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PART III, SECTION 4

TELECOM REGULATORY AUTHORITY OF INDIA

NOTIFICATION

New Delhi, the 10<sup>th</sup> February, 2014.

THE TELECOMMUNICATION (BROADCASTING AND CABLE) SERVICES  
(FOURTH) (ADDRESSABLE SYSTEMS) TARIFF (THIRD AMENDMENT) ORDER,  
2014

(No. 2 of 2014)

No. 1-9/2012 - B&CS. ----- In exercise of the powers conferred by sub-clauses (ii), (iii), (iv) and (v) of clause (b) of sub-section (1) and sub-section (2) of section 11 of the Telecom Regulatory Authority of India Act, 1997 (24 of 1997), read with notification of the Government of India, in the Ministry of Communication and Information Technology (Department of Telecommunications), No.39 ,-----

(a) issued, in exercise of the powers conferred upon the Central Government by proviso to clause (k) of sub-section (1) of section 2 and clause (d) of sub-section (1) of section 11 of the said Act, and

(b) published under notification No. 39 (S.O. 44 (E) and 45 (E)) dated the 9<sup>th</sup> January, 2004 in the Gazette of India, Extraordinary, Part II- Section 3- Sub-section (ii), ----

the Telecom Regulatory Authority of India hereby makes the following Order further to amend the Telecommunication (Broadcasting and Cable) Services (Fourth) (Addressable Systems ) Tariff Order, 2010 (1 of 2010), namely:-

1. (1) This Order may be called the Telecommunication (Broadcasting and Cable) Services (Fourth) (Addressable Systems) Tariff (Third Amendment) Order, 2014 (2 of 2014).

(2) This Order shall come into force from the date of its publication in the Official Gazette.

2. In clause 3 of the Telecommunication (Broadcasting and Cable) Services (Fourth) (Addressable Systems ) Tariff Order, 2010 (1 of 2010) , (hereinafter referred to as the principal Tariff Order),-----

(a) after sub-clause (d), following sub-clause (da) shall be inserted, namely:----

“(da) “authorised agent or intermediary" means any person including an individual, group of persons, public or private body corporate, firm or any organization or body authorised by a broadcaster or multi-system operator to make available its TV channels to a distributor of TV channels and such authorised agent or intermediary, while making available TV channels to the distributors of TV channels, shall always act in the name of and on behalf of the broadcaster or multi-system operator, as the case may be;”

(b) for sub-clause (f), the following sub-clause shall be substituted, namely:---

“(f) “broadcaster” means a person or a group of persons, or body corporate, or any organization or body who, after having obtained, in its name, uplinking permission or downlinking permission, as may be applicable for its channels, from the Central Government, provides programming services;”

(c) for sub-clause (x), the following sub-clause shall be substituted, namely:----

“(x) “multi system operator” means a cable operator who has been granted registration under rule 11C of the Cable Television Networks Rules, 1994 and who receives a programming service from a broadcaster and re-transmits the same or transmits his own programming service for simultaneous reception either by multiple subscribers directly or through one or more local cable operators;”

(Sudhir Gupta)  
Secretary, TRAI

Note.1-----The principal Tariff Order was published in the Gazette of India, Extraordinary, Part III, Section-4 vide notification no. 11-14/2009- B&CS dated the 21<sup>st</sup> July 2010 and subsequently amended vide notifications No.1-9/2012 - B&CS dated the 30<sup>th</sup> April 2012 and No. 1-12/2012 -B&CS dated the 20<sup>th</sup> September 2013.

Note.2-----The Explanatory Memorandum explains the objects and reasons of the Telecommunication (Broadcasting and Cable) Services (Fourth) (Addressable Systems) Tariff (Third Amendment) Order, 2014 (2 of 2014).

## Explanatory Memorandum

### The need for amendment

1. The value chain in the distribution of television channels comprises the broadcaster, the Distribution Platform Operator (DPO), the last mile operator and the end consumer. The business of distribution of TV channels from the broadcaster to the consumer has two levels - i) bulk or wholesale level - wherein the distributor of TV channels i.e. DPO obtains the TV channels from the broadcasters, and ii) retail level - where the DPO offers these channels to the consumers, either directly or through the last mile operator. Amongst the DPOs, the Direct to Home (DTH) operator and the Internet Protocol Television (IPTV) operator serve the consumer directly, while the Multi System Operator (MSO) and the Headend in the Sky (HITS) operator generally serve the consumer through its linked Local Cable Operator (LCO).
2. At the wholesale level, as per the regulatory framework prescribed by TRAI, broadcasters are mandated to enter into interconnection agreements with the DPOs for the carriage of their TV channels. The broadcasters are to offer their channels on a non-discriminatory basis to all the DPOs in accordance with their Reference Interconnect Offer (RIO). The interconnection agreements are to be finalised on the basis of the commercial and technical terms and conditions specified in the RIO.
3. Many broadcasters, especially the larger ones, appoint authorised distribution agencies as intermediaries. Many such agencies operate as authorised agents for more than one broadcaster. These authorised distribution agencies have come to be popularly known as 'aggregators'. These aggregators have indulged in the practice of publishing the RIOs, negotiate the rates for the bouquets/channels with DPOs and enter into interconnection agreement(s) with them.
4. As on date there are around 239 pay channels (including HD and advertisement-free channels) offered by 55 pay broadcasters. These channels are distributed by 30 broadcasters/aggregators/ agents of broadcasters. Table I below shows the number of channels being distributed to the DPOs by the top three aggregators.

**Table I: Number of TV channels distributed by leading aggregators**

<b>Total number of pay TV channels : 239</b>		
	<b>Name of the aggregator</b>	<b>Number of channels</b>
1	M/s Media Pro Enterprise India Private Limited	76
2	M/s IndiaCast UTV Media Distribution Private Limited	36
3	M/s MSM Discovery Private Limited	28
	Total	140 (58.6%)

Thus, the distribution business of 58.6% of the total pay TV market available today is controlled by the top three aggregators. These channels include almost all the popular pay TV channels.

5. The bouquets being offered by the aggregators comprise popular channels of the multiple broadcasters they represent. Thus, for purely business considerations, DPOs have no option but to subscribe to these bouquets. It is alleged that, exploiting this fact, the aggregators further start to piggy-back more channels on these bouquets especially the ones that have very less standalone market value. The aggregators being in a dominant position use their negotiating powers to 'push' such bouquets to the DPOs. In such a scenario, at the retail end, the DPOs have no option but to somehow push these channels (though not necessarily in the form of the bouquets that they purchase from the aggregators) to the consumers so as to recover costs. Thus, in the process, the public, in general, ends up paying for 'unwanted' channels and this, in effect, restricts consumer choice. Moreover, since the aggregators distribute a large number of popular channels of different broadcasters, they are in a position to, in effect coerce DPOs and sell the channels at terms favourable to them.
6. Recently it also came to the notice of the Authority that an aggregator M/s Media Pro was offering channels of a broadcaster, the New Delhi Television Ltd., as a part of certain bouquets only to platform operators of cable TV sector and not to the DTH operators. The DTH platform was directly dealt with by the said broadcaster. In effect, the situation was one where different distribution platforms were being treated differently. On enquiry, the aggregator claimed that since the

broadcaster has bestowed the right only to distribute the channels to platform operators of cable TV sector it is in full compliance with the provisions of the regulations. However, as per the existing regulatory framework, the broadcaster is mandated to offer the same bouquet to all the distribution platforms. With this kind of arrangement with its aggregator, the broadcaster was, in effect, circumventing the regulations through an aggregator by creating a situation where the different DPOs (platforms) could be treated differently. It is a well established principle in law that what cannot be achieved directly, cannot be achieved indirectly. And, that is precisely what the broadcaster was able to do using the device of the aggregator.

7. The market distortions arising out of the current role assumed by the aggregators were amply reflected during the implementation of digital addressable cable TV systems (DAS), Phase I and Phase II. Several MSOs have complained that they were forced to accept unreasonable terms and conditions to obtain signals of the broadcasters through some of the major aggregators, that too at the fag end of the implementation deadline. According to the non-vertically integrated MSOs as well as smaller MSOs, they always get a raw deal. This impacted the smooth implementation of DAS. In the Open House Discussions (OHDs) held in various parts of the country on 'Issues related to Media Ownership', concerns have been vehemently voiced by various MSOs and LCOs regarding the monopolistic practices of the major aggregators. While the issue was being examined at the Authority, the Ministry of Information and Broadcasting (MIB) also, echoed the complaints from MSOs in this regard, through its reference to TRAI vide D.O. No. 16/1/2013-BP&L dated 23<sup>rd</sup> May 2013, requesting the Authority for reviewing the regulatory framework on this aspect.
8. The regulatory framework has been reviewed to bring clarity in the roles and responsibilities of the broadcasters and their authorised agents. Accordingly, a Consultation Paper, in the form of draft amendments to the existing interconnection regulations, tariff orders and the register for interconnect regulations, were uploaded on the website of TRAI, seeking comments/views of stakeholders. In response, 102 comments were received from the stakeholders. An OHD was also held in Delhi on 12th September 2013, wherein 170 stakeholders participated in the discussions. Further, in response to the opportunity given by the Authority during the OHD, 26 further comments were received from stakeholders. Taking into account the views/comments of the stakeholders and after detailed analysis of the issues involved, amendments to the following regulations and tariff orders are being notified simultaneously:

- i. The Telecommunication (Broadcasting and Cable Services) Interconnection (Seventh Amendment) Regulations, 2014 (1 of 2014),
  - ii. The Telecommunication (Broadcasting and Cable Services) Interconnection (Digital Addressable Cable Television Systems) (Third Amendment) Regulations, 2014 (2 of 2014)
  - iii. The Telecommunication (Broadcasting and Cable) Services (Second) Tariff (Tenth Amendment) Order, 2014 (1 of 2014),
  - iv. The Telecommunication (Broadcasting and Cable) Services (Fourth) (Addressable Systems) Tariff (Third Amendment) Order, 2014 (2 of 2014) and,
  - v. The Register of Interconnect Agreements (Broadcasting and Cable Services) (Fifth Amendment) Regulations, 2014 (3 of 2014).
9. The amendments incorporate the following changes to the existing regulatory framework. The framework defines a broadcaster as an entity having the necessary Government permissions in its name. Further, that only the broadcaster can and should publish the RIOs and enter into interconnection agreements with DPOs. However, in case a broadcaster, in discharge of its regulatory obligations, is using the services of an agent, such agent can only act in the name of and on behalf of the broadcaster. Further the broadcaster shall ensure that such agent, while providing channels /bouquets to the DPOs, does not alter the bouquets as offered in the RIO of the broadcaster. In case an agent acts as an authorised agent of multiple broadcasters, the individual broadcasters shall ensure that such agent does not bundle its channels or bouquets with that of other broadcasters. However, broadcaster companies belonging to the same group can bundle their channels.
10. A time frame of six months has been prescribed for the broadcasters to amend their RIOs, enter into new interconnection agreements and file the amended RIOs and the interconnection agreements with the Authority. While amending their RIOs, certain bouquets may require reconfiguration to align them with the amended regulatory framework. The method for working out the rate of such reconfigured bouquets has also been illustrated.

### **Stakeholder comments**

11. The response of the stakeholders can be broadly divided into two categories. One group, represented by leading/big broadcasters and aggregators, is against the proposed amendment whereas the other group, represented by DPOs, their

associations and small broadcasters, has supported the provisions of the proposed amendment and requested for its urgent implementation.

12. The broadcasters/aggregators have opposed the amendments on the ground that they are in violation of Article 19(1)(g) of the Constitution and on the ground of jurisdiction of TRAI in the said matter. They have stated that it is a competition issue and the Competition Commission of India (CCI) has sole jurisdiction over it. Apart from this, they have also stated that aggregators play a vital role in the distribution of TV channels and provide a balanced platform, especially to smaller broadcasters, for negotiations with the DPOs, who, according to the aggregators/broadcasters, have substantial negotiating power. This group of stakeholders have also stated that the practice of broadcasters to utilize distribution agencies/aggregators is a normal business practice as is prevalent in the other sectors like banking, telecom, insurance etc. and cannot be considered anti-competitive.
13. However, in contrast, and in a directly opposite stance, the small broadcasters, DPOs and cable operator associations, have stated that the proposed amendments would provide a level-playing-field and eliminate the monopolistic practices arising from the role that the aggregator has assumed viz. as surrogates for multiple major broadcasters. In support of the argument, one of the cable operator associations has stated that 186 cases were filed by MSOs and LCOs against Media Pro in TDSAT in the year 2012 which provides sufficient indication of the level of discontent amongst the DPOs vis-a-vis the aggregators. It has further stated that the maximum number of cases are against Media Pro and, unsurprisingly, there is no case filed by either DEN or Siti Cable against the aggregator, precisely because they are Media Pro's vertically integrated partners. It has also been opined by this set of stakeholders that removing the aggregator will reduce costs to consumers.

### **Analysis**

14. Taking into account the views/comments of the stakeholders and after detailed analysis of the issues involved, this amendment to the tariff order applicable for addressable systems is being notified. The succeeding paragraphs explain the objects and reasons of the provisions of this amendment order along with the analysis of the issues raised.



*Issue of jurisdiction*

15. One of the objectives laid out in the preamble of the TRAI Act is to protect the interests of the service providers and consumers of the sector as well as to promote and ensure its orderly growth. TRAI has the powers to frame 'ex-ante' rules/regulations to ensure that the objectives of the TRAI Act are met. In fact in a recent Judgment dated 6<sup>th</sup> December 2013, in the Civil Appeal No. 5253 of 2010 (Bharat Sanchar Nigam Ltd. Vs TRAI and Ors) the Hon'ble Supreme Court has made following observations:

*"..... under sub section 1 of Section 36 of TRAI Act, the Authority can make regulations to carry out the purposes of the Act specified in various provisions..."*

*".....we hold that the power vested in the Authority under section 36(1) to make regulations is wide and pervasive. The exercise of this power is only subject to the provisions of the Act and the Rules framed under section 35 thereof. There is no other limitation on the exercise of power by the Authority under section 36(1). It is not controlled or limited by section 36(2) or sections 11, 12 and 13. "*

Thus, it is well within the jurisdiction of TRAI to issue regulations and amendments thereto on the subject matter.

*Right to do business-Violation of 19(1)(g)*

16. Another issue is whether these amendments are violative of Art. 19(1)(g) of the Constitution of India? As discussed earlier, the aggregators are not independent entities; rather, they are authorised agents of the leading broadcasters whose channels they distribute. Further, through the aggregators, the broadcasters are able to realise dominant positions as described above. The aggregators make their own bouquets which are a mix of channels of various broadcasters including certain non-popular ones. The DPOs who take up these bouquets are then compelled to offer them to the consumers to recover costs. This activity of the aggregators is beyond the scope of their agency; it involves an act which the broadcaster is not authorised to do under the existing regulations. It is thus not in public interest and the protection of the right to do business cannot be claimed for this.
17. These amendments do not restrict a broadcaster from appointing an authorised agent or intermediary to facilitate in carrying forward its businesses. If authorised by a broadcaster, they have the freedom to carry out the assigned jobs. However, the same is to be done on behalf of and in the name of the concerned broadcaster.

In no business, can any authorised agent or intermediary go beyond the scope of the business of its principal. The present amendment prescribes certain responsibilities for the broadcasters in order to ensure that their authorised distribution agencies (aggregators) do not indulge in certain activities beyond the scope of the business of their principals (broadcasters). Further, the amendments seek to ensure that the broadcaster publishes its RIO and maintains its sanctity. This is in conformity with various provisions of existing interconnection regulations. Therefore, the current amendment to the interconnection regulations does not impinge upon the fundamental rights of the broadcasters and their authorised agents or intermediaries as granted to them under Art. 19(1)(g) of the Constitution.

#### *Principal and Agent*

18. It is well accepted that an agent always acts on behalf and in the name of its principal and the scope of action/activities of the agent cannot exceed that of the principal.
19. For example in the telecom sector, an agent does everything only on behalf of and in the name of the service provider (the principal) e.g. the consumer application form is prescribed only by the service provider and filled up by the consumer thereby entering into an agreement directly with the service provider. The agent, who could also be a local corner store or a *paan wallah*, merely facilitates the process. However, in the case of aggregators operating in the broadcasting sector, it is the aggregators who are combining the offerings of different principals (broadcasters) and are directly entering into agreements in their name with the DPOs. Invariably, the aggregators are going beyond the scope of business of their principals. Thus, the analogy between agents of other sectors like telecom, insurance etc. and aggregators in the broadcasting sector does not hold any ground. In fact, this amendment aligns them, in principle, with authorised agents in other sectors.

#### *Amendment to the Definitions of broadcaster/MSO/Authorised agent or intermediary*

20. In the cited amendments, the definition of a broadcaster has been amended and an authorised agent or intermediary has been separately defined. A broadcaster of a TV channel, prior to commencing its services, has to obtain certain clearances and permissions following an elaborate process. This procedure and process involves

registration of its channel by the broadcaster with the MIB under the elaborate Uplinking/Downlinking Guidelines. These Guidelines, apart from others, require security clearance of the channel as well as clearance of the key executives managing the business affairs of a broadcaster. The broadcaster is also required to coordinate with the Department of Space (DoS) for getting the required satellite bandwidth and related permission to use it. Hence, the broadcaster has a separate and distinct identity and this should be maintained. The aggregator, on the other hand, requires no such clearances or permission and so cannot proxy as a broadcaster. Therefore, there is a need to bring clarity to the entire regulatory framework.

21. The definition of the broadcaster has been amended to clarify, and place beyond all doubt, the exclusive role of the broadcaster in publishing the RIOs and entering into the interconnect agreements with the DPOs, as prescribed in the interconnection regulations. The definition of authorised agent or intermediary has been separately framed to clarify their facilitative role in the business of TV channel distribution both for the broadcasters and MSOs. The definition of MSOs has also been accordingly amended.
22. In summary, the above discussed amendments clearly bring out the distinct roles and responsibilities of a broadcaster and its authorised agent. This is expected to address the market distortions caused because of the present role assumed by the aggregators in the distribution of TV channels to various DPOs. They will also contribute to the orderly growth and overall development of the sector.

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