INDIAN BROADCASTING FOUNDATION'S ("IBF") PRELIMINARY RESPONSE TO TELECOM REGULATORY AUTHORITY OF INDIA'S ("Authority") CONSULTATION PAPER ON ISSUES RELATED TO INTERCONNECTION REGULATION 2017

We thank the Authority for inviting stakeholders to respond on its consultation on issues related to Telecommunication (Broadcasting and Cable) Services Interconnection (Addressable Systems) Regulations, 2017 ("Interconnect Regulations"), as set out in the Consultation Paper ("CP") released to the public on September 25, 2019.

The CP has identified its objective to review provisions of the existing Interconnect Regulations, in consultation with stakeholders on the issues related to 'target market', and to placement, marketing and other agreements between broadcasters and distributors. The CP recognizes that Interconnect Regulations provide for no regulatory intervention in respect of all technical, commercial arrangements, placement, marketing arrangements between broadcasters and distributors. For clarity, the Authority has stipulated provisions relating to listing on of channels on electronic programme guide ("EPG") by distribution platform operators ("DPO") and that once a logical channel number is assigned to a channel then the same should not be changed by DPOs for a period of one (1) year. The CP also refers to issues raised by certain broadcasters regarding the issue of target market and their inability to exercise rights under 'must carry' provisions of Interconnect Regulations.

We submit this preliminary response on behalf of IBF, in order to appropriately support and assist the Authority *inter-alia* with a view to maintain no regulatory intervention with respect to all arrangements such as placement, marketing and other similar agreements / arrangements between broadcast service providers and the distribution service operators.

At the outset, we would like to submit that the Authority need not regulate any arrangements not specifically falling within the purview of TRAI Act. By way of present preliminary response to the CP, we request the Authority not to proceed with a consultation process on issues related to placement, marketing and other agreements between broadcasters and DPOs since, these issues / agreements are beyond the scope of the Authority's jurisdiction under the provisions of the Telecom Regulatory Authority of India Act, 1997 (as amended) ("TRAI Act"). It is respectfully submitted that marketing activities towards promotion of services are based on commercial and business concerns. The manner of marketing, promotion, advertising and the general business mechanics of broadcasters and DPOs are not matters related to interconnection, hence cannot be subject to regulation under the TRAI Act. Regulations. Therefore, the Authority ought not regulate aspects of the broadcaster-DPO relationship that do not relate to distribution of signals of television channel and/ or its subscription *inter-alia* since, the same would not qualify as 'interconnection'.

It is submitted that clause 2 (y) of Interconnect Regulations defines "interconnection agreement" as under:

> *"interconnection agreement" with all its grammatical variations and cognate expressions means agreements on interconnection providing technical and commercial terms and conditions for distribution of signals of television channel;*

We note that an agreement qualifies as an interconnection agreement only if it contains (a) technical terms; (b) commercial terms; and (c) conditions for distribution of television channels. Thus, any arrangement between a broadcaster and DPO that is not conditional on distribution of television channels of a broadcaster on a DPO's network is not an "interconnection agreement".

Further, a plain reading of the definition in regulation 2 (x) of the Interconnect Regulations clearly shows that 'interconnection' refers to and means only those commercial and technical arrangements, which enable or authorize service providers to connect their equipment and networks to provide broadcasting services to the subscribers. Interconnection is clearly distinct from arrangements for commercial marketing, advertising, placement or such other activities.

It is submitted that the Interconnect Regulations deal with subscription of channels, carriage of channels, listing of channels on DPO's EPG as well as prohibition in changing of channel listings on EPG. Regulating any other arrangement which is not conditional upon interconnection for distribution of TV channels such as, marketing or promotion or ad sales of an upcoming television programme on a DPO's website is not an interconnection agreement by any stretch of imagination. Assumption of jurisdiction in such matters will be detrimental to interest of the sector which is fraught with structural changes and an increasingly hostile regulatory environment.

It is humbly requested that the Authority ought not curtail the freedom of market participants by trying to oversee and/or regulate those aspects of businesses of broadcasters and DPOs that are unrelated to mandate or the Authority or are not related to distribution of television channels and/or are not related to technical-cum-commercial arrangements / agreements for distribution of channels.

The Authority must consider, all the stakeholders respective service and business imperatives in context to the current hyper-competitive environment in which the broadcast cable and satellite sector is vying for the consumers' attention. To this end, broadcasters are constantly investing and creating new content and programs and marketing such programmes to be available by way of TV channel to DPOs for retransmission to subscribers. Broadcasters as content creators, have a genuine commercial interest to improve viewership experiences for consumers across geographies. This, by itself, cannot be a ground to carry out roving and fishing enquiries into all agreements entered between broadcasters and DPOs.

By way of abundant caution and without prejudice to the foregoing submissions, our response to questions posed for comments by the Authority regarding issues related to placement, marketing and other agreements between broadcasters and distributors is mentioned below. Submissions made hereinabove may kindly be read as forming part of our issue-wise response, and the same are not being repeated herein for the sake of brevity.

1. **Do you think that the flexibility of defining the target market is being misused by the distribution platform operators for determining carriage fee? Provide requisite details and facts supported by documents/ data. If yes, please provide your comments on possible solution to address this issue?**

RESPONSE:

We are not aware of the rationale and basis as to how DPOs ascertain and declare their respective target market however, we understand that the same is done in accordance with the business model being followed by each one of them. Currently, we do not have any inputs on misuse of flexibility with respect to the DPOs defining target markets. As per current Interconnect Regulations, each DPO is required to define its target market for each distribution network/headend.

Without prejudice to our preliminary submissions, it is humbly submitted that the demand for regional channels may not be restricted only to the states where a particular language is predominantly spoken as demand for all kinds of channels, including niche and regional channels, is determined per the choice of the consumers across India.

The broadcaster is in the best position to determine its own target market, keeping in mind the kind of content being programmed for the TV channels.

2. **Should there be a cap on the amount of carriage fee that a broadcaster may be required to pay to a DPO? If yes, what should be the amount of this cap and the basis of arriving at the same?**

RESPONSE:

1.1. Without prejudice to our preliminary submissions above, it is submitted that carriage Fees should not be permitted to continue in the DAS regime, since bandwidth constraints cannot be an excuse for DPOs to seek rental arbitrage.

The authority has already provisioned NCF at Rs. 130 per STB in order to address recovery of capacity cost as well as 20% dealer commission per channel per month for any other overheads associated with DPO operations.

Hence we find it unnecessary to address the issue of capping Carriage Fee.

3. **How should cost of carrying a channel may be determined both for DTH platform and MSO platform? Please provide detailed justification and facts supported by documents/data.**

RESPONSE:

Without prejudice to our preliminary submissions above, we submit that it may be feasible to determine the cost of carrying a channel by working out the capital and operational cost of the DPO's network. An endeavour may be made to consider – cost attributable to one-time establishment, and recurring costs with respect to maintenance / upkeep of the systems, operational issues and retransmission of channels.

4. Do you think that the right granted to the DPO to decline to carry a channel having a subscriber base less than 5% in the immediately preceding six months is likely to be misused? If yes, what can be done to prevent such misuse?

RESPONSE:

It is submitted that notwithstanding the size of the viewership of a TV Channel, where there is a demand and any viewership, the viewing subscribers should have the flexibility and opportunity to watch the channel of their choice. A new channel launched takes time to pick up and be viewed/used by the subscribers/consumers at large therefore, a channel should be carried irrespective of the percentage of subscribers viewing it. Further, focus should on capacity building of DPOs without undermining integrity of systems. TV channels covering regional, kids, infotainment, English entertainment, etc. are already struggling for survival in a hyper-competitive market *inter-alia* owing to reduced viewership and highly limited subscription revenues coupled with high costs of regulatory compliances, content acquisition as well as pay-outs towards marketing and promotion of channels and content. Any restriction of this nature is an infringement of Article 19(1)(a) of the Constitution of India.

Mindful that abovementioned TV channels may be prone to being leveraged by DPOs due to low subscriptions (i.e. less than 5% on a national level although, extremely high demand in their respective markets), it would be in consumer interest to do away with the 5% threshold.

5. Should there be a well-defined framework for Interconnection Agreements for placement? Should placement fee be regulated? If yes, what should be the parameters for regulating such fee? Support your answer with industry data/reasons.

RESPONSE:

It is respectfully submitted that we do not concur that there is any need for specifying any framework for agreements for placement and/or regulating placement fee. As such, no parameter for regulating such fee is being proposed. Submissions made above, may kindly be read as forming part of our reply to question under response.

Without prejudice, we state, that the below mentioned provisions under the Interconnect Regulations already provide for placement of channels –

- DPO to list channels of same genre together consecutively in the EPG and each channel to appear at one place only.

- Channels of same language within the same genre to be listed together consecutively in the EPG.

- DPOs to assign a unique channel number for each television channel available on its network

- Channel number once assigned to a channel not to be altered by the distributor for a period of at least one year from the date of such assignment.

6. **Do you think that the forbearance provided to the service providers for agreements related to placement, marketing or any other agreement is favoring DPOs? Does such forbearance allow the service providers to distort the level playing field? Please provide facts and supporting data/ documents for your answer(s).**

RESPONSE:

In view of submissions made above, the issue of distortion of level playing field and/or forbearance resulting in favourable scenario for DPOs does not require consideration. It is respectfully submitted that placement, marketing and other agreements that are not interconnection agreements are outside the scope of Authority's jurisdiction.

It is humbly submitted that intervention with the respective commercial and business activities for enhancement or value creation by service providers is beyond the scope of directions and may only be curtailed for good reason and as provided for under the TRAI Act and Interconnect Regulations. Intrinsically, over-regulation and curtailment of respective rights of stakeholders are likely to cause irreparable harm to stakeholders while causing unanticipated consequences that would be borne by consumers.

7. **Do you think that the Authority should intervene and regulate the interconnection agreements such as placement, marketing or other agreement in any name? Support your answer with justification?**

RESPONSE:

It is respectfully submitted that placement, marketing or other agreement merely because it is between a broadcaster and a DPO would not automatically mean that such agreement is an interconnection agreement. Further, we do not concur that the Authority should intervene and/or regulate agreements such as, placement, marketing or other agreements. It is submitted that agreements such as, placement, marketing or other similar agreements are not interconnection agreements and should not be regulated. Submissions made above may kindly be read as forming part of our reply to question under response.

8. **How can possibility of misuse of flexibility presently given to DPOs to enter into agreements such as marketing, placement or in any other name be curbed? Give your suggestions with justification.**

RESPONSE:

In view of submissions made above, the issue pertaining to evaluation of misuse of flexibility to stakeholders to enter into agreements such as, marketing, placement or other agreements does not arise. It is submitted that flexibility available to stakeholders to enter into non-interconnection agreements or purely commercial agreements such as, marketing, placement, etc. ought not be interfered with on misplaced belief that such agreements would also qualify as interconnection agreements merely because they have been executed between a broadcaster and a DPO.

We respectfully submit that aside from stakeholder's business considerations, marketing and promotion campaigns serve in building consumer interest, ensuring the public's informed decision making facilitated by awareness and education towards diversity and plurality of views.

9. **Stakeholders may also provide their comments on any other issue relevant to the present consultation.**

RESPONSE:

It is suggested that in the present hyper-competitive environment where vying for the subscribers' attention requires constant investment in programme and content creation to enhance the customers experience, that the Authority observes regulatory non-interference in view of submissions made above. Further, this approach would also serve the best interests of the consumers.