

April 14, 2009

**Submissions of ESPN Software India Private Limited (“ESIPL”) to
Telecom Regulatory Authority of India (“TRAI”) in response to the
Consultation Paper on DTH Issues Relating to Tariff
Regulation & New Issues Under Reference
 (“Consultation Paper”)**

**Kind Attention: Chairman
Telecom Regulatory Authority of India
Mahanagar Doorsanchar Bhawan,
Jawahar Lal Nehru Marg,
New Delhi – 110002.**

The Hon’ble Authority has requested stakeholder input on DTH issues relating to tariff regulation and new issues under reference from the Indian Ministry of Information and Broadcasting.

The following response is without prejudice to any of our rights. In particular we reserve our right to challenge:

- The release of this consultation paper.
- Any directions, tariff orders, regulations, recommendations or any other order(s) that may be made/passed by the Authority on the subject matter.

We submit that the Consultation Paper as released is premature. The Hon’ble Authority must first conduct a transparent and comprehensive review of the Indian pay-television (Pay-TV) industry for the following reasons.

In its decision of 15 January 2009, the Telecom Disputes Settlement & Appellate Tribunal (“TDSAT”) specifically ordered that the Telecommunication (Broadcasting and Cable) Services (Second) Tariff

(Eighth Amendment) Order 2007 dated 4 October 2007 be set aside and that the Hon'ble Authority "study the matter afresh ... and issue a comprehensive Order covering all aspects including the issue of subscription base in a non-addressable system."¹ It would not be prudent to introduce fresh regulations in respect of the DTH sector of the Pay-TV industry without the benefit of the Authority's findings in such a wide-ranging enquiry which the Hon'ble Authority has been ordered to undertake. In addition, as the current interim regime for DTH distribution sets tariffs by reference to the rates for non-CAS cable distribution,² it makes sense to first review and assess those rates pursuant to the 15 January 2009 order of the Hon'ble TDSAT before considering their applicability (or otherwise) to the DTH platform.

Further, we wish to remind the Authority that the non-CAS price ceiling fixed vide Tariff Order dated October 1, 2004 was merely an interim intervention and that it was to continue only until a final determination, by the Authority, of the various issues involved.³ It is disappointing that even after 4 years of that Order becoming effective, the Authority has not yet completed its final determination and that interim ceiling continues to impede the growth of broadcasting industry.

In particular, we refer to the following articulation of the TRAI's position on price regulation:

It must be emphasized that the regulation of prices as outlined above is only intended to be a temporary measure and till such time there is no effective competition. The best regulation of price is done through competition. Therefore, as soon as there is evidence that

¹ Order of Telecom Disputes Settlement & Appellate Tribunal dated 15 January 2009 in Appeal Nos 9(C) of 2006 (*MSO Alliance v TRAI & Ors*); 10(C) of 2007 (*SET Discovery Private Limited v TRAI*); 11(c) of 2007 (*Zee Turner Ltd v TRAI & Ors*); 12(C) of 2007 (*Star India Pvt Ltd v TRAI & Ors*); 13(C) of 2007 (*Intermedia Cable Communications Pvt Ltd v TRAI*) and 15(C) of 2007 (*SUN Network Ltd v TRAI*).

² See decisions of the Telecom Disputes Settlement & Appellate Tribunal dated 31 March 2007 in Petition No. 189(C) of 2006 and dated 14 July 2006 in petition no. 136(C) of 2006, which did not consider the issue of pricing applicable to add-on packs on DTH platforms.

³ Explanatory Memorandum to The Telecommunication (Broadcasting and Cable) Services Tariff Order 2004

*effective competition exists in a particular area price regulation will be withdrawn. TRAI will conduct periodic reviews of the extent of competition and the need for price regulation in consultation with all stakeholders.*⁴

This express promise of TRAI gives rise to a legitimate expectation on the part of consumers and industry participants alike that TRAI would periodically review the extent of competition in the Pay-TV industry and determine whether continued regulation was warranted. There have been no such reviews and in the meantime TRAI is proceeding on the basis of outdated assumptions despite the dramatic transformation of the Pay-TV industry over the past few years.

As detailed in our submissions in response to the Consultation Paper No. 15/2008 entitled “Interconnection Issues relating to Broadcasting and Cable Services”, the level of regulation is presently too high and is hindering the achievement of the very objectives that regulation is intended to achieve. In particular, the extremely low tariffs make it difficult for industry participants to invest in quality programming, digitization and infrastructure and in overall growth of the industry. Without investment, the industry will not be able to keep pace with technological developments, to the detriment of consumers. A cross-jurisdictional study of 14 jurisdictions in Asia, the United Kingdom and the United States of America has shown a direct link between investment and a market-focused regulatory environment.⁵

In particular, heavy regulation is likely to distort market uptake (or otherwise) of new technologies. As the Hon’ble Authority has noted, although a primary objective of regulation is to protect consumer interests, “at the same time it is apprehended that over-regulation in a

⁴ Telecom Regulatory Authority of India, *Consultation Paper on Issues relating to Tariff for Cable Television Services in Non-CAS Areas*, 2007, quoting its own recommendations of October 2004.

⁵ CASBAA, *Regulating for Growth: a Regulatory Regime Index for Asia Pacific Multichannel Television*, 2008

sector that is growing rapidly might have unforeseen consequences.”⁶ For this reason, many regulators adopt a more flexible attitude in respect of emerging technologies, such as IPTV in Singapore and Korea and mobile TV in Hong Kong.

There is a direct relationship between an effective, market oriented regulatory environment and digitization of the Pay-TV industry. A comprehensive study of relationship between the pay-TV pricing regulation and digitization of pay-TV networks in various countries shows that countries, like Australia, UK, Singapore, Malaysia, Japan and New Zealand, using flexible and free-market oriented rate regulation systems have amongst the highest rates of digital pay-TV penetration. Study also shows that stringent limits on pricing and packaging as imposed in countries like India and Taiwan affect the entire value chain with an adverse impact on digitization of, and network investment in, the Pay-TV industry.⁷

The current level of regulation is anomalous when compared with other media and entertainment sectors in India and with international best practice.⁸ For example, movies are immensely popular in India, yet the Government has not put any tariff restriction on such movies or their distribution, leaving pricing to be determined by market forces. As there is no tariff order/regulation governing ticket prices, a multiplex can charge a much higher amount for the same movie than a cinema hall.

To date, the setting of tariffs in the Pay-TV sector has not adequately taken into account the rate of growth in India’s economy, the cost of sourcing content and the diversity of cost structures for Indian broadcasters.

⁶ Telecom Regulatory Authority of India, *Consultation Paper on Issues relating to Broadcasting and Distribution of TV Channels*, 2004

⁷ CASBAA, *Regulating for Growth: a Regulatory Regime Index for Asia Pacific Multichannel Television*, 2008

⁸ The TRAI has itself acknowledged this: see its recommendations on Broadcasting & Cable Services dated 1 October 2004.

To give some examples of content costs in the sports broadcasting sector, it has been reported that:

- The BCCI recently sold the worldwide broadcasting rights for the Indian Premier League cricket tournament for nine years to Multi Screen Media and World Sport Group for Rs 8,200 crore (approximately US\$1.6 billion);
- ESPN STAR Sports paid a similarly large amount for worldwide broadcasting rights for the Twenty20 Champions League cricket tournament for ten years;⁹ and
- The Indian sub-continent rights for the football World Cup have substantially increased, from US\$2.5 million for the 2002 event, to US\$8 million for the 2006 event, to US\$42 million for the 2010 event.¹⁰

Inflation cannot by itself account for the increase in content costs. Further, Authority must also take into account the current recessionary impact on the broadcasting sector. The broadcasters today are facing the brunt of recession like any other sector. In recent years, broadcasters invested in extremely high quality programming resources.

With the current global economic crisis, the entire broadcasting industry has suffered rapid financial erosion. Flow of funds and liquidity in the sector has been severely affected due to depleting advertising spends by corporates. This in turn has had a negative impact on the advertising revenue of broadcasters, which makes them all the more reliant on subscription revenues, to cover content and infrastructure costs.

In the circumstances imposing extreme form of tariff regulations will become a major threat to the very survival of the channels, thereby reducing consumer choice.

⁹ *TV Sports Markets*, 16 January 2009, Vol 13 No 1.

¹⁰ *TV Sports Markets*, 4 July 2008, Vol 12 No 12.

Further, the price regulation regime does not take into account the increased competition in the Pay-TV industry. The Hon'ble Authority has previously noted that the competition between DTH operators and non-CAS cable operators is already stimulating the roll-out of voluntary CAS in non-CAS areas.¹¹ There is considerable competition between broadcasters for the limited channel-carrying capacity of operators, between multi-system operators, between local cable operators and nationwide distributors and between different delivery systems and platforms, as well as a highly competitive advertising market.¹² During the years 2004-07 alone the number of pay channels have increased by more than 300%.¹³ The Hon'ble Authority needs to review its position that there is a lack of effective competition in the Pay-TV industry, a position which it has neither justified nor refuted by reference to any data or analysis. Moreover, by imposing stringent tariff regulation the Hon'ble Authority would, in time, erode effective competition and consequently negate the growth of the industry.

More specifically, the Hon'ble Authority has stated on many occasions that until the impact of the CAS roll-out can be assessed, "it would be premature to initiate the consultation process on DTH tariff issues both at the retail level and at the wholesale level."¹⁴ The Hon'ble Authority has maintained this position to date and we agree that such an assessment is required before considering any price regulation of the DTH platform.

The Hon'ble Authority should consider in particular a comparison of the heavily regulated CAS sector with the DTH sector. As at the end of March 2008, there were around 6,08,000 CAS subscribers.¹⁵ DTH operators, on the other hand, are minimally regulated and yet subscriber numbers

¹¹ Telecom Regulatory Authority of India, *Consultation Paper on Interconnection Issues relating to Broadcasting and Cable Services*, 2008

¹² For details, please refer to Media Partners Asia, *Asia-Pacific Pay-TV & Broadband Markets 2008* at 275-280

¹³ Explanatory Memorandum to the Telecommunication (Broadcasting and Cable) Services (Second) Tariff (Eighth Amendment) Order, 2007

¹⁴ Telecom Regulatory Authority of India, *Consultation Paper on Issues relating to DTH*, 2004.

¹⁵ TRAI Annual Report 2007-08

have now reached over 10 million after only three years.¹⁶ Such data provides a compelling argument for not regulating DTH in a manner similar to CAS.

In addition, the tariff regime for CAS areas was expressly identified as being an interim measure.¹⁷ We submit that the Hon'ble Authority should first review the CAS roll-out and tariff regime before it can properly assess whether price regulation of the DTH sector is required.

Further, as an expert body charged with the task of tariff fixation and promoting healthy growth of the industry, the TRAI is expected to arrive at a tariff based on data and rational analysis. Any data on which the Authority intends relying on before issuing a tariff order must be made available to stakeholders.¹⁸ The Hon'ble Authority has not, in the Consultation Paper, provided any data or relevant analysis justifying the need for imposition of a tariff. Without more, the consultation process to date would not fulfil the requirement of transparency stipulated in the TRAI Act.¹⁹

We agree with the Hon'ble Authority's goal of more competition and less regulation.²⁰ Even if the Hon'ble Authority decides not to conduct a review as we have suggested above, we submit that at the very least the authority should review recent Pay-TV industry trends and set a date in a few years by which time the current regulatory framework will cease. A "sunset" provision will encourage long-term planning and investment in the Pay-TV industry.

¹⁶ Telecom Regulatory Authority of India, *Consultation Paper on DTH Issues relating to Tariff Regulation and new issues under reference*, 2009.

¹⁷ Explanatory Memorandum to the Telecommunication (Broadcasting and Cable) Services (Third) (CAS Areas) Tariff Order, 2006.

¹⁸ Order of Telecom Disputes Settlement & Appellate Tribunal dated 15 January 2009 in Appeal Nos 9(C) of 2006 (*MSO Alliance v TRAI & Ors*); 10(C) of 2007 (*SET Discovery Private Limited v TRAI*); 11(c) of 2007 (*Zee Turner Ltd v TRAI & Ors*); 12(C) of 2007 (*Star India Pvt Ltd v TRAI & Ors*); 13(C) of 2007 (*Intermedia Cable Communications Pvt Ltd v TRAI*) and 15(C) of 2007 (*SUN Network Ltd v TRAI*).

¹⁹ *Ibid.*

²⁰ Telecom Regulatory Authority of India, *Consultation Paper on Interconnection Issues relating to Broadcasting and Cable Services*, 2008

Below are our responses to the specific questions raised in the Consultation Paper.

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

As would be clear from our introductory comments, we submit that that the TRAI has not provided any data or analysis justifying the requirement for fixing of a tariff for DTH and accordingly none should be set.

In any event, we submit that there is no need to fix retail or wholesale tariffs for the DTH sector. There is sufficient competition between broadcasters, amongst DTH operators and between DTH operators and operators of other platforms, to discourage perverse pricing. For example, there are:

- more than 350 channels available, competing for inclusion in the limited suite of channels offered to consumers by DTH operators;
- 6 DTH operators operating in India; and
- Tens of thousands of local cable operators competing against DTH operators as well as emerging platform such as IPTV and soon to be introduced HITS.

As the Hon'ble Authority states in the Consultation Paper, "competitive play of market forces [are] likely to lead to discovery of efficient prices in the market in the interest of all stakeholders."

We further submit that, for the reasons cited in paragraph 1.4 of the Consultation Paper, the Authority had specifically decided not to intervene in wholesale or retail pricing in the DTH sector, when it issued the Consultation Paper on issues relating to DTH in March 2007. No issues have arisen in the interim, which have been counter productive to the growth of the DTH sector, and which warrant tariff fixation. Indeed, with almost 10 million subscribers currently and a forecast of 25 million by 2013, India's DTH sector is growing at a rapid pace and is poised to be the largest in Asia.

We also rely on Supreme Court's decision in the case of *Ashoka Smokeless Coal India Pvt. Ltd. v. Union of India*²¹ where it was held that when considering the fixing of tariffs, the market forces of supply and demand are relevant factors to take into account.

According to the Consultation Paper, Tata Sky Ltd has claimed that the absence of wholesale content tariff regulation for DTH platforms is creating a significant barrier to entry for DTH operators and is creating pricing and packaging disadvantages when compared to CAS operators. However, this is difficult to accept when India has more DTH operators than almost any other country in the world and when the uptake of DTH has far exceeded uptake of CAS (10 million subscribers to 6,80,000). Such a claim becomes even more difficult to accept when we come across the statement made by Dish TV India Limited (a DTH Operator) that it has seen its business grow 40% in the last 5-6 months.²² These figures suggest that the absence of tariff regulation is no barrier to entry and is, in fact, benefiting the industry, including DTH operators and consumers.

We are aware from the Consultation Paper that Tata Sky Ltd has complained about the cost of content. We note in particular that the cost of acquiring quality content has increased substantially over recent years, as demonstrated in our introductory comments. If left to market forces, all participants in the industry, including broadcasters, platform operators and subscribers, would share the burden of increased content costs. However, what Tata Sky Ltd is proposing is that broadcasters disproportionately bear the cost of content. If this is permitted to occur by the setting of a restrictive wholesale tariff (as has occurred in CAS-notified areas), the creation and acquisition of quality content is discouraged and broadcasters will be forced to acquire or create only cheaper, lower-quality content rather than a range of programming at various price points according to consumer demand. Consumers will

²¹ (2007) 2 SCC 640

²² Article titled "World in my Village, courtesy Dish TV" appearing in Mint on March 25, 2009.

have a poorer choice of programming as a result, the exact opposite of the desired effect of regulatory intervention.²³

In setting out in the Consultation Paper the issues for determining the price of content of a television channel, the Hon'ble Authority has included the range of taxes and licence fees payable by DTH operators (but not those payable by broadcasters). It does not make sense to take into account the taxes and fees applicable to DTH operators in considering whether a tariff needs to be fixed. If DTH operators have an issue with their levels of taxes and other imposts, they should raise it with the relevant governmental authority, rather than the Hon'ble Authority introducing a whole new level of regulation on the rest of the Pay TV industry to address it. Further, costs such as license fees and taxation are incidental to the normal course of DTH business, of which DTH operators were aware before entering into the market. These operators should not be allowed to surmount these cost constraints by seeking an effective reduction in the cost of content through tariff regulation.

Similarly, the Consultation Paper sets out other costs on DTH operators without taking into account equivalent costs on broadcasters (such as content costs, hardware costs and transponder leases). Any consideration of whether a wholesale or retail tariff for DTH platforms is warranted should have regard to all costs incurred by the various industry participants, not just the costs of one participant only.

However, if the Hon'ble Authority were to introduce price regulation (a position we do not support and which has not been justified by reference to any data or analysis), we submit that any such regime should be an interim measure with a clearly defined expiry date.

²³ “[TRAI’s] function is also to ensure orderly growth which includes quality growth”: Order of Telecom Disputes Settlement & Appellate Tribunal dated 15 January 2009 in Appeal Nos 9(C) of 2006 (*MSO Alliance v TRAI & Ors*); 10(C) of 2007 (*SET Discovery Private Limited v TRAI*); 11(c) of 2007 (*Zee Turner Ltd v TRAI & Ors*); 12(C) of 2007 (*Star India Pvt Ltd v TRAI & Ors*); 13(C) of 2007 (*Intermedia Cable Communications Pvt Ltd v TRAI*) and 15(C) of 2007 (*SUN Network Ltd v TRAI*).

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?

As submitted above, we aren't in favour of any DTH tariff being fixed, at either wholesale or retail level. We support the Hon'ble Authority's view that market forces will control the price that a content provider is able to charge for its content and that a DTH operator is able to charge subscribers.

If the Hon'ble Authority were to introduce price regulation (a position we do not support and which hasn't been backed up by any data and analysis), we submit that any such regime should continue on the same basis as the current regime – that is, regulating wholesale tariffs only, on an interim basis –modified as outlined below. As any price regulation should be for a limited period only, it wouldn't be reasonable nor practical to introduce a dramatically different regime at this stage.

Having said that, if no retail tariff were fixed:

- cost savings of DTH operators wouldn't be passed on to consumers;
- DTH operators would be able to enjoy the commercial rewards of quality content while broadcasters disproportionately bear the burden of content costs; and
- There'd be little incentive for broadcasters to invest in the growth and diversity of the Pay-TV industry, which would have a detrimental impact on the industry as a whole.

For these reasons, any fixing of wholesale tariffs in respect of the DTH platform would have to be supported by compelling data and analysis to balance the disadvantages in undertaking such an action. To date, the Hon'ble Authority hasn't provided any such data or analysis.

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.

We do not support any DTH tariff being fixed. However, if the Hon'ble Authority were to introduce price regulation (a position we do not support and which hasn't been justified with any data or analysis), we submit that any such regime should continue on the same basis as the current regime – that is, that the wholesale rate is fixed by reference to the prices of channels for non-addressable platforms. However, the following qualification must be made: a broadcaster need only offer its channel(s) to DTH Operators at a 50% discount on non-CAS rates if each such channel is made a part of an entry level tier or is otherwise given wide distribution in a “base pack”.

In a non-addressable cable system, all the channels distributed by a cable operator are delivered to all of its subscribers without distinction. The issue that arises in wholesale pricing of channels for non-addressable systems is that cable operators often under-declare subscriber numbers, commonly by up to 80%. Hence, if a DTH operator distributes the channels to all of its subscribers and declares 100% of its subscribers, it may be accorded a 50% discount on the non-CAS rate. The figure of 50% represents a median figure for the rate of under-declaration by cable operators.

The basis for this approach may be shown in the following two tables:

TABLE 1: NON ADDRESSABLE CABLE OPERATOR WITH 5,000 SUBSCRIBERS.

(A)	Subscribers paid for	2,500 nos.
(B)	Price per channel	Rs.100
(C)	Pay out based on negotiated subscriber base (2500 x Rs.100)	Rs. 250,000
(D)	Pay out based on entire subscriber base (5000 x 100)	Rs. 500,000
(E)	Effective price as applied to entire subscriber base (Rs.250,000 ÷ 5000)	Rs.50
(F)	Effective discount deemed to have been given to such cable operator as applied to its entire service base – (Rs.250000 ÷ Rs.500000 x 100)	50%
(G)	Reach provided to broadcaster	5,000 subscribers (100% Reach)

TABLE 2: DTH PLATFORM WITH 5,000 SUBSCRIBERS, CHANNELS IN BASE PACKAGE

(A)	Subscriber paid for where channel part of base package	5000 nos.
(B)	Price per subscriber in non addressable cable system	Rs. 100
(C)	Pay out as price per subscriber applied to entire service base (5000 x Rs.100)	Rs.500,000
(D)	Price per subscriber (50% of non addressable cable system price) as mandated by the Hon'ble TDSAT	Rs.50
(E)	Pay out as per price mandated by the Hon'ble TDSAT (5000 x Rs.50)	Rs.250,000
(F)	Effective discount deemed to have been given on the per subscriber price given to non addressable system in compliance with the Hon'ble TDSAT order (Rs.250,000 ÷ Rs.500,000 x 100)	50%
(G)	Reach provided to broadcaster	5,000 subscribers (100% reach) or the vast majority of its subscriber base.

However, DTH operators now offer subscribers a base package of channels and “add on” packs, whereby a subscriber has to pay an additional amount for channels that don’t form part of the base package. Hence the majority of the subscriber base of DTH operator is not available for such channels. The additional amount payable for “add on” packs discourages subscriber uptake of a particular channel with a corresponding impact on that channel’s exposure and potential for advertising revenue. See the table below.

TABLE 3: DTH PLATFORM WITH 5,000 SUBSCRIBERS, CHANNELS IN ADD-ON PACK

(A)	Subscribers paid for when channel is a part of Add On Pacakage	1000 nos.
(B)	Price per subscriber in non addressable cable system	Rs. 100
(C)	Price per subscriber (50% of non addressable cable system price) as mandated by the Hon'ble TDSAT	Rs.50.
(D)	Total pay out as per price per subscriber (50% of non addressable cable system price) mandated by the Hon'ble TDSAT – (1,000 x Rs.50)	Rs. 50,000
(E)	Pay out as per price per subscriber applied to entire service base (5000 x Rs.100)	Rs.500,000
(F)	Total pay out as applied to entire subscriber base (Rs.50,000 ÷ Rs.500,000 x 100)	10%
(G)	Effective discount when applied to the entire subscriber base	90%
(H)	Reach provided to broadcaster	1,000 subscribers only (20% Reach)

If a DTH operator charges (and receives) an additional amount for a particular channel as an “add on” pack, the operator should not also obtain the benefit of the discount that it would receive if that channel were part of the base pack and therefore available to all subscribers.

Although the figures in the above table are given as “round” figures for the purpose of illustration, they are consistent with what has happened in practice since DTH operators introduced “add on” packs.

We therefore propose the following pricing slab for DTH wholesale prices, calculated with reference to non-CAS prices of the channels and taking into account the reach provided by a DTH operator:

<u>Subscriber Base/Reach provided</u>	<u>Discount on Non-CAS Price</u>	<u>Effective Price</u>
If given 100% of platform reach or placed in base pack	50%	50% of non-CAS Price
If given 80% of platform reach	40%	60% of non-CAS Price
If given 70% of platform reach	30%	70% of non-CAS Price
If given 60% of platform reach	20%	80% of non-CAS Price
If given 50% of platform reach	10%	90% of non-CAS Price
If less than 50% or Add on Pack	Nil	Same as non-CAS price

We do not agree with the options proposed by Tata Sky Ltd in its representation dated March 13, 2008 filed again on December 23, 2008 that channel prices to DTH platforms should be no greater than 20% of the analogue cable rates. Such a position is unwarranted, unreasonable, unrealistic and unsupported by any data. It wouldn't allow broadcasters to recover their content costs and invest in development of infrastructure and technology. It would mean that broadcasters are effectively subsidising DTH operators' businesses, which would be the exact opposite of the "level playing field" that Tata Sky Ltd claims to seek and which would be inconsistent with broadcasters' constitutional right to equality pursuant to Article 14 and fundamental right to carry on a trade or business pursuant to Articles 19(1)(g)²⁴ of the Constitution of India.

If taken up, the proposal would have a detrimental impact on the range and quality of content available to consumers and wouldn't guarantee competitive prices for consumers. Further, it wouldn't achieve any of the Hon'ble Authority's aims of regulation, being:

- "i) to promote digital transmission;

²⁴ Order of Supreme Court of India in the case of *Reliance Energy Limited and Anr. v. Maharashtra State Road Development Corporation Ltd. and Ors.* (C.A. No. 3526 of 2007)

- ii) restructuring of the sector so as to encourage investment for financial viability and technological upgradation;
- iii) quality service at an affordable price to the consumer; and
- iv) to enhance competition.”²⁵

In summary, Tata Sky’s proposal would give DTH operators a windfall gain in the short term, but would be contrary to the interests of consumers and the Pay-TV industry alike.

As mentioned above, if TRAI were to introduce tariffs (a position we do not support), it should nominate a “sunset date” for the removal of the tariffs.

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.

There is no need for TRAI to regulate DTH tariffs, whether in general terms or in terms of fixing prices for different channels. In particular, there is sufficient competition driven by the large number of channels available and the limited capacity of a DTH platform to carry those channels. However, if TRAI were to introduce tariff regulation, a position we do not support and which hasn’t been justified with any data or analysis, it should adopt the interim measure for a limited period of time suggested above, which permits differentiation of channels according to their non-CAS prices.

Also, if TRAI decides to regulate tariff in terms of fixation of prices for different channels (a position we do not support) it should treat sports

²⁵ Telecom Regulatory Authority of India, *Consultation Paper on Interconnection Issues relating to Broadcasting and Cable Services*, 2008

channels differently from channels of other genres, such as general entertainment, considering the enormous content costs incurred by sports broadcasters.²⁶

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?

As stated above DTH tariffs should not be regulated at all. Competition/market forces would itself control the prices charged by a DTH to subscribers.

However, if TRAI does decide to fix a DTH tariff (a position we do not support and which hasn't been justified with any data or analysis), such a tariff should be an interim measure which continues the current regime, subject only to the modification set out in our comments at section 5.2.3 above. Accordingly, no tariffs should be fixed at the retail level.

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?

Please see our comments at section 5.2.5 above.

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?

²⁶ See our introductory comments on page 5 of these submissions.

We are surprised that TRAI is even contemplating an extension of the ceiling on Channels' maximum retail price applicable to CAS areas to DTH platform. The Authority acknowledged in its 2008 Consultation Paper on Interconnection Issues relating to Broadcasting & Cable Services that roll-out of addressable systems for non-CAS areas (DTH/IPTV) was market driven as opposed to the roll-out of CAS on account of judicial intervention in CAS-notified areas.

TRAI itself acknowledged the difference between CAS and DTH in its Explanatory Memorandum to the Tariff Order dated 31st August 2006. The DTH contracts and the standard contracts for CAS follow two different routes. The two regimes are different in terms of their origins, geographical spread and business models. The MRP regime in CAS areas was mandated to ensure smooth roll out of CAS and the Authority was to review the market once established. Therefore, it is not necessary for the DTH wholesale prices to be equated with the CAS prices fixed in the 2006 tariff order.²⁷

In this context, we also ask the Authority to consider that unlike CAS, which is a mandatory regime, DTH is a voluntary addressable system which is free to compete with cable across the country. The potential of DTH players is not just the 2.5 million CAS households but the entire 120 million TV homes in India.

To extend an over-regulated and mandated CAS regime, which represents only 2% of the Indian TV homes, to DTH operators who operate across the country, is highly arbitrary and unreasonable. We note that a tariff (if any) fixed for DTH at this point will set the foundation for the fixation of tariffs of all existing and future addressable delivery platforms. In effect, the Authority would be extending the interim CAS regime to 120 million TV homes without

²⁷ Paragraph 5.27 of Explanatory Memorandum to the Telecommunication (Broadcasting and Cable) Services (Third) (CAS Areas) Tariff Order, 2006.

providing any rational basis for such a dramatic regulatory intervention.

The Hon'ble Authority's objective of fixing a ceiling on MRP of pay channels in CAS-notified areas was to ensure a quick and smooth transition to CAS in those areas. The Authority also stated that the ceiling was for a limited period and that it would be revisiting the price related decision and consider the deregulation of CAS.²⁸ However, 2 years after the successful roll out of CAS, and while we are still waiting for the Authority to lift the arbitrary ceiling on channels' MRP for CAS-notified areas, the Authority is considering whether to extend the same arbitrary ceiling to the DTH platform. This is despite the fact that the DTH platform has been taken up enthusiastically by subscribers without any price intervention.

The arbitrary ceiling fixed for CAS-notified areas did not take into consideration the cost of content and the cost differences between genres. This ceiling is irrational and is not based on intelligible criteria such as the nature, cost of development, intellectual property rights regimes and price of content. Accordingly, it should not be extended to the DTH platform. In any event, the Authority has not provided any data or analysis to support such an extension.

A uniform price for all channels irrespective of their genre and content cost is damaging to the industry and to the interests of consumers as it encourages investment in cheap, low-quality content only rather than in a wide range of programming of varying quality and cost, as would be dictated by viewer demand in a deregulated market. As the Hon'ble TDSAT has noted, one of TRAI's statutory functions is to ensure orderly growth of the industry, which includes quality growth.²⁹

²⁸ Counter Affidavit filed by TRAI before Supreme Court of India in Civil Appeal 2327 of 2007 (*ESPN STAR Sports & Another v. TRAI*)

²⁹ Order of Telecom Disputes Settlement & Appellate Tribunal dated 15 January 2009 in Appeal Nos 9(C) of 2006 (*MSO Alliance v TRAI & Ors*); 10(C) of 2007 (*SET Discovery Private Limited v TRAI*);

The Authority itself recognizes the uniqueness of content stating that even within same genre, each channel has a distinctive character owing to its content and hence one channel cannot easily substitute another.³⁰ However, it is surprising that while fixing the tariff for CAS Areas, Authority ignored the foregoing and prescribed an across the board tariff which was not based on any intelligible criterion (type/cost of content etc). It's all the more disappointing that the Authority is now considering the adoption of this "one size fits all" tariff strategy for DTH platform as well.

In any event, the fixing of a ceiling on MRP as low Rs. 5.00 (now Rs. 5.35) per channel per month for CAS-notified areas has not fostered subscriber growth in those areas. As at the end of March 2008, there were around 6,08,000 CAS subscribers³¹. By comparison, DTH operators are minimally regulated and yet subscriber numbers have now reached over 10 million after only three years.³² It is obvious from this data that the fixing of a ceiling on MRP has not achieved the desired effect and that there is no justification for regulating the DTH platform in the same way. The Hon'ble Authority has not provided any data or analysis to the contrary.

As submitted above, we strongly support deregulation. However, if TRAI still decides to regulate DTH Tariff at wholesale level (a position we do not support and which hasn't been justified by any data or analysis), we submit that such regulation should be on the basis of non-CAS pricing of channels as suggested in section 5.2.3 above and that the TRAI set a "sunset" date for deregulation.

11(c) of 2007 (*Zee Turner Ltd v TRAI & Ors*); 12(C) of 2007 (*Star India Pvt Ltd v TRAI & Ors*); 13(C) of 2007 (*Intermedia Cable Communications Pvt Ltd v TRAI*) and 15(C) of 2007 (*SUN Network Ltd v TRAI*).

³⁰ Explanatory Memorandum to the Telecommunication (Broadcasting and Cable) Services (Second) Tariff (Eighth Amendment) Order, 2007.

³¹ TRAI Annual Report 2007-08

³² Telecom Regulatory Authority of India, *Consultation Paper on DTH Issues relating to Tariff Regulation and new issues under reference*, 2009.

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?

Please see our response to section 5.3.1 above.

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?

As the Hon'ble Authority has noted, it would be premature to regulate such matters in the absence of a review of the CAS rollout.

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?

We do not support any requirement that broadcasters or operators make available pay channels on an a-la-carte basis and no data or analysis has been provided by TRAI to justify such a proposal.

Economists around the world are virtually unanimous in agreeing that bundling in competitive markets is efficient and pro-consumer because of the efficiency benefits and increase in competition it provides.³³

In addition, consumer choice is actually *reduced* by such a requirement because it discourages investment in new or niche channels. If broadcasters can't secure wide distribution (and hence, exposure) through a bouquet arrangement, they're less likely to take

³³ Pages 7-17 CAP Analysis of Federation Communication Commission's First and Further Report on A-la-carte pricing of Cable Television. March 7, 2006

the commercial risk involved in launching such channels. DTH operators are also less likely to take the risk of carrying new or niche channels as part of a limited line-up if consumers can elect not to take them.

We note that the Hon'ble TDSAT has held that any imposition of an a la carte requirement has to be bolstered by safeguards for both the consumer and broadcaster,³⁴ particularly when there are capacity restraints in the number of channels an operator can provide to consumers.

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

As the Hon'ble Authority has noted, it would be premature to regulate such matters in the absence of a review of the CAS rollout.

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?

We submit that no regulation of pricing on the DTH platform is required. However, if the TRAI does introduce a wholesale tariff (a position we do not support and which hasn't been justified by any data or analysis), it would be unreasonable to give DTH operators both the benefit of a wholesale tariff and the opportunity to charge broadcasters an additional carriage fee. This arrangement would be even more unreasonable if DTH operators weren't subject to a retail tariff. In effect, by such an arrangement the broadcasters would be subsidizing the DTH operators' business and would be restricted in their ability to invest in

³⁴ Order of Telecom Disputes Settlement & Appellate Tribunal dated 15 January 2009 in Appeal Nos 9(C) of 2006 (*MSO Alliance v TRAI & Ors*); 10(C) of 2007 (*SET Discovery Private Limited v TRAI*); 11(c) of 2007 (*Zee Turner Ltd v TRAI & Ors*); 12(C) of 2007 (*Star India Pvt Ltd v TRAI & Ors*); 13(C) of 2007 (*Intermedia Cable Communications Pvt Ltd v TRAI*) and 15(C) of 2007 (*SUN Network Ltd v TRAI*).

programming, infrastructure and technology, with a corresponding impact on the Pay-TV industry as a whole. The only parties who would benefit (in the short term, at least) would be the DTH operators.³⁵

If a wholesale tariff, or wholesale and retail tariff, is set by the TRAI (a position we do not support and which hasn't been backed up by data and analysis), we submit that DTH operators should be prohibited from charging any carriage fee to broadcasters.

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 the same for all DTH operators?

Please refer to our response in section 5.4.1 above.

However, if TRAI elects to introduce a wholesale tariff, or a wholesale and retail tariff, without prohibiting the charging of a carriage fee (a position we do not support and which hasn't been justified by any data or analysis) then a ceiling should be prescribed which takes into account the impact of the wholesale tariff on broadcasters' ability to recover costs and to invest in programming, infrastructure and technology and which ensures that DTH operators do not make a windfall gain at the expense of broadcasters.

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

We don't agree with any of the contentions made by Tata Sky Ltd in its writ petition. Our comments on the prayers made in the writ petition are as follows.

- **To pass a writ, order or direction in the nature of mandamus to TRAI to forthwith discharge its obligations under the TRAI Act to ensure level playing field conditions including fixing content tariffs for DTH;**

³⁵ See also our comments at section 5.2.3 above.

The TRAI should intervene to provide a level playing field only where competition in an industry is insufficient. This is not the case with the Indian Pay-TV industry.

Tata Sky Limited has argued that DTH is entitled to equal treatment at par with other addressable systems such as CAS which, it claims, is necessary to create competition.

By way of background, the stringent regulatory system for CAS-notified areas was introduced as an interim measure to enable the CAS roll-out to occur. The TRAI should be looking at removing such regulation now that the several years have passed since the roll-out. Although it is expected that CAS will be extended into other areas in the near future, the system is now established and the TRAI can loosen regulation to enable market forces to operate effectively.

What Tata Sky Limited is seeking is a heavy-handed regulatory approach to fix problems caused by an earlier heavy-handed regulatory approach. This will only compound the problems. Rather than introducing additional regulations to treat the DTH platform equivalently to CAS, the TRAI should be looking at deregulating all platforms to permit effective competition. The current level of regulation is hampering competition, not promoting it.

- **To pass a writ, order or direction to TRAI to ensure that similarly placed systems, namely CAS and DTH are treated equally and viewers and subscribers of these systems/platforms are not denied popular content due to anti-competitive practices or otherwise;**

Please see our comments above in relation to whether CAS and DTH should be treated equally.

Tata Sky Limited has complained constantly about access to content. However, it is clear from the petition that the relevant content was available to Tata Sky Limited, but not on its preferred terms.

This DTH operator is not seeking fair competition but is seeking to avoid sharing the burden of content costs.

- **To pass a writ, order or direction to declare that viewers and subscribers have the right under Article 19(1)(a) to popular content on the DTH platform;**

Article 19(1)(a) of The Constitution of India confers on citizens of India, the fundamental right of “Right to freedom of speech and expression”. By no stretch of imagination can this fundamental right be interpreted to include a right to popular content other than at a fair market price.

In fact, this prayer of Tata Sky Limited and any consequent Tariff Order passed by the Authority imposing arbitrary tariff restrictions on the Broadcasters is and will be injurious to broadcasters’ fundamental right to carry on trade or business³⁶

- **To direct the respondents to make available/offer popular content of the ETC Punjabi Channel on the petitioner’s DTH platform; and**

Our understanding of the petition was that the relevant respondents were willing to make available the relevant content on the petitioner’s DTH platform, but that the petitioner did not wish to accept the respondents’ terms but were interested only in ensuring they received content on terms dictated by them.

6. New issues on DTH under reference from Ministry of Information and Broadcasting

³⁶ Article 19(1)(g) of the Constitution of India.

The Government of India has requested the Hon'ble Authority to provide recommendations on value-added services and radio channels carried on DTH platforms.

Given the impact of any such recommendations on various stakeholders, the Hon'ble Authority has sought feedback through its Consultation Paper. The issue underpinning the various questions posed by the Hon'ble Authority is whether value-added services and radio channels on DTH platforms should be treated as broadcast channels in order to bring them within the current regulatory regime.

As noted above, we're of the view that a comprehensive review of the Pay-TV industry is necessary in order to determine whether the current, stringent level of regulation is warranted. We are certain that the outcome of any review would be that deregulation, and not extended regulation, is warranted. In particular, deregulation is likely to stimulate the growth of nascent markets and technologies.³⁷ Accordingly, it'd be inappropriate to consider extending the regulatory regime to new services before undertaking the review process in relation to existing services.

In addition, in considering the new services being made available on DTH platforms, the Hon'ble Authority should take into account the fact of technological convergence and the uncertainty that would arise if similar services could be subject to different regulatory regimes. We submit that more research, analysis and stakeholder consultation is required before the Hon'ble Authority would be in a position to consider regulating new services on DTH and other platforms.

6.1 Provisioning of new services on DTH platform

³⁷ Please see our introductory comments on pages 2-3 of these submissions.

6.1.5(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?

Video-on-demand, pay-per-view and other value-added services should not be treated as broadcast of television channels. They are fundamentally different services.

Broadcast television channels generally provide a 24/7 service on a channel-by-channel basis and show specific content only at scheduled times. There is a limited exercise of viewer choice in the selection of content on a channel at any particular time.

On the other hand, value-added services are generally not provided on a 24/7 basis, are provided on a program-by-program basis and show content at the specific request of the viewer and usually at a time designated by the viewer. By their nature, these value added services are interactive rather than linear, making them inherently different from broadcast television channels.

(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?

We submit that such value-added services should not be treated as broadcast television channels: see our comments in section 6.1.5(a) above.

Further, implicit in the Hon'ble Authority's question is an assumption that all content services must be regulated. We submit that this assumption is incorrect; rather, the Hon'ble Authority should proceed on the basis of no regulation unless there are

compelling reasons, supported by data and analysis, for regulatory intervention. TRAI has given no such justification for extending the scope of regulation to cover these value-added 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?

We have stated earlier that heavy regulation is likely to distort market uptake of new technologies, and for this reason, many regulators around the world adopt a flexible regulatory approach for emerging technologies.³⁸

Accordingly, we suggest that the appropriate regulatory approach in this respect would be no regulation.

However, if the Hon'ble Authority considers it necessary, after taking into account all relevant data and analysis and obtaining stakeholder feedback on the same, to regulate the provision of value-added services on DTH platforms (a position we do not support), we submit that such services be brought within the scope of the existing DTH licence arrangements, rather than being subject to separate regulation. Likewise, if a broadcaster were to offer similar services as an add-on to a particular channel, such as a movie channel offering movies-on-demand service as an adjunct to its broadcast movie channel, such services should be brought within the scope of the broadcaster's permissions/licence arrangements for that channel.

(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

³⁸ See our introductory comments on pages 2-3 of these submissions.

provisions- Uplinking/ Downlinking, Programme Code, and Advertisement Code be prevented?

So long as value-added services remain interactive rather than linear and are provided on a program-by-program basis, they will not assume the role of a traditional television channel and need not be regulated as such, if at all.

In respect of the Programme Code and Advertising Code, DTH operators are already required to comply with these pursuant to Article 5 of the DTH licence terms and conditions.

- 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.?**

Consistent with our comments above, we submit that no specific permissions should be required for value-added services which are interactive rather than linear and which are provided on a program-by-program basis on the request/demand of the viewer.

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

We are of the view that no amendments are required to the current DTH licence conditions and Uplink/Downlink guidelines.

- 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?

We note that DTH operators are already required to comply with the Programme Code and Advertising Code pursuant to Article 5 of the DTH licence terms and conditions.

- 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?**

A DTH operator should only be allowed to carry advertisements on its own service/channel. A DTH operator should not, under any circumstances, be allowed to carry advertisements on Broadcasters’ channels as this would amount to interference with Broadcasters’ content, which would in turn jeopardise broadcasters’ obligations under their rightsholders’ agreement.

Further, if DTH operators are allowed to carry advertisement independently then they should be required to abide by the Programme Code and Advertisement Code, as is already provided for in the DTH licence terms and conditions.

6.2: Radio channels on DTH services

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

(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?

(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?

DTH operators may be permitted to carry radio channels in accordance with the existing statutory framework for private radio channels. Accordingly, any DTH operator who making available a radio channel on its platform should be required to comply with the existing laws, bye laws and regulations applicable to the radio industry.