WITHOUT PREJUDICE

On Wednesday, 1 October 2014 3:08 AM, "Bagchi, Pulak (STAR India)" <pulak.bagchi@startv.com> wrote:

Dear Sir

While reviewing the submissions, two typographical errors seem to have inadvertently crept in which are as follows:

1. At page 2 of 9, 2nd paragraph reproduced hereunder:

TRAI had recommended pan India digitalisation in 2010 and on that basis the Cable TV Networks (Regulation) Act 1995 got amended to usher in digital addressable systems in areas notified for the said purpose. However, today the industry has been pushed into a tail spin with the government all of a sudden extending the switch off dates for analog cable to 31st January 2016. The entire sector which had made business projections on the basis of the earlier notified switch off date of 31st Dec 2014 has now been compelled to go back to the drawing boards and revisit plans for the future. Today there is complete uncertainty looming over digitalisation and there is a genuine apprehension that the digitalisation initiative will now lose steam, peter out and end up like its predecessor CAS.

It is respectfully submitted that the date "31st January 2016" mentioned above should be read as "31st December 2016".

2. At page 6 of 9, Para 3 Sub Para (a) reproduced hereunder:

(a) A 'Sun Set Date' for Analog Cable has to be clearly mentioned. It has to be stated that the said Tariff Order shall cease to be effective from midnight of 31st December 2017 or any other cut-off date as may be notified by the Central Government as the last date for switching off analog cable.

It is respectfully submitted that the date "31st December 2017" mentioned above should be read as "31st December 2016".

The above errors are sincerely regretted and accordingly the attachments in the trailing have been suitably modified only to the limited extent as stated hereinabove and reattached accordingly.

Requesting your kindself to take on record our submissions as attached herein and to please ignore the ones sent earlier

Regards
Pulak Bagchi
Authorised Signatory

Date: 30th September 2014

To

The Chairman

Telecom Regulatory Authority of India

Mahanagar Doorsanchar Bhawan (next to Zakir Hussain College)

Jawaharlal Nehru Marg (Old Minto Road)

New Delhi: 110 002

Sub: Judgment/Order of the Supreme Court in Civil Appeal No. 829-833 of 2009.

Re: Star India's submission on Notification of Draft Tariff Order for Non DAS areas.

Dear Sir,

We would like to take this opportunity to address your kind self in terms of the aforesaid Order of the Hon'ble Supreme Court that required stakeholders to submit their representations on or before 30.09.2014.

We would like to clarify herein at the very outset that our instant representation is (i) without prejudice to our rights and contentions, (ii) without admitting, consenting or acquiescing to the draft report filed by TRAI in the aforesaid Appeal, (iii) without derogating from our stand or pleadings taken in the said Appeal and in Appeal No12 © of 2007 before the Hon'ble TDSAT or otherwise and (iv) without derogating from our submissions in the TRAI in this regard or otherwise;

Further we state that this is only a preliminary submission on our part and we reserve our rights to file a detailed submission on the issue at a later date as and when required.

We would like to draw the Authority's kind attention to the fact that a sea change has occurred since the said draft report (containing the said draft Tariff Order) had been filed by the TRAI in the Hon'ble Supreme Court

way back in 2010. These developments since 2010 cannot be ignored while formulating any new Tariff for the analogcable regime.

TRAI had recommended pan India digitalisation in 2010 and on that basis the Cable TV Networks (Regulation) Act 1995 got amended to usher in digital addressable systems in areas notified for the said purpose. However, today the industry has been pushed into a tail spin with the government all of a sudden extending the switch off dates for analog cable to 31stDecember 2016. The entire sector which had made business projections on the basis of the earlier notified switch off date of 31st Dec 2014 has now been compelled to go back to the drawing boards and revisit plans for the future. Today there is complete uncertainty looming over digitalisation and there is a genuine apprehension that the digitalisation initiative will now lose steam, peter out and end up like its predecessor CAS.

The entire content industry's hope for unlocking value through accurate subscription fees, have now crashed owing to the extension granted to analog cable. The broadcasting sector who saw in DAS the potential to mitigate piracy is now struggling to reconcile with the unending reality of putting up with rampant area transgression, under declaration of subscriber bases, and retransmission of illegal pirated content that are endemic to analog cable among others.

Also legitimate channels that have registered themselves in accordance with the uplinking/downlinking guidelines are finding it hard to compete with illegal and unencrypted cable channels that are eating into the former's viewership. Rather than actively restraining such cable channels as recommended by the Parliamentary Standing Committee, thereisa consultation process underway to legitimise these illegal cable channels being carried unlawfully by cable operators.

Broadcasters had also anticipated that carriage fees would undergo a downward revision owing to the introduction of DAS. However in reality today we are again witnessing an upward spiral that characterised

analogcable. Operators are again engineering artificial scarcity and have ratcheted up carriage and placement charges.

A sizeable section of the broadcasting sector who had expectations that DAS shall be implemented in a timely manner, went ahead in cooperating with the TRAI in the latter's efforts to rationalise ad inventory. With the extension of timelines granted toanalogcable, even that move has now back-fired. Moreover there are reports appearing in the media of the government'sintent to allow FTA channels to have unlimited ad inventory, thereby rendering the entire exercise futile.

As if these were not enough, the entire broadcasting industry woke up one day to see that business models which had been painfully built over the years on the basis of aggregating multi broadcaster channels into bouquets, being dealt a death blow through the Aggregator regulations that made channel aggregators redundant.

While the bargaining powers of broadcasters were taken away by mandating compulsory fragmentation of multi-broadcaster bouquets, the TRAI came up with a startling revelation of the nature, type and extent of monopoly power being enjoyed by cable operators over the years that had been perpetuated by analog cable. However the same being only a recommendation from TRAI on cable monopoly, without any commensurate regulation- the level playing fields got permanently skewed thereby exposing broadcasters to unbridled abuse from cable operators who continue to enjoy enormous and disproportionate market clout.

While regulations targeting broadcasters were actively monitored and enforced, however those regulations that were aimed at building the necessary discipline for ushering in DAS were systematically and successfully flouted, evaded and avoided by Operators. As a result none of the notified areas have successfully transitioned from analog to fully compliant digital addressable cable systems.

It is in this backdrop that we request the Authority to suitably incentivise voluntary DAS by commensurately disincentivising analog cable. In this regard please find below our suggestions and recommendations.

1. The Authority should declare complete forbearance in so far as analog cable is concerned. It could be argued that any operator who is DAS compliant should be entitled to protection by broadcasters; however there is no reason why analog cable operators should be extended the same protection. In any event broadcasters are not protected at all from upstream content providers who ratchet up costs without appreciating the downstream challenges faced by broadcasters. Also there is hardly any instance of channel price regulation in any country apart from India. Given TRAI's own finding that television channels fulfil only 'esteem needs' of consumers and are as such non-essential, there is all the more no reason whatsoever for regulating channel prices. Moreover in cable systems where subscriber bases cannot be determined accurately, it would be in the fitness of things to leave the parties to their own devices to strike a deal rather than asking broadcasters to abandon expectations of accurate subscriber bases and instead subsidise operations of analog cable players whoare in any event unlawfully and illegally gaining through under declaration and area transgression. The TRAI could ask broadcasters to compulsorily declare ala carte prices for its channels even for analog cable without however capping it in any manner or making it mandatory that broadcasters have to compulsorily offer channels on ala carte. In so far as analog cable is concerned broadcasters should only have the option of striking ala carte deals without however being mandated to do so. This position is also aligned with the Draft Report filed by the TRAI as aforesaid. However for those operators who are voluntarily setting up digital addressable systems that are fully compliant with the applicable regulations, it could be mandated for the time being (till the time the DAS appeal is heard and decided by the Hon'ble Supreme Court) that 42 per cent of ala

carte whole sale prices declared by the broadcaster for analog cable would be the effective ceiling and if the broadcaster wishes to offer additional incentives or benefits based on certain parameters to such operators undertaking voluntary digitalisation then the broadcaster should also mention the same in its Reference Interconnect Offer meant for Digital Addressable cable systems.

2. In case the TRAI decides that complete forbearance cannot be allowed across the value chain (a position with which we fundamentally dis agree) it should atleast consider regulating the channel prices at the retail end rather than intervening and regulatingthe channel prices at the wholesale level. Such situations do exist in India particularly in the Film industry where the hall/theatre ticket prices have been regulated by some State Governments without however impinging on party autonomy to negotiate at the wholesale. In some Southern States (like Tamil Nadu. Andhra Pradesh and Kerala) while the State Government or local bodies have gone ahead regulating the prices for movie tickets in cinemas/ halls/theatres, it has not intervened at all in the whole sale price negotiations conducted by and between the film producer and the distributor on one hand and the distributor and exhibitor on the other. This practice can be replicated in analog cable as the present tariff order (4th Oct 2007) or even the Draft Tariff Order has not been able to link whole sale analog cable rates to the ceilings prescribed at the retail. This approach, of allowing free negotiations at the wholesale while prescribing a ceiling at the retail would hopefully ensure a linkage of sorts between whole sale pricing and retail prices.The TRAI could ask broadcasters to compulsorily declare ala carte prices for its channels even for analog cable without however capping it in any manner or making it mandatory that broadcasters have to compulsorily offer channels on ala carte. In so far as analog cable is concerned broadcasters should only have the option of striking ala carte deals without however being mandated to do so. This position is also aligned with the Draft

Report filed by the TRAI as aforesaid. However for those operators who are voluntarily setting up digital addressable systems that are fully compliant with the applicable regulations, it could be mandated for the time being (till the time the DAS appeal is heard and decided by the Hon'ble Supreme Court) that 42 per cent of ala carte whole sale prices declared by the broadcaster for analog cable would be the effective ceiling and if the broadcaster wishes to offer additional incentives or benefits based on certain parameters to such operators undertaking voluntary digitalisation then the broadcaster should also mention the same in its Reference Interconnect Offer meant for Digital Addressable cable systems.

3. In case the TRAI decides that neither option 1 nor option 2 is feasible (a position with which we fundamentally disagree) , it could at the very least immediately notify the said draft Tariff Order and declare that the same shall come into effect from 1st January 2015.We submit that however the followingchanges to the aforesaid draft tariff order are imperative for the purpose:

   (a) A 'Sun Set Date' for Analog Cable has to be clearly mentioned. It has to be stated that the said Tariff Order shall cease to be effective from midnight of 31stDecember 2016 or any other cut-off date as may be notified by the Central Government as the last date for switching off analog cable.

   (b) The inflationary adjustment as indicated in the Telecommunication (Broadcasting and Cable) Services (Second) Tariff (Eleventh Amendment) Order, 2014 (3 of 2014) dated 31st March 2014 should be given effect to in full.So if the TRAI has itself identified that 43.69 % is the quantum of inflation as per WPI, there is no reason for allowing only 63 per cent of the same ie 27.5 per cent as pass through. Instead channel tariffs have to be increased by the full 43.69 per cent across the board rather than only 27.5 per cent.

(c) There should be no obligation on broadcasters to offer old bouquets as the markets have evolved and today there are more than 800 channels in the market. The old bouquets have completely lost their relevance particularly after the promulgation of Telecommunication (Broadcasting and Cable) Services (Second) Tariff (Tenth Amendment) Order, 2014 (1 of 2014) dated 10th Feb 2014 that led to disaggregating multi-broadcaster bouquets.

(d) As correctly pointed out in the Draft Report, broadcasters should not be mandated to provide channels on ala carte basis. Ala carte provisioning of channels should be made optional so that any broadcaster who wishes to offer channels on ala carte even in analog cable can do so. In any event Broadcasters should be required to declare the ala carte rates for each of its channels (even though not offered as such) so that the channel pricing in DAS notified areas can be appropriately benchmarked at 42 per cent of such prices.

(e) Align the definitions in the Draft Tariff Order to bring it in line with the amendments made in the Cable Television Network Regulation Act 1995 as amended from time to time and the regulations framed by TRAI in pursuance thereof. For example the definition of 'addressable systems' in the draft Tariff Order needs to be changed to bring it in line with the present definition of 'addressable systems'. If this is not done then the anomalies that were endemic in analog cable in the form and shape of hybrid boxes (digital but non addressable) would likely continue.

(f) Further operators should be required to declare accurate subscriber bases and thus the definition of 'subscriber base' should be revisited to ensure that operators do not get away by negotiating an under declaredsubscriber base. Under declaration

should not be acceptablein analog cable and strict financial disincentives should be prescribed for illegal retransmission, area transgression, under declaration, piracy or any other illegality or non-compliance.

(g) In addition the TRAI should strictly monitor and enforce the Standards of Quality of Service (Broadcasting and Cable Services) (Cable Television – Non-CAS Areas) Regulations, 2009. Any operator who is found to violate the said QOS regulations should be denied protection of the TRAI Interconnect and Tariff Regulations. Suitable financial disincentives should also be imposed on such non-compliant operators.

(h) The TRAI should also revisit the Interconnect Regulations applicable for analog cable in order to ensure that the "Must Provide" requirement is suitably qualified to ensure that only genuine legitimate operators who are fully complying with applicable laws are entitled to the same. Accordingly operators who have been found to be non-compliant, or those who have been engaging in area transgression or under declaration should not be given the protection of the Must Provide or regulated Tariffs.

(i) Also the definition of 'Television Channels' should be revisited to only restrict itself to Standard Definition Channels. High Definition Channels cannot be a subject matter of analog cable tariff as the same requires high quality digital addressable boxes.

(j) The Reporting requirements as stated in Clause 8 (d), (e) and (g) should be dropped as revenue share arrangements between owners of channels in a bouquet has been rendered redundant post the Aggregator Regulations. Further broadcasters have a national presence and hence mentioning the target audience is

altogether irrelevant. Further advertisement revenues have no relevance in so far as subscription rates are concerned. Both the revenue streams are open to a broadcaster and it should be the channel owner's prerogative as to how it intends to monetise its offering. Advertisement revenues have no cost implication for consumers or operators.

Yours Truly

For Star India Private Limited

Sd/

(Pulak Bagchi)

Authorised Signatory/Senior Vice President-

Legal and Regulatory.

Comments Received w. r. t. “Draft Tariff Order applicable for Non-Addressable Cable TV Systems” issued on 01.12.2014

To

Date: 15th Dec 2015

Mr.Wasi Ahmad, Advisor (B&CS),
Telecom Regulatory Authority of India,
MahanagarDoorsancharBhawan,
JawaharLal Nehru Marg,
New Delhi – 110002,
Tel No.011-23237922,
Fax No.011-23220442;
Email: traicable@yahoo.co.in or advbcs@trai.gov.in

Sub: **Consultation on Draft Tariff Order applicable for Non- addressable Cable TV Systems ("Draft Tariff Order")**

Dear Sir

We hereby submit our response to the aforesaid Draft Tariff Order which we request should be read in continuation to our earlier response dated April 28, 2010 and our comments dated 30th September 2014. Our instant response is not in contradiction or in derogation of our said earlier responses and is without prejudice to any of our stated position in this regard in any litigation, representation or deliberation or otherwise. We also reserve our rights to make additional submissions if so required.

I. Preliminary Objections:

We submit that the said Draft Tariff Order suffers from the following infirmities:

1. **Freezes rather than fixes**: Itisonlyinthenatureofan interimmeasureresultinginfreezingofprices, and thus it is no different from the one dated 04.10.2007 that got impugned in the TDSAT ;
2. **Unduly Restrictive**: Such tariff freeze is illegal and unconstitutional in that it is unduly restrictive and impinges on the broadcaster's freedom to carry on business or trade. In the absence of any specific finding by any competent authority that Broadcasting services are essential services and on the contrary, TRAI itself having found on numerous occasions that such services are non

essential and only satiate "esteem needs"[1], there is no rhyme or reason why prices for such services have to be regulated and notdetermined by market forces as is the case with all other goods and services catering to the 'esteem needs' of consumers.

3. **Ignores Competition**: TRAI haswrongfullyconcludedthatadequateandeffectivecompetitioninthemarketislacking,despiteclearevidenceofsubstantialgrowth in the number of channels and the sheer diversity of distribution platforms. The Tariff Order is thus contrary to the extant Competition laws as it asserts that competition within almost 821 channels and within rival distributions platforms is not competition enough;

4. **No basis for retail ceilings**: Theceilingimposedonthesubscriptionchargestobecollectedby LCOsfromthesubscribersisunreasonable, withoutany basis; restrictive and unduly impinges on the operator's and broadcaster's freedom to trade; The cap at the retail ceiling seriously impairs operator's ability to drive ARPUs in analog cable market through differentiated offerings and also impacts broadcasters' ground collections and fair share;

5. **Contrary to earlier Tariff Order**: It has not given effect to the balance 12.5 percent inflationary adjustment as was stated in the Telecommunication (Broadcasting and Cable) Services (Second) Tariff (Eleventh Amendment) Order, 2014 (3 of 2014) dated 31st March 2014. In fact the instant draft tariff Order reduces the maximum retail tariff ceiling from INR 320/- (specified in the said Tariff Amendment dated 31st March 2014) to INR 263/-. It also

[1] Non CAS CP dated 25th March 2010: See pages 79 para 5.3.15, "It has beenunderstood that cable services meet 'esteem' needs in a household." Also para 7 page 156 : "Thus cable services can be compared to other goods &services such as 'consumer goods' & 'durable goods' that meet esteem needsand education that meets cognitive needs."

deviates from the city wise ceilings that were prescribed in the amendment dated 31st march 2014 in that the instant draft does not make any reference to city-wise classifications. Such change in stance within just 9 months of promulgation of the said Tariff amendment dated 31st March 2014 apart from being unreasonable is also not in consonance with the tenets of 'certainty' and 'stability' that regulators have to abide by per the Supreme Court Judgment in the Vodafone Case.[2]Infact the retail rates proposed herein is in line with those prescribed in the Telecommunication (Broadcasting andCable) Services (Second) Tariff (Eighth Amendment) Order, 2007, dated 4th Oct 2007. The maximum retail rate prescribed in this Amendment of 2007 was INR 260/-. The maximum retail rate prescribed in the instant draft is INR 263/- , which is a mere INR 3/- hike. No reason or rationale has been provided in the instant draft for such deviation and a regressive deflationary approach particularly when as per the amendment dated 31st March 2014 – the consumer price index has increased by more than 43%.

6. **Contrary to Copyright**: The Tariff Order is contrary to the prevailing Copy right laws that hold the field on Broadcasting Services, in that it usurps the role of the Copyright Board in fixing tariffs for works and broadcast reproduction. It may be mentioned that the Copyright board only resorts to rate fixation on certain specific situations unlike TRAI where regardless of such situations it believes in an exante tariff regulation. Further the frozen tariffs and the prescribed retail tariffs do not distinguish

[2]"Certainty is integral to rule of law." - Supreme Court Judgment in CIVIL APPEAL NO.733 OF 2012 (arising out of S.L.P. (C) No. 26529 of 2010) in Vodafone International Holdings B.V. …Appellant(s) versus Union of India &Anr. …Respondent(s) (Para 91) Also "Lack of properregulatory laws, leads to uncertainty and passing inconsistentorders by Courts, Tribunals and other forums, puttingRevenue and tax payers at bay." (Para 53 of Concurring Judgment of Justice Radha Krishnan)

between signals and the work being carried on it and in one fell swoop includes both within its sweep; the said tariff order thus overreaches itself as it intervenes in the domain of prevailing legislations on both copyright and competition.

7. **Discriminatory treatment**: While rates to be charged by broadcasters to operators have been frozen and cable operators' charges to subscribers have been made subject to ceilings, the charges payable by cable operators to MSOs have been kept under forbearance; this shall only help in skewing level playing fields.
8. **Unequals treated as equals**:Itdoes not apply intelligible differentia while holding commercial subscribers are to be treated at par with ordinary subscribers and treats unequals as equals. Ignores that commercial subscribes unlike ordinary subscribers - uses the signals for commercial gains.
9. **Does not consider TDSAT findings:**It ignores the findings of the TDSAT Judgment dated 28th May 2010 that laid down the principles and criteria on the basis of which TRAI was asked to reconsider the question of Commercial Tariff in a 'broadbased manner'. This Judgment has since attained finality and has also thus merged with the Supreme Court's Order dated 16.04.2014. However none of these findings are mentioned in TRAI's explanatory memorandum to the Tariff Order dated 16th July 2014, nor have they been acted upon
10. **Wholly Impractical**: The requirement that commercial subscribers should specifically charge for showing the program or that they should have increased the prices of goods and services during the duration of telecast of the program for broadcasters to be eligible to enter into agreements with such subscribers and charge a

differential rate is altogether impractical and unworkable. It also unduly restricts the broadcasters from freely carrying on with their business or trade.

11. **Unfair:**The Draft tariff Order is patently unfair on broadcasters as they are denied the right to levydifferential tariffs on commercial subscribers simply because such commercial subscribers are not transparent enough to provide break up of their service charges which would have clearly shown the channel cost as an input cost.
12. **Inconsistent with Regulations**: The Tariff Order is also inconsistent with Regulations as the latter imposes an outright ban on contracts between Broadcasters and commercial subscribers.
13. **Unjustifiable Conditions**: That the twin conditions interlinking bouquet and ala carte rates at the whole sale is unreasonable and unjustifiable and without any basis
14. **Blanket Ban**: The blanket ban on broadcasters disabling them from changing composition of bouquets existing as on December 2007 is unreasonable, illegal and unconstitutional in that it impinges on the broadcasters freedom to trade and their rights under existing copyright law. It may be mentioned that while broadcasters have been subjected to such arbitrary ban there is complete freedom given to operators to freely package retail offerings as per their choice which is against the doctrine of level playing fields.
15. **Rate for Modified bouquets defies logic**: The rate prescribed for modified bouquets pursuant to the Telecommunication (Broadcasting and Cable) Interconnection (Seventh Amendment) Regulation 2014 is altogether illegal, arbitrary, restrictive and unreasonable and devoid of logic besides skewing level playing fields between operators and broadcasters. This restriction is

further impinging on the broadcaster's constitutional freedom to trade and their rights given under copyright law.

16. **Not determining subscriber base**: Inspite of repeated directions from the TDSAT and the Supreme Court , there is no methodology prescribed by TRAI to determine connectivity/subscriber levels of individual operators. While the Authority relies upon lack of addressability to justify direct intervention, it unfortunately steers clear of laying down a methodology for determining levels of connectivity amongst stakeholders. This inspite of specific directions to that effect by both the Hon'ble Supreme Court and the Hon'ble TDSAT vide Orders dated 13th May 2009 and 15th January 2009 respectively. The relevant portion of the Hon'ble TDSAT Judgment reads as follows. *"Secondly, in a non-addressable scenario, which is what characterises most of the cable industry, the problem of under declaration by the cable operators/MSOs persists, and the concern of the Broadcasters in this regard cannot be brushed aside. In fact, a significant percentage of the disputes in the broadcasting sector are on account of the subscriber base, a fact recognised by the Authority in Para 3.27 of the explanatory memorandum annexed to the impugned tariff Order. It is essential that this issue is addressed squarely. The Authority would be well advised to review its decision indicated in Para 3.29 of the explanatory memorandum of having decided not to determine the levels of connectivity between the stakeholders. Since digitalisation and addressability are bound to take some time, it is essential that the Authority, set up to regulate the industry, finds a way to address the issue."*[3]

[3]Paragraph 80 of Judgment rendered by the Hon'ble TDSAT dated 15th January 2009 in Appeal No. 12 © of 2007

17. **Arbitrary genre norms**: The genre based pricing mechanism suggested in the draft tariff order based on existing channels of similar genre and language is again unreasonable and arbitrary on the one hand and unduly restrictive on the other particularly with none other than TRAI concluding on many occasions that channels though within the same genre may vary widely in terms of costs. Under this absurd mandate - a channel showing new Hindi movies will be priced similarly to channels showing old Hindi movies though the costs incurred by the broadcasters in the former will be considerably higher than in the latter. Likewise sports channels that show live content will have to be priced similarly to sports channels showing recorded content though costs incurred to acquire live sporting events is much higher than what is required for mere recordings;
18. **Lacks teeth**: The entire Tariff Order is unworkable as between cable operators and MSOs on the one hand and between Cable operators and subscribers on the other as there is no provision for enforcement or implementation nor any penal consequences inbuilt for breach;
19. **One sided**: The Reporting Requirements are clearly one sided. Given that there is total lack of transparency on the ground and there is very little visibility in transactions occurring at the retail end and as between operators and MSOs, yet there is nothing that has been prescribed as reporting requirements for operators or MSOs or for commercial subscribers. The Reporting requirements only saddle broadcasters with onerous conditions that significantly compromise their business interests and trade secrets. Also irrelevant information like advertising revenues and revenue share arrangements between owners of channels in the bouquet

have been sought that have nothing to do with cable operators, MSOs or consumers. Given the ban on multi broadcaster aggregation – seeking information on revenue share arrangements between owners of channels in the bouquet is altogether misplaced and unwarranted. The entire operator community (both LCOs and MSOs) has been exempted from any reporting requirement whereas the maximum leakages both to the government as well as the broadcaster admittedly occur at the operator level (both LCOs and MSOs).

20. **Disjointed exercise**: The Tariff Order completely ignores the structural issues in Analog cable systems and instead seems to believe that an isolated and disjointed tariff exercise shall be the panacea for all ills. It does not acknowledge that a parallel or simultaneous exercise is needed for reviewing the Interconnect and Quality of Service Regulations applicable to Non DAS cable.

II. Irrelevance of the Report and Explanatory Memorandum:

At the outset we would like to submit that the TRAI Report that had been submitted to the Hon'ble Supreme Court in 2010 is of little significance today considering the sea changes that have impacted the narrative of the industry since the last five years.The REPORT and the Explanatory Memorandum ignores how level playing fields have been fundamentally skewed in favor of Operators owing to the ban on multi broadcaster aggregation vide the Regulations and Tariff Orders issued on 10th Feb 2014 ("Aggregator Regulations")on the one hand and because of TRAI opening up the commercial subscriber space to Operators vide the Tariff Orders and Regulations dated 16th and 18th July 2014 ("The Commercial Tariff Regulations") on the other.The industry was expecting TRAI to come up with a detailed consultation paper as neither the Report nor the

Explanatory Memorandum take in to account the impact of the extension of the Non DAS regime till 31st December 2016 excepting for a passing reference in the Explanatory Memorandum. Neither the Report nor the Explanatory Memorandum considers the phenomenal growth of channels (821by last count) and the plethora of platform choices available to a viewer today (with the advent of HITS). The REPORTjust makes a fleeting mentionabout the cable monopolies in certain states and otherwise both the Report as well as the Explanatory Memorandum is completely oblivious of its own analysis and recommendations on Cable Monopoly (where it identified that there have been frequent instances of abuse of dominant position by cable operators and how such abuses are magnified by political support or by collateral interests), Media ownership, Entry of certain entities in the broadcast space, etc. The Report thus talks about tariff fixation for analog areas in complete isolation of and without adverting to any of the ground realities that characterises today's cable space as identified and triggered by none other than TRAI. While the draft Tariff Order has picked up the amendments that have been made since, it has not considered the fundamental aspect of whether there is any need at all for tariff regulations to continue for analog cable systems in such changed circumstances. The Report and the Explanatory Memorandum only attempts to make an attempt at defending its 'status quo' like approach and justifies continuation of the historical tariff freeze which had been rightfully set aside by the TDSAT. It has to be accepted that TRAI, from the time it had been given the mandate to regulate broadcasting and that too by a mere executive fiat dated 9th January 2004, has all along resorted to freezing prevalent prices and has abstained from any meaningful exercise of tariff fixation.With its excessive focus on developments upto the year 2009 – 10, both the Report and the Explanatory Memorandum continue to be caught up in a time warp. Instead of coming up with a full fledged consultation paper that would have analysed these recent happenings TRAI has presented the industry with a fait accompli in the form and shape of the instant draft Tariff Order. It is altogether denied that broadcasters and operators recognized that the current system despite its imperfections is

working at the ground level or that continuing with the current system in the interim was the most practical solution.[4]Inspite of the sea changes as stated above the Explanatory memorandum regrettably concludes that the market dynamics are more or less the same as that prevailed at the time the said consultation process (of 2009 – 10) was carried out.

Recommendations:

We recommend that TRAI take into account the effective competition prevailing in the market today and also the economic impact that its recent regulations have had on the sector and further its own recent recommendations pertaining to the sector. Accordingly the TRAI should embark on a roadmap for tariff de regulation as it must be realized that Tariff forbearance need not necessarily mean that the broadcaster shall increase prices at the very first available opportunity. What it effectively ensures for a broadcaster is effective price discovery of its content proposition that helps it to optimally price its offeringsin a way and manner that the market can bear.

III. A fallacious approach:

TRAI justifies regulatinganalog cable markets on the ground**:**

"If sellers (broadcasters and distributers) do not know how many buyers (subscribers) are ultimately purchasing their services, the Authority concludes that the retail price and revenue arrangements among stakeholders cannot be negotiated on any scientific basis and hence cannot be left entirely to free market forces;"

We submit that there is no industry or sphere of activity where there is a mechanism that would enable sellers to know beforehand the number of actual buyers, again there are hardly any goods or services where retail prices and revenue share arrangements are negotiated on a scientific basis. If we consider (a) commodities like potatoes, onions, vegetables, groceries,

[4]Para 25 , page 37 of the Explanatory Memorandum

or (b) products like television sets, washing machines, A.C Machines and any other white goods, or (c) services like real estate, tourism, medical assistance, private cab services, laundry – it is only the market that acts as the compass for stakeholder alignment on prices and revenue shares on the one hand and ultimate uptake by buyers on the other.

The Report goes on to say :

"Price regulation is justified when markets fail to produce efficient prices. When markets are competitive and are said to function smoothly, they will lead to "efficient" prices that maximize value to consumers. For this efficient ideal competitive situation to be realized, the market must meet a number of conditions. The market must have several suppliers and consumers with none so large as to affect prices. There must also be free entry into and exit from the market. There must be perfect information and absence of transactions costs. Where all these conditions are not present, the market will not generally produce optimal results. In such a situation, there is justification for intervention. The introduction of price regulation in any market is one such intervention. Having examined the characteristics of the analog cable market and the impact of these characteristics upon market efficiency, the Authority is of the view that the non addressable cable TV sector will require appropriate regulatory interventions at some points across the supply chain."

Again the conditions for forbearance and freedom of regulations have been set so high that they border on the unreal. To expect that there shall be perfect information and a complete absence of transaction costs would be utopian. Also today the analog market is indeed characterised by numerous channels and a plethora of distribution platforms justifying the operation of market forces more than rate regulation. It is in fact the legacy tariff orders which TRAI now wishes to perpetuate that result in imperfect information and presence of transaction costs as is evident from the presence of carriage and placement fees.

Recommendation:

TRAI should take into account that in a world that is ever dynamic, a perfect symmetry in information collection, collation and analysis could be an utopian thought. Instead in a market beset with too many unknown variables, it is always better to leave prices to market forces as market dynamics is the greatest of all levellers as has been proven in the case of other non-essential commodities.

IV. Systemic and endemic Structural Issues in Analog Cable:

We further submit that the Non DAS market is plagued more with structural issues and the rate regulations have only aggravated matters. The need of the hour is thus structural reforms rather than an all pervasive tariff formulation. A tariff stricture at this juncture will only serve to exacerbate the asymmetries that are prevalent in the market as we know it today.We believe that the structural issues can be better addressed if we identify the maladies in Non DAS markets holistically; accordingly the Authority will be well advised to focus onthe following:

(a) Under-reporting of the analog cable subscriber base

(b) Lackof transparency in business and transactionmodels

(c) Differential pricing at the retail level

(d) Incidence of carriage and placement fee on account of artificiallycreated - limited capacity in analog platforms

(e) Incidence of state and region based monopolies perpetrated by operators

(f) Frequent disputes and lack ofcollaboration amongstakeholders

(g) Lack of enforcement across the entire value chain

(h) Absence of minimum eligibility/documentation criteria for Operators

(i) Must Provide of Signals by broadcasters not backed by Must Carry by the Operators

(j) MSOs/LCOs resorting to arbitrary change in "Band" placements and "Black Outs".

(k) Lack of proper billing systems/record keeping by LCOs/MSOs

(l) Interconnect Regulations promoting largescale default byLCOs/MSOs;

(m) Unauthorised Cable Casting, area transgressions and Piracy

(n) Courts asking broadcasters to supply signals on arbitrary subscriber bases; ordering joint surveys that are meaningless and ineffective, accepting SLRs from operators that are far from the truth.

(o) Quality of Service Regulations not made applicable uniformly to LCOs and MSOs and not tied up with Must Provide.

(p) Lack of an "Audit" and Report culture among MSOs.

No amount of tariff prescription, be it at the whole sale or at the retail, can resolve these structural defects.

While digitization with addressability and licensing will go a long way in resolving most of these issues, a solution needs to be found in the interim, laying down a tariff ceiling will be no answer. Likewise frequent disputes arise between stakeholders resulting from lack of clarity in connectivity levels, for which both the Hon'ble TDSAT and the Hon'ble Supreme Court have urged TRAI to come up with a solution. A mere tariff ceiling will not solve this problem either.

Recommendation:

TRAI should take necessary steps to revisit the interconnect regulations and the quality of service regulations in order to take care of these systemic

maladies identified herein. This exercise needs to be done parallelly with the Tariff exercise if at all as coming up with a Tariff will not solve such endemic and deep-rooted malaise that have grown over the years.

V. Today Tariff Regulations are wholly anachronistic:

It may be argued that during the formative years of Pay TV in India, the acknowledged market distortive effects of frozen tariffs and "Must Provide" were deemed acceptable on the strength of the assumption that it would be impractical and unduly burdensome to require every Distributor of TV Channels to negotiate the broad terms with every broadcaster whose work was retransmitted by such distributor. The question that now warrants an asking is whether that assumption has withstood the test of time. At that time it was thought that regulatory mandates were perhaps designed as a transitional measure to facilitate competition and the marketplace's ability to meet the needs and demands of satellite and cable subscribers. But TRAI surely could not have intended that the regulations mandating tariffs would be a permanent fixture in the regulatory landscape of Pay Television in India. In fact TRAI on repeated occasions had suggested that the Tariff Orders were but interim measures.

We reiterate that regulators whose basic policies have been designed to increase consumer choice and to maintain a free market in which buyers and sellers of products freely negotiate the terms of sale, should avoid broad and complex intervention, which will in the long run make their consumers worse off. Programme content is not a rare product in today's world - there is no scarcity which needs to be regulated. And in the past decade, a wide array of new channels has also begun broadcasting. Channels in the marketplace vary widely in subject matter, and quality of production. Similarly, the cost of these channels (even if they are within the same genre) varies.The situation is not unlike the automobile market, which featuresmany different types of car. Many people might like Mercedes, but thegovernment does not intervene to set the prices for

Mercedes, or to tellthe manufacturer that it cannot sign an exclusive distribution contractwith a single car distributor, if the firms can agree. Even within a Mercedes, Audi or a BMW, there are segmentations done to cater to a varied clientele.

The Regulator ought to believe that other distributors, andconsumers can nevertheless buy a Toyota, or a Ford, a Maruti or a Tata, or any other make or brands of cars if they do not like or cannot buy a Mercedes.

In a similar way, a cable TV company that cannot buy a channel has access through the marketplace to hundreds of other channels, provided it is willing to pay the fair, market-determined price for those channels. That price ranges from zero for so-called "free-to-air" channels to relatively high prices for high-value sports, infotainment and movie channels, which invest substantial sums to ensure the channels remain of high quality to maintain consumer interest. Suggestions of content "unavailability" frequently come down to questions of price. In India, argumentation against exclusive carriage has frequently been used by those who do not wish to pay the fair price for the content. But in light of the huge and growing number of satellite TV channels available in India today, there is an ample supply of programming for potential competitors. Accordingly broadcasters today do not have any incentives to raise prices to such levels where there is no subscriber uptake. Given below is the range of options that an operator has on a genre wise basis and why broadcasters cannot price its offerings disproportionately as it then runs the risk of not being picked up at all:

Genre	# of channels carried by a typical operator in Non-DAS area (incl. FTA)	# of channels from leading 300 available to operators in Non-Das areas (incl. FTA)
Hindi General Entertainment	10	More than 27
Hindi Movies	9	More than 16
English General Entertainment	1	More than 8
English Movies	2	More than 6
Infotainment/ Lifestyle	7	More than 15

Regional channels	20	More than 162
Kids	4	More than 12
Sports	3	More than 11
Music	7	More than 15
Religious	6	More than 11
News and Current affairs	16	More than 32
Total	**85**	**More than 330**

Recommendation:

In the light of plethora of content choices on a genre wise bases, TRAI should seriously consider tariff forbearance both at the whole sale and the retail.

VI. Dysfunctional Regulations and its consequences:

In India, broad regulations were adopted in 2004, requiring that all content must be made available by channel suppliers on non-discriminatory terms to all cable operators (i.e. banning exclusivity). The principle of "Non Discriminatory" has been stretched to the point of "Indiscriminate" whereby Broadcasters irrespective and regardless of the known antecedents and prior history of unscrupulous Operators have to nevertheless provide signals to them at tariffs that are frozen.

The Indian regulations/tariff orders are the broadest and the most sweeping in effect anywhere in the world, and it is actively enforced against broadcasters rather than operators. In an environ where under-declaration of subscriber base is the norm, the cable and satellite Interconnection/Tariff Regulations provide a number of examples of the market-distorting effects. The most glaring of such adverse impacts inter aliaare:

(i) *Tax Evasion*: the largescale evasion of taxes that occurs at the ground level.[5]Not only are the evasion limited to service tax or

[5]See Para 2.66 of the REPORT:

entertainment tax, but the amount of income tax that goes unreported owing to Operator's not even making those ground collections public has also reached alarming figures.

Recommendation: It is essential that tax authorities are roped in to ensure abuse and bring in the required level of transparency.

(ii) *Underdeclaration*: Admitted underdeclaration and a lopsided revenue share favouring operators[6]. It may be pertinent to mention that all over the world Broadcasters or content providers/networks as they are more commonly known abroad, get atleast 50 percent of the ground collections for their channels.

Recommendation: Steps should be taken to increase greater visibility of subscriber base that an operator enjoys at the last mile and also a national initiative should be launched with renowned associations like NCAER/ IRS/NRS to determine connectivity levels of operators at National, State, District levels. Also SLRs should be filed with the Authority by Operators through quarterly affidavits and any false statement should, apart from the legal consequences, also result in financial disincentives prescribed by the regulations.

(iii) *Carriage and Placement*: the disincentives for digitization with addressability owing to arbitrage opportunities arising from artificial scarcity in analog cable and resultant premium being

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Again, the last publicly available CBEC report in 2005-06 shows only Rs.75 crore of service tax as being collected from the industry……. there is still a significant gap between estimated and actual tax collection which points to the possibility of under-reporting of subscriber numbers in the cable industry.

[6]See Para 2.70 of the REPORT:
"As mentioned in para 2.45 above, the estimated distribution of subscription revenue across the value chain, based on information received from stakeholders, is as follows: Broadcaster/Aggregator ~20% (Rs.2,900crore) and Distributor (MSO+LCO) ~80% (Rs. 10,600 crore)."

charged by Operators for carriage and placement[7]. The huge carriage and placement charges act as an insurmountable entry barrier for new channels. Again with the limitations imposed on vertical integration between broadcasters and DTH, coupled with the TRAI recommendations on Media Ownership and DTH licensing dated 12th Aug 2014 and 23rd July 2014 respectively - broadcasters are not in a position to strategically invest in distribution platforms. As such the money that could have been used by the broadcaster productively in building up necessary capital infrastructure for retransmission of broadcast signals thereby providing employment and generating income, instead gets used up as one time carriage and placement fee -appearing as a line item expense in the broadcaster's Profit and Loss Account.

***Recommendation**:* Broadcasters should be freely permitted to have their own distribution platforms so that it does not have to depend upon third party distributors to carry their channels. Accordingly the vertical integration restrictions should be removed in totality.

(iv) *The fallacy of genre based pricing*: TRAI's frozen Tariffs that were again based on a historical genre based approach has resulted in channels within the same genre adopting and charging the same range of prices regardless of the underpinning costs which would invariably vary from one channel to another.[8] A channel therefore showing new Hindi movies have to be priced similarly as one showing old Hindi movies, though the cost of acquisition is far higher than the latter. A sports channel having no live content

[7]See para 2.72 of the REPORT

[8]See para 3.71 of the REPORT'

shall be priced similarly as a sports channel with live content though the latter pays a premium to acquire such live content.

Recommendation:As stated the Authority should embark and work on a roadmap to free up prices both at the whole sale and the retail.

(v) *Unequals have been made equals*: Commercial subscribers have been equated with Ordinary subscribers for the purpose of tariff though the former unlike the latter uses the TV channels for its own gain or profit.

Recommendation: Revisit the entire tariff issue on commercial subscribers in the light of signal usage by end user. Accordingly those end users using the channel for gain cannot be equated with those using it for their personal purposes.

(vi) *Plethora of court cases*: As admitted in the REPORT[9], there has been a huge caseload of disputes and appeals between cable operators and channel suppliers to ensure "non-discriminatory" treatment of each cable operator. Thousands of disputes are being litigated, with content owners having to expend substantial resources on litigation which could have been more meaningfully deployed towards generating quality content (litigations have been going on in Courts of Criminal Jurisdiction and also in a specialized Tribunal formed for the purpose viz. the Hon'ble TDSAT). This has become a huge burden both on the administrative/justice system and the pay-TV industry.

Recommendation: TRAI should increasingly play an active role to minimize disputes amongst stakeholders and facilitate deal

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[9]See para 2.69 of the REPORT

making. It should also play a more active role in ground audits and develop an easier implementation and enforcement module.

(vii) *Lack of differentiated programming*: As all programming is available to all cable and satellite platforms, the content market has become homogenized and commoditized. The same TV content is available everywhere in India for relatively low prices. Programming diversity and growth has been stymied. With piracy being wide spread and the law not affording much protection as a result, the pay-TV industry has been led to move down-market and rely increasingly on advertising revenue.[10]Channels do not seek "niche" markets; they all compete for high ratings (and more advertising income) in the mass market. Creative content aimed at "niche" markets does not appear in India; there is no vehicle for it to reach its audience. Introduction of new channels not having mass appeal has been made much more difficult. New entrants into the broadcasting market complain they are prevented from usingcontent to attract new customers. They are unable to offer a differentiated service to allow them to compete more effectively with existing platforms.

Recommendation: Must Provide should necessarily mean Must Carry. If an operator has availed a channel under Must provide it should be his obligation to carry that channel as availing the channel under must provide should create a legal presumption that it has the capacity to run the channels actually in its distribution network. Also new channels should be granted easier and priority access to distribution networks in its first year to reach viewers in order to spread awareness of the new product, or

[10] The television broadcasters are heavily dependent on advertising revenues. The industry size is split 66:34, in the favour of subscription revenue at the retail level. However the income of major broadcasters is roughly in the ratio of 35:65 in favour of advertising revenue (Para 2.11 of the REPORT) Also see para2.41 , 2.42 and 2.70.

else there will be very little visibility of such new ventures and they will die a slow but sure death.

(viii) *Erodes copyright law*: Today the consumer has a choice through the existence of multiple channels and platforms (analogue/terrestrial and digital). This inherently ensures a competitive landscape in so far as availability of channel to the viewer is concerned. Even if there any competition issues, there are specific legislation on Competition matters that have the required remedies. The time has come to ask the question whether continued existence of the current Tariff regime is justified or one ought to look beyond existing Regulatory formulations. Cable and satellite rates determined through the TRAI run rate-setting process are consistently below those that would have been negotiated in the market.[11] It is submitted that regulatory strictures that partake the character of mandatory standardized off the shelf terms for Distribution through either a "Must Provide" or "Tariff Ceiling", cast a duty upon owners/licensees of copyright to compulsorily give away their property to other commercial entities for the latter to profit at the cost of the former and are thus untenable deviationsfrom the rules of exclusivity embodied in the Copyright Act. The end result is a statutorily-mandated and sizeable subsidy for cable and satellite providers paid for by broadcasters who in most cases are copyright owners/licensees. Thus the Must Provide clauses perpetuate a regime of compulsory licensing that exacerbates such market distortion. They are market distorting and act in derogation of the legal principles that the public's interest in access to expressive works is best served by the market-based incentives that result from clearly-defined and meaningful exclusive rights. While such standardized formulations for tariff

may be seen as a means of lowering transactions costs in cases of inefficient or failedmarkets, government rate-setting and administration are traditionally inefficient, involve higher transactions costs, and are far less flexible than private-sector negotiations in functioning markets.[12] As a result, TRAI should review the question whether the policy justifications, that formed the basis for enactment of the "Must Provide" Regulations and the "tariff ceilings", continue to exist today as there is no evidence of any market failure or abuse of market power by broadcasters**.**

Recommendation: TRAI should consider the primacy of Copyright law while prescribing on carriage related issues

(ix) *Disproportionate say to regulators/operators*: Even where TRAI attempts to reflect the market in its Regulatory formulations, the enactments tend to make simplistic assumptions that may or may not be reflected in fact. For example, that the SLR provided by Operators to broadcasters are sacrosanct and inviolable, notwithstanding lack of addressability and admitted underdeclaration or that joint surveys are a panacea for all ills. These reflect a common defect of the Regulations as currently drafted, which is that the existing Interconnection/Tariff regime increasingly involves the TRAI in deciding the terms of carriage for television networks and affiliates without an opportunity for the people who invest Crores of Rupees in the provision of those signals to negotiate over where and how those signals are used by others. Whether it is TRAI deciding that "must provide, nondiscriminatory" clauses shall apply to Broadcasters thereby

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1. ***See*** Robert P. Merges, ***Compulsory Licensing vs. the Three "Golden Oldies: Projperty Rights, Contracts, and Markets"*** (Cato Policy Analysis No. 508, 2004)***See also*** Merges, supra (noting the problem that compulsory licenses or ceiling of rates "can easily become outdated and unreflective of supply and demand" and that "[i]n practice, ... compulsory licensing/ceiling of rates has led to price stagnation.") which is exactly the case in India;

enabling Operators who claim abysmally low subscriber bases to avail signals; provisions crafted to ensure ceiling of rates and that too on a genre wise basis regardless of costs; or even the persistent refusal to (a) lay down minimum eligibility criteria for MSOs/LCOs, (b) ensure quality of service and Must Carry as a precondition to Must Provide, (c) stipulate basic documentation for MSOs/LCOs - the over reaching Interconnection/tariff regime continues to expand its scope in supplanting the rights of broadcasters, by controlling how their products are used by other commercial entities with scant regard for the IP rights of broadcasters.

***Recommendation*:** TRAI should act on these long pending issues and have them resolved in this year.

(x) *Operators incentivized to litigate than negotiate*: Today the massive penetration of Pay TV in India is undisputed, so is the plethora of platforms. Considering this, as well as the fact that satellite services and cable systems, redistribute the offering of broadcasters directly in the marketplace, it is again fair to ask whether the goal articulated by TRAI in enacting the Tariff and other Regulations have been achieved.There is absolutely no market based reason why operators cannot negotiate with broadcasters covering all aspects of cable and satellite redistribution. This happens every day with cable networks and satellite service providers all across the globe. Moreover broadcasters have to subject themselves to competitive bid to procure content, and have to submit to market forces to obtain rights for popular programming. Indeed, in the absence of mandatory nondiscriminatory must provide clauses and frozen tariffs, Operators like all program providers, have every incentive to negotiate agreements for distribution of their products in as

many markets and on as many platforms as possible. The only reason such rights would not be sought for cable and satellite distribution is that the must provide nondiscriminatory interconnection and tariff regulations take away the incentive for them to do so. In effect, such Regulations take the right to determine the terms of distribution out of the hands of the ones who have actually incurred or invested crores to acquire or make that content viz. broadcasters and places them squarely into the hands of Operators, TRAI and the courts. One might ask whether the fact that broadcast signals continue to be regulated through TRAI mandated statutory clauses, rather than in the market, reflect a market failure, or whether whatever market failure that may exist is in fact the outgrowth of over regulating the broadcasting space through "must provide" and frozen tariffs.

Recommendation: All out efforts need to be undertaken by the Authority in order to ensure that extant regulations and tariff orders are not seen as creating an arbitrage favouring litigation over negotiation. This effort could be aided by several dispute resolution measures whereby the Authority also gets an opportunity to redress issues instead of stakeholders rushing to courts at the first available opportunity.

(xi) *Regulations are leading to disincentives and systemic erosion of IP:*Over the years we have been witnessing:

- a continuing and growing threat from content piracy, as extant regulations have no solves for it;
- the continuing and growing commoditization as new players enter the value chain, and
- Regulatory intervention that makes content creation a less attractive business.

If these forces are not addressed, the consequences could be both serious and corrosive. Weakened commercial incentives would mean lower levels of investment, a diminution in range and quality, and increased reliance on the public sector. As professional broadcasters, we are a long-term believer - and investor - in content. The business was founded on a belief that people wanted a better choice of TV and would be prepared to pay a fair price for it. Equally, we believed that companies which recognised that opportunity would, if successful, be rewarded. And that those financial returns would, in turn, help to fund continued provision of more high-quality programmes. Those beliefs remain just as strong to this day. And they are backed up by actions. We want to invest more than ever before. Continual improvement in the range and quality of our on-screen offering is central to our ambition as a business. We want not only to satisfy existing customers, but to reach out to more and more new customers over time. This means that we have a keen interest in a durable and sustainable economic model for investment in quality content. Of course, that interest is shared widely. And not just by all the other companies with a stake in the business of content creation. It is in the interests of consumers, and of society as a whole, that content creators should be able to secure a fair and profitable return. The argument - usually heard from publicly-funded organisations with no need to make a return on investment - is that content is too important for social or cultural reasons to be reduced to a mere commercial transaction. In response, it can be said that it is precisely because content is important that it is necessary for us to understand and preserve the incentives for commercial investment. The fact that the availability of high-quality content is socially desirable is not enough to guarantee its continued existence. Without investment by the commercial sector, consumers would not enjoy anything like the same range of quality content that they receive today, which connects them to the wider world and provides

enjoyment, information and inspiration. That's why there is nothing permanent or unchanging about the value of content. Like the value of anything else, it is constantly subject to a variety of forces - economic, technological and political - which can destroy as well as create. The way in which broadcasters as an industry recognize and respond to these opportunities and threats will determine our ability to maintain a virtuous cycle of investment, creativity and reward.

Looking ahead, we don't see any reason why the long-term growth in pay TV penetration should not continue. A key factor in this will be the increasing ability of subscription-funded broadcasters to invest in quality content, widening further the gap between what's available free and what more one can get if one chooses to subscribe. We understand that, at the heart of it, our customers choose us for the content. Their willingness to pay for the programmes they really care about is vitally important. That's what opens up the potential for increased investment and, in turn, the continued broadening of the pay TV offering. From DTH and mobile devices to IPTVs, our channels are making TV anywhere and everywhere a reality.This in turn is helping us to make our content investments work even harder. This isn't about replacing cable or satellite. It's about ensuring that customers can access our content on their terms.

But if changes in technology and consumer behaviour have the potential to enhance value, there are even more powerful forces working in the opposite direction. Unconstrained, they are capable of sucking value out of the system with dramatic consequences. We enumerate these forces as hereunder:-

i) PIRACY :ie transgression or underdeclaration, of course, is not a new problemfor content owners. But the stakes today are higher, given audiencefragmentation, emergence of new media and the resultant hit on theadvertising revenues for the industry as a whole,

thereby calling for a more emphatic reliance onsubscription revenue. We need to see area transgression and underdeclaration for what it is - theft, pure and simple. It is often thought of as a victimless crime, butthat couldn't be further from the truth. If we allow piracy to weaken thebusiness case for content investment, it will ultimately hurt the interestsof creators, distributors and consumers of content.

ii) COMMODITISATION: A second, very real risk to the long-term value ofcontent - and a flipside to the positive opportunity that comes with newdistribution channels - is the threat of commoditisation. And it is all tooeasy to see how this can happen. The arrival of new players in the value chain will create a greater number and variety of routes to reachconsumers. But the choice of which partner, or partners, to work withmust be weighed with great care. While all Operators are engagedsuperficially in the same activity, it would be wrong to assume that thereis a uniformity of strategic interest. For some, content is far from the coreof their business; it is the means to an end rather than an end in itself.As a consequence, there are operators who are happy to retail content at the lowest possible cost in order to earn their profits through area transgression underdeclaration and other revenue streams which could be through thesale of hardware (digital but non addressable boxes), broadband connections or the delivery of targeted advertising through their local unlicensed channels. The recent recommendations of TRAI on Platform Services have only helped in exacerbating the risks as it allows Operators to come up with their own channels. For these entities, cheap access to third party quality content is the magic formula. But here's the problem: creating quality content costs money and is inherently risky. If the value out of content is stripped out to take a handsome margin elsewhereie in distribution, we risk undermining the long-term future of quality content altogether. That may not be an issue for the operator. But it's a big problem if broadcasters want to go on earning

a return from content investment. Or, for that matter, if consumers want to go on watching the very best TV programmes they wish to. Therefore all stakeholders with an involvement in content creation will need to think carefully about the alignment of long-term interests when we consider our approach to distribution in the future. This is why non exclusivity needs to be over hauled and frozen tariffs derailed.

iii) REGULATORY DISTORTION: Regulators in the past, in the pursuit of their own policy agenda to promote the growth of analog cable operators, moved value from one part of the chain to another through the "Must provide" and the "frozen rates". These regulations particularly those on the rates were an onslaught on the value of content as they materially undervalued the offerings of broadcasters and failed to reflect the level of risk and investment in the broadcasting business. This is why broadcasters were compelled to mount a legal challenge before the courts. The Regulators admittedly with good but perhaps misplaced intentions sought the promotion of investment in analog delivery platforms. But what they perhaps did not realize was that these platforms would be operated by businesses having very little interest in direct content investment. But to make content retailing a more attractive business the Regulators squeezed the margins available in the considerably riskier and more expensive business of content creation. Regulators then, seem to have had convinced themselves that the consequences of intervention will be universally benign, that everyone wins when content becomes cheaper. Broadcasters disagreed fundamentally with that analysis and continue to do so now along with many other owners of valuable content who fear a catastrophic decline in the value of their respective rights. Such interventions were examples of the erstwhile regulators pursuing its own subjective vision of how the market should work, above that of content rights owners who have decades

of experience in how best to secure returns from investment in content creation.

Recommendation: TRAI should be doing a lot more on antipiracy intiatives and measures and focusing more on implementation and enforcement then it ever has.

VII. Regulating broadcasters is the only exception to an usuallyotherwise hands off approach from the government or the regulators:

We do not envisage any need to fix tariff for Non DAS areas. Motion pictures and cricket are immensely popular in India, yet the government has not stepped in to regulate the pricing of such films or cricketing events or their distribution terms for that matter. There is no regulation deciding the pricing of a ticket for a film or a cricketing event. The same is entirely left to market forces. This should also be the approach for the Broadcasting Sector. Even multiplexes charge higher than stand alone Cinema Halls for the same film. Ticket rates for cricketing events are way higher than what a subscriber pays for watching the matches within the comfortable confines of his home. Very recently there was a standoff between Multiplexes on the one hand and Producers and Distributors of Motion Pictures on the other, yet the government had done well not to intervene in a commercial dispute and instead it had left the dispute resolution entirely to market forces. The impasse eventually got resolved with all stakeholders leveraging on their respective bargaining powers. Subsequent disputes of like nature between Multiplexes and Producers/Distributors have been taken to the Competition Commission for adjudication. There is no reason why broadcasting should be treated any differently.

Recommendation: TRAI should be mainly concerned with driving transparency at the last mile and during the intermediate stages of channel retransmission in order to plug leakages and prevent value erosion, rather than setting prices at the whole sale and retail through regulation thereby artificially disregarding market forces.

VIII. Forbearencethus is the only answer:

In a market characterized by so many unknown variables and parameters as is the case in Non DAS areas, the Authority in its perspicacity would do well to allow the parties to address all issues and find all answers through market based negotiations and contracts. While TRAI has allowed operators to come up with declared subscriber bases it has frozen the other multiplier viz. the whole sale rates which is patently unfair. If subscriber bases can be a subject matter of negotiation or declaration on the part of the operator, likewise the whole sale rate should also be negotiated or declared by broadcasters. It could however hold a periodic review say once in every year to evaluate the state of the markets. In any event if there is a proven market failure the Authority can always intervene and this fear of intervention shall itself create necessary checks and balances within the system that will address all tariffs and structural issues till such time licensing and digitization (with addressability) sets in.Self Regulation among stakeholders brought about by market dynamics and the inbuilt fear of Regulatory intervention is bound to usher in the required hygiene in Non DAS markets. Even today, TRAI has been doing a commendable job by intervening in appropriate cases where it has reason to suspect that there has been a market failure or in instances where it sees a just cause for its intervention. Directions have been passed on several stakeholders on many instances and those have been abided by, as well. There is no reason why such a practice cannot be continued, with the Authority perhaps taking a more pronounced step than before in settling disputesbetween parties rather than the parties approaching courts in the very first instance. Forbearance shall work because of the fact that the distribution space today has acquired a level of maturity over the years. This is primarily due to:

> multiplicity of channels (both FTA and Pay) that are available

> multiplicity of platforms that a subscriber has access to

- equal bargaining power between stakeholders
- the indispensable requirement for "reach",
- Cable television being admittedly only an "Esteem Need" rather than a "Physiological need".[13]

The Authority it is respectfully submitted, needs to interpret the Orders of the Hon'ble Supreme Court and the Honble TDSAT in true letter and spirit. The Orders are not a mandate upon the Authority to affirmatively come up with a Tariff formulation. Rather, on the contrary, TRAI has only been asked to study the matter afresh by undertaking a ***de novo*** exercise and then take an informed decision on what should be the way forward. The Courts have in no way fettered TRAI or circumscribed its remit. All that the courtshave said as an unstated premise is that in case it chooses to do so, itshould be mindful of the lacunaes that the Tariff orderwould perpetuated and the same should not be repeated. The Authority has itself acknowledged, that neither Cost Plus, nor Revenue Share, nor Retail minus, are feasible in a non addressable environment. In any event historical costs cannot be a basis for future tariff in a dynamic industry like broadcasting. It is the Authority's ownfinding, after analysing Regulatory practices in 11 countries, that there is hardly any precedent for regulating the wholesale[14]. The position was the same even 14 years back when cable and satellite television was at its infancy in the world stage. The following Table 3 illustrates this[15]:

[13] Annexure F of the REPORT
[14] Page 61 , para 4.1.18 (2) of the REPORT

[15]Page 48 of Consultation Paper No. 9/2004 Telecom Regulatory Authority of India Consultation paper On Issues relating to Broadcasting and Distribution of TV Channels New Delhi April 20, 2004

Table 3.2 Regulation of Cable Television Pricing

	Are cable television prices for subscription service specifically regulated by government	Additional comments or major reasons for regulation.
Australia	No	Cable companies must operate in a maimer, winch is consistent with the Trade Practices Act (1974), which specifically prohibits misuse of market power and anti-competitive behaviour.
Austria	No	
Belgium	Yes	Regulated by the Ministry of Economic Affairs.
Canada	Yes	Basic Services regulated but not discretionary services
Denmark	No	
Finland	No	
France	No	
Germany	Yes	
Greece	Service yet to commence	
Iceland	N/A	
Ireland	N/A	
Italy	Service yet to commence	
Japan	No	
Luxembourg	N/A	
Mexico	N/A	
Netherlands	No	
New Zealand	No	
Norway	No	
Portugal	No	
Spain	N/A	
Sweden	No	
Switzerland	No	
Turkey	Yes	Regulated with reference to inflation.
UK	No	

Source: OECD paper on Current Status of Communication Infrastructure Regulation Cable Television, Paris 1996 (Table 9)

Costing of pay channel like any other costing requires details of capital expenditure and operational expenditure but cost determination for pay channels become difficult because:

- Some Pay Channels are broadcasted and viewed in more than one country making it difficult to apportion cost to a specific country/region.
- It is difficult to cost the contents being broadcasted, as it is not a standardized commodity. Video services are highly differentiated, programming quality is very difficult to measure objectively, and both services and their costs are changing rapidly.

Regulation of price of pay channels leads to lack of innovation by programmers resulting in stagnation or decline in overall quality, variety of programmes and other television offerings. Being a creative media, the contents of Television channels have unique programming and quite often comprises of copyrightable material and other intellectual property which cannot be standardized like telecom, electricity and water and thus cannot be priced in a standardised manner.

IX. Recommendations:

While the Authority should move towards mandating forbearance in analog cable, we suggest some measures that shall go a long way in addressing stakeholder concerns on analog cable. The time line for implementing these suggestions should be one year. If these are heeded to, the transition to DAS shall be smooth:

a. Forbearance in Whole sale and Retail , while continuing with a theoretical whole sale tariff for analog (after giving effect to the inflation adjustment) for the limited purposes of inference of DAS Tariff in terms of the interim Order of the Supreme Court directive. Thus while negotiations could be market based in analog cable, yet for the sake of DAS a notional/fictional wholesale tariff for analog cable could be devised after giving effect to the inflationary adjustment as identified in the amendments on 31st March 2014. This would be required as the

Supreme Court in the appeal pertaining to the DAS Tariff Orders had issued an interim order stating that till the matter is finally decided, wholesale tariffs for addressable systems shall be 42 percent of the wholesale channels rates applicable for analog cable. Retail rates for analog cable deserve to be under forbearance in order to avoid an anomalous situation wherein TRAI prescribes retail forbearance for digital addressable systems but calls for retail rate regulation for analog cable. Given that regulatory formulations should be technology agnostic and further that analog cable is already facing pressure from DTH together with broadcasters having to vie for space within a 821 channel paradigm, there is all the more a need to free up whole sale and retail analog rates. This legal fiction of a theoretical analog tariff can be said to fall apart once the appeal in the DAS tariff matter is finally heard and decided by the Supreme Court.

b. Urgently review extant Interconnect and Quality of Servoce Regulations and Laying down Minimum Eligibility Criteria/Documentationrequirements for MSOs/LCOs and laying down grounds fordisqualification from Must Provide, this could include:

    (1) Basic documentation requirement. It has to be appreciated that broadcasters extending signals to operators are more like financiers extending credit to borrowers, accordingly broadcasters like financiers should be allowed to do a due diligence on the Operator and call for as much information as may be required.

    (2) All eligibility/ineligibility criteria for borrowing in the finance sector should be made equally applicable in the broadcasting sector.

c. Suggest a methodology of determining Connectivity levels among subscribers or existing practice could continue but with (1) broadcasters having a right to call for records and (2)

broadcasters doing a pre audit/pre inspection by an independent third party auditor/inspector if necessary to examine total receipts and connectivity, lay out of optical fibre across specific areas , examine the Right of ways to obtain a fair idea of the operator's area of operation, etc; Adverse opinion if any by auditor or non cooperation with auditor, or not presenting data to auditor should disqualify Operator from Must Provide. TheAuditor/Inspector shall be appointed by Broadcaster. The Operator should pre deposit the cost with the broadcaster. It is submitted that negotiations will be meaningful only when there is sufficient clarity on the total subscriber base of an Operator. Operators should also be called upon to submit their SLR vide a sworn judicial affidavit which they should submit to the TRAI and the MIB. They should be asked to submit this Affidavit on a quarterly basis.

d. Allow year on year inflation adjusted increment as identified by the Authority. TRAI should allow the entire 43.69 % inflation hike at the very least to ensure purchasing power parity rather than confining it to a mere 27.5 %. In any event the Authority should notify the additional 12.5 % tariff hike as promised in the Tariff Order dated 31.03.2014. [16]

e. Must Provide should mean Must Carry, it must be presumed that if an Operator is asking for a particular channel under Must Provide it hasthe requisite infrastructure to carry it.

f. Placement deals could however be concluded after Negotiations

g. Ensure enforcement of Placement contracts

h. Stringent penalty on Black Outs/Band change extending todisqualification from Must Provide

[16]See para 7 and 9 of The Telecommunication (Broadcasting and Cable) Services (Second) Tariff (Eleventh Amendment) Order, 2014 (3 of 2014) dated 31st March 2014

i. Mandate availing unitary feed, ban availing multiple feed byLCOs

j. LCOs should be franchisees of MSOs

k. Billing should be shifted from LCO to MSO

l. Periodic Audit rights should be given to broadcasters to checkand verify the records of the MSO

m. QOS obligations should be linked to Must Provide, QOSobligations should be uniform for LCOs and MSOs

n. Stringent record keeping/billing obligation on LCOs/MSOs

o. Stringent penalties/financial disincentives on areatransgression/unauthorizedcable casting/piracy extending to disqualification from MustProvide, For this purpose the FIR filed by Broadcasters should be accepted as prima facie proof along with the proof of raid if any. In the event Operators are able to prove conclusively that there was no piracy committed by it, in that event Authoirity could impose suitable financial disincentives to Broadcasters.

p. Bringing down the Notice period to 7 days for Non DAS areas in particular.

q. Stringent penalty on default on payment or other proven violation of the regulation extending to disqualification from Must Provide

u. An over all culture of enforcement needs to be brought in, and this could perhaps be facilitated by the state level officers to whom TRAI has delegated some of its powers but obviously with proper checks and balances.

q. Broadcasters should be allowed to differentiate between commercial and ordinary subscribers. Even several Utilities have tariff structures that do make such distinctions, for example the Power sector applies different rates to commercial subscribers. We believe that even forbearance is a form of regulation, accordingly the tariff dispensation for commercial

subscribers should not even be under forbearance, itshould be completelyderegulated. Therefore all the enactments that pertain to commercial subscribers in our view should be repealed primarily because (1) Cable television is not an essential commodity and (2) commercial entities do not require regulatory support and specialized treatment for availing such services as they use such services for their commercial gain. Even within the present system, the Authority has not found any instance of abusive pricing in so far as the commercial subscribers coming under the forbearance regime is concerned.[17] There is accordingly no room to suspect that in a deregulated environment, broadcasters shall be unfair in their dealings with commercial subscribers.

r. TRAI had commissioned a market survey in 2004 whereby it had found the all India average cable bill to be Rs. 176 excluding taxes.[18] Six years have elapsed since and TRAI has also allowed inflation induced increments from time to time ranging from 4- 7 percent per annum. New Channels/bouquets have also since come into existence. Accordingly we are not in a position to accept retail rates being sealed off at INR 260/-. In 2006, in another Paper[19] TRAI had held: *"In the current scenario in non CAS environment information as available in the market shows that an average price for25-30pay channels along with 30 free to air channels is around Rs 175-200/-."*There can thus be no doubt today that taking into account year on year growth allowed by the Authority, together with the entry of new Pay channels in

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[17]Page 91, Para 5.6.22 of the Consultation Paper dated 25.03.2010.......the rates for commercial subscribers are typically in the range of 3 to 5 times than the rates charges for the ordinary subscribers for different pay channels distributed by various broadcasters. This has been observed since 2007. However, this ratio has been more or less the same over the past 3 years, which indicates that there has been stability in these negotiations"

[18]Paragraph 2.27, Page 15, of Consultation Paper No. 6/ 2007 dated May 21, 2007, On Issues relating to Tariff for Cable Television Services in Non - CAS areas.

[19]See Para 5.13, page 37 of The Telecommunication (Broadcasting and Cable) Services (Third) (CAS Areas) Tariff Order, 2006 (6 of 2006) 31st August 2006.

the fray, the Average All India Cable Bill today should be in the rangeof Rs. 300 - 400/- per month. The 4th Oct 2007 Taroff Order had an upper most Tariff ceiling of INR 260/- .We are also surprised to note that the TRAI had just on 31st march 2014 prescribed a set of retail tariffs with INR 300 being the upper most limit. It is not even 9 months and the TRAI has come up now with a completely different tariff structure with INR 260/- being the uppermost ceiling. No rationale has been given for the same whatsoever. We submit that given the stiff competition from rival platforms, Analog retail rates should be kept at forbearence. However if the Authority so chooses to regulate retail tariff for analog cable (a position that we neither support, accept or concede) then in keeping with inflationary trends the retail tariff should be kept at levels not below the range of INR. 300 – 400 to reflect the actual impact due to inflation.

s. In Clause 8 of the Draft Tariff Order, it has been provided that the advertisement revenue for the last 3 financial years is required to be furnished annually with the Authority. We fail to understand the logic/purpose of stipulating this requirement. We should oppose this on the ground of confidentiality. It has also been provided that in case of launch of new pay channel and/or in case of conversion of FTA to pay channel the relevant intimation should be notified to the Authority one month before such change takes place. It may be recalled that earlier the broadcaster could file the necessary declaration with the Authority within 7 days of the launch of channel. Now this requirement has been changed to 30 days prior intimation. This is going to cause practical hardship. The earlier provision should be retained.

t.. It has been stipulated by way of explanation to Clause 4 as well as Clause 5 that the provisions of Addressable Systems Tariff

Order 2010 shall apply to the Broadcasting and Cable services being provided to the consumers through addressable systems. In this regard TRAI should:

(a) notify the amendment to the QOS Regulations whereby it had proposed to levy the fines and penalties/financial disincentives on MSOs/LCOs for defaulting on issuing bills/receipts to the subscribers as per their CAS/SMS systems. Despite the expiry of about 2 years, the CAS/SMS systems of the MSOs are not in place in the DAS notified areas. The said clause should be subject to the condition that amendment under reference regarding the penalties/fines/disincentives be notified immediately. Also the Non DAS QOS Regulations should also be amended on similar lines.

1. It has to be categorically made clear that (i) Pricing should be technology based and not area based (ii) There are only two forms of signal Analog and Addressable and (iii) If an operator has put up a set top box he has to be dealt commercially as an addressable operator andthe provisions of the DAS Tariff Order of 2010 as well as the Das Regulations shall apply in toto. In other words, the number of subscribers receiving channels is clearly ascertainable from the CAS/SMS systems maintained by MSOs. It should be made clear by TRAI by stipulating a necessary provision in this regard that where the MSO is effecting digital delivery i.e. the signals are being provided through STBs, the system must be addressable and should meet the prescribed specifications laid down by BECIL/BIS and TRAI.

(b) That the operator concerned shall enter into a DAS contract with all broadcasters and not be selective by entering into contracts for analog cable retransmission with some

broadcasters while entering into DAS based retransmission contracts with others.

(c) No signals should be provisioned by such operator in a digital but unencrypted manner through Set Top Boxes. Signal provisioning through pre-activated boxes should be prohibited as that has been the greatest learning of implementing DAS in phases I and II. In case the operator is providing signals through STBs, it should be deemed that his head end must in any event be digitally addressable and hence he should automatically be considered as one coming under voluntary DAS and as such amenable to the DAS regulations and Tariff Orders. Also such operators should be periodically submitting reports to the MIB, TRAI and Broadcasters on the number of STBs being seeded by it on a quarterly basis. It should be mandated that such Operator could however seed boxes as a part of transition measures once he has set up a digital addressable head end, but he should not be allowed to retransmit analog/unencrypted signals through such boxes. This shall help the Operator in garnering CAFs and feeding it into the system in a timely and organized manner. Accordingly there ought to be a mandated three stage phase out/switch over (a) first he seeds the boxes but does not provide signals through these boxes (he may continue to provide analog signals as such), (b) once CAFs are in place and the subscriber has been configured in the Operator's SMS and CAS, the STB gets activated, (c) simultaneous with STB activation - analog signal provisioning should be stopped,

Yours Truly
for STAR India Private Limited
Sd/ Pulak Bagchi
(Pulak Bagchi)
Authorised Signatory