STAR INDIA PVT LTD.

Response to TRAI's Consultation Paper No. 3/2015 On Tariff issues related to Commercial Subscribers dated 14th July 2015

FOR ANY CLARIFICATION PLEASE CONTACT: PULAK BAGCHI
Ph - 9999796432; E-Mail: pulak.bagchi@startv.com

1. **Is there a need to define and differentiate between domestic subscribers and commercial subscribers for provision of TV signals?**

RESPONSE:

(i) The Authority should approach this issue by first asking some fundamental questions among others viz. whether channel price regulation for commercial subscribers is at all needed or called for in the first place, if yes, what purpose would it serve, what would be the intended and unintended consequences, whether it would lead to increasing overall economic welfare or whether it would simply result in a transfer of a gain arising from regulatory arbitrage (benefitting commercial subscribers and operators at the cost of broadcasters), whether there is any proven instance of market failure, whether there has been any proven abuse of dominance, whether there has been any adverse effect on competition, whether there is lack of competition in channel provisioning to commercial subscribers. The Authority has neither posed these existential questions nor held any enquiry to answer the same.

(ii) We submit that the entire Consultation Paper ("CP") seems to have taken a closed approach. The CP presupposes that regulating channel prices for commercial subscribers is a given and then proceeds to ask the questions that have been posed in the Paper. In fact the CP goes one step

further. The entire CP reads as a justification of TRAI's stated position[1] in the earlier impugned tariff orders[2] which has now been set aside by the TDSAT vide its Judgment dated 9th March 2015.

(iii) Hardly any contrary arguments or reasoning have been proffered by TRAI in the CP to justify why commercial subscribers should not be treated as ordinary subscribers. It is submitted that in a consultation process it was expected of TRAI that it shall present both sides of the story to formulate an independent and objective opinion. However the instant CP makes it appear that the TRAI may still be fixated to its earlier stand as stated.

(iv) Also the CP proceeds on the basis that broadcasters should not be permitted to directly enter into contracts with commercial establishments. This again is the stated position taken by the TRAI in the Regulations that have been impugned in the Delhi High Court.

(v) In this context it may be pertinent to note the directions of the Delhi High Court vide its Judgment dated 15.05.2015 in C.M. No. 8130/2015 in W.P. © 5161/2014:

[1] viz. that for the purposes of tariff, commercial subscribers shall be treated at par with ordinary subscribers

[2] The Telecommunication (Broadcasting and Cable) Services (Second) Tariff (Twelfth Amendment) Order, 2014 (5 of 2014) on 16 July 2014. AND The Telecommunication (Broadcasting and Cable) Services (Fourth) (Addressable Systems) Tariff (Fourth Amendment) Order, 2014 (6 of 2014) on 18 July 2014.

"25. Therefore to meet the ends of justice, we direct that while determining the fresh tariff in terms of the Judgment of the TDSAT dated 09.03.2015, the TRAI shall not consider itself bound by the Regulations impugned in this petition in any manner whatsoever....."

(vi) Be that as it may, we submit that Yes, there is a need to define and differentiate between the domestic and commercial subscriber as the usage in both the cases is different. A domestic subscriber utilizes the signals for self-consumption without any commercial gain; however, commercial establishments screen the signals for a commercial benefit. Just because the commercial establishment is not charging its guests or visitors separately or visibly for provisioning such services that does not mean that such services are not being commercially exploited. In almost all such cases the charges for providing such services are bundled with the room rate (in case of hotel/hospital rooms, etc) or with the food and beverages bill (in case of restaurants, bars and other public viewing areas).

(vii) Hotels for example recover all input costs of amenities through the room tariffs they levy on their guests, it is a different matter that no break-up of the room tariff is given to the guest, fact remains that there is hardly anything complimentary that is offered by hotels to its guests/clients, etc. It would thus be unfair upon broadcasters that they are

deprived from levying commercial tariffs simply because the hotels are not transparent enough to provide break up of their room tariffs which would have clearly shown the cable cost as an input cost. Even the so called "free" breakfast or "free" use of Wi-Fi or "free" use of special lounges are all part of the overall tariff. All this is done by offering "superior" rooms at a differential tariff. These so called "superior" rooms come with special privileges at a different tariff but none of these extra privileges are charged separately.

(viii) Even the Government resorts to charging differential prices to different customers with regard to Tolls, Electricity, Water, Property Taxes, Luxury Taxes and Property Registration (Stamp Duty) etc.

(ix) It may be noted that in almost all other markets for products or services, the world over, such a differentiation does exist. (Please see ANNEXURE I)

(x) It is surprising that the TRAI is posing this query after allowing for such distinction in the broadcasting market for almost a decade now. This sudden change in goal posts, is only serving to create uncertainty and confusion. This regulatory U Turn is not at all in accordance with market practices which none other than TRAI has established over the years.

(xi) The TDSAT Judgment dated 9th March 2015 holds:

"TRAI recognized that at the ground level ordinary subscribers and commercial subscribers were treated differently in regard to charges payable by them for receiving television signals and that it was a well-established business practice. It is so stated in the explanatory memorandum to the seventh amendment of the Second tariff order. Further, on behalf of the appellant a fat compilation is filed enclosing the rate cards and reference interconnect offers submitted by the broadcasters before TRAI under the reporting requirement in the tariff orders. The rate cards and the reference interconnect offers relate to domestic viewers and expressly exclude hotels (three star plus heritage plus inns with 50 rooms etc.). TRAI never took any objection to the exclusion of the commercial establishments from the rate cards and RIOs submitted by the broadcasters nor any objection was taken in this regard by any MSO or any other commercial establishment."

(xii) We also do not agree with the contention of the Regulator in Para 1.22 and 1.23 as today the only regulatory framework post the TDSAT Judgment, is that there is no regulatory framework for Commercial Subscribers and they are presently under forbearance. The matter pertaining to Broadcasters providing signals directly to commercial subscribers is subjudice before the Hon'ble Delhi High Court as stated. We reiterate that the same is not violative of the extant uplinking and downlinking guidelines. It is

surprising to note that the Regulator has off late been toeing this line at the instance of the operators and hotel associations when it has for all these years (since 2006) been explicitly allowing Broadcasters to directly provide signals to such select commercial subscribers notwithstanding the uplinking and downlinking guidelines. It is also not true that broadcasters cannot fix prices for the commercial subscriber. Broadcasters have all along been fixing channel tariffs for commercial subscribers till the unprecedented and misconceived intervention by TRAI last year. As stated TRAI has taken a complete U turn and is now prohibiting what it had been specifically allowing for an entire decade.

(xiii) As noted by the TDSAT Judgment of 9th March 2015:

"We accordingly find and hold that the impugned tariff orders, breaking away from the past reversed the regulatory scheme in treating the entire body of commercial subscribers at par with the home viewer."

RECOMMENDATIONS:

We therefore recommend that the definition of "Ordinary Subscriber", "Commercial Subscriber" and "Commercial Establishment" as contained in the earlier Tariff Orders[3] be retained. It is submitted that neither the Delhi High Court nor the

[3] The Telecommunication (Broadcasting and Cable) Services (Second) Tariff (Twelfth Amendment) Order, 2014 (5 of 2014) on 16 July 2014. AND The Telecommunication (Broadcasting and Cable) Services (Fourth) (Addressable Systems) Tariff (Fourth Amendment) Order, 2014 (6 of 2014) on 18 July 2014.

TDSAT has ever found fault in these definitions. However as stated there is no reason to treat ordinary subscribers at par with commercial subscribers for the limited purposes of tariff.

2. **In case such a classification of TV subscribers is needed, what should be the basis or criterion amongst either from those discussed above or otherwise? Please give detailed justification in support of your comments.**

RESPONSE:

(i) Again, it is beyond comprehension why TRAI has now all of a sudden, at the instance of commercial subscribers, started questioning the basis or criterion of classifying TV subscribers.

(ii) It is pertinent to mention that the TRAI way back in 2006 had already recognized the basis or criterion as recorded by the TDSAT in its Judgment dated 9th March 2015:

'It is significant to note that the classification of 'ordinary cable subscriber' and 'commercial cable subscriber' was based on the use to which the signals received by the subscribers were put. In the explanatory note following the two definitions it was stated as under:

"The distinction between an ordinary cable subscriber and a commercial cable subscriber is in terms of the difference in the use to which such signals are put. The former would use it for his/her own use or the use of his/her family,

guests etc. while the latter would over commercial and other establishments like hotels, restaurants, clubs, guest houses etc. which use the signals for the benefit of their customers, clients, members or other permitted visitors to the establishment." (emphasis added)

(iii) It is intriguing to note that the TRAI is now questioning the very basis and criterion of classifying subscribers when it never originally intended for commercial subscribers to avail the regulatory protection afforded to ordinary subscribers; As The Honble TDSAT in its said Judgment of 9th March 2015 notes:

"In the explanatory memorandum to the tariff order it was candidly stated that the First tariff order (issued on 15 January 2004) as well as the Second tariff order (issued on 1 October 2004) were aimed at protecting the home viewer, that is, the ordinary subscriber and in those two tariff orders the commercial subscriber was not under contemplation. Paragraph 3 of the explanatory memorandum had the marginal heading "Issue wise analysis" and in paragraph 3.1 it was stated as under:

"3.1 Definition of Commercial Cable Subscriber and issues relating thereto

3.1.1 The principal Tariff Order of 1.10.2004 did not provide for any distinction between an ordinary cable subscriber and a commercial cable subscriber. Neither did the first interim tariff order of 15.1.2004. In fact both the tariff orders did not

contain the definition of the word cable subscriber. A perusal of the explanatory memorandum particularly para 4 of the first tariff order of 15.1.2004 and para 3 of the principal order of 1.10.2004 would, however, indicate that under the given situation of a non-addressable regime and reported frequent increases in cable charges, complexities involved in determining tariff based on cost, a ceiling in the form of a cap on tariff charges was considered to be feasible way of providing relief to the cable subscriber who as an end user had no mechanism of protection.

The thrust on the need for protection of the ordinary cable consumer could also be noted in the consultation paper issued by TRAI for finalizing the recommendations on various issues relating to broadcasting and distribution of TV channels. The commercial establishments considered to be having a mechanism and wherewithal to protect themselves were not in the realm of deliberation of tariff regulation. Thus, it could be seen that the underlying objective was the need to give relief and protection to the users of broadcasting and cable services who had no mechanism to protect themselves from the hike in cable charges. Therefore, the question for a separate dispensation or otherwise for those establishments who avail broadcasting and cable services not for their own domestic use but for the benefit of his/her clients, customers, members etc. was not an issue focused upon in the context of

the circumstances leading to the issue of the said tariff orders in 2004." (emphasis added)

(iv) The TDSAT then expounds on the need for categorization of different kind of subscribers and the basis and criterion thereof:

"The explanatory memorandum further stated that the proceedings before the Tribunal brought to fore the question of need for categorization of different kinds of subscribers and applicability of the Second tariff order of 01.10.2004 to hotels and it was then felt that the Second tariff order needed clarity on the real intent of applicability or otherwise to establishments that do not use the broadcast and cable services for their own use. It further observed that the need and extent of protection for a commercial establishment are not the same as that for an ordinary cable subscriber. It also noted that even at the ground level, the commercial establishments and such other similar establishments were treated differently as the prevailing business practice.

It sought to justify the classification of commercial subscriber separately from the home viewer primarily on the basis of the end-use of the broadcast. In this regard, in paragraph 3.1.5 (v) of the explanatory memorandum it was observed as under:

"(v) It is not denied that the product is same whether it is a ordinary cable consumer or commercial establishments but the value derived from the product in the case of TV channels

may not be the same in the situations where it is put to self use compared to a situation where it is meant for the purpose of its clients, customers. The television channels or programmes, even though may not be sold as a standalone service by commercial establishments particularly like hotels, etc. but as a means of entertainment do possess the potential to give an enhanced value to their packaged services. Therefore, the manner how the broadcasting services are being used becomes relevant for differentiating between an ordinary cable subscriber and a commercial cable subscriber." (emphasis supplied)

It further observed that commercial establishments particularly the hotels and other big establishments that received the broadcasting and cable services as a value addition to their own package of services have the potential to pass on the burden to their own clients.'

(v) As stated, the Courts and Tribunals have always questioned TRAI's regulating channel prices for commercial subscribers. However none of the Courts or the Tribunals have ever found, or held that the differentiation attempted by TRAI between Ordinary subscribers and Commercial subscribers through their respective definitions is illegal or unlawful per-se.

(vi) On the first occasion when TRAI's Tariff Orders dated 21st November 2006 were challenged, the TDSAT only questioned TRAI's creation of a sub - class within a class by

unintelligibly carving out some specific entities out of the broader genus of commercial establishments and then subjecting those specific entities only to forbearance while leaving out all others and treating them as Ordinary subscribers for the purpose of tariff. The Judgment of the TDSAT dated 28.05.2010 held:

"54. Capacity to protect their own interests which have been attributed by the TRAI so far as the appellants are concerned, we may only point out that it is not the case that others are not in a position to do so.

56. The economic interest, we would assume, matters. But whether or not a turnover would do is a matter of serious debate in a situation of this nature. We find force in the submissions made on behalf of the appellants that others who fulfill the said criteria were not brought within the net.

57. Similarly, any existing potential to settle a negotiated settlement by itself cannot be a ground as cable services cannot be said to be an essential services. It is true that for a sizeable section of the people having regard to the number and nature of programmes that are broadcasted, it is almost a household affairs and thus, may be held to be very necessary, but constitutionalism, if taken into consideration, must lead to a legal conclusion that it is not an essential commodity or essential service so as to consider as to

whether the same would come within the purview of the statues specifically framed by the Parliament in this behalf.

58. TRAI bringing out the commercial hospitals and other commercial establishments have referred to socio-economic causes. Luxury hospitals which may be costlier than three to five star hotels, in our opinion do not serve any socio-economic purpose apart from the fact that such a consideration in the context of fixing the tariff for cable service may be irrelevant. Even assuming that the hospitals required protection on the ground of socio-economic causes, we fail to see any reason as to why the luxury clubs, malls, other commercial establishments have been found to be belonging to the different class on that ground alone.

59. It is difficult to understand as to why the clubs, malls and cinema halls, where the viewers again are different from the owners of the premises were to be treated differently and bracketted together with the hospitals/nursing homes. Why the restaurants have been kept out of the purview of the order is difficult to comprehend.

60. Even for the purpose of having headends in their own establishments which admittedly some of the hotels have admitted, require agreements with the broadcasters.

61. We, however, have no doubt in our mind that the TRAI in exercise of its provisions contained in the said Act is entitled to directed forebearance in respect of a particular service or for a particular category of consumers. ….."

(vii) Even on the second occasion, when the TRAI's Tariff Orders came to be challenged in 2014, the TDSAT only found fault in TRAI taking an inconsistent stand by equating commercial subscribers with ordinary subscribers for the limited purpose of channel prices on the one hand while on the other it fundamentally acknowledged the differentiation between Ordinary and Commercial Subscribers by the respective definitions that it had formulated for the purpose. However on neither occasion did the TDSAT ever differ with TRAI when it came to fundamentally defining and thereby distinguishing ordinary subscribers from commercial subscribers.

(viii) The TDSAT Judgment dated 9th March 2015 notes:

"Thus, for all intent and purposes, in the matter of tariff for broadcasting services, the very large and disparate body of commercial subscribers is put at par with the home viewer of television.

The first thing to notice here is that this is a reversal of the regulatory scheme that had prevailed from the time of the first intervention by TRAI for fixing tariff for broadcasting services in the early 2004."

(ix) We therefore submit that such questions by TRAI asking for basis or criterion to differentiate consumers is irrelevant. The TDSAT has not found anything illegal in TRAI differentiating between Ordinary and Commercial Subscribers through their respective definitions.

(x) Thus there are admittedly differences between ordinary subscribers, who use television services only for their own personal purposes and commercial subscribers who use television services in order to advance their businesses. There cannot be any justification for treating the two categories of subscribers at par. In this case it is not the nature, cost of signals or infrastructure allocated therefor that should determine tariff fixation, but the nature, type, and purpose of the end use of the signals and the value derived therefrom that becomes critical. Even the Copyright Act, 1957, which is the substantive Law that deals with the rights of the broadcasters, itself provides that utilization of broadcast services by entities like Hotels, Inns, etc, are in the nature of commercial purposes and specific permission has to be obtained from the rights owner. A combined study of Sections 2(dd), 2(ff), 37(1), 37(3) and 52(1)(k) would undoubtedly give out that commercial entities such as Hotels, require authorization and/or license from the right owners under the provisions of the Copyright Act, 1957. This only means that the Law of the land treats commercial and domestic utilization also differently and different considerations ought to apply in relation to domestic and commercial utilization of proprietary material like Television content.

(i) One must not lose sight of the fact that commercial establishments like Hotels, Restaurants, Malls, etc, operate

in complete forbearance. Such establishments are free to charge any amount from guests, boarders, clients, et al depending entirely on their discretion and understanding of what the market can bear.

RECOMMENDATION:

The present differentiation between ordinary and commercial subscribers as per Recommendation in 1 *supra* should continue for consistency and certainty. The present definitions recognize the nature, type, and purpose of the end use of the signals on the one hand and the value derived therefrom on the other. This was always the TRAI's position from 7th March 2006 onwards and has also been repeatedly reiterated and upheld by the Courts including TDSAT. Treating commercial subscribers at par with ordinary subscribers for television channel prices is unprecedented in the entire world of business, trade and commerce.

3. Is there a need to review the existing tariff framework (both at wholesale and retail levels) to cater for commercial subscribers for TV services provided through addressable systems and non-addressable systems?

4. Is there is a need to have a different tariff framework for commercial subscribers (both at wholesale and retail levels)? In case the answer to this question is in the positive, what should be the suggested tariff framework for commercial subscribers

(both at wholesale and retail levels)? Please provide the rationale and justification with your reply.

RESPONSE:

(i) Both these questions are taken together for a collective response.

(ii) The Judgment of the TDSAT dated 9th March 2015 notes :

"The judgement, (ie dated 28.05.2010 in Appeals 17 C & 18 C of 2006) however, recognised that different rates could be fixed for different consumers and in paragraph 45 of the judgement observed and held as under:

"45. It may be true having regard to the contents of different broadcasters may be valued differently but it appears to us, with all respect to the TRAI, that no serious attempt appears to have been made in relation thereto. The TRAI in a matter like the present one, was required to apply its mind more thoroughly as to whether it was necessary to provide for a regulatory regime be it for their domestic consumers or the commercial consumers. The Act provides therefor. But the need and extend therefore was required to be considered. One cannot compare selling a piece of bread in a dhaba with the one in five star hotel. All selling the same product may have to spend differently on a large number of things including hygiene. There cannot, however, be any doubt or dispute that different rates could be fixed for the different consumers. There cannot, however, be any doubt or dispute that different types of rates can be

provided for different categories of consumers. The consultation paper itself proceeds on the basis that even as on 17.01.2006, the TRAI noticed from the documents furnished by the Hotel Associations that rates per room charged vary from as low as from Rs.20/- to as high as Rs.1300/- per room per day. It has specifically been noted in paragraph 3.6 that the Authority had indicated that price control will be lifted once there is effective competition."

(iii) Even the limited retail rate regulations prescribed in the Tariff Orders dated 21st July 2010 and 30th April 2012 apply only to Ordinary Subscribers. These Tariff Orders were therefore promulgated by TRAI clearly with the inherent understanding that Commercial Subscribers were not intended to benefit from the said Tariff Orders and they would continue to avail channels at deregulated rates. Given that the said Tariff Orders also mention that Distributors of TV channels shall provide channels to Ordinary subscribers only, it clearly means that Broadcasters are at liberty to directly provision signals to commercial subscribers, independent and regardless of operators in the distribution chain. It is a different matter that a broadcaster may decide to co-opt the services of an operator to provide its channels to any such commercial subscriber after due authorization.

(iv) The TDSAT's Judgment dated 9th March 2015 notes:

"The Fourth tariff order that was issued on 21 July 2010 defined "ordinary subscriber" and "subscriber" separately and the latter expression was defined to include commercial subscriber. Nonetheless, as seen in the previous paragraphs, the regulatory protections, limited as those were, vide clauses 6 & 7 of the tariff order were extended only to ordinary subscriber and not to commercial subscriber. Under the Fourth tariff order this position prevailed right up to the issuance of the impugned amendment."

(v) The Judgment goes on to hold that:

"It is to be seen that apart from the two factors namely, the content being the same and the cost to the broadcaster and the distributor being the same, the element of the use of the broadcast is completely divorced from consideration. The use of the broadcast, to our mind, is of considerable importance for fixing tariff for broadcasting services. It was a recurrent theme in the earlier exercises undertaken by TRAI for framing tariff. In our view, any exercise of fixing tariff for broadcasting services that completely disregards the user of the broadcast is bound to lead to unreasonable and inequitable results and so have the impugned amendments in the tariff orders.

TRAI makes it appear as if in putting commercial subscriber at par with ordinary subscriber, it has followed and given effect to the judgment of the Supreme Court. But the Supreme Court judgment does not even remotely suggest that for the purpose of

tariff, commercial subscriber should be meted out the same treatment as ordinary subscriber. On the contrary, the Supreme Court repeatedly observed that TRAI must act independently in framing tariff for broadcasting service in exercise of its authority under section 11 of the TRAI Act. TRAI has completely misread the judgment of the Supreme Court and has selectively quoted from it to rationalise its conclusion. As noted earlier, the Supreme Court repeatedly said that it was for TRAI to deliberate whether the two kinds of subscribers need the same treatment and it must exercise its jurisdiction independently and without being influenced by any observations."

(vi) The said Judgment finally concludes holding:

"Further, in the DAS regime (that is scheduled to cover the entire country by the end of this year), the regulatory constraint on tariff, as noted above, is only in respect of the broadcaster and the relationship between the MSO and the LCO and the MSO or the LCO and the subscriber is left completely unregulated. There is no reason assigned for subjecting the broadcaster alone to tariff restrictions while leaving free the other players on the lower tiers. On behalf of respondents 2 and 3, it was argued that at the two lower tiers there is sufficient competition in the market and that justifies forbearance by the regulatory authority. But at the top tier of the broadcasting service, comprising the broadcaster and the MSO, there is no sufficient competition and the broadcaster is in the position of monopoly

and hence, the need of regulatory restrictions in the case of broadcasters.

There is no such statement in the explanatory memoranda to any of the tariff orders and we do not find any material in support of the contention. On the contrary, TRAI had earlier observed that large hotels (or large commercial establishments) have sufficient wherewithal and the bargaining power to protect themselves. No distributor of TV channels would like to lose certain kinds of commercial subscribers that, to the former, would be like a flock of ordinary subscribers. Moreover, as observed by TRAI itself, commercial establishments have the means to pass-on the charges to their customers and clients."

(vii) The TRAI had in an earlier consultation process identified television viewing as an "esteem" need rather than an "essential" or "physiological" need in terms of Maslow's Need Hierarchy Theory.[4] Accordingly any attempt to regulate channel pricing vis a vis commercial subscribers or even otherwise, would tantamount to regulating only for the sake of regulations without solving for any larger competition or public policy issue. Even in the current CP similar arguments have been made at para 3.19:

"…it appears that television today is a commonly available amenity. While a specific channel at a given point in time may attract viewers, in general the availability of a television

[4] Annexure F of the Non CAS CP dated 25/03/2010

can no longer be the primary reason for attracting a client into a place where commercial activity is being carried out."

(viii) Accordingly for non- essential services ie services that are of the nature of amenities - it needs to be appreciated that free contract pricing should be the norm. However TRAI in its wisdom had decided to extend some tariff protection for Ordinary (household) Subscribers, a position which we believe is anachronistic in today's times. Be that as it may, it would be however altogether unfair and also contrary to the freedom of commerce that this country allows, if such tariff protection meant primarily for ordinary subscribers is now artificially extended in a blanket manner to even include in one fell swoop, Commercial Subscribers as well.

(ix) Further in addition to the commercial nature of the services provided by commercial subscribers for gain, it may be stated that another reason warranting differential tariff for such subscribers is that since the rates for ordinary subscriber are highly regulated, at rates that have remained virtually frozen for years, broadcasters need commercial subscribers to cross subsidise to some extent the reduced charges being levied on ordinary subscribers. However vide earlier Tariff dispensations as majority of commercial subscribers were kept out of bounds from broadcasters and only certain categories of commercial subscribers were allowed to be charged differentially, the broadcasters had to

accordingly adjust their prices. However such differential prices did not prejudice the commercial establishments as these were monthly levies and were in turn recovered by the commercial subscriber from the guests on a daily basis through the daily room tariffs. For example if a hotel would have to pay INR 50000/- to 100000/- per month to all broadcasters for all the channels that it availed, it would recover this channel cost many times over through the daily room tariffs which would be in the range of INR 10000 – 15000 per day. The same position continues today also in respect of the daily room tariffs however the broadcasters have been forced to charge the tariffs to those that are applicable for ordinary subscribers because of these impugned amendments (that have now been set aside) which not only is highly unfair but also unjust and discriminatory given that it seeks to treat unequals as equals.

(x) For a regulator to ask a pay broadcaster to subsidize channel prices for a commercial establishment defies all logic particularly when such pay broadcasters are unable to realize the full potential of their offerings qua ordinary subscribers owing to the rates for such ordinary subscribers being already regulated as stated.

(xi) The CP points out at para 3.15 that certain manufacturers of products (like mineral water or cold drinks for eg) are able to provide bulk discounts to commercial subscribers.

However it is to be noted that their rates are not regulated qua ordinary subscribers unlike broadcasting where there is a regulatory subsidy in place in so far as ordinary subscribers are concerned in the form and shape of a price freeze that's in operation since 2004.

(xii) Thus by equating ordinary subscribers with commercial subscribers , TRAI is asking pay broadcasters to effectively not only subsidise ordinary subscribers but also to subsidise the businesses of commercial subscribers in a manner that will result in direct loss to the pay broadcaster while resulting in a corresponding identical and exact gain to the commercial subscriber and the Operator. Such situations in regulatory parlance is called 'Regulatory Transfer Costs" (a 'rob Peter to pay Paul' sort of a situation) that only results in potential gains being transferred from one stakeholder in the value chain to another in the same value chain , without resulting in any tangible growth in overall economic welfare.

RECOMMENDATION:

We therefore urge the regulator to completely deregulate the pricing piece in so far as commercial subscribers are concerned. There is no reason whatsoever for broadcasters to be subjected to a regulated pricing regime vis a vis commercial subscribers or even otherwise. Total forbearance for Commercial Subscribers is thus the only option. There is no necessity for the Authority to set a regressive precedent by prescribing otherwise as that will result in

uncertainty resulting in unnecessary erosion of investors' confidence. The Courts have recognized the Authority's power to regulate through forbearance and also adopt different approach qua different subscribers.

5. Is the present framework adequate to ensure transparency and accountability in the value chain to effectively minimise disputes and conflicts among stakeholders?

6. In case you perceive the present framework to be inadequate, what should be the practical and implementable mechanism so as to ensure transparency and accountability in the value chain?

7. Is there a need to enable engagement of broadcasters in the determination of retail tariffs for commercial subscribers on a case-to-case basis?

RESPONSE

While we strongly argue for complete forbearance in so far as channel pricing for commercial subscribers is concerned however given the view, stand and approach taken by the Regulator in the instant CP (to which we do not subscribe to at all), by way of abundant caution and without prejudice to our rights and contentions we propose as follows:

RECOMMENDED PRICING AND DEAL CONSTRUCT:

(1) Broadcaster shall declare annually the maximum list price/rate per channel per television set per month

exclusive of taxes that the DPO can charge the commercial subscriber

(2) This list price/rate shall be different for different categories of commercial establishments, based on market practices

(3) Broadcaster shall negotiate the margins or its shares of the revenue on a non-discriminatory basis with the DPOs whereby similarly placed operated DPOs will be treated similarly. Broadcasters assure that there will be a margin on the maximum list price/rate per channel per television set per month for the DPOs however the same shall be negotiated with the DPOs on a non-discriminatory basis depending among others, on the volumes that they deliver.

(4) Broadcasters shall enter into separate agreements with DPOs for catering to commercial subscribers that shall be distinct from the contracts for ordinary subscribers

(5) In the event any Commercial Subscriber wants to directly negotiate a contract with Broadcasters then there shall be a tripartite agreement among the broadcaster, the commercial subscriber and the DPO of the commercial subscriber's choice.

(6) The present arrangement whereby broadcasters directly negotiate with Commercial Subscribers (who have their own head ends or even otherwise) should be allowed to work unhindered as it has brought in the required stability and

certainty of availability of channels by such Commercial Subscribers;

(7) A Commercial Subscriber once subscribing to a particular DPO, should be locked-in for a minimum period of 3 months unless advised or instructed otherwise by such broadcaster. If the Commercial Subscriber intends to change from one authorised DPO to another then the Commercial Subscriber should take a No-Dues Certificate from the earlier DPO or have documentary proof that there is no outstanding dues.

(8) Commercial Subscriber should also satisfy itself that the DPO from whom signals are being taken by it, is duly authorized (ie has the necessary rights by way of an agreement) by the broadcaster and it should be no defense to claim ignorance. Commercial Subscribers should demand from LCOs/MSOs a written undertaking that they have the necessary authorisation to distribute signals of the channels to the Commercial Subscribers in the defined area of operation.

(9) It should also be mandated that no signals shall be made available to a Commercial Subscriber without a written agreement.

(10) The Commercial Subscribers catered to by the DPOs should be given a separate customer identification number (different from that of ordinary subscribers) by such DPO and shall be easily verifiable.

(11) Further the monthly SMS reports submitted by DPOs to broadcasters should report ordinary and Commercial Subscribers separately. While subscriber numbers may be reported for Ordinary Subscribers, full particulars of all Commercial Subscribers that are receiving signals, those that were activated during the month and those that were deactivated during the month should be clearly disclosed. Also the package wise and channel wise details should also be provided

(12) Any discounts at the retail end will be the DPO's responsibility.

(13) Operators ie DPOs should report to broadcasters the package wise uptake/subscriber base.

(14) DPO shall provide signals to commercial subscribers in digital addressable mode in DAS markets and if it's a voluntary DAS operator. The Commercial Subscriber should not retransmit the signals. Each television of the Commercial Subscriber shall be connected with an individual set top box which is linked to the DPOs SMS and CAS. There should be a clear bar and prohibition on commercial subscriber to redistribute or retransmit the signals to its rooms/televisions. Also it should be clearly provided that the Commercial Subscriber, unlike DPOs, cannot re-transmit the TV signals to any other subscriber.

(15) Given that in Non DAS areas also the number of television sets availing the channels in a commercial

establishment can be conveniently ascertained, there is no need to have different rates for DAS and Non DAS areas in so far as commercial subscribers are concerned.

(16) The regulator can always intervene ex-post, on specific conduct issues or abuse of dominance.

Illustration:

- (A) Broadcaster declared List price of a-la-carte channel for Commercial Establishment:
Rs.100/- (+ taxes)
- (B) Broadcaster's Negotiated margin for the DPO (eg. @25%): Rs.25/-
- (C) Broadcaster margin (A-B):
Rs.75/-
- (D) DPO has freedom to negotiate with Commercial Subscribers for rate lower than List price. Say.
Rs.95/- (+ taxes)
- (E) DPO has to pay broadcasters as per (C) List price less negotiated margin
Rs.75/-

Note: the aforesaid margin of 25 percent is only indicative. It could also vary from one channel to another and from one state to another.

8. How can it be ensured that TV signal feed is not misused for commercial purposes wherein the signal has been provided for non-commercial purpose?

RESPONSE

This should be the exclusive responsibility of the Operator if the signal provisioning is occurring through an operator. In all such cases Operator should cease and desist or take any other

appropriate action (including switching off set top boxes) within three hours of being served notice in this regard.

9. Any other suggestion which you feel is relevant in this matter.

ANNEXURE I

Differential pricing

Differential pricing is a pricing strategy whereby a company establishes different price points for different customers based on a number of variables, including customer type, volume, and delivery and payments terms. Some of the examples are as follows:

1.1 Movie Theatres

Differential pricing is often a good fit with more intangible, service-oriented solutions where customers place different values on the merits of the service. Cinemas can differentiate pricing by charging full price to moviegoers who are willing to pay that amount. They can still offer incentives to more price-sensitive customers through the use of coupons, advanced ticket promotions and other types of discounts for certain types of customers.

1.2 Airlines

The airline industry is one of the most oft quoted instances for differential pricing strategies. Airlines commonly schedule flights with a low ticket price for high intensity traffic destinations. As time goes by, they gradually increase the price point because demand goes up. The strategy is exactly the opposite with low intensity traffic destinations.

1.3 Entertainment

Entertainment is certainly a broad category of products and services, but entertainment offerings are routinely presented with differential pricing for common reasons. Restaurants and amusement parks, for instance, often offer discounts for both senior citizens and children under a certain age. Buffet-style restaurants attract families and older customers with these discounts and feel comfortable in a lower price point because seniors and children are likely to consume less food than those in the age ranges in between.

1.4 Medical Care

It is the norm amongst many doctors and other medical service providers who charge regular service fees for standard patients but often charge lower fees for poorer patients. Not only is this attractive to lower-income people, but it is often perceived by the public as a socially responsible behaviour, thus enhancing the ethical reputation of the provider.

1.5 Electricity

Distribution companies provide electricity at different rates to different categories of consumers. Every state has different categories that cater to the needs of the businesses prevalent in their states. But the most common categories are domestic (residential), commercial (shops and offices) and Industrial (manufacturing units) - with rates being lowest for residential consumers and highest for industrial consumers. Within these categories there are separate rates for LT and HT. So if we have to list down, following categories will be available in most states:

Domestic-LT: for most individual residential connections.

Commercial-LT: for small shops and offices. Also for hotels, guest houses, theatres, etc.

Industrial-LT: for very small manufacturing units (like bakery, stone cutting, poha mills, etc.)

Domestic-HT: Bulk supply for residential colonies.

Commercial-HT: for bigger offices, film studios, etc.

Industrial-HT: for most heavy industries

Many a times the categories are also differentiated depending on the connected load and the tariffs increase if the connected load is higher. Even though both NDHT and NDLT consumers use electricity for the same purpose i.e., 'Commercial Activity' and if merged, would have simplified things by reducing the number of categories and therefore simplifying tariff structure further and would have maybe helped to curb malpractice. However, it was felt that such merger would not be in the consumer interest as it would impact the low end consumers (NDLT) the most. Therefore, the Commission took the view that the sub-categorization ought to continue.

1.5.1 Delhi Electricity Reforms Act, 2000

The government of national capital territory of Delhi under part VII (Tariffs) section 28 (7) (a) states-

The tariff implementation shall not show undue preference to any consumer of electricity, but may differentiate according to the consumer's load factor or power factor, the consumer's total

consumption of energy during any specified period, or the time at which supply is required.

1.5.2 Thus what needs to be ascertained and is backed by a plethora of Supreme Court judgments is that the basis for fixation of tariff is normally based on the nature of supply and the purpose for which the supply is required without showing undue preference. The Electricity commission must give effect to concept of equality under article 14 of The Constitution of India to the extent that there is no discrimination between similarly placed subscribers, nor are unequal subscribers treated identically. It has been held in a plethora of judgments that favourable treatment to a certain class of consumers on account of economic disparity does not violate Article14.

1.6 Water

Even in the case of supply of water various state agencies such as the Delhi Jal Board make a clear distinction between Residential, Partly and Industrial/Commercial consumers. The rate and volume of water supply is dependent on the categorization and even though all these categories use the same standard and quality of commodity ie: water yet there is differential pricing being used by the Jal Board.

i) Residential: Water supplied to such plot/property which is used purely for residential purpose.

ii) Partially Residential/Mixed: Water supplied to such residential buildings where commercial activity having non-intensive use of water exists, such as private clinic, consulting chambers, shops,

Atta Chakki, property dealer's office etc. For Group Housing Societies and Apartments with one bulk connection for water, the dwelling units which are having mixed use activity, shall be charged at tariff applicable for mixed use rates after taking average consumption for each unit.

iii) Industrial/Commercial :- Water supplied to plot/property where intensive use of water is envisaged such as institutes, hospitals, schools, offices, office complexes, Railway Stations/ yards, Police Stations, Airports, Bus- stand, Petrol Pumps, Hotels, restaurants, clubs, marriage halls, industry, cooling plants, factories, ice cream factory, amusement parks dhobi ghat etc.

The rationale again is that a consumer using water for its own use without gaining any commercial value cannot be equated with commercial establishments that gain monetarily and commercially from the existence of the water supply to their establishments.

1.7 Gas

Cooking Gas (LPG) is considered an essential commodity and is considered at par with Water and Electricity, even under the LPG distribution model followed by companies such as Indian Oil Corporation, Bharat Petroleum and Hindustan Petroleum there is a clear demarcation between a Commercial and Domestic Consumer. Commercial consumer includes LPG used by non-manufacturing establishments or agencies primarily engaged in the sale of goods or services. Included are such establishments as hotels, restaurants, wholesale and retail stores and other service enterprises. These

establishments are given no subsidy and their cost of purchase is directly linked to the market forces and global cues.

Domestic consumer includes usage by private dwellings, including but not limited to apartments for the purposes of cooking, heating and other household usages. These users are given gas via LPG cylinders/pipeline at a subsidized rate having no relation to the global market rates.

1.8 Satellite Television (abroad)

Further instances of differential Satellite TV pricing for commercial subscribers also abound in other jurisdictions for example in UK broadcasters such as Skyfor Business TV and Virgin Media Inc have incorporated into their respective business models a differential pricing methodology for different categories of consumers like:

a. Pubs

b. Hotels

c. Offices

d. Betting Premises

e. Retail

f. Golf Clubs

g. Gyms and leisure facilities

h. Schools

i. Any other businesses