RESPONSE OF DISH TV INDIA LIMITED

TO

THE TELECOMMUNICATION (BROADCASTING AND CABLE) SERVICES (SEVENTH) (NON-ADDRESSABLE SYSTEMS) TARIFF ORDER, 2014 Dt. 1/12/2014.

Submitted by

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RESPONSE BY DISH TV INDIA LIMITED TO THE DRAFT TARIFF ORDER PRESCRIBING THE RATES AND MANNER AT WHICH THE CHANNELS SHALL BE MADE AVAILABLE IN NON ADDRESSABLE AREAS

PRELIMINARY SUBMISSION

At the outset and before proceeding with giving our comments on the proposed clauses of the Draft Tariff Order for Non Addressable systems, we would like to highlight the new practice adopted by the broadcasters of not offering the bouquets and in fact discontinuing their existing bouquets, which is a gross violation of the applicable Regulations and is being resorted to only for the purpose of circumventing and defeating the price freeze orders of the TRAI.

As it is abundantly clear, the primary objective and the reason for bringing the "The Telecommunication (Broadcasting and Cable Services) Interconnection (Seventh Amendment) Regulation, 2014 dated 10th February, 2014("Regulations") was to address the market distortions caused by the broadcasters and their authorized agents (aggregators) (hereinafter collectively referred to as "Broadcasters"). TRAI, by notifying the said Regulations, aimed at rectifying / removing such distortions. The objective of the TRAI was clear from Press release No. 7/2014 of February 10, 2014 which prescribed the salient features of the amendments as under:

i. Broadcaster is defined as an entity having the necessary Government permissions in its name.

ii. Only the broadcaster shall publish the Reference Interconnect Offers (RIOs) and enter into interconnection agreements with DPOs. However, in case a broadcaster, in discharge of its regulatory obligations, is using the services of an agent, such authorised agent can only act in the name of and on behalf of the broadcaster.

iii. The broadcaster shall ensure that its authorised agent, while providing channels/bouquets to the DPOs, does not alter the bouquets as offered in the RIO of the broadcaster.

iv. In case an agent acts as an authorised agent of multiple broadcasters, the individual broadcasters shall ensure that such agent does not bundle its channels or bouquets with that of other broadcasters. However, broadcaster companies belonging to the same group can bundle their channels.

The Regulation was notified by the TRAI on February 10, 2014 and a time frame of six months was given by TRAI to broadcasters for transition to new regime i.e. to amend their RIOs and file the amended RIOs and the interconnection agreements with the TRAI.

In accordance with the above and in terms of the extant TRAI Regulations including the abovementioned Regulation notified on 10.02.2014, the broadcasters were required to amend and file RIOs in compliance of the TRAI Regulations in furtherance of the objectives of the amendments. However, certain broadcasters, while filing their RIOs with the TRAI, have declared only the A-la-carte rates of their channels and have not filed any bouquet of their channels nor have they declared the rates of the same. Such an attempt by the Broadcasters falls foul of the existing Regulatory regime in respect of the rates at which the channels are mandatorily required to be offered by the Broadcasters to the Distributors of the TV Channels. This is also an apparent attempt by the Broadcasters to force the Distributors of TV Channels to only enter into a fixed fee deals and not to opt for the RIO based Agreement. Further, not making available the bouquets in Non Addressable areas would also mean even the non-addressable platforms will have to avail channels on RIO basis despite not having the feature of addressability.

It is stated that while doing so, the broadcasters have in effect attempted to not only circumvent the provision of the aforementioned amendments of the TRAI in letter and spirit which aims at the correcting the role of intermediaries / content aggregators but also violated the requirements of 'The Telecommunication (Broadcasting and Cable) Services (Second) Tariff Order 2004' and its subsequent amendments which provides a ceiling on the rates of the channels as on 26.12.2003, only to be increased as per the amendments of the said Tariff Order from time to time. As a corollary, the requirement of such ceiling was equally applicable for the packages/bouquets of the broadcasters as prevalent on that day and as allowed by the amendments from time to time.

However while completely omitting filing compositions/details of their existing packages and rates thereof, the broadcasters are attempting to misuse the recent amendments by the TRAI to their benefit and to the detriment of distributor of channel thus defeating the very purpose of these amendments. Effecting, if the Broadcasters are allowed to continue do so, the recent Regulations of TRAI dated 10.02.2014 will only create further anomaly in the market rather than eliminating the market anomalies which is the basic intent of the Regulation. The monopolistic position of certain broadcaster will further get strengthened and the Distributors of TV Channels & the consumers will further get adversely impacted.

In this context it is pertinent to point out that the Regulation dated 10th February 2014 prohibits only the "multiple broadcaster bouquet" i.e. bundling of the channels belonging to the different broadcasters. The said Regulation nowhere provides that the bouquet *per se* shall not be offered. On the contrary, the Regulation contemplates that the existing bouquets that are being provided by the broadcasters shall continue to be made available to the distributors of channels by amending the composition thereof to the effect that the channels of other broadcasters shall be removed from the said bouquets and only the channels of the said broadcaster along with the channels of its Group companies if any shall be retained in the said bouquet.

The attention in this regard is invited to Clause 3 of the Telecommunication (Broadcasting and Cable Services) Second Tariff (10th Amendment) Order 2014 dated 10th February 2014 which provides for the formula for determining the rates of modified bouquet to be offered by a broadcaster.

The said Clause 3 reads as under:

> *"In clause 3C of the principal Tariff Order, in sub-clause (2)-*
> *(a) after the first proviso, the following proviso shall be inserted namely:-*
> *"Provided further that nothing contained in the first proviso shall apply to those bouquets of channels existing on the 1st day of December, 2007, which are required to be modified pursuant to the commencement of the Telecommunication (Broadcasting and Cable Services) Interconnection (Seventh Amendment) Regulation, 2014 and the rate of such modified bouquet of channels shall be determined in the following manner-*

The rate of the modified bouquet =[rate of the existing bouquet] x [sum of a-la-carte rate of pay channels comprising the modified bouquet/sum of a-la-carte rate of all the pay channels comprising the existing bouquet].
and if after modification of the bouquet, there remains only one channel in such bouquet, the broadcaster shall be free to offer such channel at its published a-la-carte rate in its Reference Interconnect offer".

(b) after the second proviso, so inserted, the following proviso shall be inserted, namely:-
"Provided also that no pay TV channel shall be added to or removed from the modified bouquet of TV channels referred to in the second proviso."

(c) in the existing proviso, for the word "further" the word "also" shall be substituted."

A perusal of the above would reveal that a broadcaster is obliged to offer the bouquet hitherto being offered by him either directly or through content aggregator(s) after deleting the channels belonging to other broadcasters from the said bouquet and complying with the requirements of Clause 3 above in respect of rates of such bouquet.

In view of this it is impermissible for any broadcaster to discontinue the offer of the bouquet itself under the garb of the Regulation dated 10th February 2014 and offer its channels only on a-la-carte basis.

It is also relevant in this context to point out the following:

(a) In non-DAS areas the channels are being offered only on bouquet basis. It is broadcasters own case that in non-DAS areas since there is no addressability at subscribers level and there is no technological mechanism to deliver the channel in accordance with choice exercised by a subscriber, they are not at all under any obligation to offer the channels on ala-carte basis to MSOs/LCOs etc at wholesale level.

(b) In this context it may be pointed out that Clause 3(C)(1) was inserted in Tariff Order dated 4th October 2007 which reads as under:

"3C. Manner of offering channels by broadcasters.
(1) Every broadcaster shall offer or cause to offer on non-discriminatory basis all its channels on a a-la-carte basis to the multi system operator or the cable operator, as the case may be, and specify an a-la-carte rate, subject

to provisions of sub-clause (2) of this clause and clauses 3 and 3B, for each such pay channel offered by him.

(c) The said Clause was challenged by the broadcasters before Hon'ble TDSAT mainly on the premise that since in non-DAS areas there is no addressability and since the MSOs/LCOs do not have any technological mechanism to deliver the channel on a-la-carte basis to the consumers in accordance with their choice and requirement, it is not obligatory upon them to offer & provide the channels to MSOs/LCOs on a-la-carte basis. Hon'ble TDSAT has accepted arguments of broadcasters in this behalf and set aside Clause 3(C)(1) from the said Tariff Order vide its judgement dated 15.1.2009.

(d) Thereafter the order of Hon'ble TDSAT became the subject matter of an Appeal before the Hon'ble Supreme Court wherein an interim order was passed on 13.5.2009 ordering status quo in the matter and TRAI was directed to file a comprehensive report on the tariff related issues with Hon'ble Supreme Court. It is important in this context to point out that TRAI had filed its report on Tariff issues related to Cable TV services in non-CAS areas dated 21st July 2010 with Hon'ble Supreme Court and vide para 3.93 & 3.94 of the said report observed as under:

> 3.93 The Authority has also observed that a la carte has not translated into practice even after broadcasters had been mandated to offer their channels on a la carte basis by the 8th Tariff Amendment Order of 4.10. 2007. In an environment where wholesale level pricing is determined by market forces, the a la carte price of a channel is likely to be disproportionately higher than the bouquet price. This has also been the experience in international markets. In the non-CAS regime, the gap between a la carte and bouquet pricing is lower, due to applicable price controls and the perverse pricing conditions. However it is observed that broadcasters demand higher connectivity to offset the impact of price control. Until the lack of transparency in the system persists, this practice cannot be controlled and MSOs are thus unlikely to opt for a la carte. In the absence of addressability, mandatory a-la-carte at the wholesale level is therefore not an implementable solution.
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> 3.94 Further, the Authority also has noted that in an analogue system, the benefit of a la carte provisioning cannot be passed on to subscribers due to

technological constraints. Thus even if MSOs purchase content on a-la-carte basis, the subscriber has limited choice, as the analog service is a bundled service of ~80 FTA and pay channels at the retail level. The full benefits of a la carte can be achieved only if it translates into genuine choice for the individual subscriber. **In the analog, non-addressable environment, the Authority is of the view that a la carte should not be made mandatory at the wholesale level as technological constraints in any case make it impossible for the benefits of a-la-carte provisioning to be passed on to the subscribers.**

(e) Thus it is an accepted position that even after the insertion of Clause 3(C)(1) in the Tariff Order dated 4th October 2007, only the bouquets have been made available to MSOs in non-DAS areas and same is the position even today. It is a matter of record that only about 40-45% of the total C&S homes have so far been digitized. The balance 60-55% of C&S households are still non-DAS. In non-DAS areas the ala-carte offering is not being made and in the absence of technological mechanism at the end of MSOs/LCOs to deliver the channel on ala-carte basis to a subscriber, only bouquet offerings are being availed. Non stipulation of the bouquet in RIOs is in fact a violation of Tariff Order dated 4th April 2007.

(f) It is also important to point out that since only bouquet offering is being done in non-DAS areas as per extant Regulatory stipulations, it is imperative on the part of the broadcasters to offer the bouquet to the distributors in addressable systems as well.

The attention in this regard in invited to Clause 23 of the Explanatory Memorandum to the Tariff Order dated 21st July 2010 which reads as under:

> *"Broadcaster will continue to offer all bouquets that are available for the non-addressable (non-CAS) system to the distributors in addressable system. They will also offer their channels to the distributors in addressable systems on a-la-carte basis as at present".*

In view of the above regulatory position, it is quite clear that discontinuing the bouquet offering and filing RIO only on the basis of ala-carte offering is a gross violation of not only the Tariff Order dated 4th October 2007 but also that of Tariff Order dated 10th February 2014 as well as Interconnect Regulation dated 10th February 2014.

The present draft Tariff Order regretfully seeks to provide legitimacy to this dubious, illegal & impermissible practice adopted by the Broadcasters when it seeks to provide vide clause 5 that while it would be mandatory for the Broadcasters to offer their channels on ala-carte basis, it would be discretionary for them to offer the Bouquets. The attention is also invited to the draft Explanatory Memorandum which provides vide clause 29 that ;

> 29. *The issue of mandatory offering of channels on a-la-carte basis at the wholesale level was discussed during the consultation exercise 2009-10, and, a provision to keep it optional for the broadcasters was proposed in the draft tariff order, forming part of the Report submitted to the Hon¨ble Supreme Court. Considerable time has passed since formulation of the said draft tariff order.* ***In the intervening period, the a-la-carte offering of channels by the broadcasters, in the non-addressable areas at the wholesale level, has been mandatory.*** *The system has already stabilized and working on the ground, without any major issues reported. Moreover, most of the major broadcasters are themselves moving towards offering their channels, exclusively, on a-la-carte basis. Further, with progressive penetration of digitization, mandatory a-la-carte offering is going to be the road ahead.* ***Therefore, the Authority is of the view that broadcasters be mandated to offer their channels on a-la-carte basis. They may, in addition to a-la-carte offerings, offer bouquet of channels.***

It is pertinent to point out that it is wrong on the part of TRAI to state that "*In the intervening period, the a-la-carte offering of channels by the broadcasters, in the non-addressable areas at the wholesale level, has been mandatory".* This was never the case. Ala-carte offering in non-addressable areas was never made mandatory. This is nothing but approving the practices adopted by certain Broadcasters of discontinuing their existing bouquets which they had been providing since December 2003 and which they are bound to provide as per prevalent Regulatory regime and circumvent the tariff freeze. This needs to be corrected immediately.

Further, with only the a-la carte offerings by the broadcasters, the Distributors of TV Channels will be forced to increase the prices of their offering to the consumers. It is matter of common knowledge that the rate of the bouquet/packages, wherein various channels are packaged together and offered as a bunch, are comparatively cheaper when the same channels are opted on ala carte basis and then packaged and offered by a distributor of channel as a bouquet/package to the subscribers. This has been the stated position of TRAI in its affidavit submitted to Hon'ble Supreme Court. Despite that "ala carte" is proposed to be mandatory and "Bouquet" discretionary.

It is therefore clear that the present practice adopted by the broadcaster is to circumvent the tariff freeze order and it would inevitably result in the increase in the prices of the channels being availed by the subscribers. This said practice by the broadcasters is therefore completely against the consumer interest. Keeping in view that the TRAI has recently issued a tariff order allowing the broadcaster to increase the prices of the channels, this action on the part of the broadcaster would cause further steep hike in the subscription amount being paid by the Subscribers for availing the channels.

It is therefore clear that the present RIOs being filed by the broadcasters are only eyewash and the actual intent is to wriggle out of the requirements of the price freeze and pressurize the Distributors of TV Channels to enter into fixed fee deals at the prices to be solely decided by the broadcasters**. It has therefore become imperative that an urgent cognizance of this gross malpractices is taken by the TRAI in order to ensure orderly growth of the broadcasting and cable sector and also that the current Tariff Order under consultation is not misused by the Broadcasters.**

It is also a matter of common knowledge that distributors of addressable system have been complaining to TRAI that the rates of ala-carte offered by the broadcasters are illusory and unrealistic. It is not possible for a distributor of channels to subscribe to the channels of broadcasters at wholesale level on a-la-carte basis and provide its services to its subscribers at an affordable cost. As pointed out hereinabove, the entire exercise of the broadcasters in discontinuing the bouquet and offering the channels only on ala-carte basis in their RIOs is

aimed at forcing the distributor of channels in addressable system to enter into fixed fee deals with them.

It is stated that if no corrective action is taken by TRAI in this regard the prices at the retail level are bound to increase manifold. It may no longer be possible for the distributor of channels to offer attractive bouquets/packages to their subscribers as the ala-carte prices of the channels of the broadcasters are prohibitive and unviable. The TRAI in para 19 of Explanatory Memorandum of its Tariff Order dated 30th April 2012 as applicable for DAS areas has inter alia observed as under:

> *".....Therefore, the Authority feels it appropriate to extend the a-la-carte provisioning of channels to cover both the FTA and pay channels carried over the network of an operator as it is technically feasible and does not burden much the operator logistically on the one hand and empowers the consumers to benefit from the digitization with addressability of the TV services distribution sector, on the other hand.* ***However, the advantages of bundled packages of channels should also be available to the subscriber. Subscribers should be able to choose between a-la-carte channels or bouquets or a combination of the two. This is likely to ensure the co-existence of bouquets with a-la-carte offerings on addressable systems. Accordingly, the provisions of bouquet of channels to the subscribers is also a part of the Tariff Order."***

The above stipulation may no longer be feasible as procuring the channel on ala-carte basis at prohibitive prices, creating bouquets and packages and offering them to the consumers at affordable and attractive prices will not be a feasible proposition under the prevailing circumstances.

In this regard, we would like to refer to the Interconnect Regulation under which the TRAI has been vested with an obligation to ensure that the RIOs filed by the broadcasters comply with the requirement of the applicable regulation and if it so requires, the TRAI may ask the concerned broadcaster to modify its RIO in order to bring the same in line with the regulations. It is worth mentioning in this regard that in the past, the broadcasters, on various occasions, have been found to be on the wrong side of the regulatory obligations by not only the TRAI itself but also by the Hon'ble TDSAT. The relevant provision of the Interconnect Regulation is reproduced hereunder:

13.3 In case the Authority is of the opinion that the Reference Interconnect Offer requires modifications so as to protect the interests of service providers or consumers of the broadcasting sector and cable sector, or to promote or ensure orderly growth of the broadcasting sector and cable sector or the Reference Interconnect Offer has not been prepared in accordance with the provisions of these regulations, it may, after giving an opportunity of being heard to the concerned broadcaster, require the concerned broadcaster to modify the said offer and such broadcaster shall make such modifications and publish, within fifteen days of receipt of requirement for the modifications, the said offer after incorporating such modifications.]"

Further, recently, the Hon'ble TDSAT in its order dated 25.04.2014 in the petition number 836 (C) of 2012 titled as Dish TV India Limited vs. ESPN Software India Pvt. Ltd. has held that the RIOs of the broadcasters should be in conformity with the TRAI Regulations and to ensure the same, the TRAI should have a relook at all such RIOs and if required a task force may be set up for this purpose so that the same may be done in a time bound manner. The relevant portion of the said order is reproduced hereunder for your ready reference:

> *"As per regulation 13.3, in case the TRAI is of the opinion that the RIO requires modifications so as to protect the interest of service providers or consumers, or to promote the growth of the broadcasting and cable sectors, or the same has not been prepared in accordance with the provisions of these regulations, it may after giving an opportunity of hearing to the broadcaster require it to modify the same.*
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> *Implicit in these regulations is that the RIOs published by the broadcasters have the consent and the approval of the Regulator (TRAI) and these RIOs shall be the basis for interconnect agreements between the Broadcasters and the distributers of signals. The terms and conditions of the RIOs, not only have to be in conformity with the regulations, but also for them to be meaningful and serve their purpose, should be reasonable and representative of the industry norms. However, from the cases coming up before us, it appears otherwise and we find that the parties, either wanting to enter into agreements based on RIOs or migrate from the existing agreements to those based on RIOs, find it difficult to do so because either the terms and conditions prescribed are not in conformity with the regulations or the costs prescribed are not representative of the industry norms but on much higher side. This leads to a situation where parties are forced*

to negotiate the conditions of the interconnect agreements with the seeking party being at a disadvantage.

We would, therefore, urge the TRAI to have a relook at all such RIOs (which may not be very large in numbers) and if required set up a task force for the purpose so that the same may be done in a time bound manner."

(Emphasis supplied)

Further, the Hon'ble TDSAT also in its recent order dated 25.09.2014 in the petition number 47 (C) of 2014, 210 (c) of 2014, 214 (c) of 2014, 309 (c) of 2014 and 335 (c) of 2014 has held that the RIOs of the broadcasters are completely divorced of the market and the TRAI should have a relook at all such RIOs. The relevant portion of the said order is reproduced hereunder for your ready reference

"In this country, unfortunately, RIOs are framed seemingly in negation of these attributes. RIOs mostly give only a-la-carte rates and even those rates are fixed with reference to the maximum permissible under the tariff orders. But in reality the maker of the reference would be giving signals to most parties, or at least its favoured ones, at rates far lower than those stated in the RIO. In other words, the RIO rates are completely divorced from the market rates. The vast difference between the realistic market prices and the rate in the RIO gives the provider a free hand to quote a price much higher than the market price to a new seeker or one in disfavour, a price that would be commercially unviable and force the seeker either to accept that price or to accept the RIO.

Clause 4(1) of the DAS Regulations requires the RIOs to be submitted to the TRAI and clause 6 requires that any amendments in the RIO must also be similarly submitted to the TRAI. The Regulations thus imply the endorsement of the RIOs by TRAI and that gives the RIOs a certain degree of sanctity. But we are constrained to observe that the TRAI has failed to examine the rates quoted in the RIO submitted before it from the point of view indicated above. In an earlier judgment [Petitions nos.836(C)/2012 & 382(C)/2011 – Dish TV India. Ltd. Vs. ESPN Software India Pvt. Ltd.], we had asked the TRAI to pay attention to this aspect of the matter but unfortunately our observations failed to receive due attention. We reiterate the urgent need for TRAI to examine the RIOs submitted to it, especially the rates quoted by broadcasters and MSOs, to make these serve the purpose as intended in the regulations"

In view of the above, it is imperative on the part of the TRAI to direct all the Broadcasters to publish the bouquets and the rates thereof existing as on 01.12.2007 in addition to evaluating the ala carte rates notified by the Broadcasters.

Dish Response to the Clauses of the Draft Tariff Order

Response to the proposed Clause 2 (h) – Definition of Bouquet

The proposed definition of "Bouquet" should also provide that the "Bouquet" shall mean and include all such bouquet which existed on 01.12.2007. In case a Bouquet was a multi broadcaster bouquet, it should be modified by deleting/removing the channels of other broadcasters and the rates of such bouquet should be reduced in terms of the reduction formula laid down by the TRAI upon removal of channels which did not belong to one single broadcaster.

Response to the proposed Clause 5

The Clause 5 should clarify that the Broadcaster will be mandatorily required to also offer its bouquet which existed as on 01.12.2007.

In this regard, it is pertinent to note that the third proviso to Clause 2 provides that the bouquet as existing on 01.12.2007 shall not be changed as far as the pay channels are concerned. The fourth proviso also provides for the manner in which a multi broadcaster bouquet would be required to be modified to a single broadcaster bouquet.

It is stated that though the intent of the TRAI is absolutely clear in the said Clause however the Broadcasters have failed to submit the bouquet and the rates thereof with the TRAI only with an intent to by pass/circumvent the freeze order of the TRAI and consequently increase the price of the channels. By doing away with the practice of offering the bouquet, the Broadcasters are attempting to remove the linkage of the ala carte rates of the channels with the bouquet rates. Such an attempt by the Broadcaster is totally illegal and impermissible.

The draft tariff order is required to be modified accordingly to the abovementioned effect.