Consultation Paper on Draft Telecommunication (Broadcasting and Cable Services) Interconnection (Addressable Systems) Regulations, 2016

In response to TRAI's consultation paper on the above mentioned 'Draft Regulation', please find below our views and comments as response to said order. You may kindly note that below comments are without prejudice to our rights and contentions, including any ongoing or future litigations and we reserve our rights to modify, change and submission of further comments or counter comments to clarify our position on the issues under this consultation paper.

I. Clause-wise views and inputs on Draft Regulation

A. Definitions:

i. Clause 2 (hh): "pay channel":

By this definition, new launched pay channel may not qualify as pay channels, as new channel is generally distributed without charges on promotional basis to the DPOs and subscribers during its initial launch/ promotion period.

In view of this, we suggest that:

a) a new pay channel should be considered as pay channel on the basis of the declaration, as such, by the broadcasters, and the condition that the 'license fee to be paid to the broadcaster by the distributor of television channels' should not applicable for the first six months of the launch of the new channel, and

b) The discount ceiling under clause of 5(4) of the draft should be relaxed for at least initial six months of the launch of a new pay channel, and

c) Option should be given to DPOs to allow, at their discretion to launch certain numbers of newly launched channels immediately and out of turn on their distribution network.

ii. Clause 2 (mm) "Subscriber"

The definition of "Subscriber" has no mention of commercial subscriber(s). Although the prevailing regulations promulgates the 'Commercial subscribers' and 'Tariff for Commercial Subscribers', whereas the Draft Tariff Order, has no mention of commercial subscribers and tariff related to commercial subscribers.

Time and again, it has been submitted that ordinary subscriber that include primarily domestic household and commercial subscribers, are fundamentally incomparable and different by the way they consume the service. An ordinary subscriber would consume TV service for its own pleasure, whereas the commercial subscriber will further sell that service to its consumer and make profit from it.

On September 08, 2015, the Authority has issued The Telecommunication (Broadcasting And Cable) Services (Fourth) (Addressable Systems) Tariff (Fifth Amendment) Order, 2015 (Commercial Tariff Order 2015), whereby the authority had defined the Commercial Subscriber to mean and include a subscriber who causes the signals of TV channels to be heard or seen by any person for a specific sum of money by such persons.

While the provisions of Commercial Tariff Order 2015 are under challenge before the court and the Authority is defending the new definition of Commercial Subscriber, however now it feels that in the addressable systems the definition of Commercial Subscriber is not relevant and has been completely done away with it in the Draft Tariff Order.

The Authority while issuing a generic definition for 'Subscriber' in the draft Tariff Order has made an fundamental error of treating distinct and separate classes or groups as equals hence, violative of Article 19 (1) (g) *(Fundamental Right to Practice*

any Profession or to Carry on any Occupation, Trade or Business) of the Constitution of India.

TRAI has arbitrarily obliterated the distinction between Commercial Subscriber and Ordinary Subscriber, without following the due process of law.

No consultation was done by TRAI on the aspect if there is a need to completely destroy the distinction that legally exists between the Commercial Subscriber and the Ordinary Subscriber.

In fact, there are certain registered DPOs who have been approaching broadcasters for their channels to cater only to Commercial Subscribers & establishments viz. hotels, restaurants, hospitals, commercial areas and offices, etc. The Authority should make regulatory framework that allows such DPOs to enter into subscription arrangements, that caters to Commercial Subscribers, with broadcasters basis fixed rates or without ceiling rates basis.

B. General provisions relating to interconnection

i. Clause 3 (5)

The draft regulation provides that *'…broadcaster shall, within sixty days of receipt of written request from a distributor of television channels for obtaining signals of television channel..'*

This Conflicts with Clause 9 (7) on page 24, which says "….within **thirty days** of receipt of written request from a distributor of television channels, shall enter into a written interconnection agreement with the distributor of television channels for providing signals of its pay television channel(s)."

We suggest that this inconsistency should be clarified and the internal conflicts of timelines be removed. Ideally, sixty days timeline for obtaining signals has been the norm under the past regulations and the same may be maintained in the new regulations as well.

ii. Clause 3(9)

This clause provides that every distributor of television channels shall, within thirty days of the commencement of these regulation, publish on its website the total channel carrying capacity of its distribution network(s) in terms of number of standard definition channels, coverage area of the network(s), list of channels available on the network(s), spare capacity available on the network(s) and the list of channel(s) in chronological order for which requests have been received from the broadcaster(s) for re-transmission and are pending.

We submit that without the necessary disclosures to TRAI and/ or time bound self–disclosure on DPO's website, there will be no transparency and the clause will remain a subject to manipulation & inefficiency. Such slack regulation may result in either no or just self-serving reporting by DPOs.

Thus we suggest that it should made mandatory for the DPOs to publish and update complete details of their network's channel carrying capacity and pending channel list in chronological order, within seven days of any change in place of thirty days as mentioned in proviso to clause 3(9).

It would be only fair to DPOs, if they are given discretion to allow any newly launched channel out-of-turn placement from the chronological order channel list on their network by way of mutual agreement. The discretion, if allowed, should be restricted only to limited positions in each genre. While such provision will be beneficial for both the DPOs and the broadcasters who wish to launch their new channels, at the same time it will remain fair to other broadcasters who are seeking channel placement in order of the availability of the channel carrying capacity on the DPO's network.

Lastly, to negate any unfair practice by DPOs or prejudice to the broadcasters against exploitation of the provisions of the proposed regulation, it should be made mandatory for the DPOs to carry all the channels/ bouquets, which are being carried by it during the last calendar quarter from the effective date of the proposed regulation, at least for

the next 60 days. This will provide level playing field to all broadcasters and opportunity for true and desirable consumer choice. Otherwise, some DPOs may illegitimately demand for unreasonable carriage fees under the garb of exercising its rights and threatening to switch-off broadcaster's channels from its network before the proposed draft regulation comes into effect.

iii. Clause 3(10)

The clause mandates that every broadcaster shall, for the purpose of carrying its channel(s) by a distributor, declare target market in terms of the relevant geographical areas as specified in **Appendix I**.

We suggest that the term 'Target Market' needs to be specifically defined and distinguished from the 'Relevant Geographical Areas' as specified in Appendix I. Distinguishing and defining 'Target Market' is necessary in view of the conditions that have been proposed in the clauses pertaining carriage and 'must carry' obligations for DPOs. Further, the broadcaster should have adequate freedom to identify target market for its channels. The term 'Target Market' should flexible to include DAS phase I & II cities, separately or conjoined, along with the States & Union Territories.

iv. Clause 3 (12)

The clause provides that it shall be open for a distributor of television channels to discontinue carrying of a television channel in case the monthly subscription, in the immediate preceding six consecutive months, for that particular television channel is subscribed less **than five percent of the subscriber base of that distributor, in the target market** specified by the broadcaster in the interconnection agreement, in that particular month.

Our submission is that present clause is susceptible to manipulation and misuse by the DPO against the broadcaster. We suggest that following measure must be taken to save this clause from misuse/ manipulation, the measures are:

a) The term 'Target Market' should be clearly defined;

b) It should be clarified that the subscriber base should be accounted on the basis of genre and technical parameter, like SD or HD channels.

Rather than the subscription accounting on the basis of the entire subscriber base, the accounting should be relative to the subscriber base of the genre. For eg. English News Genre subscription is relatively skewed (less than 7% of the total cable & satellite Indian households) when compared to other genres, thus a English news channel, on its own, may actually never be able reach the proposed threshold of more than five percent of the subscriber base of that distributor, in the target market and thus, can be discontinued by a DPO. Whereas the English News is an important genre from the point of view of media plurality and customer choice and therefore should be encouraged to sustain such rigors and not allowed to be done away or become subject of exploitation under the garb of exercising rights under the regulations.

Thus we suggest that provision for discontinue carrying of a television channel in case the monthly subscription should have twin conditions, as under:

i) **When that particular television channel is subscribed less than five percent of the subscriber base of that distributor, in the target market; and**

ii) **When that particular television channel is subscribed less than 10 percent of the collective subscriber base of channels in its relevant genre of that distributor, in the target market;**

Similarly, HD channels which are niche channels should be given protection to sustain themselves in such competent markets and demanding regulations. We

are of the view that the above suggested twin conditions when applied to SD channels should have provide for comparison only with subscription of all SD channels and for HD channels with the subscription of all HD channel of a DPO in a Target Market;

c) The threshold should be applied and assessed for separately for each 'Target Market' and not collectively for conjoined areas;

d) This clause should made effective only after six months after the proposed regulation coming into effect. This will give broadcasters some time to review and reassess the market and take suitable measure to sustain their channels for the 'Target Markets'.

C. General provisions relating to interconnection agreements.

i. 3rd Proviso to Clause 9(20)

The clause provides that a distributor of television channels shall not discontinue carrying a television channel if the signals of such television channel remains available for re-transmission and subscription for that particular television channel is more than 20% of the subscriber base in the **target market**.

The inference that can be drawn from the clause is that in the case a channel has a subscription which is less than 20% of the subscriber base in the target market, the DPOs can disconnect television channels. Whereas, in the context of carriage fee provisions, the term 'Target Market' has not been defined or clearly explained. Thus this clause is subject to abuse by DPOs against broadcasters especially against small and non-GEC broadcasters.

ii. Clause 10 (2): Territory of the interconnect agreement:

Our submission is that the said clause requires clarifications regarding:

- Whether the DPO's area of operation can be restricted by way of mutual agreement between broadcaster and DPO or not?

- Whether upon notice, is there a limit to DPO's extension of area of operation? Unrestricted movement of the DPO may cause disputes between competing DPOs, resulting in duplicate billing for the same number of subscriber at least for the month, the area of service was extended.

D. Clause 21: Repeal:

With the reference to this clause, we request for clarification on the following issues:

- Will an agreement, signed before the effective date (1st April, 2017) of the new regulation, survive the effect of the Regulation if the agreement does not fully comply with the terms of the new regulation.

E. Explanatory Memorandum:

i. On the issue of Carriage and Placement Terms in Interconnect agreements:

Para 36:

The para states as following:

"….. The parties to the interconnection agreement must not include any clause in the interconnection agreement which directly or indirectly require the DPOs to include the channels or bouquet of pay television channels in any particular bouquet offered by the distributor as this may affect the choice of the consumer. ***However, the parties***

can provide discounts for placing of channels for allocating a particular number to a channel on the basis of parameter disclosed in the RIO."

With reference to clause 3(6) of the draft regulation, there is a conflict between the clause and the para. We seek clarification, whether the discounts for the provision of particular position/ LCN to a channel in the RIOs by a broadcaster shall amount to a pre-condition or not?

ii. On carriage and Placement Agreement (Separate from Interconnection/ Subscription Agreement):

While the draft regulation in para 42 of Explanatory Memorandum, suggests for possibility of Placement & Marketing agreement between DPO and broadcaster outside the interconnection agreement. This may result in demand for substantial placement & marketing fee by DPOs from the broadcasters.

In view of this, a provision must be made that obligates the DPOs to maintain parity and non-discriminatory pricing for all agreements, including Placement & Marketing agreements. Further, the draft regulation must ensure that under garb of such agreements, DPOs should not demand unreasonable and discriminatory carriage fee, in access of what is provided under the regulations.