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4th October 2019

To,

Shri Arvind Kumar
Advisor (B&CS)
Telecom Regulatory Authority of India,
Mahanagar Doorsanchar Bhawan,
Jawahar Lal Nehru Marg,
Old Minto Road,
New Delhi – 110 002

Dear Sir,

Re: Response to the Consultation Paper on "Platform Services offered by DTH Operators" dated 28th August 2019, on behalf of Discovery Communications India

At the outset, we would like to thank the Authority for giving us an opportunity to tender our views on the issues related to Platform Services offered by DTH Operators.

In regard to the present consultation process, we submit that we have perused the said paper carefully. We hereby submit our comments attached as Annexure. The said comments are submitted without prejudice to our rights and contentions, including but not limited to our right to appeal and/ or any such legal recourse or remedy available under the law.

The same are for your kind perusal and consideration.

Yours Sincerely,

For Discovery Communications India

Encl: As above

Discovery Communications India
(A Private Company with Unlimited Liability)

Registered Office
125-B, Som Datt Chamber-1
5 Bhikaji Cama Place,
New Delhi-110066, India
T: +91 11 41647135
F: +91 11 46032870

Regional Office
Building No - 9, Tower A,
9th Floor, DLF Cyber City,
Gurugram - 122 002, Haryana, India
T: +91 124 4349100
F: +91 124 4349289

CIN - U74300DL 1996 ULT 082136

I. PRELIMINARY OBSERVATIONS

Before proceeding with the responses to the questions in the Consultation Paper on Platform Services offered by DTH Operators (dated 28.08.2019) (**"the Consultation Paper"**), DCI would like to set out some preliminary observations on the legality of the issues addressed in the Consultation Paper.

1. Definitional Challenges to Platform Services

1.1 The Consultation Paper has referred to TRAI's Recommendations on Regulatory Framework for Platform Services (dated 19.11.2014) (**"the Recommendations"**) to define Platform Services (**"PS"**) as "programs transmitted by Distribution Platform Operators (DPOs) exclusively to their own subscribers and (not including) Doordarshan channels and registered TV channels. PS shall not include foreign TV channels that are not registered in India." At the outset, it is submitted that the acceptance of this definition in the Consultation Paper violates the scheme of the regulatory framework as established by TRAI itself and seeks to introduce a distinct regulatory regime for PS without examining the effect of the same on fair play and competition within the broadcasting industry.

1.2 Broadcasters of TV channels in India operate within the four corners of the regulatory and licensing regime established by the Uplinking/Downlinking Guidelines of the Ministry of Information and Broadcasting (**"MIB"**), TRAI's Interconnection Regulations, Tariff Order and the Programme Code/Advertisement Code. Broadcasters are expected to adhere to the terms of the Reference Interconnection Offer as provided by TRAI and ensure technical and content compliance with guidelines and regulations in order to be granted permission to broadcast their TV channels. It is submitted that the provision of TV channels as PS by DPOs are admittedly not subject to the regulatory framework for broadcasting services as established by TRAI and MIB. By applying different standards for broadcast channels and PS for the same service, i.e., provision of TV channels, TRAI is disturbing the functional differentiation between broadcasters and DPOs, and seeks to discriminate between the channels of DPOs, i.e., PS channels, and broadcasting channels. There is no intelligible differentiation between regular TV channels and PS channels in terms of their operation and the intrinsic nature of their contents. This, yet again, demonstrates a lopsided and favourable approach by TRAI towards DPOs.

1.3 The Telecommunication (Broadcasting and Cable) Services Interconnection (Addressable Systems) Regulations, 2017 (**"the Regulations"**) define "broadcaster" as a person or a group of persons, or body corporate, or any organization or body who, after having obtained, in its name, downlinking permission for its channels, from the Central Government, is providing programming services. The Regulations define "programme" as any television broadcast and includes- (i) exhibition of films, features, dramas, advertisements and serials; (ii) any audio or visual or audio-visual live performance or presentation, and the expression "programming service" shall be construed accordingly. Further, the Regulations define "broadcasting services" as the dissemination of any form of communication like signs, signals, writing, pictures, images and sounds of all kinds by transmission of electro-magnetic waves through space or through cables intended to be received by the general public either directly or indirectly and all its grammatical variations and cognate expressions shall be construed accordingly. As per the definition, majority of the channels/ programmes offered under PS form part of broadcasting services.

In view of the above definitions, it is submitted that the adoption of the definition of "Platform Services" as contemplated by the Consultation Paper is flawed, arbitrary and discriminatory on the following counts:

a.) For overlooking the similarities in the nature of broadcasting services and PS channels as both involve the dissemination of communication like signs, signals, writing, pictures, images and sounds of all kinds by transmission of electro-magnetic waves through space or through cables intended to be received by the general public either directly or indirectly. Both provide content in the nature of news, serials, movies, music, sports, documentaries, teleshopping, devotional, regional programs, market news, educational and interactive games. Most of the genres of channels/ programmes provided by PS are covered under the extensive and varied range of channels/ programmes by broadcasters.

b.) For overlooking the regulatory requirement of having to obtain licenses for use of satellite signals from the Central Government.

1.4 In Canada which is one of the very few jurisdictions, where the regulator has opted for heavy handed regulations and has provided for a-la carte offerings by broadcasters, the treatment of PS is markedly different than that contemplated under the present Consultation Paper.

The Canadian Radio-Television and Telecommunications Commission (CRTC) in its Directions to the CRTC (Direct-to-Home (DTH) Pay-Per-View Television Programming Undertakings) Order SOR/95-320 (**"the Order"**) recognizes that "pay-per-view television programming undertakings should operate through licensing in a dynamically competitive market, subject to appropriate requirements, including their contribution to the development of programming, in order to provide to their subscribers, in competition with each other, the widest range of Canadian and foreign feature films and other programming". The Order defines the term "DTH pay-per-view programming undertaking" as a "pay-per-view television programming undertaking licensed to provide pay-per-view services for distribution to subscribers through a licensed DTH distribution undertaking." Thus, the definition mandates licensing as a pre-condition for providing pay-per-view services for distribution to subscribers through a licensed DTH distribution undertaking.

2. Issues Regarding Network Capacity

Network capacity is claimed to be a scarce resource by DTH Operators/ DPOs and the provision of PS by distributors raises issues regarding cross-subsidizing, allocation and provision of capacity and cost thereof.

2.1 Cross-subsidizing

The Regulations, in sub-clause (ee) of clause 1 of Regulation 2 define "network capacity fee" as *the amount, excluding taxes, payable by a subscriber to the distributor of television channels for distribution network capacity subscribed by that subscriber to receive the signals of subscribed television channels and it does not include subscription fee for pay channel or bouquet of pay channels, as the case may be.*

The default use of network capacity by PS channels means that subscribers pay their share of the network capacity fee not just for the channels they subscribe to, but also for PS channels

that are provided as a default on the DPO's network. Thus, it leads to cross-subsidizing of network capacity for PS channels are they are paid for by subscribers even if they do not want to see them.

2.2 Avoiding the Process of Allocation

The existing framework for allocation of network capacity allows broadcasters to approach distributors for booking network capacity in order for distributors to assign a specific portion of their admittedly limited network capacity to the channels of a particular broadcaster. This system of allocation ensures that different broadcasters compete with each other and are granted network capacity on the basis of their negotiation process with the distributors. In the extant circumstances, PS channels effectively avoid this allocation process by having default access to a DPO's limited network capacity. Thus, whereas on the one hand broadcasters compete with each other in a level playing field, on the other hand PS channels gain an unfair advantage over broadcast channels by effectively bypassing the allocation process.

2.3 Blocking of Network Capacity

The network capacity available with DPOs is purpotedly limited and requires infrastructure investment on the part of DPOs to increase their total carrying capacity. In the extant circumstances, different broadcasters compete with each other by negotiating agreements with DPOs to book capacity on the DPOs network in order for their channels to be distributed and reach the end consumer. However, the provision of PS channels on a DPO's network results in blocking of network capacity and encroaches upon a scarce resource for which broadcasters are mandated to compete under the given regulatory framework. On the one hand, detailed regulations have been framed by TRAI to control channel prices and secure choice of channels to viewers, while on the other, PS channels are allowed to block capacity irrespective of whether viewers subscribe to such channels, and that too, on unregulated terms.

3. Effect of Platform Services on Competition within the Broadcasting Industry

3.1 The Consultation Paper refers to the Recommendations para 1.2 which says that cable TV operators (MSO/ LCO), DTH, IPTV and HITS operators - provide certain programming services which are specific to each platform and are not obtained from satellite-

based broadcasters. DPOs are stated as providing self-produced PS, distinguished from ground-based broadcasters and satellite-based broadcasters. The Recommendations state that provisioning of PS results in an additional source of revenue for the DPOs as they earn revenue not only from their subscription but also from the advertisements transmitted along with such PS. Advertisements, if any, on these channels is inserted by the DPO and ad-revenues, therefore, accrue to it. It has also been argued that non-regulated supply of such services by DPOs is trespassing into the domain of regular TV channels. Therefore, it is essential to distinguish such services as distinct from regular TV broadcasting.

3.2 TRAI's Consultation Paper on Media Ownership (dated 15.02.2013) states in Para 4.13 that TRAI in its Recommendations on Media Ownership dated 25.02.2009, inter-alia, recommended the following with regard to vertical integration in a media segment:

(i) The broadcaster should not have — "control" in the distribution and vice-versa.
(ii) Definition of Control: Any entity which has been permitted/ licensed for television broadcasting or has more than 20% equity in a broadcasting company, shall not have more than 20% equity in any Distributor (MSO/Cable operator, DTH operator, HITS operator, Mobile TV service provider) and vice-versa.

TRAI's Consultation Paper on Media ownership also explores the question of "control" – its meaning and alternate definitions and methodologies. In view of the above, it is submitted that allowing DPOs to provide their own set of channels would allow distribution entities to acquire control in broadcasting, thus leading to vertical integration within the industry and adversely affecting competition.

3.3 Violation of Essential Facilities Doctrine

An essential facilities doctrine specifies when the owner(s) of an "essential" or "bottleneck" facility must provide access to that facility, at a reasonable price.[1] The principle that companies in dominant positions have a legal duty to provide access to genuinely essential facilities on a

[1] The OECD Competition Committee Policy Roundtables Report: The Essential Facilities Concept 1996, http://www.oecd.org/competition/abuse/1920021.pdf, Last accessed: 26.09.2019

non-discriminatory basis is one of great and increasing importance in telecommunications, transmission of energy, transport, and many other industries.[2]

i. India

The doctrine is an inherent part of various sector-specific laws and regulations.

The Regulations mandate in clause 2 of Regulation 3 that the *Broadcasters maintain non-exclusivity and must provide their signals on a non-discriminatory basis to the distributors of various TV Platforms.*

Further, the Electricity Act, 2003 enshrines the principle of "open access" in S.2(47) as *the non-discriminatory provision for the use of transmission lines or distribution system or associated facilities with such lines or system by any licensee or consumer or a person engaged in generation in accordance with the regulations specified by the Appropriate Commission.*

ii. United States

If one takes the American Bar Association commentary as the closest thing to consensus regarding the identity of cases, then the facilities deemed essential have included: railway bridges, etc. into the city of St. Louis, a nationwide telecommunications network, a local electricity transmission network, a sports stadium and a multi-day ski-pass scheme.[3]

iii. Australia

In Australia, the report on National Competition Policy (the "Hilmer Report," pp. 250-253) recommended that the following criteria must be met for the Minister to declare a right of access: "1. Access to the facility in question is essential to permit effective competition in a downstream or upstream activity. [Access must be essential rather than merely convenient.]; 2.

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[2] J.T. Lang, Defining Legitimate Competition: Companies' Duties to Supply Competitors and Access to Essential Facilities, Fordham International Law Journal [Vol. 18:437], pp. 439, https://pdfs.semanticscholar.org/7229/02801e2357f297de5c4205a1ccf855a036f0.pdf, Last accessed: 26.09.2019

[3] The OECD Competition Committee Policy Roundtables Report: The Essential Facilities Concept 1996, http://www.oecd.org/competition/abuse/1920021.pdf, Last accessed: 26.09.2019

The making of the declaration is in the public interest, having regard to: a) the significance of the industry to the national economy; and b) the expected impact of effective competition in that industry on national competitiveness.

These criteria may be satisfied in relation to major infrastructure facilities such as electricity transmission grids, major gas pipelines, major rail-beds and ports.[4]

iv. European Union

In *La Poste/SWIFT + GUF* case[5], a complaint was filed by the French Post Office, La Poste, against the Society for Worldwide International Financial Telecommunications (SWIFT) and GUF. SWIFT is engaged in the international transfer of payment messages. La Poste applied to become a member of SWIFT and was refused on the basis that it did not meet SWIFT's membership criteria. The European Commission noted that SWIFT was an essential facility for transmitting electronic payment messages. SWIFT was the only network providing connections to banks located worldwide. To deny membership would in effect be to exclude a competitor from the international transfer market. Clearly it was not possible for a competitor to duplicate SWIFT's worldwide network.

In view of the above, it is submitted that 'transmission' is an essential facility in terms of the doctrine and the conception of PS under the Consultation Paper and the Recommendations as the sole medium for providing services to subscribers, restricting transmission capacity through DPO/DTH provider's own content in an unregulated manner would amount to violating the essential facility doctrine.

3.4 Adverse Effects of Vertical Integration

It is submitted that broadcasting and distribution are two distinct functions performed by two different entities in the broadcasting industry value chain. Whereas broadcasters create content for programming and perform the traditional "supply" function, distributors are tasked with carrying this content to the end consumer, performing the function of "transmission". However,

[4] The OECD Competition Committee Policy Roundtables Report: The Essential Facilities Concept 1996, http://www.oecd.org/competition/abuse/1920021.pdf, Last accessed: 26.09.2019
[5] IV/36.120 (Official Journal C335, 1997/11/06)

the concept of PS leads to a combination of these two functions of creating and distributing content, effectively resulting in vertical integration in the broadcasting industry, thus having an adverse effect on competition.

The European Competition Commission (EUCC) has inquired and adjudicated into anti-competitive behaviour within the energy sector in Europe and ruled against vertical integration between supply and distribution in various judgements.

i. 39173 Gas Sector Inquiry[6]

On 13th June 2005, the Commission opened sector inquiry into gas and electricity markets. The inquiry responds to concerns voiced by consumers and new market entrants about the development of wholesale markets and limited consumer choice. The relevant extracts of the inquiry report are as under:

> "It was found that ***Vertical integration between supply and generation and infrastructure businesses appears to worsen competition problems by creating unequal access to essential market information and by enabling incumbents to engage in strategic behaviour.***
>
> Generally, the vertically integrated incumbent companies were not in favour of further measures, whilst consumers, traders/new entrants and authorities supported the call for legislative initiatives. The inquiry report underlined the fact that a single competitive European energy market had not yet been achieved and that there is little cross border trade between the vertically integrated national incumbents. ***The Commission had received a number of allegations that vertically integrated incumbents have discriminated against new entrants, for example by ensuring that the supply arm gets privileged access to available firm capacities on transit routes, as well as to capacity information, resulting in important competitive advantages over independent third parties***.
>
> ***Is vertical integration between electricity generation and supply a problem? Vertical integration between generation and supply reduces the necessity for companies to trade on wholesale electricity markets, thus potentially hindering the development of liquidity. Vertical integration might not pose a problem per se where there is an actively traded wholesale market giving market participants the convenience to manage their price and volume risks. Vertical integration should give rise to concern where the extent of***

[6] European Commission – Competition, Antitrust/ Cartel Cases, 39173 Gas sector inquiry, https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=1_39173, Last accessed: 26.09.2019

this phenomenon has a clear foreclosing effect and threatens the operation of independent generation and supply businesses.

What about the efficiencies in vertical integration of generation and supply?
The Commission is fully aware of efficiencies which may stem from vertical integration. Vertical integration may, for instance, provide a hedge against wholesale market price volatility and allow economies of scope to be realised. The related savings will, in a truly competitive electricity market, be transmitted through lower prices to final customers. However, vertical integration across the entire supply chain means that companies have little reason to trade on electricity wholesale markets. Liquidity on electricity wholesale markets is therefore likely to remain low when vertical integration is widespread.

Secondly, many energy markets are characterised by a high degree of vertical integration, in other words insufficient unbundling of network and supply activities. When incumbents control the network, they also control the supply market. It is therefore no surprise that incumbents view their networks as strategic assets that allow them to exclude competition through discrimination. Moreover, where network and supply companies are integrated, there are too few incentives to invest in networks - a major obstacle to new entry and a threat to security of supply. Many of Europe's electricity interconnectors are chronically congested. In other words, capacity requests by interested network users exceed the amount of available capacity.

The report shows that Europe needs more interconnection capacity. But at the moment, there is insufficient investment to build additional interconnection capacity. For example, the report shows that a selected group of transmission system operators – so called TSOs – collected significant congestion revenues. These revenues are generated by auctioning off the scarce interconnector capacity. *The total amount of revenues collected by these TSOs between 2001 and 2005 was about 1.3 billion euros. However, only 250 million euros of these revenues, i.e. less than 20%, was invested back into increased capacity. This is particularly worrying because it is the vertically integrated companies, i.e. those active in supply and network, that failed to invest in network expansion.*

Concerns with respect to vertical integration also exist in a different form. There are insufficient tradeable supplies on energy markets – in other words energy markets are not as liquid as they need to be. Long-term contracts contribute to locking-in the markets - for instance they prevent alternative suppliers from supplying customers on the retail markets."

ii. 39315 ENI[7]

On 20 April 2007, the Commission decided to initiate antitrust proceedings into capacity hoarding and strategic underinvestment in the transmission system leading to the foreclosure of competitors and harm for competition and customers in one or more supply markets in Italy. These suspected practices, constituting possible infringements of Article 82 EC, were allegedly engaged in by ENI S.p.A., its subsidiaries and companies under their control, including Trans Austria Gasleitung GmbH, Trans Europa Naturgas Pipeline GmbH & Co. KG, ENI Deutschland S.p.A. and Eni Gas Transport International SA. The relevant extracts of the inquiry report are as under:

> "The Commission concluded that ***ENI, as a vertically integrated and dominant company controlling the gas transport infrastructures to import gas into Italy, may have embarked upon a strategy of deliberately avoiding capacity expansions in order to ultimately limit third party access to capacity and thereby prevent competition and lower prices on the downstream markets***. For the above reasons, the Commission came to the preliminary conclusion that ***ENI's behaviour consisting of capacity hoarding, capacity degradation and strategic underinvestment can only be explained by the intention to protect the profits of its gas supply business in Italy by limiting gas imports by third parties into Italy. Furthermore, this behaviour of limiting competitors' access to indispensable gas transport capacity to Italy may have negatively affected competition and prices on the downstream gas supply markets and may thus constitute an abuse under Article 102 TFEU."***

iii. 39849 BEH Gas[8]

The European Commission has opened formal proceedings to investigate whether Bulgarian Energy Holding (BEH), its gas supply subsidiary Bulgargaz and its gas infrastructure subsidiary Bulgartransgaz might be hindering competitors from accessing key gas infrastructures in Bulgaria, in breach of EU antitrust rules. The relevant extracts of the inquiry report are as under:

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[7] European Commission – Competition, Antitrust/ Cartel Cases, 39315 ENI, https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=1_39315, Last accessed: 26.09.2019

[8] European Commission – Competition, Antitrust/ Cartel Cases, 39849 BEH gas, https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=1_39315, Last accessed: 26.09.2019

"These companies may be preventing competitors from accessing the main gas import pipeline by reserving capacity that is consistently not used, without releasing it on the market. Without access to this key infrastructure, it is impossible for any companies to compete with Bulgargaz on the Bulgarian gas supply markets.

The European Commission imposed a fine of EUR 77,068,000 on Bulgarian Energy Holding (BEH), its natural gas supply subsidiary Bulgargaz and its Bulgartransgaz gas infrastructure subsidiary ('the BEH Group') for having prevented its competitors from accessing strategic gas infrastructure in Bulgaria, in breach of EU rules on cartels and abuse of dominant position. BEH is the historical, vertically integrated public energy supplier of Bulgaria. One of its subsidiaries, Bulgartransagaz, controls the gas infrastructure in Bulgaria. Another, Bulgargaz, supplies gas to Bulgarian customers. The decision adopted today concludes that the BEH Group holds a dominant position in both the gas infrastructure market and the gas supply market in Bulgaria.

In its decision, the Commission also found that BEH and its subsidiaries abused their dominant position, blocking access to the Bulgarian gas supply markets by unduly restricting access to the infrastructure they owned and operated. BEH used the dominant position of one of its subsidiaries, Bulgartransgaz, to protect the quasi-monopoly position of its other subsidiary, Bulgargaz, in the gas supply market. Moreover, Bulgargaz has accumulated capacity on the only gas import pipeline in Bulgaria via Romania, so that it cannot be used by potential competitors."

3.5 Distinction between 'Transportation' and 'Sourcing'/ 'Supply' in other industrial sectors in India

3.5.1 There has been a conscious legislative preference to keep carriage and content unbundled. In the Petroleum and Natural Gas sector, it is evidenced through the Petroleum and Natural Gas Regulatory Board (**"PNGRB"**) Act, 2006 and Regulations:

i. The PNGRB Act, 2006

Section 21(1) of the Act provides that:

In case of an entity is engaged in both marketing of natural gas and laying, building, operating or expanding a pipeline for transportation of natural gas on common carrier or contract carrier basis, ***the Board shall require such entities to comply with the affiliate code of conduct*** *as may be specified by regulations* ***and may require such entity to separate the activities of marketing of natural gas and the transportation*** *including*

ownership of the pipeline within such period as may be allowed by the Board.
(emphasis supplied)

ii. The PNGRB Regulations

A. The PNGRB (Affiliate Code of Conduct for Entities Engaged in Marketing of Natural Gas and Laying, Building, Operating or Expanding Natural Gas Pipeline) Regulations, 2008, Regulation 4 states as follows:

4. Scope of affiliate code of conduct.
(1) The affiliate code of conduct referred to in these regulations and hereinafter referred to as the "code" sets out the manner of the –
(a) interactions between the entity and its affiliate for the purposes of carrying out the activities of both transportation and marketing of natural gas based on the principle of "at an arm's length "; or
(b) engagement in both the activities of transportation and marketing of natural gas by the entity on its own by following the principle of "at an arm's length".

(2) The objectives of this code are to ensure-
(a) protection of the interests of the consumers and other entities against the actions of an entity while dealing with its affiliate as also when the entity on its own is engaged in both the activities of transportation and marketing of natural gas;

B. The PNGRB (Guiding Principles for Declaring or Authorizing Petroleum and Petroleum Products Pipelines as Common Carrier or Contract Carrier) Regulations, 2012, Regulations 5 and 6 state as follows:

5. Contract carrier system for petroleum and petroleum products pipelines.
(b) The contract for transportation of petroleum and petroleum products in petroleum and petroleum products pipeline shall be independent of the activity of marketing of petroleum and petroleum products.

6. Common carrier system for petroleum and petroleum products pipelines.
(b) The contract for transportation of petroleum and petroleum products in a petroleum and petroleum products pipeline shall be independent of the activity of marketing of petroleum and petroleum products;

3.5.2 In the Electricity sector, it is evidenced through the distinction between 'Trading' and 'Transmission' in the Electricity Act, 2003 (**"the Act"**). The Act defines 'trading' and 'transmission' as separate terms. In consonance with this scheme, the Act defines 'transmission licensee' and prohibits it from engaging in the business of trading in electricity.

> *S.2(72) "transmission lines" means all high pressure cables and overhead lines (not being an essential part of the distribution system of a licensee) transmitting electricity from a generating station to another generating station or a substation, together with any step-up and step-down transformers, switch-gear and other works necessary to and used for the control of such cables or overhead lines, and such buildings or part thereof as may be required to accommodate*
> *such transformers, switchgear and other works;*
>
> *S.2(74) "transmit" means conveyance of electricity by means of transmission lines and the expression "transmission" shall be construed accordingly;*
>
> *S. 2(73) "transmission licensee" means a licensee authorised to establish or operate transmission lines;*
>
> *S. 2(71) "trading" means purchase of electricity for resale thereof and the expression "trade" shall be construed accordingly;*
>
> *S. 41 A transmission licensee may, with prior intimation to the Appropriate Commission, engage in any business for optimum utilisation of its assets:*
> ...
> ***Provided also that no transmission licensee shall enter into any contract or otherwise engage in the business of trading in electricity*** (emphasis supplied)

In view of the above, it is submitted that a clear distinction between Content, i.e., 'Supply', and Carriage, i.e. 'Transport'/ 'Transmission' has been made by the legislature in various statutes. The separation of generation/supply and transmission is one of the key principles of the energy sector. It is submitted that the Consultation Paper deviates from this key principle by seeking to permit DTH Operators/ DPOs i.e. the transmission entity in the broadcasting industry to engage in activities of broadcasters, thus leading to vertical integration in the relevant market resulting in conflict of interest and disruption of competition in the broadcasting industry.

II. RESPONSE TO SPECIFIC ISSUES/ QUESTIONS RAISED IN THE CONSULTATION PAPER

Question 1: Do you think programmes of the PS should be exclusively available on one single DTH Operators' network only to qualify as a PS channel for the DPO? Should there be any sharing of such programmes with other DPOs? If yes, please provide justification and if no, the reasons thereof.

Question 2: In case answer to Question 1 is no, how it can be ensured that programmes of the PS are exclusively available only on single DTH Operators' network? What conditions are to be imposed in registration/license/guidelines?

Question 3: Is there a need to revisit/review the earlier recommendations of the Authority dated 11th November, 2014, relating to keeping recording of all PS channel programs for a period of 90 days and maintaining a written log/ register of such program for a period of 1 year by the DPO from the date of broadcast and the role of Authorised Officer and the State/ District Monitoring Committee and MIB as monitoring authorities.

Answer to Questions 1,2 and 3:

No, PS channels should not be exclusively available on one single operators' network to qualify as a PS channel for the DTH Operator/ DPO.

The Regulations define "broadcaster" as a person or a group of persons, or body corporate, or any organization or body who, after having obtained, in its name, downlinking permission for its channels, from the Central Government, is providing programming services. Further, "programme" means any television broadcast and includes- (i) exhibition of films, features, dramas, advertisements and serials; (ii) any audio or visual or audio-visual live performance or presentation, and the expression "programming service" shall be construed accordingly. The genres of channels/ programming provided by broadcasters include, but are not limited to, news, serials, movies, music, sports, documentaries, teleshopping, devotional, regional programs, market news, educational and interactive games. Most of the genres of channels/ programmes provided by PS are covered under the extensive and varied range of channels/ programmes by broadcasters.

Further, all rules and regulations such as the Guidelines, Regulations, Tariff Order, the Programme Code/Advertisement Code and all other provisions of the regulatory and licensing regime established by TRAI and MIB that are applicable to broadcasters' channels shall be applicable to PS channels/ programmes.

Question 4: What should be the Registration fee/Annual fee for PS per channel? And how it is to be estimated?

Answer 4: To examine the issue of Registration/ Annual fees, it is imperative to consider the nature of broadcasting services and the corresponding regulatory regime. The rationale adopted by TRAI to recommend a reduced license fee for PS channels is completely flawed and arbitrary.

The broadcasters' TV channels/ programmes are made available to a limited number of consumers, as only a channel's subscribers constitute its consumer base. Thus, whereas broadcasters "must provide" their channels to distributors who make a request for its channels, on a non-discriminatory basis, only those consumers who choose the channels of a particular broadcaster constitute its subscriber base. In contrast, DTH Operators/ DPOs have a pan-India presence and a huge consumer base.[9] Thus, the subscriber base of PS for a particular DTH Opeator/ DPO will be co-extensive with the total consumer base of the DTH Operator/ DPO.

Secondly, broadcasters are subject to a comprehensive system of uplinking and downlinking under the Uplinking/Downlinking Guidelines (**"the Guidelines"**) of MIB (dated 05.12.2011) The Guidelines provide for a comprehensive set of eligibility criterion, financial requirements and conditions with regard to channels uplinked from India. PS are also in the nature of channels/ programmes uplinked from India, thus, having no logical or legal basis for differential treatment with regard to the Guidelines as provided by MIB.

Thirdly, in view of the comprehensive regulatory framework for broadcasters as provided in the Regulations, the Reference Interconnection terms and the Guidelines, broadcasters incur significant costs in order for their channels to be delivered to the subscribers. If DTH Operators/ DPOs are not subject to the set of principles and rules that affect the total cost incurred by a

[9] Approx 10mn and above on each DTH platform

broadcaster, the former will be encouraged to provide an increased number of channels that will compete unfairly with the broadcasters' channels, since it would be much cheaper for distributors to provide those channels.

Thus, PS channels should be brought under the Registration Fee/Annual Fee regime and there should be reasonable entry barriers to PS channels/ programmes.

Question 5: How many PS channels are to be allowed to DTH operators? and Why?

Answer 5: The Regulations in clause 8 of Regulation 4 provide that it shall be permissible to the distributor of television channels to discontinue carrying of a television channel in case the monthly subscription percentage for that channel is less than five percent of the monthly average active subscriber base of that distributor in the target market specified in the interconnection agreement, in each of the immediately preceding six consecutive months, provided that for the purpose of calculation of monthly subscription percentage for high definition television channel, the monthly average active subscriber base shall be of subscribers capable of receiving high definition television channels. Thus, it is submitted that PS channels be made subject to the restrictions that broadcast channels are subject to, since the unbridled provision of network capacity for PS channels would result in squatting on network capacity.

It is submitted that the number of PS channels allowed to DTH Operators/ DPOs should be limited to 2% of the network capacity of the DTH Operator/ DPO. This would ensure that the distribution service functions of the DTH Operator/ DPO remain their primary function and are not superseded by their PS programming operations.

Further, the network capacity available with DPOs is limited and requires infrastructure investment on the part of DPOs to increase their total carrying capacity. In the extant circumstances, different broadcasters compete with each other by negotiating agreements with DPOs to book capacity on the DPOs network in order for their channels to be distributed. In view of the above, it is submitted that the Authority should develop a competitive modality for capacity booking wherein broadcast channels and PS channels have an equal opportunity to compete with each other for the abovementioned capacity.

Thus, PS channels should be capped at 2% capacity of the DPO, for which there should be a

competitive process for capacity booking which would ensure a level playing field for broadcast channels and PS channels.

Question 6: Whether PS channels should be placed separately on EPG to distinguish them from regular TV channels? If yes, how these channels are to be placed?

Question 7: Should there be any provision for displaying name and sequence number of PS channels in a particular font size under the heading 'PS' or 'Value Added Services' on TV screen so as to distinguish them from the regular TV channels? If yes, please provide justification.

Question 8: Should PS channels be also categorised in specific genre such as 'Devotional' or 'General Entertainment' or 'Infotainment' or 'Kids' or 'Movies' or 'Music' or 'News and Current Affairs' or 'Sports' or 'Miscellaneous'? Please provide proper justification for your answer

Answer to Questions 6,7 and 8:

PS channels should be placed separately on EPG to distinguish them from regular TV channels. There should be a different category for PS channels, and it shall be distinguished from regular TV channels. They should be placed at the end of the spectrum as 'Value Added Services' before the Barker Channel '999' which is an infotainment channel. A separate heading for PS channels under 'Value Added Services' shall be given to distinguish PS channels from the regular TV channels. It is further submitted that all broadcaster's channel shall be under 'Broadcaster's Genres' which should not be clubbed with PS channels genre. However, one separate 'Category – 2 Genre' for all PS channels shall be created under 'Value Added Services'.