TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL

NEW DELHI

Dated 28th April, 2015

Appeal No. 1(C) of 2014

(M.A.No.6 of 2015)

Centre for Transforming India ... Appellant

Vs.

Telecom Regulatory Authority of India ... Respondent

Appeal No. 2(C) of 2014

(M.A.No.7 of 2015)

Home Cable Network Pvt. Ltd. ... Appellant

Vs.

Telecom Regulatory Authority of India ... Respondent

Appeal No. 3 (C) of 2014

M/s Lucknow 9 Cable Network Pvt. Ltd., Lucknow ... Petitioner

Vs.

M/s Telecom Regulatory Authority of India ... Respondent

Appeal No. 4(C) of 2014

(With M.A.No.209 of 2014)

Good Media News Pvt. Ltd. … Appellant

Vs.

Telecom Regulatory Authority of India … Respondent

Appeal No. 5(C) of 2014

(With M.A.No.210 of 2014)

Sikkim Digital Network Pvt. Ltd. … Appellant

Vs.

Telecom Regulatory Authority of India … Respondent

Appeal No.6(C) of 2014

(With M.A.No.216 of 2014)

Cable Combine Communication Pvt. Ltd.,Siliguri … Appellant

Vs.

Telecom Regulatory Authority of India … Respondent

BEFORE:

HON'BLE MR. JUSTICE AFTAB ALAM, CHAIRPERSON

HON'BLE MR. KULDIP SINGH, MEMBER

For Appellant [in Appeal No.1(C) of 2014]	:	Mr. Aman Lekhi, Sr. Advocate Mr.Ashok Kumar, Advocate
For Appellant [in Appeal No.2(C) of 2014]	:	Mr. Arun Kathpalia, Advocate Mr. Vivek Sarin, Advocate
For Appellant [in Appeal No. 3(C) of 2014]	:	Mr.Vikram Singh, Advocate
For Appellants [in Appeal No. 4(C), 5(C) & (6) of 2014]	:	Mr.Vineet Bhagat, Advocate Ms.Neha Jain, Advocate
For Respondent-TRAI	:	Mr.Saket Singh, Advocate
For Intervener – Dish TV (M.A. No.167 of 2014)	:	Mr.Meet Malhtora, Sr. Advocate Mr.Tejveer Singh Bhatia, Advocate Mr. Upender Thakur, Advocate Mr.Ravi S.S.Chauhan, Advocate Mr.Prateek Dahiya, Advocate Ms.Pallak Singh, Advocate

		Mr.Rohan Swarup, Advocate
For Intervener – Reliance Big TV Ltd. (M.A. No.176 of 2014)	:	Mr. Lakshmeesh Kamath, Advocate Mr.Ruchir Visaria, Advocate
For Intervener – Bharti Telemedia Ltd. (M.A. Nos.177 & 182 of 2014)	:	Mr. Harsh Kaushik, Advocate Mr.Abhay Chattopadhyay, Advocate
For Interveners – (in M.Nos.168,169, 180 & 181, 191 of 2014)	:	None.
For Intervener –Bharat Business Channel Ltd. (M.A. No.184 of 2014)	:	Mr.Devender Singh, Advocate for Mr. Sandeep S. Ladda, Advocate
For Intervener – (in M.A.No.179, 183, 190, 200, 205 of 2014)	:	Mr.Nittin Bhatia, Advocate
For Intervener – (M.A. Nos.201 & 202 of 2014)	:	Mr.Nasir Husain, Advocate
For Intervener – IBF (M.A.	:	Mr. Salman Khurshid, Sr. Advocate

No.186 of 2014) Mr.Abhishek Malhotra, Advocate
Mr.Saurabh Srivastava, Advocate
Mr.Angad Singh Dugal, Advocate
Mr.Arjun Natarajan, Advocate
Mr.Saurabh Srivastava, Advocate
Mr.Avijit Singh, Advocate
Ms. Shilpa Gupta, Advocate

For Intervener – : None.
(M.A. No.178 of 2014)

ORDER

Kuldip Singh: These Appeals are directed against the Telecommunication (Broadcasting & Cable) Services (Second) Tariff (Eleventh Amendment) Order, 2014 issued by TRAI.

The Appellant in Appeal No. 1 (C) of 2014 is a Consumer Welfare Organization. The other appellants are cable operators providing free to air and pay channels to the consumers/subscribers. The appellants are aggrieved by a 27.5 % inflation linked hike in wholesale prices of pay channels. The hike is provided in two installments; 15 % w.e.f. 01.04.2014 and 12.5 % w.e.f 01.01.2015.

2. Briefly stated, the contention of the Appellants is that the impugned tariff Order is without jurisdiction, and arbitrary. They allege that the impugned Order has been passed without following the requirements of transparency as ordained in section 11 (4) of the TRAI Act. It completely disregards the interest of consumers/subscribers at large and is heavily tilted towards broadcasters and distributers of channels. As per the Appellants, the impugned Order has resulted only in the continuation of price freeze stipulated by the Principal Tariff Order dated 1.10.2004.

3. Vide order dated July 8, 2014, the Tribunal allowed the applications for impleading of co-appellants and other interveners. The intervener on behalf of Indian Broadcasting Federation (IBF) supports the impugned order. The other interveners who are Direct to Home (DTH) operators, Multi System Operators (MSOs) , Association of Cable Operators/Cable Operators oppose the impugned order on the same grounds as the Appellants.

4. The impugned order has been issued under Sub Clause (ii), (iii) and (iv) of Clause (b) of sub-section (1) and sub-section (2) of Section 11 of the TRAI Act, 1997 (24 of 1997). Prior to 09.01.2004, Broadcasting & Cable services were not in the purview of TRAI. On 09.01.2004, the Government of India issued Notification No. 39 [S.O. 44 (E) and 45 (E)] whereby definition of 'Telecommunication Services' was expanded to include 'Broadcasting & Cable Services'. On 15.01.2004, a tariff order "Telecommunication (Broadcasting & Cable) Services Tariff Order 2004 (1 of 2004) " was issued by TRAI freezing the

charges payable by a subscriber to a cable operator, a cable operator to a MSO, and a MSO to a broadcaster as prevalent on 26.12.2003. Since then six tariff orders and a number of amendments to these have been issued.

On 01.10.2004, 'The Telecommunication (Broadcasting and Cable) Services (Second) Tariff Order 2004 (6 of 2004)' , also known as the 'Principal Tariff Order', was issued repealing the Tariff Order dated 15.01.2004. While fixing the ceiling for the rates as prevailing on 26.12.2003, this Tariff Order also provided for proportionate increase and decrease of the price in case the channels were added or reduced after 26.12.2003. Fourteen amendments have since been made to this Tariff Order.

5. Another Tariff Order titled 'The Telecommunication (Broadcasting and Cable) Services (Third) (CAS areas) Tariff Order, 2006 (6 of 2006)' was issued on 31.08.2006 in respect of addressable systems. Three amendments have since been issued to this order.

6. 'The Telecommunication (Broadcasting and Cable) Services (Fourth) (Addressable system) Tariff Order, 2010 (1 of 2010)' was issued on 21.07.2010. Four amendments to this order have since been issued. Two more Tariff Orders, 'The Telecommunication (Broadcasting and Cable) Services (Fifth) (Digital Addressable Cable TV System) Tariff Order, 2013' and 'The Telecommunication (Broadcasting and Cable) Services (Sixth) (Direct To Home) Tariff Order, 2013' were also issued on 27.05.2013.

7. This is not the first time when the Tariff Orders issued by the TRAI have come under the scrutiny of the courts. To understand the present dispute, it is necessary to look at some of these Tariff Orders. The first Tariff Order in the series of Tariff Orders to which the impugned order belongs was ' The Telecommunication (Broadcasting and Cable) Services (Second) Tariff Order of 2004' also called the 'Principal Tariff Order'. This Tariff Order fixed the ceiling for both free to air and pay channels as per rates prevailing on 26.12.2003 and also provided for a proportionate increase and decrease in price in case the channels were added or reduced after 26.12.2003. The relevant portion of this order is as under:-

> *"3. Tariff:*
>
> *The charges, excluding taxes, payable by*
>
> *(a) Cable subscribers to cable operator;*
>
> *(b) Cable operators to multi system operators/broadcasters (including their authorized distribution agencies); and*
>
> *(c) Multi system operators to broadcasters (including their authorized distribution agencies)*
>
> *Prevalent as on 26th December 2003 shall be the ceiling with respect to both free-to-air and pay channels. Provided that if any new pay channel(s) that is/are introduced after 26.12.2003 or any channel(s) that was/were free to air channel on 26.12.2003 is/are converted to pay channel(s) subsequently, then the ceiling referred to as above can be exceeded, but only if*

the new channel(s) are provided on a stand alone basis, either individually or as part of new, separate bouquet(s) and the new channel(s) is/are not included in the bouquet being provided on 26.12.2003 by a particular broadcaster. The extent to which the ceilings referred to above can be exceeded would be limited to the rates for the new channels. For the new pay channel(s) as well as the channel(s) that were free to air as on 26.12.2003 and have subsequently converted to pay channel(s) the rates must be similar to the rates of similar channels as on 26.12.2003.

Provided further that in case a multi system operator or a cable operator reduces the number of pay channels that were being shown on 26.12.2003, the ceiling charge shall be reduced taking into account the rates of similar channels as on 26.12.2003."

8. On 01.12.2004, the TRAI permitted an increase of 7 % w.e.f. 01.01.2005 in the price of pay channels that was prevalent on 26.12.2003 vide 'The Telecommunication (Broadcasting and Cable) Services (Second) Tariff (Second Amendment) Order 2004, (8 of 2004)'. The relevant part of this amendment is as under:-

"2. The phrase "prevalent as on 26th December 2003 shall be the ceiling" appearing in the second last line of para 3 under the

heading titled "Tariff" and before the first proviso under the same para of the "Telecommunication (Broadcasting and Cable) Services (Second) Tariff Order 2004". (6 of 2004) shall be replaced by "prevalent" as on 26.12.2003 plus 7% shall be the ceiling."

9. Vide Third Amendment to the Second Tariff Order dated 29.11.2005, a further increase of 4 % on account of annual inflation was allowed w.e.f. 01.01.2006. The said order was challenged before this Tribunal and stayed on 20.12.2005. The stay was subsequently vacated and the Tribunal clarified in the final order dated 21.12.2006 that the TRAI was free to consider if it required to pass some order on the revision of rates for the next year. On 21.05.2007, TRAI issued a Consultation Paper (No. 6 of 2007) on issues relating to Tariff for Cable TV Services in Non-CAS areas. On 04.10.2007, it issued 'The Telecommunication (Broadcasting and Cable) Services (Second) Tariff (Eighth Amendment) Order'. By this amendment, the base date on which the prevailing prices were determined was changed from 26.12.2003 to 01.12.2007. The amendment allowed an inflationary hike of 4 % on the rates prevailing at the wholesale level on 01.12.2007 for Pay and Free to Air channels. On 26.12.2008, the Ninth amendment to the second Tariff Order was issued vide which the TRAI allowed a further increase of 7 per cent at the

wholesale level on the enhanced rates obtained after 4 per cent increase in the rates prevailing as on 01.12.2007.

10. The Eighth Amendment was challenged before this Tribunal in Appeal No. 10 (C) to Appeal No. 13 (C) of 2007. Vide judgment and order dated 15.01.2009, the amendment was set aside and the TRAI was directed to study the matter afresh in the light of various observations made in the judgment. Appeals against this judgment were made before the Hon'ble Supreme Court of India being Civil Appeals No. 829-833 of 2009 wherein the Hon'ble Court passed an order of status quo on the order of TDSAT and subsequently on 30.04.2009, asked the TRAI to consider the matter de novo as regards all relevant aspects and give a report by 11.08.2009.

11. Rates for DAS (Digital Addressable Systems) areas were fixed vide 'The Telecommunication (Broadcasting and Cable) Services (Fourth) (Addressable System) Tariff Order 2010". The Tariff Order provided that a-la-carte rates of the pay channels for addressable system as well as the bouquet rates for these channels for addressable systems shall not be more than 35 per cent of the rates specified for Non-addressable systems. The relevant portion of this order is as under:-

> *"4. Manner of offering pay channels by broadcasters to distributors of TV channels using addressable systems-----(1) Every broadcaster shall offer or cause to offer all its pay channels on a-la-carte basis to distributors of TV channels using*

addressable systems, and specify the a-la-carte rate for each pay channel:

(1)Provided that the a-la-carte rate for a pay channel for addressable systems shall not be more than thirty-five per cent of the a-la-carte rate of the channel as specified by the broadcaster for non-addressable system.

(2)In case a broadcaster, in addition to offering all its channels on a-la-carte basis, offers, without prejudice to the provisions of sub-clause (I), pay channels as part of a bouquet consisting only of pay channels, or both pay and free to air channels, such broadcaster shall specify the rate for each such bouquet of channels offered by it:

Provided that------

(a)The composition of the bouquets offered by the broadcaster to distributors of TV channels using addressable systems shall be the same as those offered by such broadcaster for non-addressable systems; and

(b)The rate for a bouquet of channels for addressable systems shall not be more than thirty-five per cent of the rate for such bouquet as specified by the broadcaster for non-addressable systems."

This Order also came under challenge before the Tribunal in an Appeal. The Tribunal in its judgement dated 16.12.2010 set aside the proviso to clause 4 of this Tariff Order. The order of the Tribunal was challenged in Supreme Court and on 18.4.2011, the Hon'ble Court while staying the order of Tribunal increased the ceiling of 35 per cent to 42 per cent.

13. On 11.11.2011, the Government of India issued a notification laying down a road map for implementation of Digital Addressable System (DAS) regime in a phased manner from the month of June, 2012 to December, 2014. The entire implementation schedule for DAS has been divided into four phases covering the entire country. Phase 1 to 2 have already been implemented. The date of implementation of phase 3 and 4 has since been extended up to 31.12.2016.

14. In the meanwhile, the TRAI carried out the exercise as directed by the Hon'ble Supreme Court and submitted its report on 21.7.2010. It approached the Supreme Court by filing Interlocutory Application Nos. 71-75 of 2014 in C.A. Nos. 829-833 of 2009 seeking permission of the Court to review the Tariff Order. On 28.02.2014, the Hon'ble Supreme Court of India permitted the TRAI to review the tariff ceiling to make adjustment for inflation and notify the same in exercise of its powers conferred under section 11(2) of the TRAI Act, 1997.

By the impugned order titled 'The Telecommunication (Broadcasting and Cable) Services (Second) Tariff (Eleventh Amendment) Order, 2014 (3 of 2014)' TRAI allowed another inflationary hike of 15% percent in the wholesale rates

for Non-addressable systems on the rates existing prior to 31.03.2014. The relevant part of this order is a sunder:-

> *"2. In clause 3 of the Telecommunication (Broadcasting and Cable) Services (Second) Tariff Order, 2004 (6 of 2004) (hereinafter referred to as the principal tariff order), for the words and figure "prevalent as on 1st day of December, 2007 and increased by an amount not exceeding seven per cent of such increased amount shall be the ceiling", the words and figures "prevalent before the coming into force of the Telecommunication (Broadcasting and Cable) Services (Second) Tariff (Eleventh Amendment) Order, 2014, and increased by an amount not exceeding fifteen per cent shall be the ceiling shall be substituted."*

As per the explanatory memorandum to this order, an increase of 27.5 per cent has been made in two installments. Vide Eleventh Amendment, 15 per cent increase is allowed w.e.f. 31.03.2014. A second installment of further 11% increase was allowed w.e.f 01.01.2015 vide Thirteenth Amendment dated 31.12.2014. The relevant portion of this order is as under:-

> *"In Clause 3 of the Telecommunication (Broadcasting and Cable) Services (Second) Tariff Order, 2004 (6 of 2004) (hereinafter referred to as the principal Tariff Order):---*

(i) For the words and figures "prevalent before the coming into force of the Telecommunication (Broadcasting and Cable) Services (Second) Tariff (Eleventh Amendment) Order, 2014, and increased by an amount not exceeding fifteen per cent shall be the ceiling", the words and figures, "prevalent before the coming into force of the Telecommunication (Broadcasting and Cable) Services (Second) Tariff (Thirteenth Amendment) Order, 2014, and increased by an amount not exceeding eleven per cent, shall be the ceiling" shall be substituted."

15. The Civil Appeals No. 829-833 of 2009 were disposed of by the Hon'ble Supreme Court of India by judgement dated 17.09.2014. While disposing of the appeals, all questions of law were left open for being agitated by the stake holders as and when the TRAI passed a fresh Tariff Order.

16. As per the TRAI, the inflationary increases given by it are based on increase in the Wholesale Price Index (WPI). In the Explanatory Memorandum with the Second Amendment to the Principal Tariff Order, it was explained that for making adjustments for inflation Wholesale Price Index (WIP) had been used. It was explained that Consumer Price Index (CPI) was not used as latest information for this was not available and further this related to certain specific consumption baskets.

As per the Explanatory Memorandum to the impugned Tariff Order, the WPI has increased by 43.69% and giving a pass through of 63%, an inflation linked increase of 27.5% is allowed.

17. Mr. Aman Lekhi, learned senior counsel appearing on behalf of the Appellant in Appeal 1 (C) of 2014, submitted that WPI as a measure of inflation is not appropriate for service sector. He further submitted that the TRAI has given no answer regarding the grievance of the Appellant in regard to appropriateness of WPI but reiterated that the same has been used in the past. He submitted that after raising the issue in the Consultation Paper dated 21.05.2007, the same has not been addressed and no explanation is available in the Explanatory Memorandum with the Tariff Order. As per Mr. Lekhi, the WPI is a general index meant for micro-economic purpose and used for fiscal and other economic policies of the Government.

Submissions of Mr. Lekhi in this regard are as under:-

(a) WPI does not include services. There is no "all purpose" index and the construction of an index is decided with the objective of what is to be measured and its use. If an index is to measure consumer prices for working class, luxury items should not be included. The basket of commodities and weights assigned to them are based on the said objective. WPI does not include services which form a major part of inputs for broadcasting sector.

(b) The economic activities are divided into 130 sectors and inputs of the said sectors are given in Input-Output Matrix (IO Matrix). The Inputs of communication sectors which is broadcasting service are few compared to WPI basket of 676 items. If weights of such inputs are provided from IO Matrix and price movement of these inputs/items is taken from WPI, the total inflation between 2008-09 to 2013-14 comes to about 9.8% only. Importantly the Communication Equipments which is item No. 92 in IO Matrix and also in WPI basket, constitute 53 % of input for broadcasting services and price inflation for this in the last five years is 0.04 % only. The primary articles (cereals, vegetables, etc) having more than 20 % weights in WPI are of no relevance in broadcasting sector but Communication Equipment which forms more than 53 % Inputs in IO Matrix contributes only 0.11% in WPI basket.

(c) GDP Deflator is a better alternative and should have been considered before deciding to use any of the indexes. It is economy wide and sector specific also.

18. Mr. Lekhi further submitted that following factors have not been considered at all while issuing the impugned amendments:-

(i) The growth in the number of subscribers which would offset the increase in the cost of input of services and goods, has not been considered. With

a growth of subscribers @ 34%, the cost of providing service reduced from Rs.110/- to Rs.57 in four years. The impugned increase of 27.5% in the ceiling price when applied on the increased number of subscribers, i.e., 34%, results into exponential growth of 308% in the revenue for the broadcasters.

(ii) Advertisement revenue also increases with increase in subscriber base and the same has not been considered.

(iii) Inflation is linked with costs and not with price. The price includes a component of profit also and WPI cannot be applied as such.

(iv) TRAI miscalculated charges for 30 FTA channels by applying 11% increase on Rs.94/- to arrive at Rs.117/- which shows that the entire approach was casual and arbitrary. No issue for Consultation was framed on the usage of WPI or any other index for the purpose of increasing the price in Consultation Paper of 20.04.2004 and no findings were given on the issue of usage of WPI despite objections by the stake holders in the Eighth Amendment.

19. Mr. Lekhi submitted that it is not the case of the petitioner that GDP Deflator or any other specific index should have been used by the TRAI but TRAI being an expert body should have been aware of the various alternatives available. It should have considered all the alternatives and given reasons for accepting or rejecting the usage of any index. TRAI should have undertaken an

exercise for fixation of prices of the channels rather than continuing with ad-hoc measure of price freeze since 2004.

20. Mr. Arun Kathpalia, learned counsel appearing on behalf of Appellant in Appeal No. 2 (C) of 2014 submitted as under:-

(i) Original exercise on which tariff fixation is predicated is not a tariff exercise and therefore all tariffs fixed on that basis are not tariff fixation exercises.

(ii) The entire increase is arbitrary as it is on an ad-hoc and interim fixation, as such itself arbitrary in the first place. The increase is otherwise also wholly arbitrary and suffers from non-application of mind.

(iii) The impugned tariff order has been issued in complete violation of section 11(4) and there is no transparency whatsoever in the process adopted by the TRAI.

21. It was submitted that despite availability of all the relevant information for price fixation in Digital Addressable System (DAS) , TRAI arbitrarily linked ceiling of rates in DAS with analog regime vide 4th Tariff Order dated 21.07.2010. The upward revision by 27.5% in wholesale price for Non-DAS area will automatically result in revision of the ceiling of corresponding prices in DAS regime. TRAI has created another ad-hoc regime for DAS by linking the ceiling of charges of DAS with analog.

22. It was further submitted that in the matter of tariff fixation, TRAI has at all times acted arbitrarily and without jurisdiction. From the very first tariff order of 15.01.2004, TRAI neither considered relevant factors, nor afforded consultations with the stakeholders. The impugned order, violates the provisions of Section 11(4) of the TRAI Act. The first two inflationary increases were effected vide tariff orders dated 01.12.2004 and 29.11.2005. No study or consultation process was undertaken prior to issuance of these tariff orders. First time when TRAI commenced the consultation process was vide its consultation paper dated 21.05.2007. Though several responses and protest were received none of these were addressed and on a mere *ipse dixit*, without any reason or justification, the TRAI proceeded to impose an inflationary increase of 4%. Though there has never been any meaningful consultative process, the rational and need for the inflationary increase in the impugned order is sought to be justified on the basis of the various tariff orders giving inflationary increases.

23. Issue of usage of WPI was never proposed or discussed by the TRAI and never formed part of any consultative process except for the 8th amendment where also despite several responses; there was no discussion or finding. There is no rationale for a 63% pass through of the total increase in WPI for the purpose of inflationary increase in the tariffs. This shows the non-application of mind and casual approach of TRAI.

24. TRAI has ignored the subscriber growth. TRAI acknowledged in its report dated 21.07.2010 that due to inflation, the cost of operation might have increased but the growth in subscribers has an offsetting effect.

25. The subscriber agreements are reviewed every year after mutual negotiations. These negotiations take into account all aspects including growth in subscribers, inflation, etc. Each year the subscription charge goes up and the subscription revenues have increased by 130% as against the growth in subscriber of 34%. Yet these aspects have not been taken into account by the TRAI.

26. Mr. Kathpalia argued that in Non-CAS area, the agreements are negotiated to arrive at a negotiated subscription amount. Though the agreements are based on Subscriber Line Report (SLR) and the price of bouquets / channels, the broadcasters are willing to have lower prices if SLR is increased correspondingly so that subscription amount remains the same. He gave an example of what he called as a 2X formula as per which in certain agreements, if the SLR is doubled, the prices were correspondently reduced to half to arrive at the same subscription amount.

27. In addition to the submission already made, Mr. Meet Malhotra, learned senior counsel appearing for Intervener - Dish TV, submitted that subsequent to the Principal Tariff Order, the content being provided by some channels has been split up into multiple channels. He gave the example of specialized sports channels that show the content of a particular sport such as cricket. Earlier all

such content was part of one sports channel. He submitted that though the same content which was earlier being shown as part of one channel is now split into different channels, TRAI has not considered the effect of this.

28. Mr. Harsh Kaushik appearing for Intervener-M/s Bharti Telemedia submitted that there was no independent or active consideration carried out by TRAI and it being expert body, it is not open for it to take a stand that tariff fixation is not possible.

29. Ms. Vandana Jaisingh, learned counsel appearing on behalf of IMCL additionally submitted that while issuing the impugned tariff orders, TRAI has completely disregarded the time of introduction of channels by the broadcasters and has granted the arbitrary hike for all channels irrespective of the year of introduction. There has been no consideration between the old and recent channels.

30. The submissions as above were also adopted by Mr. Vineet Bhagat, learned counsel appearing on behalf of Appellants in Appeal No. 4 (C), 5 (C) and 6 (C) of 2014 and by Mr. Nittin Bhatia, learned counsel appearing for Intervener -Association of LCOs.

31. Mr. Saket Singh, learned counsel appearing on behalf of the respondent-TRAI submitted that while forwarding its recommendations in regard to the issues relating to broadcasting and distribution of TV channels to the Central Government on 01.10.2004, it was inter-alia stated that the ceiling prescribed in the tariff order dated 01.10.2004 shall be reviewed and reiterated

periodically to make adjustments for inflation. Further, the issue of annual inflationary adjustment was also raised in the consultation process leading to the tariff amendment order dated 04.10.2007. This issue was made open for consultation in the consultation paper dated 21.05.2007 on issues relating to Tariff for Cable TV Services in Non-CAS Areas.

He referred to para 4.5, 4.12, 4.13 and 4.15 of the recommendations dated 01.10.2004 which are as under:-

"*4.5 The following issues have been examined in this chapter;*

(i) Pricing of pay channels

(ii) Prices of a-la-carte channels vis-à-vis bouquet of channels

(iii) Price of Basic Tier

(iv) Uniformity of Cable TV rates

(v) Periodicity of revision of rates"

"4.12 In Non-CAS areas consumers are not able to choose what they want to watch and do not have the option to maintain cable bills at affordable levels. Consumers have been protesting against frequent price hikes and available evidence suggests that this increase has been far more than the rate of inflation in the recent past. Thus there is need to regulate the pay channel prices in Non-CAS areas at least till competition ensures that consumers have adequate choice."

"4.13 TRAI had specified as the ceiling the rates at which the charges will be paid by the cable subscribers to cable operators, by the cable operators to multi service operators and by multi service operators to broadcasters, as those prevailing on 26th December, 2003. The Authority has decided that for Non-CAS areas the ceiling rate of 26.12.2003 would be reviewed periodically to make adjustments for inflation."

"4.15 The Authority had considered various alternatives to price control. Given the large number of operators and the extent of price variation it would be difficult to formulate a uniform price policy except in terms of general principles. Cost based pricing would be difficult since the product is not homogenous and this could damage incentive to improve quality of content. It is for this reason the Authority has decided to continue with the approach of regulating prices using historical prices."

Referring to the above, it was submitted by Mr. Saket Singh that cost based pricing was difficult as the product was not homogeneous and further such pricing would be a disincentive to improve the quality of content and for this reason the authority has decided to continue with the approach of regulating prices using historical prices

32. Mr. Saket Singh submitted that in accordance with the directions of the Tribunal to study the matter afresh in the light of its judgement dated 15.01.2009 and in pursuance of the order dated 30.04.2009 of the Hon'ble Supreme Court of India passed in Civil Appeal No. 829-833 of 2009, a detailed exercise was carried out by TRAI. A report dated 21.07.2010, based on that exercise, was submitted to the Hon'ble Supreme Court. The study was carried out with the help of a reputed consultant engaged for the purpose. He submitted that various methods to regulate the wholesale tariff in Non-CAS areas were considered as under:-

(i) Revenue Share
(ii) Retail Market
(iii) Cost Plus; and
(iv) Any other method/approach.

The comments were solicited from the stakeholders on these and various other related issues.

As per the report, though the cost plus model was considered to be most relevant to the Indian market, it was found that the results of the cost based model were of limited reliability and applicability due to the lack of comprehensive data. Further, the Authority was of the view that effective resolution of the wholesale tariff issue can only come through the introduction of Digital Addressability. The Authority found that keeping in mind the views

of the stakeholders, the best option was to draw upon the features of the prevailing tariff structure for a workable solution for the analog regime.

33. Mr. Saket Singh submitted that the tariff based on historical prices is an accepted international practice. Mr. Kathpalia, however, argued that even historical cost in this case is also not based on any exercise or reason but admittedly is a temporary and interim measure.

34. Mr. Saket Singh submitted that the tariff fixation undertaken by TRAI was after due consultation and consideration of the issues. He referred to para 5 of the Explanatory Memorandum to tariff order dated 01.10.2004 wherein it is explained that fixation of prices charged for new pay channels to consumers is difficult because of large variation of these prices and of the difficulty in linking these to costs. He further submitted that while using WPI, the Authority decided not to use CPI as it does not have the latest information. Also these relate to certain specific consumption baskets.

35. He further submitted that inflationary increase is to compensate for the increase in cost. The increase in number of subscribers is factored by the broadcasters in their business plans while fixing the rate for channels. This was strongly contested by Mr. Kathpalia, who submitted that increase in subscribers as a relevant criteria is recognized by TRAI and there is no mention of a business plan in any tariff order or explanatory memorandum. TRAI being a statutory body cannot supplement its reasons subsequently.

36. Mr. Salman Khurshid, learned senior counsel appearing for Intervener-Indian Broadcasting Foundation submitted that the pricing of channels by the broadcasters is based on a business plan that takes into consideration the economies of scale. While pricing the channels, the growth expected in the number of subscribers and revenue from advertisement etc. is factored in the plan. The inflationary increase in cost is an independent factor.

37. With regard to the submissions of Mr. Kathpalia that the original exercise on which the tariff fixation is predicated is not a tariff exercise, Mr. Khurshid submitted that if the Principal Tariff Order was set aside, there will be no tariff order and forbearance will follow. It was further submitted that the subject matter of the present tariff appeal is 11th and 13th Amendment to the Principal Tariff Order dated 01.10.2004. There is no challenge to the Principal order, 8th Amendment Order and even the 14th Amendment Order. The challenge to11th and 13th Amendments needs to be seen in the context of Supreme Court Order dated 17.09.2014 and the Tribunal in effect is being asked by the said order to reconsider the inflationary hike and not Principal Tariff Order. It was further submitted that the costs have escalated since 2004 due to bandwidth crunch, equipment cost and content acquisition cost and TRAI has rightly recognized that cost of content is directly related to its quality and not to the volume of subscribers. This position was upheld by Hon'ble Supreme Court vide order dated 28.02.2014 in C.A No. 829-833 of 2004 granting permission to TRAI to review the ceiling to make adjustments for inflation and notify the same holding it to be in exercise of its powers conferred

under Section 11(2) of the TRAI Act. It was further submitted that Appellants have enjoyed the tariff and hence cannot challenge the same. It was submitted that Authority has consistently been transparent and has consulted the stakeholders in the exercise of its powers. The knowledge of the stakeholders as to what is being done by the Regulator is what is essential in order to examine whether the action of the Regulator is transparent. MSOs/DTH operators have all along been aware that inflation linked adjustment is calculated on the basis of WPI.

38. Reliance was made on the judgement of Tribunal dated 22nd July, 2010 in Tata Sky Ltd. Vs. ESPN Software India Pvt. Ltd. (Petition No. 155 (C) of 2010) and it was submitted that Tribunal observed that analysis in relation to inflation based upon WPI is a reasonable basis. It was submitted that GDP Deflator or CPI indices have correctly not been considered reliable by TRAI as the time lag for these indices is two years and one month respectively as opposed to one week for WPI.

39. It was further submitted that the Principal Tariff Order has never been challenged anywhere and the question of validity of the same cannot be adjudicated in the present proceeding. The *de novo* exercise to be undertaken by the TRAI in in terms of the Supreme Court Order was only with regard to the issues that were before it.

40. With regard to the submission of Mr. Kathpalia that the original exercise on which tariff fixation is predicated is not a tariff exercise and therefore all

tariffs fixed on that basis are not tariff fixation exercises we my note that in the case of Zee Turner Ltd. Vs. TRAI and Ors. [1] , this Tribunal in its judgment dated 16.12.2010 has discussed the question as to whether providing for a 'ceiling' would come within the purview of 'tariff fixation'. The observation of the Tribunal in this regard is as under:

> "This would give rise to a question as to whether providing for a `ceiling' would come within the purview of the 'tariff fixation'.
>
> A tariff is a public document setting forth services of a common carrier being offered, rates and charges with respect to services and governing rules, regulations and practices relating to those services. A tariff sets forth the terms and conditions under which a service offered to the public, one of the terms being the rates i.e. the price term. The word `rate' used in Section 11 (2) of the Act should be viewed in the context of users are not for the benefit of the broadcasters are an intermediaries.
>
> Fixation of ceiling, leaving the parties to enter into their own agreement, which would be in the nature of making a provision for forbearance subject to a ceiling, in our opinion, would not come within the purview of the term "fixation of rate" and/or "fixation of tariff"."

41. Be that as it may, we are conscious of the fact that the present appeal is against the 11th and 13th Amendments to the Principal Tariff Order dated 1.10.2004 and the Principal Tariff Order itself is not under challenge before us. It was also argued on behalf of IBF that the de novo exercise to be conducted by the TRAI was only with regard to the issues before the Hon'ble court. We note from the TRAI report dated July 21, 2010 that though a detailed exercise was conducted, the end result was that it found the prevailing tariff structure

[1] Batch of appeals tagged with Appeal No.3 (C) of 2010.

as the best workable solution for the analog regime. The main reason given against a cost based model was the lack of comprehensive data and the nature of the industry. The TRAI also observed that effective resolution of the wholesale tariff issue can only come through the introduction of digital addressability and as the industry was moving towards that, bringing in a new tariff regime at this stage will create significant compliance costs.

42. We also note that while disposing of the appeals (C.A. Nos. 829-833 of 2009), Hon'ble Supreme Court in its order dated September 17, 2014 left all questions of law open. The court also observed that since the report (submitted by TRAI) was prepared in 2010, there may be a necessity to hold further consultations. However, TRAI had already issued the impugned order before the judgment was delivered and, therefore, did not have the benefit of the same.

43. In regard to the impugned tariff orders there are a few questions to which we do not find any satisfactory answers. The first is with regard to WPI and how the same has been applied to give the inflationary hikes. No doubt that in case of Tata Sky Ltd. Vs. ESPN Software, this Tribunal observed that analysis in relation to inflation based upon WPI is reasonable; what bothers us is how the same has been applied. In the first inflationary increase allowed vide second amendment to the Principal Tariff Order, increase in WPI was nearly 7.06% and an inflationary increase of 7 % was allowed w.e.f. January 1, 2005. Again, vide third amendment dated 29.11.2005, when the WPI increased by

4.14%, a further hike of 4% was allowed w.e.f. January 1, 2006. However, vide ninth amendment to the Principal Tariff Order, a hike of 7% was allowed w.e.f. January 1, 2009 on rates prevalent as on December 1, 2007. As per the Explanatory Memorandum with this order, the monthly data for WPI was available up to August 2008 as per which inflation for the period August 2007 to August 2008 was 12.82%. However, increase of only 7 % was allowed giving a justification in terms of trend in WPI increase based on provisional weekly data. Curiously, in the impugned tariff order, this justification based on trend of WPI increase is dispensed with but another justification of a pass through of 63% is taken. In the Explanatory Memorandum to the impugned tariff order it is stated that from December 2003 to December 2008, WPI increased by 30% but actual quantum of hike allowed was 19% which comes to 63% pass through or in other words 63% of the increase in WPI was allowed as the hike. This pass through, the rationale for which is not explained anywhere, now became a de facto standard and on a WPI increase of 43.69% for the period December 2008 to February 2014, an inflation linked increase of 27.5 % is allowed to be implemented in two steps; 15% w.e.f. April 1, 2014 and further 11% w.e.f. January 1, 2015. When we questioned Mr. Saket Singh on the rationale of this 63% pass through now and 100% pass through in the first two amendment orders, the explanation given was that this is consistent with the ninth amendment and the same is not under challenge. However, the discussion in the Explanatory Memorandum to ninth amendment is on a totally different footing of WPI trend and is not based on any pass through. If

an arbitrary pass through is to be given, then any index could be used to give the same hike albeit with a different pass through and the WPI to our mind loses its relevance.

44. It was argued that the tariffs based on historical costs is one of the internationally accepted methods. We find that even that is required to be based on a proper exercise conducted for the purpose. We may note that in the United States following the Cable Television Consumer Protection and Competition Act of 1992, U.S. Congress asked Federal Communications Commission (FCC) to ensure that rates for basic services tier are reasonable. FCC decided to go for price caps and the first thing it did was to collect data on rates being charged by cable operators operating in competitive as well as non-competitive areas.[2] We can understand the freezing of rates being charged on a particular date as an interim measure but we fail to understand why TRAI did not examine the rates being charged in the agreements at the time of giving inflationary hikes. Again, a cost based tariff may be difficult in the absence of comprehensive data but TRAI being an expert body could have identified the various cost elements. At least the major elements of cost should not be difficult to identify. If it had done so, the WPI could have been applied in a much more meaningful way. How can the increase in cost of agricultural products for example has the same weightage as increase in the cost of electricity, communication equipment, etc. which has a direct bearing on the broadcasting service. Even in the usage of WPI, the arbitrariness is apparent as

[2] Jerry Kang, "*Communications Law & Policy*" 4th Ed. Foundation Press 2012, Pp 177.

earlier 100% pass through of increase in the same was allowed as against 63% in the ninth and impugned amendments. Though it is argued that ninth amendment is not under challenge before us and 63% pass through in impugned amendments is consistent with the ninth amendment, we cannot overlook the arbitrariness of this pass through.

45. The TRAI in its own report submitted to the Hon'ble Supreme Court acknowledged that the cost plus model was considered to be the most relevant to the Indian Market. Yet it did not go for the cost based model citing lack of comprehensive information. We are aware of the complexity of determining costs of a broadcast channel especially if the broadcasters do not share the information freely. We also understand the difficulties faced by TRAI as the regulation of the broadcasting sector is not easy. We, however, observe that it definitely has access to a lot of data available in the agreements being signed between the various stakeholders. As per " The Register of Interconnect Agreements (Broadcasting and Cable Services) Regulation 2004", all broadcasters are required to register with the TRAI all the interconnect agreements entered into by them including modifications/amendments thereto. These are to be provided to the TRAI within the time frame as specified in clause 5(b) of these regulations. These agreements can give a fairly good idea of the market realities. We do not find that TRAI has done any analysis of the rates at which the agreements are being executed. Nothing has been shown to

us in this regard. Both the Tribunal and the Hon'ble Supreme Court have been time and again asking the TRAI to conduct a fresh tariff fixation exercise. Though it was argued on its behalf that the tariff fixation undertaken by it was after due consideration of the issues and consultations with the various stakeholders, we are not convinced. The large amount of data available with it in the form of the interconnect agreements for both DAS and Non-DAS areas has not been considered anywhere. Had it done so, it would have gotten a fairly good idea of the market realities which could have helped it to carry a proper tariff fixation exercise. Being the statutory regulator, it was duty bound to do so.

46. In the case of Star Sports India Pvt. Ltd. Vs. Hathway Cable & Datacom Ltd. [3] this Tribunal in its judgment dated September 25, 2014, observed that the Reference Interconnect Offers (RIOs) are completely divorced from the market rates. In reality the signals are given to most parties at rates far lower than those stated in the RIO. The Tribunal had reiterated the need for TRAI to examine RIOs submitted to it, especially the rate quoted by broadcasters and MSOs to make these serve the purpose as intended in the regulations. The observations of the Tribunal in this regard are reproduced as under:

> "But in reality the maker of the reference would be giving signals to most parties, or at least its favoured ones, at rates far lower than those stated in the RIO. In other words, the RIO rates are completely divorced from

[3] Batch of petitions with lead petition no. 47 (C) of 2014

> the market rates. The vast difference between the realistic market prices and the rate in the RIO gives the provider a free hand to quote a price much higher than the market price to a new seeker or one in disfavour, a price that would be commercially unviable and force the seeker either to accept that price or to accept the RIO.
>
> ---------- We reiterate the urgent need for TRAI to examine the RIOs submitted to it, especially the rates quoted by broadcasters and MSOs, to make these serve the purpose as intended in the regulations."

It is significant that the observations of the Tribunal above were in relation to the RIOs in DAS areas where the ceiling prescribed by TRAI is 35% of the a-la-carte rates of channels as well as the rates for bouquets of channels in the analog (non-CAS) areas[4]. The question that comes to our mind is that when the agreements being entered in these DAS areas were at rates far lower than the prescribed ceilings even in these areas (which were already 42% of those in non-CAS areas), what was the justification for a hike of 27.5 % in the non-CAS areas? Mr. Saket Singh argued that in case on non-CAS areas, there is large under declaration of the subscriber base. No doubt that it is so. But by allowing further hike in the ceiling to the extent of 27.5%; will it not encourage further under declaration? What about the DAS areas where there can be no under declaration? Tariffs being linked to the non-CAS areas as a percentage of the same, will increase automatically in these areas. To our mind, the remedy of higher ceiling in non-CAS areas to compensate for the under declaration of

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[4] The Telecommunication (Broadcasting and Cable) Services (Fourth) (Addressable Systems) Tariff Order, 2010. The matter is presently in Supreme Court C.A. Nos. 2847-2854 of 2011. The Hon'ble Court has vide interim order dated 18.4.2011 allowed the ceiling as 42%.

subscribers and a further inflationary hike in the same, appears worse than the disease. Though the fourth tariff order is now a subject matter before the Apex Court and the ultimate rates for channels in DAS areas will be decided as per the verdict of the Apex Court, we must note here that one of the reasons given in the report of TRAI submitted to Hon'ble Supreme Court for not bringing a completely new tariff at the wholesale level in non-CAS areas was that the market is moving towards a fully digital addressable environment. It was the view of TRAI that this will lead to an effective resolution of the wholesale tariff issue.

47. As we observed in the Hathway case, the actual agreements being executed in the DAS areas were not only on a different basis but also at rates which were far below the ceilings fixed. We have serious doubts that the situation would be much different in case of Non-DAS areas. In any case, we cannot find any justification in the action of the TRAI in not considering the agreements for these areas. If these agreements were also being executed at rates below the ceilings fixed, where was the need to give further inflationary hikes? We are not saying that this is the case. All that we are saying is that when the TRAI was asked to conduct the exercise de novo the least that it could have done was to consider all the relevant data available with it rather than follow the past practice citing lack of data.

48. Before we conclude, we think that TRAI will be well advised to have a fresh look at the various tariff orders in a holistic manner and come out with a comprehensive tariff order in supersession of all the earlier tariff orders . While doing so, it may consider all the agreements and relevant data available with it. It may consider differentiating between content which is of a monopolistic nature as against that the like of which is shown by other channels also. It may also consider classifying the content into premium and basic tiers. It may identify the major cost components so that increase or decrease in such costs may be suitably factored while working out the inflationary hikes. Increase in costs of such components as may be available in indexes such as WPI, GDP deflator etc. can then be applied. While working out the tariffs, the effort should be to encourage a correct declaration of SLR. While carrying out the exercise, it may take the inputs from various stakeholders and give a reasoned order for accepting or rejecting the same. We want to be amply clear that the above are only some suggestions and TRAI being an expert body may arrive at suitable tariffs independently; it is up to it to consider the above and/or any other factors.

48. In view of the aforesaid facts and circumstances of the case, we do not find the impugned amendments in the 'Principal Tariff Order' ['The Telecommunication (Broadcasting & Cable) Services (Second) Tariff (Eleventh Amendment) Order, 2014' and 'The Telecommunication (Broadcasting & Cable)

Services (Second) Tariff (Thirteenth Amendment) Order, 2014'] as tenable and accordingly set aside the same. Parties to bear their own costs.

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(Aftab Alam)
Chairperson

.....
(Kuldip Singh)
Member

HKC/ 18.3.2015-24.03.2015