ISSUES FOR CONSULTATION

COMMENTS:

As the regulator for the Indian television market, TRAI has the responsibility to introduce appropriate regulations, support the implementation of Government policy objectives, ensure consumers have access to a wide range of services and content at competitive prices and provide a framework which will benefit the overall development of the television sector. TRAI's orders for regulating tariff for cable services in non-CAS areas were challenged in the Supreme Court. In January 2009 the decision of TDSAT set aside the tariff order of 2007 which was appealed by TRAI. Supreme Court passed judgement on May 13, 2009 directing TRAI "to study the matter afresh and issue a comprehensive order covering all aspects including the issue of subscription base in a non-addressable system." We would like to highlight 2 key findings in the Supreme Court judgement :

1. The order does not constitute a price fixing exercise
2. A more rational assessment of the competition issues must be provided

Thus, we believe that based on the Supreme Court and TDSAT order, TRAI was required to address the following key concerns in its exercise:

1. Establishing a framework to assess whether market failure exists at a point of time

2. Methodology for arriving at tariff regulation <u>once the framework establishes the need for such tariff regulation</u>.

Hence, a review of cost structures and profitability was only required to be done only when it is determined that adequate level of competition does not exist. Unfortunately, it seems that TRAI commenced the exercise by asking for detailed cost and profitability analysis from the industry. Presenting this consulatation paper , it appears that entire exercise relate to a tariff-fixation exercise.

Q8. Is the market for cable services in non-CAS characterized by the following issues:
- **(i) Under-reporting of the analog cable subscriber base**
- **(ii) Lack of transparency in business and transaction models**
- **(iii) Differential pricing at the retail level**
- **(iv) Incidence of carriage and placement fee**
- **(v) Incidence of state and region based monopolies**
- **(vi) Frequent disputes and lack of collaboration among stakeholders**

Q9. Are these issues adversely impacting efficiency in the market and leading to market failure?

<u>Response to Q8 and Q9</u>

While the market for cable services as described above has instances as stated above, the mere presence of these issues should not/cannot be construed to lead to a conclusion of failure of the television market as a whole. As per international practices, evidence of the existence of market power can be drawn from a number of sources including:

- Market shares
- Overall size of the undertaking
- Control of infrastructure not easily duplicated
- Technological advantages or superiority
- Absence of or low countervailing buying power
- Easy or privileged access to capital markets / financial resources
- Product / services diversification (e.g. bundled products or services)
- Economies of scale
- Vertical integration

Thus, in each element of the value chain it is essential to:

- Define the source of the market power
- The impact the exploitation of a market position will have and
- The durability of the source of market power

However, we believe that this level of detail continues to be absent in the analysis presented by TRAI in its consultation paper. While the consultation paper mentions about instances of the above mentioned issues, at the same time, it also gives views contrary to the practices/ reasoning, which contradicts the assumption in Q9 that this issue adversely impacts efficiency and leads to market failure. For example,

§ *Under-reporting of the analog cable subscriber base*- While TRAI mentions that there is evidence of transactions being conducted on a "negotiated subscriber base", at the same time it also states that the reason for this "could be lack of transparency in the system". Hence, this issue arises because of analog distribution system and there is no other way to conduct a transaction but on a negotiated basis. If this situation were in a digital addressable system, then TRAI's conclusion could be justified. Further, since the transactions have to be on negotiated basis as a result of analog cable systems, the negotiation will vary from transaction to transaction and hence, this cannot be seen as an issue indicating market failure.

§ *Lack of transparency in business and transaction models*- Similarly, because the transaction is not possible to be made on any other basis other than negotiated basis because of analog systems, current analog systems by itself do not have the basis to determine the exact number of subscriber data. If this were to happen in a digital addressable system (e.g. current DTH sector in India and international cable markets as noted by TRAI) where transparency is not maintained inspite of knowing the actual number of subscribers, then TRAI is correct in its justification of lack of transparency. Negotiated basis pre-assumes lack of transparency and hence, this cannot be seen as an issue indicating market failure.

§ *Differential pricing at the retail level*- The fact that differential prices are prevalent at the retail level are testimony to the fact that adequate competition exists at the retail level. The fact that subscribers pay less in one area compared to another suggests to indicate that level of competition is higher in that area than the others based on which consumers are offered discounted cable fee, where rates are higher could suggest better quality, service and more content available to such subscribers who are willing to pay for such services. Further, with choices available from DTH services, this further accentuates the point, where TRAI mentions "some consumers pay more than others for the same product" is incorrect as the product and its associated quality and service differs it should not be compared to "voice" in the telecom industry where the product is standard. In fact, if there was one price for all-India, that would indicate lack of competition and hence, this cannot be seen as an issue indicating market failure.

§ *Incidence of carriage and placement fee*- While TRAI's suggestion that "auctioning of frequencies" is caused by a demand-supply mismatch is correct, but this is due to the capacity constraints of an analog system, In this context it is worth noting that constraints on subscription revenue because of tariff regulation force greater reliance on advertising revenue, increasing the importance of audience reach in business model and accentuating the prevalence of carriage fee.

§ *Incidence of state and region based monopolies*- Consultation paper states "Lack of visibility at the last mile, especially with respect to subscriber numbers, creates practical issues with assessing the presence or absence of monopoly. To detect and control monopolistic situations, the industry requires a framework within which information can be gathered and analyzed". Thus Honorable TRAI's own admission is that this incidence is as a result of analog system and hence it is not possible to detect and control monopolistic situation because analog system cannot bring out a framework to gather and analyze information. If this was not being done in a digital addressable environment, then a conclusion of indicator of market failure can be justified but not in an analog system.

§ *Frequent disputes and lack of collaboration among stakeholders*- This is as a result of the above issues, all arising because of analog systems hence to conclude that these issues result in inefficiency and adversely impacts growth of the industry.

In conclusion, while we agree to the incidences mentioned by TRAI which is impacting efficiency, these are all as a result of analog cable systems and hence to conclude that analog cable system lead to a situation of market failure is completely incorrect. Further, it would also mean that because it's an analog cable system, it pre-assumes that it will indicate a situation of market failure and thus TRAI will have the power to regulate tariff till such time that analog systems are in place, which is not the case as per international norms.

Instead, these incidences point to even a greater need for TRAI to work towards facilitating a digital addressable system and thereafter to evaluate occurrences of these incidences. Only in the situation that these incidences continue to exist in the digital addressable environment, TRAI should be empowered to regulate tariff. Hence, till such time, we urge TRAI to replete all its tariff orders and simultaneously introduce mandatory digital systems to absolve situations that arise due to analog systems. Once the digital addressable market matures, we propose TRAI to progressively withdraw the mandatory digital addressable market stipulations, test the market for anti-competitive and other such incidences pointing towards an inefficient system and only then get into tariff regulation. In fact, TRAI itself in its consultation paper says that "addressability is a crucial pre-requisite for effective competition".

Q10. Which of the following methodology should be followed to regulate the wholesale tariff in the non-CAS areas and why?
i) Revenue share
ii) Retail minus
iii) Cost Plus
iv) Any other method/approach you would like to suggest

Response:
In principle, we do not approve TRAI's contention of regulation of wholesale tariff. TRAI, in its own analysis of 11 international markets presented in the consultation paper, has said that there is not one market where wholesale prices are regulated, which further accentuates the point. TRAI, again, in its own analysis of 11 international markets has said that that principles of tariff regulation do not merit in cases where 'must provide' and 'must carry' regulations are enforced since regulators are required to adapt policies through 'platform agnostic' regulation. Since, in India, the 'must provide' and 'must carry' regulations are in force, it is not appropriate to regulate wholesale tariff in such a scenario.

Q11. If the revenue share model is used to regulate the wholesale tariff, what should be the prescribed share of each stakeholder? Please provide supporting data.

Response:
In non-CAS areas, due to analog systems, there will always be a lack of reliable subscriber data. Hence, in such cases, no revenue share model can be/should be evolved.

Q12. If the cost plus model is used to regulate the wholesale tariff, should it be genre wise or channel wise?

Response:
In principle, we do not validate any cost-based tariff regulation for the following reasons:
§ Media products are not standard such as in telecom where voice is a standard product
§ Data on costings are not available in the public domain.
We urge TRAI to refrain from undertaking any cost-based analysis without sharing the relevant information with the public. Even in the current case, TRAI is unable to share the cost details since the financial information of relevant companies is not in the public domain. As this scenario is unlikely to change in the coming years, this methodology should not be adopted….

Q13. Can forbearance be an option to regulate wholesale tariff? If yes, how to ensure that (i) broadcasters do not increase the price of popular channels arbitrarily and (ii) the consumers do not have to pay a higher price.

Response:
As stated in response to Q11 above we disagree on wholesale tariff regulation. Further, as stated above, these incidences are as a result of a 'must provide' and 'must carry' regulation in force. Once these are regulations are removed and a-la carte pricing is mandated, consumers will then have a choice to pick only those channels which they like/can afford. In such a scenario, such incidences of raising prices of 'popular channels' will not arise.

Q14. What is your view on the proposal that the broadcasters recover the content cost from the advertisement revenue and carriage cost from subscription revenue? If the broadcaster is to receive both, advertisement and subscription revenue, what according to you should be the ratio between the two? Please indicate this ratio at the genre levels.

Response:
This is a business-level decision and should be left to the market forces to decide.

Q15. What is your view on continuing with the existing system of tariff regulation based on freezing of a-la-carte and bouquet rates as on 1.12.2007; and the rate of new channels based on the similarity principle at wholesale level? You may also suggest modifications, if any, including the periodicity and basis of increase in tariff ceilings.

Response:
As stated above, these orders should be replete as they were meant to be temporary in any case.

Q16. Which of the following methodologies should be followed to regulate the retail tariff in non-CAS areas and why?

i) Cost Plus

ii) Consultative approach

iii) Affordability linked

iv) Any other method/approach you would like to suggest

Response:
Similar to our comments on wholesale tariff regulation, we would like to submit that we do not approve TRAI's contention of regulation of retail tariff. We disagree with TRAI's reasoning of regulatory intervention at the retail level on the following grounds which in TRAI's view "tends towards a natural monopoly" :

§ *High level of fragmentation*
§ *Lack of a structured growth and licensing regime for the cable sector*
§ *Absence of disclosure requirements that can allow for regular tracking of prices and identification of regulatory abuse*
§ *It is not cost-effective for multiple service providers to wire the same area resulting in no choice available to consumers*
§ *That basic television services are essential in nature and hence need regulatory oversight*

As stated above, these grounds mentioned by TRAI reflect the nature of any analog cable network and not just in India. Hence, similar to our argument above that because the nature of cable services is analog (and hence its characteristics) does not imply the need for regulatory intervention but just need a regulatory oversight.

Q17. In case the affordability linked approach is to be used for retail tariff then should the tariff ceilings be prescribed (i) single at national level or (ii) different ceilings at State level or (iii) A tiered ceiling (3 tiers) as discussed in paragraph 5.3.23 or (iv) Any other

Response:
In India, basic television services are not mandated to be provided to the consumers. Hence an affordability-linked approach is meaningless. Only in a situation where this is mandated as an essential service should the retail price be regulated, which can be determined by a regulator. This is currently not the case with cable television services.
Further, fixing tariff ceilings may also propel MSOs/LCO to provide the minimum-possible service as their revenues will get capped in this scenario. This is against the interest of consumers.
Hence, similar to the reasoning in the wholesale tariff as above, cost-based tariff and revenue sharing is not feasible in an analog environment. TRAI has also highlighted additional factors such as 'wide variation in MSO/LCO infrastructure' and others for retail tariff which further point towards the fact that cost-based tariffs are not feasible.

Q18. In case of retail tariff ceiling, should a ratio between pay and FTA channels or a minimum number of FTA/pay channels be prescribed? If so, what should be the ratio/number?

Response:
As is evident from our earlier submissions, we do not support micro-management of business models, in a competitive marketplace, by the regulator. The role of the regulator should be that of an enabler providing a framework for effective competition and not specifying factors used by competitors to structure their business offerings. The market has now matured enough for TRAI to eschew the role of a tariff-fixer and omnipresent controller. We therefore submit that the decisions on the construction of an operator's bouquet should be an operator's choice but can be under constant review by TRAI. TRAI has neither the resource nor the responsibility to prescribe such details, and if it attempts to do so it will only render the industry more rigid and less able to respond to competitive factors. Therefore, we support the view that this ratio be left to the market forces in view of the presence of alternative delivery platforms like DTH.

Q19. Should the broadcasters be mandated to offer their channels on a-la-carte basis to MSOs/LCOs? If yes, should the existing system continue or should there be any modification to the existing condition associated with it?

Q20. How can it be ensured that the benefit of a-la-carte provisioning is passed on the subscribers?

Q21. Are the MSOs opting for a-la-carte after it was mandated for the broadcasters to offer their channels on a-la-carte basis by the 8th tariff amendment order dated 4.10.2007. If not, why?

Response to Q19, Q20 and Q21:
The presumption on which these questions are being posed is faulty i.e. the presumption- that the current market is not efficient in terms of free pricing because there is no measurable subscriber base is faulty. Firstly, the measurement of subscriber base is not the only basis for determining whether broadcasters should be mandated to offer their channels on an a-la-carte basis or not. Secondly, in an analog environment, it is incorrect to say that there is no measurement of subscriber base- it's just that the measurement has been arrived on a 'negotiated' basis. Hence, this cannot be the basis of a decision of a-la-carte or not.

Q22. Should the carriage and placement fee be regulated? If yes, how should it be regulated?
Q23. Should the quantum of carriage and placement fee be linked to some parameters? If so, what are these parameters and how can they be linked?
Q24. Can a cap be placed on the quantum of carriage and placement fee? If so, how should the cap be fixed?

Response to Q22, Q23 and Q24:
Similar to our reasoning as above, these aspects should be left to market forces. Given the various factors determining the price (as enumerated by TRAI) it is not possible to determine tariff, basis of tariff and thereafter monitor the same. Hence, we urge TRAI that the same should be left to market forces.

Q25. Is there a need for a separate definition of commercial subscriber in the tariff order?
Q26. If the commercial subscriber is to be defined in the tariff order, then does the existing definition of 'commercial subscriber' need to be revised? If yes, then what should be the new definition for the commercial subscriber?
Q27. In case the commercial subscriber is defined separately, then does the present categorization of identified commercial subscribers, who are not treated at par with the ordinary subscriber for tariff dispensation need to be revised? If yes, how should it be revised?
Q28. Should the cable television tariff for these identified commercial subscribers be regulated? If yes, then what is your suggestion for fixing the tariff?

Response to Q25, Q26, Q27 and Q28:
Similar to our reasoning as above, these should be left to market forces.

Q29. Do you agree that complete digitization with addressability (a box in every household) is the way forward?
Q30. What according to you would be an appropriate date for analog switch off? Please also give the key milestones with time lines.
Q31. What is the order of investment required for achieving digitization with addressability, at various stakeholder levels (MSOs, LCOs and Customers)?
Q32. Is there a need to prescribe the technology/standards for digitization, if so, what should be the standard and why?
Q33. What could be the possible incentives that can be offered to various stakeholders to implement digitization with addressability in the shortest possible time or make a sustainable transition?

While we agree with TRAI that the eventual goal should be complete addressability, however, the way forward needs to be realistic. The current need is for a realistic plan for digitization.

In order to facilitate this transition from analogue to digital, we submit that TRAI should draw up a plan, which takes into account the following:

§ Digitization should be the stated top priority for the sector, at every level.
§ The role and support required from the Government in this process of digitization should be consulted with all stakeholders
§ The difficulty faced by the stakeholders where they cannot implement voluntarily digitalization needs to be taken into consideration while assessing the role of the Government
§ Announcement should be made of a clear division of responsibilities, again pursuant to consultation with stakeholders.
§ A neutral body – to be supervised and directed by the TRAI – should be identified to help move the process forward. It should develop the details of a plan, identify key tasks, prepare the timetable, monitor progress, raise "red flags" where progress is lagging and report, both internally to the government and externally to stakeholders and the public.

§ TRAI should seek necessary legislation to make it possible for all legal/regulatory bodies to support the process.

We strongly recommend that TRAI should be empowered to achieve the plan and it should not be left for the government's agencies to implement on their own. A back-up framework should be specified during the transition period during which not all areas can achieve complete addressability.

We do not agree with a final switch off. While eventually there will be a complete switch off, but the more immediate question is the region-by-region timetable for implementation. Setting, and reaching, milestones will be vital. For ease and speed of implementation, the process should be decentralized, with individual goals for regions and cities. The decentralized process must involve consultation and obtaining buy-in from local and state governments, legal bodies, police forces, etc. In principle, we believe a period of 4-5 years should be enough to achieve full conversion, if enough energy can be mobilized.

The necessary investments will be very large. The costs should be borne by the distributor chain of the television industry, and the Government must offer monetary support. In practice, consumers will have to share in the cost of new terminal equipment.

We believe that support from the Government/ Regulator is essential if the transition is to take place. Further, TRAI needs to ensure that digitization entails its trademark benefit of transparency.

In our opinion technology standards prescribed under the Interconnection Regulation as amended on March 17, 2009 are sufficient. However, adherence to these prescribed set of standards is crucial and TRAI should focus on ensuring the same. At the same time, periodic review of these standards is also required to keep our digitization efforts up to speed.

Q34. What is your view on the structure of license where MSOs are licensed and LCOs are franchises or agents of MSOs?
<u>Response:</u>
We agree with TRAI's proposals.

Q35. What would be the best disclosure scheme that can ensure transparency at all levels?
<u>Response:</u>
We agree with TRAI's proposals

Q36. Should there be a 'basic service' (group of channels) available to all subscribers? What should constitute the 'basic service' that is available to all subscribers?
<u>Response:</u>
We propose that no private channels should be mandated in the basic service group. However, an option can be given to broadcasters to opt for their channels in this basic services group but only on a-la-carte basis and keeping in consideration that there is no bundling or any type of misuse by the private channel.

Q37. Do you think there is a need for a communication programme to educate LCOs and customers on digitization and addressability to ensure effective participation? If so, what do you suggest?
<u>Response:</u>
There is definitely a need for clear and simple communication on periodic basis even where for certain periods of time where there are no significant updates. Communication transparency must be maintained, especially with respect to Government policies, their working etc.

Q38. Stakeholders are free to raise any other issue that they feel is relevant to the consultation and give their comments thereon.
<u>No Response</u>