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NETWORKS ASIA-PACIFIC™

September 3, 2013

Telecom Regulatory Authority of India
Mahanagar Door Sanchar Bhawan
Jawahar lal Nehru Marg (Old Minto Road)
Next to Zakir Hussain College
New Delhi 110 002

Kind Attn: Mr. Wasi Ahmad, Advisor (B&CS)

Dear Sir,

Ref: Discovery Communications India's **("DCIN")** response to the Telecom Regulatory Authority of India **("TRAI")** Consultation Paper on Distribution of TV Channels from Broadcasters to Platform Operators **("Consultation Paper")**

We write in reference to the Consultation Paper, whereby TRAI has invited comments from stakeholders on draft amendments to the Tariff Orders, Interconnection and Register of Interconnect Regulations relating to addressable and non – addressable broadcasting and cable TV services **("Draft Amendments").**

We thank TRAI for providing us with this opportunity to respond to the Consultation Paper, and are placing on record our concerns and objections viz-a-viz the Draft Amendments (enclosed herewith).

This response sets out our views and comments based on the information shared and Draft Amendments proposed by TRAI in the Consultation Paper and is without any prejudice to all our rights and remedies in the event these Draft Amendments are sought to be notified / implemented by TRAI.

Thanking you,

Yours sincerely,

For **Discovery Communications India**

Rahul Johri
SVP and General Manager: South Asia

Encl: a/a

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DCIN's response TRAI Consultation Paper on Distribution of TV Channels from Broadcasters to Platform Operators

A. Preliminary Objections

(i) From a reading of the Consultation Paper, it appears that TRAI has already made up its mind to introduce the Draft Amendments, and that it is a foregone conclusion. However, we submit that TRAI has not made out a considered, cogent case concluding with the need for the introduction of the Draft Amendments in the first place. With due respect, we submit that the Consultation Paper is vague and presents assumptions which are unsubstantiated. It does not contain any empirical data or other evidence to establish the premise on which TRAI is proposing the Draft Amendments, i.e. the so called abuse of market power by aggregators.

(ii) TRAI has not followed a proper, transparent and due consultation process prior to proposing the Draft Amendments. TRAI has not consulted the stakeholders on the issues raised in the Consultation Paper and has proceeded to suggest the Draft Amendments basis prima facie assumptions. We believe that TRAI should first initiate consultation on the core issues and invite comments from all stakeholders (which is the case with all consultations), provide an opportunity to stakeholders to submit their comments and counter comments on such issues, establish (through analysis of reliable data and facts) if there is a requirement at all of making any changes in the existing regulatory set up, and then propose any amendment(s) if such requirement is established. In fact, we submit that the premises and assumptions basis which TRAI wants to introduce the Draft Amendments are themselves misplaced, since they have been examined by the Competition Commission of India (elaborated supra), which held that an aggregator is not in a position to indulge in anti-competitive behavior in this market.

B. Jurisdiction

Role of Competition Commission of India under the Competition Act

(i) The Consultation Paper is based on certain assumptions including that aggregators wield substantial negotiating power which can be, and is often misused and has led to several market distortions; there is misuse of dominant position and abuse of market power by aggregators, etc. Without prejudice to the fact that none of these have been substantiated as aforesaid, we submit that TRAI does not have jurisdiction to deal with these issues and they have to be taken up by the appropriate body set up to deal with them, i.e. the Competition Commission of India.

(i) The Competition Act of India **("Competition Act")** provides adequate safeguards for ensuring fair competition and restraining anti-competitive behavior. Section 3 of the Competition Act *inter alia* prohibits any enterprise or association of enterprises or person or

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association of persons to enter into any agreement in respect of production, supply, distribution, storage, acquisition or control of goods or provision of services, which causes or is likely to cause an appreciable adverse effect on competition within India. Section 4 of the Competition Act *inter alia* prohibits an enterprise or group from abusing its dominant position.

(ii) The authority set up under the Competition Act, i.e. the Competition Commission of India (CCI) is the appropriate authority with the expertise to deal with such issues. The Competition Act *inter-alia* provides the CCI the power to regulate / take corrective steps in case it comes across agreements amongst enterprises or persons at different stages or levels of the production chain in different markets, in respect of production, supply, distribution, storage, sale or price of, or trade in goods or provision of services, including tie-in arrangement, exclusive supply / distribution agreement, refusal to deal, resale price maintenance, etc., which cause or are likely to cause an appreciable adverse effect on competition.

(iii) The Competition Act also provides for safeguards and corrective steps in case an entity abuses its dominant position in a manner which distorts competition. The CCI has the power, in such instances, to order discontinuation of the abuse of dominant position, discontinue impugned agreements, impose penalties, modify agreements or even order division of an enterprise enjoying dominant position. It is important to note that the Competition Act does not prohibit an entity from being in a dominant position, but it is the abuse of such position (which has to be established after a proper inquiry and due investigation) which makes the CCI step in.

(iv) In light of the extensive powers and jurisdiction vesting with the CCI to deal with issues related to anti-competitive behavior, abuse of dominant position, etc., we submit that these issues should be examined under the Competition Act by the CCI.

(v) The CCI, while investigating the allegations that the merger between Star Den Media Services Ltd. and Zee Turner Ltd to form a joint venture, viz. Media Pro Enterprise India Pvt. Ltd. (Media Pro) noted *inter alia* (after due investigation by the DG) as follows:

"It is noted that the broadcasting sector in India is regulated by the TRAI, which has framed various regulations which, inter-alia, make it obligatory for a broadcaster to provide signals of its television channels on a non-discriminatory basis to every DTHO/MSO/IPTVO and not to enter into exclusive agreements with any distributor that prevents others from obtaining such television channels for distribution. Further, the regulations and tariff orders issued by TRAI, from time to time, stipulate that broadcasters/aggregators cannot deviate from the pricing methodology mentioned in those regulations/tariff orders."

After a perusal of the relevant TRAI regulations, the CCI concluded as follows:

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"The plain reading of the aforesaid regulations suggests that broadcasters are under an obligation to provide non-discriminatory access of their content to all distributors of TV channels and cannot refuse to deal with a distributor on unreasonable or discriminatory grounds such as discriminatory pricing etc. Therefore, in view of the present TRAI regulations, there is almost no scope for the aggregators / broadcasters to indulge into the restrictive activities of controlling the supply of their channels to MSOs or other distribution platforms"

CCI has noted that *"TRAI has also issued various tariff orders from time to time and as per these tariff orders the broadcasters/aggregators are effectively prohibited from charging any price either from MSOs or DTH operators, which exceed the prescribed ceiling prices."*

CCI also noted that *"During the course of the investigation, DG has not come across any evidence which hints towards the control on the supply of channels by the JV in the market."*

The CCI also cleared the acquisition of 26% equity by UTV Global Broadcasting Limited in IC Media Distribution Services Private Limited, a wholly owned subsidiary of IndiaCast Media Distribution Private, which resulted in the transfer of the aggregation business of Indiacast and Disney group into one entity. The CCI formed the opinion that that the proposed combination was not likely to have an appreciable adverse effect on competition in India.

We urge TRAI to give appropriate consideration to the these orders of the CCI, where the CCI carefully examined the role of two of the biggest aggregators and came to the conclusion, after investigation, that their activities are not likely to lead to any market distortion or anti-competitive behavior. In light of CCI's findings, we submit that the premises on which TRAI wants to introduce the Draft Amendments are misplaced and misconceived.

Statutory recognition of distribution agencies and their role

(vi) The Consultation Paper correctly notes that the Cable Television Networks (Regulation) 1995 Act and rules made thereunder recognize the role of distribution agencies. The TRAI Act and the Regulations made thereunder also have all along acknowledged the role of distribution agencies and make them responsible for several compliances. The operations of such distribution agencies (also referred to as aggregators) have always been subject to the said Cable Act / Regulation and TRAI Act / Regulations. The Consultation Paper acknowledges that such distribution agencies have come to be popularly known as 'aggregators'. It is therefore erroneous to state that 'aggregators' as a separate entity have not been recognized or specifically defined anywhere or that there is absence of any regulatory frame work for these authorised distribution agencies. In fact, the CCI, in the Media Pro matter referred to above, *inter alia* concluded as follows (after considering the detailed investigation report of the DG as well as the relevant TRAI regulations):

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*"Due to the said regulations, the distribution of the channels and their pricing by the broadcasters**/aggregators** is totally regulated."*

(vii) All channels broadcast in India are subject to the Up linking and/or Downlinking guidelines laid down by the Ministry of Information and Broadcasting, as the case may be. Neither the Uplinking guidelines nor the Downlinking guidelines contain any restriction or stipulation of the nature proposed by way of the Draft Amendments.

(viii) We therefore submit that the existing legal regime governing the broadcast sector does not restrict the freedom of a broadcaster to distribute its channels through a distribution agency, which have been statutorily recognized and regulated. The law of the land also recognizes such principal to principal contracts whereby a broadcaster appoints a distribution agency/aggregator to manage the distribution of its channel(s). In our view, TRAI does not have the jurisdiction to introduce the Draft Amendments which intend to restrict this freedom of broadcasters and also override the existing legal regime in India.

C. Effect on channels having unique content

(i) Channels which have unique content and which have dedicated audiences across the country may not have the resources or the infrastructure on their own to manage a large distribution network to reach and service their audiences. Such channels depend on the infrastructure of their distribution agencies which have nationwide distribution networks to manage their distribution (including operational and logistical aspects) to reach their viewers pan India. This also enables them to cut costs and keep a lean structure. The proposed Draft Amendment would be detrimental to the growth of such unique content channels and would make it difficult for them to survive/compete against general content channels with higher revenues which have the capacity and the resources to manage their own independent and elaborate set up to take care of distribution of their channels. The Draft Amendment, if implemented, would put the broadcasters of unique content under severe financial distress, especially when the effects of digitalization are yet to fully accrue for broadcasters, content acquisition costs are continually rising and there is strain on revenues on account enforcement of the ad-cap regulation.

D. Role of distribution agencies / aggregators

(i) Aggregators play a vital role in the television industry in India, which has always been a vast and fragmented market. The aggregators deal and negotiate on behalf of the broadcasters with various distribution platform operators, which are more than 6000 at present. The aggregators thus facilitate the distribution of different channels through single negotiation with each operator. Aggregators create efficiencies in the distribution system by optimum utilization of resources and cost reduction. They also help counter the monopolistic and unilateral practices of a majority of the MSOs to a certain extent, by giving broadcasters some bargaining power when dealing with the MSOs and other distribution platform owners.

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The aggregators have also been instrumental in promoting the implementation of digitization and addressability.

TRAI itself has noted in its Consultation Paper on Monopoly in Cable Services that MSOs enjoy extensive monopoly. The Draft Amendments, if implemented, would greatly reduce the bargaining power of the aggregators (and consequently the broadcasters) viz-a-viz the MSOs and other operators and would end up in bringing about inefficiencies in the distribution market in India.

We also oppose the Draft Amendments on the following grounds:

a) The existing Interconnection Regulations are already one sided with a mandatory "Must Provide" condition applicable on broadcasters and no corresponding mandatory "Must Carry" obligation on all distribution platforms. The proposed Draft Amendments will have the effect of taking away the limited bargaining strength that broadcasters currently have viz-a-viz the distribution platform operators and will lead to increase in carriage costs of broadcasters and reduction of subscription revenue. This will in effect defeat the very objective of digitalization.

b) TRAI has not considered the fact that a distribution platform operator has the right under the Interconnection Regulations to subscribe to channels on a-la-carte basis. This coupled with the "Must Provide" obligation means that an aggregator / broadcaster cannot deny signals to a distribution platform operator, even if the platform may not want all channels distributed by the aggregator. In case of any denial, an operator is free to approach the TRAI / TDSAT to force the aggregator to supply the signals of the concerned channel(s). Thus, the premise that distribution platform operators are compelled to subscribe to all of aggregator's channels is erroneous.

c) TRAI has incorrectly stated that market distortions arising out of current role assumed by the aggregators have impacted the smooth implementation of DAS. In reality, it is the failure of MSOs to execute agreements with LCOs and get subscriber forms (CAF) from viewers that has led to the current fiasco. TRAI is well aware of the ground position, and has indeed taken a tough stand against MSOs and LCOs who are yet to get their subscribers to submit CAF. Hence this statement in the Consultation Paper is contrary to the actual position, which TRAI is well aware of.

d) The Consultation Paper wrongly assumes that Fixed Fee deals have been imposed on MSOs when in reality it was the MSOs who insisted on Fixed Fee deals and sought TRAI's intervention in ensuring that deals are signed on Fixed Fee basis to facilitate smooth transition to digitalization. Aggregators have always been willing to execute agreements on a per subscriber basis. TRAI has also ignored the fact that till date, none of the key

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MSOs have provided accurate and correct subscriber reports, defeating one of the chief objectives of digitalization. Even TRAI has not shared the data filed by MSOs with TRAI with the aggregators/broadcasters. We suggest that TRAI should, instead of burdening the broadcasters with further unreasonable restrictions, work towards ensuring transparency in the system post implementation of DAS, which would go a long way making digitalization a success.

e) TRAI has failed to recognize the fact that distribution platform operators themselves prefer subscribing to all channels because of the high discounts they receive on account of bulk buying. We suggest that the TRAI should analyze the interconnection agreements filed with them to ascertain the discounts in rates that have accrued to MSOs/DTH operators on this count.

f) TRAI has failed to consider that fact that if aggregators were in a position to dictate terms with MSOs, then they would not be making substantial carriage fee payouts to such platforms, even after the process of digitalization is well underway. Hence it is erroneous to state that the aggregators can adopt unilateral monopolistic behavior while dealing with MSOs/LCOs. If the Draft Amendments are introduced by the TRAI, broadcasters would lose whatever little negotiating power they have while dealing with MSOs/LCOs for carriage fees, which are then bound to go up.

g) The Consultation Paper fails to recognize that even the MSO is an aggregator and negotiates on behalf of numerous LCOs with the broadcasters / aggregators and enters into agreements with broadcasters / aggregators in its own name. The MSO subsequently executes agreements with LCOs on a principal to principal basis. While there is a price ceiling on the wholesale price which a broadcaster / aggregator may levy from distribution platform operators, there is no ceiling on the prices which a MSO may charge from LCOs or its direct consumers.

h) The Consultation Paper further fails to recognize the fact that de-bundling of channels at the broadcaster / aggregator level will not result into benefits to consumers/end viewers since the MSOs/DTH Operators will continue to sell multi broadcaster bouquets to consumers and LCOs.

We are of the view that the regulators in India should be looking at streamlining and simplifying the regulatory regimes across the different sectors, rather than complicating the legal structures. This is especially true for the media sector, which is already one of the most highly regulated industries in comparison with other countries. Existing regulatory rules, including those laid down by the TRAI, should be relaxed or streamlined, given the fact that the digitalization process is being implemented across the length and breadth of the country, and there exists sufficient competition in the market with multiple channels and platforms. We request TRAI not to take a backward

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step and bring about further restrictive regulation as proposed by way of the Draft Amendments. In our view, TRAI should instead focus on increasing capacity at the MSO / LCO level to firmly implement "Must carry" and ensuring accurate declaration of subscriber numbers to ensure that the positive effects of digitalization accrue to all stakeholders and consumers.

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