

Shri A. K. Sawhney, Member, TRAI
cc Shri R. K. Arnold, Secretary, TRAI

14 April 2009

NDS Comments on Consultation Paper on DTH Issues Relating to Tariff Regulation and New Issues Under Reference

Dear Mr Sawhney,

NDS welcomes this opportunity to provide a written response to the Consultation Paper on DTH Issues Relating to Tariff Regulation and New Issues Under Reference. NDS would also welcome the opportunity to present its recommendations to and discuss them further with TRAI at your convenience.

NDS is the world's leading vendor of digital conditional access systems, with over 99 million active NDS smart cards, set top boxes and authorised devices incorporating its technology worldwide. Many of the world's largest pay TV platforms use NDS conditional access technology including DirecTV (US), BSkyB (UK), Sky Italia, DirecTV Latin America, SkyLife (South Korea), Tata-Sky, Astro (Malaysia) and Foxtel (Australia). NDS is also the world's second largest provider of set top box middleware, with over 98 million set top boxes deployed, and a leading provider of personal video recorder software and firmware, with over 17 million personal video recorders deployed.

NDS employs over 1,000 software engineers in its Bangalore research and development facility, working on set top box middleware, interactive applications, personal video recorder software and mobile television software.

NDS's customers in India include Hathway Cable and Datacom and DEN for digital cable solutions and Tata-Sky and Bharti Airtel for DTH solutions. NDS is a key player in content protection for IPTV and also has a full range of content protection and interactive solutions for mobile television platform standards including DVB-H/-SH and MediaFLO. NDS technology supports and is used by nearly 5 million subscribers in India today.

NDS is thus a significant stakeholder in the current Indian pay TV market and is committed to increasing its stake as this market expands and new markets develop.

NDS has been engaged in regulatory consultation on broadcast pay television since April 2002, before TRAI assumed authority for some aspects of broadcast and cable regulation.

NDS's responses are consistent with and similar to its responses to a range of over 20 TRAI consultations over the past five years, including its Response to TRAI's Consultation Paper on Restructuring of Cable Services, 22 April 2008. That, in pages 11 to 15 contains further details and references of some of the NDS positions outlined here.

In particular, NDS has consistently made the following recommendation, since 2004:

TRAI should construct a light regulatory framework that promotes and enhances competition between platform operators and platform types (DTH, cable, IPTV etc).

Unfortunately, TRAI appears neither to be constructing a light regulatory framework, nor promoting and enhancing competition, but rather imposing ever more complex regulations across the various platforms.

It almost appears as if TRAI is attempting to run the pay TV industry – albeit remotely and without advantage or profit for itself – rather than to regulate it.

NDS's specific responses and recommendations are set out in the following response.

NDS further recommends that TRAI set and publicly communicate clear guidelines on the criteria it would use to trigger automatic relaxation in the regulation of the entire pay TV broadcasting sector. These could include a minimum threshold level of market share by competitive suppliers to be achieved within a designated geographical market, for example a Metro, state or collection of states (e.g. 15% set by the US FCC) and specific “expiry” or “sunset” dates, after which specific regulations would automatically be relaxed or removed.

Please do not hesitate to contact me if you need any clarifications or have any questions on this submission, or if you would like to arrange a presentation of and / or further discussion on these recommendations.

Yours sincerely

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Response to Specific Questions

5.2 Tariff fixation for DTH services

5.2.1 Whether there is a need to fix tariff for DTH?

No. NDS sees no need in such a highly competitive pay TV market as India's to fix any wholesale or retail tariffs for pay TV content on DTH, nor any need to fix such tariffs for pay TV content on any other platform.

Notwithstanding this objection, the current situation where one platform type – cable – has both its wholesale and retail tariffs tightly controlled by TRAI, artificially distorts the entire pay TV market.

In the interests of level playing field regulation, it would be better not to fix any pay TV tariffs, including for cable. Regulating wholesale tariffs across all platforms including DTH would be a less preferable option, but fairer to the DTH platforms than that in place today, at the expense of fairness to some content providers that wish to charge more than the current tariff limits allow for higher cost content, e.g. sports and especially cricket.

5.2.2 If yes, whether tariff regulation should be at wholesale level or at retail level or both, i.e., whether tariff should be regulated between broadcasters and DTH operators or between DTH operators and subscribers or at both the levels?

If regulation means price fixing or capping, then no, neither is necessary and both should be avoided.

However, TRAI should ensure transparency and level playing field nature of tariff regimes by appropriate means.

At the wholesale level, this would enable TRAI (and where necessary, other regulatory bodies) to make fair, like-for-like comparisons between the pricing of broadcasters' content and other service options as presented to different pay TV platforms, in order to determine whether the level playing field regulations are being adhered to.

At the retail level, this would enable subscribers to make fair, like-for-like comparisons between the pay TV platform operators' pricing of content and other service options.

In the interests of level playing field regulation, it would be better not to fix any pay TV tariffs, including for cable. Regulating wholesale tariffs across all platforms including DTH would be a less preferable option, but fairer to the DTH platforms than that in place today, at the expense of fairness to some content providers that wish to charge more than the current tariff limits allow for higher cost content, e.g. sports and especially cricket.

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5.2.3 Whether tariff regulation for DTH at wholesale level should be in terms of laying down some relationship between the prices of channels/ bouquets for non-addressable platforms and the prices of such channels/ bouquets for DTH platform? If yes, then what should be the relationship between the prices of channels/ bouquets for non-addressable platforms and the prices of such channels/ bouquets for DTH platform? The basis for prescribing the relationship may also be explained.

No. In addition to NDS's general objection to tariff fixing for pay TV content, constructing a false dependency of pricing of pay TV content for addressable DTH platforms on the pricing of the same for non-addressable cable platforms is unreasonable.

The precise numbers of actual, authorised subscribers for specific channels / bouquets on the addressable DTH platforms can accurately be determined, whereas these numbers remain a mystery on the non-addressable cable platforms. The degree of under-declaration of subscribers on non-addressable cable platforms can vary widely and thus remains a subject of continuous debate and negotiation – debate and negotiation from which the DTH platform operators are excluded and over which they have no control.

If there is to be any tariff control for DTH services, and if there is to be an external yet not directly related reference, that reference should be to the most similar cable pay TV services – i.e. addressable pay TV cable services.

5.2.4 Whether tariff regulation for DTH at wholesale level should be in terms of fixation of prices for different bouquets/ channels? If yes, then the prices for different bouquets/ channels may be suggested. The methodology adopted for arriving at the prices for such bouquets/ channels may also be elucidated. Further, the methodology to fix price for a new pay channel may also be given.

No, any tariff regulation should avoid price fixing or capping by the regulator.

NDS offers no suggestions on methodologies to fix prices for different bouquets and channels – whether established or new. NDS believes that any such methodologies devised by TRAI are likely to be deeply flawed due to oversimplification on the one hand and inflexibility to deal with a very dynamically changing content market on the other.

As evidence of oversimplification, the premise that all content comprising a TV channel should have the same maximum price constraint is clear oversimplification, imposing the utilitarian regulation from a telecommunications environment onto a broadcasting environment.

As evidence of inflexibility to deal with a very dynamically changing content market, NDS notes that the cost of TV broadcasting rights for Indian cricket have soared in recent years, yet prices for individual channels have not been permitted to rise significantly and neither have any exemptions been made for specific categories of content, e.g. sports.

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TRAI should, however, ensure transparency and level playing field nature of tariff regimes by appropriate means.

At the wholesale level, this would enable TRAI (and where necessary, other regulatory bodies) to make fair, like-for-like comparisons between the pricing of broadcasters' content and other service options as presented to different pay TV platforms, in order to determine whether the level playing field regulations are being adhered to.

5.2.5 Whether retail regulation of DTH tariff should be in terms of maximum retail prices of various channels or is there any other way of regulating DTH tariff at retail level?

No. Notwithstanding NDS's general objection to tariff fixing or capping for pay TV content, there is actually no need to fix or cap prices for pay TV content for addressable DTH platforms, since they provide their services in a highly competitive environment and part of their competition – that from cable – is already subject to tariff control.

NDS notes that even if, as it recommends, the cable pricing and tariff caps were also removed, the competition between cable, DTH and in future other pay TV platforms would not diminish at all and believes that this would be sufficient to ensure optimal pricing for consumers from at least some service providers.

Furthermore, NDS notes that fixing maximum retail prices of various channels has to date involved the deeply flawed assumption that all channels are of equal value to the subscriber. This is patently not the case, given the different viewer ratings for different content and a wide range of other factors. NDS does not believe that regulators anywhere are well equipped to determine content value on behalf of subscribers.

TRAI should, however, ensure transparency of tariff regimes by appropriate means. At the retail level, this would enable subscribers to make fair, like-for-like comparisons between the pay TV platform operators' pricing of content and other service options. NDS believes that this is already the case in India's highly competitive pay TV market, with multiple independent sources of information on the various offerings also available.

5.2.6 In case DTH tariff is to be regulated at both wholesale and retail levels, then what should be the relationship between the wholesale and retail tariff?

In addition to NDS's general objection to tariff fixing or capping for pay TV content, there should be no regulator-defined relationship between the wholesale and retail tariffs.

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5.3 Comparison with CAS

5.3.1 Whether the basic features of tariff order dated 31st August, 2006 for cable services in CAS areas, namely fixing of ceiling for maximum retail prices of pay channels, at the level of the subscriber fixing of ceiling for basic service tier and standard tariff packages for renting of Set Top Boxes should be made applicable to DTH services also?

No. Notwithstanding NDS's objection to tariff fixing for pay TV content, since DTH operates in a highly competitive environment with cable in many urban areas, there is no justification for any of these.

Furthermore, NDS believes that these features of the cable channel tariff orders should be removed also.

5.3.2 Whether the ceiling for maximum retail prices of pay channels for DTH should be the same as laid down for cable services in CAS areas?

No. Notwithstanding NDS's objection to tariff fixing or capping for pay TV content, since DTH operates in a highly competitive environment with cable in many urban areas, there is no justification for this.

Furthermore, NDS believes that this cable channel tariff restriction should be removed.

5.3.3 Whether DTH operators should be mandated to provide a basic service tier of FTA channels and if so, what mechanism should be adopted by DTH operators to provide the service of unencrypted Basic Service Tier, which is available in CAS areas without having to invest in a Set Top Box?

No. There is absolutely no need for this. Subscribers who only want a basic service tier of free-to-air channels have a range of options, including:

- if they own a DTH pay TV set top box, using it to receive Doordarshan DirectPlus
- if they do not want the option of pay TV services, purchasing a free-to-air satellite set top box compatible with Doordarshan DirectPlus
- if they live in cabled areas, taking out a basic cable subscription.

5.3.4 Whether the DTH operators should be required to make available the pay channels on a-la-carte basis to the subscribers as the cable operators are required to do in the CAS areas?

No. Moreover, the same restriction should also be removed for the cable CAS areas.

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5.3.5 Whether standard tariff packages for renting of Set Top Boxes should also be prescribed for DTH operators?

No. Notwithstanding NDS's objection to tariff regulation for renting and purchasing of set top boxes, because these are already applied to cable set top boxes in the CAS areas, and because DTH operators have to compete with the CAS area STB offerings, there is no need for such regulations in the DTH environment.

Furthermore, NDS recommends removing the standard tariff packages for renting cable set top boxes, as these have served their purpose, having set an expectation among subscribers of what can be achieved for a given tariff. The focus now should be on permitting choice and encouraging differentiation of services, not imposing lowest common denominator features, functionality and prices on all pay TV subscribers.

5.4 Other Relevant Issues

5.4.1 Whether the carriage fee charged by the DTH operators from the Broadcasters should also be regulated? If yes, then what should be the methodology of regulation?

No. However, notwithstanding NDS's objection to tariff fixing or capping for pay TV content provision, if the tariffs are to be regulated, then the carriage fees should be regulated in a similar 'symmetric' way. However, neither content fees nor carriage fees should be fixed or capped.

5.4.2 Whether any ceiling on carriage fee needs to be prescribed? If yes, then whether the ceiling should be linked with the subscriber base of the DTH operator or should it be same for all DTH operators?

No. However, notwithstanding NDS's objection to tariff fixing or capping for pay TV content and carriage, if carriage fees are to be regulated, then similar flexibility should be permitted in the setting of carriage fees according to various objective criteria including subscriber base as is permitted in the setting of content fees.

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5.4.3 Comments may also be offered on the prayers made in the writ petition of M/s Tata Sky Ltd.

6.1: Provisioning of new services on DTH platform

6.1.5 In view of the above situation, the following issues are posed for comments of the various stakeholders:

a) Whether Movie-On-demand, Video-on-Demand, Pay-per-view or other Value added services such as Active Stories should be recognized as a broadcast TV channel?

NDS has no preference on how these are defined, but strongly recommends that, however they are defined, such services should not only be permitted, but encouraged, in order to provide subscribers with real choices.

b) In case these are termed as broadcast TV channels, then how could the apparent violation of DTH license provision (Article 6.7, Article 10 and Article 1.4), Uplinking and Downlinking guidelines be dealt with so that availability of new content to consumer does not suffer for want of supporting regulatory provisions?

If the DTH license provision is found to be wanting due to lack of maintenance and updates, then it should be updated to enable new services and not be used to inhibit or impose indefinite delay on such services.

c) What should be the regulatory approach in order to introduce these services or channels while keeping the subscriber interest and suggested alterations in DTH service operations and business model?

NDS has no specific suggestions to offer, beyond that the lightest possible regulatory framework should be tried first.

d) In case these are not termed as broadcast TV channels, then how could such a channel be prevented from assuming the role of a traditional TV channel? How could bypassing of regulatory provisions- Uplinking/ Downlinking, Programme Code, and Advertisement Code be prevented?

NDS has no suggestion to offer regarding the first question.

Concerning bypassing of regulatory provisions, it should be possible to require DTH operators to comply with the relevant Codes as if they were broadcasters – or other relevant entities defined in the Codes – until such time as the relevant Codes are updated to include specific reference to DTH operators, if such references are actually required.

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e) Whether it should be made mandatory for each case of a new Value added service to seek permission before distribution of such value added service to subscribers? Or whether automatic permission be granted for new services on the basis that the services may be asked to be discontinued if so becomes necessary in the subscribers' interest or in general public interest or upon other considerations such as security of state, public order, etc.?

The latter option is preferable, since the former option would merely add bureaucratic delay and uncertainty to the launch of new services.

Any service launched against either the subscribers' interest, or the general public interest, or security of state, public order etc, would by definition come to the regulator's attention very quickly, by virtue of keen competition and a free press.

f) In view of above, what amendments shall be required in the present DTH license conditions and Uplink/ Downlink guidelines?

NDS has no specific amendments to propose.

g) How could the selling of advertisement space on DTH channels or Electronic Program Guide (EPG) or with Value added Service by DTH operators be regulated so that cross-holding restrictions are not violated. In this view, a DTH operator may become a broadcaster technically once the DTH operator independently transmits advertisement content which is not provided by any broadcaster. How could the broadcaster level responsibility for adherence to Program code and Advertisement Code be shifted to a DTH operator, in case the operator executes the sale and carriage of advertisements?

NDS has no suggestions to offer on the first question.

It should be possible to require DTH operators to comply with the relevant Codes as if they were broadcasters – or other relevant entities defined in the Codes – until such time as the relevant Codes are updated to include specific reference to DTH operators, if such references are actually required.

h) Traditionally advertisements as well as program content fall in the domain of the Broadcasters. In case, DTH operator shares the right to create, sale and carry the advertisement on his platform, then the channels are necessarily distinguished on the basis of who has provided the advertisement with the same program feed. In what way any potential demand to supply clean feed without advertisement by a DTH operator be attended to (by a broadcaster)? Should 'must provide' provision of the Interconnect Regulation be reviewed, in case supply of clean feed is considered necessary?

NDS notes that advertising insertion onto broadcasters' channels by DTH operators is a very different proposition to DTH operators providing advertising that is not directly

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related to any broadcasters' channel, but forms part of a stand-alone interactive service provided by the DTH operator – for example a weather forecast service application.

In the first case, there clearly needs to be agreement between the broadcaster and the DTH operator. In the second case, the broadcasters are not directly involved. For cases that lie between these scenarios, the issues are more complex and NDS has no specific recommendations, except that such areas should not be over-regulated from the outset and are best left to commercial negotiations between the directly affected parties.

NDS further notes that, even if TRAI chooses to amend the 'must provide' provision of the Interconnect Regulation, in order to simplify DTH operators' own advertising insertion, provision of a "clean feed" is not necessary and may not even be as useful as providing scheduling metadata and advertising break signalling in agreed formats.

6.2: Radio channels on DTH services

6.2.4 In view of the above, the following issues may be posed for consultation:

a. Whether carriage of radio channels by a DTH operator be permitted? Should such permission cover all kind of radio channels to be carried?

Yes. This is common practice in many other countries, as also is carriage of radio channels on cable networks.

Such carriage must, however, be arranged under the agreement of the relevant radio broadcasters and content providers.

b. In case this is permitted, whether DTH license, Uplink/ Downlink guidelines, Conflict of business interests conditions with existing radio system operators, should be amended keeping in view, the incumbent or new DTH operators?

Yes, as appropriate. NDS has no specific suggestions to offer.

c. If so, what changes are needed in the existing regulatory provisions so that the general policy of must provide and a non-discriminatory offering of channels be extended to between radio channels and DTH operators?

In addition to NDS's general objection to the must provide regulations, there is certainly no need to extend the must provide nor non-discriminatory offering of channels to radio channels. TRAI ought to be simplifying regulations, not imposing a slew of new ones.

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