoding devices can be hacked if left in the field long enough which is why NDS' business plan calls for periodic replacement of cards and devices. NDS also designs its system to permit electronic counter measures to be sent over the air to disable counterfeit cards and devices. Canal Plus' card has not provided effective counter measures." (*NDS President and CEO Dr. Abe Peled, quoted by Toby Marshall. (2002), Digital TV Group).

(8) An exquisite range of websites and message boards provide indepth background information on the different conditional access systems, tutorials on how to (re-)program smart cards as well as references to where to "find" essential key material. Smart card technology has entered the main stream of business applications. The hardware and software tools to program these cards are widely available, because smart cards and their programmers are also used for legitimate purposes. It is obvious that user-friendliness of the necessary tools and the availability of knowledge and information via the Internet have facilitated piracy of digital systems

considerably. This is something which India can ignore only at its peril in the long run with the emergence of new technologies and platforms particularly IPTV. It is probably a matter of days before mobile TV and internet TV also enter the fray.

A.11. DAMAGE CAUSED BY PIRACY

(1) Audio-visual piracy is not a "victimless" crime. Most pay-TV broadcasters operate within narrow financial margins. The difference between commercial success and bankruptcy is usually very small in emerging industries of this kind and often depends on a progressively expanding paying audience and ARPU. The number of pirate viewers watching without payment can make the difference.

(2) Piracy does not only deprive genuine operators of their revenues, it also increases the operating costs as well as the need for additional investment. In Europe detailed surveys have revealed that the replacement of one smart card in a major card swap-out costs about €11. One major pay-TV operator claimed to have spent over €35 million to develop its widely used set-top box middleware and conditional access system.

In India however the loss has been phenomenal as piracy here is more at the Distribution level. The following News Article throws light on the magnitude of the issue:

"Asia pay TV losing $1 billion yearly to pirates

Nov 8, 2005 8:00 AM, Strategic Content Management e-newsletter

The pay television industry in Asia is expected to see revenue losses due to piracy rise by 11 percent this year to $1.06 billion, with India accounting for more than half the losses, according to a study released last week by an industry group.

Governments in the region are expected to lose $155 million this year in taxes, license fees and other revenues as a result of pirated cable and satellite television, said the study, which was co-authored by investment bank CLSA.

Total losses in India are expected to rise by 19 percent to $670 million this year, due largely to theft of programming on a wholesale basis, the study found.

Piracy losses from China were not included in the report, because it is seen as having a negligible genuine pay-TV market by some industry standards, the report said.

The study covered all forms of pay TV in Hong Kong, India, Indonesia, Malaysia, the Philippines, Singapore, South Korea, Taiwan, Thailand and Vietnam. Both Singapore and Malaysia saw declining piracy percentages from 2004, the report found."

(3) As highlighted, Piracy also has a negative impact on the revenues of the national treasury. Pirates do not pay taxes on their services; and legitimate providers pay less VAT, Service and Income taxes due to lower turnover and lesser profits.

(4) Law-abiding consumers ignorant about the source of the signals and the manner how it reaches, are the first to bear the consequences of the fraudulent behaviour of pirates when their signals are deactivated.

(5) Indirectly, piracy also distorts other audio-visual markets. It not only affects the retail market of set-top boxes and subscriptions, it also has a potentially detrimental effect on the cinema sector and the rental of video cassettes and DVDs due to the availability of premium material via illegal access to electronic pay services.

(6) Information provided by AEPOC, the European Association for the Protection of Encrypted Works and Services, showed that lost revenue from piracy in Europe exceeded €200 million in 1996. AEPOC estimates that, due to the increased annual legal turnover of pay-TV operators, the illegal turnover connected to piracy is in the order of €1 billion yearly.

(7) Apart from the economic damage it produces, the act of piracy itself also causes "societal" damage. Burglary and theft are per definition unacceptable in any civilized society because they attack the heart of our system of values. The cyber equivalents of these offences and the damage done to the public interest should be seen in the same light.

A.12. COUNTERMEASURES

(1) In developed economies technical countermeasures have been successfully deployed along with statutory countermeasures.

(2) In India generally legal actions are avoided by Operators even in known cases of piracy, as firstly there are hardly any remedies and also in order not to make the general public or Content providers/Broadcasters aware of the vulnerability of their services as these might result in

counterclaims. More often such unauthorized satellite/cable casting is resorted to by Operators themselves.

(3) As stated Piracy occurs in India at the wholesale distribution level itself, through what in technical terms is referred to as the "Analog hole". Operators in India do not have the necessary wherewithal or inclination to continuously and routinely monitor the piracy market nor do they analyse new piracy devices and methods in order to keep abreast of piracy and to strike back with counterattacks. Though they are in a position to reduce the vulnerability of their systems by upgrading the encryption and enhancing the key schemes used to identify (individual) users, yet seldom are these taken up in right earnest. Content owners are extremely concerned about keeping their content safe, while genuine Platform Operators will tolerate some piracy till the time lost subscriptions are less than the cost of tackling it. If the addressable platform operator also has a presence in the analog market, he would not care at all.

(4) There are, admittedly, practical limits to these efforts due to the prohibitive costs involved; In India the sole focus is to cut costs even if it means compromising on quality. This mindset prevents even willing operators to undertake even the smallest of small technical countermeasures, as he knows he shall not be compensated for the same by his subscribers. Also the vendors of conditional access devices are foreign entities, and it is very much likely that cost considerations of Operators would force such vendors to dump dated technology on Indian shores with impunity taking advantage of knowledge differentials as there are hardly any regulatory strictures that such vendors have to comply with. The main concern of the broadcasters is that the market for CAS equipments is dominated by only large overseas actors. Corporate agreements between these actors who are manufacturers of such systems and the Operators which are beyond the reach of the broadcasters do not address the concern of broadcasters at all. Such actors also keep "failure" data to themselves for fear of reputation and lack of any regulatory requirement. The contracts between operators and such actors are kept confidential, without anybody in a position to assess the covenants with regard to rights of operators vis a vis such systems, and whether such rights have the potential to undermine broadcaster interests. Also standardization of the specifications by the Bureau of Indian Standards render the equipments more vulnerable to piracy as the pirate has only to solve the "cross word riddle" such specifications provide. It is at this point that effective enforcement of legal protection becomes the next line of credible defence. But formulations for legal protection are non existent in India, not to speak of their enforcement.

(5) In Europe the Copyright Directive, complements the legal protection offered by the Conditional Access Directive, in particular by providing

legal protection of anti-copying devices and right management systems. Traditionally, conditional access technologies were only supposed to protect the signal as transmitted by the service provider. Like in Europe and the United States, there is a need now that new generation of in-home digital networks and personal video recorders maintain the conditional protection in the subsequent stages of digital consumption. In Europe Conditional access tends to become part of a larger protection scheme designed to provide end-to-end protection for content in all processes from the point of initial distribution through to the point of viewing and listening by the end-user. Conditional access and digital rights management may use the same encryption engine in the home multimedia centre. This is where Conditional Access and Content Protection merge, while the former relates to access, the latter ensures subsequent usages are within authorized domain. Abroad, most conditional access vendors have extended their products to include content protection capabilities. The most prominent examples are PVRs and some Multimedia utilities.

(6) At the same time, business is seeking new ways of exploiting available technologies, in often unexpected and innovative ways, in an attempt to offer new compelling content and to optimise value creation and revenues. These new business models are often experimental, at least in the beginning, and thus may be allowed for the time being to ignore the applicable legal framework.

(7) In India market developments have to be monitored closely in order to ensure that seamless, complementary protection is offered by the law which at the moment is altogether non existent for even existing technologies not to speak of emerging ones.

(8) As stated, Broadcasters do not have the necessary wherewithal to protect their content from unauthorized usage, the protection afforded by way of legal enactments are far too little , accordingly broadcasters can only ensure better protection if they are allowed to inbuild proper safeguards by way of contractual clauses and compensation mechanisms negotiated bilaterally with the Operator concerned.

A.13. ENFORCEMENT

(1) Recently, the Commission of the European Communities adopted a proposal for a Council Framework Decision on attacks against information systems. This proposal seeks to extend criminal law across the EU to ensure that Europe's law enforcement and judicial authorities can take action against the latest and most significant forms of criminal activity against information systems. The proposed Framework Decision covers *inter alia* the unauthorised access to a computer or networks of

computers, including the access to services protected by conditional access without payment. The adopted proposal recognises that conditional access devices, such as digital set-top boxes and personal video recorders, are *de facto* "computers" and that conditional access-protected services are provided via an information system". Such a principle is very much needed in India as well.

(2)Member States of EU have brought into force the necessary measures aimed at establishing and punishing the offence of illegal access to information systems, if committed against an information system which is subject to specific protection measures (for example, a satellite pay-TV service using conditional access), or with the intent to cause damage (for example, to the provider of conditional access technology or services), or with the intent to result in economic benefit (for example, by making profits from selling illicit devices or adopt illegal practices). These formulations complement the legal protection offered by the Conditional Access Directive and provide an additional level of protection against the piracy of conditional access-protected pay services.

(3) In the absence of such extensive and intensive legal sensitivity as is seen abroad, it is requested that Broadcasters in India be atleast left to fend for themselves by attempting to mitigate risks as per their own understanding of given situations, through contractual formulations that can be arrived at with minimal Regulatory intervention through negotiations. In the absence of any other laws, atleast Contract laws could be pressed into service to protect the interests of broadcasters.

A.14. COMBATING PIRACY

(1) Interestingly, abroad Operators have the responsibility to use the best available encryption techniques.

(2) All over the world there are appropriate penal or administrative sanctions as well as on the forfeiture of seized decoders and the financial profits resulting from the unlawful activities by the infringing party.

(3) Time has shown that the Council of Europe's pioneering efforts to complement technical protection by legal protection has been instrumental in the consensus building among European countries on how to effectively tackle piracy. A National effort needs to be undertaken in India on similar lines, unfortunately we do not have the requisite Institutions that would facilitate the same. In Europe the AEPOC takes a lead in ensuring hygiene issues in copyright, while in the United States it is a direct government initiative. The AEPOC has most of the States in the European Union as its members, and performs a yeoman's service to content owners including broadcasters by pro actively ensuring member

countries enact necessary legislation to protect copyrights not only internally but also within nations. The Bratislava Charter in 2004 , the Code of Ethics formulated under its aegis has since become a reference point for all operators of the broadcasting and telecommunication sector in Europe. A Code of Ethics and Institutions that support conditional access and content protection are also the need of the hour in India, as we stand at the threshold of "Convergence". Such initiatives can never be feasible without government and regulatory support. Without laying down the legal infrastructure addressable systems have an inherent tendency to be rendered defunct.

(4) Canada is perhaps the greatest success story in conditional access and content protection. Canada, a nation with a highly advanced market penetration of cable, satellite and IP broadband networks and services , through determined legislation, prosecution and the active support of own investigation teams at CAAST (Coalition against Satellite Signal Theft) is today an international showcase for anti piracy strategies.

(5) In India however, though some actions are initiated by broadcasters under the Copyright Act, yet the same have not been found to be a cost effective deterrence enough. In the absence of stringent and concrete legal protection, Copyright violations in India are looked more as civil law infractions. The sense and degree of criminality that usually is attached to copyright infringement by the rest of the world, is unfortunately missing in India. It is thus only contractual remedies that can come to the aid of the broadcasters, given the ground realities prevailing today.

A.15. NEXT STEPS

(1) Electronic pay services are important for a maturing knowledge economy. Today, electronic pay services exist predominantly in the field of digital pay TV. A massive proliferation of all sorts of new electronic pay services provided over all possible distribution networks is generally expected to happen during this decade.

(2) The digitalisation of cable networks as well as the introduction of 3rd generation mobile communications and advanced transport-related services will result, in the not too distant future, in large-scale deployment of intelligent appliances able to handle pay services. New consumer electronics, such as integrated home entertainment centres and personal video recorders, will be designed to enhance listening and viewing experiences even if conditional access technologies are used and full access is only possible with payment.

(3) The knowledge-based economies of the 21st century are expected to rely progressively on pervasive electronic pay services. Consequently, the

economic and societal relevance of these services will grow over time. Fraud and piracy related to pay services will tend to develop at the same speed as the pay services themselves unless adequate legal protection and effective enforcement is ensured. Piracy of electronic pay services has the same detrimental effects in the knowledge society as white-collar crime and counterfeiting of goods in the 20th century. This development has to be taken into account if India wants to meet its ambitious target of emerging as one of the most dynamic and competitive economies by 2010. It is therefore important to give a clear signal to business and citizens indicating that this Nation cannot accept that its economic and societal development be severely hindered by acts of piracy. An early and powerful signal may prevent a level of tolerated and socially accepted piracy, as is currently noticed in the field of digital music.

(4) Electronic pay services are a pivotal building block of the emerging knowledge-based economy. Legal protection against piracy of electronic pay services is an essential condition for the development of such services and a prerequisite for future growth and prosperity for the citizens of this country. In the absence of adequate legal protection, MSMD reiterates that it is Contracts alone, negotiated at an arms length on an even keel, that can ensure a semblance of assurance for broadcasters howsoever minimal.

(5) "The Slogan 'content everywhere' could directly translate into 'piracy everywhere' turning these new opportunities into new, serious threats for the media industry" explains Jean Grenier, president of AEPOC (Association Europeenne pour la Protection des CEuvres et Services Cryptes or the European Association for the Protection of Encrypted Works and Services"). "Existing legislations and enforcement priorities must be reviewed…to take the new reality into account."

(6) Piracy destroys the incentive to artistic creation and without creation there will be no content. It means less return on investment, therefore lesser new investments are possible, accordingly piracy means also lesser competition and fewer opportunities for the players, less employment, less taxes, less welfare and to put it simply – less future.

A.16. Answers:

I. Whether the Interconnection Regulation should make it mandatory for the broadcasters to publish Reference Interconnect Offers (RIOs) for all addressable systems, and whether such RIOs should be same for all addressable systems or whether a broadcaster should be permitted to offer different RIOs for different platforms?

Comments:

(1) The RIO model that has been formulated, to supposedly ensure content availability to DTH operators, has not in MSMD's considered views served any purpose in that the said mechanisms have only resulted in the spawning of litigation which could have been well avoided had parties been allowed to negotiate and conclude their own dealings. Prior to the Regulatory mandate of Broadcasters being required to publish their RIO, fully functional agreements were already concluded between the then existing DTH operators and Broadcasters and that too without even having to resort to any sort of litigation. The only instances of litigation were when two DTH operators who were vertically/horizontally integrated with competing broadcasters had decided to take their *lis* before the TDSAT. The Regulations however only served to open a can of worms whereby existing DTH operators who had on an even keel negotiated with Broadcasters and thrashed out contracts for themselves were allowed to agitate perceived grievances of "discrimination" before the authorities and reopen contracts that had already been mutually decided and concluded. Regulations 13.2A (Series) of the Interconnect Regulations 2007, were unprecedented in that it allowed Operators who had concluded deals with broadcasters to question and reopen such deals whereas the known intent of any Regulatory formulation all over the Globe is to be prospective, cut down upon litigation, let concluded matters be for the sake of certainty, and foster growth of industries in the spirit of cooperation and meeting of minds of the players that comprise it. The fact that not even one Operator had insisted on revisiting concluded deals post the Regulations inspite of being allowed to do so , speaks volumes in favour of contractual mandates than Regulatory impositions. Post the Regulations an unprecedented wave of compulsive litigation was unleashed against Broadcasters before the TDSAT by a particular new DTH entrant who was again vertically integrated to a Regional broadcaster. It did neither parties any good. Even after the Regulations the other comparatively newer DTH entrants who had no vertical integration with any broadcaster concluded deals with an even keel with all the broadcasters, and practically no noises were generated in the process. The important lesson to be learnt is that what has already been a time tested and accepted practice in countries where Pay TV has been in vogue for quite some time, namely that vertical/horizontal integration of Operators with broadcasters may call for some limited regulatory intervention but not a blanket one at that. Today even the terms of RIO of some broadcasters are being debated in Courts, thereby defeating the very purpose for which the RIO formulation was adopted. Negotiations instead of happening in board rooms by business people are being carried out in Court Rooms by lawyers. While interconnection between broadcasters and distributors are being subjected to regulatory and judicial scrutiny, there is no attention being paid to terms and conditions being imposed by Operators upon Consumers. While there has been a spate of directions by

TRAI against most of the Broadcasters, directions against other stakeholders have been few and far in between.

(2) Reference Interconnect Offers may perhaps at best be a stop gap arrangement but are not the ultimate answers in themselves as contractual formulations are based on both the content as well as the context. Like as has been stated addressable markets are contrary to conventional wisdom in that, the buyer (Distributor of TV Channels) gets to tell the seller (Channels) what he is going to pay. Contracts cannot be made out of context namely the particular technology or platform and the prevailing situation at the ground. Each technology or platform has weaknesses that can be manipulated by illicit devices or practices designed and adapted to give intelligible access to protected services without the authorisation of the service provider. In India piracy mostly occurs at the whole sale distribution level itself through what is popularly known as the "Analog hole". Addressable platforms after de crypting the signals do not re encrypt the same and retransmit the unencrypted channels for onward distribution in analog mode. A DTH/IPTV decoder can be very well used in analog cable networks. Re encrypted signals that are retransmitted by such platforms over their networks are downloaded by unscrupulous elements who de crypt the same and redistribute it in analog mode. These risks are particularly acute for a broadcaster when an Operator has a presence in both the Analog as well as addressable markets. Stringent Regulations are required that could prevent the use of any cross service devices such as IPTV or DTH boxes on a cable plant; use of any card splitters whereby one decoder is tampered with to deliver multiple channels; connection of signals to any networks outside of the contracted ones without prior confirmation and transport of decoders, cards, etc. to any address, area or location other than those explicitly authorized. Other typical examples of illicit devices are special purpose hardware devices like polyvalent receivers or software programmes built to bypass the conditional access protection. Due to developments in smart card-related technologies, new vistas of piracy have opened up. Again as stated there are devices and equipments that have the functionalities of a decoder, modulator, converter or amplifier that can decrypt encrypted digital signals for onward transmission in analogue mode. These are instrumentalities that facilitate the creation of the "Analog hole". Such equipments facilitating piracy are also far too many to be generalized or catagorised as they depend upon the specific technology that a particular addressable platform deploys in a given situation. Protective measures have to be incorporated in Contracts with regard to illicit practices and devices that are technology and situation specific. As such no amount of standardization of interconnection contracts or offers would be able to exhaustively take care of each and every situations and illicit practices and devices that are now prevalent.

(3) It would be impossible to render such RIOs "future-proof" and less "maintenance prone" more so in the absence of a stable legal framework and therefore as a logical corollary the lack of optimal legal security. Not only typical conditional access technologies based on cryptography, such as used in pay TV, have to be covered, but also any other technology, denying access without the prior approval of the service provider, such as user-ID/password schemes, have to be considered.

(4) Again India is a vast country with unprecedented and unparalleled heterogeneity in its population, no two states speak the same language, neither are law and order propositions the same all over. Accordingly the risks that a broadcaster would seek to cover and mitigate shall vary with territory, language, political dispensation, local practices, and sundry other innumerable variables which we submit is impossible to be factored in any Standard off the Shelf formulations. It is submitted that a broadcaster has not only to factor in commercial and technical considerations in contracts but also the risks arising from dealing with specific persons in particular areas under special circumstances which has a direct bearing on the Commercials. No standard formulations would be able to capture the specificities in a comprehensive manner to the satisfaction of all the contracting parties. States differ on parameters like gas, electricity, telephone, bandwidth penetration and television connections which have a direct bearing on Subscriber base and over all connectivity which in turn would have a bearing on facilitations by way of discounts, etc. to be provided by the broadcaster to the Operator and vice versa. Again the extent of criminality in certain areas, political turmoil, civil unrest, antecedents of operators, fly by night players, probability of outstandings, and recoveries, all play a vital part in forming contracts which again is a very subjective process. So long as parties are allowed to enter into contracts basis what they deem fit, at arms length and which are not unconscionable, fraudulent, or on mistaken premises, there should not be any further enquiry. Ensuring non discrimination cannot lead to a situation where intrinsically disparate operators seek parity. Again some operators may be meriting some special facilitation, while others may not for a host of other reasons for example degree of cooperation in promotional activities, data collection, research activities, intimating on demands and habits of local subscribers, ideating, rendering other services to broadcasters, carrying signals on desired bands, etc. It is submitted that the Broadcasting industry runs primarily on relationships which again is a bundle of reciprocal expectations and cooperation which can only be factored in through contractual dispositions and the same by any stretch cannot be generalized through regulatory intervention.

(5) Contracts also have to take care of defining infringing activities which no amount of standardization can ever comprehensively generalize, catagorise or render exhaustive.

(6) Also generalizing remedies for infringing activities in a Standard Contract or a reference offer would be a tall order bordering on the impossible as they have to be effective, dissuasive and proportionate.

(7) Digital television markets are at very different stages of development in the Indian States. Differences in penetration of the varied digital TV delivery mechanisms will influence the level of piracy in each Indian State. Contracts cannot be made in isolation, with simply technical parameters in mind.

(8) The number of players varies in each of the addressable platforms. So does the reach of the individual platforms. As stated earlier, facilitation is directly proportional to many factors one of which is reach. However risks are directly proportional to the number of players in a platform, their nature and type, the surrounding circumstances to tell a few. To enmesh this complex matrix in "a one size fit all" sort of a Standard Contract or a RIO or for that matter a RIA, it is submitted, shall effectively sound the death knell to the industry.

(9) On the DTH front there is a tripartite dispensation with the Broadcaster, Operator and the Subscriber, and its reach is more or less pan India.

(10) In HITS there is the broadcaster on the one hand, the HITS license holder on the other, the infrastructure provider who hoists the facilities and administers the same in the middle, with innumerable operators in the distribution chain availing the facilities, some directly serving the end subscriber and some again redistributing it to another intermediary who in turn distributes the signals to the end subscriber. The HITS platform is most susceptible to piracy because of the multiplicity of parties involved. The Government of India is perhaps as confused as the Broadcasters otherwise what explains their dithering to formally amend the Downlinking Guidleines for the HITS Platform like it has done for IPTV? Moreover the intricate web of contractual relationships between a HITS operator and the other major players apart from the broadcaster is altogether kept hidden from the latter. The broadcaster is not at all privy to the contractual terms between a HITS licensee and its infrastructure provider, or that of the licensee with middle ware vendors, or the infrastructure provider with link operators or between link operators and the licensee. Risks are further magnified if the infrastructure provider has a presence in analog market as well. Again the business model of no two HITS operators shall be the same. These are issues which the broadcaster should be permitted to seek clarity on only through negotiations.

(11) The situation in IPTV is also precarious. Three types of entities have been made eligible to participate. Telecom Service Providers, Internet Service Providers and Cable Operators. The Regulations that govern the constitution, formation and functioning for each of such entities are altogether different. While TSPs and ISPs require elaborate licenses the terms of which are again fundamentally different from each other, Cable Operators require only a post office registration. Also the licensors/registering authorities are not the same in all cases. Again in some cases it is the TSPs and ISPs who have been approaching the Broadcasters for procuring content, in other cases it is the Cable Operator claiming to be a franchisee of a TSP or an ISP who has been deliberating with the broadcasters. While hygiene in billing systems, sanitization of business practices, quality of services can be discerned for TSPs who atleast in all fairness can be said to be commanding a semblance of corporate governance, professionalism and incorporating international best practices whether the same can however be said of Cable Operators or for that matter even ISPs are questions that involve subjective evaluations. Most importantly there is very little clarity on IPTV compatible Set Top Boxes. Again the reach of such platforms are considerably limited. The broadcaster is in no way privy to the arrangements existing among the multiple players of such entities that would have a bearing on its arrangement with such entity.

(12) With each addressable platforms there are thus contextual issues, which are further magnified by the socio economic milieu that varies to a great deal across the length and breadth of the country. The risks thus are too much and too many. The search for a master key Contract, or for that matter a RIO, MSMD submits would be illusory. The only way forward is bilateral negotiations where parties have a clear idea where they are getting into basis which mutually acceptable terms and conditions may be arrived at and agreed.

(13) The Subscriber management systems ("SMS") deployed by operators in India are mostly sourced from local vendors who are under no regulatory scanner. Neither do they have any accepted norms for propriety, nor do they have to endure the rigours of international best practices and requirements. They, like any other businesses have targets to contend with and that too under severe competition. Again because of the cost cutting proclivities of operators there is very little incentive for such vendors to develop state of the art and as a result costly products that would ensure some basic hygiene for Broadcasters. In view of the tough competition in the middleware market, one cannot discount the possibility of Vendors knowingly or unknowingly parting with some reverse engineering and other circumventing techniques as value added services, enabling some of their client Operators to tinker with the system generated subscriber base to facilitate under declaration vis a vis

broadcasters. However the heavy garb of confidentiality and privacy that shroud the bilateral contracts between the Operator and the middle ware vendor prevent any such deficiencies in systems from coming to the fore. It does not make business sense for such Middleware Vendors to undermine their own product by placing the discrepancies in their systems in the public domain. The same can only be done by operators but they have hardly any incentive to do so, as long as their purposes are served.

(14) It will not be fair to ask broadcasters to supply signals to Operators indiscriminately, jeopardizing their commercial interests when statutory and other remedies as explained before are non existent. We accordingly request the Authority to revisit the Must Provide Clause under the diktat of "non discriminatory access". There ought not to be an obligation on broadcasters in the absence of mechanisms that secure their rights or address their concerns. The Freedom to Contract has been a time tested module for most of the distribution related industry across the globe, it is urged that the Broadcasting industry not be made an uncalled for exception. Also tariff formulations should not be resorted to through Interconnect Regulations. RIOs as stated may be looked upon as temporary stop gap arrangements but not solutions in themselves, further there cannot be a single Master RIO for all addressable platforms, as the risk and return matrix has to be formulated by broadcasters taking into account all the factors hereinabove stated. There cannot by any stretch be a requirement that broadcasters offer their channels on identical pricing to all addressable platforms, and the thumb rule of availing 50 percent of Non addressable rates to DTH operators it is submitted cannot be verbatim reproduced for all addressable platforms as the Hon'ble TDSAT in the relevant Judgments whereby the "50 percent" norm came into being, had no occasion to consider the peculiar nuances of each of the addressable platforms that are making rapid foray into India today. Neither can the revenue share model in CAS areas be incorporated as the complexities of various addressable systems today are not amenable to likewise treatment as that of mandatory CAS. No regulatory mandated revenue sharing model ought to be imposed upon stakeholders. Accordingly it is submitted that the broadcaster's inherent need to ensure maximum reach through emerging addressable systems, shall per se ensure competitive pricing and packaging through contractual negotiations rather than any regulatory compulsion.

II. Is there any other methodology which will ensure availability of content to all addressable platforms on non-discriminatory basis?

Comments:

(1) Further commoditization of content should be discouraged. Broadcasters have an innate desire to be present in all platforms and networks to grab the maximum number of eyeballs. Let this be incentive alone for stakeholders to negotiate and enter into contracts. Further there cannot be indiscriminate provisioning of signals throwing all caution to the winds. There cannot be non discrimination amongst fundamentally disparate entities.

(2) Rarely will Operators under identical or similar platforms have the same business plans and projections. While some may have a pan India reach meriting some special accommodations, some may have very limited reach which cannot be made amenable to any such similar facilitation. This one factor alone precludes non discriminatory treatment. It is submitted that in so far as DTH Operators are concerned barring a handful of broadcasters, all others have more or less been able to arrive at an understanding. However in so far as new technologies are concerned namely HITS and IPTV, together with the emergence of Mobile and internet television perhaps also seeming pretty much imminent, it is not technology alone that shall govern understandings. Each such Operators have fundamental differences as have been highlighted above. Again while there has been no amendment to the downlinking guidelines in so far as HITS Operators are concerned, as had been done explicitly for IPTV, and with only Generic ideas on Set Top boxes for IPTV platforms doing the rounds, there is admittedly a regulatory haze that is yet to clear which is of considerable concern for broadcasters.

(3) Accordingly the parties shall have no option but to arrive at an agreement by themselves, through negotiations or if all options fail then the intervention of TRAI may be sought as per existing Regulations, to facilitate, mediate and conciliate and not adjudicate the contract formulation process. Both parties may be asked to bring to the table their best proposals and a middle ground may be forged. However there ought not to be any insistence on ala carte provisioning of channels. The welfare economic argument in favour of bundling and against an ala carte mandate is overwhelming. Please refer to Annexure "I" . Only when the facilitation by TRAI fails should TDSAT be approached. Also during the facilitation process, the Operator ought to be mandatorily required to submit relevant documents that would corroborate the business plans and projections. Such documents shall include representations made to Banks and financial institutions, contracts entered into with middleware vendors, etc. MSMD submits that if an Operator invokes the Must provide clause, the onus would be on it to be transparent about its plans and projections. Reluctance on the part of Operators to be transparent should be discouraged. As operators and broadcasters are not competitors, there ought not to be any fear in the mind of Operators while divulging information. Parties may also undertake on oath that they shall keep the

proceedings under wraps and respect the confidentiality of the proceedings.

(4) Moreover technological facets of the Operator should be state of the art by virtue of which there ought not to be any carriage constraints. Accordingly such entities should be explicitly barred to enter into carriage deals with broadcasters.

(5) Also as these systems are yet to establish their credibility in the Indian markets, there should not be a blanket prohibition of "minimum guarantees", Broadcasters should have the freedom to contractually negotiate on such issues as well, as these primarily involve commercial considerations. Ofcourse such amount shall take into realistic consideration the business plans of the Operator concerned, their projections and the ground realities. This is very much needed by broadcasters as a confidence building measure and to instill some faith that a long term viable and meaningful relationship would be possible. It must be appreciated that while most of the broadcasters today have been around for quite some time now in the industry, Operators with new technology pose considerable risk by being rank newcomers. It is also not fair or advisable that such operators have no qualms on spending a huge fortune on setting up infrastructure and also paying up substantially to middle ware vendors but suddenly nurturing reservations and developing grudges only when it comes to paying Broadcasters. In fact such minimum guarantees would also be helpful for operators who would be able to plan their operations well by having an element of certainty with regard to the cash out flows during the initial teething period. It is common knowledge that when it comes to buying middle ware, the operator already has an idea of his initial connectivity, as it is not that an Operator would be enlisting a subscriber and then it shall go to the market to buy set top boxes. Accordingly he would be on the look out for availing the maximum possible bulk discount that his projections would tell him to take from the middle ware vendors. MSMD requests the authority to consider the proposition that if such new entrants could have elaborate budgeting for initial fixed payments to be made to other entities why deny the same to broadcasters.

(6) After the Contract is concluded and the parties get on with their respective business, any instance of default or piracy/unauthorized cable casting should immediately entitle the Broadcaster to take resort to punitive provisions as per the Regulations. On such proven instances of piracy, the Operator ought to be barred from operating for atleast one year. In cases of default and when the said default is magnified by dishonour of cheque(s), then reactivation may be done only subject to the Operator paying up 1.5/2 times of the amount defaulted. Also costs incurred by the broadcaster to bring out public notices in newspapers and

legal fees ought to be reimbursed prior to reactivation. Also please refer to "C" ***infra as the provisions for Public Notices need to be reviewed as well.***

III. What should be the minimum specifications/ conditions that any TV channel distribution system must satisfy to be able to get signals on terms at par with other addressable platforms? Are the specifications indicated in the Annexure adequate in this regard?

Comments:

(i) As stated before laying down minimum specifications though helpful and commendable makes no difference on the ground. To factor in all variables that would fit a Master Formulation it is submitted is a very tall order and prone to extreme risks.

(ii) However the need of the hour is to interalia strengthen "Finger Printing" provisions. As it has been found that most addressable platforms are not amenable to finger printing at all.

(iii) Again the entire life cycle of addressable equipments ought to be traceable, meaning that a system has to be in place whereby any movement of Operator premises equipment or Customer premises equipment in so far as it relates to encoding and decoding is concerned ought to be traceable for atleast three years.

(iv) Any violation of norms with regard to finger printing or traceability should lead to adverse inference being drawn against such operators and suitable punitive action must follow.

(v) If specifications are intended to be incorporated then, periodicity of reviews of such specifications should be settled and also the review itself should be carried out and implemented in right earnest. Also the methodology to be adopted for such review needs to be thought out. Usually such review should encompass a study of the problem areas, ways and means to permanently resolve them, study of state of the art next generation formulations, idea about the losses incurred so far. The result of the review should also be implemented in a time bound manner. All broadcasters availing signals to the operator should be allowed to constructively participate in the review exercise. There is another danger of laying down such specifications, in that products in the field are running well ahead of standardization.

(vi) TRAI does not at present have any control over the Middle ware industry whose products' attributes are being intended to be specified. Further if such specification has to be indeed drawn up, then the instant consultation process has to be far more widened and broadbased to

include within its scope the representatives from the Middle ware industry comprising the vendors of such Systems. Without their take on the specifications, any regulatory formulations would perhaps run the danger of being rendered futile. Also with due respect government run expert bodies like BECIL alone submitting representations will not be enough as it is the vendors/suppliers of such systems at the ground whose inputs shall be required. Eminent faculties in Broadcast Engineering both in India as well as abroad should also be taken into confidence.

(vii) Further it has to be made mandatory that the systems deployed by operators are amenable to carry at least 350 video channels. In digital systems there should not be any carriage or compression constraints. So must in analog where local cable operators need to be directed to deploy systems well above 552 M Hz, and also deploy amplifiers of suitable magnitude.

(viii) The specifications in the Annexures are well thought out and well intended, however a lot more needs to be done as aforesaid, the following may however also be considered,:

a) Broadcaster's advertisement signals, OSD, fingerprinting should pass through without any change or interference by MSO/LCO.

b) MSO/LCO should allocate adequate bandwidth to each channel so that the Audio Video quality is of good quality at the consumer's premises.

c) STBs should have the capability to display fingerprinting with/without background in different colours.

d) STBs should not have DVR/PVR/TSV facility without approval from the broadcaster. The network storage should also not be permitted.

e) **The SMS and CAS should have capabilities of reverse integration so that all subscriber entries that are made through the CAS should reflect in the SMS of the operators.**

f) **Further, the TRAI should also devise a migration plan for migration of existing operators or addressable platforms to the specifications summarized above. This can be done in a time bound manner preferable within 3 months.**

g) Pre - Certification by an Indian and internationally renowned rating agency about the accuracy and efficaciousness of the systems of the Operator, with tenure thereof if any. Any distribution network which does not have a minimum stipulated rating of the approved agency, must

be disqualified from acquiring content from the broadcasters on "must Provide" basis.

IV. What should be the methodology to ensure and verify that any distribution network seeking to get signals on terms at par with other addressable platforms satisfies the minimum specified conditions for addressable systems?

Comments:

This has to be answered on the basis of the following cornerstones:

a. Fixation of responsibility and accountability
b. Non discriminatory treatment to broadcasters
c. Reporting
d. Attestation
e. Audit/enquiry/ investigation
f. Review
g. Panel of Auditors
h. Enforcement

a. Each addressable systems pose a unique challenge for the broadcasters to secure their commercial interests. Firstly, addressable systems are by themselves at a very nascent stage in India. There is no ready precedence about their functionality, efficacy and efficiency in India. It is not that technology per se is corrupt. It is the socio economic milieu within which a particular technology finds itself that makes it corrupt. Again the individual characteristics of each of the addressable platforms and the number of players that comprise each such addressable platforms vary from one technology to another. Unlike in DTH where there are just 3 players in the distribution chain apart from the involvement of middleware vendors nobody is sure about the number of players in the HITS platform and where the points of execution, accountability, authority, control and responsibility would meet. The same could be said of IPTV players as well. The Regulatory authority must recognize that technology alone does not define contracts. Greater the number of players in a platform greater is the risk for broadcasters as each such player would be interacting with the other player basis a contractual relationship that might fundamentally militate with the relationship between the Operator and the Broadcaster. To site some real life examples, there may be a confidentiality clause between an operator and a middleware vendor that would preclude the broadcaster from knowing some aspects of the technology deployed by the Operator in his platform. Again in HITS there may be contractual formulations between the HITS licensee and an infrastructure provider whereby the licensee or the infrastructure provider may as would suit their convenience keep shifting their liability

to third parties among themselves. Such Contracts would also be out of bounds for Broadcasters.

b. Non Discriminatory treatment is a major concern for broadcasters in the addressable field. While there is atleast a semblance of protection afforded to Broadcasters on the DTH front though its effectiveness leaves a lot to be desired, there is no protection offered to Broadcasters at all in other addressable systems. While the License Conditions of DTH at Clause 7.6 stipulates that the DTH operator shall provide access to Channels in a non discriminatory manner, no other addressable systems have similar injunctions. This leaves the Broadcaster particularly vulnerable. In cases where an addressable platform is vertically/horizontally integrated with a competing broadcaster, chances of discrimination and being targeted become all the more acute.

c. Reportings is another grey area. Till now there have been no standards on reporting formats though this is invariably the bread and butter issue for broadcasters. Taking advantage of this regulatory chasm, some addressable platforms have been resorting to total lack of transparency in their reporting. It is submitted that no two platforms package their offerings in an identical manner, again while some have narrow packaging, some have a wide array of packages that they offer to their subscribers. The broadcaster has to keep track of the subscriber numbers for each of its Channels and also for each of the packages where the channels have been placed. It is also imperative to keep track of any changes that might have been effected in the pricing and packaging of the channels in the platform since the last reporting. Comprehensive Reporting structures must be substantially predetermined by the Authority. The Regulatory authority is also requested to make it mandatory for addressable platforms to declare their subscriber base to the Authority. The Authority is also requested further to put this vital data in the public domain. A similar practice has been in vogue for telecom service providers, whereby TRAI comes up with the Subscriber growth figures of major telecom players every month and places the same in its website for public consumption.

d. Again attestation is a vital issue. Operators ought to report in their letter heads duly signed by their Chief Executive Officer and also attach copies of system generated reports duly countersigned by the authorized representatives/employees of the vendors of the Subscriber Management System and Conditional Access Systems. These system generated documents ought to be retrieved on a pre appointed day in the presence of representatives of broadcasters, representative of SMS/CAS vendors, and representatives of Operators.

e. Audit, Enquiry and Investigations are the only ways by which broadcasters can satisfy themselves about the veracity and efficaciousness of the Operator's systems. Extensive audit rights ought to be permitted depending on the nature, scale, type and manner of operations. Independent Systems Auditors appointed by broadcasters should have extensive access rights to Operator's CAS, SMS, Bills, Billing Systems, contracts with Vendors of SMS/CAS and other such relevant records pertaining to the subscriber base. Any denial of access or facilitation to auditor or any adverse comments by the auditor that in such auditor's opinion attract materiality in the business relations of Operator and broadcaster ought to lead to punitive action. The Authority is requested to appreciate that addressability and its accompanying systems must apart from being meaningful also appear to be meaningful. Atleast once a year a "sudden check" ought to be allowed on the lines of the Audit as above mentioned so that there is a necessary element of surprise. Such checks once a year ought not to be construed as intrusive in view of the magnitude of the risk involved for the Content industry as a whole.

f. Review: Operators should be mandatorily required to conduct both an extensive as well as intensive review of its entire systems particularly Billing, SMS and CAS by appointing any leading independent Systems Auditor, the findings of whom ought to made public. Any actionable points suggested by such Auditors ought to be implemented by the Operator in right earnest in a timely manner, or else the Broadcasters ought to be within their rights to determine the future course of relationship with such Operator.

g. Panel of Auditors: It is requested that the Authority maintain a panel of reputed, independent, objective and dispassionate Systems auditors who could be taken on assignments both by the broadcaster for the "audits" and "checks" as aforesaid and also by the Operators for the review as stated above. Banks in India have this system of empanelled auditors which have met with considerable success. Payments towards their services may be made to the Authority, out of which the Authority may pay them for their services. The importance of a true and fair subscriber base brooks no difference in view of the stakes involved both from the point of view of broadcasters and also Government for taxation purposes.

h. Enforcement: Any material infraction on the part of the Operator ought to lead to suitable punitive action as per Regulations. Enforcement has to be cost effective to ensure proper remedies and solutions.

To figure out a Master Matrix that shall enmesh all these variables in neat rows and columns shall in all likelihood be an impossible task. Accordingly it is requested that while TRAI comes out with exhaustive

Regulations to secure the aforesaid, Broadcasters be also allowed to be the makers of their own destiny by entering into negotiations with the Distributors of TV channels in a manner either parties consider best for themselves.

V. What should be the treatment of hybrid cable networks in non-CAS areas which provide both types of service, i.e., analogue (without encryption) and digital (with encryption) services?

Comments:

(1) It is submitted that hybrid cable networks in India shall combine the evils of both analog and addressable systems.

(2) In the United States dual carriage has been allowed but not hybrid systems. It must be remembered that the system of dual carriage prevailing there are based on fundamentally different realities than what prevails in India and also unlike India, The United States has two types of Television Stations that supply feed to the cable operators and such stations maybe "local" or "distant" beaming analog or digital signals; also the number of households receiving analog and digital signals are clearly discernible in the United States. Again in US there are also pay TV Channels like here in India which are Satellite Channels that supply feed to such Operators.

(3) Accordingly it is submitted that unless there is overwhelming proof of a Cable Operator switching over to Digital addressability in the strictest sense, it ought to be presumed that such Operator is continuing to operate in the Analogue mode. There is no ready data available at hand that could effectively help in gauging the extent of reach of such systems. An operator who has a simultaneous presence in both addressable as well as non addressable markets, pose considerable risk for broadcasters in India, in that there are no boundary lines between the two sets of markets in so far as such operator is concerned. The possibility of self serving and conflicting claims cannot at all be ruled out. When pressed by government authorities viz. tax departments and broadcasters there is a possibility that actual facts shall never see the light of the day. Also it is submitted that hybrid systems in India simply retransmit digital signals without however encrypting them. The digital set top box that is installed at the residence of the subscriber is merely a tool to ensure availability of greater number of channels. There is no channel-wise addressability in such systems.

(4) Either an Operator should be rendering signals in analogue mode or it should tread the path of addressability in letter and spirit. Existing hybrid operators must be asked to migrate within a time bound manner and till

such time, the Broadcasters should have the liberty to impute a weightage to the subscriber base of such operators by 1.25 in so far as the households availing hybrid feed are concerned. Accordingly the Operator should report separately on houses availing exclusive analog signals and those availing hybrid services, and in the event out of the reported subscriber base of 1000, 300 are availing hybrid feed the subscriber base should be taken to be as 700 + (300*1.25) i.e. 1075. The reason being availability of greater number of channels to subscribers usually leads to considerable increase in cable bills for the subscriber. In all such cases, the billing amount to the subscribers invariably increases substantially as the common refrain of such operators are that henceforth the subscriber concerned shall be availing lot more channels than what the subscriber was earlier availing in analog mode alone. Again analogy may be drawn with the industry practice that households with more than one point are charged as multiple subscribers for as many points. Thus while an additional point taken by a household leads to such households being counted twice, similarly a household availing hybrid feed i.e. analog as well as non addressable digital signals should be counted 1.25 times. Such Operator shall however continue to be charged by the broadcaster as if it is a non addressable operator. Also all households may not find it feasible to subscribe to the digital non addressable set top boxes, hence the need for separate reporting and weightage.

(5) While the same Channels usually appear in both analogue and non addressable but digital modes, what would be of great concern is a Pay Channel appearing in analogue mode but not in digital mode. Monitoring these issues at the ground would be a very tough proposition. Micromanagement of such a scale would be next to impossible.

(6) It must be appreciated that digitization in analog areas can only be gradual and not overnight, accordingly by no stretch of imagination can it be said that an Operator will in a very short time manage to wholly alter the signal demography of its entire constituency from analog to digital. It is because of these reasons that the transition from non addressable to addressable mode be allowed to be made in a time bound manner.

(7) A criteria may be evolved whereby it can be determined whether an operator hitherto rendering analog services, ought to be considered to be rendering addressable services vis a vis a particular broadcaster or not. The analysis has to be done by and between the broadcaster and the operator concerned, at the time of renewal of contract for the forthcoming year, and it may be that an operator will be deemed to be in addressable mode for one broadcaster but analog for another. The mechanism suggested is as follows: The average of the subscriber bases declared by such entity for the last three years to a broadcaster may be arrived at. In the event the operator has been affiliated with the

broadcaster for less than 3 years and insists on being treated as one who is rendering addressable service, then such contentions ought to be refused upfront and he should be continued to be treated as one rendering analog services. This is because addressability cannot be presumed to have taken place overnight. Assuming that the known under declaration in analogue mode to be around a liberal figure of 80 percent, so that the same may not be reckoned as too onerous for the operator, (though actual under declarations as per TRAI's own findings are to the alarming tune of over 90 percent in the analog mode) it may be presumed that the said operator has reported only 20 per cent of its total subscriber base to such broadcaster for all the preceding three years on an average. The said average subscriber base as arrived at as aforesaid could then be multiplied by 100/20. The resulting figure shall be indicative of his actual total subscriber base vis a vis that particular broadcaster. Once the operator is able to give a declaration to the particular broadcaster that he has allotted addressable set top boxes to 90 per cent of such actual total subscriber base vis a vis that particular broadcaster and accordingly basis that he shall be making payments henceforth to the broadcaster concerned, only then should such operator be reckoned as an operator rendering addressable services in so far only that particular broadcaster is concerned. For other broadcasters to whom he is not able to give such declarations he ought to be deemed to be an Analog operator. For the first year of such declaration he should pay for 90 percent of such subscribers as stated, for the next year onwards payments should be made for the entire 100 percent. If in any subsequent years the operator concerned reports a subscriber base lower than the one reported in the preceding year by more than 5 percent of the subscriber base of such preceding year, an adverse inference ought to be drawn and the burden of proof should be on such operator to substantiate his declarations by adducing system generated documents, reports of reviews, audits, registers of subscribers, etc. If the declaration has been found to be false, the Broadcaster ought to have the right to take resort to suitable punitive action.

(8) Further it is advisable that there ought not to be any turbulence being created within the contractual term. In the absence of any clear data with regard to billings and extent of penetration of such hybrid systems it is not advisable that the contractual arrangements be disturbed. It is only when at the time of renewal of his contract with the broadcaster, the operator concerned makes a declaration as aforesaid, should the new arrangements be given effect to.

(9) Most importantly such Operators ought to be precluded and banned from entering into any carriage deals as they do not have any frequency constraints. Any instances of carriage fees being charged by such entities should result in automatic cancellation of registration/license.

Broadcasters may also be permitted at their discretion to deactivate such operators by adhering to the regulations. In the event it is found that such platforms are resorting to discriminatory treatment for a particular channel, then such channels ought to have the right to deactivate all its offerings in such systems. Very often it is found that Operators after contracting for channels, deliberately switch off some channels to extract carriage, in such cases the broadcaster at its discretion should be allowed to decide to switch off the system in entirety.

(10) Broadcasters should have the right to conduct such audit, reviews, enquiries and investigations as it deems fit to ascertain the number of boxes purchased by the Operator, number of boxes in closing and opening stock, number of boxes given to link operators for installation at subscriber premises, etc. Also operators should be called upon to submit declarations with regard to the above unto broadcasters on a quarterly basis. Any discrepancies between such declarations and results of audits, etc as aforesaid ought to lead to suitable punitive actions under the regulations.

VI. Whether there is a need to define "Commercial Subscribers", and what should be that definition?

VII. Whether the Broadcasters may be mandated to publish RIOs for all addressable platforms for Commercial Subscribers as distinct from broadcasters' RIOs for non-Commercial Subscribers?

Comments:

1. Definition of Commercial Subscribers: Commercial Subscribers include persons who in their ordinary course of business or affairs permit the viewing of Pay Television by their employees, customers, clients, members, patients, guests or visitors within the premises of their place of business or where they carry out their affairs from, either for a fee that is specific for such viewing or as part of overall services rendered against a fee or as a means of direct or indirect incentive to its employees, customers, clients, members, patients, guests or visitors.

2. It is submitted that there ought to be total forbearance both in tariffs as well as interconnection when it comes to dealing with commercial subscribers, as they cannot by any stretch of imagination be considered to be a disadvantaged section of society meriting any special regulatory or government care. Any regulatory protection given to such entities on this score shall fall within the realm of "Reverse Affirmative action" which shall be entirely misplaced. In India we have had reservations in jobs to facilitate disadvantaged sections of society, and such reservations

withstood the Constitutional mandate of Reasonable restrictions on the Right to Equality. The Respected TRAI and Hon'ble TDSAT have placed television channels on an equal footing with essential commodities for the benefit of the masses. Broadcasters now ought not to be asked to reserve television programming for such commercial entities at administered prices meant for the mass market. Such a proposition would be unheard of anywhere in the world. Moreover there should not be any distinction among Commercial subscribers.

3. Operators may be allowed to serve Commercial Establishments only consequent to approvals to this effect from the broadcaster concerned, which approval shall ensue once an agreement between the broadcaster and the commercial subscriber has been formalized. The broadcaster may then enter into commercial understandings with operators for servicing such commercial establishments.

4. Oxygen is free to air and also essential but when taken on a hospital bed, bills are raised.

VIII. Whether the regulation should mandate publishing of Reference Interconnect Agreements (RIAs) for addressable systems instead of Reference Interconnect Offers (RIOs)?

Comments:

(1) As stated before, standard off the shelf formulations do not work in the Broadcasting industry. It is requested that the Honble Authority, revisit the provisions regarding Reference Interconnect Offers and allow freedom to contract between parties to be the cornerstone of the Industry. It is submitted that parties ought to enter into contracts basis the negotiations they conduct. Not under the weight of regulations. Broadcasting, cable and satellite is an industry that would do very well without large scale legal protectionism for only one of the stakeholders. Litigation resorted to by only one of the stakeholders and that too inspired by Regulations is not a very healthy trend as they throw a spanner in the relationship among the various players in the industry who would do well to cooperate than litigate. In so far as broadcasters are concerned, on any given day, more cases are filed against broadcasters in the TDSAT Registry than what broadcasters file perhaps in a month or quarter or even a year. This is clearly indicative of the fact that one of the stakeholders are resorting to litigation more than the other and this can happen only when such stake holders perceive that there is an advantage to be had in litigating rather than negotiating. Such misplaced confidences arise clearly when legal /regulatory formulations are perceived to be loaded against a particular stakeholder and favouring

another. This trend it is submitted is definitely not healthy. It is respectfully submitted that relationships be allowed time and space to grow and fructify rather than be stymied under the weight of any regulatory or judicial compulsion or intervention as it is not enough for an industry to grow, whether the growth has been healthy also ought to be looked into. In no other sector, do we have such magnitude of litigation amongst various stakeholders. All stake holders involved in litigation are losing precious resource and time which could have been more meaningfully deployed elsewhere. This does not augur well for the industry. Off late there is a trend of requests being made as one liners by way of email so as to initiate the forty five day count and then on the request of broadcasters incomplete Application forms are filled up in a perfunctory manner that reveal little and conceal far more and the next day the applicant Operator is in Court with the broadcaster being arraigned as a respondent.

(2) The Authority has itself at paragraph 2.8.2 of the Consultancy Paper admitted that roll out of addressable systems for CAS areas was on account of Judicial intervention and as such formulations made therein ought not to be considered in the instant consultation paper. Accordingly it is requested that Standard CAS agreements prevalent in CAS areas not be brought within the discourse or narrative as the same would be misplaced and unwarranted. A one size fit all formulation as has been stated, does not work in a complex industry of ours.

(3) It is to be noted that interconnection as a term is a misnomer in the context of broadcasting as the same is a terminology more akin to telecom. Interconnection in telecom happens between entities that are almost identical in the services they render and the licenses they operate under. Their products and services, operations, systems, marketing, structure and above all compliances are synonymous. Such agreements are entered into for example by and between Vodafone and Airtel. The underlying technologies may differ in some cases, some may be using GSM as their platform and some CDMA. The subject matter of the interconnection agreements consists basically of reciprocal service obligations to each other in the form of handling calls and SMSes from one's network to the other's network. In such a context of all round uniformity, and clarity, chances of leakages are minimal and transparency is the biggest gainer. Most importantly Telcos have first hand knowledge of their subscriber bases, the details of calls/smses they have made, etc. they don't have to rely upon a third party to tell them the number of people that have used their various services, unlike in the broadcasting sector where there is no privity of relationship contractual or otherwise - between the broadcaster and the subscribers. It is submitted that Telcos have two systems of ensuring they have proper count of their revenues,

i. IN i.e. intelligent network usually available for prepaid customers

ii. Modern Billing and metering systems for post paid customers.

The personalized deployment of technology ensures that only state of the art and not redundant mechanisms are resorted to. No Telco or ISP has had to bear the brunt of piracy the way the broadcasting industry is having to deal with on a daily basis. Packaging and pricing have all along been a TSP's prerogative though there are also ceilings and tariffs in place but most of it is under forbearance. Handling of calls and SMSes are well regulated, traffic flow is measurable with substantial accuracy, "handshaking" points are clearly discernible. In such standardized environs it makes sense to have "off the shelf" standardized contracts between parties.

Contrast this with the broadcasting sector, where transparency is a choice between analogue systems - where piracy is the norm and addressable systems – where piracies have forms, the contrast cannot be missed and the magnitude of the difference cannot be understated or escaped.

(4) In so far as broadcasting is concerned, the correct terminology would be "Distribution" or "Retransmission" rather than "Interconnection".

(5) Broadcasters procure rights in original work and develop programmes for television viewing. It is these programmes that they distribute to the Distributors of television channels which the latter retransmits through layers to the ultimate subscribers. This layer may be highly populated as in the case of HITS and Cable where there are Local Cable Operators, or altogether non existent as in the case of DTH. Also as stated, these distributors deploy diverse technology to carry the signals to the ultimate subscriber. Again there are middle ware vendors who supply CAS, SMS, Set Top Boxes whose privities of contracts are only with Distributors and who are ever elusive in so far as the broadcasters are concerned but they nevertheless play a very vital role in the distribution chain

(6) Accordingly the players in the Broadcasting sector are fundamentally disparate entities, where a plethora of technologies that are fundamentally different from each other interplay with the multiplicity of personalities that man them through out the demographic diversity of India. There is no uniformity whatsoever and hardly any transparency. Underdeclarations are rampant and par for the course. Accordingly formulations like RIO, RIA, SIO, SIA, may be meaningfully denoted for Interconnects in the telecom sector, the same would be altogether misplaced in the broadcasting sector.

IX. Whether the time period of 45 days prescribed for signing of Interconnection Agreements should be reduced if RIOs are replaced by RIAs as suggested above?

(1) It is far more better a proposition spending 45 days meaningfully in negotiations than litigating for 365 days in a year. It is submitted that it be clearly enshrined in the Regulations that the 45 day period shall be commencing only from the date the applicant operator has submitted the application to broadcasters complete in all material particulars. If any item of information or document as required under the terms of the application is not submitted, then proper and satisfactory explanations have to be furnished. Further enquiries from broadcasters should be answered in a time bound manner viz. 3 days of receipt.

(2) It is requested that consequent to a breakdown, if any in the negotiations after 45 days, TRAI must compulsorily facilitate, conciliate, mediate the parties for coming to an agreement but definitely not adjudicate or write a contract between the parties, It is only when all options fail that the party may approach Hon'ble TDSAT, but such party ought to refrain from relying upon materials or making submissions that were not produced or made before the TRAI during the facilitation process. Pleadings and supportings should be confined to the assertions that were made during the TRAI and the bilateral negotiations. This approach shall help in having narrowed down the issues in the Hon'ble TDSAT as much of the paper work would have been done beforehand enabling the Hon'ble TDSAT to concentrate on the defined and narrowed down issues at hand.

(3) Also the hands of the Honble TDSAT ought not to be tied down by "must provide" and "non discriminatory" clauses, instead Decisions may be made that are in consonance to the rules of justice, equity and good conscience, with principles of natural Justice, Laws of Contract and Specific Relief being the guiding light and for the sake of certainty, the Civil Procedure Code (CPC) ought to be followed for rules of procedure. Each case ought to be judged by the merit and circumstances of that particular case and not by any straitjacketed approach. If Hon'ble TDSAT can have powers given under the CPC, nothing ought to prevent it from ensuring that procedures bear a certain degree of similarity with the CPC, for the sake of certainty. It is submitted that the Laws of Contract, Specific Relief and the Civil Procedure Code have withstood the ravages of time since the days it was pressed into service by the Britishers. Unless there are compelling grounds, there ought not to be a dilution in its application in specialized forums.

X. Whether the regulation should specifically prohibit the broadcasters from imposing any kind of restrictions on packaging of channels on an addressable platform?

XI. Whether the regulation should specifically prohibit the broadcasters from imposing any kind of restrictions on pricing of channels on an addressable platform?

Comments:

(a) MSMD submits that Article 7.6 of Schedule to Form B i.e. The License Agreement between the Direct To Home Service Providers and the Ministry of Information and Broadcasting read as follows:

7.6 The Licensee shall provide access to various content providers/channels on a non-discriminatory basis.

(b) Accordingly it is submitted that the DTH Operators be asked to comply with this license condition. All the channels of a Broadcaster need not be included in any given package, but if any channels of a particular broadcaster are included in any package then the said channel ought not to be targeted or discriminated against qua other channels of the same language or genre or inhouse channels, i.e. channels belonging to the broadcaster who have a financial relationship with the DTH Operator.

© It is true that Operators enjoy freedom in packaging the channels; the scope of such freedom however cannot be unrestricted.

(d) It is submitted that regulations should be enabling enough for operators to upgrade their systems and augment capacity. If there are restrictions in a DTH Operator's capacity, it may be mandatorily required to either increase its transponder space or it ought to cease carrying all the channels of a particular broadcaster in a bid to free transponder space. It cannot under any circumstances exploit individual channels of a particular broadcaster to further its business interests. The same is prone to massive abuse in that - a particular DTH operator having vertical links with a broadcaster, may crowd all the entry level packages with their own inhouse channels. After availing channels from other broadcasters, the same may be then included in such entry level packs selectively to entice subscribers to subscribe to the entry packs and after a substantial connectivity being ensured the channels may be targeted, discriminated against and withdrawn from the pack, in the name of freedom of

packaging and also placed as an "add on" or "ala carte" offering with a high price tag at even more than 150 percent of the wholesale ala carte rate being charged by the Broadcaster thereby discouraging buyers from subscribing to the same. Accordingly both broadcasters and subscribers shall end up being shortchanged in the process. And on explanations being sought, the broadcasters would be asked to cough up carriage fees to carry the channels on their platform, or offer substantial discounts for their carriage. Arguments may be cooked up that because of increased payments having been made to middleware vendors viz. Set Top Box manufacturers , the operator concerned is facing losses, little appreciating that Broadcasters cannot be made to suffer or subsidize their arrangements with such middle ware vendors. Subscribers would be kept at bay by introducing some free to air channels, or channels carrying lower value proposition in the packs from where the channels were withdrawn, and thereby subscription fees receivable from the subscribers may not be reduced as well.

(e) It is submitted that Subscriber interests bear no correlation to this particular demand of DTH operators which is in out right violation of their license condition. The MIB is conscious of its obligations to the customers of such services when it says at Article 7.7 (*ibid*)

The Licensee shall adhere to any guidelines/regulations which may be laid down by the Licensor in the interest of consumer such as pricing of bouquet(s) or tier(s) of channels, etc.

(f) While DTH holders avail channels on ala carte from Broadcasters, they do not have any corresponding obligation to put the same in their respective platform. It must be made mandatory that when a DTH operator requests for a particular channel(s) on ala carte, then it ought to place the same in a non discriminatory manner in its platform. It ought to be presumed that when a request for a channel has been made on ala carte basis, then there are no constraints for the DTH Operator concerned to place the same on his platform, as, if he had such constraints he would have not asked for the particular channel in the first place. MSMD also requests the authority to revisit its ala carte mandate as a whole given the overwhelming economic opinion favouring bundling as given out in Annexure "I".

(g) Further there are no regulatory compulsions on Middleware Providers and DTH operators claim that they have to subsidise them. In the process broadcasters who are producers of content are being shortchanged by being told to facilitate the business relationships between Operators and Middleware vendors. This exposes the fallacy of selective Regulation. If the argument is that Television Channels are akin to essential commodities then the means of having them delivered should also be

considered as essential services, accordingly it escapes logic that DTH and broadcasters suffer while vendors of Middleware make merry. This in effect results in Transfer Payments as stated above. Yet admittedly Middleware vendors cannot be seemingly brought under the Regulatory dragnet for a number of reasons, most prominent of which is that most of them are overseas players who are ever elusive to the authorities of this country. This only fortifies the contention of the Broadcaster that relationships in the industry ought to be business driven rather than being a subject matter of selective regulation.

(h) Broadcasters sometimes acquire rights of special events paying a very heavy premium. Accordingly there is a need also being felt that programmes should be allowed to be developed and carried under the flexi pricing mode whereby a particular event is carried on a channel and the channel is allowed to charge a premium over and above its normal price for the duration of the special event. The DTH operator may also add his own desired margin over and above the special price charged by the broadcaster. Gradually India shall, following international best practices, have to enter into the PPV (Pay per view) regime and this is where MSMD requests the Authority to play a pivotal role to facilitate consumer choice together with fostering an enabling and encouraging environment for channels to come up with niche time sensitive content at a motivating and remunerative price.

(i) If the authority has been receiving complaints as it says at paragraph 2.12, about too many channels of the same genre crowding DTH space, then the obvious implication as a logical corollary would be that, that particular Genre has attained effective competition. And if such be the case channels within that particular Genre atleast should be under total forbearance and hence ought to be deregulated forthwith.

(j) Industries all over the world have to correlate their retail prices with their wholesale prices, so that there is a parity ensuring that one stakeholder in the distribution chain does not profiteer at the cost of another. Prices charged by the DTH holder reflects his subjective valuation of consumer preferences, Broadcasters ought not to be deprived of such valuations as they don't have any mechanism for evaluating their products and offerings on their own. Broadcasters should not be asked to base their expectations on a keel that is altogether uneven to that of its distributors.

(k) Consumers also need to be sensitized that if they are willing to pay unregulated fares for having to watch a film on DVD or in a Multiplex, there is no reason for them to expect otherwise for TV, further the Government of the Day is earnestly requested to direct its policies to empowering Consumers by managing the economy, creating employment,

alleviating poverty, facilitating infrastructure growth, ensuring education and the like. Ensuring cheap television for the masses through selective regulation though a nobel objective, may lose its sense of purpose unless seen within a broader context.

(l) To create an even playing field between Cable and DTH it is necessary that diverse content is introduced through the plethora of platforms, at market driven prices, not by keeping prices artificially low. The mass market of TV viewership in India shall itself ensure by the "invisible hand" that prices reflect a Channel's desirability among the masses and the Operators concerned. Regulations may be selectively resorted to only in cases of proven market failure or competitive distortion. It is also submitted that TRAI has time and again unfortunately taken the stand that Channels because of their unique content are monopolists by themselves calling for regulations mandating them to be ubiquitous in all platforms at dirt cheap rates. It is submitted that this approach shall invariably drive the market for niche and quality driven content to oblivion and what shall then last is only mass homogenized undifferentiated dirt cheap commodity channels. Differentiation need not necessarily be a monopoly trait. The Content Industry all over the world realizes that differentiation is a key to programming diversity; to treat the same as a monopoly shall only result in annihilating creativity. It is understandable if there are limited regulations in place for vertical integration between broadcasters and distributors of TV channels viz. DTH, MSOs and the likes as such formations have the potential of creating entry-exit barriers for both - other broadcasters as well as other Operators, it would also perhaps make sense if regulatory efforts are area, genre, or technology platform driven, that is to say, asking questions about whether the lack of players in a particular area, genre or a particular technology platform is resulting in the creation of a monopoly situation within that area, genre or technology platform, what is definitely not comprehensible is that a Channel managing to create an exceptionally good programme ends up being branded as monopolist and as a way of satisfying lesser performers, brought down to the levels of mediocrity through regulations by mandatorily requiring it to make itself available indiscriminately at dirt cheap rates.

(m) Do we punish a University Topper by asking him to share his notes or for that matter his brains with all coaching institutes and tutorials for a pittance under a must provide non discriminatory clause. Or do we allow coaching institutes and tutorials to attract talent by paying a price to come up with even better formulations than what was considered best. In short should the aim of regulations be to promote mediocrity at the cost of meritocracy in the name of regulating monopoly is a question whose time has come.

(n) The Regulator must appreciate that the Broadcaster's need to reach the largest number of TV viewing households shall by itself ensure content availability on all platforms, the same is a business need, let us not derogate it to the status of a regulatory need. In doing so the risks and rewards matrix that contractual parties could have arrived at by themselves vide a contract get undermined and skewed to the detriment of the entire industry.

(o) Accordingly these issues ought to be as well left to the contractual formulation between the parties. There should not be any regulatory bar that shall have the effect of taking away rights of parties that could be contractually arrived at, unless such rights are on the face of it illegal or unconscionable.

A.17. Conclusion for Interconnection for Addressable Platforms:

1. The time has perhaps come to ask the question whether continued existence of the current Interconnection regime is justified or one ought to look beyond existing Regulatory formulations. It is submitted that formulations that partake the character of mandatory standardized off the shelf terms for Distribution are in a way exceptions to the rules of exclusivity embodied in the Copyright Act. They are market distorting and act in derogation of the legal principles that the public's interest in access to expressive works is best served by the market-based incentives that result from clearly-defined and meaningful exclusive rights. While such Standardised formulations of interconnection or for that matter tariff may be seen as a means of lowering transactions costs in cases of inefficient or failed markets, government rate-setting and administration are traditionally inefficient, involve higher transactions costs, and are far less flexible than private-sector negotiations in functioning markets. *See* Robert P. Merges, *Compulsory Licensing vs. the Three "Golden Oldies: Property Rights, Contracts, and Markets"* (Cato Policy Analysis No. 508, 2004). As a result, TRAI should regularly review the question whether the policy justifications that formed the basis for enactment of Regulations pertaining to Interconnection/Distribution and Tariff continue to exist today.

2. It may be conceded that during the formative years of Pay TV in India, the acknowledged market distortive effects were deemed acceptable on the strength of the assumption "that it would be impractical and unduly burdensome to require every Distributor of TV Channels to negotiate the broad terms with every broadcaster whose work was retransmitted by such distributor. The question that now warrants asking is whether that assumption has withstood the test of time. At that time it was thought that regulatory mandates were perhaps designed as a transitional measure to facilitate competition and the marketplace's ability to meet the needs

and demands of satellite and cable subscribers. But TRAI surely could not have intended the mandatory regulations with regard to RIO/SIA to be a permanent fixture in the regulatory landscape of Pay Television in India.

3. Today, the massive penetration of Pay TV in India is undisputed, so is the plethora of platforms. Considering this, as well as the fact that satellite services and cable systems, redistribute the offering of broadcasters directly in the marketplace, it is again fair to ask whether the goal articulated by TRAI in enacting the Interconnect Regulations have been achieved.

4. The cable and satellite Interconnection Regulations provide a number of examples of the market-distorting effects of mandatory interconnection/distribution schemes. There is no market based reason why operators could not negotiate with broadcasters that would cover cable and satellite redistribution. This happens every day with cable networks and satellite service providers all across the globe. Moreover broadcasters have to subject themselves to competitive bid to procure content, and have to submit to market forces to obtain rights for popular programming. Indeed, in the absence of mandatory non discriminate must provide clauses, Operators like all program providers, have every incentive to negotiate agreements for distribution of their products in as many markets and on as many platforms as possible. The only reason such rights would not be sought for cable and satellite distribution is that the must provide non discriminatory interconnectivity regulations take away the incentive for them to do so. In effect, such Regulations take the right to determine the terms of distribution out of the hands of market participants and places them squarely into the hands of TRAI. One might ask whether the fact that broadcast signals continue to be regulated through TRAI-mandated statutory Interconnection/Distribution clauses, rather than in the market, reflects a market failure, or whether whatever market failure may exist is in fact the outgrowth of the compulsory must provide non discriminatory clauses itself.

5. In another example of market distortion, cable and satellite rates determined through the government-run rate-setting process are consistently below those that would have been negotiated in the market. *See also* Merges, supra (noting the problem that compulsory licenses "can easily become outdated and unreflective of supply and demand" and that "[i]n practice, ... compulsory licensing has led to price stagnation."). The end result is a statutorily-mandated and sizeable subsidy for cable and satellite providers paid for by broadcasters who are copyright owners. Significantly, there is no evidence that any of this subsidy is passed on to subscribers.

6. Even where TRAI attempts to reflect the market in its Regulatory formulations, the enactments tend to make assumptions that may or may not be reflected in fact. For example, the Regulations assume addressable systems are inviolable and sacrosanct, whether or not such addressability actually exists. This reflects a common defect of the Regulations as currently drafted, which is that the existing Interconnection regime increasingly involves the TRAI in deciding the terms of carriage for television networks and affiliates without an opportunity for the people who invest billions of dollars in the provision of those signals to negotiate over where and how those signals are used by others. Whether it is TRAI deciding that "must provide, non discriminatory" clauses shall apply to Broadcasters thereby enabling Operators who claim abysmally low subscriber bases to avail signals, provisions crafted to ensure ceiling of rates, or even the persistent refusal to allow the broadcasters to enter into contracts freely with the Operators to atleast ensure that packaging and pricing are not the sole prerogative of the Distributors alone, the Interconnection regime continues to expand its reach in supplanting the rights of broadcasters who in most cases are themselves the copyright owners, in controlling how their products are used by other commercial entities.

7. All that said, we recognize that in assessing whether the Mandatory Interconnect regime should continue to exist, consideration must be given to the impact elimination of the Interconnect and Tariff Regulations would have on the Distribution practices and expectations formed over the past 06 years since 2004. Disruption in the market for distribution of programming by cable and satellite systems would be inconsistent with the legislative intent in instituting those Regulations. It is for that reason we are not here to advocate repeal of the cable and satellite interconnection and tariff regulations, but rather to urge TRAI to give careful consideration to these questions in light of past experience and the market as we know it today. To the extent that the TRAI believes there is justification for a continuation of the statutory Regulations, whether over the short or long term, it should include specific recommendations designed to limit the various market-distorting aspects of those Regulations, including but not limited to those that have been raised herein. Also a Sun Set Clause ought to be introduced to give out the likely tenure of such Regulations. But we do believe that there is one bright line that can be drawn now. Because of the market distorting effects of statutory interconnect and tariff regulations, and because there are no settled expectations with respect to new technologies the TRAI should also make a strong and clear recommendation that the existing Regulations NOT be expanded further to new services and new platforms. Just as the market has worked over the last 10 years to produce a robust market for the aggregation of rights by cable and satellite networks, the market should be allowed to work to facilitate the distribution of

broadcast signals through the use of nascent technologies in the absence of any regulatory formulations. The same is justified as the Authority's own findings in the Consultancy Paper are as hereunder:

"2.5 Presently, the regulation requires the broadcasters to publish their Reference Interconnect Offers (RIOs) only for non-addressable systems and for Direct to Home (DTH) systems. No such provisions are there in respect of other addressable platforms such as Voluntary CAS in non-CAS areas, IPTV, HITS, Mobile TV etc. As already mentioned, the broadcasting and cable industry is witnessing a gradual transition towards deployment of addressable platforms for distribution of TV channels. Voluntary CAS in non-CAS areas is already being rolled out in different pockets across the country because of competition from DTH. There are some industry estimates that nearly one million Set Top Boxes have been deployed in non-CAS areas of the country, as against 0.7 million in CAS areas. The Government have already issued the IPTV guidelines. Some service providers are offering IPTV services. One head-end in the sky (HITS) permission holder has already announced plans to launch the service. In the near future, mobile TV services are also likely to be available."

8. These new technologies and new platforms for delivery of digital broadcast signals are growing rapidly. They include things such as Internet based transmissions, digital delivery of television programming to mobile devices, and a host of other services that are very often difficult to predict. They are seen by many as critically important to the future of the television industry, and therefore provide the necessary incentives for broadcasters to clear rights necessary to enable not just those services, but others as well. Thus, allowing the market to develop in this area has the potential salutary effect of countering the market disincentives created by the prevailing Must Provide Non Discriminatory Clauses.

9. In talking about new technology, it is important to note the questions raised in the Consultation Paper regarding the status of HITS in CAS areas and HYBRID Cable Systems. The same have been answered separately but MSMD believes that more clarity is required with regard to IPTV as well, as there is an important distinction between the use of Internet Protocol based technology to deliver a signal from a central facility over a truly closed network in a defined and limited geographic area – as cable systems do – and the use of the public Internet to retransmit broadcast signals to Internet users. TRAI is yet to come out with any regulatory formulations on the subject. The latter ought to be specifically barred because if these were to be allowed you might imagine the compulsory interconnection regulations applying to a foreign web site operator (like TVU Networks) that allows peer-to-peer redistribution of broadcast signals from sources worldwide to Internet users it determines, somehow, are located in a defined geographic location, one of such counter part peer

being an India based operator. Similarly, a local Operator might decide to stream its signal over the Internet to computers located within its local viewing area, without any explicit authority from broadcasters in the content being retransmitted or the network with which it is affiliated. Whether or not those models are good business models, and putting aside the conversation about the impact they would have on various interested parties, such services are far beyond the scope of the kind of service TRAI had in mind when it adopted the Interconnection and Tariff Regulations. To bring these new Internet retransmission services within the existing interconnection regime would require substantial legislative change. Such a change would not only be ill-advised, it would also likely run afoul of our international obligations in various bilateral and multilateral trade agreements prohibiting compulsory provisioning of television signals over the Internet. The right approach it is submitted is the one to which common sense appeals, which is to let the market work. Given recent past experience in global markets, we should have every confidence that it will.

B. Interconnection for non-addressable platforms :

I. Whether the terms & conditions and details to be specifically included in the RIO for non-addressable systems should be specified by the Regulation as has been done for DTH?

II. What terms & conditions and details should be specified for inclusion in the RIO for non-addressable systems?

Comments:

(a) MSMD submits that Non Addressable systems with massive underdeclarations, transgression of areas, insistence to cling on to dated technology and refusal to upgrade systems at the same time demanding carriage fees - not only undermine consumer interests, but also deprive broadcasters and the national exchequer. It has already been submitted that the existing Interconnection Regime, in the considered opinion of MSMD may have left a lot to be desired and accordingly ought to be revisited to usher in a dispensation that would perpetuate the freedom to Contract amongst the various stakeholders of the industry allowing market forces to freely interplay and interference to be occasional, need based and limited only in cases of proven market failure.

(b) The need of the hour is some definitive regulations regarding determination of minimum subscriber bases which should act as minimum eligibility criteria for MSOs wishing to avail signals from broadcasters. The time has come now to tackle the issue of underdeclarations head on in Analog systems, as this is the single most dispute which occupies centerstage coupled with the Must Provide and non discriminatory clauses. A requirement for the same has also been expressed by the Hon'ble TDSAT vide its Judgment in Appeal 10 C of 2007. Accordingly MSMD proposes a Regulatory formulation for the Authority's kind perusal.

(c) THE ISSUE: Off late a disturbing trend has come to the fore. Operators are unabashedly underdeclaring subscribers, and approaching broadcasters for signals. Any insistence by the broadcaster on a reality check is being frowned upon and met with a petition in court invoking the Must Provide and Non Discriminatory Clauses. The Courts accordingly having no other option and as a matter of routine allow such petitions under the Must Provide non discriminatory clauses, without attaching any significance to the representation of broadcasters in this regard. The mandatory "Sixty Day" period for conducting negotiations have been rendered a dead letter of the law today. So has the provision pertaining to

mediation by TRAI. Regulation 3.2 (Must Provide) has overtaken and over ridden all other salutary provisions in this regard. After the Sea TV Judgment, came the Ortel Judgment. Any entity with a post office registration having name sake of a head end, can today approach the Courts and take the signals from the broadcasters. The death knell has also been sounded for the safe guards that were earlier available to broadcasters which enabled them to redirect operators who were not "similarly based" as other MSOs to MSOs already operating in the requested areas. After the Sea TV Judgment followed by the Ortel Judgment, there has not been a single instance where a broadcaster on consideration of ground realities, has been able to ask the Operator concerned to take its feed from the local MSO already operating in the requested area. Any such proposal by the broadcaster is per se taken to be anti competitive. Worse still, the mandatory sixty day period for negotiation is being given a go by. Simple one liner emails are being taken as "requests" and the counting of the sixty day period is being done from the date of such emails. Application Forms are filled up in a sketchy manner, and are mostly incomplete, revealing nothing (at best a two digit subscriber base) and concealing far more. Yet these applications are also being taken as requests and are being vigorously acted upon. The situation now is that a broadcaster has to provide boxes indiscriminately, at any cost, come what may, throwing all caution to the winds. Asking legitimate questions is taken as refusal or delaying tactics. The past few years has seen an unprecedented rise in the cost of litigation for broadcasters. Also taking advantage of the liberal dispensation - Broadcasters had to incur heavy losses for some unscrupulous elements. Monies which were earlier spent on developing quality content are now being defrayed towards legal expenses and write offs. Markets which had stabilized have now been rendered fragmented, with disputes and bickering amongst various entities in the distribution chain being common place together with massive bad debts. The result is all round instability, uncertainty, and a mad rush for low quality content with a scramble for the ever elusive advertisement revenues like never before. The broadcasting industry which had started with a bang, has today lost even its whimper.

(d) THE SOLUTION: MSMD submits the following proposals as a Methodology for Determination of Subscriber Base in Non CAS areas for non addressable systems for the Authority's kind consideration:

MSMD recommends that data already available in the public domain be pressed into service. This coupled with some basic eligibility conditions being cast upon MSOs over and above Post Office registrations, should solve the problem to some extent.

MSMD recommends as follows:

i. That any arrangement in Non CAS areas for non addressable systems ought to be left to the parties concerned to deliberate upon, for themselves. In the event parties fail to arrive at an agreement the procedure below may be resorted to.

ii. For any given area, the number of households having television connection be first considered. Reliance may be placed on the latest Census data available. In the event no such figure is discernible, then the average of the following figures as may be available from the Census data may be considered:

(i) Number of households availing gas connection
(ii) Number of households availing electricity
(iii) Number of households availing telephone connection
(iv) Number of households availing cars
(v) Number of households availing any other amenity or amenities as may be seen from the Census Data.

Usually Television does have a correlation to all of the above.

iii. For any given area the number of households having cable and satellite connections be then ascertained on the basis of IRS (Indian Readership Survey) or NRS (National Readership Survey) data. In the event of the IRS and NRS data varying, an average may be taken of the two figures. In the event there is no such data available in the first place, then 50 percent of ii. above may be taken as the number of households having cable and satellite connections. Under no circumstances can the number of television viewing households be lesser than the number of households having cable and satellite connection. If data reveals so, then it is an anomaly in public data and it is better to equate the two with the lower figure.

iv. It is submitted that iii. above shall be indicative of the Existing Market.

v. The figure that is obtained after subtracting iii. as aforesaid from ii. above, shall be indicative of the Potential Market that is poised for a cross over from mere TV viewing to being Cable and Satellite enabled.

vi. Any operator who intends to seek boxes directly from the broadcaster, ought to be mandatorily presumed to be in a position to command a market share of not less than the lesser of the following at the very first instance:

- (1/number of existing operators in the area including the applicant operator) * 100

or

- 25 percent (assuming there to be on an average generally speaking 4 operators in an area)

of the Existing Market as aforesaid.

vii. It may be perhaps too much to expect that the entire 75 percent is going to be out of bounds for the Operator concerned in cases when there are very few numbers of existing operators in the area, considering the admitted levels of under declaration in the Analog market. But then a liberal balance is being attempted to be maintained in favour of the applicant operator. Also one has to take into account the fact that there may be other Operators entering the fray in the near future as well.

viii. It is quite unlikely that an Operator rendering services in an analog mode shall be interested in an area unless he is confident about grabbing a major percentage of the connectivity for himself. Thus the presumption that should be inferred ought to be in these lines. Though admittedly the Operator shall be recovering from his link local cable operators, his costs (payments to be made to all the Channels and the Overheads) and also the profits, on a per subscriber basis, yet Broadcasters may show some further leniency and accordingly instead of demanding payments to be made for the entire market share of such Operator as has been determined above, they may charge subscription fees taking only 60 percent of the existing market share of such Operator and allow the other 40 percent to be retained by the Operator concerned, so as to enable the latter to price his offering at a discount, keep it to himself for further growth and also ensuring a level playing field with existing and new operators.

ix. Similarly such operators ought to be mandatorily presumed to be in a position to command a market share of not less than the lesser of the following:

(i). (1/number of existing operators in the area including the applicant operator) * 100

(ii) 30 percent

of the Potential Market as aforesaid.

x. 30 percent has been taken assuming that the applicant MSO shall be aggressively targeting these fence sitters at the first instance who were hitherto untouched by the existing operators.

xi. The Broadcasters may accordingly be given a subscriber base of only 50 percent of the Potential Market share of the Operator, the other 50 percent being allowed to be retained with the Operator as an incentive to pass on attractive discounts to the subscribers in such areas so that the latter also finds it less onerous to make the transformation from ordinary television viewing household to a Cable and Satellite viewing household.

xii. A numerical example:

Let us say the city of Varanasi has the following statistics:

No. television viewing households: 1,50,000

No. of cable and satellite viewing households : 90,000

No. of existing operators in Varanasi excluding applicant operator: 2

The Operators existing market share should be lesser of the following:

1. 1/3 * 100 = 33.33 percent

2. 25 percent

i.e. 25 percent of 90,000 = 22,500 subscribers

of which Operator pays broadcaster for only 13,500 subscribers. From which he recovers his costs including costs for all channels and overhead plus margin for those many subscribers, over and above that in addition he gets to keep the entire receipts from the rest 9000 subscribers.

For Potential market share of such Operator, it shall be lesser of the following

1. 1/3 * 100= 33.33 percent

2. 30 percent

i.e. 30 percent of 60000 = 18000 subscribers

of which Operator pays broadcasters for only 9000 subscribers as above and retains the rest 9000 subscribers for himself.

(e) When in the year subsequent to the first year, the contract is renewed based on market conditions, the existing and potential market share of the Operator and the broadcaster's share therein shall be reviewed, thus the above formulations are over and above the existing Regulations that are already there for furnishing SLR etc. It is also requested that the existing provisions for submission of SLRs be further strengthened by adding punitive provisions in cases of non compliance. Broadcasters should be allowed to take resort to suitable punitive actions for non submission of SLRs. There is tremendous opposition and reluctance to submit SLR which should be sternly dealt with. Also regulatory formulations should have the effect of discouraging wide divergence between the SLR figures and that reported to the service/entertainment tax authorities which reportings should mandatorily be required to be shared with broadcasters. Further operators should not be allowed to discriminate between broadcasters in analogue mode when it comes to subscriber reporting. The subscriber base of the operator concerned should be the subscriber base of all the channels taken by such operator. The Regulations should clearly establish these in unequivocal terms. Very often Operators have been found to be declaring different subscriber bases to different broadcasters which bear no relation whatsoever to their actual subscriber base.

(f) It is submitted that the above formulations would lend some transparency into the system, ensure somewhat fairer distribution revenues for all concerned and above all, what this would serve is ensure rapid penetration of Cable and satellite in areas that were hitherto untouched. In both telecom and Broadcasting sector there is a huge concern for rural penetration. Perhaps these formulations would help to some extent address the problem.

(g) Operators who do not want to be subjected to the aforesaid criteria may be taken as one not being a "similarly based distributor of TV channels" under the Regulations and accordingly broadcasters ought to be permitted at their discretion to redirect applications received from such operators to existing MSOs operating out of such requested areas in pursuance to Regulation 3.4 of the Interconnect Regulation (13 of 2004) as amended by Interconnect Regulation (10 of 2006)

(h) The another major issue is that of availing channels on ala carte. It is requested that the ala carte proposition for Non CAS areas be now revisited and analysed with far greater intensity considering its economic effects. The overwhelming mandate amongst economists is that bundling is pro competitive while ala carte is not. MSMD hereby submits a Study conducted by reputed economists on the specific question of ala carte channels being offered on TV. Annexure "I" CAP Analysis: "The FCC's further report on ala carte pricing of cable television". March 7, 2006 –

Jeffrey A Eisenach and Richard E Ludwick. Accordingly not only non addressable systems, addressable systems also should not be given an ala carte mandate.

Suffice it to say, if we don't expect Newspapers to supply us articles, cartoons, cross word puzzles, news reports, on ala carte, it ought not to be doing justice to expect the same from broadcasters.

(i) The focus we submit ought to be on overcoming carriage constraints which has now become endemic for the industry.

(j) The Issue: Another problem that is faced vis a vis Analogue systems is that of carriage fees coupled with dated technology. MSOs and LCOs have a collective obligation towards ensuring some semblance of quality in the services they render. There have been instances where it has been found that the minimum numbers of Pay Channels that have been stipulated by TRAI are not being carried in many NON CAS areas on the plea of limited bandwidth. Though subscribers are being charged with more than the maximum Fees laid down by the Regulations. Exorbitant carriage fees are being demanded for carrying Channels in such areas. In the end it is the subscribers who lose out. MSMD requests the Authority to come up with Regulations that create an enabling environment and mechanism for technology upgradation. This can be done by mandating compulsory adoption of State of the Art Compression Technologies that are now available in the market and making it mandatory to invest in infrastructure to augment capacity for carrying greater number of Channels. This may be done in a phased manner. It is a fact that the Honble Authority has attempted to facilitate and protect Operators who are content aggregators as well as Carriers of Signals through and by way of various Regulatory stipulations. Perhaps it is time that such facilitation and protection is also coupled with some obligation for the sake of subscribers. International experience has shown that Regulatory intervention has taken place in some countries to ensure carriage of greater number of channels by cable operators through adoption of upgraded technology as per mandates of the Regulatory authority without compromising on quality of signals. The Bureau of Indian Standards may also be pressed into service to lay down the specifications for such Equipments that facilitate Compression of Signals over limited bandwidth without compromising on signal quality within acceptable thresholds and also identify areas where further investments would help to enhance capacity. For this purpose it is imperative that industry and international best practices be considered and only those vendors/OEMs (Original Equipment Manufacturers) be permitted to supply such equipments in India who have proven credibility in the international market and whose technologies are either cutting edge or Next Generation. Periodical upgradations of systems are needed to bring the same at par with State of

the Art. MSMD requests the Authority to come up with regulatory formulations that would ensure such regular up gradation and also specify the periodicity thereof in order for Operators to enjoy continued Regulatory protection and facilitation. In the absence of such Regulatory formulations - India shall continue to be in the dark ages of technology with subscribers suffering and carriage Fees being widespread and perpetually on the rise, with no incentive on the Operator's part whatsoever to upgrade systems. New Channels, that do not have the ability to pay carriage fees nor have the ability to attract much advertisement revenue, ought to be provided with a level playing field as well, so that subscribers are not deprived of novelty and innovation. Local Cable Operators should also be nudged to upgrade their systems and it ought to be mandated that they atleast acquire amplifiers that are readily available in the market to enhance signal delivery. Technologies like "Interlace" have been seldom deployed in India to ensure efficient signal compression by MSOs in analogue areas. This particular issue has been dealt with at greater length in the subsequent query that deals specifically with Carriage Fee Issues.

(k) Any instance of default or piracy/unauthorized cable casting should immediately entitle the Broadcaster to take resort to punitive action under the Regulations. On such proven instances of piracy the Operator ought to be barred from operating for atleast one year. In cases of default and when the said default is magnified by dishonour of cheque(s), then reactivation may be done only subject to the Operator paying up 1.5/2 times of the amount defaulted. Also costs incurred by the broadcaster to bring out public notices in newspapers and legal fees ought to be reimbursed prior to reactivation. Also please see "C" *infra*. The requirements of Public Notices it is submitted also needs to be revisited.

C. General Interconnection Issues:

I. Whether it should be made mandatory that before a service provider becomes eligible to enjoy the benefits/ protections accorded under interconnect regulations, he must first establish that he fulfills all the requirements under quality of service regulations as applicable?

Comments:

MSMD submits that there should not be any protection to be afforded to operators, who now have effective competition amongst themselves. The QOS Regulations should be taken as minimum eligibility conditions and basic hygiene related compliance issues for any Operator to participate in the business. Also we sincerely hope that when the Authority talks of service providers enjoying benefits and protections under interconnect regulations, it has not prejudged the issue in that i. operators need protection and benefits and ii. that this would be achieved only through Stringent Regulations with regard to "interconnection" with broadcasters.

II. Whether applicability of clause 3.2 of the Interconnect Regulation should be restricted so that a distributor of TV channels is barred from seeking signals in terms of clause 3.2 of the Interconnect Regulation from a broadcaster for those channels in respect of which carriage fee is being demanded by the distributor of TV channels from the broadcaster?

III. Whether there is a need to regulate certain features of carriage fee, such as stability, transparency, predictability and periodicity, as well as the relationship between TAM/TRP ratings and carriage fee?

IV. If so, then what should the manner of such regulation be?

Comments:

(i) MSMD submits that it would be entirely misplaced to tie carriage fees being charged by operators with Advertisement Revenues of Broadcasters by linking it with TAM/TRP. Also market conditions reveal that Carriage fees are being charged by Addressable and non addressable platforms alike. It is also questionable whether the nature or price of a Channel has any correlation or nexus with the popularity of such channels.

(ii) The Authority it is submitted has to adopt the legal maxim of "*Causa Proxima Non Remota Spectatur*" (it is the proximate cause and not the supposed remote cause that matters). This doctrine found in Insurance laws is what can be aptly considered in the current context as carriage

fees may be viewed as an insurance premium being paid for by broadcasters to cover the risk that their channels may not be carried properly in the network, though the same have been taken under a "must provide", resulting in loss of subscription fees rather than advertising revenue losses.

(iii) From the point of view of Broadcaster, the proximate cause for the loss of subscription revenue is on account of denial of proper carriage by Operators, citing capacity constraints, despite having taken the channels under non discriminatory must provide.

(iv) Looking at it from the point of view of Operators it is the artificial creation of capacity constraint which is the proximate cause for denial of carriage. Remote causes of sharing of advertisement revenues, linkages with TAM/TRP and the likes ought not to be brought into the narrative and discourse it is submitted, because the proximate causes for advertising revenues is the strength of the content.

(v) Operators see a beneficial proposition by deliberately clinging on to archaic systems and refusing and neglecting to adopt state of the art technology for their analogue delivery systems. There is practically no movement on the ground by local cable operators to adopt state of the art amplifiers available at highly competitive rates today. Likewise cutting edge state of the art Compression technogies that have had a successful run in the West have never seen the light of the day in India. Instead carriage fees are demanded on the pretext of sharing of advertisement revenues which is to say the least altogether misplaced, unwarranted and uncalled for.

(vi) No wholesaler in any industry asks the manufacturer to pay for products sold by it to retailers. With carriage fees, let us not rewrite the norms of business and commerce the way it has been, and the way it shall always be.

(vii) We have seen the perils of artificial shortage in the history of our country, charging carriage fee is no less similar than profiteering out of such artificially created shortage. Regulatory authorities must come down heavily upon such charges as it has the effect of distorting the rules of trade and commerce and taking India back to the dark ages of technology. Ought there to be at all a non discriminatory must provide when we are talking of operators discriminating in carriage, is an answer which has to be decisively dealt with by the Authority, it is requested.

(viii) The proposition that a carrier shall have to be paid by the broadcaster for carrying the signals of the latter it is submitted is against all known canons of Broadcasting industry norms the world over.

(ix) Accordingly MSMD recommends that any operator found to be receiving, accepting, demanding carriage fees, or imposing arbitrary terms and conditions, directly or indirectly ought to at the discretion of the broadcaster concerned be disentitled from asking for television channels on a must provide basis at the time of renewal. Any operator asking for channels on a must provide should not demand carriage/placement fees from such broadcaster as a matter of right. Once a Channel has been demanded for on a "Must Provide", it ought to be presumed that i. There is a demand for the channel in so far as that particular Operator is concerned and such demand is irrespective of TRP/TAM/GRP etc. and ii. The Operator has capacity to carry the channel to the subscriber in the same manner as it has been doing so for other channels of the same language and genre and on a non discriminatory basis vis a vis such operator's inhouse channels if any.

(x) It is submitted that it ought to be made mandatory for all General Entertainment Channels which the Authority and also the Hon'ble TDSAT had on previous occasions likened to "essential commodities" be placed in the prime bands by all operators so that subscribers are not deprived of quality signals.

(xi) If availability of Channels to operators is of importance, so must availability of Band to broadcasters be a Regulatory prerogative and the same ought to be based on genre and ownership. Given the admitted fact that some operators have tie up with broadcasters on the equity front or otherwise, it would be incumbent that the band allocation of channels of such broadcasters who are holders of equity or have any relationship financial or otherwise with such operator be looked into and scrutinized and compared with placements accorded to third party channels. Channels that are free to air need not be brought within these stipulations, also channel placements by similarly based operators within a particularly area ought to be looked into to establish whether a particular channel is being discriminated against vis a vis inhouse channels of such other operators. In the event an operator is found to be placing channels in a manner that is widely divergent from that practiced by other operators in the area, or the fact that inhouse channels have been allotted prime band whereas third party channels have been placed erratically, the Authority and TDSAT on specific pleas to these effect by the aggrieved broadcaster, ought to draw adverse inference and forthwith issue appropriate directions namely for such Operator to immediately augment capacity, upgrade technology, adopt latest techniques and investing in necessary infrastructure to ensure that no discrimination takes place in the realm of carriage and placements, and bandwidth allocation and frequency allotment to third party channels is atleast proximate to inhouse channels of the Operator concerned. The rule here

ought to be that "Birds of the same feather folk together". All third party channels of a particular genre ought to be placed in that proximate frequency where the Operator concerned has placed its own inhouse channels of that particular genre viz, channels of a particular broadcaster (s) with whom it shares a relationship financial or otherwise. In the event such operator is unable to oblige, a broadcaster ought to be entitled to withdraw all its offering from such operator, and in case the argument advanced by the Operator is that channels of a particular genre are too many in number to be accommodated non discriminatory placements then it ought to be presumed that for that particular operator atleast the channels within a particular genre have attained "effective competition" and then that genre ought to be deregulated forthwith for such operator. Accordingly there ought to be no ceiling on subscription fees of channels of that particular genre qua such operator and he ought to negotiate with broadcasters individually to avail channels from that individual broadcasters. Broadcasters feeling the heat of the market shall automatically price their offerings that reflect ground realities. In short operators shall avail channels on their capacity to pay, keeping in mind the subscriber interests and broadcasters shall make available channels by pricing and packaging their offerings in an attractive manner to tide over the rigors of competition. In these independent negotiations, questions of subscription revenues, placement fees, discounts, may be allowed to be freely taken up any issues that they wish to deliberate upon.

(xii) Again the Authority is also requested to come up with yardsticks that would determine when a particular area would be treated as having effective competition amongst operators, to ensure selective deregulation for such broadcasters in such parts of the country. It is submitted that the metropolitan areas of Kolkata, Delhi Chennai and Mumbai can by all estimates be said to have acquired effective competition given the level of penetration of Pay TV in such areas. Accordingly whether Mandatory CAS ought to be prevalent in such areas is a question whose time has come.

(xiii) Further the Authority is also requested to come up with yardsticks that would specify when a particular platform ought to be determined to be in a state of effective competition, so as to deregulate broadcasters qua such platforms.

(xiv) The Authority is requested to take note of the fact that the purpose of Regulation is to usher in competition. Accordingly formulating determinants of "effective competition" should also be an intrinsic part of regulatory exercise, whereby genres, areas and platforms are systematically deregulated on being found that the same have now come within effective competition.

(xv) It is submitted that TRP/TAM ratings are historical figures and are subjective percentages that are prone to wide spread variation within any limited time intervals. Moreover such measure is more to do with the content of the broadcasters rather than its carriage per se. A news Channel might be commanding exceptional TRPs/TAMS on the happening of a specific event of national importance, and the ratings might slide on the completion of such event. Again such news channel may not decide to air advertisements to ensure coverage of such special event in view of its national importance. Accordingly we might have a situation of oscillating ratings, no corresponding impact on advertisement revenues, yet carriage having to be paid to Operators because of the temporary jump in ratings. The same cannot be relied upon by the Regulator which needs to arrive at formulations that are long lasting and based on objective ground realities. Moreover such constructs are alien for the purpose of arriving at constructs for "delivery mechanisms" as it is subscription revenues and not sharing of advertisement fees that ought to be the driver and subject matter of Carriage Regulations.

(xvi) It is submitted that arguments proffered by operators that carriage fees is a means of sharing advertisement revenues is potently anti consumer in that , an operator may then package in unpopular programmes because of the largesse paid to it by broadcasters of such programmes, and force subscribers to avail the same as well by extracting subscription revenues, the situation it is submitted would be far more precarious in analog markets where subscribers are left to the mercy of the proverbial last mile monopolist. On the contrary if Operators argue that there is no longer any last mile monopoly given the number of Operators in the fray, together with DTH, HITS and IPTV players, then the obvious question that comes to mind is if competition is an admitted reality, why have regulations in the first place.

(xvii) MSMD is of the considered opinion that in cases wherein Operators have not applied for channels of a particular broadcaster and the broadcaster wants its offerings to be placed in the operator's platform, only then it is essential that Regulations be in place for carriage fees regarding certain features, such as stability, transparency, predictability and periodicity, the same may be allowed to be levied on the basis of an Operator's declared subscriber base, either on a per subscriber basis or on the basis of slabs for the purpose. Accordingly the same may be packaged within slabs to encourage declarations by operators of actual subscriber bases, and further the same may be pegged at a particular percentage of the subscription revenue depending on the bandwidth placements.

(xviii) Accordingly it may be in these lines:

- Upto 500 subscribers : no carriage fees

- 500 – 1000 subscribers:

: If in prime band : 1 percent of subscription fee of the bouquet

: If in any other band : 0.5 percent of subscription fee

- 1000- 1500 subscribers :

: If in prime band: 1.5 percent of subscription fee of the bouquet

: If in any other band: 1.25 percent of subscription fee of the bouquet

- 1500 – 2000 subscribers:

: If in prime band: 2 percent

: If in any other band : 1.75 percent

And so on and so forth.

The definition of Prime Band may be easily formulated given the prevailing practices in the market. The same is however best left to the parties to define for themselves by way of a Contract

Such formulations may also ensure stability, periodicity and transparency.

MSMD further reiterates that contractual negotiations and market forces are the best way forward to reconcile the issues of subscription revenues and carriage fees.

Addressable systems and hybrid systems should altogether be discouraged from charging carriage from broadcasters given their admitted unlimited capacity.

V. Whether the standard interconnect agreement between broadcasters and MSOs should be amended to enable the MSOs, which have been duly approved by the Government for providing services in CAS areas, to utilize the infrastructure of a HITS operator for carriage of signals to the MSO's affiliate cable operators in CAS areas?

VI. Whether the standard interconnect agreement between broadcasters and HITS operators need to be prescribed by the Authority, and whether these should be broadly the same as prescribed between broadcasters and MSOs in CAS notified areas?

Comments:

MSMD requests the Authority at the very least not to alter or amend the existing Regulations as they stand in so far as HITS Operators are concerned. The Regulations as it stands excludes HITS as a platform from mandatory CAS and rightly so. The number of players in a HITS platform is not definitive. The contractual arrangements between such players shall have a profound bearing in the manner of operations. It would not at all be advisable nor possible to formulate a revenue sharing model for HITS owing to the sheer multiplicity of actors in the platform. HITS also poses unique risks for the broadcasters. Also the risk of piracy is most manifest in this particular platform. The risk is acute when a HITS Operator either directly or through it any third party (for example the infrastructure provider concerned of such HITS Operator), has simultaneous presence in both addressable and non addressable markets. On several occasions it has been found that Multi System Operators who were earlier availing signals from the broadcaster in analogue mode, suddenly cease to avail the same, and instead resort to taking signals from the HITS operator without affording any reasonable explanation as to how his entire signal delivery module in the authorized area changed over night from analogue to addressable-digital. HITS as a platform ought to be left entirely to market forces, negotiations and Contracts. In any case, MSMD submits, mandatory CAS has been kept out of the discourse in the instant Paper. The Regulator has represented time and again in various fora that specifying a Standard Interconnect Agreement for Mandatory CAS was a judiciary ordained necessity. It is respectfully submitted that there is no clear mandate in the TRAI Act or other statutory enactments as to whether TRAI at all has the legislative backing to draft distribution contracts between stakeholders. The regulatory framework with respect to HITS Platform is yet to be notified by the Government on the basis of the recommendations of the Regulator dated 17th October 2007. The current license conditions clearly prohibit the HITS operators from either directly or indirectly assigning or transferring its rights in any manner to any other party or sub-licence/ partnership relating to any subject matter under the licence. Under the current system of HITS, HITS operator contracts with different broadcasters for buying content, aggregates the same at an earth station and then uplinks with his own encryption to a satellite hired by him in the sky. The uplinked channels are then permitted to be downlinked by the cable operators using large dish antenna for onward distribution through last mile cable network to the TV homes. In this case the HITS operators works like a Master MSO. As said before it has been seen that the HITS operator may also enter into understandings with an infrastructure provider though the legality or validity of the same is an open question given the licensing condition. Unlike in the CAS areas, in the current

method of HITS system, there is no privity of contract between the MSOs' and broadcasters. The broadcasters execute agreements with the HITS licensor for content and not the MSO's. The HITS operator in turn executes contracts with the MSO's/cable operators. Hence, it would be incorrect and beyond the scope of existing legal/regulatory framework to amend the standard interconnect agreement for CAS areas between broadcasters and MSO's to utilize the infrastructure of a HITS operator for carriage of signals to the MSO's affiliate cable operators in CAS areas. Moreover, it is unclear as to whether the permission of the government permitting MSO's to operate in the CAS areas, allows MSO's to retransmit signals in the CAS areas through the satellite based HITS system. In the absence of clear regulatory framework, we recommend that the Regulator must refrain from making any changes to the standard interconnection agreement for CAS areas. Nor is there any material to argue that agreements between broadcasters and HITS operators should be broadly the same as prescribed between Broadcasters and MSOs in CAS notified areas. CAS has been a non starter it is submitted respectfully owing to the heavy regulation that it was subjected to. New Addressable systems like HITS should be allowed breathing space inorder to be effective and viable.

VII. What further regulatory measures need to be taken to ensure that DTH operators are able to provide six month protection for subscribers as provided by Sub clause (1) of Clause 9 of the Direct to Home Broadcasting Services (Standards of Quality of Service and Redressal of Grievances) Regulations, 2007?

VIII. Towards this objective, should it be made mandatory for broadcasters to continue to provide signals to DTH operators for a period of six months after the date of expiry of interconnection agreement to enable the DTH operators to discharge their obligation?

IX. Is there any other regulatory measure which will achieve the same objective?

Comments:

(i) In the absence of a contract, Broadcasters it is submitted cannot be asked to continue to provide signals to ensure continued availability of signals. The only alternative in such cases is for the subscriber to be given a reduction in rates by the DTH operator or a replacement Channel as per choice of the subscriber concerned. The DTH operator should serve prior notification to its subscribers who have subscribed to a particular package about any channels that may be moving out from such package within 6 months, and also give the Subscriber an option to exercise choice by picking up any channel from a range of channels as a replacement/substitute for the Channel that shall be moving out of the

package. In the event the subscriber elects not to exercise the option, his charges may be reduced by the average price of such Channel which may be derived as follows:

Average Price of the Channel (A) = Price of the Package charged by the DTH Operator (P) / Number of Channels comprising the Package (N).

(ii) Such prior intimation may be served either at the point of time when the subscriber is being enrolled to a particular plan, when such an exit is clearly foreseeable, or during the pendency of the Subscription agreement when such an exit was not foreseeable at the time the subscriber was enrolled to a particular package (cases of premature termination owing to breach of contract, etc.), however the manner in which the said Subscriber may be compensated in the event of any Channels being dropped within 6 months of enrolment as a result of termination of a Contract with a broadcaster during the tenure of the subscription agreement, may however be clearly laid down beforehand at the time of entering into the subscription agreement as the consequence of such moving out of a particular channel shall be clearly foreseeable at that stage also.

(iii) In the event the Operator wishes to avail signals for a longer period he may enter into long term agreements with the broadcaster concerned or for that matter initiate negotiations with the broadcaster well before he sees a likelihood of a broadcaster moving out of the line within six months of subscription being allowed to a particular subscriber(s).

(iv) It is imperative however that lesser durations may be permitted if Special Events are telecast by Broadcasters in pursuance to a flexi – pricing mechanism or for any new premium channels or channels with premium niche content, in which case the Broadcaster may be permitted to charge a premium over the existing administered rates for such duration of the special event or for such premium channel or channels with premium content.

Conclusion:

MSMD also submits the following for the Authority's kind consideration:

(1) It has been found that Operators using addressability have been submitting their subscriber bases in an arbitrary manner. We submit that the regulator should establish a licensing regime for cable and satellite operators that mandates for the accurate reporting of subscriber numbers as well as ensuring the implementation of technical standards to facilitate

the accurate reporting. This would be consistent with international standards for implementation of such systems.

(2) Subscriber Management Systems have an inherent potential to pose a huge risk to broadcasters because of the arrangements between the SMS vendor and the Operator to which the broadcasters are not privy to. Accordingly Reporting forms the crux for broadcasters and any dilution in that ought not to be condoned.

(3) In India Public Notices issued by broadcasters in compliance with the Regulations after incurring heavy costs to switch off an operator on the grounds of non payment, piracy, under declaration, etc. no matter how so ever warranted by the circumstances are as a matter of routine shot down or stayed by judicial intervention, because of the "must provide clause" resulting in incalculable financial burden upon the Broadcaster. The matter than gets protracted, with the Broadcaster being left with little choice but to count its mounting operating expenses. Also a 21 days notice would be altogether ineffective and meaningless when a broadcaster is telecasting special events of very short durations.

(4) MSMD thus further recommends as follows:

: In the event the Operator has dishonoured a cheque, there is already a notice period available to the Operator u/s 138 of the N.I. Act in case the broadcaster wishes to pursue that route for recovery of dues.

: Further the Invoice wherein the amount outstanding is clearly mentioned along with due date ought to be treated as a Notice in itself and it ought to be deemed that the Operator concerned has had in any case notice of his outstandings and also availed himself the opportunity of paying the same till the due date. In ordinary course Invoices sent under certificate of posting should be considered as valid delivery.

: As the invoice dates and due dates again are a subject matter of agreement between parties, and as such well within the knowledge of the parties, there ought not to be even an insistence on the broadcaster to prove that invoices had indeed been delivered by the broadcaster as the operator concerned already has prior knowledge of the payments to be made by him. The presumption ought to be that the broadcaster has been raising invoices, more so when the operator takes the defence of non receipt of invoices for the first time as a reaction to the broadcasters' claims and has nothing to show that he had made known his grievances beforehand to the Broadcaster concerned. It would be unconscionable for an operator to be sitting idle without paying the broadcaster for months together and only when the broadcaster raises an issue on non payment that the operator comes out with a defense of not having received

invoices. There must be some material to show that the operator concerned had raised the issue of not availing the invoices in a sincere manner. He should have, sent a complaint atleast once vide Registered Post with Acknowledgment due that he has not been in receipt of the same. However if after having made the payments the Operator requires a broadcaster to issue an invoice claiming that the invoice never reached him then broadcaster ought to forthwith issue a duplicate invoice to the operator concerned and send over the same under Registered with Acknowledgement. This is imperative as the Operator has also to take input credit on the service tax actually paid by him. After the due date as specified in the invoice/agreement expires without the broadcaster receiving any payments, the Broadcaster should be at liberty to forthwith notify by way of running scrolls giving out a 5 days notice period, as such notification is meant only for the public and not the Operator concerned. It is submitted that the requirement of a Public Notice is onerous on the Broadcaster, and the Broadcaster ought to be allowed to run scrolls to intimate the subscribers of the Operator's area. There is no guarantee that payments would be recovered or would have to be written off and on top of it to incur expenses for publication of notice in newspapers would only be piling up the unproductive expenses for the Broadcaster. It is submitted that instead an Affidavit or Undertaking of compliance be taken from the broadcaster that scrolls have been running for the 5 day notice period. MSMD shall also undertake to produce recordings of the same in the event of any doubt and such recordings shall indicate the area, time and date such recordings were taken. It is submitted that a shorter notice period is also required in the event of telecasting of special events by broadcasters wherein the said event may not even last long enough to outrun the mandated 21 days notice period. It is submitted that on being proven that the Operator concerned has had indeed defaulted or indeed committed an act of piracy, liquidated damages as may be specified in the agreement/contract ought to be allowed to be recovered from the Operator concerned together with all expenses incurred in connection with the deactivation and/or proceedings against such operators before the TDSAT. In case the same is a result of Arrears, dishonour of cheques, the operator concerned ought to be debarred from carrying out the business of a Distributor of TV Channels for atleast one year or till such time he pays up 1.5/2 times the amount in arrears. However for piracy, the minimum period for disqualification ought to be for a minimum period of 1 year.

: MSMD further states that Distributors of TV Channels being made amenable to a licensing regime would perhaps have added meaning if freedom to contract and free interplay of market forces are allowed. While the licensing regime would ensure basic hygiene about the operator's business, viz. compliance of QOS Regulations, the free contractual dispensation and market forces would complement each other to ensure a

more equitable Distribution Industry for the Pay TV Market where stakeholders are compensated adequately basis the nature, quality and type of effort that they put in their respective businesses. It is also submitted that some basic eligibility criteria be evolved so that persons with neutral records may only enter the fray and not one against whom criminal cases are pending or against whom convictions have been read out by a Judge or who has had a past sentencing of imprisonment or who has a proven track record of creating nuisance, perpetrating hooliganism and resorting to vandalism at broadcaster's place of business.

: In the Telecom Sector, TRAI on its website publishes data pertaining to the monthly subscriber growth of individual telecom service providers viz. Airtel, Vodafone, Reliance, Tata, etc. TRAI is requested to also make it mandatory for MSOs/LCOs/HITS Operator/DTH Operator to declare their subscriber base to the Authority on a monthly/quarterly/half yearly basis and put the figures in the public domain. However if it is felt that such an exercise would be unwieldy and voluminious, it is requested that the Authority at the very least makes it mandatory for MSOs to declare their subscriber base in National Newspapers in case they operate in more than one district, or a state level newspaper in case they operate in only one district. Similarly DTH/HITS Operators be also made to declare their subscriber base in leading National Papers. This shall result in much needed transparency, and shall without doubt be useful to various stakeholders including the Government. This shall also give an idea about the penetration of Cable and Satellite Television in India. The methodology of arriving at the Subscriber base may also be indicated. TRAI may also stipulate the format of reporting such Subscriber base to the Authority. Only Current, Active and Paying Subscribers should be reported, and not those who had at one point of time been activated and later deactivated. Also Multiple counting of an individual subscriber should be done in case he has opted for more than one package, or when he has sought for additional connections in his home.

D. Registration of Interconnection Agreements

I. Whether it should be made mandatory for all interconnect agreements to be reduced to writing?

II. Whether it should be made mandatory for the Broadcasters/ MSOs to provide signals to any distributor of TV channels only after duly executing a written interconnection agreement?

III. Whether no regulatory protection should be made available to distributors of TV channels who have not executed Interconnect Agreements in writing?

Comments:

MSMD supports the Authority's endeavor to further professionalize the sector. The above questions thus are accordingly answered in the affirmative. Similarly, the regulations should mandate that all amendments/modifications to agreement should be reduced in writing and shall not take effect unless it is executed in writing.

IV. How can it be ensured that a copy of signed interconnection agreement is given to the distributor of TV channels?

V. Whether it should be the responsibility of the Broadcaster to hand over a copy of signed Interconnect Agreement to MSO or LCO as the case may be, and obtain an acknowledgement in this regard? Whether similar responsibility should also be cast on MSOs when they are executing interconnection agreements with their affiliate LCOs?

VI. Whether the broadcasters should be required to furnish a certificate to the effect that a signed copy of the interconnect agreement has been handed over to all the distributors of television channels and an acknowledgement has been received from them in this regard while filing the details of interconnect agreements in compliance with the Regulation?

Comments:

An acknowledgement issued by the MSO in favour of the broadcaster ought to be taken as conclusive proof of the broadcaster having handed over a copy of signed interconnect agreement to the MSO concerned. Moreover once the MSO concerned has paid on the basis of an invoice raised by the broadcaster, it ought to be presumed that the MSO

concerned has in its possession a copy of such interconnect agreement. There should be a corresponding obligation on the MSOs/LCOs to seek a copy of the Subscription Agreement within 30 days from the date of the agreement from the Broadcaster. Such a request should mandatorily be made by a letter sent through Speed Post or Registered Post. In the event, an MSO/LCO does not exercise its right to claim a copy of the Subscription Agreement within further 15 days then it shall be deemed that the copy of the Subscription Agreement has already has been furnished to the MSO/LCO. Yes. MSOs should also provide copy of the Subscription Agreement to the LCO and the same should also be registered with TRAI has in case of a Broadcaster. The Broadcaster should also be allowed access to such agreement either through the Regulator or through MSOs/LCOs. Certification it is submitted shall be a cumbersome process, and in any event, on a specific complaint, TRAI can always look into the compliance issues.

VII. Whether the periodicity of filing of Interconnect agreements be revised?

Comments:

It is requested that the periodicity in such cases be half yearly.

VIII. What should be the due date for filing of information in case the periodicity is revised?

Comments:

30th April and 31st October of a year ought to be the due date for filing of information.

IX. What should be a reasonable notice period to be given to the Broadcaster/ DTH operator as the case may be, by the Authority while asking for any specific interconnect agreements, signed subsequent to periodic filing of details of interconnect agreements?

Comments:

A notice period of one month should suffice.

X. What should be the retention period of filings made in compliance of the Regulation?

Comments:

We respectfully leave this query to the decision of the Authority, suffice it to say that the parties usually retain filings till the tenure of the agreements that form the subject matter of the filings and in the event of any dispute the same may at any time be retrieved from the parties by the Authority on reasonable notice.

XI. Whether the broadcasters and DTH operators should be required to file the data in scanned form in CDs/ DVDs?

Comments:

This is not advisable as the existing Regulations ensure comprehensive reporting. Moreover the same shall result in unintended delays, mounting pressure on scarce resources and also be cost ineffective. The chances of errors and other misplaced inadvertences cannot also be ruled out. Further confidentiality shall to a great deal be compromised.

XII. Whether the interconnection filings should be placed in public domain?

XIII. Is there any other way of effectively implementing non-discrimination clause in Interconnect Regulation while retaining the confidentiality of interconnection filings?

Comments:

(i) MSMD is of the opinion that a Regulation should have the effect of curtailing rather than promoting disputes. It is submitted that as no two distributors of TV Channels are similar or identical, there cannot be non discriminatory treatment amongst fundamentally disparate entities. Again mandatory requiring of placing interconnection terms in the public domain is unheard of anywhere in the world. Also such an arrangement would call for reciprocal obligations on the part of Operators as well, in that they shall have to provide uniform declarations to all broadcasters. It is also widely known that declarations by operators to various broadcasters are not identical, particularly when it concerns subscriber base. Also it is unlikely that Operators shall prefer entering into identical agreements with all broadcasters. Such a proposition would inevitably lead to internal affairs being placed in the public domain thereby triggering more disputes and greater harm than any good. It also needs to be appreciated that Operators shall not be entering into contracts with Broadcasters alone. They shall be entering into a host of other contracts say with middle-ware providers, and other service providers that shall have a bearing on the performance of the contract entered into by and between the operator and the broadcaster. Charges levied on subscribers by last mile operators are hardly ever in the public domain. Accordingly

when most of such other contracts would be out of the public domain, it does not make sense at all that only interconnection agreements be placed in the public domain.

(ii) It is further submitted that no fiduciary relationship subsists between a broadcaster and an operator, as both shall be dealing at an arms length, on a principal to principal basis. As stated, the broadcaster is in a far more vulnerable position as declarations by operators with regard to subscriber bases vary from one broadcaster to another.

(iii) The law cannot police the fairness of every commercial contract by reference to moral principles. It frequently appears with hindsight…that one contracting party had knowledge of facts which, if communicated to the other party, would have protected him from loss. However, subject to well recognized exceptions, and in all arms length transactions, the law does not and should not undertake the reopening of commercial transactions in order to adjust losses. (1989 2 All ER 952)

(iv) This reflects the sovereignty of certainty over justice in the interests of freedom of contract and the finality of transactions rather than securing standards of commercial morality and fairness. To impose general standards of good faith and reasonableness would be to promote uncertainty, the court being the subjective adjudicator on what is reasonable when a dispute arises. (Cole TRH, The Concept of Reasonableness in Construction Contracts, Duggan, Bryan and Hanks, "Contractual Non Disclosure", op cit, p 14, discussed in Chapter Two, "Good faith in Disclosure."

(v) In Hospital Products V United States Surgical Corporation, Gibbs CJ held:

The fact that the agreement between the parties was of a purely commercial kind and that they had dealt at arm's length and on an equal footing has consistently been regarded by this court as important if not decisive in indicating that no fiduciary duty arose."

(1984) 156 CLR 41

(vi) Ibid at page 70, see also Wilson J at 118-119 as to the reluctance of courts to allow the extension of equitable principles into the domain of commercial relationships where the parties are dealing at arms length, and Dawson J at 149 who also discussed the undesirability of extending fiduciary duties to commercial relationships where the parties are dealing at arm's length from one another.

(vii) One of the primary concerns of business is to arrange its affairs so that at the very least a reasonable amount of profit flows. A business's stock of information can be its most important asset. The loss of control over the exploitation of this information has significant effects on profits due to the loss of the competitive advantages which access to and control over superior information gives.

(viii) Again there are appropriate remedies provided under the RTI Act, whereby serious and genuine seekers of information can place their request for information before the designated officer who shall forward the same before TRAI and the Authority from its archives can render the information . Attached is an article:

"Private firms not exempted under Right to Information Act
By Sriparna

Tuesday, 27 February 2007, 11:00 hrs IST

New Delhi: India's private sector companies are no more exempted by the Right to information act. M.M. Ansari, information commissioner at the Central Information Commission that oversees the implementation of the Right to Information (RTI) Act, 2005, told a national daily that as long as these companies reported to a regulator or a government department, they were within the purview of the law.

The commission said the companies would not have to appoint information officers to deal with right-to-information demands the way government entities do. Applicants will route their requests through the relevant agency.

He said that information on telecom companies such as Bharti Airtel, the largest mobile telephony firm, could be accessed through the Telecom Regulatory Authority of India; for banks through the Reserve Bank of India; and on brokerages and foreign investors active in stock markets from the Securities and Exchange Board of India.

"Applicants have every right to seek information on a private company even though it is in the private sector, if it reports to a government body," said Ansari, citing sections of the Act that made this possible.

Only applications that served public interest would be dealt with, not

those that sought to erode a company's competitive position, he adds. The message: you can ask a cola company for details on how much water it used and where the water came from, but not the formula of its fizzy drink. If there is any difference of opinion on what constitutes public interest and what doesn't, the commission will intercede and decide."

(ix) In Australia, the Freedom of Information Act was enacted in December 1982. It gave citizens more access to the Federal Government's documents. With this, manuals used for making decisions were also made available. But in Australia, the right is curtailed where an agency can establish that non-disclosure is necessary for protection of essential public interest and private and business affairs of a person about whom information is sought.

(x) Again TRAI on a specific complaint being received can always get hold of documents either from its own archives or by asking the company concerned to furnish information and documents. Again in cases of specific complaints of discrimination, the Hon'ble TDSAT may be approached by the aggrieved.

CONCLUSION:

I. REGULATORY IMPACT ANALYSIS:

(1) It has been accepted in a majority of countries that a Regulatory Impact analysis has to precede any Regulatory formulation. It is requested that such efforts and analyses are also undertaken in India prior to any Regulatory formulation, and the findings shared with the industry as well, to ensure transparency so that all the stakeholders' interests are duly taken care of and the regime that the Regulations seek to usher in is equitable, fair and just for all stakeholders concerned.

(2) In the United States for more than a quarter century, agencies have been required to perform detailed regulatory impact analyses before issuing major regulations. Under E.O. 12291 (issued in February 1981 by President Reagan) and E.O. 12866 (issued by President Clinton and still in effect), government agencies must analyze the expected benefits and costs of major regulatory proposals, as well as potential alternative policies.

(3) E.O. 12866 describes the specific criteria such analyses must meet, including:

"(i) An assessment, including the underlying analysis, of benefits anticipated from the regulatory action (such as, but not limited to, the promotion of the efficient functioning of the economy and private markets . . . .) together with, to the extent feasible, a quantification of those benefits;

(ii) An assessment, including the underlying analysis, of costs anticipated from the regulatory action . . . together with, to the extent feasible, a quantification of those costs; and

(iii) An assessment, including the underlying analysis, of the costs and benefits of potentially effective and reasonably feasible alternatives to the planned regulation. . . ."

(4) The specific analytical techniques to be used in such evaluations are further described in guidance from the Office of Management and Budget ("OMB"). Specifically, OMB Circular A-4, issued September 17, 2003, presents "guidance to Federal agencies on the development of regulatory analyses." Circular A-4 requires that regulatory analyses include "(1) a statement of the need for the proposed action, (2) an examination of alternative approaches and (3) an evaluation of the benefits and costs...." It also requires agencies to "Identify a baseline....normally a 'no action' baseline: what the world will be like if the proposed rule is not adopted." Most importantly, OMB requires that "Before recommending Federal

regulatory action, an agency must demonstrate that the proposed action is necessary," and "if the regulation is designed to correct a significant market failure, [the agency] should describe the failure both qualitatively and (where possible) quantitatively. *You should show that a government intervention is likely to do more good than harm.*" The Moot question to be asked is whether the hypothesized benefits to some consumers represent a welfare gain or, alternatively, a transfer payment namely a "robbing Peter to pay off Paul" scenario. The OMB guidelines specifically prohibit counting transfers from one economic group to another as a benefit or cost of a government regulation. To meet the OMB Standard any regulatory formulation would need to explain whether the benefits received by "some" consumers represent net benefits to society or, alternatively, simply transfers from other economic actors (e.g., consumers, producers or both).

II. WHAT MAKES A GOOD REGULATION:

(1) Irrespective of the objectives of regulation, there are certain common principles that should apply in framing new regulation as well as reforming older frameworks. The UK's Better Regulation Task Force sets out five Principles of Good Regulation:

· ***Proportionality***
Policy solutions should be appropriate for the perceived problem or risk: you don't need a hammer to crack a nut!

· ***Accountability***
Regulators/ policy officials must be able to justify the decisions they make and should expect to be open to public scrutiny

· ***Consistency***
Government rules and standards must be joined up and implemented fairly and consistently

· ***Transparency***
Regulations should be open, simple and user-friendly. Policy objectives including the need for regulation, should be clearly identified and effectively communicated to all stakeholders

· ***Targeting***
Regulation should be focused on the problem. You should aim to minimize side-effects and ensure that no unintended consequences will result from the regulation being implemented.

(2) The Task Force also noted that alternatives to regulation should always be considered and consulted on:

· ***No intervention***
Is it really necessary or feasible to intervene?

· ***Information and Education***
It may be more effective and cost effective to provide users with information, for example through advertising or media campaigns.

· ***Self Regulation***
Will introducing voluntary codes of practice be as - or more - effective than implementing compulsory regulation?

· ***Incentive-based Structures***
Can you introduce targets, financial or trading incentives to achieve better standards instead of introducing regulation?