M/S Noida Software Technology Park Ltd vs M/S Media Pro Enterprise India Pvt. Ltd. ... on 7 December, 2015

TELECOM DISPUTES SETTLEMENT& APPELLATE TRIBUNAL
NEW DELHI

Dated 7th December, 2015

Petition No.295(C) of 2014
(M.A. No.166 of 2015, M.A. Nos. 223-232, 240-245, 256, 261, 266 of 2015)

M/s Noida Software Technology Park Ltd. ... Petitioner

Vs.

M/s Media Pro Enterprise India Pvt. Ltd. & Ors. ... Respondents

Petition No.526(C) of 2014
(M.A. Nos. 167, 206 of 2015, 233-237, 246, 247, 257 of 2015)

Noida Software Technology Park Ltd. ...Petitioner

Vs.

Taj Television India Pvt. Ltd. & Anr. ...Respondents

BEFORE:

HON'BLE MR. JUSTICE AFTAB ALAM, CHAIRPERSON
HON'BLE DR. KULDIP SINGH, MEMBER
HON'BLE MR. BIPIN BIHARI SRIVASTAVA, MEMBER

Petition No.295(C) of 2014

For Petitioner : Mr. Vivek Chib, Advocate
Ms. Ruchira Goel, Advocate
Mr. Asif Ahmed, Advocate
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Mr. Joby P. Varghese, Advocate
Mr. Rishab Kapur, Advocate
Mr. Ankit Prakash, Advocate
Mr. Kushal Gupta, Advocate

For Respondent No.1 (Media Pro) : Mr. Meet Malhotra, Sr. Advocate
Mr. Tejveer Singh Bhatia, Advocate
Mr. Upender Thakur, Advocate
Mr. Rohan Swarup, Advocate
Mr. Kunal Vats, Advocate
Mr. Ravi S.S. Chauhan, Advocate

		Ms. Pallak Singh, Advocate
For Respondent No.2 (TRAI)	:	Mr. Saket Singh, Advocate Mr. Kumar Ranjan Mishra, Advocate Ms. Sangeeta Singh, Advocate
For Respondent No.3 (Taj TV)	:	Mrs. Prathiba M. Singh, Sr. Advocate Mr. Tejveer Singh Bhatia, Advocate Mr. Upender Thakur, Advocate Mr. Rohan Swarup, Advocate Mr. Kunal Vats, Advocate
For Respondent No.4 (Star)	:	Dr. A.M. Singhvi, Sr. Advocate Mr. Saikrishna Rajagopal, Advocate Mr. Sidharth Chopra, Advocate Mr. Gopal Singh, Advocate Mr. Saurabh Srivastava, Advocate Ms. Shilpa Gupta, Advocate Mr. Vidhur Bhatia, Advocate Mr. Arpita Singhal, Advocate
Amicus Curiae	:	Mr. Aman Ahluwalia, Advocate

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For Intervenors:

Den Network Ltd. (M.A.No. 223/15) All India Digital Cable Federation (M.A.No. 232/15)	:	Mr. Navin Chawla, Advocate Mr. Harsh Kaushik, Advocate Mr. Abhay Chattopadhyay, Advocate
Siti Cable Network Ltd. (M.A.No. 224/15)	:	Mr. Samir Sagar Vasishta, Advocate Mr. Virender Singh Thakur, Advocate Mr. Nachiketa Suri, Advocate
Hathway Cable and Datacom Ltd. (M.A. No.225/15)	:	Mr. Arun Kathpalia, Advocate Mr. J.K. Mehta, Advocate Mr. Nasir Husain, Advocate
IndusInd Media Communication Ltd. (M.A.No. 226/15)	:	Ms. Kanupriya Gupta, Advocate
Times Global Broadcasting Company Ltd. (M.A.No. 227/15)	:	Mr. Kunal Tandon, Advocate Mr. Shashank Sekhar, Advocate
Multi Screen Media Pvt. Ltd. (M.A.No. 230/15)		
Indian Broadcasting Foundation (M.A.No. 228/15) and Viacom 18 Media Pvt. Ltd. (M.A.No. 245/15)	:	Mr. Abhishek Malhotra, Advocate Mr. A.S. Dugal, Advocate Mr. Namit Suri, Advocate

Sun TV Network Ltd. (M.A.No. 244/15)	:	Mr. Abhishek Malhotra, Advocate Mr. A.S. Dugal, Advocate Mr. Vidhur P. Bhatia, Advocate
Grant Investrade Ltd. (M.A.No. 229/15)	:	Mr. Manjul Bajpai, Advocate Mr. Shashwat Bajpai, Advocate Ms. Madhur Bharatiya, Advocate

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Dish TV India Ltd. (M.A.No. 231/15)	:	Mr. Aman Lekhi, Sr. Advocate Mr. Vivek Sarin, Advocate Mr. Sidhartha Johar, Advocate
Home Cable Network Pvt. Ltd. (M.A.No. 240/15)	:	Mr. Varun Mathur, Advocate
Delhi Distribution Company (M.A.No. 241/15); Satellite Chanel Pvt. Ltd. ; (M.A.No. 242/15);	:	Mr. G.S. Oberoi, Advocate Mr. Varun Mathur, Advocate
Digi Cable Network India Pvt. Ltd. (M.A.No. 243/15)	:	Mr. Jayant K. Mehta, Advocate Mr. Diggaj Pathak, Advocate Ms. Shweta Sharma, Advocate
New Delhi Television Ltd. (M.A.No. 256/15)	:	Mr. Nikhil Rohatgi, Advocate Mr. Lakshmeesh Kamath, Advocate Mr. Shruti Garg, Advocate Ms.Vasudha Gupta, Advocate

Petition No.526(C) of 2014

For Petitioner	:	Mr. Vivek Chib, Advocate Ms. Ruchira Goel, Advocate Mr. Asif Ahmed, Advocate Mr. Joby P. Varghese, Advocate Mr. Kushal Gupta, Advocate Mr. Rishab Kapur, Advocate Mr. Ankit Prakash, Advocate
For Respondent No.1 (Taj TV)	:	Mrs. Prathiba M. Singh, Sr. Advocate Mr. Tejveer Singh Bhatia, Advocate Mr. Upender Thakur, Advocate Mr. Rohan Swarup, Advocate Mr. Kunal Vats, Advocate

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For Respondent No.2 (TRAI)	:	Mr. Saket Singh, Advocate Mr. Rishad A. Chowdhury, Advocate Mr. Himanshu Bhushan, Advocate
Amicus Curiae	:	Mr.Aman Ahluwalia, Advocate

For Intervenors:

Den Network Ltd. (M.A.No. 233/15) All India Digital Cable Federation (M.A.No. 237/15)	:	Mr. Navin Chawla, Advocate Mr. Harsh Kaushik, Advocate Mr. Abhay Chattopadhyay, Advocate
Times Global Broadcasting Company Ltd. (M.A.No. 234/15);Multi Screen Media Pvt. Ltd. (M.A.No. 236/15)	:	Mr. Kunal Tandon, Advocate Mr. Shashank Sekhar, Advocate
Indian Broadcasting Foundation (M.A.No. 235/15) and Viacom 18 Media Pvt. Ltd. (M.A.No. 247/15)	:	Mr. Amit Sibal, Sr. Advocate Mr. Abhishek Malhotra, Advocate Mr. A.S. Dugal, Advocate Mr. Namit Suri, Advocate
Sun TV Network Ltd. (M.A.No. 246/15)	:	Mr. Gopal Jain, Sr. Advocate Mr. Abhishek Malhotra, Advocate Mr. A.S. Dugal, Advocate Mr. Vidhur P. Bhatia, Advocate
New Delhi Television Ltd. (M.A.No. 257/15)	:	Mr. Nikhil Rohatgi, Advocate Mr. Lakshmeesh Kamath, Advocate Mr. Shruti Garg, Advocate Ms. Vasudha Gupta, Advocate

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ORDER

By Aftab Alam, Chairperson -

INTRODUCTION:

This case raises some very basic issues concerning the broadcasting services. The Interconnect Regulations are founded on the principles of "must provide" and non-exclusion. A broadcaster must give its signals to every distributor, indeed on reasonable terms. The Regulations further mandate the broadcaster to publish a Reference Interconnect Offer (RIO) setting forth the technological and commercial terms on which it would give its signals to a distributor. The RIO is a sort of offer to the world at large and if a distributor expresses willingness to take the broadcaster's signals on the RIO terms the broadcaster must give its signals to the distributor without ado (provided of course the distributor's system are technologically compliant with the regulatory prescriptions!). At the same time, the Regulations also seem to allow for inter-connect arrangement between the broadcaster and a

distributor, based on mutually negotiated agreement. To cap it all, the Regulations dictate parity and non-discrimination in the inter-connect arrangements that a broadcaster may enter into with different broadcasters. These demands, that to some may appear incompatible or even conflicting and that go into the making of the Regulations give rise to a number of questions. Does the RIO have precedence over mutual negotiations and does it circumscribe the scope of negotiations and limit it to the framework of the RIO within which negotiations may be held to agree upon some changes in the terms of the RIO? Does this view interfere with the broadcaster's freedom to contract on the basis of voluntary negotiations said to be guaranteed under the Constitution and further sanctioned by the Copyright Act? Is the converse of the above the correct view, that for entering into interconnect agreement, mutual negotiation has primacy and RIO is the fall back device, in case negotiations fail to satisfy both sides? But in that case if the broadcaster does not disclose to everybody the terms of the agreement based on negotiation with a certain distributor, how are the rights of parity and non- discrimination of other similarly situated distributors impacted? What is the parameter to judge similarity between different distributors of TV signals? What weight should be assigned to mutual negotiations, RIO and parity and non- discrimination in the over-all scheme of interconnection to best sub-serve the intent and purpose of the Regulations. These are some of the main questions, along with some ancillary issues that come up for consideration before the Tribunal.
II. THE CASE OF THE PETITIONER:

The petitioner is a head-end in the sky (HITS) operator and a distributor of TV channels within the meaning of the Regulations. It makes the grievance that it is being discriminated against from the beginning and its very entry in the broadcasting sector was sought to be blocked at the threshold. According to the petitioner, the present petitions are a sequel to its earlier petition before the Tribunal and the present proceedings may be viewed as continuation of its efforts to find a fair place in the broadcasting sector on the basis of parity and non- discrimination.

III. THE FACTS

i. [Before the Present Proceedings]:

The petitioner earlier came to the Tribunal in Petition No. 166 (C)/2013 making the grievance that Media Pro was unreasonably denying it the supply of signals. At that time Media Pro used to be the "agent or intermediary" of several broadcasters, including two major broadcasters of the Star and Zee groups of channels and it altogether controlled the distribution of more or less seventy (70) channels of different broadcasters. As their common agent, it also acted as a "content aggregator" and offered bouquets for distribution by bundling together channels of different broadcasters. In that position it held a dominant position and great bargaining power

in the broadcasting sector. In that case the Tribunal found that Media Pro was denying signals to the petitioner for non-complying with certain technical conditions insisted upon by it that were beyond the regulatory prescription. The Tribunal, accordingly, held that the denial of signals by Media Pro to the petitioner was unreasonable and by judgment and order dated 12 September 2013, allowed the petition observing and directing as under:

"To us it, therefore, appears that the insistence for higher norms than the ones provided in schedule IV is simply a bogey and an afterthought to somehow deny the signals of TV channels to the petitioner.

In light of the discussions made above, we find no merit in the objections raised by respondent no.2 for refusing to provide signals of its TV channels to the petitioner. We accordingly direct respondent no.2 to enter into an Interconnect Agreement with the petitioner as provided under Clause 3.2. of the Interconnect Agreement within three weeks from today and to supply activated decoders and viewing cards to the petitioner for viewing its channels".

Following the Tribunal's judgment, the petitioner repeatedly asked Media Pro to disclose the terms and rates at which it (Media Pro) was providing the signals of TV channels under its control to other similarly situated distributors of TV channels so as to form the basis for negotiations for an agreement between the two sides. The petitioner based its demand for disclosure on the provisions of the Interconnect Regulations, 2004, specifying reasonableness and discrimination in the formation of the interconnect agreement. Media Pro, however, flatly refused to disclose to the petitioner the terms and rates at which it was providing signals to other distributors, taking a somewhat curious position that under the order of the Tribunal it was obliged to give the petitioner the signals of its channels only in terms of its Reference Interconnect Offer (RIO) as provided in clause 13.2B.1 of the Interconnect Regulations, 2004. Media Pro maintained that its RIO was completely non-discriminatory; it applied to all distributors uniformly and Media Pro charged all distributors of TV channels who took signals from it on RIO basis, the same rates as mentioned in the RIO.

The petitioner was thus faced with the situation where the only option given to it was to take the Media Pro signals on its RIO terms and rates. According to the petitioner, for want of the pay-channels on its network it was suffering a loss of over Rs.8 crores every month in payments of bank interests and satellite space rent and to get the pay channels was a matter of survival for it at that time. It, accordingly, agreed to accept the Media Pro RIO terms, albeit under protest and without prejudice to its rights, and on 1 October, 2013 executed the RIO based agreement for the period 1 October 2013 to 30 September 2014.

By then the three weeks' time within which Media Pro was directed to enter into the interconnect agreement with the petitioner was already over. Hence, in order to safeguard its position Media Pro filed an application 1 casting the responsibility for the delay in execution of the agreement on the petitioner. However, on 3 October 2013 when the application came up before the Tribunal, the petitioner had already executed the RIO based agreement and it was, therefore, stated on behalf of Media Pro that a signed copy of the agreement received from the petitioner was under its examination and the agreement was hoped to be M. A. No. 264 of 2013 in the disposed of Petition No. 166 (c) of 2014 finalized within 10 days. On 30 October 2013 when the application again came up, the Tribunal was informed that the parties had entered into an agreement in terms of the Media Pro RIO and the application was, accordingly, dismissed as infructuous.

One or two things need to be noted here. The RIO that Media Pro offered to the petitioner and which the petitioner eventually signed had only a la carte rates of channels; the RIO did not mention any bouquets of channels nor did it give any bouquet rates. There was thus a clear dichotomy between its RIO and the very large number of negotiated agreements that Media Pro entered into with many distributors, almost all of which would be for bouquets of channels.

As regards the petitioner, it needs be noted that having executed the RIO based agreement it never told the Tribunal that it was forced to enter into that arrangement even though there were occasions for it when MA No. 264 of 2013 came up before the Tribunal.

Be that as it may, even after execution of the RIO based agreement, the petitioner kept asking Media Pro to disclose to it the terms and conditions and the rates of its channels in its negotiated agreements with similarly situated distributors or at least the concessions that it offered to other distributors of TV channels in its published agreement that was available on its website. To all such requests Media Pro responded by curt and indignant rejections. According to Media Pro, its RIOs for all delivery platforms that were uploaded on its website were fully compliant with the applicable laws, including but not limited to the TRAI's Regulations; that the terms and conditions of its RIOs applied uniformly to all its affiliates who subscribed to its channels on RIO terms; further that it was not obliged to disclose to the petitioner or to any third party, the rates and conditions of interconnect agreements executed by it with other distributors on the basis of mutually negotiated terms. In regard to sharing the details of its negotiated agreements, it said, a little sanctimoniously that it was in fact legally bound by its obligations of confidentiality to not share the same with the petitioner or with any third party(vide Media Pro's email dated 13 January 2013 addressed to the petitioner).

It is, thus, clear that from the beginning the two sides had completely different ideas regarding the nature of the interconnect agreement and the extent of negotiations

leading to the agreement.

A few months after the petitioner executed the RIO based agreement with Media Pro two things happened that had a bearing on the course of events concerning the petitioner's arrangements with the broadcasters - one in the sphere of Regulations and the other by way of the decision of the Tribunal. On 10 February 2015 Telecom Regulatory Authority of India (TRAI) introduced provisions in the Interconnect Regulations (clause 13A in the Interconnection Regulations, 2004 and clause 10 in the Interconnection Regulations, 2012) that in substance prohibited any formation of bouquet of channels by bundling together channels of one broadcaster with those of the other broadcaster(s). The prohibitory Regulation was aimed at curbing the activities of content aggregators, like Media Pro, who by means of making bouquets of popular channels from different broadcasters were tending to assume a monopolistic position in the broadcasting sector. After the incorporation of the aforementioned provisions in the Regulations, Media Pro, with effect from 1 April 2014 stopped signing fresh agreements or renewal agreements on behalf of its principals-broadcasters and with effect from 9 August 2014 Media Pro ceased to be the content aggregator in terms of the prohibitory provisions introduced in the Regulations on 10 February 2014.

The second event is the Tribunal's decision in a case between Star and a large, pan-India Multi System Operator (MSO), called Hathway. The decision in the Hathway case2 came on 25 September 2014 when the first of the two petitions in hand [Petition No.295(C) of 2014] had already been filed before the Tribunal on 8 July 2014. Nonetheless, the decision in the Hathway case has much relevance to the issues arising in the present case and we shall advert to that decision at an appropriate stage in this judgment. In the Hathway case, one of the main issues was in regard to the discriminatory rates given by Star to two MSOs both of which had inter-connection arrangement with it on the basis of mutually negotiated Petition No.47(C) of 2014 & other analogous cases agreements. Hathway claimed that Star gave lower and far more advantageous rates for its channels to another MSO, DEN which, it alleged, was vertically integrated to Star and which, like Hathway was a pan-India MSO and its rival and competitor. Initially Star sought to justify having different terms and conditions and giving its channels to two different distributors of channels on different rates, on grounds of freedom of contract and right to free negotiations but towards the end of hearing of the case and sensing perhaps the direction the case was likely to take, Star filed an affidavit stating that for a period of one year it would enter into interconnect agreements with every distributor of channels only on a la carte basis, on its RIO rates. The Tribunal found that the affidavit answered, at least prospectively, the charge of discrimination, as it professed a uniform basis for agreements with all distributors and hence, did not deal with the finer issues of discrimination raised in the case.

ii. [The Matter Comes Again to the Tribunal] A little before the coming of the Hathway decision, the petitioner filed the first one of its two petitions [Petition No.295(C) of 2014] before the Tribunal on 8 July 2014, seeking the following reliefs:

"(a) Declare the Regulation 3.2 of the interconnection regulations mandates that all distributors be offered the same rate per subscriber per month, which is the rate specified in the broadcaster's RIO, unless the conditions of Regulation 3.6 are fulfilled.

(b) Declare that in the term of Regulation 3.6 of the Interconnect Regulations any discounted volume related scheme must be disclosed in a transparent manner so as to enable the similarly placed distributors to avail of the same.

(c) Direct the Respondent Company herein to disclose the volume related schemes at which it offers TV channel signals to distributors that are similarly placed with the Petitioner Company.

(d) Direct that the Respondent Company has an obligation to disclose the existing and future volume related schemes to the petitioner and further direct that the petitioner may avail them if so desired."

On 10 July 2014, the Tribunal issued notice on the petition and, having regard to the questions arising in the case, directed that TRAI may also be added as one of the respondents. The matter was then listed before the Registrar's court on a number of dates from August to November 2014 for completion of pleadings. No reply was, however, filed by Media Pro during the four months. In the meanwhile, as noted above, from 9 August 2014 Media Pro ceased to be the content aggregator of the different broadcasters in terms of newly incorporated provisions in the Interconnect Regulations.

Even while its petition was pending, the petitioner, on 1 August 2014 executed an RIO based interconnect agreement with Star for the period up to 30 July 2015 and on 4 August 2015 it executed two interconnect agreements with Taj Television, one for the channels of Turner International India Pvt. Ltd. (of which Taj Television was the authorized agent) and the other for the Taj general entertainment channels (GECs). Both the agreements were RIO based and both were for the period up to 31 March 2015. It is not clear why the petitioner executed these fresh agreements even though its agreement with Media Pro in respect of these very channels was subsisting till 30 September 2014. This much, however is clear that like the Media Pro RIO, these three RIOs too only gave lists of individual channels with a la carte rates for each of the channels. The RIOs did not include any bouquets of channels or gave any bouquet rates of the channels.

After the Hathway judgment came on 25 September 2014, Star published an incentive scheme allowing certain incentives/discounts on its newly published RIO. On 24 November 2014 the petitioner wrote to Star requesting that the discounts under the scheme may be afforded to it. Star, however, declined the request on the ground that the incentive scheme was not applicable to the

petitioner being a HITS operator.

Coming back to the proceedings before the Tribunal, as Media Pro did not file its reply in the case for four (4) months, the Assistant Registrar directed the matter to be listed for directions before the Tribunal on 27 November 2014. On 26 November 2014 Media Pro filed an application (M.A. No.318/2014) under Order 7 Rule 11 CPC for rejection of the petition on the ground that it was no longer a content aggregator. Notice was issued on the application and the petitioner was granted permission to amend its petition. In pursuance of the order, the petitioner moved two applications, one under Order 1 Rule 10 CPC for impleadment of Taj and Star3 and the other under Order 6 Rule 17 CPC for amendment4 of the main petition so as to include the consequential relief of recovery of the excess amounts unlawfully received by Media Pro, Taj and Star under the respective interconnect agreements.

On 12 February 2015, the aforesaid two applications were allowed. Taj and Star were directed to be impleaded in the proceedings as respondents 3 and 4 and the petitioner's prayer for addition of reliefs was also accepted.

In the meanwhile, on 18 November 2014 Taj TV issued a disconnection notice to the petitioner under clause 4.1 of the Interconnect Regulations, 2004. Challenging the disconnection notice the petitioner filed the second petition, registered as Petition No.526(C)/2014. This petition, apart from challenging the disconnection notice, also took the plea that the interconnect agreements dated 4 August 2014 were discriminatory against the petitioner and sought substantially the same reliefs as in the earlier petition, including recovery of the excess amounts paid to Taj Television. On 12 December 2014 notice was issued on Petition No.526(C)/ 2014 and Taj was restrained from giving effect to its disconnection notice dated 18 November 2014.

After this, both petitions remained pending for the respondents to file replies and it was only in April 2015 that both Taj and Media Pro filed their respective replies in both the petitions. Star filed its reply in the first petition5, in which alone it is a party on 6 July 2015. In the meanwhile, on 25 May 2015 the petitioner filed an application6 seeking a direction against Taj to supply its signals to the petitioner at the same rates at which it gave its signals to some other distributors. The application, after notice was issued on it, was listed for orders on 10 July 2014 when the Tribunal felt that it would be more appropriate to dispose of the two main petitions finally, instead of dealing with the matter piecemeal on the basis of interim applications filed by parties. It was accordingly directed that the two petitions be listed for hearing on 29 July 2015. On 17 July 2015, the petitioner filed a joint rejoinder to the replies by respondents 1, 3 and 4 in Petition No.295(C)/2014.

On 24 July 2015 Taj filed an application7seeking modification of the order dated 10 July 2015 and asking for a trial of the case. The application appeared to be an attempt to somehow stall the hearing on the core issues in the case and the final disposal of the petitions. The Tribunal, therefore, declined to modify the order of 10 July 2015 and directed the application to be listed along with the main Petition No. 295 (C) of 2014 M. A. No. 166 of 2015 in Petition No. 295 (C) of 2014 M. A. No.206 of 2015 in Petition No. 526 (C) of 2014 petition which was due to come up for hearing on 29 July 2015.The case could not be taken up on 29 July but was taken up on 30 July 2015 when, on

hearing the parties, the Tribunal formulated the questions that seemed to arise in the case and passed the following order:

> "Some of the questions that arise for consideration in these two cases may be enumerated as under:-
>
> (i) Should a broadcaster's RIO form the basis for negotiations to enter into an interconnect agreement with the distributor of signals or the RIO is only a fall back basis, in case the negotiations between the broadcaster and the distributor for entering into interconnect agreement otherwise fails?
>
> (ii) Whether an interconnect agreement between a broadcaster and a distributor of signals on a fixed fee basis, completely de hors the broadcaster's RIO can be said to be in accordance with the provisions of the Regulations?
>
> (iii) Is it open to the broadcaster to give discounts, concessions and facilities to distributors of signals on a deal to deal basis or is the broadcaster obliged to frame a standard scheme of discounts, concessions and facilities and make it public so that it may be available to all similarly situated distributors equally?
>
> (iv) What is the status of a head-end in the sky operator vis-a-vis a broadcaster for the purpose of inter-connect arrangements? Whether a HITS operator is comparable to a large MSO operating on a pan India basis?

The Tribunal would wish the TRAI to take a clear stand on the aforesaid questions.

As any adjudication on the above questions is likely to affect the broadcasting sector as a whole fundamentally, it will be open to any stake holders to intervene and address the Tribunal on the issue. Any applications for intervention may be filed within one week from today.

Put up under the same heading on 11.08.2015 at the top of the list as part-heard.

Let this order be put in the form of a notice on the TDSAT's website. Copies of this order may also be sent to the Indian Broadcasting Foundation, MSO Alliance and DTH Operators' Association." In pursuance of the order a large number of intervention applications came to be filed8 that are taken note of in the order dated 11 August 2015. The parties seeking intervention included individual broadcasters and their association, distributors of TV channels of different kinds and other stake holders in the broadcasting sector. By order dated 11 August 2015 the cases were directed to be listed for hearing on 25 August 2015. On 25 August, on the request of Taj and Star (respondent 2 and 4 respectively) permission was granted for filing applications raising preliminary objections to any adjudication by the Tribunal on the issues framed by it; some other broadcasters too that had joined the proceedings as interveners made the request and were granted permission to file affidavits in support of the applications proposed to be filed by Taj and Star. On that date, with the consent of all concerned the hearing of the case was fixed for 31 August 2015.

The hearing of the case was spread over many days in course of which submissions were made by the petitioner, TRAI and the three respondents, that is, Star, Media Pro and Taj. This was followed by submissions on behalf of all the parties seeking to intervene in the proceedings and at the end Mr. Aman 10 in Petition No. 295 (C) of 2014 and 6 in Petition No. 526 (C) of 2014 Ahluwalia, the amicus curiae, made his submissions, rendering invaluable assistance to the Tribunal. It was a highly insightful exercise and it gave the Tribunal a clear picture of the broadcasting sector, its dynamics and equations, from a very wide perspective. The petitioner and one of the interveners, that holds a HITS licence and is due to commence operation shortly, argued in favour of limiting the scope of "mutual negotiations" for arriving at an interconnect agreement and to bring it within the confines of the Regulations, as the Regulations were read and represented by them. TRAI also gave its view of the Regulations it has framed which, to a large extent, appears quite close to the petitioner's understanding of the Regulations. If the petitioner argued in favour of limiting the scope of negotiations as the basis for the interconnect agreement, the broadcasters represented the other extreme. All the broadcasters strongly opposed the slightest limitation on their right to sell their signals on the basis of mutually negotiated terms, which right, according to them, was guaranteed by the Constitution, sanctioned by some related laws and recognised even by the Interconnect Regulations framed by TRAI. The MSOs were divided in their stand on the issue; Hathway stuck to its position, taken in the earlier case, and urged the Tribunal to take the matter to its logical conclusion. Some other MSOs were not willing to limit the scope of negotiations to the extent suggested by the petitioner. Some distributors sought to take the middle ground while a few, like Dish TV, a major DTH operator went all the way to the position taken by the broadcasters.

Based on the submissions made by all the counsel, and in order to lend some structure to the observations and findings that we have arrived at, the issues may be enumerated as under (which in substance remain the same as the questions framed by the order dated 30.7.2015):

> 1. Whether, in the facts of this case, a dispute requiring the adjudication of issues framed by the Tribunal's order dated 30 July 2015, at all arises?
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> 2. Whether the right to freedom of contract is embedded in the Interconnect Regulations and consequently mutually negotiated agreements are outside the purview of not only the non-

discrimination obligation in clause 3.2 of the Interconnect Regulations, 2004 but the regulatory regime itself?

3. Whether, in light of the scheme of the Copyright Act and the fact that what is being transmitted is licensed content, the Interconnect Regulations 2004 must necessarily be interpreted as according complete freedom of contract and primacy of mutual negotiations in matters of interconnection?

4. What interpretation ought to be placed on the various clauses of the 2004 Regulations? Specifically, what is contemplated by an RIO, and what is the extent of negotiation that is permissible in deviating from the terms of the RIO? Specifically, can parties - by mutual negotiations - contract out of mandatory norms laid down both in the Regulations (e.g. 13.2A.11 and

13.2A.12) and the conditions / methodology contained in Schedule III?

5. Can a HITS operator be regarded as similarly situated as compared with MSO / DTH in terms of Clause 3.6 of the 2004 Regulations, thus enabling it to claim non-discriminatory treatment? IV. Some Basic Facts Concerning Broadcasting:

> Before proceeding to consider the above issues in light of the provisions of the Interconnect Regulations and any other allied regulations/orders framed by TRAI and to determine the scope and ambit of the regulatory measures in light of the submissions made on behalf of all the parties, it will be useful at this stage to flag up some basic facts concerning television broadcasting.
>
> The broadcaster's content on being given for viewing generates two separate streams of revenue. One is the licence fee that is passed on to the viewers and is collected from each TV household, either directly by the distributor (like the DTH operator) or through the last mile career, the local cable operators (in case of multi- system operators and HITS operators) and is then shared by the players along the distribution line with a substantial percentage going to the distributor. The other is the revenue for the broadcaster from advertisements. In this stream, the distributors are unlikely to have any direct share but for the broadcaster the second stream of revenue is no less important than the first one. TRAI Annual Report for 2013-14 (referring to FICCI-KPMG Report 2014) states, "[in India's television industry] the subscription revenue grew from Rs.24500 crores in the year 2012 to Rs.28100 crores in the year 2013. The advertisement revenue in the TV sector in India grew up from Rs.12500 crores in the year 2012 to Rs.13600 crores in the year 2013. The broadcaster thus has a two-fold market and, as succinctly put by the amicus, "it sells content to viewers and also sells eye-balls to advertisers".
>
> The ability of television broadcasting to generate a second, equally lucrative stream of revenue by attracting advertisements, coupled with the economics of broadcasting not only determines the way the broadcaster finds it profitable to give its channels for distribution but also has a bearing on the way it might find gainful to negotiate with the distributor on the commercial terms. The amicus invited our attention to studies9 that have found that the broadcaster has huge fixed cost but practically nil marginal cost. This means that production of content (TV programme) entails heavy cost but it does not require any additional cost to make the same content available for viewing to more than one viewer. It is also evident that there is great variation in individual preferences for TV programmes - one may like to watch soap operas while the other the news channels. It is equally evident that it is impossible for the broadcaster to ascertain individual preferences. Thus, the marginal cost being zero and the individual preferences being unknown, The Economic Regulation of Broadcasting Markets: Evolving Technology and the Challenges for Policy, Cambridge University Press, pages 49-50.

the broadcaster finds that its channels have greater reach to the viewers when packaged together in a bouquet than on a la carte basis. Hence, unless compelled by law, the broadcaster would always prefer to give its channels for distribution in bouquets. The Regulations though require the broadcaster to offer its channels on a la carte basis, apparently in recognition of this basic fact, do not prohibit it from giving its channels for distribution in bouquets. The first choice for the broadcaster, therefore, as dictated by the market dynamics, is to give its channels for distribution in the form of bouquets.

As regards the commercial terms on which the broadcaster might wish to give its channels for distribution it needs to be borne in mind that the potential of a TV channel to generate advertisement revenue is directly proportional to the number of viewers it commands. It, thus, follows that the broadcaster might agree to give its channels for distribution on comparatively lower licence fee if it ensured a greater reach of its channels to the viewers and thus a larger potential for advertisement revenue. Volume-based discount in the licence fee is recognised by the Regulations 10 but, in so far as reaching the viewers a lot depends upon packaging and "placement" by the distributor. For instance, the broadcaster may agree for a lower licence fee if the distributor, in turns, agrees to put the broadcaster's channels in its basic pack, so as to reach all its subscribers.

Clause 3.6 of the Interconnect Regulations, 2004 Conversely, the broadcaster may not reduce its licence fee if the distributor puts the broadcaster's channels on its distribution platform only in some premium packs or, even worse, on a la carte basis, greatly reducing its reach to the viewers.

Here it also needs to be noted that though the terms of inter-connect are sought to be regulated through the Interconnection Regulations, the terms of distribution concerning packaging and placement etc. are left unregulated 11 . Having taken the signals from the broadcaster, the distributor too is mandated by the Regulations to offer the channels down the distribution line on a la carte basis but at the same time it is free to package the channels in any way it likes. Thus a large area is left out for negotiations between the broadcaster and the distributor for entering into an interconnect arrangement.

Further, in light of the empirical evidence from the cases coming to the Tribunal it is clear that the interconnect agreements between the broadcaster and distributors of TV channels are based on any of the three possible modes for payment of licence fee: (i) a fixed amount payable monthly or over a fixed period as may be stipulated in the agreement. This is commonly called the "fixed fee basis" and the fixed amount is payable regardless of the subscriber base of the distributor increasing or decreasing during the period of the agreement; (ii) "cost per subscriber" basis, in which a certain amount (e.g. Rs.30.00 or Rs.35.00) is Clause 13.2A.13 of the Interconnect Regulations, 2004. payable per month per subscriber. There may also be a hybrid

mode for payment of licence fee, in which a certain amount (a sort of minimum guarantee) is fixed up-to a certain number of subscribers and beyond the pre-fixed number of subscribers, a cost per subscriber (CPS) is applied; (iii) a la carte basis at the rates prescribed in the broadcasters' RIO.

The mode of payment of the licence fee, in turn, has a direct co-relation with the way the distributor would offer the channels to the subscribers. On the fixed fee basis, the distributor would be free to put as many channels of the broadcaster in as many of its bouquets as it might please because that would not cost him anything extra. In the CPS basis, the distributor may still put the broadcaster's channels in a number of bouquets to make the bouquets attractive to the subscriber as per its marketing policy. But in the a la carte basis, a distributor would hardly, if ever, put any channels of the broadcaster in a bouquet because, according to the Regulations, if any channel of the broadcaster is part of a bouquet made by the distributor, the entire subscriber base for the bouquet is to be taken as the factor for multiplying with the a la carte cost of the channel, regardless of how many subscribers to the bouquet are actually watching the broadcaster's channels. Therefore, a distributor taking the channels of a broadcaster on a la carte basis would almost invariably offer those channels to its subscribers also on a la carte basis. And in that case, the licence fee would be determined by multiplying the number of subscribers asking for the channel specifically, as recorded in the subscriber management system, multiplied by the a la carte price of the channels prescribed in the RIO.

From the cases coming before the Tribunal, we also find that the distributor too fancies taking the broadcaster' channels in the form of bouquets rather than individual channels on a la carte basis. The former gives the distributor greater choice to make its own bouquets to make the packages more and more marketable and attractive for the subscriber. Further, corroborating the premise that the broadcaster's first choice is to give its channels for distribution in bouquets and not on a la carte basis we find that in a fight between the broadcaster and the distributor, for the latter the most potent weapon of the last resort is to withdraw the broadcaster's channels from all the bouquets from its platform and to put them for the subscribers to take, on a la carte basis. Such an action suddenly and drastically brings down the viewer's base for the channels and, invariably the dispute immediately comes before the Tribunal where, following some interim arrangement, it is finally resolved either through bilateral negotiations or by judicial adjudication.

The a la carte basis for the interconnect agreement is normally kept reserved by the broadcaster for the distributor with whom, for some reason it does not wish to enter into any commercial relationship but cannot outright deny the request for signals in view of the must provide mandate of the Regulations. V. The Provisions of the Regulations:

At this point we need to turn to the Regulations and see how its provisions are designed to control or encourage the different equations in the broadcasting sector as broadly indicated above. The Interconnection (Broadcasting and Cable Services) Interconnection Regulations, 2004 was notified by TRAI on 10 December 2004. It was originally designed to regulate television broadcast in analogue mode, in vogue at that time. Since inception it has undergone a number of amendments, evolving with time and keeping pace with the technological advances from transmission of TV signals in analogue mode to digital addressable mode. [Or, to put the matter less charitably, it is a patchwork of ad hoc regulatory measures, lacking in clarity and consistency and with no discernible central theme!] Be that as it may, all the provisions relevant to the issues under consideration in these proceedings are contained in clauses 3, 13.2B and 13.2A (each with a number of sub-clauses) of the Interconnection Regulations, 2004. Clause 3 contains the general provisions relating to interconnection and lays down the broad framework for the relationship between the broadcaster and the distributors as also between the top rung of distributors and the distributors of TV channels at different levels of the distribution line. Clause 13 has provisions concerning Reference Interconnect Offer for non-addressable system with which we are not concerned in this case and which, in any event, will come to end in all of urban India with effect from 1 January 2016. Clause 13.2A (which was inserted by notification dated 3 September 2007 and which came into effect on 1 December 2007) deals with Reference Interconnect Offer for the direct to home (DTH) platform. A number of its sub-clauses are made applicable, mutatis mutandis, to addressable systems other than DTH, (e.g., HITS or a digital MSO), the Reference Interconnect Offer for which is dealt with in clause 13.2B (inserted in the Regulations on 17 March 2009 and came into effect from the same date). Clauses 3, 13.2A and 13.2B, in so far as relevant for the present, are as under:

"3. General Provisions relating to Non-Discrimination in Interconnect Agreements 3.1 No broadcaster of TV channels shall engage in any practice or activity or enter into any understanding or arrangement, including exclusive contracts with any distributor of TV channels that prevents any other distributor of TV channels from obtaining such TV channels for distribution.

3.2 Every broadcaster shall provide on request signals of its TV channels on non-discriminatory terms to all distributors of TV channels, which may include, but be not limited to a cable operator, direct to home operator, multi system operator, head ends in the sky operator; [HITS operators and multi system operators shall also, on request, re-transmit signals received from a broadcaster, on a non- discriminatory basis to cable operators.] PROVIDED that this provision shall not apply in the case of a distributor of TV channels having defaulted in payment. PROVIDED further that any imposition of terms which are unreasonable shall be deemed to constitute a denial of request [PROVIDED ALSO that the provisions of this sub-regulation shall not apply in the case of a distributor of TV channels, who seeks signals of a particular TV channel from a broadcaster, while at the same time demanding carriage fee for

carrying that channel on its distribution platform.] [Explanation 1] xxxxxxx [Explanation 2]xxxxxxx [3.3 xxxxxxx] [Explanation] xxxxxxx [3.4] xxxxxx [3.5 Any [broadcaster, multisystem operator or HITS operator, as the case may be] or any agent/ any other intermediary of the [broadcaster, multisystem operator or HITS operator, as the case may be] to whom a request for providing TV channel signals is made, should either provide the signals on mutually agreed terms to the distributor of TV channels who is seeking signals, or specify the terms and conditions on which they are willing to provide TV channel signals, in a reasonable time period but not exceeding sixty days from the date of the request. In case, the [broadcaster, multisystem operator or HITS operator, as the case may be] or any agent/ any other intermediary of the [broadcaster, multisystem operator or HITS operator, as the case may be] to whom a request for providing TV channel signals is made, turns down the request for TV channel signals, the reasons for such refusal must also be conveyed within sixty days from the date of the request for providing TV channel signals so as to enable the distributor of TV channels to agitate the matter at the appropriate forum. Explanation: The time limit of sixty days shall also include time taken by the broadcaster to refer the distributor of TV channels, who has made a request for signals, to its agent or intermediary and vice versa.] [3.6] The volume related scheme to establish price differentials based on number of subscribers shall not amount to discrimination if there is a standard scheme equally applicable to all similarly based distributors of TV channel(s).

[Explanation: "Similarly based distributor of TV channels"

means distributors of TV channels operating under similar conditions. The analysis of whether distributors of TV channels are similarly based includes consideration of, but is not limited to, such factors as whether distributors of TV channels operate within a geographical region and neighbourhood, have roughly the same number of subscribers, purchase a similar service, use the same distribution technology.

For the removal of doubts, it is further clarified that the distributors of TV channels using addressable systems including DTH, IPTV and such like cannot be said to be similarly based vis-à-vis distributors of TV channels using non addressable systems.] 3.7 xxxxxxx [13.2B Reference Interconnect Offers for addressable systems other than direct to home service.

13.2B.1 Every broadcaster, providing broadcasting services before the date of commencement of the [Telecommunication (Broadcasting and Cable Services) Interconnection (Sixth Amendment) Regulations, 2010 (4 of 2010)]and continues (sic) to provide such services after such commencement shall, within thirty days from the date of such commencement, submit its Reference Interconnect Offer specifying, inter-alia, the technical and commercial terms and conditions including those listed in Schedule III for interconnection with addressable systems other than -----

a) cable service in areas notified by the Central Government under sub-section (1) of section 4A of the Cable Television Networks (Regulation) Act, 1995 (7

of 1995);

(b) the direct to home service, to the Authority.

13.2B.2 Every broadcaster, who begins to provide broadcasting services after the date of commencement the [Telecommunication (Broadcasting and Cable Services) Interconnection (Sixth Amendment) Regulations, 2010 (4 of 2010)]shall, within thirty days of such commencement or before providing such services, whichever is later, submit to the Authority, its Reference Interconnect Offer specifying therein the technical and commercial terms and conditions referred to in sub-regulation 13.2B.1 and publish the same, before or simultaneously with such intimation, on its website.

13.2B.3 The provisions of regulations 13.2A.1, 13.2A.2, 13.2A.4, 13.2A.5, 13.2A.6, 13.2A.7, 13.2A.8, 13.2A.9, 13.2A.10, 13.2A.11, 13.2A.12 and 13.2A.13, relating to Reference Interconnect Offers for direct to home service, shall apply, mutatis mutandis, to such a Reference Interconnect Offer for interconnection with addressable systems other than cable service in areas notified by the Central Government under sub-section (1) of section 4A of the Cable Television Networks (Regulation) Act, 1995 (7 of 1995) and the direct to home service:

Provided that a broadcaster may have different Reference Interconnect Offers for different types of addressable systems. 13.2B.4 Any distributor of TV channels using an addressable system for distribution of TV channels seeking interconnection with a broadcaster in terms of the Reference Interconnect Offer referred to in regulation 13.2B.1 or 13.2B.2, as the case may be, shall ensure that the addressable system being used for distribution of TV channels satisfies the minimum specifications for addressable systems as specified in Schedule IV to these regulations:

Provided that in cases where a broadcaster is of the opinion that the addressable system being used for distribution of TV channels does not satisfy the minimum specifications for addressable systems as specified in Schedule IV to these regulations, upon being informed of such opinion by the broadcaster, the distributor of TV channels shall get the addressable system audited by M/s. Broadcast Engineering Consultants India Ltd., or any other agency as may be notified by the Authority from time to time for the purpose of such audit and obtain a certificate to the effect that the addressable system being used for distribution of TV channels satisfies the minimum specifications for addressable systems as specified in Schedule IV to these regulations:

Provided further that the finding of M/s. Broadcast Engineering Consultants India Ltd., or any other agency notified by the Authority in this regard, as the case may be, based on such audit as referred to in the first proviso, about the addressable system

being used for distribution of TV channels satisfying or not satisfying the minimum specifications for addressable systems as specified in Schedule IV to these regulations, shall be final.] [13.2A Reference Interconnect Offers for direct to home service. [13.2A.1 Every broadcaster, providing broadcasting services before the date of commencement of the [Telecommunication (Broadcasting and Cable Services) Interconnection (Sixth Amendment) Regulations, 2010 (4 of 2010)]and continues to provide such services after such commencement shall, within thirty days from the date of such commencement, intimate to all the direct to home operators existing on that date and coming into existence within the said period of thirty days, its Reference Interconnect Offer specifying, inter-alia, the technical and commercial terms and conditions for interconnection for the direct to home platform, including the terms and conditions listed in Schedule-III to these regulations.

Provided that no broadcaster shall, directly or indirectly, compel any direct to home operator not to make available its direct to home service to any class of subscribers including commercial subscribers. Provided further that a broadcaster may have a different Reference Interconnect Offer for supply of signals by the direct to home operators----

(a) to the following categories of commercial subscribers, namely:-

(i) hotels with rating of three star and above;

(ii) heritage hotels (as described in the guidelines for classification of hotels issued by Department of Tourism, Government of India);

(iii) any other hotel, motel, inn, and such other commercial establishment providing board and lodging and having fifty or more rooms; and

(b) in respect of programmes of such broadcaster, shown on the occasion of a special event for common viewing, at any place registered under the Entertainment Tax Law and to which access is allowed on payment basis for a minimum of fifty persons.

Explanation: For removal of doubts, it is clarified that the reference interconnect offer containing various terms and conditions including commercial terms, published by a broadcaster for provision of signals to ordinary subscribers shall apply to provision of signals to commercial subscribers not specified in the second proviso.] 13.2A.2 Every broadcaster shall publish a copy of the Reference Interconnect Offer, referred to in sub regulation13.2A.1, on its website:

PROVIDED that any broadcaster, who had intimated or published on its website, before the commencement of [the [Telecommunication (Broadcasting and Cable Services) Interconnection (Sixth Amendment) Regulation, 2010 (4 of 2010)], any Reference Interconnect Offer, shall modify such Reference Interconnect Offer so as to be in conformity with the Reference Interconnect offer referred to in regulation

13.2A.1 and publish the same as required under this sub-regulation.

13.2A.4 Every direct to home operator, who has been granted a licence after [thirty days] from the date of commencement of [the [Telecommunication (Broadcasting and Cable Services) Interconnection (Sixth Amendment) Regulations, 2010 (4 of 2010)], may request a broadcaster for being provided with a copy of Reference Interconnect Offer of such broadcaster and such broadcaster shall, within ten working days from the date of receipt of such a request, provide the same to the direct to home operator. 13.2A.5 Every broadcaster, who makes any modification to its Reference Interconnect Offer referred to in sub-regulation 13.2A.1 or sub-regulation 13.2A.3, shall, immediately after such modifications, intimate to all the direct to home operators such modifications so made to its Reference Interconnect Offer:

PROVIDED that all such modifications shall be published and exhibited on its website in the same manner as the Reference Interconnect Offer had been intimated to the direct to home operators and published on the website of the broadcasters. 13.2A.6 Agreements between the broadcasters and direct to home operators.

(1) The Reference Interconnect Offer of a broadcaster referred to in clause 13.2A.1 or 13.2A.3 or 13.2A.5, as the case may be, and intimated to the direct to home operators and published by the broadcaster on its website shall be the basis for all interconnection agreements to be entered into between the broadcaster and direct to home operators:

PROVIDED that the broadcaster may enter, on non discriminatory basis, into agreements with different direct to home operators modifying the Reference Interconnect Offer on such terms and conditions as may be agreed upon between them:

PROVIDED FURTHER that in case a broadcaster had entered, before the commencement of [the [Telecommunication (Broadcasting and Cable Services) Interconnection (Sixth Amendment) Regulations, 2010 (4 of 2010)], into an agreement with any direct to home operator and publishes, subsequently, its Reference Interconnect Offer (including its modifications) under said regulations, such broadcaster shall, after publication of the said offer, give an option to such direct to home operator to either enter into an agreement in accordance with these regulations or continue with the agreement entered before such commencement till its validity.

(2) xxxxxxx (3) xxxxxxxxx 13.2A.7 Time limit for entering into agreements between the broadcasters and direct to home operators (1) Every broadcaster shall, within a period of forty-five days from the date of receipt of request from a direct to home operator for entering into interconnection agreement or for modification of an

interconnection agreement already entered, shall enter into an agreement, or, modify such agreement already entered, with such direct to home operator, in accordance with the Reference Interconnect Offer published under these regulations.

(2) In case a broadcaster intimates any modification as referred to in regulation 13.2A.5, the agreement referred to in sub-regulation (1) shall be modified at the option of the direct to home operator, in the same manner as that of entering into of an agreement under sub- regulation (1).

13.2A.8 In case the broadcaster and the direct to home operator fail to enter into an interconnection agreement, then both of them may jointly, without prejudice to the provisions of section 14A of the Act, at any time, request the Authority to facilitate in the process for entering into an interconnection agreement.

13.2A.9 Nothing contained in clause 13.2A.8 shall be construed to take away any legal right conferred upon the broadcaster and the direct to home operator under any law for the time being in force and either of them may, at any time during the facilitation process, exercise such right conferred upon them under any law for the time being in force.

13.2A.10 Nothing contained in clause 13.2A.8 or 13.2A.9 shall apply to any matter or issue for which ---

(a) any proceedings are pending before any court or tribunal under the Act or any other law for the time being in force; or

(b) a decree, award or an order has already been passed by any competent court or tribunal or Authority, as the case may be.

13.2A.11 Compulsory offering of channels on a-la-carte basis.

It shall be mandatory on the part of the broadcasters to offer pay channels on a-la-carte basis to direct to home

operators and such offering of channels on a-la-carte basis shall not prevent the broadcaster from offering such pay channels additionally in the form of bouquets:

PROVIDED that no broadcaster shall, directly or indirectly, compel any direct to home operator to offer [any channel or channels or bouquet]or bouquets offered by the broadcaster to such operator in any package or scheme being offered by such direct to home operator to its direct to home subscribers.

13.2A.12 The rates for pay channels on a-la-carte basis and rates for bouquets shall be subject to the following conditions, namely:-

(a) The sum of the a-la-carte rates of the pay channels forming part of such a bouquet shall in no case exceed one and half times of the rate of that bouquet of which such pay channels are a part; and

(b) the a-la-carte rates of each pay channel, forming part of such a bouquet, shall in no case exceed three times the average rate of a pay channel of that bouquet of which such pay channel is a part and the average rate of a pay channel of the bouquet be calculated in the following manner, namely:-

If the bouquet rate is Rs. 'X' per month per subscriber and the number of pay channels is 'Y' in a bouquet, then the average pay channel rate of the bouquet shall be Rs. 'X' divided by number of pay channels 'Y'.

13.2A.13 Every direct to home operator, who, after the commencement of the Telecommunication (Broadcasting and Cable Services) Interconnection (Fourth Amendment) Regulation, 2007 (9 of 2007), opts for one bouquet or more bouquets (hereafter referred to as the opted bouquet) offered by a broadcaster, may decide the packaging of the channels from such bouquet or bouquets which may be offered by it to its direct to home subscribers:

PROVIDED that in a case where a direct to home operator--

(a) does not offer such opted bouquet as a whole to its direct to home subscribers but offers to such subscribers only certain channels comprised in such opted bouquet ; or

(b) packages the channels comprised in such opted bouquet in a manner resulting in different subscriber base for different channels comprised in such opted bouquet, then, the payment, to the broadcaster for such entire opted bouquet by the direct to home operator, shall be calculated on the basis of the subscriber base for the channel which has the highest subscriber base amongst the channels comprised in that bouquet.]" [The portions in the above provisions of the Regulations shown in the bold font are relied upon by the petitioner and those interveners who argued for limiting the scope of mutual negotiations and to bring it within the confines of the broadcasters RIO; portions shown in the different font and italicized are relied upon by the broadcasters and those interveners who argued for not putting any limitation or control over mutual negotiations for entering into an agreement] VI. Consideration of the Issues:

We now proceed to consider the six issues framed above in light of the submissions of the counsel for the different parties and the provisions of the Regulations.

VI. a. Issue no. 1:

Dr. Singhvi learned Senior Counsel, appearing for Star India Private Limited, prefaced his submissions on the merits of the issues arising in the case by first urging the Tribunal not to adjudicate upon the questions framed by order dated 30 July 2015 because, according to Dr. Singhvi, those questions did not arise in any dispute between the petitioner and Star. He, though, did not elaborate on the reasons for saying that the questions framed by the Tribunal did not arise in the case. We are unable to accept, or to be candid even to follow the statement made by the learned counsel. The repeated request by the petitioner to engage in any negotiation was summarily rejected, first by Media Pro and then by Star and Taj and for getting their signal the only option given it was to sign their respective RIOs. Thus, what directly arises for consideration in the case is the rights and liabilities of the parties when a distributor approaches a broadcaster, seeking its signals for distribution. The questions framed by the Tribunal merely highlighted the different aspects of the issue within the framework of the Interconnect Regulations. Those questions, and indeed the issues framed earlier in this judgment, arise out of matters that are squarely in dispute in these proceedings, and therefore require to be decided by the Tribunal.

VI. b. Issues nos.2 and 3:

Dr. Singhvi strongly argued that the Interconnect Regulations, 2004 never intended to take away the broadcaster's right to freedom-of-contract and the ancillary right to mutual negotiations. He submitted that any interpretation of the Interconnect Regulations impinging upon mutual negotiations would be an infringement of the broadcasters' right to freedom-of-contract and the concomitant right to free negotiations guaranteed under Article 19(1)(g) and Article 300A of the Constitution. Further, both Dr. Singhvi and Mrs. Pratibha Singh, Senior Advocate, appearing for Taj contended that the provisions of the Regulations must be so interpreted as to give primacy to the negotiated agreement (fully preserving the broadcaster's right to mutual negotiations) over an agreement regulated by RIO, so as to be in harmony with the scheme of the Copyright Act.

The arguments based on the principle of freedom-of-contract, to our mind, show more than substance, a determination to press, over and over again, though unsuccessfully, the same arguments before different courts. It is now well settled that the freedom-of-contract is neither an absolute right nor an immutable principle. From among a very large number of decisions of the Supreme Court concerning industrial and labour laws, employment legislation, rent restriction Acts, public trust doctrine etc. suffice here to notice only two decisions, one in Salar Jung Sugar Mills Ltd Vs. State of Mysore12 and the other in Reliance Natural Resources Ltd Vs. Reliance Industries Ltd13. In Salar Jung a seven Judges Bench of the Supreme Court, rejecting the pleas based on freedom-of-contract held and found that the transaction, though taking place compulsorily under the rigid provisions of the Sugar Control Orders, (that were far more restrictive and stringent than any provision of the Interconnect Regulations and) that practically allowed no room for any mutual

negotiations, yet constituted the contract of sale of goods for levy of taxes. In Reliance Natural Resources Ltd., the Supreme Court 1972(1)SCC23 2010(7)SCC1 accorded supremacy to the public trust doctrine evolved to interpret the Constitutional provision over the contractual rights of the parties.

Even in respect of the broadcasting laws the freedom-of-contract argument has already been tested and repelled by the courts and the matter is no longer res integra. In Star India P Ltd Vs Telecom Regulatory Authority &Ors14, the very same broadcaster sought to challenge (i) the proviso to Section 2(1)(k) of the TRAI Act, (ii) the Interconnect Regulations, 2004 and (iii) a host of tariff orders framed by TRAI. The provision of the Act, the Regulations and the tariff orders were assailed on grounds of freedom of contract [Article 19(1)(g)] and the right to property (Article 300A), as were urged before us, and additionally on ground of the even higher right to freedom of speech and expression guaranteed under Article 19(1)(a) of the Constitution. A Division Bench of the Delhi High Court held that the Writ Petition filed by Star, being a company, was not maintainable but nonetheless, went on to consider the questions raised before it and on which the Court had held extensive arguments. It rejected all grounds of challenge, including those invoking Articles 19 (1)(a) and 19(1)(g) (see paragraph 41 of the judgment). In paragraph 49 of the judgment the High Court further held as under:

"49. Furthermore, the TRAI is clearly competent to prescribe the conditions and tariff impugned before us by virtue of the TRAI Act itself. We have already upheld the legality of Section 2(1)(k), the consequence of 2007SCC On Line Del 951 which is that broadcasting is undeniably and unassailably covered by that statute. TRAI accordingly is expected to make recommendation inter alia in respect of "measures to facilitate competition and promote efficiency in the operation of telecommunication services so as to facilitate growth in service [see Section 11(1)(a)(iv)]". TRAI must regulate arrangements amongst service providers of sharing their revenue derived from providing telecommunication services [see Section 11(1)(b)(iv)] and generally to perform such other function including such administrative and financial functions as may be entrusted to it by the Central Government as may be necessary to carry out the provisions of the Act [see Section 11(1)(d)]. However, on perusal of Section 11 (2) there is no scope for any controversy concerning the competence of the TRAI to prescribe the impugned rates at which telecommunication services are to be provided. Therefore, de hors the CTN Act and the CTN Rules TRAI is otherwise competent to fix tariffs, as also to prescribe the Standard Interconnection Agreements."

The High Court then went on to reject Star's challenge to some specific provisions under the Regulations, e. g., in regard to restrictions on disconnection of TV channel signal.

In regard to the earlier decision of the Delhi High Court in Mahanagar Telephone Nigam Ltd Vs. Telecom Regulatory Authority of India 15 , (on which much reliance has been placed by Mrs.

Pratibha Singh and Mr. Sibal, learned Senior Counsel, appearing for one of the intervenors), the Court observed that after the Mahanagar Telephone Nigam decision, the TRAI Act was amended, and the impugned Interconnect Regulation was issued thereafter in which Regulation 4 was substituted in place of the earlier Regulation. The Court observed that "in AIR2000 Delhi208 view of the subsequent events, it is not open to the petitioner to contend that the said decision continues to hold the field."

A Special Leave Petition filed against the judgment was dismissed by the Supreme Court by order dated 3 January 2008 observing that there was "no merit"

> in it, though leaving the question open in regard to the maintainability of the writ petition before the High Court.
>
> Even while TRAI's jurisdiction to regulate the broadcasting sector was under challenge in the above case before the Delhi High Court, certain notifications making amendments in the Interconnect Regulations 2004 framed by TRAI were sought to be challenged, in appeals before the Tribunal. TRAI issued notifications dated 24 August 2006 and 31 August 2006 making certain amendments in the Interconnect Regulations 2004 relating to the Conditional Access System (CAS) regime. By notification dated 24 August 2006 the broadcaster's share in the revenue was fixed at 45% while the balance 55% was left to be divided between the MSO and the local cable operators. The notification further prescribed a Standard Interconnect Agreement(SIA) which the parties would be bound to execute in case they failed to arrive at an interconnect agreement based on mutual negotiations within ten days from the date of request for supply of signals. By notification dated 31 August 2006 the maximum retail price of a channel was fixed at Rs.5/- per month per subscriber. As may be seen the regulatory provisions regarding SIA were far more rigid and stringent than those under consideration in the present case.
>
> The broadcasters challenged the statutory provisions enforced in areas under
>
> CAS transmission on materially the same grounds as canvassed before us. It was contended that the notification dated 31 August 2006 infringed the broadcaster's right to fix the rates for its channels and to decide about the sharing of revenue with MSO/LCOs; that the impugned notification would destroy their business model and would render their business unviable. The broadcasters felt particularly aggrieved by fixation of Rs.5/- per month per subscriber as the maximum retail price of a channel. They also felt aggrieved by the percentage of revenue sharing fixed by TRAI.
>
> The Tribunal in its judgment dated 27 February, 2007 by which all the appeals were dismissed, noted the broadcasters' submissions, assailing the impugned notifications as under:

> "Cable service is neither essential commodity nor an essential service and therefore the freedom to contract in a free trade and business regime should not have been curtailed or interfered with. The notification dated 24.8.2006 provides a short time of 10 days for negotiating and arriving at mutually acceptable interconnection agreement and it prescribes that in the event of failure to do so within 10 days, the standard Interconnection Agreement in Schedule-I (between broadcaster and MSO) and in Schedule-II (between MSO and Cable Operators) shall be entered into.

The period of 10 days allowed for freedom to contract is too short and it virtually amounts to compelling the parties to adopt the standard Interconnection Agreement prescribed under the Notification. In support of the argument that Cable broadcasting is not an essential commodity and unless there is specific legislative intent to regulate it, there should have been no regulation, the submission is that there is no clear a specific legislative intent permitting regulation." The Tribunal, referring to Section 11(2) of the TRAI Act negated the submissions and held that the legislative intent was clear and it recognized the need to regulate the broadcasting service.

The Tribunal then dealt with the broadcasters' challenge to the SIA, which, unlike RIO that is framed by the broadcaster itself, was statutorily prescribed and was thus clearly far more stringent than the provisions under consideration in this case. The SIA was challenged on the ground that it infringed the broadcasters' freedom of contract. Rejecting the submission the Tribunal held:

> "Introduction of a standard format of the interconnect agreement as prescribed by the Authority has been seriously challenged. It was argued that this it (sic) curtails freedom of contract. The learned counsel for the appellants submits that in the contractual regime there is complete freedom for the parties to agree upon mutually accepted terms and conditions and there is no scope for interference by way of prescribing a standard format of agreement. So far as this argument of complete freedom to contract is concerned, first we have to note that the prescribed interconnect agreement comes into play only after the parties fail to reach an agreement on their own for which they have complete freedom. Ten days' time has been allowed to parties to negotiate. If they fail to arrive at an agreement within ten days, the prescribed agreement has to be entered into. The appellants argued that this period of 10 days is too short. We need not go into whether this period is short or whether it is sufficient. Parties may approach the TRAI for extension of the period. Secondly, Rule 10(4) of the CTN Rules, 1994 requires prescription of a standard interconnect agreement by the Authority which the broadcasters and the MSOs have to enter into in case they fail to arrive at mutually acceptable agreement. The TRAI has carried out the mandate of the Rule. The Rule is not challenged. Coming to the argument regarding curtailment of freedom to contract, Article 19 (1)(g) of the Constitution gives the parties a freedom to trade which includes freedom to contract. However, this freedom is subject to reasonable restrictions. Even at the Common Law, there was never any absolute freedom to contract, for instance, nobody could enter into a contract to do an illegal act. As the society grew, need for regulation gradually increased and inroads were made in the freedom to contract. Article 19

> permits 'reasonable restrictions' being imposed in the domain of freedom of contract. The TRAI Act and the CTN Act are both primary legislations which purport to regulate the broadcasting service. They provide for reasonable restrictions. The regulation is in the interest of society. There is no challenge to these statutes. The legislation permits curtailment of freedom to contract. It is settled that freedom of contract is not available in absolute terms and it can be curtailed by legislation for justifiable reasons. Power to regulate allows reasonable restrictions on freedom to contract. The argument, therefore, is without any merit and, therefore, has to be rejected."

It is the same argument, rejected by both the High Court and this Tribunal that is once again canvassed, perhaps with some greater force and finesse, by Dr. Singhvi before us. The simple answer to Dr. Singhvi's submission is this. Broadcasting service is undeniably a service regulated by statutes in India. That being the position the freedom-of-contract is necessarily limited by Regulations and can only be exercised within the framework provided by the Regulations. The regulation of the broadcasting sector is no different in other countries and internationally similar restrictions (wholesale must offer remedy) have been imposed in the case of content16 either by means of sectoral regulations or through general Competition Law. Dr. Singhvi also submitted that the freedom of contract See judgment dated 17 February 2014 by the Court of Appeal (Civil Division) in British Telecommunication PLC and Office of Communications and others.

and mutual negotiation in interconnection matters were accorded primacy by this Tribunal and in support of the submission relied on the Tribunal's decision in Jak Communications17. The submission is, in our considered view, misconceived, as that decision is distinguishable on the ground that it rested on Section 65 of the Contract Act and estoppel principles. We thus find that the freedom-of-contract argument is unacceptable both on merits and in light of earlier precedents.

We now come to the submissions made by Mrs. Pratibha M. Singh, learned Senior Advocate appearing for Taj that in interpreting the Interconnect Regulations, primacy must be given to agreement based on mutual negotiations following the scheme of the Copyright Act 1957.

Section 39(A) of the Copyright Act does not make section 31 applicable to "broadcast reproduction rights" and it is thus true that under the scheme of the Copyright Act, "broadcast reproduction rights" do not come under compulsory licensing. However, exclusion from compulsory licensing under the Copyright Act by no means suggests that provisions requiring "must provide" of the broadcasting content on "non-exclusive and non-discriminatory" terms may not be mandated in a different set of statutes, aimed at regulating the broadcasting service. It needs to be borne in mind that under the Copyright Act there is an omission and not a prohibition or bar against compulsory licencing for "broadcasting content rights".

Petition No.151(C) of 2010 disposed of by judgment and order dated 4 February 2011. Thus, contrary to the submissions made by Mrs. Singh, the matter of compulsory licencing of "broadcasting content rights" is left open to be dealt with in a different context, by a different set of laws, regulating another area of societal demands. In case of broadcasting service the Regulator felt,

and very rightly so, that "must provide' of the broadcasting content is the first step towards any meaningful regulation of the service and the omission of such a condition would give unmatched monopolistic power to the broadcaster and would leave the broadcasting service completely at its mercy. It is well settled that two central legislations may overlap on the same subject matter. And as long as there is no doubt as regards the legislative competence or the source of legislative power, the courts have consistently upheld any action taken under a certain Act in regard to a matter that may be primarily covered by another legislation 18 . Other sectoral regulators have also rejected the argument that a compulsory licensing regime can only be created under the Copyright Act and that creation of a virtual compulsory licensing regime under some other statute would be ultra vires19.

Mrs. Singh, in her rejoinder, also referred to rule 6(3) of the Cable Television Network Rules, 1994, which she submitted is necessary to understand the link between the regulatory regime that governs distributor platforms and the See Ram Chandra Mawa Lal Vs State of UP, 1984 Supp SCC 28 See decisions of Competition Commission of India dated 1 October 2014 in Case No.40 of 2012 (M/s HT Media Ltd. Vs. M/s Super Cassettes Industries Ltd.) and dated 25 May 2011 in Case No.1 of 2011 (FICCI Multiplex Association of India Vs. United Producers/Distributors Forum). copyright regime governing content. Under the scheme of the Cable Television Network Rules, DPOs are not only required to be registered under the Cable Television Network Regulation Act, they are also mandated not to carry or include any programme in their cable service in which copyright subsists, unless they have obtained a license from the owner of the copyright. Mrs. Singh submitted that owners of intellectual property in content have full freedom to commercially exploit such intellectual property rights, and rule 6(3) has been inserted into the Rules in recognition of this right. Thus, in effect and in essence, the submission is that the sectoral regulatory regime actually acknowledges and accords primacy to copyright rights in content, and ought not to be interpreted in a manner where such rights are whittled down. Having considered this submission, we are of the view that there is no impairment or impingement of copyright in the present case. First, contrary to what is submitted before us, we do not find that the RIO regime amounts to a compulsory license. Interconnect Regulations only require that the same offer be extended to all similarly situated distributors of channels. It is left to the broadcasters to design and customize their own RIO terms and conditions. They enjoy a large measure of freedom in the manner in which such RIOs are framed, naturally within the framework of the applicable Regulations. Second, far more intrusive Regulations - such as those prescribing a mandatory sharing ratio for CAS areas - have been upheld in the past, and if those Regulations are permissible, there is no reason to find any fault with a far less intrusive Regulation which gives broadcaster ample freedom in the manner in which its RIO is made. Third, the inclusion of Rule 6(3) is mainly to protect against piracy. It is but trite to state that no programme must be shown without entering into an agreement with the copyright owner. All that the Regulations do is to create a non-discriminatory regime where a broadcaster must offer the same terms to every distributor who wishes to enter into such an agreement. This does not, in our view, undermine in any way the copyright that vests in the content owners.

We, therefore, find no merit or substance in arguments based on the principle of freedom-of-contract and the provisions of the Copyright Act and accepting the submission of the amicus curiae we hold that the Interconnect Regulations 2004 must be interpreted on their own terms applying normal methods of statutory interpretation.

VI. c. Issue 4 Dr. Singhvi contended that the Regulations contemplate two independent and parallel regimes - namely, mutually negotiated contracts and RIO based agreements. According to Dr. Singhvi, the sphere of RIO based agreements was regulated, but if parties elected to opt for the mutual negotiation route, they were entirely outside the ambit of the Regulations, and were operating in an unregulated space. Thus, for example, the regulatory mandatory provisions fixing the ratio between a la carte and bouquet rates would not apply to such mutually negotiated agreements. Using the rather colourful metaphor of two roads, Dr. Singhvi submitted that RIO is like one of the two roads that is fraught with not only speed limits but all kinds of restrictive traffic regulations; the other, that is, mutual negotiations is, on the other hand, comparable to a highway, free from all kinds of restrictions. Travelling on the free highway, it is perfectly open to the broadcaster to not only drive at a speed of 100 mph but also, if it so desired, in a zigzag manner.

Once the submissions based on grounds of freedom of contract and the right to mutual negotiations is shown to have no substance, the contention that the RIO based and negotiated agreements are two separate and parallel regimes becomes completely untenable. The reference to "mutually agreed terms" in clause 3.5 and ".... modifying the Reference Interconnect Offer on such terms and conditions as may be agreed upon by them" in the proviso to clause 13.2A.6 (1) is too tenuous and fragile to bear the weight of the submission completely negating the mandates of non-exclusion, non-discrimination and reasonableness in clauses 3.1 and 3.2 of the Regulations.

Moreover, what Dr. Singhvi did not say in the above imagery is that the choice of the road also rested absolutely with the broadcaster. Hence, in practice it would mean that to submit or not to submit to the Regulations depends entirely on the volition of the broadcaster --- while the Regulations cover and apply to all other players in the broadcasting sector, including even the viewers, the broadcaster is far above and beyond their reach. Such conclusion is plainly fallacious and any submission leading to such a conclusion cannot be accepted.

Not only is the submission unfounded but we find it somewhat surprising that the very same submission that was earlier rejected in the case of Hathway, in which Star was the main contesting party, is once again advanced, couched slightly differently and garnished with some Constitutional pleas. In the earlier case, Hathway made the grievance that the commercial terms given to it by Star were highly discriminatory in comparison with those offered to Den, another MSO, which, according to Hathway, was vertically integrated with Star and was its rival and competitor as a distributor of TV channels. It was submitted on its behalf that the rate of Rs.31.00 cost per customer (CPS) offered to it (Hathway) was an arbitrary figure and without basis. Hathway was somehow able to lay its hands on the interconnect agreement between Star and Den and it submitted that Star's stance in telling Hathway to take its TV channels either at Rs.31.00 CPS or on RIO rates while giving its channels to Den at Rs.14.80p CPS was unacceptably discriminating and it was clearly aimed at promoting Hathway's rival MSO. It was argued on behalf of Hathway that though essentially a private contract, the interconnect agreement for provision of TV signals by a broadcaster to a distributor is mandated by the Regulations to be based on fairness, reasonableness, transparency and principles of non-exclusivity and parity. It, therefore, followed that for entering into an interconnect agreement for giving its TV channels to an MSO, the broadcaster did not have complete freedom as it might have in any purely private contract. It was submitted that the position taken by

Star was not only unreasonable and unfair but was also in breach of regulatory clauses relating to parity and non-discrimination.

On behalf of Star it was contended that the RIO framed by it and put on its website fully satisfied the non-discrimination directive. Further, it was free to fix the a la carte rates of its channels up to the ceiling fixed under the TRAI tariff order (which was at that time and continues to be 42% of the a la carte rates of its channels for non-addressable systems.) The RIO rates were available to all distributors of channels without discrimination. Any distributor wishing to get its channels on non-discriminatory basis could sign its RIO and get its channels at the RIO rates. Having thus satisfied the non-discrimination clause of Regulations, it was free to negotiate, regardless of the RIO, and enter into a negotiated agreement with any distributor as it might like on terms and rates completely different from the terms and rates given in the RIO. This contention was supplemented by another curios submission that the non-discrimination clause had no application prior to entering into the interconnect agreement and it would apply subsequent to the agreement, only among those distributors with whom Star was in interconnect agreements. In other words, it had limitless discretion in negotiations leading to the agreement and its obligations started only after the execution of the agreement when it was required to supply signals without making any discrimination among its different affiliates who, though were bound by their respective agreements that might be completely different in commercial terms and rates.

The Tribunal, of course, rejected both the submissions made on behalf of STAR. It held:

> (i) It is wrong to assume that publication of the RIO on the website satisfies the condition to act non-discriminatingly and besides the RIO, the broadcaster or the MSO (as the case may be) has full freedom of negotiations including the right to not maintain parity and discriminate between comparable seekers of signals;
>
> (ii) The conditions of reasonableness, parity, non-exclusiveness and non-discrimination stipulated in regulation 3 of the DAS Regulations commence from the stage a seeker makes request for provision of signals and goes right up-to the execution of the agreement followed by the actual provision of signals;

On the facts of that case the Tribunal also found that Star (and Zee) acting through their intermediary Media Pro, provided their signals to DEN at much lower rates and on more advantageous terms than Hathway.

In course of hearing of the case, however, Star filed an affidavit stating that for a period of one year (from the date of the affidavit), it would enter into interconnect agreements with every distributor of channels only on a la carte basis at its RIO rates. The Tribunal found that the affidavit met, at least prospectively, the charge of non-discrimination as it professed a uniform basis for agreements with all distributors. Hence, while recording the above quoted findings it left open the question as to the extent of freedom of negotiation enjoyed by the provider and seeker of signals and the extent to which the RIO of the provider regulates, limits or expands the area of negotiation.

The Hathway case arose under the DAS Regulations, 2012 20 . But the findings arrived at in that case would apply with full force to the present case not only because the relevant provisions of the Regulations, 2004 and Regulations, 2012 are quite similar but more importantly because there cannot be contrary Regulations for a MSO operating in the DAS regime and other distributors of channels like HITS and DTH operator which too operate in the digital addressable systems.

On the issues under consideration we must now consider the submissions made by Mr. Sibal, Senior Counsel, appearing for the Broadcasters Foundation. Mr. Sibal raised an interesting point that has not been considered in any earlier proceeding. Referring to clause 2.3 of the Regulations ["..... HITS operators and The Telecommunication (Broadcasting And cable Services) Interconnection (Digital Addressable Cable Television Systems) Regulations, 2012.

multi system operators shall also, on request, re-transmit signals received from a broadcaster, on a non-discriminatory basis to cable operators....."], Mr. Sibal submitted that clause 3.2 lays down a two-tier non-discriminatory provision, whereby broadcasters have a non-discriminatory obligation towards distributors (i.e. MSO, HITS, DTH), and the distributors, in turn, have a similar non-discriminatory obligation towards the local cable operators. Learned counsel submitted that the two limbs of the non-discriminatory provision contained in Clause 3.2, could not be interpreted differently and they must be construed in one and the same way. He further relied on the 2010 Tariff Order to submit that TRAI has expressly left the second tier (i.e. agreements between MSO/HITS etc. and LCO) to a regime of mutual negotiation. Taking a cue from there, he submitted that the very same clause of the very same Regulation could not be interpreted differently insofar as broadcasters are concerned.

The submission, at first sight seems attractive but on taking all the relevant facts into consideration it would appear groundless. Mr. Sibal alludes to the Telecommunication (Broadcasting and Cable Services) (Fourth) (Addressable Systems) Tariff Order, 2010. This tariff order was notified by TRAI on 21 July 2010 and clause 5 of the order provides as under:

> "Charges payable by cable operator to multi system operator or HITS operator to be governed by mutual agreement between them - The charges payable by a cable operator to a multi system operator or to a HITS operator, as the case may be, shall be as determined by mutual agreement."

However, one must not lose sight of the fact that the tariff order underwent several amendments and by the amendment introduced on 30 April 2012 the following proviso was introduced to clause 5:

> "Provided that in case the multi-system operator and the local cable operator fail to arrive at mutual agreement, the charges collected from the subscribers shall be shared in the following manner:-
>
> (a) the charges collected from the subscription of channels of basic service tier, free to air channel and bouquet of free to air channels shall be shared in the ratio of 55:45

between multi-system operator and local cable operator respectively; and

(b) the charges collected from the subscription of channels or bouquet of channels or channels and bouquet of channels other than those specified under clause (a) shall be shared in the ratio of 65:35 between multi-system operator and local cable operator respectively.

The result is that while the main provision of clause 5 gives the (illusory) right to mutual negotiations, the proviso fixes the respective shares of the MSO and the LCO. It is not difficult to imagine that normally neither the MSO nor LCO would agree for anything less that their shares fixed under the proviso. In reality, therefore, though there may be an illusion of mutual negotiation, the sharing of revenue between the MSO and the LCO is more rigidly fixed21 than in the upper tier between the broadcaster and the MSO as the broadcaster is given the right to frame its own RIO. We thus find that the argument is not sustainable on facts.

Though it appears to be more in favour of the MSO than the LCO. But even in case the Tariff Order is left aside, the extent of Regulation in the two tiers of the broadcasting sector may be construed differently if we adopt the principle of purposive interpretation. It must be borne in mind that the very object and purpose of Regulation is to promote competition. It, therefore, follows that at the level where there is little or no competition, the degree of Regulation would be much higher and the level at which competition is sufficient or near sufficient there might be less or even no Regulation. Keeping in mind this premise, if one looks at the broadcasting sector, it would be evident that the broadcasters enjoy a virtually monopolistic position. A popular TV programme may be available only with one particular broadcaster and no one else; a movie picture or a popular sporting event likewise may be available with only one or two broadcasters. But when the broadcast comes to the distribution platforms, its availability gets widely spread out. The same programme, movie picture or the sporting event may be available to more than half a dozen pan-India MSOs, apart from several DTH operators and HITS operators. Thus there may not be any reason for objection if the Regulations allow the players at the lower tiers of the broadcasting sector more leeway for mutual negotiations.

Next, referring to the two streams of revenue for the broadcaster, i.e., subscription revenue and advertising revenue, Mr. Sibal submitted that this dual revenue stream was sufficient justification for differential pricing and the different rates given to different distributors could not be called discriminatory. In his submission, when a lower price is offered to a certain distributor, it is offset by the greater advertising revenues (on account of higher viewership) in addition to greater subscription revenue. Thus, though from the point of view of the distributor, different rates given to different distributors may appear discriminatory, viewed from the standpoint of return to the broadcaster, there was in fact no discrimination - as, in aggregate, the broadcaster was getting the same return. He further submitted that in a country with so many diversities - where consumers in each area are likely to have diverse preferences - it was impracticable and unworkable to have a single RIO, as it would necessarily need to be altered many times in dealing with different regions/markets. Mr. Sibal submitted that a broadcaster may wish to penetrate a new market by undercutting and offering lower prices, which was a perfectly permissible pricing behavior. In his

submission, it stands well settled that every differentiation would not amount to discrimination. Finally, Mr. Sibal submitted that the real issue in the present case was not non-discrimination but non-disclosure. He fairly acknowledged that non- discrimination must be enforced, but caveated that by submitting that it must be on a case-to-case basis. To enforce non-discrimination, the seeker of the channels (like the Petitioner in the present case) would need information on agreements being entered into by similarly situated operators. Mr. Sibal submitted that there was a separate set of Regulations (i.e., the Access Regulations) under which such disclosure could be sought. In reply to the Tribunal's query that those very Regulations treat such information as confidential and exempt it from disclosure, Mr. Sibal submitted that those were interpretational issues which had to be tested by invoking those Regulations and approaching the appropriate forum, that is, TRAI. Thus, Mr. Sibal submitted that the remedy,- if any, lay in approaching TRAI, and the Petitioner cannot raise these issues in the present proceeding.

We are not convinced by Mr. Sibal's submissions based on the large size, regional, cultural and linguistic diversity of the broadcasting market and in our view the apprehension that the great diversity of viewer preferences would lead to multiplicity of RIOs, rendering the RIO regime unworkable appears to be misconceived. It is our experience at the Tribunal that interconnect agreements are mostly entered into on a pan India basis and the difference in the two types of agreements relate only to DAS and non-DAS areas without much differentiations on regional basis.

In any event, Mr. Sibal's first two submissions, based on the dual stream of revenue and the diversity of the broadcasting market in the country are actually answered by his third submission regarding disclosure of the commercial terms of the inter-connect agreements. The Regulations demand non-discrimination Clause 3.6 of the Interconnect Regulations, 2004 among similar distributors. If a certain broadcaster is given lower rates, having regard to its larger viewership that might lead to larger advertisement revenue, there is no reason why another distributor with a similar reach to viewers may not be given the same commercial terms. In the same way if certain rates are given to a particular distributor on any regional, cultural, linguistic or any other special consideration, there is no reason why another distributor operating in the same regional, cultural, linguistic zone and offering to deliver similar returns to the broadcaster may not be given the same special rates. But in order that another similar distributor should be able to claim the same commercial terms, promising, in return, to give similar paybacks to the broadcaster it is crucial for it to know the special deal given to another distributor. Having thus identified disclosure of commercial terms of every interconnect agreement entered into by the broadcaster as basic for enforcement of the non-discriminatory clause, Mr. Sibal referred to the Access Regulations23 framed by TRAI and submitted that that set of Regulation has its own procedure and must receive its own interpretation by TRAI. He further submitted that any seeker of channels demanding from the broadcaster disclosure of the commercial terms of the broadcaster's agreements with other distributors must approach TRAI and it would then be for TRAI to decide the dispute on an interpretation of the provisions of the Access Regulations. Mr. Sibal submitted that The Telecom Regulatory Authority of India (Access to Information) Regulation, 2005 (Access Regulations) a demand of disclosure cannot be made before the Tribunal for the first time and any such dispute falls outside the purview of the Tribunal.

In the present scenario, the issue of disclosure indeed becomes basic for the enforcement of non-discrimination. But the matter of disclosure may be seen from two angles. First we are not satisfied with Mr. Sibal's submissions based on the Access Regulations. The provisions of an ancillary set of Regulations cannot be left out for being interpreted in a manner as to set at naught the very soul of the primary Regulations that form the mainstay of the regulatory regime for the broadcasting service. Mr. Saket Singh, appearing for TRAI, submitted that the non-discriminatory provision in Clause 3.2 is the essence of the Regulations. The Written Submissions filed behalf of TRAI describes Clauses 3.1 and 3.2 as the "most essential conditions of the interconnection regulations". We are in full agreement with this view of the Interconnect Regulations, 2004 and in that view the commercial terms of the interconnect agreement cannot be held to be exempt from disclosure under the Access Regulations. In view of the "must provide & non-discrimination" obligation there can be no secrecy in the commercial terms, because they cannot be permitted to be the source of any comparative or competitive advantage. In our considered opinion, therefore, the broadcasters cannot hide behind the Access Regulations on the plea that the distributor must first obtain an order of disclosure from TRAI Secondly, the issue of disclosure is, in reality, quite deceptive. In the present scenario, disclosure has become basic for the enforcement of non-discrimination because no broadcaster is making its RIO as required by the Regulations. The importance of disclosure is on account of the vast divergence in the rates on which negotiated agreements are executed and the rates are shown in the RIO. This, in turn, is due to the fact that today, there is not a single RIO of any broadcaster that can be said to be in accordance with the Regulations. If the RIO is framed as required by the Regulations, as discussed in the following part of the judgment, the gap between an RIO based agreement and a negotiated agreement would inevitably get narrowed down and the issue of disclosure would become irrelevant or, in any event, marginal.

We also find no merit in Mr. Sibal's submission that all possible variations in the commercial terms in the agreements resulting from the dual stream of revenue and the great diversity of the broadcasting market cannot be accommodated in a single RIO. First, there is no sanction to say that there may not be more than one RIOs and secondly, as explained later on in this judgment, if is framed properly and as required by the Regulations, RIOs in very manageable numbers can provide a broad framework, also leaving sufficient room for mutual negotiations within reasonable and non-discriminatory limits.

On a consideration of the relevant provisions of the Regulations, 2004, the submissions made on behalf of the parties and the interveners and the earlier decision of the Tribunal in the Hathway's case we are unhesitatingly of the view that reasonableness, parity and non-discrimination, as mandated in clause 3.2 of the Regulations are essential and un-violable elements of an interconnect agreement. We accept as correct, the submission made on behalf of TRAI that Clause 3.2 is the essence of the Regulations and that clauses 3.1 & 3.2 stipulate the "most essential conditions of the interconnection regulations".

Having thus disposed of the main contentions made on behalf of the broadcasters and some others in favour of leaving the field completely open for negotiated agreements and having arrived at some primary findings we now proceed to examine the question that was left open in the Hathway

decision namely, the extent of freedom of negotiation enjoyed by the provider and seeker of signals and the extent to which the RIO of the provider regulates, limits or expands the area of negotiation.

This brings us to the RIO which is the most basic in this controversy. Once the nature of the RIO and its position in the Regulations is correctly understood everything falls into place and a number of points raised by the different counsel are either answered or appear to lose relevance, including the issue of disclosure of commercial terms raised by Mr. Sibal.

At the outset we may briefly set out the manner in which the RIO concept found its way into the Indian regulatory landscape. The concept of Reference Interconnect Offer (RIO) may be traced to a document entitled "Trends in Telecommunication Reform; 2000-2001: Interconnection and Regulation"

> published by the International Telecommunication Union (ITU). Chapter 3 of the said report considered the relative merits of ex ante Regulation (sectoral regulation) versus ex post Regulation (general competition law). The report referred to a WTO Reference Paper which stated that transparency, non- discrimination, timeliness and anti-competitive safeguards are the cornerstone of interconnection rules. The report further noted that the "WTO Reference paper requires major suppliers to provide interconnection under non-discriminatory terms, conditions and rates". We are conscious, of course, that these recommendations were made in the context of telecommunications, and not broadcasting. In telecommunications, Interconnection Regulation is a necessity to offset the advantages enjoyed by a dominant incumbent, and interconnection rates are essentially cost based (with various possible complex models on how such rates should be set). These various issues were considered by TRAI in Consultation Paper No.2001/5, where specific reference was made to the recommendations of ITU, and the concept of RIO and fixing of interconnection rates was discussed in the context of telecommunications. The concept of RIO was then introduced in the broadcasting sector by an amendment to the 2004 Regulations (the concept appears to have first been discussed for the broadcasting sector in a consultation paper of TRAI, in 2006). While the issues in the broadcasting sector are undoubtedly different, the primary objective appears to be to control the exercise of market power by dominant broadcasters who control premium content. With this background, we may proceed to consider the applicable Regulations.
>
> A proper RIO, true to its nature as envisaged in the Regulations, is meant to go a long way in introducing/bringing about fairness, reasonableness and non- discrimination in interconnect arrangements between a broadcaster and distributors. But what is passed off by the broadcasters as RIO, instead of doing away with non-discrimination actually becomes a device to perpetuate discrimination.
>
> Here we may once again refer to the Hathway decision where there is a discussion on the RIO. In the Hathway decision, in regard to the RIO it was observed:

The "Reference Interconnect Offer", as defined under the Regulations, is a positive concept and if framed properly it should go a long way in ensuring a level playing ground. In Europe, and in an increasing number of jurisdictions worldwide, incumbent operators and/or those with significant market power are required to produce a Reference Interconnect Offer. "This Specimen offer provides a common and transparent basis for all agreements for the provision of interconnection services subject to regulation. It also helps to ensure that new entrant operators can be confident of gaining terms which will not be less favourable to those applied to others (including the interconnection provider's own retail operation)". Seen thus the RIO may be said to define the parametre of negotiations for arriving at an agreement on mutually acceptable terms. It may be argued that the RIO must contain the details and rates relating to all the bases on which the maker of the RIO intends to enter into a negotiated agreement.

But in this country, unfortunately RIOs are framed seemingly in negation of all the attributes of a true RIO. The RIO is used by the broadcaster as a coercive tool and a threat to the seeker of TV channels and it undermines the essence of the Regulations, which is to promote healthy competition by providing a level playing field.

Mr. Kathpalia, learned Counsel appearing for Hathway, as one of the interveners in the proceeding hit the nail on the head in submitting that what are passed off as RIOs by the broadcasters are no RIOs at all. Mr. Kathpalia submitted that the RIO was intended to be a standard, or a reference point. Instead, in its current form, it can be empirically established that less than 5% of the actual deals are on RIO basis and that too, for very short periods. In other words, Mr. Kathpalia submitted that the present RIO (as published by broadcasters) was nothing but a threat, or a bullying tool in negotiations, where distributors were presented with a 'my way or the highway' choice, with the RIO being the highway. The RIO rates were also divorced from commercial or market realities, that neither party actually wanted an agreement on RIO basis. This, Mr. Kathpalia submitted, was borne out by the fact that when distributors did - in certain cases - agree into an agreement on RIO basis, the broadcasters themselves were forced to rush to this Tribunal. Mr. Kathpalia further submitted that the RIO was structured in a manner to make the a la carte offering of channels a non-starter. Mr. Kathpalia submitted that discrimination was inherent in the faux RIO that exists today.

We agree with Mr. Kathpalia's submissions on RIO and we proceed to examine in how many ways the RIOs, currently offered by the broadcasters, do not conform to the Regulations.

The RIO offered by every broadcaster to the distributors has three main features:

i) It gives only a list of individual channels with their a la carte rates

ii) It does not give any bouquets of channels or the prices thereof

iii) Even the a la carte rates of channels are fixed with no regard to the market realities, as reflected in the negotiated deals, but at the highest permissible rate under the tariff order framed by TRAI This faux RIO gives the broadcaster immense advantages. First, as every distributor of channels much prefers to take channels in bouquet forms and not individually, and specially not at the higher rates fixed in the RIO, the omission to give any bouquets in the RIO makes the broadcaster by and large free of the Regulations and gives it complete freedom of negotiations for entering into interconnect arrangements with the distributors. The broadcaster is thus able to retain the choice to take the "high road" of negotiations and thereby not to submit to the regulatory provisions or to take the "low road" of the RIO in which case alone it would submit to the Regulations. Secondly, by not giving in the RIO the bouquets and their prices that it offers for distribution in all its negotiated deals the broadcaster completely bye passes the mandate of clause 13.2A.12 that fixes the ratio between the a la carte rate and the bouquets rates channels. Thirdly, as the a la carte rates given in the RIO do not follow the ratio under clause 13.2A.12 of the Regulations and are also completely divorced from the actual market prices of the channels, the broadcaster acquires great bargaining power in any negotiation with the distributors. It can always refuse to enter into negotiations or terminate a negotiation asking the seeker of the channel to take the RIO that would be highly disadvantageous and quite often commercially unviable for the distributor. The RIO thus puts the broadcaster in a position where it can flout not only the non-

discrimination clause but quite effectively also the "must provide" clause. Fourthly, the RIO in its present form completely defeats the thrust of the Regulations towards giving the subscriber the option to take only a few channels of his/her choice and not to be burdened with a very large number of channels in the form of a bouquet to sub-serve the broadcaster's interests in securing its advertisement revenue.

The broadcaster seeks to justify the faux RIO by taking the following positions. It first, relies upon the untenable theory, as argued by Dr. Singhvi that the Regulations recognise the negotiated agreement as a separate regime, independent of the RIO and the Regulations give the broadcaster complete freedom for entering into a negotiated agreement. The proposition is misleading and incorrect.

The provisions that form the basis for the submissions are contained (i) in clause 3.5 that provide that the broadcaster to whom a request for providing TV channels signals is made should provide the signals on mutually agreed terms to the distributor of TV channels who is seeking signals, or specify the terms and conditions on which it is willing to provide TV channels signals.....and (ii) in the proviso to clause 13.2A.6(i), providing that the broadcaster may enter, on non-discriminatory basis, into agreements with different direct-to-home operator modifying the reference interconnect offer on such terms and conditions as may be agreed upon.

It must be understood that provision of mutually agreed terms in clause 3.5 mainly relates to the areas under analogue mode of transmission. In analogue system, there is absolutely no scientific or objective way to ascertain the number of viewers watching any particular channel and in analogue mode gross understatement of the subscriber base by the distributor is a well-known and recognised fact. There is thus no other mode for the broadcaster and the distributor to agree upon the subscriber base and/or the licence fee payable by the distributor excepting mutual negotiations. The position is, however, entirely different in addressable systems of transmission in which the computerized subscriber management system keeps record of every single viewer watching every channel given by the distributor. Unlike analogue mode, in addressable systems, there cannot be any dispute or any negotiations in that regard. Hence, Mr. Saket Singh rightly submitted on behalf of TRAI that once the RIO regime is introduced in any area under addressable transmission, the provision of clause 3.5 gets ousted. As regards, the proviso to clause 13.2A.6(i), it is to be noted that "the mutually agreed terms and conditions are qualified by the condition of non-discriminatory basis and provide only for modifying the RIO and not to discard it altogether".

It is secondly contended that by putting up the RIO on its website offering the channels individually and on a la carte rates the broadcaster satisfies the requirement of non-discrimination. Additionally that the broadcaster is free to fix the a la carte rates of channels upto the upper limit allowed under the tariff order and regardless of the actual market price of the channels. It is further contended that the broadcaster is not obliged to give any bouquets in the RIO because the Regulations mandate it to offer all its channels for distribution on a la carte basis; there is no mandate to give the channels in the form of bouquets. The submission is quite fallacious. As discussed earlier, offering channels in the form of bouquets is the preferred mode in the broadcasting sector. There is no need for any mandate for that. The Regulation requires that apart from the bouquets, channels must also be offered on a la carte basis. That was intended for the benefit of the ordinary subscriber. But that objective too is totally frustrated as the a la carte rates are artificially raised with no reference to the market prices of the channels. Moreover, Schedule III to the Interconnect Regulations enumerate "Terms and Conditions Which Should Compulsorily Form Part of Reference Interconnect Offer ……". The Annexure to schedule III clearly requires the compositions of different bouquets with their respective prices to be stated in the RIO, apart from the a la carte rates of the channels. The omission to give the bouquets in the RIO is thus plainly a contravention of the Regulations. Furthermore, the submission has already been rejected in the Hathway decision.

As the Regulations stand in its present form, we are clearly of the view that the RIO must reflect not only the rates of channels but also the different formations, assemblages and bouquets in which the broadcaster wishes to offer its channels for distribution along with the rates of each of the formation or bouquet. Further, the a la carte rate and the bouquet rates must bear the ratio as mandated in clause 13.2A.12. The RIO must also clearly spell out any bulk discount schemes or any special schemes based on regional, cultural or linguistics considerations that would be available on a non-discriminatory basis to all seekers of signals. To sum up the RIO, must enumerate all the formats, along with their respective prices, in which the broadcaster may enter into a negotiated agreement with any distributor. To put it conversely, the broadcaster cannot enter into any negotiated deal with any distributor unless the template of the arrangement, along with its price, consistent with the ratio prescribed under clause 13.2A.12 is mentioned in the RIO. In addition, any

volume-related price scheme must also be clearly stated in the RIO so as to satisfy the requirement of clause 3.6 of the Interconnect Regulations.

A proper RIO would, thus, form the starting point for any negotiations which would be within the limits allowed by the ratio between the a la carte and the bouquet rates as stipulated under clause 13.2A.12 and the margins between different negotiated agreements would be such as they would hardly be any requirement for disclosures.

VI. d. Issue 5 Issue no. 4 is thus answered in the above terms and this takes us to the fifth issue, regarding the status of the HITS operator for the purpose of interconnect arrangements. In this regard, Mrs. Pratibha Singh submitted that "HITS has a PAN-India footprint and a last mile monopoly". It, therefore, enjoys the benefits of both MSOs and DTH operators without any of their deficiencies. She submitted that a HITS operator could, thus, emerge as a monopolistic and a dominant player in the market. We simply take note of the submission for the sake of record. There is no material to support the apprehensions expressed by Mrs. Singh, and, in any event, this is a matter to be addressed by the regulator. It is not open to the broadcaster to mete out a discriminatory treatment to the HITS operator on the basis of a self-serving prediction that at some future date HITS has the potential to dominate the broadcasting sector.

Dr. Singhvi and some other counsel submitted that the HITS operator was different from other distributors of TV channels because it worked on a different distribution technology and referring to the Explanation to clause 3.6 sought to justify the different rates offered to the petitioner as compared to other distributors of channels. The explanation referred to is intended to clarify the expressions "all similarly based distributors of TV channels" occurring in clause 3.6 of the Regulations. According to the explanation, the factors on the basis of which similarity may be judged include geographical region and neighbourhood, having roughly the same number of subscribers, purchase of similar service, using the same distribution technology. It is contended that the HITS operator uses a distribution technology different from both the MSO and the DTH operator. The contention, however, ignores the second part of the Explanation that puts the difference based on distribution technology in two broad categories as under:

> "For the removal of doubts, it is further clarified that the distributors of TV channels using addressable systems including DTH, IPTV and such like cannot be said to be similarly based vis-à-vis distributors of TV channels using non addressable systems."

From the above it is clear that the difference based on technology relates to addressable systems and non-addressable systems and not between different technologies among the addressable systems.

Any difference in distribution technology can be accounted for in the technological terms stipulated in the RIO but so far as commercial terms are concerned, it is difficult to see a HITS operator as different from a pan-India MSO and in our considered view a HITS operator, in regard to the commercial terms for an interconnect arrangement has to be taken at par with a pan-India MSO and must, therefore, receive the same treatment.

VII. Operative Directions In light of the discussions made above, both Star and Taj, as well as the other broadcasters who have joined the proceedings as intervenors, are directed to issue fresh RIOs, in compliance with the Interconnect Regulations, as explained in this judgment within one month from the date this order becomes operational and effective. It will be then open to the petitioner to execute fresh interconnect agreements with Star and Taj, and with any other broadcasters on the basis of their respective RIOs or on negotiated terms within the limits, as described hereinabove. Star and Taj must execute fresh interconnect agreements with the petitioner within two weeks from the date of issuance of their fresh RIOs. The agreement with Star would relate back to 30 October 2015 and with Taj to 30 June 2015.

The issuance of the fresh RIOs by the broadcasters will also give right to other distributors of channels with whom the broadcasters may be in interconnect agreement to have their agreements modified in terms of clause 13.2A.7.

It is noted in the earlier part of the judgment that the petitioner executed an RIO based agreement with Media Pro. At that time, it did not complain before the Tribunal that it was being forced into the RIO based agreement even though it had ample opportunity to do so as the Media Pro application was pending before the Tribunal. Later on, after Media Pro ceased to be an agent of the broadcasters, the petitioner, even after filing the present petition, signed RIO based agreements both with Star and Taj. The agreement with Star was for the period upto 30 July 2015 and the two agreements with Taj were upto 31 March 2015.

The petitioner must, therefore, be held bound by those agreements till the periods of those agreements and further, three months beyond that in terms of clause 8 of the Interconnect agreement. After those dates (29 October in case of Star and 30 June in case of Taj) the arrangement will be governed by the fresh agreements.

IX. Suspension of the judgment.

We are conscious that in interpreting the Interconnect Regulations, 2004, it has been necessary to reconcile seemingly inconsistent strands of the Regulations. The non-discrimination obligation, which TRAI acknowledges as the pivot of those Regulations, appears inconsistent with a regime where parties are allowed full latitude to mutually negotiate their agreements and also not disclose the commercial terms of the agreement to other market participants. The task before this Tribunal has been to reconcile these different facets of the Regulation such that no one part is rendered completely hollow, redundant or otiose. Thus, in the interpretation that we have placed on the Regulation, there is the obligation to frame a meaningful RIO in which all bouquet and a la carte rates are specified, and there is also some room for mutual negotiation (even on rates) within certain specified parameters. This will achieve the objective of introducing a transparent non-discriminatory regime whereby distributors can obtain access to content, while still retaining some latitude to mutually negotiate the terms and conditions of access. It will also make the nexus between a la carte and bouquet rates, which the regulator thought fit to introduce, applicable to all mutually negotiated agreements. Negotiations must be within the parameters to those mandatory conditions specified in the Regulations that cannot be avoided or waived, and the mutual

negotiation course cannot be used as the means to completely step out of the Regulations. It would be plainly opposed to any common sense principle to first set out an elaborate cumbersome regulatory architecture, only to allow parties to opt out of it at will.

At the same time, we are conscious that the present judgment may unsettle the way in which various parties in the broadcasting sector have entered into existing agreements. We are further conscious that while the TRAI has taken a position broadly in line with our conclusions in this case, that has not always been the case. As the Amicus Curiae and the counsel for the Petitioner have pointed out, the positions taken by TRAI in the past have not always been fully consistent. In particular, we note the observation of TRAI in Consultation Paper No.15 / 2008 that in view of the confidentiality restrictions, "the automatic implementation of non-discrimination clause in Interconnect Regulation is practically difficult". Thus, as far back as 2008, TRAI was aware that the non-discrimination clause - which, in these proceedings, it has sought to place on a very high pedestal - was effectively inoperative. And yet, matters in the broadcasting sector have been allowed to lie where they are by TRAI.

There are, undoubtedly, important issues of regulatory policy that underlie the interpretative issues that this Tribunal has had to confront. It is incumbent on this Tribunal to interpret the Regulations as those stand, and place an interpretation that is aligned with the legislative and regulatory intent. But in a matter where TRAI has not been entirely consistent at every point in time, in a matter where the Regulations have evolved with frequent and successive amendments, and in a sector which has undergone some technological change with the shift from analogue to digital transmission, it is better if an opportunity is given for the Regulator to comprehensively consider such issues, initiate appropriate consultations, and frame a comprehensive code for the broadcasting sector.

We have, on past occasions as well, made similar suggestions with the hope of nudging the Regulator to take proactive steps to reduce the scope of disputes arising out of the Regulations. At the same time, the fact that regulatory intervention may be the ideal way forward cannot and should not be an excuse for this Tribunal to shirk the interpretative issues that have come before us. This is particularly so when there appears to be regulatory inertia.

It is in this background, and having given our anxious consideration to this matter, that we resolve to suspend the operation of this judgment till 31 March 2016. The judgment shall take effect on 1 April 2016. While we are aware that this is not a common procedure, we are of the view that it is appropriate in the peculiar facts and circumstances of this case, since the effect of this judgment may be to unsettle a number of existing agreements and necessitate re-negotiation.

In the meanwhile it will be open to TRAI, if it elects to do so, to undertake a comprehensive restructuring of the Regulations which would hopefully clarify many of the issues that arise in these proceedings. We make it clear that this Tribunal is issuing no such direction to TRAI. The delayed operation of the judgment is only to afford an opportunity to TRAI to consider the matter and act in the intervening period, if appropriate.

Having regard to the fact that the greater part of the country would come under the DAS regime with effect from 1.1.2016, it would be advisable that TRAI should try to frame a consolidated Broadcasting Code instead of the large number of Regulations dealing with different aspects of the service and each having undergone numerous amendments. In order to make a serious effort in that direction, TRAI would be required to get hold of all the negotiated interconnect agreements between the broadcasters and the distributors of channels, which the broadcasters are in any event obliged to submit to TRAI. The analysis of the commercial terms of the negotiated agreements would give TRAI a clear picture of the market prices of the broadcasters' channels. A comparison of the prices in the negotiated agreements and those shown in the current RIOs will then show how far the RIOs are removed from market realities. Having examined the negotiated agreements between the broadcasters and the distributors of channels, TRAI may even feel the need to take a re-look at the tariff orders framed by it. But for any meaningful exercise for reviewing and consolidating the broadcasting Regulations it would be imperative for TRAI to get hold of the negotiated agreement between the broadcasters and distributors which alone would give the correct picture of the market reality.

Needless to add that in case TRAI issues any fresh Regulations before 1 April 2016, the petitioner and the broadcasters would be obliged to execute agreements on that basis. In case, however, no fresh Regulations are issued by TRAI, this judgment and order will come into effect from the aforesaid date and the parties would be obliged to follow the directions give above.

X. Tying up the loose ends.

Suspension of this judgment, as explained above is in the larger interest of the broadcasting sector. It does, however, leave open the question of the petitioner's liability to pay licence fees to the broadcasters, Star and Taj, for their signals received by it during the pendency of the petitions before the Tribunal and further until execution of fresh agreements in terms of this judgment or in terms of fresh Regulations, if any, framed by TRAI. It will not be fair that the broadcasters should continue to supply signals to the petitioner without any payment for the next several months. It is, therefore, necessary to make some interim arrangement under which the petitioner should make payment of licence fees to the two broadcasters until after execution of fresh agreements accounts are finally reconciled. The determination of payment liability by the petitioner may also require some evidence to be taken. For this purpose, Petition No. 526 (C) of 2015 is de-tagged from this judgment and kept pending. Star has already filed an application (M. A. No.377 of 2015) in Petition No. 314 (C) of 2015 claiming the dues of licence fees from the petitioner. Petition No. 526 (C) of 2015 is directed to be tagged with Petition No. 314 (C) of 2015. In these two petitions, the Tribunal proposes to determine the Petitioner's liability to pay the license fees to Star and Taj on an ad hoc basis and as an interim measure until the execution of the agreements with the two broadcasters, and when the accounts of the two sides may be reconciled to determine any final liability of the Petitioner or Respondents to make any further payments.

Before concluding we would like to put on record our deep appreciation for the assistance rendered by all the counsel who appeared in these proceedings. We also record our gratitude, particularly to the amicus curiae for the very valuable assistance he provided to us by his thorough work and

painstaking research of the evolution of the regulatory regime for the broadcasting sector not only in India but in some other jurisdictions as well.

In the result, Petition No.295(C) of 2014 (along with all applications pending in it) is disposed of in the above terms. Petition No.526(C) of 2014 is held back and kept pending as directed above.

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(Aftab Alam) Chairperson .....

(Kuldip Singh) Member .....

(B.B. Srivastava) Member