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PART III, SECTION 4

TELECOM REGULATORY AUTHORITY OF INDIA

NOTIFICATION

New Delhi, the 16th July, 2014.

THE TELECOMMUNICATION (BROADCASTING AND CABLE) SERVICES
(SECOND) TARIFF (TWELFTH AMENDMENT) ORDER, 2014

(No. 5 of 2014)

No. 1-18/2014 - B&CS. ----- In exercise of the powers conferred by sub-clauses (ii), (iii) and (iv) of clause (b) of sub-section (1) and sub-section (2) of section 11 of the Telecom Regulatory Authority of India Act, 1997 (24 of 1997), read with notification of the Government of India, in the Ministry of Communication and Information Technology (Department of Telecommunications), No.39 ,-----

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

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

the Telecom Regulatory Authority of India hereby makes the following Order further to amend the Telecommunication (Broadcasting and Cable) Services (Second) Tariff Order, 2004 (6 of 2004), namely:----

1. (1) This Order may be called the Telecommunication (Broadcasting and Cable) Services (Second) Tariff (Twelfth Amendment) Order, 2014 (5 of 2014).

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

2. In clause 2 of the Telecommunication (Broadcasting and Cable) Services (Second) Tariff Order, 2004 (6 of 2004) (hereinafter referred to as the principal Tariff Order),--

(a) after sub-clause (dd), the following sub-clause shall be inserted, namely:-

“(dda) “**commercial establishment**” means any premises wherein any trade, business or any work in connection with, or incidental or ancillary thereto, is carried on and includes a society registered under the Societies Registration Act, 1860 (21 of 1860), and charitable or other trust, whether registered or not, which carries on any business, trade or work in connection with, or incidental or ancillary thereto, journalistic, printing and publishing establishments, educational, healthcare or other institutions run for private gain, theatres, cinemas, restaurants, eating houses, pubs, bars, residential hotels, malls, airport lounges, clubs or other places of public amusements or entertainment”;

(b) for sub-clause (ddd) and the Explanatory note, the following sub-clause shall be substituted, namely:-----

“(ddb) “**commercial subscriber**” means any person who receives broadcasting services or cable services at a place indicated by him to a cable operator or multi system operator or direct to home operator or head end in the sky operator or Internet Protocol television service provider, as the case may be, and uses such services for the benefit of his

clients, customers, members or any other class or group of persons having access to his commercial establishment;”

(c) for sub-clause (f) and its Explanations, the following sub-clause shall be substituted, namely:-

“(f) “**Charges**”, with reference to---

(i) subscriber, means the rates (excluding taxes) payable by the subscriber to the cable operator or multi system operator, as the case may be, for cable services received by him;

(ii) cable operator, means the rates (excluding taxes) payable by the cable operator to the multi system operator or broadcaster, as the case may be, for broadcasting services or cable services received by him;

(iii) multi system operator, means the rates (excluding taxes) payable by the multi system operator to the broadcaster, for the broadcasting services received by him;”

3. In clause 3 of the principal Tariff Order,----

(a) for the sub-clauses (a), (b) and (c) and paras (A) and (B), appearing before Explanation 1, the following sub-clauses and paras shall be substituted, namely:----

“(a) Ordinary cable subscribers to cable operators or multi system operators, as the case may be;

(b) cable operators to multi system operators or broadcasters, as the case may be;

(c) multi system operators to broadcasters,

prevalent before the 1st day of April, 2014 and increased by an amount not exceeding fifteen per cent, shall be the ceiling,----

(A) for both free to air channels and pay channels transmitted or re-transmitted by multi system operators to cable operators, and by multi system operators and cable operators to the Ordinary cable subscribers; and

(B) for bouquets of channels, consisting only of pay channels or both pay channels and free to air channels, and stand-alone channels, not forming part of any bouquet, transmitted by broadcasters to multi system operators or cable operators or both:

(b) the Explanations 1, 2 and 3 below sub-clause (c), shall be deleted;

(c) for the third proviso and its paras I and II, the following proviso shall be inserted, namely:---

“Provided also that in the case of the commercial subscriber, for each television connection, the charges payable by the Ordinary cable subscriber under sub-clause (a), shall be the ceiling;

Provided also that if a commercial subscriber charges his customer or any person for a programme of a broadcaster shown within his premises, he shall, before he starts providing such service, enter into agreement with the broadcaster and the broadcaster may charge the commercial subscriber, for such programme, as may be agreed upon between them.

Explanation: For the removal of doubt, it is clarified that any increase in the price of goods or services, being provided by the commercial subscriber during the duration of the telecast of a programme, referred to in the above proviso, shall also be treated as charge for the said programme.”

(Sudhir Gupta)
Secretary, TRAI

Note.1-----The principal Tariff Order was published in the Gazette of India, Extraordinary, Part III, Section 4 vide notification No. 1-29/2004-B&CS dated the 1st October 2004 and subsequently amended vide notifications No.1-29/2004-B&CS dated the 26th October 2004, No. 1-29/2004-B&CS dated the 1st December 2004, No. 1-13/2005-B&CS dated the 29th November, 2005, No. 1-2/2006-B&CS dated the 7th March 2006, No. 1-2/2006-B&CS dated the 24th March 2006, No. 1-13/2005-B&CS dated the 31st July 2006, No. 1-19/2006-B&CS dated the 21st November 2006, No. 1-1/2007-B&CS dated the 4th October 2007, No. 1-31/2008-B&CS dated the 26th December 2008, No.1-2/2014-B&CS dated the 10th February, 2014 and No.1-6/2014-B&CS dated the 31st March, 2014.

Note.2-----The Explanatory Memorandum explains the objects and reasons of the Telecommunication (Broadcasting and Cable) Services (Second) Tariff (Twelfth Amendment) Order, 2014 (5 of 2014).

Explanatory Memorandum

Background

1. The Telecom Regulatory Authority of India (TRAI) was entrusted with the responsibility of regulating 'broadcasting and cable TV' services in January, 2004. An interim Tariff Order was issued on 15.01.2004, which provided that the cable charges prevailing on 26.12.2003 shall be the ceilings at the respective levels. Thereafter, following extensive consultations, a detailed Tariff Order was issued on 01.10.2004. This order, while maintaining the sanctity of the ceiling of cable TV charges prevailing on 26.12.2003, also provided a window for introduction of new pay channels and conversion of existing Free-to-Air (FTA) channels to 'pay channels' subject to prescribed conditions. The underlying objective of these Tariff orders was to give relief and protection to consumers of broadcasting and cable TV services from frequent hikes in cable TV charges.
2. Subscribers of broadcasting and cable TV services are basically of two kinds. First, there are ordinary subscribers who consume TV services domestically for their own pleasure. The second group comprises commercial subscribers who obtain TV services for the benefit of their clients, customers etc., at their commercial establishment. While issuing the Tariff Orders in 2004, as mentioned above, the Authority, however, did not differentiate between ordinary and commercial subscribers.
3. The matter pertaining to tariffs for commercial subscribers has been under judicial scrutiny since 2005, before the Hon'ble Telecom Disputes Settlement Appellate Tribunal (TDSAT), when Hotels and Restaurants Association (Western India) (HRAWI), a sister association of Federation of Hotel and Restaurant Associations of India (FHRAI), challenged differential tariffs imposed by some broadcasters. The Hon'ble TDSAT disposed of these petitions *vide* its judgment dated 17.01.2006 wherein it concluded that the members of the petitioner associations couldn't be regarded as subscribers or consumers. It also asked the Authority to consider whether it was necessary or not to fix tariff for commercial cable TV subscribers.
4. As an interim measure, on 07.03.2006, the Authority issued an amendment to the principal Tariff Order of 01.10.2004. This Tariff Amendment Order defined the terms 'Ordinary cable subscriber' and 'Commercial cable subscriber'. In the

meanwhile, the aforesaid judgment of the Hon'ble TDSAT was appealed by the Associations of Hotels and Restaurants before the Hon'ble Supreme Court. In an interim order on 19.10.2006, the Hon'ble Supreme Court directed the Authority to carry out the processes for framing the tariff under Section 11 of the TRAI Act, independently and not relying on or on the basis of any observation made by TDSAT. In its final order on 24.11.2006, the Hon'ble Supreme Court confirmed its interim orders and stated that it did not agree with the opinion of the Hon'ble TDSAT that the Authority should also consider whether it is necessary or not to fix tariff for commercial cable TV subscribers.

5. Based on the interim order of the Hon'ble Supreme Court dated 19.10.2006, the Authority issued two Tariff Amendment Orders, on 21.11.2006, applicable to commercial subscribers in non-CAS and CAS areas, respectively. This tariff amendment order categorized commercial subscribers into the following two groups, namely:-
 - (a) A specified category of commercial subscribers comprising---
 - (i) Hotels with rating of 3 stars and above;
 - (ii) Heritage hotels (as defined by the Department of Tourism, Government of India);
 - (iii) Any hotel, motel, inn or commercial establishment providing board & lodging and having 50 or more rooms; and
 - (b) All other commercial subscribers (not falling under the specified category of commercial subscribers).

6. The tariff for cable TV services for the specified category of commercial subscribers was to be mutually determined by the parties. However, the tariff for commercial subscribers not falling in the specified categories (coming under the second category) was subject to the same charges as ordinary cable subscribers and thus the ceiling of rates prevailing as on 26.12.2003 was made applicable to them. The tariff amendment order also provided that whenever a commercial cable TV subscriber belonging to either of the two categories uses the programme of a broadcaster for public viewing by fifty or more persons on the occasion of special events at a place registered under the Entertainment Tax Act, the tariff will have to be mutually decided between the parties concerned.

7. These orders too were appealed against in the Hon'ble TDSAT by way of appeals [Appeal No.17(C) of 2006 - East India Hotel Ltd. Vs TRAI & Ors and Appeal No. 18 (C) of 2006 - The Connaught Prominent Hotels Limited vs. TRAI & Ors] by the hotels and their associations. The Hon'ble TDSAT passed its judgment on 28.05.2010 in the two appeals filed by the hotels against the tariff amendment

orders dated 21.11.2006. The operative portion of the judgment of the Hon'ble TDSAT read:

"We, therefore, are of the opinion that it is a fit case where the impugned orders are required to be set aside. We direct accordingly. We, however, do not wish to issue any direction with regard to the refund of any amount but we would request the Authority to consider the case of commercial establishments once over again in a broad based manner".

8. In sum, the sub-classification of commercial consumers into two categories was struck down by the Hon'ble TDSAT. Aggrieved by the TDSAT judgement dated 28.05.2010, M/s ESPN Software India Pvt. Ltd. filed an appeal (CA No. 6040-41 of 2010 -M/s ESPN Software India Pvt. Ltd. Vs TRAI and Ors.) in the Supreme Court. The judgment of the Hon'ble Supreme Court, dated 16.04.2014, in this case, directs as follows:

"... .. we direct that for a period of three months, the impugned tariff, which is in force as on today, shall continue. Within the said period, TRAI shall look into the matter de novo, as directed in the impugned judgment, and shall re-determine the tariff after hearing the contentions of all the stake holders...."

9. Accordingly, as directed by the Hon'ble Supreme Court in its judgment dated 16.04.2014, TRAI initiated a consultation process, as part of a de novo exercise, and issued a Consultation Paper (CP) on 11.06.2014 seeking comments/views of the stakeholders. The CP discussed and raised related consultation issues pertaining to various alternatives for tariff stipulations for the commercial subscribers, manner of offering of TV services to them, the definition of the 'commercial establishment', 'shop' and 'commercial subscriber', and sub-categorization of the commercial subscribers into similarly placed groups. In response to the CP, 24 stakeholders submitted their views/comments to the Authority. Subsequently, to further discuss the issues involved, an Open House Discussion (OHD) was also held at Delhi on 4th July 2014, wherein 59 stakeholders participated in the discussions.
10. This tariff order is being notified after analyzing all the issues involved and the inputs received from various stakeholders.

Analysis of Issues

Definition of commercial subscribers, commercial establishment and shops

11. Draft definitions of commercial subscriber, commercial establishment and shops were discussed in the CP and views/comments of the stakeholders were solicited.

Stakeholder comments

12. Several broadcasters including the two prominent broadcasters, a broadcasting industry association, a Hotel industry association as well as a couple of cable TV operator associations have broadly agreed with the draft definitions. Some of them have pointed out that the 'profession' appearing in the definition of 'commercial establishments should be deleted as some court decisions have held that the premises of doctors, lawyers, engineers etc. should not be considered commercial establishments. Some other broadcasters have stated that shops, factories and public viewing areas should be included in the definition of 'commercial establishment'. It was also suggested by a broadcaster that 'publishing' should also be included in the definition of 'commercial establishments'. An association of broadcasters and some other stakeholders from the broadcasters fraternity have put forth the view that any premise, indoor or outdoor, that is not a domestic premise should be categorized as commercial and commercial subscribers be defined in an all inclusive manner to include all subscribers except residential subscribers.
13. The majority of the distribution platform operators, cable and DTH, as well as a hotel and restaurant industry association are of the view that there is no need to make a distinction between ordinary and commercial subscribers and all subscribers should be treated at par. It has also been suggested to include the concept of commercial purpose and/or commercial exploitation into the definition of commercial establishment. Another industry association has proposed that commercial subscriber should be defined as the one who uses TV signals as its business or commercial activity or part thereof, irrespective of whether TV channels are charged or not from the viewers/audience.

Analysis

14. Taking into account the views of the stakeholders, the definition of 'commercial establishment' has been included and the definition of 'commercial subscriber' has been accordingly amended. This is also in line with the tariff prescription

and the manner of offering of television services to the commercial subscribers, which have been discussed in subsequent paragraphs.

Tariff for Commercial subscribers

15. In the CP, the following four alternatives were discussed for prescribing tariff for commercial subscribers, seeking views/comments of the stakeholders:
 - (i) The tariff for commercial subscribers is the same as that for ordinary subscribers.
 - (ii) The tariff for commercial subscribers has a linkage with the tariff for ordinary subscribers.
 - (iii) The tariff for commercial subscribers has no linkage with the tariff for ordinary subscribers but there are some protective measures prescribed to protect all the stakeholders such as mandatory a-la-carte offering, conditions to prevent perverse a-la-carte pricing vis-à-vis bouquet rates etc.
 - (iv) The tariff for commercial subscribers is kept under total forbearance.

Stakeholder comments

16. Hotel industry associations and almost all distribution platform operators (DPOs) have advocated for adoption of the first alternative discussed in the CP i.e. the tariff for commercial subscribers should be same as that prescribed for the ordinary subscribers. To support their view, the main arguments put forth have been - (i) the ultimate consumer/viewer is the same whether the TV services are availed at the domestic premises of the consumer or in a hotel or hospital or any other commercial establishment, (ii) a consumer does not go to such commercial establishment specifically to view TV channels (iii) there is no extra cost to the broadcaster for production of content and its distribution in both the cases and the content/quality of signal remains the same. Some of them further stated that, in cases where the consumer goes to a commercial establishment specifically to avail TV services and pays for it, the tariff may be different from that for the ordinary subscribers.
17. On the other hand, all broadcasters and their representative bodies are of the view that the fourth alternative, prescribing total forbearance on tariff for commercial subscribers, be adopted. The main arguments presented by them in this regard are - (i) the TV services are basically non-essential services and, therefore, need not be regulated, (ii) in many international markets, differential pricing is done for the commercial subscribers, (iii) commercial subscribers

exploit the TV signals for commercial gains, therefore, the broadcasters are entitled to a fair share of the same. In response to a query during the OHD, an Association of broadcasters has indicated that the total revenue of the commercial subscribers that are 'known' to subscribe to television are estimated at 1.5-2.2% of total distribution revenues.

18. A headend in the sky (HITS) operator has suggested for prescription of the second alternative which provides that there should be a certain linkage between the tariff for ordinary and commercial subscribers. A broadcaster and a couple of cable operator associations have expressed their preference for the third alternative. It has also been suggested by a multi system operator (MSO) that a broadcaster should prescribe the retail price of its channels for different categories of commercial subscribers and the revenue share for different stakeholders in the value chain should be determined by TRAI.

Analysis

19. The end consumer, whether at his domestic premises or at any commercial establishment, gets to view the same content with same quality of signals. In both the cases, the cost to the content owner (broadcaster) and the DPO, for supplying the signals, per se, does not vary on account of where the signals are supplied - at the domestic premises or the commercial establishment. Moreover, The Hon'ble Supreme Court in its judgment dated 24.11.2006 in appeal (Civil) 2061 of 2006 Hotel and Restaurants Association and Anr Vs Star India Pvt Ltd. and Ors has, amongst others, observed as under:

"....The owners of the hotels take TV signals for their customers/ guests. While doing so, they inter alia provide services to their customers. An owner of a hotel provides various amenities to its customers such as beds, meals, fans, television, etc. Making a provision for extending such facilities or amenities to the boarders would not constitute a sale by an owner to a guest. The owners of the hotels take TV signals from the broadcasters in the same manner as they take supply of electrical energy from the licensees. A guest may use an electrical appliance. The same would not constitute the sale of electricity by the hotel to him. For the said purpose, the 'consumer' and 'subscriber' would continue to be the hotel and its management. Similarly, if a television set is provided in all the rooms, as part of the services rendered by the management by way of an amenity, wherefor the guests are not charged separately, the same would not convert the guests staying in a hotel into consumers or subscribers....."

The said judgment further quotes another judgment of the Hon'ble Supreme Court (in The State of Punjab v. M/s. Associated Hotels of India Ltd. [(1972) 1 SCC 472]) on similar issue, which is reproduced as under:

".... When a traveller, by plane or by steam-ship, purchases his passage-ticket, the transaction is one for his passage from one place to another. If, in the course of carrying out that transaction, the traveller is supplied with drinks or meals or cigarettes, no one would think that the transaction involves separate sales each time any of those things is supplied. The transaction is essentially one of carrying the passenger to his destination and if in performance of the contract of carriage something is supplied to him, such supply is only incidental to that services, not changing either the pattern or the nature of the contract. Similarly, when clothes are given for washing to a laundry, there is a transaction which essentially involves work or service, and if the laundryman stitches a button to a garment which has fallen off, there is no sale of the button or the thread. A number of such cases involving incidental uses of materials can be cited, none of which can be said to involve a sale as part of the main transaction."

20. From the observations of the Hon'ble Supreme Court, cited above, it is clear that provision of TV services in a commercial establishment is only incidental to the service that the commercial establishment is providing to its clients. It cannot be construed as re-distribution or re-sale of TV services. In any case, there is no re-transmission. In sum, the question as to who is the subscriber has been settled through this judgment. It has also been settled by the said judgment that any service rendered to a guest by way of an amenity, wherefor the guests are not charged separately, the same would not constitute as sale of the said service to the guest. Further, this judgment specifically refers to the subject in hand. **Accordingly, the Authority was of the view that in the rates of TV services, there should be no differentiation between an ordinary subscriber and a commercial subscriber i.e. in both the cases, the charges should be the same and on per TV set basis.**
21. However, in case, the commercial establishment specifically charges extra to its clients/visitors on account of viewing of channels at its premises, there is a case for broadcasters to have a share in such revenue of the commercial establishment. Therefore, where the commercial establishment is earning extra revenue from its clients specifically on account of providing TV services, the rates should be based on mutual negotiations between the broadcaster and the commercial subscriber. In such cases also, the commercial subscriber would be required to obtain such signals of TV channel through a DPO/cable operator only. Accordingly, the clause 3 pertaining to 'Tariff' has been suitably amended.

Manner of offering TV channels to the commercial subscribers

22. Three models of offering of TV channels to commercial subscribers were discussed in the CP. The first model envisages that the commercial subscriber

enters into agreement with the broadcaster and obtains signals either from the broadcaster itself or a DPO designated by the broadcaster. In the second model, the commercial subscriber is to enter into agreement with the DPO and obtain the signals while DPO and broadcasters have their own mutually agreed arrangements. The third model discussed in the CP is a combination of the first and second models.

Stakeholder Comments

23. Almost all the broadcasters and their representative bodies and agents have stated that only the first model is viable and should be adopted. While suggesting a detailed procedure for implementation of this model they have reasoned that – (a) the second model is prone to commercial subscribers not getting signal because of potential breakdown of negotiations between broadcasters and DPOs and (b) the third model is prone to confusion, as both broadcasters and DPOs would be allowed to provide Reference Interconnect Offers(RIOs).
24. Almost all the DPOs have suggested adoption of second model. A couple of cable TV operator associations have opined that the regulator should fix the MRP based on which the broadcasters and DPOs make the RIO. However, broadcasters should not identify the DPO through which the commercial subscriber should get the signals of the broadcaster. They have also stated that in cases where commercial subscribers have their own headend, the broadcasters can directly negotiate with the commercial subscribers as per RIO. Another cable operator association has stated that the broadcaster and commercial subscribers should negotiate the rates while the DPO should give the services at the same rate as for ordinary subscriber.
25. One of the hotel and restaurant industry associations has stated the first model should not be adopted, while another hotel industry association has expressed its preference for the third model.

Analysis

26. The guideline for downlinking of TV channels in India prescribe as under:

“5.6. The applicant company shall provide Satellite TV Channel signal reception decoders only to MSOs/Cable Operators registered under the Cable Television Networks (Regulation) Act 1995 or to a DTH operator registered under the DTH guidelines issued by Government of India or to an Internet Protocol Television (IPTV) Service Provider duly permitted under their existing Telecom License or authorized by Department of

Telecommunications or to a HITS operator duly permitted under the policy guidelines for HITS operators issued by Ministry of Information and Broadcasting, Government of India to provide such service."

So, the broadcaster cannot supply signals directly to subscribers, including the commercial subscribers. Broadcasters should supply their signals through a DPO. It would also ensure competition in the market if a commercial subscriber can obtain TV signals from any MSO or its linked local cable operator /DTH operator etc. operating in his area. Accordingly, clause 3 has also been suitably amended.

Sub-categorization of commercial subscribers

27. In the CP, the issue regarding sub-categorization of commercial subscribers into similarly placed groups and fixing the tariff therefor was discussed and views of the stakeholders were sought. Almost all the stakeholders, across all the segments, are of the view that any such sub-categorization and fixing of tariff for such sub-categories may not be the appropriate way forward.

Analysis

28. In view of the tariff prescription and the provisions regarding manner of offering of TV signals to the commercial subscribers, there is no need for sub-categorization of the commercial subscribers into similarly placed groups for the purpose of prescription of tariff dispensation for commercial subscribers. The only distinction required is to place the commercial subscribers into two broad classes - (i) those who offer television services/programmes as part of amenities to their guests and (ii) those who charge for the same in the manner as discussed in para 21 above. Accordingly, clause 3 has been suitably amended.
