September 3, 2013

The Telecom Regulatory Authority of India
Mahanager Door Sanchar Bhawan,
Jawahar Lal Nehru Marg (Old Minto Road)
New Delhi- 110002

Kind Attn.: Mr. Wasi Ahmad, Advisor (B&CS)

Re: TRAI Consultation Paper dated August 6, 2013 on "Distribution of TV Channels from Broadcasters to Platform Operators"

Dear Sir,

We write with reference to the Consultation Paper dated 6 August 2013 released by the Authority on **"Distribution of TV Channels from Broadcasters to Platform Operators"**

With respect to the current Consultation Paper titled 'Distribution of TV Channels from Broadcasters to Platform Operators' ("**Consultation Paper**"), we would like to place our reservations on the extremely limited scope of consultation in the above paper as well as the sources of data which have been used to depict the state of the cable television industry in the country especially the role of content aggregators. It is submitted that the Authority has suggested radical changes to the existing regulatory regime without any detailed analysis or sharing the relevant data basis which the conclusions have been drawn on the role and activities of authorised distribution agencies.

Without prejudice to the above, and reserving our rights under law and also with the understanding that our response to the entire Consultation Paper is an expression of our thoughts on the issue and may not be considered binding on us, we are submitting our comments enclosed herewith for your kind perusal and reference.

We would request you to please take the same on record and acknowledge.

Thanking you

Yours sincerely,
For Viacom18 Media Private Limited

Kunal Rajpal

Kunal Rajpal
AVP – Legal & Secretarial

Comments on behalf of Viacom18 Media Private Limited to Consultation Paper titled 'Distribution of TV Channels from Broadcasters to Platform Operators'

I. Introduction

II. Scope of the Consultation Paper

III. Role of Content Aggregators

IV. Necessity for change of regulatory regime

V. Conclusion

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I. INTRODUCTION

Viacom18 Media Private Limited acknowledges the efforts of the Authority to identify the issues with respect to various activities in the Broadcasting and Cable TV sector on periodic basis to facilitate the orderly growth of the business.

With respect to the current Consultation Paper, we would like to place our reservations on the extremely limited scope of consultation in the above paper as well as the sources of data which have been used to depict the state of the cable television industry in the country especially the role of content aggregators.

It is submitted that the Authority has suggested radical changes to the existing regulatory regime without any detailed analysis or sharing the relevant data basis which the conclusions have been drawn on the role and activities of authorised distribution agencies.

Without prejudice to the above, and reserving our rights under law and also with the understanding that our response to the entire Consultation Paper is an expression of our thoughts on the issue and may not be considered binding on us, we record our other submissions

II. SCOPE OF THE CONSULTATION PAPER

It is submitted that the current Consultation Paper is proposing major changes to the current regulatory regime by addressing issues which not only are without any basis or empirical data but also by arriving at conclusions which are strictly not within the domain of TRAI Act.

a. The proposed amendment(s) proposes by TRAI are beyond its jurisdiction, as this issue of alleged monopolistic practices clearly falls within the domain of the CCI.

b. The CCI in ***Consumer Online Foundation v/s Tata Sky Ltd and Ors [2011 Indlaw CCI 12],*** has held that any matter that raises competition concerns would fall within the purview of the Competition Act, enabling the CCI to exercise jurisdiction. The following was clearly stated,

> *"There is no doubt that TRAI is the sector regulator for the market. But competition in the market falls within the exclusive jurisdiction of CCI". [Para 27]*

c. The Competition Act was enacted after the TRAI Act and has a non-obstante clause that enables it to operate in exclusion of other laws. The Competition Act is a specific Act enacted primarily to deal with anti-competitive agreements and monopolistic trade practices. Thus, the issues raised by the Authority in the Consultation Paper clearly fall within the ambit of the Competition Act. In ***Union of India and Ors. v. G.M. Kokil and Ors, AIR1984SC1022,*** it was held that -

> *"...It is well known that a non-obstante clause is a legislative device which is usually employed to give overriding effect to certain provisions over some contrary provisions that may be found either in the same enactment or some other enactment, that is to say, to avoid the operation and effect of all contrary provisions. Thus the non-obstante clause in Section 70, namely, notwithstanding anything in that Act" must mean not withstanding anything to the contrary contained in that Act and as such it must refer to the exempting provisions which would be contrary to the general applicability of the Act..."*

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d. The Competition Act empowers the CCI to examine alleged violations of the Act which cause or are likely to cause "**appreciable adverse effect on competition**" in India (AAEC).

e. In view of the specific scheme of the Competition Act matters relating to market dominance or monopolistic trends in the broadcasting services fall under the exclusive domain of the CCI.

f. The CCI is the Expert Body, which has exclusive jurisdiction on issues of competition. The Act is a special act enacted subsequent to the TRAI Act and will prevail over the same.

g. The issue of alleged monopolistic practices by content aggregators and its effect on competition (raised at the behest of MSOs) was considered by the Expert Body on competition (CCI).

h. The initiation of the CP itself is flawed and suffers from a serious jurisdictional error. The proposed amendments, if brought about, will only give rise to jurisdictional disputes and conflicts [with respect to separation of regulatory powers] which will affect the orderly growth of the sector.

It is submitted that the existing statutory provisions in the current regulatory regime are adequate to address the concerns of TRAI regarding any anti competitive and/or monopolistic practices across the Indian Media Industry and effectively cover each of the issues that have been identified by TRAI as those requiring regulation.

It is pertinent to note that "The Competition Act 2002" in its preamble provides for the establishment of a Commission to **prevent practices having adverse effect on competition, promote and sustain competition in markets, protect the interests of consumers and ensure freedom of trade** by other participants in markets in India and with matters connected therewith and incidental thereto. The Act, being the most current relevant statute governing competition, proves its effectiveness by laying down broad encompassing provisions that range from prohibiting anticompetitive agreements, regulating certain species of business combinations and punishing organizations for the abuse of market power.

The provisions of the Competition Act are designed for and operate specifically to prevent any entity from holding a monopoly or stifling competition. Agreements that create horizontal and vertical ownership are adequately dealt with under the Competition laws. Therefore the Competition Act clearly provides for competitive conditions in the markets.

The CCI has since its inception had an opportunity to look into various aspect of the Media Industry from inception in general and with respect to content Aggregators in particular.

The proposed amendments/ Consultation Paper overlooks the CCI ruling dated 21.03.2013 in respect of Media Pro in case no 31 of 2011.

In the instant, the CCI held that the JV (MediaPro) is not a dominant player in the relevant market of services of aggregating and distribution of TV channels to MSOs etc for the following reasons:

- MSOs earn more from placement fees rather than subscription revenue, thus they exercise greater bargaining power over the broadcasters.
- No evidence which suggests that entry of MSO/DTHO has been restricted due to the greater bargaining power of the JV.

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- Agreement between two players who control less than 40% market cannot result in fixing of price in the market unless all the players or at least all the major players simultaneously join their hands together with such intent in the market.
- It is the MSO that decides the channels that would finally be made available to subscriber.
- TRAI mandates broadcasters/aggregators to provide TV signals to MSOs on non-discriminatory terms and any aggrieved person in this regard can approach the TDSAT for Redressal.
- Supply in market not affected. The Commission also noted that that the JV cannot create any entry barriers for new entrants in the market nor can it foreclose the competition by creating hindrances for new players to enter in the market due to the present market dynamics and TRAI regulations.
- MSOs have counter veiling powers, negotiating powers by charging carriage and placement fees.
- JV cannot work in isolation ignoring the TRAI rules and regulations.
- JV formed may have largest number of channels in its kitty but when compared to the total number of channels available in the country its market share is approximately 10% only.
- Aggregators have brought efficiency in the market. They deal with inefficiencies of the market and have to negotiate on behalf of broadcasters.

The judgment of the CCI clearly shows that content aggregators have brought efficiency in the market and negotiate on behalf of broadcasters. Thus, the assumption in the Consultation Paper that there are monopolistic practices followed by content aggregators is entirely misplaced.

III. ROLE OF CONTENT AGGREGATORS

Under the TRAI Regulations as well as Cable Television Network (Regulation) Act, a broadcaster is defined under Sec. 2(e) and includes authorized distribution agencies of a broadcaster. A Content Aggregator falls within the purview of an authorized distribution agent of a broadcaster. As per the current regulatory regime, broadcasters arranged their business and regulatory affairs in a manner by which they appointed Authorized Distribution Agencies, known as 'Content Aggregators'.

The Content Aggregators have entered into valid and binding agreements with the Broadcasters. Accordingly, Content Aggregators publish the RIO on behalf of the broadcaster and execute Interconnect Agreements with Distribution Platform Operators. The Content Aggregator is thus an important stakeholder in this chain.

It is submitted that the Content Aggregators have resulted in the following major steps for the growth of the Broadcasting & Cable sector:-

(a) Penetration of cable & satellite viewership from the big metros to the hinterland to ensure growth of Cable sector;

(b) Creating efficiency by optimizing distribution costs;

(c) Ensuring that the Broadcasters get a fair share in the overall subscription revenues

(d) Reducing multiplicity of deals/contracts, facilitating discussions/negotiations as well as execution of commercial agreements for multiple broadcasters which has reduced the execution

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of multifold agreements between Broadcasters and platform operators (MSOs/DTH);

(e) Ensuring that the monopolistic approached of MSOs having huge bargaining power is offset during negotiations.

Content Aggregators have been a significant part of the broadcasting industry and have been responsible for bringing about efficiency in the market.

a. They have been functioning/ operating in this sector for a period of 8 to 10 years and until now the TRAI has not seen them as menace or threat to other players/entities in this field.

b. The proposed amendments in the Consultation Paper will bar/ result in a prohibition a broadcaster from having a Distribution Agent as it has to publish its own RIO and enter into Interconnect Agreements.

c. The proposed amendments in the Consultation Paper will result in rendering the role of the Content Aggregator otiose and practically meaningless as it can only act as a facilitator or an authorized signatory – the Content Aggregator has been completely sidelined and left with no effective functional role whatsoever. This is violative of Art. 19 (1) (g) of the Constitution of India.

IV. NECESSITY FOR CHANGE OF REGULATORY REGIME

1. The Consultation Paper is vague, ambiguous and seems to have been hastily put together. It is neither goes into details nor clearly sets out the issues for consultation and also does not provide any body of evidence to substantiate the statements put forth therein.

2. The said Consultation Paper contains mere allegations and references to so called "complaints" without any details and/or supporting data or facts. We are thus constrained to respond to vague statements in the absence of supporting data. It is pertinent to draw your kind attention to the fact that such "complaints" are nothing but an attempt to mislead TRAI and are solely intended to shift the blame from the platform operators to Content Aggregators for the platform operators shortcomings in effective implementation of DAS as per the mandated phases, including in ensuring greater transparency and building public awareness through the implementation of the CAF process at the grass root level.

3. It is submitted that it has been erroneously stated in the Explanatory Memorandum to the said Consultation Paper that the term "Aggregators" has not been defined anywhere in the law or regulatory framework. In fact, Regulation 2(b) of 'The Telecommunications (Broadcasting and Cable Services) Interconnection Regulation 2004 (13 of 2004) ("Principal Regulation of 2004") clearly defines and recognizes 'Agent or Intermediary'. As stated by TRAI itself in para 3 of the 'Background' in the Explanatory Memorandum to the said Consultation Paper, "Aggregators" is a popular expression and not a legal definition. Hence, it is our submission that the TRAI has, from the very inception in 2004, duly acknowledged and recognized the valuable role of the 'Agent or Intermediary'.

Moreover, the authorized distribution agencies have also been recognized as service providers by the Hon'ble TDSAT, High Courts and Supreme Court in a plethora of judgements, which are binding on both the broadcasters and their authorized distribution agencies.

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4. Now, having accepted and adopted this position since 2004, which has led to the growth of a large and self-sustained organized industry, which operates a legitimate business and provides employment and means of livelihood to several thousands of people, the TRAI cannot now suddenly do an about turn and simply attempt to wipe out their entire existence. It is humbly submitted that any such attempt by the Hon'ble Regulator would be hit by the principle of *promissory estoppel*.

5. We submit that the Content Aggregators is an integral part of the value chain in the distribution of TV channels from broadcasters to platform operators from the very beginning and continues to be so. It not only has an established and legitimate business model, but also aids broadcasters to effectively make available their channels to the public at large, across all parts of the country, besides collecting subscription revenue from the far corners of the country, which a broadcaster is unable to reach.

6. Further, the definition of 'Broadcaster' has always included their authorized distribution agencies. While the TRAI has sought to amend the definition of Broadcaster in the proposed amendments to the TRAI Regulations by randomly deleting such reference to authorized distribution agencies of the Broadcasters, the definition of 'Broadcasting Services' which is unchanged, itself permits dissemination of communication in any form, either directly or indirectly, to the general public. Interestingly, both these definitions i.e. of 'Broadcaster' and 'Broadcasting Services' have remained unchanged from 2004 and infact, were also included in the recent DAS Regulations i.e. 'The Telecommunication (Broadcasting And Cable Services) Interconnection (Digital Addressable Cable Television Systems) Regulations, 2012 No. 9 of 2012'. 'Broadcaster' is similarly defined under the Cable Television Network (Regulation) Act.

7. The proposed changes in the said Consultation Paper also take away the right of the Content Aggregators /'Agent or Intermediary' to offer different bouquets in various combinations to their subscribers, which offers greater choice and better value to the consumers. This provision is not only discriminatory, arbitrary and against consumer interest but is also *ultra vires* Article 19 (1) (g) and Article 301 of the Constitution of India. While on one hand, the Consultation Paper take away the right of the 'Agent or Intermediary' to offer different bouquets in various combinations to their subscribers, there is no such bar on the MSOs/DTH operators from doing so, thus rendering the proposed amendments meaningless and at the same time giving more concentration of power in the hands of the MSOs/DTH operators. Moreover, such proposed changes will be contrary to the status quo orders passed by the Supreme Court as regards bouquets and rates.

8. The MSO's/DTH operators further re-package bouquets they have subscribed to from broadcasters and this has been addressed at all in the said Consultation Paper, thus leading to discrimination and arbitrariness in the entire process and at the same time feeding greater concentration of power in the hands of the MSOs/DTH operators, which is contrary to the intent of the TRAI and also is totally against consumer interest.

9. The said Consultation Paper purports to "address the issues that have arisen out of the present role assumed by the authorized distribution agencies of the broadcasters...." Without categorically specifying what these "issues" are. The said Consultation Paper is riddled with such vague and ambiguous statements which have not been substantiated at all.

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10. We wish to draw to the kind attention of TRAI that unlike as stated in para 1 in the background section in the Explanatory Memorandum to the Consultation Paper, distribution platform operators do not "obtain TV channels from broadcasters" but merely the non-exclusive and temporary right to retransmit signals of the broadcasters TV channels.

11. As regards the commercial terms, it is submitted that there is no coercion and that the parties involved have mutually agreed to these commercial terms. Such allegations of abuse of market power, made by smaller MSOs and those MSOs who are not vertically integrated are baseless.

12. It is submitted that the Hon'ble Regulator has opened up multiple discussions on related issues, vide separate consultation process, but the same are not being looked at holistically. There is an urgent requirement to discuss all such related issues under a common lens, specifically 'Issues Related to Media Ownership', "Monopoly/market dominance in Cable TV Service" and the subject matter of the said Consultation Paper.

13. The Hon'ble Regulator has failed to establish what public interest will be served by its proposed amendments as set out in the said Consultation Paper. In fact, such action will only be counter productive to consumer interest.

14. The said Consultation Paper proposes that the Reference Interconnect Offer as well as the interconnection agreements should be published and entered into directly by the broadcasters, respectively, and that the authorized distributors are not allowed to do so on behalf of the broadcasters. It would be pertinent to point out here that, as the Hon'ble Regulator would no doubt be aware, the entire exercise of reaching out to the deepest corners of the country to sign agreements (as well as seeding boxes and collecting subscription revenue) with the various distributors of TV channels, requires a very specialized knowledge of the market dynamics, effective networking and connections on the ground, along with specialized manpower, which is not available with the broadcasters, who are primarily focused on creation of content for their respective TV channels, collecting advertisements, as well as technical operations of running their TV channels. Such functions have thus been outsourced by broadcasters to their authorized 'Agent or Intermediary'. Such business process outsourcing leads to cost and operational efficiencies and are in the interest of both the broadcasters and the general public, as cost efficiencies and savings are ploughed back by broadcasters into better and higher quality of programmes and dissemination thereof using cutting edge latest technological advances, such as HD channels, with surround sound, to enhance the viewing experience and pleasure of the consumers.

15. In any event, the said authorized 'Agent or Intermediary' duly appointed by the broadcasters are bound by the various Regulations prescribed by the Hon'ble Regulator from time to time, including annual filing of details of all interconnect agreements. Thus, no purpose is served by the proposed amendments to the said Regulations as they exist.

16. It is submitted that there exists provision in the Regulation such as 'Must Provide' which duly protect the distribution platforms under the larger protection of non-discrimination. In the absence of effective 'Must Carry' protection, the broadcasters and their authorized 'Agent or Intermediary' are left with no protection whatsoever, thus further increasing the concentration of power in the hands of the platform operators. This further defeat the goal set for itself by the TRAI and is anti-competitive as well as against larger consumer interest.

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17. The existing Regulations do not need to be amended, as proposed or otherwise, since there is no real reason to do so. As submitted hereinabove, the ailment is systemic failure to effectively implement DAS due to omissions and commissions of the MSOs / Operator Platforms, but under undue pressure from the MSOs / Operator Platforms, due to their vested interests, the medication is being wrongly administered to the Content Aggregators for no fault of their own.

    In light of the above, we submit that are sufficient checks and balances and enforcement mechanisms in the existing TRAI Regulations in respect of Interconnection, Quality of Services, Customer Grievances and TRAI Tariff Orders to address any anti competitive and anti consumer behaviour.

    The approach in the consultation paper and the proposed amendments are skewed in favour of MSOs and against Content Aggregators, which disturb level playing field conditions.

The Supreme Court in ***Hotel and Restaurant Assocn. and Anr.Vs.Star India Pvt. Ltd. and Ors. [2006 Indlaw SC 1054]*** has held that:

> *The interest in one of the players in the field (herein MSO) would not be taken into consideration throwing the interest of others (content aggregators to the wind).*

In ***Telecom Watchdog v/s UOI*** *[Decided On: 13.07.2012]* the Delhi High Court held,

> *"Any action taken by a public authority which is entrusted with the statutory power as, therefore, to be tested by the application of two standards - first, the action must be within the scope of the authority conferred by law and, second, it must be reasonable. If any action, within the scope of the authority conferred by law is found to be unreasonable, it means that the procedure established under which that action is taken is itself unreasonable".*

d. The proposed amendments in the CP are directly contrary to the judgment of the Supreme Court and are clearly violative of the fundamental rights guaranteed under the Constitution of India.

The proposed amendments and Consultation Paper result in discrimination and disturb level playing field conditions

a. By way of illustrations, MSOs and platforms can do packaging, but broadcasters as Content Aggregators cannot do so. This especially is arbitrary and discriminatory and violates Article 14 of the Constitution of India as it disturbs level playing field conditions.

b. The proposed amendments in the consultation paper seek to prohibit bundling up of bouquets or channels [multi-broadcaster bouquets] thereby abridging/ taking away the consumers choice and thus defeats the purpose of the TRAI Act, 1997.

c. Furthermore, MSOs have sufficient countervailing powers, by charging carriage and placement fees. Thus, they have well balanced negotiating/bargaining powers.

V. CONCLUSION

Assuming, without admitting, that the Hon'ble Regulator has noted some short comings in the

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present Regulations as they exist, it is submitted that Hon'ble Regulator is within its right to propose certain reasonable restrictions, subject of course to completion of appropriate consultation process, to address any such specific concerns,

It is proposed that suitable provisions may be included in the definition of Broadcaster/Service Provider to address any anomaly that TRAI perceives rather than carte blanch delete such provisions as they have existed from inception and to simply wipe out and marginalize an entire industry carrying out its legitimate business.

For **Viacom18 Media Private Limited**

Kunal Rajpal
Kunal Rajpal
AVP - Legal & Secretarial