Comments on the Draft Telecommunication (Broadcasting and Cable Services) Interconnection (Addressable Systems) Regulations, 2016 ("Interconnect Regulations") and the Draft Telecommunication (Broadcasting and Cable Services) (Eighth) (Addressable Systems) Tariff Order, 2016 ("Tariff Order") (the Interconnect Regulations and the Tariff Order are collectively referred to as the "Draft Regulations")

Telecom Regulatory Authority of India ("**TRAI**") had issued consultation papers on tariff order, interconnection regulation, quality of service and register of interconnect agreements inviting comments from all stakeholders. Pursuant to receipts of comments and counter comments from the various stakeholders, TRAI has now issued the Draft Regulations, seeking further comments on the same. We have perused the Draft Regulations and our comments are detailed below.

I. THE DRAFT REGULATIONS ARE IN CONFLICT WITH THE EXISTING PROVISIONS OF THE COPYRIGHT ACT, 1957 ("Copyright Act"), THE TRAI ACT, 1997 AND ARTICLE 300A OF THE CONSTITUTION OF INDIA

TRAI is empowered to regulate the broadcasting sector in terms of Section 2(k) of the TRAI Act, 1997. However, the power to regulate the broadcasting services could neither extend nor subsume the special substantive rights granted to the broadcasting organizations under Chapter-VIII of the Copyright Act. At present the Copyright Act comprehensively covers all aspects of licensing, assignment, payment of royalties and other considerations, tariff fixation and distribution schemes by Copyright Societies, provisions for enforcement against infringements/piracy and implementation of technological protection measures in respect of works of authors and Broadcast Reproduction Rights (BRR) of Broadcast Organisations. Between a special and general legislation, it is a settled principle of law that special legislation would prevail over general legislation. For this reason also, the Draft Regulations in its current form or any other form issued under the auspices of the general TRAI Act, 1997 which impacts the rights of the stakeholders under the special act i.e. Copyright Act, cannot be issued by the TRAI. It is further submitted that the Draft Regulations, if enacted, will also be in violation of the Article 300A of the Constitution of India.

In line with the above submissions, we believe that for the following reasons the Draft Regulations are in conflict with the provisions of the Copyright Act:

a. The proposed Tariff Order impose restrictions on the nature of content, prices of channels, mandated discount caps and commissions, manner of offering, *etc.* These provisions will have to be reviewed and modified in the light of prevailing copyright laws providing freedom to Broadcast Organisations to charge royalties and any other consideration/fees for their BRR in accordance with the market demands and contract laws.

b. The proposed Interconnect Regulations issued by TRAI takes away the Broadcast Organisations' exclusive rights to deal and imposes restrictions on their freedom to contract and negotiate.

II. DRAFT REGULATIONS FAIL TO MEET THE OBJECTIVES OF THE CONSULTATION

It is submitted that the Draft Regulations fail to meet the objectives of the consultation, which were as under:-

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i. To carry out a review of existing Tariff arrangements and developing a Comprehensive Tariff Structure for Addressable TV Distribution of "TV Broadcasting Services" across Digital Broadcasting Delivery Platforms (DTH/ Cable TV/ HITS/ IPTV) at wholesale and retail level.

ii. To ensure that the tariff structure is simplified and rationalized so as to ensure transparency and equity across the value chain.

iii. To reduce the incidence of disputes amongst stakeholders across the value chain encouraging healthy growth in the sector.

iv. To ensure that subscribers have adequate choice in the broadcast TV services while they are also protected against irrational tariff structures and price hikes.

v. To encourage the investment in the TV sector.

vi. To encourage production of good quality content across different genres.

However, the Draft Regulations, are not in line with the stated objectives, for the reasons explained hereinafter.

1. *DAS has not yet been completely implemented*

The proposed model/regime in the Draft Regulations is premised on an assumption that there will be complete addressability and transparency from DPOs to end consumer level. Until there is complete addressability and transparency in the value chain, disputes between the stakeholders will continue to increase. We are all aware that DAS Phase-III implementation is not complete and the DAS Phase-IV implementation 'on ground' may take a longer time. The proposed regime is based on the assumption that digitalization shall be fully implemented by December 31, 2016, which is unlikely considering the recent non-implementation of DAS Phase-III. Also, DAS Phase-IV areas are the most fragmented and challenging markets compared to the other phases. It is therefore suggested that any new regulatory regime should be introduced only once DAS has been completely and effectively implemented.

2. *Readiness at DPOs end*

The DPOs do not have the ability to implement *a-la-carte* choice nor does the consumer have the option to exercise the same.

One of the advantages to the consumer of a digital environment, is the ability to choose from an offering of a large number of channels. However, on account of bandwidth constraints, the DPOs are unable to offer a large number of channels. Therefore, the DPOs ought to have a mandatory minimum channel carrying capacity per headend, to give an effective ability to the consumer to exercise its choice.

Also the consumers should not be left to the mercy of non-availability of STBs or non-preparedness of its DPO to implement digitization.

3. *Consumer's price will increase*

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It is submitted that the fixation of rentals at Rs. 130/- for 100 SD channels and subsequent additional levies for every 25 channels, will lead to price increase and consumers will be required to pay a significantly higher amount for accessing TV channels in comparison to the present pricing.

Further, TRAI has not considered the fact that presently, consumers in India can avail FTA services of the Public Broadcaster, DD Free Dish, comprising 100-110 FTA channels at no cost. However, if the Draft Regulations get implemented, the same consumers would be required to pay an amount of Rs.130/- to the DPOs for the same FTA channels. This creates a non-level playing field and likely to result in discrimination amongst the same set of consumers.

4. ***Views of primary stakeholders have been ignored***

TRAI in its Draft Regulations has mentioned that most of the broadcasters and DTH operators, besides price forbearance had recommended Regulated RIO or a blend of regulated RIO and flexible RIO. Further, consumer organizations and individuals suggested exclusive *a-la-carte* model or universal RIO Model with safeguards for review.

The objective of the consultation was to consider the views of all stakeholders in the value chain before notifying any regulations, tariff order, *etc.* It is pertinent to mention that the cost of creating the content is borne by the primary stakeholder (*i.e.*, broadcaster) and the cost is recovered from the end consumer. However, in the whole scheme of things, the view of the primary stakeholder and the end consumers have been completely ignored and the view of the intermediary (*i.e.*, distributor of TV channels "**DPO**") in the value chain has been given paramount importance. Under the proposed Draft Regulations, the DPOs would enjoy an unfair advantage through multiple revenue streams *e.g.* Rental fee, distribution fees (collection fee) and carriage fee. There is no justification for carriage fee for pay channels.

By recommending an Integrated Distribution Model ("**IDM**") as suggested by majority intermediary stakeholders in the value chain is contrary and detrimental to the basic objective of the whole exercise of issuance of the consultation *i.e.* subscribers have adequate choice, investment in the TV sector and production of good quality content.

Without prejudice to our submissions at Section I and II and our rights under law, equity or otherwise, we hereby make the following submissions, each of which are also without prejudice and alternative to each other:

III SPECIFIC ISSUES ARISING IN THE INTEGRATED DISTRIBUTION MODEL

1. ***Retail pricing makes MRP illusory***

The Draft Regulations nullifies the rates declared by broadcasters (MRPs) by allowing DPOs to fix retail prices of pay TV channels. It is submitted that the broadcasters are the creators of content. Based on the content requirements of consumers, the broadcasters would be best placed to fix the prices of their channels. However, the same has been defeated by allowing DPOs to fix the retail price.

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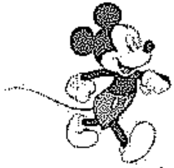

It is further submitted that the restrictions on discounting are only applicable at the broadcaster level. The cap of 35% is prescribed on wholesale level (MRP) in the form of distribution fee (20%) and discount (15%). However, no such discount cap is prescribed at retail level at DPO end which again empowers the DPO to influence the choice of consumers. Consequently, there may be no transparency and consumers in the same geographical area may end up paying different prices for the same content based on the strength and ability of the DPOs to offer a lower retail price. It is therefore submitted that there should be no fixation of retail price by DPOs.

2. *Lack of level playing field between stakeholders*

The Draft Regulations creates multiple revenue streams for DPOs - intermediaries in the form of distribution (collection) fees, rental, carriage with absolutely no benefit to consumers and broadcasters. The proposed model lacks parity and equity in the value chain and defeats the basic objective envisaged by TRAI. There is no justification for carriage fee for pay channels.

The proposed tariff order fails to provide a reason as to why DPOs should receive rentals from consumers and also distribution (collection) fees and carriage fees from broadcasters.

Further, we would like to clarify that "Distribution Fee" is a misnomer and is factually incorrect and should be categorized as "collection fees".

3. *Several restrictions on Broadcaster's*

The Draft Regulations regulate the primary stakeholders being the broadcaster in all aspects *i.e.*, price cap, cap on discounting, manner of offering, bundling of channels and restriction on its ability to negotiate with the distributor of TV channels. The broadcasters have only two sources as its revenue stream *i.e.*, subscription and advertisements, for it to invest in TV sector and production of good quality content. Too many restrictions will only lead to de-growth of the industry. This is especially true as the first - cum – first basis placement will make it difficult for new entrants in the market. Besides, first - cum - first basis placement is illusory in view of lack of mandatory minimum channel carrying capacity by the DPOs.

4. *Discount capped at 15% of MRP*

It is submitted that discounts are offered due to varied reasons including (i) the nature of a TV channel, (ii) subscriber base of a DPO, (iii) region, (iv) demand of a TV channel in a market. The cap of 15% discount offered by the broadcasters to DPOs is restrictive and broadcasters will not be in position to meet varied requirements through 15% discount, especially as the discount is consistent within a geographical area (i.e. State), which represent people with multiple income group, different stages of digitization and different content choices. Broadcasters should be free to allow discounts basis market conditions on non-discriminatory basis. It is submitted the definition of geographical areas in the proposed tariff order should be re-examined.

5. *Imposition of 5% reach for availing the continuous access of a DPO network is unreasonable*

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The proposed Draft Regulations provide that a DPO can refuse to carry a TV channel for a period of one year, if the TV channel has less than 5% subscriber base of the DPO for immediate preceding six consecutive months, is without any basis and not reasonable. The period of 6 months is not sufficient to enable the broadcaster to change content strategy or conduct effective marketing to ensure that the subscriber base is increased. Further, the calculation of 5% of the active subscriber base of a DPO is not a justifiable parameter, as it does not take into consideration the active subscriber base of channels in a relevant genre of channel under consideration or distinguish between the active subscriber base of the SD or HD channel in a particular genre.

On the contrary, this artificial cap will not only be detrimental but also inhibitory to the growth of new entrants and sampling of new channels. Exemption should be granted to new channels. In the absence of prescribed mandatory minimum channel carrying capacity by the DPOs, the above provision is redundant.

6. *Lack of parity in calculation of carriage and license fee*

Calculation of license fee is on the basis of the number of active subscribers subscribing a pay channel or bouquet as opposed to the calculation of carriage fee, takes into consideration various multipliers of the average subscriber base of the distributor in that month in the target market and not the average subscriber base of the relevant channel.

7. *Premium Channel*

It is submitted that the proposed Draft Regulations provide broadcasters to declare any of their channels as "premium channel", which will have no capping of price. However, the explanatory memorandum of the draft Tariff Order links the "premium channels" to "niche channels" leading to ambiguity and will lead to dispute in future in its interpretation.

8. *Lack of transparency - tackled through audit*

Broadcasters' right to invoice for the collection of license fee and to avail access to the DPOs' network, will entirely depend on subscriber reports submitted by the DPOs.

In fact, it has been witnessed that disputes among broadcasters and DPOs have increased due to lack of transparency. Disputes on account of lack of transparency include non-submission of reports, incorrect reporting, non-payment, non-compliance of regulations and non-co-operation during audit and non-implementation of audit results and recommendations.

In the Draft Regulations, TRAI has incorporated the provision of audit by a DPO through the empanelled auditor (BECIL) and further envisaged empanelment of more auditors, however, the same does not adequately protect the interest of the stakeholders. The proposed IDM is based on the fundamental structure that the DPO shall submit subscriber report for the TV channels, which shall form the basis of invoicing by broadcaster towards licensee fee or invoicing by the DPO towards carriage fee. In either situation accurate and correct reporting on subscriber count is the essence of the model and the same can only be achieved from the reporting by the DPO takes into consideration the pin-code of the relevant subscriber's/STB's location. Hence, enforceability of accurate and correct reporting of subscriber count is dependent upon regular and periodical audit. The DPO should be obligated to audit its SMS, CAS and other related systems through the auditor designated by TRAI once every quarter to

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verify that the subscriber counts made available by the DPO to the broadcaster are complete, true and correct and further submit such audit report to this effect with each concerned broadcaster. In addition, if the broadcaster is not satisfied with the audit report, after communicating the reasons of dissatisfaction in writing should have the right to audit the head-end of the DPO not more than twice in a calendar year.

In any event, the DPO should be obligated to carry the TV channel for a minimum period of 1 year irrespective of subscriber base of that particular TV channel in one year. The DPO should be permitted to discontinue carrying that particular TV channel only after expiry of one year, provided the said channel has less than 5 percent of the subscriber base of that DPO – within the relevant genre and HD subscriber base.

9. *No reason given as to why broadcasters' bouquet could not be included in DPOs' bouquet*

TRAI in proposing the Draft Regulations has completely ignored the fact the presently broadcasting sector favour bouquets. TRAI has precluded DPOs from incorporating the entire bouquet of broadcasters in their bouquet. The MRP of a bouquet will be less than the MRP of sum of a-la-carte TV channels. If the entire bouquet of the broadcasters will be permitted to be included in the bouquet of DPOs, it will be more price effective for the consumers. However, TRAI has not given any reason what purpose will be served be if such broadcasters' bouquets are not included in the bouquet of DPOs containing bouquets of two or more broadcasters.

10. *No provision for unauthorized transmission by DPOs*

It is the known fact that DPOs indulge in unauthorized transmission breaching the terms of agreements. The SMS should have the ability to generated subscriber reports to mandatorily include the location / pin code of the STB of the subscriber. However, TRAI has not proposed any deterrent measures to curb unauthorized transmission. It is submitted that TRAI should consider that where the DPOs have indulged in unauthorized transmission, they should be barred from receiving signals from the broadcasters at least for a year.

11. *Proposed Regulations do not for provide for provisioning of signals through court orders*

The current Regulations allow the provisioning of signals through court orders. However, the proposed Draft Regulations do not provide any such clause and contain no explanation as to why such right has been taken away by TRAI.

In view of the above, we submit that the Draft Regulations are un-implementable in their current form and require a complete reconsideration to address the original intent of the TRAI as stated above. We are happy to provide more details / explanations if so required.

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