

**April 23, 2010**

**Submissions of ESPN Software India Private Limited (“ESIPL”) to Telecom Regulatory Authority of India (“TRAI”) in response to the Consultation Paper (No. 5/2010) on Tariff Issues related to Cable TV Services in Non-CAS Areas (“Consultation Paper”)**

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**Kind Attention: Chairman  
Telecom Regulatory Authority of India  
Mahanagar Doorsanchar Bhawan,  
Jawahar Lal Nehru Marg,  
New Delhi – 110002.**

We welcome TRAI’s initiative in releasing the Consultation Paper and seeking views of the stakeholders on tariff issues relating to cable TV Services in Non-CAS Areas.

The following response is without prejudice to any of our rights. In particular we reserve our right to challenge any directions, tariff orders, regulations, recommendations or any other order(s) that may be made/passed by the Authority on the subject matter.

Pay-TV Industry in India has shown rapid growth over several years. From 2004, when broadcasting and cable services came under the purview of TRAI, to 2010 when TRAI releases this Consultation paper, market dynamic have undergone a significant change. There has been a considerable growth both on the supply as well as the demand side.

On the demand side, from a 40 million subscribers in 2002<sup>1</sup> the subscriber number has increased to 83 million at the end of 2008<sup>2</sup> and is still growing. Complementing this increase, on the supply side, the broadcasting and distributor sector in India today comprises of 485

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<sup>1</sup> CASBAA, *The Power of Pay TV 2007*

<sup>2</sup> Media partners Asia, *Asia Pacific Pay-TV & Broadband Market 2009*

television channels<sup>3</sup> , 3000-4000 multi system operators<sup>4</sup>, approximately 60,000 LCOs<sup>5</sup>, 7 DTH/Satellite TV operators and several IPTV operators<sup>6</sup>.

The Indian Pay-TV market is diversifying with the roll-out of new delivery platforms such as Direct To Home (DTH), Internet Protocol Television (IPTV) and mobile television. The Hon'ble Authority has also noted in the Consultation Paper that the landscape of the market has changed, from a scenario where 100% cable and satellite (C&S) population was dependent on analog cable services, DTH now commands around 20% market share. Authority further notes in the Consultation Paper that the roll-out of these different viewing platforms have led to a more diverse and rapidly evolving multi platform market which in turn makes choice of platform possible at the consumer end.

All of the above data and developments in the pay-TV market clearly establish that there is now effective competition. In this connection, we place reliance on effective competition conditions as defined by ICT Regulation Toolkit<sup>7</sup> as per which effective competition implies the presence of following market conditions, which, we submit, are being met with by the Indian pay-TV market:

- Buyers have access to alternative sellers for the products they desire (or for reasonable substitutes) at prices they are willing to pay.
- Sellers have access to buyers for their products without undue hindrance or restraint from other firms, interest groups, government agencies, or existing laws or regulations.
- The market price of a product is determined by the interaction of consumers and firms. No single consumer or firm (or group of consumers or firms) can determine, or unduly influence, the level of the price.
- Differences in prices charged by firms (and paid by consumers) reflect only differences in cost or product quality/attributes.

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<sup>3</sup> Business Standard December 10, 2009 Report on Number of channels permitted to be downlinked by Ministry of Information & Broadcasting

<sup>4</sup> TRAI Consultation Paper 5/2010 on Tariff Issues related to Cable TV Services in Non-CAS Areas

<sup>5</sup> TRAI "Foreign Investment Limits for Broadcasting Sector", April 26, 2008

<sup>6</sup> TRAI Consultation Paper 5/2010 on Tariff Issues related to Cable TV Services in Non-CAS Areas

<sup>7</sup> <http://www.ictregulationtoolkit.org/en/Page.About.html#>

We wish to remind the Authority that the non-CAS Price ceiling fixed vide Tariff Order dated October 1, 2004 was merely an interim measure and that it was to continue only until there was no effective competition.

We also wish to refer to the following articulation of TRAI's own position on price regulation:

*It must be emphasized that the regulation of prices as outlined above is only intended to be a temporary measure and till such time there is no effective competition. The best regulation of price is done through competition. Therefore, as soon as there is evidence that effective competition exists in a particular area price regulation will be withdrawn. TRAI will conduct periodic reviews of the extent of competition and the need for price regulation in consultation with all stakeholders.<sup>8</sup>*

However, it is a concern that these tariff regulations do not perceive an exit strategy and there seems no mechanism to take account of the growing effective and consumer-friendly competition. What is required at this point is that TRAI takes note of the dramatic transformation in the Pay-TV industry over the past few years and determine whether continued regulation of tariff is even warranted.

While a re-examination of the regulatory framework is required but the nature of that re-examination needs to be even more carefully considered.

Hon'ble Supreme Court's order dated May 13, 2009 also required TRAI "to study the matter afresh and issue a comprehensive order covering all aspects including the issue of subscription base in non-addressable system". The said order impliedly requires TRAI to put in place a mechanism for assessing whether there is effective competition or there is a market failure at this point in time. Only after that mechanism establishes that there is need

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<sup>8</sup> Telecom Regulatory Authority of India, *Consultation Paper on Issues relating to Tariff for Cable Television Services in Non-CAS Areas*, 2007, quoting its own recommendations of October 2004.

for such tariff regulation should the TRAI proceed to develop a methodology for arriving at tariffs for different channels.

We would also like to submit that this exercise i.e. review of cost structures and profitability of individual channels/genres is premature and should only be done only if and when it is established that an adequate level of competition does not exist.

We do appreciate the time and effort put in by the Authority in carrying out this detailed cost based exercise but again the same will not yield desired results as are required under the TDSAT and Supreme Court orders. It is also seems that Authority has ignored the current market landscape and assumed that there exists a market failure.

As detailed in our submission in response to the consultation papers No. 15/2008 and 4/2009, the level of regulation is presently too high and hindering the achievement of the very objectives<sup>9</sup> that regulation is intended to achieve. As the Hon'ble Authority itself noted, although a primary objective of regulation is to protect consumer interests, "at the same time it is apprehended that over-regulation in a sector that is growing rapidly might have unforeseen consequences."<sup>10</sup>

**Below are our responses to the specific questions raised in the Consultation Paper.**

- 1. Are the figures in Annexure B3 representative for the different genres of broadcasters? If not, what according to you are the correct representative figures? When providing representative figures, please provide figures for the genre, and not of your company.**

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<sup>9</sup> TRAI said in Consultation Paper 5/2008 entitled "Interconnection Issues relating to Broadcasting and Cable Services" that its guiding principles for regulating the broadcasting sector are :

- i) To promote digital transmission
- ii) Restructuring of the sector so as to encourage investment for financial viability and technological upgradation;
- iii) Quality service at an affordable price to the consumer; and
- iv) To enhance competition.

<sup>10</sup> Telecom Regulatory Authority of India, *Consultation Paper on Issues relating to Broadcasting and Distribution of TV Channels*, 2004

We note that the data for broadcasters has been collated in three steps, results of which are provided in Annexure B1, B2 and B3. We are surprised to note that while Authority itself admits in the Consultation Paper that the figures presented in these Annexures do not provide a true representation of financial health of the Industry, it plans to use these same figures as a basis for working out the wholesale and retail tariff.

We now come to the figure mentioned against sports genre in Annexure B3 under point 8. We understand that the Authority has used certain filtration criteria for removing aberrations but unfortunately that does not seem to reflect in the figures presented.

These representative figures, at least of sports genre, are the same as released by TRAI vide its letter dated November 10, 2009<sup>11</sup> and as we submitted in our reply dated November 30, 2009 we are surprised to note that these figures are not accompanied by explanatory notes explaining the basis and methodology adopted by the Authority in arriving at the representative revenue, costs and the resultant EBITDA. In particular, Consultation Paper does not clarify what filtration criterion was used for removing the aberrations in the figures represented in Annexure B3.

The explanations as included in the Consultation Paper are not sufficient and do not clearly explain the rationale/basis and methodology adopted by the Authority in arriving at these figures represented in Annexure B3.

We submit that the figures arrived at by TRAI for sports genre do not correctly represent the revenue/cost/EBITDA of our company. This is why it is very important for us to know the data relied on by TRAI in arriving at these figures. Further, when we compare these figures in Annexure B3 with the figures submitted by us vide our letter dated September 25, 2009, we find that the EBITDA arrived at by TRAI for sports genre is significantly higher than the EBITDA of our company for last 3 accounting years.

In this context, we reiterate that the Hon'ble Authority needs to also bear in mind its

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<sup>11</sup> TRAI letter No. 1-3/2009 – B&CS addressed to All Broadcasters

obligation of transparency, imposed by TRAI Act, when carrying out its (tariff-fixing) functions, which is an important one and necessary to safeguard the interests of consumers and the industry alike.<sup>12</sup> It is imperative for the TRAI to specifically ensure a transparent process, as contemplated under Section 11 (4) of the TRAI Act if it wishes to pass a tariff order.

The Hon'ble TDSAT also emphasized on this very obligation of transparency in its order dated January 15, 2009 in *MSO Alliance v. TRAI* and held that the process undertaken by the TRAI (*vis-à-vis* Telecommunication (Broadcasting and Cable) Services (Second) Tariff (Eighth Amendment) Order 2007) did not satisfy the transparency requirement of the TRAI Act.<sup>13</sup>

TDSAT vide the above order, therefore directed TRAI to study the non-CAS tariff matter afresh in the light of TDSAT's observations therein and noted that:

- The TRAI had not provided any explanation as to how it had arrived at the rates stipulated in the impugned tariff order;
- TRAI was expected to arrive at a tariff based on data and rational analysis;
- The data relied on by TRAI should have been made available to the various stakeholders;
- In exercising its statutory functions the TRAI had to consider the interests of all concerned.

It is imperative that TRAI takes note of TDSAT's observations in the above order<sup>14</sup> and Supreme Court's order dated May 13, 2009<sup>15</sup> (upholding the said TDSAT Order) and acts upon the same, more so because TRAI has undertaken this tariff fixation exercise pursuant to the said orders. Failing which, this tariff fixation process and tariff order thereon may again suffer from the same deficiencies as noted in the earlier tariff order(s).

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<sup>12</sup> Section 11 (4) of the Telecom Regulatory Authority of India Act, 1997

<sup>13</sup> Order of Telecom Disputes Settlement & Appellate Tribunal dated 15 January 2009 in Appeal Nos 9(C) of 2006 (*MSO Alliance v TRAI & Ors*); 10(C) of 2007 (*SET Discovery Private Limited v TRAI*); 11(c) of 2007 (*Zee Turner Ltd v TRAI & Ors*); 12(C) of 2007 (*Star India Pvt Ltd v TRAI & Ors*); 13(C) of 2007 (*Intermedia Cable Communications Pvt Ltd v TRAI*) and 15(C) of 2007 (*SUN Network Ltd v TRAI*).

<sup>14</sup> *ibid*

<sup>15</sup> Order of Supreme Court dated May 13, 2009 in Civil Appeal No(s). 829-833 of 2009 (*Telecom Regulatory Authority of India v. Set Discovery P. Ltd.*)

Further, as an expert body charged with the task of tariff fixation and promoting healthy growth of the industry, the TRAI is expected to arrive at a tariff based on data and rational analysis. Any and all data and relevant analysis on which the Authority has relied or intends on relying before issuing a tariff order must be made available to stakeholders.<sup>16</sup> Without more, this tariff fixation exercise to date would once again not fulfil the requirement of transparency stipulated in the TRAI Act.<sup>17</sup>

- 2. Are the figures in Annexure B3 representative for the different genres of broadcasters? If not, what according to you are the correct representative figures? When providing representative figures, please provide figures for the genre, and not of your company.**
  
- 3. Are the figures in Annexure B5 representative for aggregators? If not, what according to you are the correct representative figures? When providing representative figures, please provide figures for the category, and not of your company.**
  
- 4. Are the figures in Annexure B7 representative for the national MSOs? If not, what according to you are the correct representative figures? When providing representative figures, please provide figures for the category, and not of your company.**
  
- 5. Are the figures in Annexure B7 representative for the regional MSOs? If not, what according to you are the correct representative figures? When providing representative figures, please provide figures for the category, and not of your company.**
  
- 6. Are the figures in Annexure B9 representative for the LCOs with > 500 subscribers? If not, what according to you are the correct representative figures? When providing**

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<sup>16</sup> Order of Telecom Disputes Settlement & Appellate Tribunal dated 15 January 2009 in Appeal Nos 9(C) of 2006 (*MSO Alliance v TRAI & Ors*); 10(C) of 2007 (*SET Discovery Private Limited v TRAI*); 11(c) of 2007 (*Zee Turner Ltd v TRAI & Ors*); 12(C) of 2007 (*Star India Pvt Ltd v TRAI & Ors*); 13(C) of 2007 (*Intermedia Cable Communications Pvt Ltd v TRAI*) and 15(C) of 2007 (*SUN Network Ltd v TRAI*).

<sup>17</sup> *Ibid.*

**representative figures, please provide figures for the category, and not of your company.**

**7. Are the figures in Annexure B9 representative for the LCOs with =< 500 subscribers? If not, what according to you are the correct representative figures? When providing representative figures, please provide figures for the category, and not of your company.**

**8. What according to you is the average analog monthly cable bill in your state or at an all India level?**

ESIPL is not responding to above issues as they relate to financial information pertaining to other stake holders.

**9. Is the market for cable services in non-CAS characterized by the following issues:**

- (i) Under-reporting of the analog cable subscriber base**
- (ii) Lack of transparency in business and transaction models**
- (iii) Differential pricing at the retail level**
- (iv) Incidence of carriage and placement fee**
- (v) Incidence of state and region based monopolies**
- (vi) Frequent disputes and lack of collaboration among stakeholders**

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

The practices listed above are the key concerns/challenges faced by the broadcasting industry. We do appreciate the fact that TRAI has raised these concerns in the Consultation Paper and has sought for comments but that will not really solve the problem at hand. As a responsible economic regulator, TRAI needs to analyze these issues and come up with effective reforms which address these issues.



It is known fact that most of these concerns have been plaguing the broadcasting industry for a long time but not much has been done to eradicate these problems. Now and again, raising these issues for consultation cannot substitute for factual and analytical examination.

At the same time, it needs to be borne in mind that the presence of these issues cannot be construed as leading to the conclusion that the broadcasting industry as a whole has failed to a degree that it requires tariff regulation at all levels.

We would now offer comments to each of these issues:

- (i) Under-reporting of the analog cable subscriber base and (ii) Lack of Transparency in Business and Transaction Models: We agree with Authority's observation that there is no reliable information on the number of subscribers receiving cable TV services. Authority mentions in the Consultation Paper that the negotiated subscriber base is less than 10% of the estimated base of 68 million analog cable homes. Having said that, under declaration does vary considerably from area to area and depends on the relative bargaining power of stakeholders. However, this is not an indication of market failure rather this under declaration is due to lack of transparency in the system.

While the Interconnection Regulation as amended from time to time<sup>18</sup> does provide a mechanism for negotiation and finalization of subscriber base in non-addressable markets but since these regulations have not been effectively enforced by the Regulator, level of under-declaration remains unchanged.

Under declaration in turn leads to lack of transparency in business and transaction models. There is lack of trust and transparency amongst stakeholders but then again tariff regulation is not the solution. If such a lack of transparency persisted in spite of knowing actual subscriber numbers, then a suspicion of

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<sup>18</sup> The Telecommunication (Broadcasting and Cable Services) Interconnection Regulation, 2004 and amendments thereto

market failure might be warranted. Therefore, what is required is not tariff regulation but effective enforcement of the existing interconnection regulations.

- (iii) Differential Pricing at the retail level: The fact that differential prices are present at the retail level establishes the fact that there exists adequate competition at the retail level. We do not agree with the assumption in the Consultation Paper that “some consumers pay more than others for the same product”. Television service is different from broadband service in the telecom industry, where the product is standard. In the television industry, there are variations in content packages and service levels. And of course the fact that subscribers pay less in one area compared to another may suggest that the level of competition is higher in that area than others, based on which consumers are offered a discounted cable fee. (Where rates are higher, it may suggest that the cable operator is offering better service and quality content to subscribers who are willing to pay for such services.) Clearly, the growing penetration of DTH services has affected competition levels, and this only accentuates this point.
  
- (iv) Incidence of Carriage and Placement Fee: Authority notes in the Consultation Paper that the main reason behind rise and propagation of carriage and placement fee could be the capacity constraint of analogue cable. Mere identification of the problem will not solve it, Regulator needs to identify a solution. Once again incidence of carriage and placement fee should not be viewed as a market failure requiring tariff regulation. In this context it is worth noting that constraints on subscription revenue because of tariff regulation force greater reliance on advertising revenue, increasing the importance of audience reach in business models, and accentuating the prevalence of carriage fee.
  
- (v) Incidence of state and region based monopolies: Authority does note in the Consultation Paper that “lack of visibility at the last mile, especially with respect to subscriber numbers, creates practical issues with assessing the presence or absence of monopoly. To detect and control monopolistic situations, the industry requires a framework within which information can be gathered and analyzed.”

So the paper itself admits it is not possible to detect and control monopolistic market power because the analogue system does not provide a framework for gathering and analyzing information. It is a defect of the analogue system which cannot be solved with excessive tariff regulation. On the contrary, it requires a framework for gathering and analyzing information.

- (vi) Frequent disputes and lack of collaboration among stakeholders – It can not be denied that there are frequent disputes and which are in most cases a result of the above issues i.e. all arising from the defects of the analogue systems. These issues do adversely affects the growth of the industry but it can not be concluded that because there are such issues leading to disputes, TRAI needs to regulate tariffs because fixation of tariff is not the solution.

We submit that it is time Authority wakes up to these issues and takes action rather than raising these for consultation. To begin with, as submitted above, the Interconnection Regulations dealing with the issue of subscriber base in non-addressable markets et. al. need to be seriously enforced.

**10. Which of the following methodology should be followed to regulate the wholesale tariff in the non-CAS areas and why?**

- i) Revenue share**
- ii) Retail minus**
- iii) Cost Plus**
- iv) Any other method/approach you would like to suggest**

As would be clear from our introductory comments, we do not support price regulation of the broadcasting sector. Even TRAI has not provided any data or analysis justifying the requirement for fixing of tariff and accordingly none should be set.

We submit that there is no need to fix wholesale or retail tariff for that matter as there now exists adequate competition to discourage perverse pricing.

With respect to the options of methodologies proposed, we wish to submit that no matter which methodology is used, since the figures forming the basis (as presented in Annexure B1, B2 and B3) do not provide a true representation of the financial health of the industry<sup>19</sup>, not much success can be achieved by using any of these methodologies.

Furthermore, TRAI in its own analysis of 11 jurisdictions<sup>20</sup> (presented in the Consultation Paper) notes that across all these jurisdictions guiding principle for regulators is to promote growth through effective competition and that in none of these markets wholesale prices are regulated.

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

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

The current paper deals with non-CAS areas and recognises the issue of lack of reliable subscriber data due to use of analogue cable systems. Given that, it will be difficult to devise a fair and effective revenue share model.

Regulator itself admits in the Consultation Paper that transparency on: (1) the number of subscribers for a particular product/ service and, (2) the price paid by these subscribers, are the pre-requisites for determining revenue share. Regulator cites mobile value added service (VAS) as an example for successful roll-out of this mechanism but what needs to be noted is that both the foregoing pre-requisites are met with by VAS sector which makes it possible for revenue share model to be a success therein. Therefore, revenue sharing is an efficient form of price control where addressability exists.

Cost-based tariff regulation requires detailed information regarding one time and recurring costs of creating and transmitting content. This method also not valid for broadcasting

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<sup>19</sup> Noted by TRAI in the Consultation Paper

<sup>20</sup> United States, United Kingdom, Germany, France, Canada, Australia, Korea, Singapore, Taiwan, South Africa and Brazil.

industry because media products are not standard commodities or commodity services and there can not be a standard assumption vis-à-vis costs.

Different products have different characteristics, and in the absence of specific data on costs associated with these different products and without sharing the relevant information with stakeholders, TRAI can not reasonably undertake any cost-based analysis. We note that TRAI is unable to share these details since the financial information of relevant companies is not in the public domain and that there is no prospect of a change in this situation, we do not support adoption of cost based method.

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

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

As we mentioned in our introductory comments, we do not support price regulation of the broadcasting sector. We also note that TRAI has not provided any data or analysis in this detailed Consultation Paper that justifies requirement for fixing of tariff and accordingly none should be set.

Therefore, forbearance is the option to go ahead with and there is no need to fix wholesale tariffs for the broadcasting sector as there is sufficient competition between broadcasters, amongst different distribution platforms, to discourage perverse pricing. For example, there are:

- more than 450 channels available;
- 7 DTH operators and several IPTV operators operating in India; and

- 3000-4000 MSO and tens of thousands of local cable operators.

We rely on what Hon'ble Authority stated in consultation paper No. 4/2009, "competitive play of market forces [are] likely to lead to discovery of efficient prices in the market in the interest of all stakeholders."<sup>21</sup>

For all of the above reasons, we do not support price regulation of the broadcasting sector, particularly price regulation which has been described as being amongst "the most restrictive in the world".<sup>22</sup>

If the Hon'ble Authority were to introduce price regulation (a position we do not support and which hasn't been backed up by any data and analysis), we submit that any such regime should continue only on an interim basis and that the TRAI set a "sunset" date for deregulation.

We support Hon'ble Authority's goal of more competition and less regulation<sup>23</sup> and therefore suggest setting of a "sunset" provision because the same will encourage long-term planning and investment in the Pay-TV industry.

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

We are surprised that even after undertaking an analysis of 11 international jurisdictions<sup>24</sup> and finding that India is most excessively regulated, TRAI is still proposing micro-

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<sup>21</sup> TRAI Consultation Paper on *DTH Issues relating to Tariff Regulation & New Issues Under Reference*

<sup>22</sup> CASBAA, *Regulating for Growth: A Regulatory Regime Index for Asia Pacific Multichannel Television 2008* at 31.

<sup>23</sup> Telecom Regulatory Authority of India, *Consultation Paper on Interconnection Issues relating to Broadcasting and Cable Services*, 2008

<sup>24</sup> United States, United Kingdom, Germany, France, Canada, Australia, Korea, Singapore, Taiwan, South Africa and Brazil.

management of business models. There is no ground for Regulator to regulate business models of corporate entities.

In any case, different broadcasters from different genres of channels will of necessity adopt different business models, and this should be left for them to decide. It is absolutely not desirable or necessary for the regulator to interfere in such purely commercial/business matters.

We once again submit that such heavy regulations will distort the market. In fact such extreme of form of tariff regulations will become a major threat to the very survival of the channels, thereby reducing consumer choice.

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

**i) Cost Plus**

**ii) Consultative approach**

**iii) Affordability linked**

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

As submitted above, we do not support price regulation of the broadcasting sector. We are not in favour of any tariff being fixed either at wholesale or at retail level. We are in support of international methodology of free market/forbearance as a form of retail tariff as presented in the Consultation Paper.

As discussed earlier in this reply, there is now adequate competition in the pay-TV sector and market forces are capable of controlling the price a content provider is able to charge for its content and that a MSO/LCO is able to charge subscribers.

The Consultation Paper also notes that none of the proposed methodologies can work in the current (non-addressable) pay-TV environment.

Lets consider cost plus method, two main inputs required for this model are per subscriber cost of content and per subscriber cost of transmission/distribution. Further, a cost based method assumes that channels/offering by different commodities are standard products/commodities, which in this case they are not. Authority itself admits in the Consultation Paper that the per subscriber cost is limited by the assumption of a standard channel mix across the entire subscriber base (which as submitted earlier is a fallacious assumption) because due to there is fragmentation at the last mile and lack of addressability, there are no reliable data providing details of the channels mix of various operators.

Consultative approach though seems a better option comparatively but again as Regulator admits in the Consultation Paper this may not work well in the Indian cable sector because it not a licensed regime.

An “affordability” approach is justified only where the product is essential for daily living and we humbly submit that pay television is not an essential service. For that matter, there has not been a legislative determination that television is essential in India, and one seems highly unlikely.

Nonetheless, as submitted above, if TRAI were to introduce tariffs (a position we do not support), it should definitely nominate a “sunset date” for the removal of such tariffs.

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

The applicable laws in India provide for provision of basic television services free of charge by the national broadcaster and so is being done but there is no law that stipulates other pay channels as a basic necessity and hence the affordability approach is totally inappropriate in this case.



Regulator has cited Taiwan as an example of one of those jurisdictions to have retail rate regulation, and has had fixed tariff ceilings in force for more than 10 years but we cannot ignore that these regulations in Taiwan have resulted in much delay to network upgrades and gradual “blanding out” of the content options available.

For reasons similar to those discussed above, with respect to wholesale tariffs, cost-based tariffs and revenue sharing are not feasible regulatory approaches in an analog environment. Furthermore, we note that TRAI has also highlighted additional factors for retail tariffs such as ‘wide variation in MSO/LCO infrastructure’ etc., and these further point towards the fact that cost-based tariffs are not feasible.

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

As is evident from our earlier submissions, we do not support micro-management of business models, in a competitive marketplace, by the Regulator. The role of the regulator should be that of an enabler providing a framework for effective competition and not specifying factors used by competitors to structure their business offerings. The market has now matured enough for TRAI to eschew the role of a tariff-fixer and omnipresent controller.

We submit that the decisions on the construction of an operator’s bouquet should be an operator’s choice but can be under constant review and revision. TRAI has neither the resource nor the responsibility to prescribe such details, and if it attempts to do so it will only render the industry more rigid and less able to respond to competitive factors. Therefore, we support the view that this ratio be left to the market forces in view of the presence of alternative delivery platforms like DTH.

- 19. Should the broadcasters be mandated to offer their channels on a-la-carte basis to MSOs/LCOs? If yes, should the existing system continue or should there be any modification to the existing condition associated with it?**
- 20. How can it be ensured that the benefit of a-la-carte provisioning is passed on the subscribers?**
- 21. Are the MSOs opting for a-la-carte after it was mandated for the broadcasters to offer their channels on a-la-carte basis by the 8th tariff amendment order dated 4.10.2007. If not, why?**

We do not support any requirement that broadcasters make available pay channels on an a-la-carte basis and no data or analysis has been provided by TRAI to justify such a proposal.

Economists around the world unanimously agree that bundling in competitive markets is efficient and pro-consumer because of the efficiency benefits and increase in competition it provides.<sup>25</sup>

In addition, consumer choice is actually *reduced* by such a requirement because it discourages investment in new or niche channels. If broadcasters can't secure wide distribution (and hence, exposure) through a bouquet arrangement, they're less likely to take the commercial risk involved in launching such channels. MSO/LCOs are also less likely to take the risk of carrying new or niche channels as part of a limited line-up if consumers can elect not to take them.

We note that the Hon'ble TDSAT has held that any imposition of an a la carte requirement has to be bolstered by safeguards for both the consumer and broadcaster,<sup>26</sup> particularly

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<sup>25</sup> Pages 7-17 CAP Analysis of Federation Communication Commission's First and Further Report on A-la-carte pricing of Cable Television. March 7, 2006

<sup>26</sup> Order of Telecom Disputes Settlement & Appellate Tribunal dated 15 January 2009 in Appeal Nos 9(C) of 2006 (*MSO Alliance v TRAI & Ors*); 10(C) of 2007 (*SET Discovery Private Limited v TRAI*); 11(c) of 2007 (*Zee Turner Ltd v TRAI & Ors*); 12(C) of 2007 (*Star India Pvt Ltd v TRAI & Ors*); 13(C) of 2007 (*Intermedia Cable Communications Pvt Ltd v TRAI*) and 15(C) of 2007 (*SUN Network Ltd v TRAI*).

when there are capacity restraints in the number of channels an operator can provide to consumers.

Also, as Hon'ble Authority has noted in the Consultation Paper, w.r.t. analogue market, in the absence of addressability and technology that allows a-la-carte uptake at the subscriber end – it is not viable to push the broadcasting industry to align itself to a a-la-carte provisioning.

As a broadcaster, pursuant to 8<sup>th</sup> tariff amendment order dated October 4, 2007, we do offer our channels to MSOs on a-la-carte basis but MSOs realize that a-la-carte provision is less efficient as it reduces efficiencies related to bundling – which is an important driver of growth at retail level<sup>27</sup>. This is why out of our more than 5000 direct operators (MSOs/LCOs) hardly any number has opted for a-la-carte option.

**22. Should the carriage and placement fee be regulated? If yes, how should it be regulated?**

**23. Should the quantum of carriage and placement fee be linked to some parameters? If so, what are these parameters and how can they be linked?**

**24. Can a cap be placed on the quantum of carriage and placement fee? If so, how should the cap be fixed?**

We submit that no regulation of pricing in broadcasting is required. However, if the TRAI does introduce a wholesale tariff (a position we do not support and which hasn't been justified by any data or analysis), it would be unreasonable to give MSOs both the benefit of a wholesale tariff and the opportunity to charge broadcasters an additional carriage fee. In effect, by such an arrangement the broadcasters would be subsidizing the MSOs business and would be restricted in their ability to invest in programming, infrastructure and technology, with a corresponding impact on the Pay-TV industry as a whole.

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<sup>27</sup> TRAI Consultation Paper 5/2010 on Tariff Issues related to Cable TV Services in Non-CAS Areas

If a wholesale tariff, or wholesale and retail tariff, is set by the TRAI (a position we do not support and which hasn't been backed up by data and analysis), we submit that MSOs should be prohibited from charging any carriage fee to broadcasters.

If TRAI elects to introduce a wholesale tariff, or a wholesale and retail tariff, without prohibiting the charging of a carriage fee (a position we do not support and which hasn't been justified by any data or analysis) then a ceiling should be prescribed which takes into account the impact of the wholesale tariff on broadcasters' ability to recover costs and to invest in programming, infrastructure and technology and which ensures that MSOs do not make a windfall gain at the expense of broadcasters.

**25. Is there a need for a separate definition of commercial subscriber in the tariff order?**

**26. If the commercial subscriber is to be defined in the tariff order, then does the existing definition of 'commercial subscriber' need to be revised? If yes, then what should be the new definition for the commercial subscriber?**

**27. In case the commercial subscriber is defined separately, then does the present categorization of identified commercial subscribers, who are not treated at par with the ordinary subscriber for tariff dispensation need to be revised? If yes, how should it be revised?**

There is no need for a separate definition of commercial subscriber and if it is necessary to define the term "commercial subscriber" (a position we do not support), it should be defined in an all inclusive manner to include all subscribers except residential subscribers.

Broadcasters execute rights agreements with various rights holders and the definition of "commercial subscribers" would differ in the various rights agreements. If the Hon'ble Authority were to issue a standard definition of "commercial subscribers", it will cause difficulties with broadcasters' existing, long term rights deals.

The differentiation/categorisation provided by Tariff Order dated November 21, 2006 issued for commercial subscribers should be removed and, if the Hon'ble Authority continues to make tariff orders (a position we do not support), no commercial subscriber (irrespective of category) should be allowed the benefit of any tariff order for residential/domestic subscribers.

**28. Should the cable television tariff for these identified commercial subscribers be regulated? If yes, then what is your suggestion for fixing the tariff?**

We submit that there should be no price regulation of pay television services. However, if the Hon'ble Authority were to continue regulating price (a position we do not support), we respectfully submit that prices for commercial subscribers should not be regulated.

Hon'ble Authority has itself observed, since 2007, from the reports submitted by broadcasters to TRAI that the rates for commercial subscribers are typically in the range of 3 to 5 times than the rates charges for the ordinary subscribers and that this ratio has been more or less the same over the past 3 years, indicating stability in these negotiations.<sup>28</sup>

Arrangements with commercial subscribers are not typically regulated in other countries, and there does not appear to be any compelling reason to justify such regulation in India. This is so because regulation of pay-television industries is typically focused on consumer protection.

Commercial subscribers have sufficient bargaining power to protect their own interests and tend to benefit commercially from access to pay television services. Accordingly, it should be left to the market to determine the most appropriate distribution channel, and applicable terms and conditions, for provision of pay television services to commercial subscribers.

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<sup>28</sup> TRAI Consultation Paper 5/2010 on Tariff Issues related to Cable TV Services in Non-CAS Areas

We therefore submit that contractual arrangements between broadcasters and commercial subscribers needn't be regulated as no analysis has been provided demonstrating the need for such regulation.

**29. Do you agree that complete digitization with addressability (a box in every household) is the way forward?**

**30. What according to you would be an appropriate date for analog switch off? Please also give the key milestones with time lines.**

**31. What is the order of investment required for achieving digitization with addressability, at various stakeholder levels (MSOs, LCOs and Customers)?**

**32. Is there a need to prescribe the technology/standards for digitization, if so, what should be the standard and why?**

**33. What could be the possible incentives that can be offered to various stakeholders to implement digitization with addressability in the shortest possible time or make a sustainable transition?**

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

In this connection, we need to highlight to the Regulator, a major concern faced by broadcasters while working their way to digitization. This is concerning hybrid cable networks.

The Authority has decided to not to lay down specific regulations in respect of hybrid cable networks in non-CAS areas which provide both types of service, i.e., analogue (without

encryption) and digital (with encryption) services, because the interconnection regulations take care of addressable as well as non-addressable systems. Regulator also wanted that finer details to be worked out by the parties through commercial negotiations.<sup>29</sup>

However, we are facing a situation where Hybrid cable network operators are interpreting the above to mean that their networks are not covered by interconnection regulation. In fact, one of the Hybrid networks is contending in TDSAT that pursuant to the above paragraph, their digital network/system is not covered by the March 17, 2009 regulation.<sup>30</sup>

We take this opportunity to request TRAI to issue a clarification stating that Hybrid cable networks (i.e. both their analogue and digital systems) are very much governed by concerned interconnection regulations. Further, since such networks are operating two systems they need to execute two separate agreements with the broadcasters i.e. one agreement for analogue network and a separate agreement for digital network.

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

- Digitization should be the stated top priority for the sector, at every level.
- Role of the government in this process of digitization i.e. expectations/support required from the Government should be consulted with all stakeholders
- What are the needs of the stakeholders that they cannot meet voluntarily and hence require the government to do.
- Announcement should be made of a clear division of responsibilities, again pursuant to consultation with stakeholders.
- A neutral body – to be supervised and directed by the TRAI – should be identified to help move the process forward. It should develop the details of a plan, identify key tasks, prepare the timetable, monitor progress, raise “red flags” where progress is

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<sup>29</sup> Paragraph 29 of the Explanatory Memorandum to The Telecommunication (Broadcasting and cable Services) Interconnection (Fifth Amendment) Regulations, 2009 dated March 17, 2009.

<sup>30</sup> Petition 225 (c) of 2009 *Hathway Cable & Datacom Private Limited & Ors. V. ESPN Software India Pvt. Ltd.*

lagging and report, both internally to the government and externally to stakeholders and the public.

- As necessary, seek legislation to make it possible for all legal/regulatory bodies to support the process. The TRAI should be empowered to achieve the plan; it should not be left for the government's agencies to implement on their own.
- A back-up framework should be specified during the transition period during which not all areas can achieve complete addressability.

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

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

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

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

**34. What is your view on the structure of license where MSOs are licensed and LCOs are franchises or agents of MSOs?**



We support TRAI's objective of licensing MSOs for ensuring that growth of the industry happens in a structured fashion. We also note that the Regulator has in the Consultation Paper given a brief note on the areas this licensing regime would cover and its components, we are in agreement with that.

In addition to the points covered we suggest that Regulator makes compliance with the Interconnection Regulations one of the eligibility criteria for grant of license and non-compliance a reason of suspension or revocation of license.

### **35. What would be the best disclosure scheme that can ensure transparency at all levels?**

While we are not against a disclosure scheme which ensures transparency but Regulator needs to appreciate that the broadcasting industry at present is in dire need of transparency/disclosure as follows - MSO to LCO, MSO/LCO to consumer and MSO/LCO to Broadcaster. This would facilitate TRAI's objective of transparency to the consumer in terms of service received and paid for.

On the intent of proposed disclosure regime mentioned in the Consultation Paper<sup>31</sup>, we request the Hon'ble Authority to clarify what business information it is referring to when it says "Availability of full business information amongst stake holders to support decision making". Depending on how TRAI defines "business information", we would comment on the degree of confidentiality of such business information.

Clarification is also sought as to in which way decision making will be supported by availability of such information. If "decision making" here is referring to decision making by TRAI in connection with process of monitoring the industry, how will availability of "business information" amongst stakeholders facilitate decision making by TRAI.

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<sup>31</sup> Page 97, TRAI Consultation Paper 5/2010 on Tariff Issues related to Cable TV Services in Non-CAS Areas

**36. Should there be a 'basic service' (group of channels) available to all subscribers? What should constitute the 'basic service' that is available to all subscribers?**

As submitted above, broadcast services or television services are not essential for daily living and that pay television is not an essential service so as to be provided to all subscribers.

However, if the Regulator decides to make available a group of channels as basic service to all subscribers, we agree with TRAI to the extent that such service should include national public service broadcaster's (DD) channels for news, entertainment, regional and sports content.

Regulator may consider giving interested broadcasters an option to negotiate with MSOs for including their channel(s) in the basic service.

**37. Do you think there is a need for a communication programme to educate LCOs and customers on digitization and addressability to ensure effective participation? If so, what do you suggest?**

We agree with the Regulator that a communication programme should help in effective participation by LCOs and consumers in roll-out of digitization.

While designing such a communication programme, in our opinion, Regulator needs to ensure that MSOs/LCO are made of aware of applicable regulation and relevant policies and importance of complying with it<sup>32</sup>.

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<sup>32</sup> In this connection also refer to our response to issues 29 to 33 hereinabove.