

Date: 1st July, 2013

To,
Mr. Raj Kumar Upadhyay,
Advisor (B&CS),
Telecom Regulatory Authority of India,
Mahanagar Doorsanchar Bhawan,
Jawahar Lal Nehru Marg,
New Delhi -110 002.

Ref: Consultation Paper No: 5/2013 dated 3rd June 2013

Respected Sir,

This is with reference to our letter dated 20th June, 2013 on issues related to Monopoly/ Market dominance in Cable TV services.

Please find enclosed our submissions on the subject.

For, Gujarat Telelink Private Limited



Authorised Signatory

Gujarat Telelink Pvt. Ltd.

C-202, 2nd Floor, Sahajanand Shopping Centre, Opp. Swaminarayan Temple, Shahibaug, Ahmedabad - 380 004.
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To

Mr. Raj Kumar Upadhyay,
Advisor (B&CS),
Telecom Regulatory Authority of India,
Mahanagar Doorsanchar Bhawan,
Jawahar Lal Nehru Marg,
New Delhi - 110 002.

Dear Sir,

This has reference to the Consultation Paper on 'Monopoly / Market Dominance in Cable TV Services' dated 03.06.2013 (hereinafter referred to as the Monopoly Consultation) issued by the Telecom Regulatory Authority of India (TRAI) on its website (www.traigov.in) and asking for our written comments on the said Consultation Paper by 24.06.2013, which has been extended by a week to 01.07.2013.

The process of consultation with the stakeholders is a prelude to the recommendation to be made by TRAI and the process of consultation has been undertaken by TRAI pursuant to the reference dated 12.12.2012 made by the Ministry of Information and Broadcasting (MIB) under Section-11(1)(a) of the Telecom Regulatory Authority of India Act, 1997 (hereinafter referred to as the said TRAI Act).

Registration Certificate

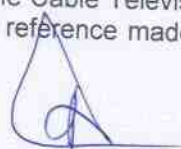
It may be clarified that Gujarat Telelinks Private Limited (GTPL) was also granted the requisite registration certificate under Section 4 of the Cable Television Network (Regulation) Act, 1995 (hereinafter referred to as the said Cable Act) in Form 3 under Rule 5 at its respective business addresses; a true sample copy of the registration certificate Number 29 dated 19.12.2012 in Form 3 under Rule 5 at its business address in Ahmedabad, Gujarat granted by the Deputy Post Master, Revdibazar HO, Ahmedabad is enclosed herewith and marked as **Enclosure-1**.

Provisional MSO Registration

GTPL as a MSO was also granted the requisite Registration Certificate by the MIB under Rule 11E of the Cable Television Network Rules, 1994 for operating in the cities/towns/areas in the States of Gujarat, West Bengal, Jharkhand, Maharashtra, Assam & Madhya Pradesh notified under Section 4 A of the said Cable Act. Further, GTPL as a MSO was also granted the requisite Registration Certificate under Rule 11E of the Cable Television Network Rules, 1994 by the MIB for operating in the city/town/area of Phase II cities namely, Visakhapatnam, Hyderabad, Patna, Faridabad, Srinagar, Bangalore, Mysore, Indore, Bhopal, Jabalpur, Amritsar, Ludhiana, Coimbatore, Allahabad, Agra, Ghaziabad, Kanpur, Lucknow, Meerut, Varanasi and Chandigarh notified by Government by notification dated 11.11.2011 under Section 11A of the said Cable Act. True copies of the Registration Certificates are enclosed herewith and marked as **Enclosure-2A&B**.

Commencement of Consultation- MIB Request to TRAI

It may be mentioned here that the process of consultation had commenced by letter dated 12.12.2012 from MIB to TRAI requesting TRAI to provide a recommendation under Section-11(1)(a) of the said TRAI Act as to whether any restriction should be imposed on MSOs/LCOs to ensure fair competition, improved quality of service and equity and to prevent monopolies/accumulation of interests and also the form, nature and scope of such restrictions and the amendments in the Cable Television Network (Regulation) Act, 1995 (hereinafter referred to as the said Cable Act). The reference made by the MIB to the TRAI was in the following terms:



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"In order to ensure fair competition improved quality of service and equity, should any restriction be imposed on MSOs / LCOs to prevent monopolies / accumulation of interests? If yes, what restriction should be imposed and what should be the form, nature and scope of such restrictions. Accordingly, amendments required in the Cable Television Network (Regulation) Act, 1995 and Rules framed thereunder may also be suggested."

Our preliminary objections to the Consultation Paper are given for and on behalf of GTPL, which are fundamental and basic and without prejudice to one another and go to the very root of exercise of jurisdiction are being filed herewith.

No reference to Monopoly/Market Dominance

At the very outset, we wish to submit that Section 11(1)(a) of the TRAI Act does not make any reference to Monopoly/Market in Cable TV Service, which is the heading of the present Consultation Paper. Section 11(1)(a) of the said TRAI Act neither refers to monopolies/accumulation of interests nor to the said Cable Act. It is respectfully submitted that TRAI is a statutory body created by the TRAI Act and has to act in accordance within the scope of the power of recommendation as conferred upon it under Section 11(1)(a) of the said TRAI Act. The Consultation Paper dated 3.6.2013 fails to state as to how and in what manner the provisions of Section 11(1)(a) of the said TRAI Act has been invoked and the process of preparing the Consultation paper has been undertaken.

MIB reference beyond S.11(1)(a) of TRAI Act

We wish to respectfully submit that MIB has wrongly invoked Section 11(1)(a) of the TRAI Act calling upon TRAI to consider and recommend restrictions on MSOs/LCOs by certain amendments to the said Cable Act without referring to the express provisions of Section 11(1)(a) of the said TRAI Act, which is extremely limited and does not cover the contents of the MIB reference. Any proposed restriction to be imposed on MSOs/LCOs to ensure fair competition, improved quality of service and equity and to prevent monopolies/accumulation of interests and also the form, nature and scope of such restrictions and the amendments in the Cable Television Network (Regulation) Act, 1995 would clearly fall outside the scope of Section 11(1)(a) of the said TRAI Act.

Registration certificates- Expressly Authorised by Law

We wish to further submit that MSOs/LCOs have been granted registration certificates under Section 4 of the said Cable Act to operate from their respective business addresses. Further, MIB has itself granted registration certificates to the MSOs including GTPL under Rule 11E of the Cable Rules as referred to above to operate in cities/towns/areas of certain States as well as registration certificates under Rule 11E of the Cable Rules to operate in city/town/area of specified Phase II as per notification dated 11.11.2011 issued by the Government. The business operations of the MSOs/LCOs are preceded by the grant of registration certificates by the Government, which are expressly authorised by law namely, the said Cable Act and the Cable Rules framed thereunder. The MSOs are further entitled in law to operate in the cities/towns/areas of the specified States as well as the specified cities of Phase II in terms of notification dated 11.11.2011 issued by the Government.

Cannot do indirectly what cannot be done directly

There is no provision under the said Cable Act defining or dealing with 'monopolies', 'market dominance', 'accumulation of interest'. There is no provision under the Cable Act or Cable Rules permitting the MIB to make a reference to TRAI for recommendation to impose restrictions on MSOs/LCOs by amendments in the said Cable Act. Article 19(1)(g) of the Constitution of India guarantees to its citizens the fundamental right of freedom to trade. We wish to respectfully submit that it is not open to the MIB to do indirectly through a reference to TRAI to make a recommendation what cannot be done directly under the Cable Act and Cable Rules. The reference made by MIB in the aforesaid terms is clearly outside the scope of recommendation as provided under Section 11 (1)(a) of the said TRAI Act and therefore contrary to law and ought not to be proceeded with.



Monopoly/Market Dominance-outside scope of TRAI Act

We wish to submit that TRAI is constituted under the provisions of the TRAI Act, 1997 and is a creature of the statute and therefore its role in making recommendations has to be confined to and limited to the statute and therefore its role in making recommendations has to be confined to and limited to Clauses (a)(i) to (a)(viii) of Section 11(1) of the TRAI Act. In view thereof, we submit that it is not clear as to how the TRAI has undertaken the process of consultation under Section 11(1)(a) of the TRAI Act which neither refers to Monopoly/Market Dominance nor to the said Cable Act. TRAI can neither recommend under Section 11(1)(a) of the TRAI Act any restriction be imposed on MSOs/LCOs to ensure fair competition, improved quality of service and equity and to prevent monopolies/accumulation of interests nor recommend the amendments in the Cable Television Network (Regulation) Act, 1995..

Order of Competition Commission of India

We wish to submit that the letter dated 12.12.2012 from the Secretary, Ministry of Information and Broadcasting to the Chairman TRAI refers to in para 5 of the said letter to the order passed by the Hon'ble Competition Commission of India(CCI) under the provisions of the Competition Act, 2002 recently with regard to monopolistic practices adopted by MSO and three other operating in a State against which a cease and desist order was passed besides the imposition of certain penalties. This is the basis of the reference made by MIB to TRAI for recommendation under Section 11(1)(a) of the TRAI Act. We wish to submit that the reference to an order passed by the Hon'ble CCI under the Competition Act clearly amounts to an admission on the part of MIB that issues of monopolies/dominant position are specifically covered by the Competition Act and the Hon'ble CCI created thereunder has rightly exercised its jurisdiction thereunder in relation to a dispute between certain MSOs/LCOs. Notwithstanding the above, the MIB is erroneously proceeding to refer the matter for recommendation, which is clearly contrary to law.

Competition Act to be considered

At the very outset, we wish to state and submit that the process of Monopoly Consultation undertaken by TRAI cannot be viewed in isolation but has to necessarily be viewed in the background of the provisions of the Competition Act, 2002, which deals with anti-competitive agreements as set out in Section 3, abuse of dominant position as set out in Section 4 and Regulation of Combinations as set out in Section 5 of the Competition Act, 2002.

Preamble to Competition Act

We wish to bring to your kind attention the preamble to the Competition Act, 2002, which reads as under:

"An Act to provide, keeping in view the economic development of the country, for the establishment of a Commission to prevent practices having adverse effect on Competition, to promote and sustain Competition in market, to protect interests of consumers and to ensure freedom of trade carried on by other participants in markets in India, and for matters connected therewith and incidental thereto."

The preamble to the Competition Act makes it clear that the purpose of the statute is to prevent practices having an adverse effect on competition and to also promote and sustain competition in the market besides protecting interests of consumers and ensuring freedom of trade to other participants in market. This would make it clear that the subject matter of the Monopoly Consultation is covered by the provisions of the Competition Act, 2002. It would therefore be inappropriate for the TRAI to completely disregard the provisions of the Competition Act and to proceed with the consultation and make recommendation or for the MIB to make a recommendation for the amendment of the Cable Television Network (Regulation) Act, 1995 (hereinafter referred to as the said Cable Act).

Preamble to TRAI Act

In contrast, the preamble to the said TRAI Act provides for the establishment of the TRAI and TDSAT to regulate telecommunication services, adjudicate disputes, and dispose of appeals and to protect the interests of the service providers and consumers of the Telecom Sector, to promote and ensure orderly growth of telecom sector.



Preamble to Cable Act

The preamble to the said Cable Act also provides for an Act to regulate the operation of Cable Television Networks in the country.

From the above it is clear that neither the preamble to the TRAI Act nor the preamble to the Cable Act refer to monopoly or market dominance and consequently the issues arising in the consultation paper are neither covered by the provisions of the TRAI Act nor the provisions of the Cable Act but are covered by the provisions of the Competition Act, 2002.

Overriding Effect

It may be mentioned that under Section 66 of the Competition Act, 2002 the provisions of the Monopolies and Restrictive Trade Practices Act, 1969 (hereinafter after referred to as the said MRTP Act) stands repealed with effect from 01.09.2009 and the Competition Act, 2002 has come to hold the field.

S.60 of Competition Act- Overriding Effect

We wish to submit that reference may also be made to Section-60 of the Competition Act, which reads as under:

"60. Act to have overriding effect.- The provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force."

From the above, it is clear that the provisions of the Competition Act, 2002 have an overriding effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force.

Statutory Duties of CCI

The Competition Commission of India (CCI) has statutory duties under Section 18 of the Competition Act to eliminate practices having adverse effect on Competition, promote and sustain competition, protect the interests of consumers, and ensure freedom of trade carried on by other participants in markets in India. It may be noted that the statutory duties of the CCI are a reiteration of the preamble to the Competition Act.

Power to inquire

Section 19 read with Section 26 of the said Competition Act also provide for the power of the CCI to enquire into any alleged contravention of Section 3(1) and Section 4(1) thereof. The CCI may inquire into alleged contravention of Section 3(1) or Section 4(1) of the said Competition Act suo motto or on receipt of information from any person or consumer or consumer association or trade association or Central Government or State Government or statutory authority. From the above it is clear that it is open to both the State Government and the Central Government including MIB to make a reference to the CCI for alleged contravention of Section 3 or Section 4 of the said Competition Act.

Anti-competitive Agreements

We wish to state and submit that under Section 3(1) there is a prohibition of Agreements on respect of production, supply, distribution, storage, acquisition or control of goods or provision of services which causes or is likely to cause an appreciable adverse effect on competition within India.

Section 3(3) of the Competition Act provides as under:

"3. Anti-competitive Agreements -

(3) Any agreement entered into between enterprises or associations of enterprises or persons or associations of persons or between any person and enterprise or practice carried on, or decision taken by, any association of enterprises or association of persons, including cartels, engaged in identical or similar trade of goods or provision of services, which—

(a) directly or indirectly determines purchase or sale prices;

(b) limits or controls production, supply, markets, technical development, investment or provision of services;

(c) shares the market or source of production or provision of services by way of allocation of geographical area of market, or type of goods or services, or number of customers in the market or any other similar way;
(d) directly or indirectly results in bid rigging or collusive bidding,
shall be presumed to have an appreciable adverse effect on competition"

Section 3(4) refers to certain types of agreements being in contravention of Section 3(1) if such agreement causes or is likely to cause an appreciable adverse effect on competition in India. Reference may also be made to Explanation (c) to Section 3(4) of the said Act which reads as under:

*"Explanation - For the purpose of this sub-section -
(c) "exclusive distribution agreement" includes any agreement to limit, restrict or withhold the output or supply of any goods or allocate any area or market for the disposal or sale of the goods;"*

From the above it is clear that Section 3 of the Competition Act clearly empowers the CCI to examine whether any practice causes or is likely to cause an appreciable adverse effect on Competition within India. In this connection reference may also be made to Section 1(2) of the said Competition Act which provides that the said Act extends to the whole of India except the State of Jammu and Kashmir. From the above, it would be clear that the Competition Act not only deals with Competition and competition related issues but also deals with the same on an All India basis and is not limited to any State. It is also evident that the Monopoly Consultation is wrongly proceeding to examine the issue of monopoly or dominant position or market share in the context of a State and not on an All India basis.

Abuse of Dominant Position

Section 4(1) prohibits an enterprise or group from abusing its dominant position. Clauses (a) to (e) of Section 4(2) of the Competition Act sets out instances of abuse of dominant position. The Explanation (a) to Section 4(2) defines dominant position as under:

*"(a). dominant position means a position of strength, enjoyed by an enterprise, in the relevant market, in India, which enables it to -
(i) operate independently of competitive forces prevailing in the relevant market;
or
(ii) affect its competitors or consumers or the relevant market in its favour."*

High Market Share- Not Dominant

We wish to state and submit that an enterprise having a high market share cannot be regarded as being in a dominant position as per Explanation (a) to Section 4(2) of the Competition Act, 2002. It is erroneous to equate high market share of a MSO in a State to a monopoly or market dominance as referred to in the consultation report.

Statutory Parameters

The CCI also has to consider certain defined statutory parameters under Section 19(3) and Section 19(4) of the Competition Act for examining the contravention of Section 3 and Section 4 of the Competition Act in relation to the anti-competitive agreements and abuse of dominant position. It is significant to note that some of the parameters under Section 19(3), which are relevant for the purposes of the present Monopoly Consultation, are set out here under:

- "(a) creation of barriers to new entrants in the market;*
- (b) driving existing competitors out of the market;*
- (c) foreclosure of competition by hindering entry into the market;*
- (d) accrual of benefits to consumers;*



(e) improvements in production or distribution of goods or provision of services;"

From the above, it is clear that clauses (a), (b) and (c) directly relate to competition issues whereas Clause (d) relates to consumers and Clause (e) to improvements in distribution of services.

Some of the relevant factors to be considered by the CCI under Section 19(4) of the said Act are also set out as under:

"(a) market share of the enterprise;

(b) size and resources of the enterprise;

(c) size and importance of the competitors;

(d) economic power of the enterprise including commercial advantages over competitors;

(f) dependence of consumers on the enterprise;

(g) monopoly or dominant position whether acquired as a result of any statute or by virtue of being a Government company or a public sector undertaking or otherwise;

(h) entry barriers including barriers such as regulatory barriers, financial risk, high capital cost of entry, marketing entry barriers, technical entry barriers, economies of scale, high cost of substitutable goods or service for consumers;

(j) market structure and size of market;

(/) relative advantage, by way of the contribution to the economic development, by the enterprise enjoying a dominant position having or likely to have an appreciable adverse effect on competition;"

From the above, it is clear that market share of an enterprise would also be considered as one of the factors to examine whether an enterprise is in a dominant position or not (Clauses (a), (b), (c), (d) and (g))

Wide Powers of CCI

The CCI is empowered under Section 27 of the Competition Act to direct an enterprise to discontinue and not re-enter any anti-competitive agreement or abuse of dominant position, impose penalty on the defaulting enterprise, direct agreements to be modified, direct enterprises to abide by such orders as CCI may pass and comply with its directions. The CCI is also empowered under Section 28 of the said Act to direct division of an Enterprise enjoying dominant position to ensure that such enterprise does not abuse its dominant position.

Not Dominant

We wish to respectfully submit that GTPL, which is a MSO in the States of Gujarat, West Bengal, Bihar, Jharkhand, Assam, Andhra Pradesh & Maharashtra cannot be regarded as an enterprise, which is in a dominant position since it neither operates independently of competitive forces prevailing in the market nor can it effects its competitors or consumers or the relevant market in its favour.

Distribution System of TV Channels

There are material facts relating to the TV Channel Industry, which are as follows:

- (i) In the last few years, the number of satellite television channels has increased from 136 channels in year 2005 to more than 800 channels today.



- (ii) The large distribution sector now comprises of 6000 Multi System Operators (MSOs), around 60,000 Local Cable Operators (LCOs), 7 DTH/ satellite TV operators and several IPTV service providers.
- (iii) However, the consumer can switch from different mode of transmission i.e. from cable to DTH. Thus, cable TV and DTH is interchangeable/ substitutable from the consumer side.
- (iv) Television is the largest medium for media delivery in India in terms of revenue, representing around 45 percent of the total media industry.

Admission of other Distribution Modes

We wish to submit that the paragraph 2 of Introduction of the Consultation Paper clearly notes as under:

"2. Presently, TV channels are distributed through cable TV, Direct to Home (DTH), terrestrial and Internet Protocol Television (IPTV) networks. Majority of the distribution is through cable TV and DTH platforms. The key entities in cable TV services are Broadcasters, Multi System Operators (MSOs) and Local Cable Operators (LCO)."

Analogue system in most of India - under declaration

Admittedly, Cable TV in large parts of the country is analogue and non-addressable. In this situation, the exact number of subscribers may not be disclosed by the LCOs to the MSOs. There is rampant under declaration of subscribers by LCOs to the MSOs and consequently, the exact number of subscribers of each MSO and consequent market share of MSO is not clear and accurate. Even in the Metros and the cities covered by DAS as per notification dated 11.11.2011 the DAS system has not been fully implemented and the analogue system / platform continue to hold the field. These are the competitive forces prevailing in the relevant market which have to be taken note of and the present MSO cannot operate independently thereof.

Fierce Competition

We wish to state and submit that the present MSO faces fierce competition from not only other MSOs (which includes All India MSOs, State MSOs and Local MSOs) but also other distribution channels or platforms of TV Channel Services which include the following:

- Direct to Home DTH
- Terrestrial (Internet)
- Internet Protocol Television
- HITS (Headends in the Sky)

Other distribution modes ignored

It is significant to note that MSOs as a category cannot be singled out or targeted since there are several other distribution modes of TV Channel Services in India. It is erroneous to proceed to consider the so called monopoly or market dominance of MSOs to the complete exclusion of other distribution modes referred to above. The emphasis in the consultation process is to attack MSOs as a category without reference to the other modes of distribution of TV Channel Services, which is clearly contrary to law and disputes the so called Monopoly or Market Dominance of MSOs in the market.

Competition - DTH Operators

The present MSO faces fierce competition from DTH Operators including the following:

- (i) Airtel
- (ii) Reliance
- (iii) Tata
- (iv) Dish
- (v) Videocon
- (vi) Delhi Doordarshan Direct
- (vii) Siti Digital



The DTH Operators are the fastest growing distribution mode of Cable TV Services in the country. It may be mentioned here that the subscribers of MSOs and/or LCOs in significant numbers have preferred to opt for Tv Services from DTH Operators.

Reference may be made to the DTH operations which have commenced a few years ago and show a huge increase in the number of subscribers from 1.6 million in March 2006 to 55.41 Million in May 2013 and also the percentage of growth. A Table showing the number of DTH subscribers from March 2006 to May 2013 is enclosed herewith and marked as Enclosure 3.

Focus on Services irrespective of Distribution Mode

It is necessary to shift the focus in the consultation paper from the MSOs and LCOs who are one of the distribution channels providing Cable TV Services to the customers and subscribers, to the Cable TV Services availed of by the customers and subscribers through different distribution channels. The relevant market has to be seen in the context of the Relevant Geographic Market for goods and services or the Relevant Product Market of products and services or both. The focus has to be on the products or services availed of by the consumers and not on the mode of distribution of such Cable TV Services.

Relevant Market, Relevant Geographic Market and Relevant Product Market - definitions and factors

In this connection reference may be made to the definition of relevant market under Section 2(r), Relevant Geographic Market under Section 2(s) and Relevant Product Market under Section 2(t) of the said Competition Act which read as under:

"2. Definitions. - In this Act, unless the context otherwise requires,—

(r) "Relevant market" means the market which may be determined by the Commission with reference to the relevant product market or the relevant geographic market or with reference to both the markets;

(s) "relevant geographic market" means a market comprising the area in which the conditions of competition for supply of goods or provision of services or demand of goods or services are distinctly homogenous and can be distinguished from the conditions prevailing in the neighbouring areas;

(t) "relevant product market" means a market comprising all those products or services which are regarded as interchangeable or substitutable by the consumer, by reason of characteristics of the products or services, their prices and intended use;"

We wish to state and submit that the CCI in order to consider the issue as to whether a market constitutes a relevant market has to have due regard to relevant geographic market and relevant product market. Section 19(6) of the Competition Act also lays down the factors to be considered to determine the relevant geographic market, whereas Section 19(7) sets out the factors to be considered to determine the relevant product market.

Decisions of CCI

The Hon'ble Competition Commission of India by its order dated 21.03.2013 in the case of **Yogesh Ganeshlaji Somani Vs. Zee Turner Ltd & Anr.** has held that there is no contravention of Section 3 or Section 4 of Competition Act. The Hon'ble CCI in para 15 agreed that the relevant geographical market delineation is India, which is recounted as under:

"15. The Commission is also in agreement with the relevant geographical market delineation as "India" by the DG because the services of aggregation and distribution of channels are not specified for some particular geographical region and the licenses of uplinking and downlinking is also given for India by Ministry of



Information and Broadcasting. Therefore, boundaries of India are considered to be the relevant geographical market for the purposes of this case."

In paragraph 6 of the aforesaid order the Hon'ble CCI has discussed the supply chain of broadcasting of TV Channels which is recounted here under:

"6. For the proper disposal of the aforesaid issue, it is required to briefly discuss the supply chain and regulatory framework of the cable TV broadcasting industry in India. The supply chain for broadcasting of television channels through analog cable network comprises the following: - (i) companies operating the television channels (broadcasters); (ii) Aggregators; (iii) Multi System Operators (MSO); and (iv) Local Cable Operators (LCO). The broadcaster owns the contents that are transmitted to the end consumers. The broadcaster may either produce its own content or source content from 3rd party. The broadcaster uplinks the content signals to the satellites which are in turn downlinked by the distributors. The broadcaster may transmit its content either directly or through an aggregator. An aggregator is a distribution agent who undertakes the distribution of television channels for one or more broadcasters. Aggregator also does bundling of television channels of different broadcasters and negotiates on their behalf with the distributors viz MSOs/DTHOs/IPTVOs regarding subscription revenues. The sale of television channels to the distributors by the broadcasters or the aggregators may be on a-a-l-carte basis (one channel sold as a single unit) or as a bouquet (two or more channels bundled and sold as a single unit). The MSOs downlink the content signals of the broadcaster and further distribute the same to LCOs for retail distribution to the end consumer. Recently, measures have been taken by the Government of India towards digitization of the cable television system to have an addressable system that enables identification of subscriber base. These measures are primarily with a view to overcome the limitations of analog cable systems including the lack of clarity on the subscriber base and the limitations on transmitting more number of channels to the end consumers. In this system also, the distribution of TV channels to end consumer is done through MSOs and LCOs."

Issues framed by TRAI

It may be noted that the TRAI has framed the following issues to be considered during the process of consultation with stake holders and form the basis of recommendations to be made to the Ministry of Information and Broadcasting for the amendment to the Cable Television Network (Regulation) Act:

1. *Do you agree that there is a need to address the issue of monopoly / market dominance in cable TV distribution? In case the answer is in the negative, please elaborate with justification as to how the ill effects of monopoly / market dominance can be addressed?*

Comment: No. The question of monopoly/market dominance falls outside the scope of the TRAI Act and the Cable Television Network(Regulation) Act and falls within the domain of the Competition Act,2002. Decisions of the Hon'ble CCI have been cited above where such issues have been raised and decided.

2. *Do you agree that the State should be the relevant market for measuring market power in the cable TV sector? If the answer is in the negative, please suggest what should be the relevant market for measuring market power? Please elaborate your response with justifications.*

Comment: No. The question of relevant market falls outside the scope of the TRAI Act and the Cable Television Network(Regulation) Act and falls within the domain of the Competition Act,2002 and has been defined thereunder. Decisions of the Hon'ble CCI have been cited above where such issues have been raised and decided. Relevant Market cannot exclude different modes of distribution of cable TV, which have to also be considered namely, Direct to Home DTH, Terrestrial (Internet), Internet Protocol Television and HITS (Headends in the Sky)

3. *To curb market dominance and monopolistic trends, should restrictions in the relevant cable TV market be:*

- (i) *Based on area of operation?*
- (ii) *Based on market share?*
- (iii) *Any other?*

Please elaborate your response with justifications.

Comment: This is outside the purview of the Section 11(1)(a) of the TRAI Act and falls under the Competition Act, 2002. Decisions of the Hon'ble CCI have been cited above where such issues have been raised and decided. Reference may also be made to the registration certificates granted to MSOs/LCOs under the Cable Act and to the MSOs under the Cable Rules where there is no limitation of area. High Market share is not per se bad in law. It is anti-competitive agreements and abuse of dominant position which are contrary to law.

4. *In case your response to Q3 is (i), please comment as to how the area of a relevant market ought to be divided amongst MSOs for providing cable TV service. Please elaborate your response with justifications.*

Comment: This is outside the purview of the Section 11(1)(a) of the TRAI Act and falls under the Competition Act, 2002 where Section 4 deals with abuse of dominant position. Decisions of the Hon'ble CCI have been cited above where such issues have been raised and decided. The issue raised to divide the relevant market amongst MSOs would create a monopoly and is against free interplay of market forces and against free and fair competition.

5. *In case your response to Q3 is (ii), please comment as to what should be the threshold value of market share beyond which an MSO is not allowed to build market share on its own? How could this be achieved in markets where an MSO already possesses market share beyond the threshold value? Please elaborate your response with justification.*

Comment: This is outside the purview of the Section 11(1)(a) of the TRAI Act and falls under the Competition Act, 2002 where Section 4 deals with abuse of dominant position. Decisions of the Hon'ble CCI have been cited above where such issues have been raised and decided. The issue raised to divide the fix threshold value for MSOs would create a monopoly and is against free interplay of market forces and against free and fair competition

6. *In case your response to Q3 is (ii), please comment on the suitability of the rules defined in para 2.26 for imposing restrictions on M&A. Do you agree with the threshold values of HHI and increase in HHI (X, Y and Delta) indicated in this para. If the answer is in the negative, what threshold values for HHI and delta could be prescribed for defining restrictions? Please elaborate your response with justifications.*

7. *Should 'control' of an entity over other MSOs/LCOs be decided as per the conditions mentioned in para 2.29? In case the answer is in the negative, what measures should be used to define control? Please elaborate your response with justifications.*

8. *Please comment on the suitability of the rules defined in para 2.31 for imposing restrictions on control. Do you agree with the threshold values of HHI and increased in HHI (X, Y and Delta) indicated in this para. If the answer is in the negative, what threshold values for HHI and delta could be prescribed for defining restrictions? Please elaborate your response with justifications.*



9. *In case your response to Q3 is (iii), you may support your view with a fully developed methodology indicating a measure arrived at to determine market power and proposed restrictions to prevent monopoly / market dominance in the relevant market.*
10. *In case rules defined in para 2.31 are laid down, how much time should be given to existing entities in the cable TV sector (which are in breach of these rules as on date), for complying with the prescribed rules by diluting their control? Please elaborate your response with justifications.*

Comment to Issues No. 6 to 10: This is outside the purview of the Section 11(1)(a) of the TRAI Act and falls under the Competition Act, 2002 where Section 3 with anti-competitive agreements, Section 4 deals with abuse of dominant position and Section 5 with regulation of combination. Decisions of the Hon'ble CCI have been cited above where such issues have been raised and decided.

11. *Whether the parameters listed in para 2.33 are adequate with respect to mandatory disclosures for effective monitoring and compliance of restrictions on market dominance in Cable TV sector? What additional variables could be relevant? Please elaborate your response with justifications.*
12. *What should be the periodicity of such disclosures?*
13. *Which of the disclosures made by the Cable TV entities should be made available in the public domain? Please elaborate your response with justifications.*

Comment to Issue Nos 11-13: This is outside the purview of the Section 11(1)(a) of the TRAI Act and falls under the Competition Act, 2002 where Section 4 deals with abuse of dominant position. Decisions of the Hon'ble CCI have been cited above where such issues have been raised and decided.

14. *What according to you are the amendments, if any, to be made in the statutory rules / executive orders for implementing the restrictions suggested by you to curb market dominance in Cable TV sector?*
15. *Stakeholders may also provide their comments on any other issue relevant to the present consultation.*

Comment to Issue Nos 14-15 : As above

Historical Background

In brief, the historical background of the steps taken by TRAI, Government and the Ministry of Information and Broadcasting are given below:

- (i) The Telecom Regulatory Authority of India had in August, 2010, recommended to the Government complete digitalisation with addressability by December 2013, in a phased manner.
- (ii) The Government have accepted the Recommendations and have issued an Ordinance in October, 2011 and a Notification in November, 2011 for complete digitalisation with addressability in a phased manner and to be completed by December, 2014. Parliament has also passed the Bill to amend the Cable TV Act paving the way for the digitalisation programme.
- (iii) It is significant to note that the implementation of DAS has been divided into four phases:
 - Cutoff date for 4 Metros in the First Phase was 31.10.2012
 - Cutoff date for 38 cities in the Second Phase was 31.03.2013



- Cutoff date for all urban areas under Third Phase other than those covered under Phase 1 and Phase 2 is 30.09.2014.
- Cutoff date for last phase covering rest of the country is to be implemented by 31.12.2014.

(iv) This was followed by exercise of powers conferred by sub-section (1) of section 22 of the Cable Television Networks (Regulation) Ordinance, 1994 (9 of 1994) to amend the Cable Television Network Rules, 1994 by inter-alia adding Rules 11A, 11B and 11C with effect from 28.04.2012 thereof, which read as under:

"11A. Application for registration as a Multi-System Operator.--

(1) For the purpose of operation of cable television network services with digital addressable system in a notified area, a person who desires to provide such service shall make an application for registration as Multi-System Operator to the registering authority in Form 6 (2) Every application under sub-rule (1) shall be accompanied by-

- *A processing fee of rupees one lakh;*
- *Declaration in Form 2;*

11B. Eligibility criteria for Multi-System Operator.--

The following criteria shall be fulfilled by an applicant who makes an application under rule 11A, namely:-

(a) where the applicant is a person, he shall be a citizen of India and not less than eighteen years of age;

(b) where the applicant is an association of individuals or body of individuals, whether incorporated or not, the members of such an association or body shall be citizens of India and not less than eighteen years of age;

(c) where the applicant is a company, such company shall be a company registered under the Companies Act, 1956 and shall be subject to such conditions relating to foreign direct investment as may be decided by the Central Government;

(d) the applicant shall not be an un-discharged insolvent;

(e) the applicant shall not be a person of unsound mind as declared by a competent court;

(f) the applicant shall not/be convicted of any criminal offence.

11C. Registration as Multi-Systems Operator.--

(1) On being satisfied that the applicant fulfils the eligibility criteria specified under rule 11B and the requirements of rule 11 A, the registering authority shall, subject to the terms and conditions specified in rule 11D and the security clearance from the Central Government, issue certificate of registration.

(2) Where the registering authority is satisfied that registration cannot be granted, it shall inform the applicant in writing giving reasons for such refusal."

- (v) Rule 2(c) of the Cable Television Network Rules, 1994 defines Multi-System Operator as under:

"2(c). Multi-System Operator" means a cable operator who has been granted registration under rule 11C and who receives a programming service from a broadcaster or its authorised agencies and re-transmits the same or transmits his own programming service for simultaneous reception either by multiple subscribers directly or through one or more local cable operators and includes his authorised distribution agencies, by whatever name called;"

- (vi) Section 4A of the Cable Television Network (Regulation) Act, 1995 provides for Central Government if satisfied in public interest to notify and make obligatory for every cable operator to transmit and re-transmit programme of any pay channel through any addressable system with effect from such date as may be specified in notification and different dates for different states, cities, towns or areas as the case may be.

- (vii) Rule 2(d) of the Cable Television Network Rules, 1994 defines 'notified area' as under:

"notified area" means the area in respect of which the date has been notified by the Central Government under sub-section (1) of section 4A of the Act."

- (viii) Pursuant to the above, TRAI issued a notification dated 14.05.2012 making the 'Consumer Complaint Redressal (Digital Addressable Cable System) Regulations, 2012'; a true copy is enclosed herewith and marked as **Enclosure-4**.

- (ix) TRAI also issued notification dated 14.05.2012 framing regulations relating to quality of service and known as "Standards of Quality of Service (Digital Addressable Cable TV Systems) Regulations, 2012 (12 Of 2012). A true copy of the notification is enclosed herewith and marked as **Enclosure-5**.

- (x) Reference may also be made to Form 6 which is required to be filled in by the MSO for the purpose of registration under the Cable TV Network Rules, 1994. A true copy of Form 6 is enclosed herewith and marked as **Enclosure-6**.

We wish to submit that the process of consultation by TRAI is also being undertaken while admitting that Cable TV in large parts of the country is analogue and non-addressable namely the Cable TV Signal is not digital. As stated above, the Government has accepted the recommendations of TRAI on implementation of an addressable Digital Cable TV System in India and the Cable TV Act has since been amended and a notification has been issued in November 2011 which makes it obligatory for each Cable Operator to transmit or re-transmit programme of any channel in encrypted form through a digital addressable system.

Huge Investment

It may be mentioned here that under the Digital Addressable System, the MSOs are required to make a huge investment in technology and infrastructure. This is a mandatory condition for smooth and harmonious function of MSOs under the DAS. Enclosure-7

Provisional Registration Cancelled

It is significant to note that the Ministry of Information and Broadcasting has also cancelled the provisional registration granted to certain MSOs since these MSOs were unable to fulfill the mandatory requirements; a true copy of the list of MSOs whose provisional registration has been cancelled is enclosed herewith and marked as **Enclosure-8**.

Rampant Under-declaration by cable operators

Although the above is noted in Paragraph 1.8 of the Consultation Paper, the same has been overlooked and ignored and not taken note of. From the above, two issues need to be highlighted. Firstly, Cable TV in large parts of the country is analogue and non-addressable. In this situation, the exact number of subscribers may not be disclosed by the LCOs to the MSOs. There is rampant under declaration of subscribers by LCOs to the MSOs and consequently, the exact number of subscribers of each MSO and consequent market share of MSO is not clear and accurate.

DAS not fully implemented

Secondly, the process of implementation of Digital TV System in India is still under way and its final implementation would be completed by 31.12.2014. In the meanwhile, there is no purpose in imposing an area restriction on MSOs or any other restriction which would be regarded as being anti-competitive and restricting, distorting and preventing competition. Any consultation process undertaken by TRAI is perhaps at a pre-mature stage when the analogue and non-addressable Cable TV is dominating the scene and an inherent shortcoming in the analogue system of Cable TV is the non-disclosure of the actual and real number of subscribers. In the absence of the real and actual subscribers been known, the market share and consequential monopoly of any MSO cannot be inferred much less categorically stated on the basis of which amendments to Cable Television Act need to be implemented.

Change of Business Model

The consultation paper has also ignored the implementation of DAS where under, the business model has under gone a change as now only MSO can receive signals from the broadcasters as per the Cable TV Network Rules 1994 as amended on 28.04.2012. Under DAS, both FTA and pay channels received from broadcasters and transmitted to LCOs in encrypted form by MSO who maintains subscribers management system where details about each customers and his / her preferences are stored. As stated above, DAS has only been implemented in a very selected part of the country whereas, the overwhelming majority of the country is still following the analogue system of Cable TV. It is admitted in paragraph 1.11 of the consultation paper that the exact market shares of MSOs are not available because in the analogue platform the number of subscribers cannot be accurately ascertained due to non-addressability and lack of transparency in reporting of subscriber base.

There is a reference to Table 1.1 giving the market share of Set Top Boxes of 5 top MSOs in the markets covered for DAS implementation in Phase 1 and Phase 2. The said figures do not reflect the exact market share of MSOs but only gives the share of Set Top Boxes given by LCOs to MSOs in the said market. As stated above, broadcasters are required to give the Set Top Boxes and signals only to MSOs who in turn supply the same to the LCOs. However, as stated above, the LCOs do not disclose the actual number of subscribers and the analogue system continues to be in operation and has not been totally phased out.

Admittedly, the Hon'ble Competition Commission of India has by order dated 03.07.2012, in the case of **Kansis News Pvt. Ltd. Vs. Fastway Transmission** imposed a penalty of more than Rs.8 Crores and passed a cease and desist order against a Multi-System Operator in the State of Punjab for indulging in abuse of dominant position within the meaning of Section-4(2)(c) of the Competition Act, 2002. A copy of the order dated 03.07.2012 passed by the Hon'ble CCI is enclosed herewith and marked as **Enclosure-9**.

Reference may be made to Section-3 of the Competition Act prohibiting anti-competitive agreements and Section-4 prohibiting abuse of dominant position. From the above provisions and the order passed by the Hon'ble CCI, it is clear that the issue of monopoly / market dominance is the subject matter of the provisions of the Competition Act, 2002 for which the Hon'ble CCI as the original body trying such matters, and the Hon'ble Competition Appellate Tribunal as the appellate body, have been constituted

and have been trying such matters. It may be appreciated that the Competition Act is providing for a prohibition, inter-alia, against abuse of dominant position.

We wish to submit that Supreme Court in **Rajeev Hitendra Pathak** has specifically held in the context of the Consumer Protection Act, 1986 that Consumer Fora, being creatures of statute, cannot exercise powers not conferred upon it by the statute. The same legal principle would apply to the TRAI which is constituted under Section-3 of the TRAI Act, 1997. From the above, it would be clear that any issue of abuse of dominant position is the subject matter of the Competition Act, 2002 and any complaint in this regard would have to be filed before the Hon'ble CCI. We would wish to respectfully submit that the TRAI cannot usurp the subject matter of another Statute, namely the Competition Act, 2002 and seek to make recommendations thereon for the purpose of imposing restrictions on MSOs and LCOs to the Ministry of Information & Broadcasting, resulting in amendment to the Cable Television Network (Regulation) Act.

Reference may also be made to Proviso (A) to Section-14 of the TRAI Act, which specifically excludes adjudication of any dispute relating to monopolistic trade practices, which are the subject matter of jurisdiction of MRTP Commission. It may be noted that the MRTP Act, 1969 has been repealed by Section-66(1) of the Competition Act, 2002, which has substituted the earlier enactment. We wish to submit that the provisions of the Competition Act include prohibition of abuse of dominant position and empower the Hon'ble CCI to pass cease and desist order and also to impose penalty in this regard. For this reason also, we wish to respectfully submit that the process of consultation as requested for by the Ministry of Information & Broadcasting cannot be and ought not to be undertaken in view of the subject matter being covered by the provisions of the Competition Act, 2002 and, in any event, falling outside the purview of recommendations to be made by TRAI under Section-11(1)(a)(iv) of the TRAI Act.

TDSAT order

We wish to submit that the said parties, who had approached the Hon'ble CCI, had also approached the Hon'ble TDSAT. The Hon'ble TDSAT by order dated 25.04.2012 held that although there was an illegal termination, it was not possible to direct restoration of supply of signals and only nominal damages of Rs.1,00,000/- was awarded. A true copy of the order of Hon'ble TDSAT is enclosed and marked as **Enclosure 10**. The Hon'ble TDSAT also noted in paragraph 67 of the order as under:

"67. I, keeping in view the facts and circumstances of the case, need not apply my mind with regard to prayers (i) to (iv). The Competition Commission may consider the prayers in that behalf on their own merits."

For ready reference the prayers are set out in Paragraph 7 of the aforesaid order which reads as under:

"7. On the aforementioned premise, this petition has been filed claiming inter-alia the following reliefs:-

- i) Declare that the nexus/cartel formed by Respondent No.1 to 4 is illegal and anti-competition and cannot be permitted to operate as such;*
- ii) Hold that the action of the Respondent No.1 to 4 in disrupting TV channels of the Petitioner without any proper notice is illegal and arbitrary;*
- iii) Hold that the public notice dated 21.1.2011 and the notice dated 19.1.2011 issued by the Respondent No.1 to 4 are illegal, arbitrary and are as such void and are thus quashed;*
- iv) Direct the Respondent No.5 and 7 to inquire into the nexus/ cartel formed by Respondent No.1 to 4 and their political nexus;*
- v) Direct the Respondent No.1 to 4 not to disrupt the signals of TV channels of the Petitioner;*
- vi) Award damages to the tune of Rs.4 crores towards loss of revenue/reputation suffered by the Petitioner due to illegal and arbitrary acts of the Respondent Nos. 1 to 4."*



We wish to submit that the aforesaid order of the Hon'ble TDSAT is final and binding qua the TRAI which is bound to follow the aforesaid direction of not entertaining any request for a recommendation which is substantially falling under the provisions of the Competition Act, 2002.

We wish to respectfully submit that the focus seems to have shifted from abuse of dominant position to the alleged dominant position per se, which is not contrary to law. The suggestions being considered by TRAI is to impose area restriction or territorial allocation of markets to MSOs / LCOs. This is totally contrary to law. Reference may be made to the provision relating to anti-competitive agreement as set out in Section-3(4) of the Competition Act, which contains an Explanation (c) thereto defining 'exclusive distribution agreements' to include any agreement seeking to limit, restrict or withhold the output or supply of any goods, or allocate any area or market for the disposal or sale of the goods, amounting to anti-competitive agreement if it causes or is likely to cause appreciable adverse effect on competition in India.

Different Distribution Modes

We wish to state and submit that having noted that there are different modes of distribution of TV channels, it would be necessary for TRAI to take into account the different modes of distribution and not to limit the consultation process only to Cable TV. Furthermore, the TRAI has overlooked and ignored the advent of the mobile phone, broadband and data card, which has wireless technology and can provide the same TV channels on a different wireless platform.

It is significant to note that not only has the TRAI overlooked and ignored the wireless technology platform and the different modes of distribution of TV channels, but the TRAI has also overlooked the intense competition between the different modes of distribution of TV signals.

Huge Growth of DTH Operators

There are different DTH service providers including Tata, Airtel, Dish, Reliance, Videocon etc . As stated above, DTH operations which have commenced a few years ago and show a huge increase in the number of subscribers from 1.6 million in March 2006 to 55.41 Million in May 2013 and also huge increase in the percentage of growth.

We wish to submit that MSOs having All India Operations like GTPL compete with other MSOs having All India Operations as well as with regional and local MSOs operation in the same market.

S.11(1)(a)(iv) of TRAI Act

Reference may be made to Section-11(1)(a)(iv) of the TRAI Act, which reads as under:

"11(1)(a) - make recommendations, either suo moto or on a request from the licensor on the following matters, namely:-

*.....
(iv) measures to facilitate competition and promote efficiency in the operation of telecommunication services so as to facilitate growth in such services."*

From the above, it is clear that the TRAI is empowered to make a recommendation in respect of measures to facilitate competition and promote efficiency in operation of telecommunication services so as to facilitate growth in such services. The word 'and' appearing in Section-11(1)(a)(iv) of the said Act makes it clear that the recommendations have to be for both measures to facilitate competition, as well as promote efficiency in operation of telecommunication services so as to facilitate growth in such services. The Consultation Paper seeks to examine the issue of monopoly / market dominance in Cable TV Services, which falls beyond the scope of the recommendations to be made by TRAI.

Technological Advancement- No Area limitation

It is significant to note that with the technological advancement in the industry it is not possible to limit or restrict the operation of the MSOs to any specified area or territory.



Huge Investments

Due to large scale of investment and for optimum returns on investment in DAS scenario, it would be unjustified and unreasonable to restrict an MSO to the specific areas of operations. Details of investments amounting to Rs. 259 Crs has been provided in Enclosure 7.

Means/ways of Competition

There are different ways in which MSOs are competing with other MSOs and also other legal entities distributing TV channels through different modes of distribution of TV signals including the price, the choice of channels and number of channels offered, value added services including High Definition Content and Electronic Guide and quality of service provided. It is significant to note that a MSO is not only competing with their MSOs but also with Doordarshan Direct which is broadcasting Free to Air Channels

Variety of Choice of Consumers

It may be noted that the TV channels and services are provided by different broadcasters and the TV channels and services are availed of by the ultimate consumers and the public at large. As stated above, there are different modes of distribution of TV signals and the consumers have the option to avail of the TV signals from one mode of distribution or the other. The choice of the consumer is not limited to the TV channels being provided by Cable TV.

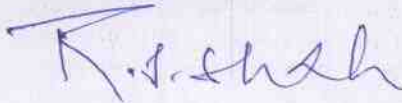
Intense Competition

We wish to submit that there is intense competition between MSOs and LCOs in different markets and areas. As stated above, a high market share of an individual MSO in a given city/town/area/State in distribution of Cable TV distribution does not mean that there is abuse of dominant position. In case of abuse of dominant position by a MSO in a State, both the Hon'ble CCI and the Hon'ble TDSAT are empowered to deal with the situation. This is evident from the above case of Kansas News Pvt. Ltd. Vs. Fastway Transmission, which was heard and decided by both the TDSAT and the CCI.

In case you require any clarification kindly contact us regarding the same. We would also request you to grant us through our authorised representative an opportunity to explain the factual position and to make our submissions before you proceed to give any recommendations.

Yours faithfully

For, Gujarat Telelink Private Limited



Authorised Signatory