RESPONSE BY SITI CABLE NEWTWORK LIMITED TO THE CONSULTATION PAPER ON DRAFT AMENDEMENT REGULATION NAME THE STANDARDS OF QUALITY OF SERVICE (DIGITAL ADDRESSABLE CABLE TV SYSTEMS) (AMENDMENT) REGULATIONS, 2014

At the outset, we welcome the consultation paper floated by the Authority wherein the Authority intends to have a holistic view from all stake holders in the supreme interest of the subscribers of the digital cable TV. SITI Cable Network Ltd. (SITI Cable) has always stood behind the Authority for all its initiative taken in the interest of subscribers and effective implementation of digitalization. Unfortunately, while circulating the proposed consultation paper the Authority has not considered its ramifications upon the MSOs and LCOs. The Authority also has not considered very important aspect of level playing field viz-a-viz other competing Distributor Platform Operators (DPOs). At this crucial juncture, wherein Phase III and IV of digitalization have yet to take place, Authority needs to adopt more pragmatic approach wherein the interest of subscribers and Service Providers should be balanced. We duly acknowledge the right of the our subscribers to get the invoice/bill for the services rendered to them and also receipt against the payment done by them, but at the same time there is dire need that all stakeholders should sit with the Authority to devise an appropriate mechanism wherein it is made sure that every subscriber gets the bill/invoice and receipt for payment made by him. Certainly, in the absence of any concrete mechanism levying financial disincentive on Service Providers is no solution because of the following reasons:

1. **Proposed Amendment in conflict and Inconsistent to the present Quality of Service (QoS) Regulation:**

   The proposed Amendment is in conflict to the present QoS Regulation wherein the Authority has allowed both the MSOs and LCOs to enter into Service Level Agreements on the basis of mutually agreed terms and conditions and share the QoS responsibilities amongst themselves as LCOs are an entity registered under

the Cable TV Act. Although the MSO has been assigned with the overall responsibility for compliance of QoS Regulation because the Subscriber Management System (SMS) is installed at their end, however once the specific responsibilities have been entrusted to LCOs through contractual arrangements/service level agreements, the LCOs alone are to be held responsible for their compliance. .

In this regard your attention is invited to the particular Explanatory Memorandum to the said QoS Regulation wherein it has been mentioned that:

> 19. Regarding the obligation of multi-system operator and local cable operator towards ensuring quality of service and billing, **the issue is to clearly demarcate the responsibility of multi-system operator and local cable operator for the same.**
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> 20. Most of the Broadcasters and multi-system operators have suggested that multisystem operator should be responsible for ensuring quality of service as well as for billing. There is a suggestion from some broadcasters, broadcasters association and multi-system operator that if local cable operator acts as franchisee of multi-system operator, responsibility for ensuring QoS norms should be with the multi-system operator and multi-system operator should set up billing system for local cable operator. Many cable operators and their associations have stated that the multisystem operators should manage and control the consumer details, generate the bills and handover the same to the local cable operators for final distribution and collection. Some stakeholders have suggested that ensuring compliance to QoS norms should be the responsibility of both the parties i.e. multi-system operator and local cable operator while billing should be done by multi-system operator alone.
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> There is a suggestion from a local cable operator association that local cable operator should bill the consumers since, as per Tax laws, the final

provider of service or product and recipient of the payment, can only bill the customer.

21. From the above views, it is clear that a number of different relationship models are possible between multi-system operators and local cable operators. **It may not be appropriate for the Authority to prescribe one specific model and so would like it to be left to the market conditions.** Since, the headend along with the Conditional Access System and Subscriber Management System are installed and maintained by the multi-system operator, the overall responsibility of quality of service and billing would remain with the multi-system operator**. However, the local cable operators are an entity registered under the Cable TV Act and carry the TV signals through his cable network to the subscriber. The responsibility of compliance to QoS norms can be shared between the multi-system operators and local cable operators through suitable service level agreements between them, depending on the model of the operator."**

A perusal of the above would reveal that in the said QoS Regulation, the Authority has specifically allowed both the MSOs and LCOs to share the responsibility of compliances to QoS norms through a suitable Service Level Agreements between them, depending on the model of the Operator. In view of the said liberty and flexibility provided in the QoS Regulation, MSOs like SITI Cable have already entered into Service Level Agreements with their affiliate LCOs wherein the said LCOs have explicitly agreed to take print out of the bills/invoices, deliver these bills to the subscribers and collect payments against such invoices/bills. Also, as the subscription money is being collected by such affiliate LCOs, they are obligated under the said Service Level Agreement to provide the receipt of the payments to the subscribers. The said affiliate LCOs have also agreed to abide by all Regulations, directions issued by the Authority from time to time relating to billing and collection.

The above arrangement clearly reflects that the affiliate LCOs have expressly agreed to share the obligation relating to providing bills/invoices to the subscribers and issuing receipts against payment collected. Accordingly in such circumstances the proposed amendment wherein the Authority has proposed to levy the financial disincentive upon both the LCOs and MSOs separately is not at all justified and appears to be in conflict with and contradictory to the present QoS Regulation. It may be mentioned that both MSOs and LCOs acting bonafidely on such TRAI Regulations have structured their business models and implemented the same in their respective operational areas in the entire country. The Authority cannot now seek to change the entire position in this behalf and make MSO liable for any willful default done by the LCOs when such a responsibility has been specifically entrusted to LCOs through service level agreements in accordance with the provisions of the QoS Regulations. Also, by bringing the proposed amendment, all MSOs including SITI Cable will be forced to change their entire business model which would seriously jeopardize their future plan and strategy to implement digitalization in the entire country.

The Authority has regularly been apprised of by SITI Cable of the measures undertaken by it to make sure that all its subscribers receive bills/invoices and get receipts against the subscription payments made by them. Also, Authority is fully aware regarding the business dynamics involved in cable industry wherein MSOs unlike other DPOs, are dependent upon LCOs for their business and cannot sustain without them. Therefore, LCOs cannot shy away from their responsibilities under the Regulations and Authority should also ensure the necessary compliance of the QoS obligations by them which they have undertaken under respective service level agreements rather than penalizing MSOs through financial disincentives .

2. No Level Playing field viz-a-viz other Distribution Platform Operators (DPOs) :

Another most important aspect which the Authority has ignored is the fact that digitalization is still at its nascent stage and Phase III and Phase IV of the digitalization is yet to be implemented in the country. Despite, facing stiff competition in the market from other Distribution Platform Operators and no Government support, all MSOs and LCOs have put their best foot forward to implement digitalization in the entire country. Unfortunately, despite giving its best it is most regretful to note that there is no level playing field in terms of QoS Regulations as framed by the Authority viz-a-viz competing Distribution Platform Operators i.e. Direct to Home (DTH), IPTV, HITS.

Surprisingly, till date there are no QoS stipulations for IPTV or HITS. In so far as DTH is concerned, the QoS Regulations with respect to billing are very relaxed and not as stringent as have been stipulated for digital cable TV. The QoS Regulations for the DTH are as follows:

BILLING FOR DIRECT TO HOME SERVICE

11. Billing for post paid direct to home subscribers. ------ Every direct to home operator shall issue bills, to its direct to home subscribers who opt for direct to home service on post-paid basis specifying in such bills,---

(a) the charges for such package;

(b)the charges for the value added services availed by such subscriber;

(c) the charges for Direct to Home Customer Premises Equipment;

(d) the nature and rate of applicable taxes;

12. Providing usage details in respect to Pre-paid direct to home service.--

-- (1) Every direct to home operator, shall, on request from any direct to home subscriber who has been provided pre-paid direct to home service, supply to

the subscriber, at a reasonable cost, the information relating to the itemized usage charges showing actual usage of direct to home service.

(2) Every direct to home operator, shall provide the information referred to in sub-regulation (1) for any period falling in preceding six months immediately preceding the month in which the request has been made by the subscriber under the said sub-regulation.

It may be noted that in case of digital cable TV, the Authority has directed all MSOs/LCOs that in case of Post Paid billing system, the bill should clearly provide itemized details i.e.it should contain details of each and every channel subscribed by the subscriber as per the package opted by him including details of any value added services taken by the subscriber and applicable taxes where as in case of DTH, there is no such obligation to provide itemized bill. In fact, as on date no DTH is providing Post Paid option.

Also, the QoS Regulations for DTH nowhere prescribe the provision of receipt to the subscriber against the payment done by such subscribers.

The Authority should also consider that like in Prepaid billing model wherein the Authority has directed the Service Providers to provide billing details on request from subscriber at nominal cost, the same should be allowed in case of post paid billing also. Therefore, in our humble submission firstly there should be level playing field between all Distribution Platform Operators with respect to QoS Regulations and secondly, the Authority should provide an appropriate and viable mechanism to implement any such Regulation which has been made mandatory for Service Providers.

There is no Regulation/restriction with respect to mandatorily providing base pack (Free to Air) pack on other Distribution Platform Operators (DPOs) which stipulation is there in case of MSOs. At present, MSOs are offering FTA package at Rs.100 (taxes excluded) and this package caters to such subscribers who have low/middle income groups having no access to internet. The Authority has to bear in mind that

by imposing such conditions on MSOs under QoS, the operational cost increases manifold thus rendering it impossible for the MSOs to survive in the market under such severe competition.

3. **LCO, being Last Mile Operator is solely responsible for delivery of Invoices, collection and providing receipt to the subscribers as per the Service Level Agreement:**

It is reiterated that the Authority has conveniently disregarded the arrangement arrived between MSO and LCO which has been allowed by the Authority itself and proposed that MSO should be held liable even for any default of its affiliate LCO. The issue here is that when the LCO itself has agreed to give the bill/invoices to the subscribers and collect the payment received and issue receipt against such payments, why MSO has been proposed to be penalized for any such default on the part of LCO?

Secondly, it is humbly submitted that the providing invoices/receipt without request will not only increase the operational cost of the MSO/LCO but also will lead to risk of being implicated under false complaints by unscrupulous elements. There is no clarity as to what will constitute the delivery of invoices/receipt to the subscriber.

It is known industry fact, that the LCOs collect the subscription amount from the subscribers and then keep their share with them and deposit the balance with the MSO. In some cases, only partial payment is deposited by the LCOs, despite the fact they have received full subscription amount from the subscribers. In such scenario, it is practically impossible for an MSO to issue receipts to the subscribers because it has not received the amount which has been collected by the LCO. Further the MSO is not even aware as to the amount collected by LCO from the subscriber and as such it would be impossible for MSO to issue the payment receipt/acknowledgement to the subscriber. The LCO is not acting as an agent of LCO. Therefore, all the responsibilities/obligations and the consequences of any default in performing its obligation should lie with LCO alone.

Without Prejudice, we would like to point out that for an instance of default either the LCO or MSO is to be held liable. In any event, there cannot be levy of penalty by way of financial disincentive on both LCO and MSO because that would amount to penalizing twice for the same instance of default.

4. **Lack of clarity with respect of providing invoices/bills/receipt through electronic and mobile phone medium:**

The Authority has proposed to levy financial disincentive/penalty on MSOs and/or LCO as the case may be, in case they fail to provide the bills/invoice and receipt of the payment against such bills/invoice to their subscribers.

Unfortunately, the Authority has not given any clarity as to whether delivery of bills/invoices/receipts through alternate medium like email, bmail and through mobile phones will constitute a sufficient compliance of the said stipulations.

It is most humbly submitted to the Authority that it is high time that Authority needs to acknowledge the alternate form of bills/invoice delivery system like Electronic/mobile payment on the similar lines like DTH wherein only the name of the package is provided to the subscriber alongwith monthly subscription money including taxes. As such, all details of the packages are available on the website.

5. **Authority has no power to levy financial disincentive/penalty under the TRAI Act:**

Without Prejudice, it is submitted that this measure of imposing 'financial disincentive' is in the nature of a penalty, the power of which the Authority under the present scheme of the Telecom Regulatory Authority of India Act 1997 (as amended in 2000) does not possess. Thus, it is most humbly submitted that Authority by introducing financial disincentive is attempting to do indirectly what it could not have done directly namely imposition of penalty.

It is established law that no Authority can levy penalty “without express authority of law” and granting power to levy penalty/financial disincentive is exclusively legislative function. This position of law has been reiterated by Supreme Court and other High Courts of the country

In ***Bihar Motor Transport Fedration V/s State of Bihar and Ors, AIR 1999 Pat 188*** it was held by the Hon’ble Patna High Court that:

> *“The power to levy penalty is a legislative function. Rule 3(B), however, provides imposition of penalty in case of non-payment of tax, Sub-section (2) of section 14 of the Act does not confer any such power upon the rule making authority to make rules in this regard.*
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> *21.“The question, therefore, which would fall for consideration is 'does such delegation of power would come within the purview of Sub-section (1) of Section 14?'*
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> *The answer to this question, in my opinion, must be rendered in negative.*
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> *22. In A. N. Parasuraman v. State of Tamil Nadu reported in AIR 1990 SC 40, L. M.Sharma, J. (as his Lordship then was), laid down the law in the following terms (at p. 42):- "The point dealing with legislative delegation has been considered in numerous cases of this court, and it is not necessary to discuss this aspect at length. It is well established that determination of legislative policy and formulation of rule of conduct are essential legislative functions which cannot be delegated. What is permissible is to leave to the delegated authority the task of implementing the object of the Act after the legislature lays down adequate guidelines for the exercise of power. When examined in this light the impugned provisions miserably fail to come to the required standard."*

Similarly in M/s. Shri Sitaram Sugar Co. Ltd. v. Union of India, reported in AIR 1990 SC 1277 *it has been stated as follows (at p. 1296) :--*

"Power delegated by statute is limited by its terms and subordinate to its objects. The delegate must act in good faith, reasonably intra vires the power granted, and on relevant consideration of material facts. All his decisions whether characterised as legislative or administrative or quasi judicial must be in harmony with the constitution and other laws of the land. They must be 'reasonably related to the purposes of enabling legislation' See Leila Mourning v. Family Publications Service (1973) 411 US 356, 36 Law Ed. 2d 318. If they are manifestly unjust or oppressive or outrageous or directed to an unauthorised end or do not tend in some degree to the accomplishment of the objects of delegation, Courts might well say," Parliament never intended to give authority to make such rules; they are unreasonable and ultra vires."

Now for examining the competence of the State Government to make a rule like 3B providing for levy of penalty in a subordinate legislation, it is first essential to understand the concept of penalty under fiscal statutes and the Constitutional law.

51. The Supreme Court in the case of C. A. Abraham v. I.-T. O.,(AIR 1961 SC 609) has held that levy designated as penalty under Section 2B of the Income-tax Act, 1922, is in fact a liability to pay additional tax and is imposed in view of the dishonest contumacious conduct of the assessee. Their Lordships have further held that "It is true that this liability arises only if the I.-T. O. is satisfied about the existence of the conditions which give him jurisdiction and the quantum thereof depends upon the circumstances of the case. The penalty is not uniformed and its imposition depends upon the exercise of discretion by the taxing authorities, but it is imposed as a part of the machinery for assessment of tax liability."

52. While dealing with a further question as to whether the levy of penalty under taxing statutes can be automatic like a tax simpliciter levied under said statutes, their Lordships of the Supreme Court in the case of Hindustan Steel v. State of Orissa, (1970) 25 STC 211 : (AIR 1970 SC

253) while dealing with Section 9(1) read with Section 25(1)(a) of the Orissa Sales Tax Act, 1947, have held that "But the liability to pay penalty does not arise merely upon proof of default in registering as a dealer. An order imposing penalty for failure to carry out a statutory obligation is the result of a quasi-criminal proceeding, and penalty will not ordinarily be imposed unless the party obliged either acted deliberately in defiance of law or was guilty of conduct contumacious or dishonest, or acted in conscious disregard to its obligation. Penalty will not also be imposed merely because it is lawful to do so.

Whether penalty should be imposed for failure to perform a statutory obligation is a matter of discretion of the authority to be exercised judicially and on a consideration of all the relevant circumstances."

In view of the law declared by the Supreme Court as noticed above, it has to be held that the levy of penalties contemplated in fiscal statutes which are authorised to be imposed by the taxing authorities created under the respective Acts, pursuant to quasi-judicial proceeding based on alleged contravention of statutory obligations, are in the nature of additional tax. But a person can be inflicted with the liability of this additional tax only on a finding that the defiance of law has resulted from a deliberate, contumacious or dishonest conduct of the tax payer. Such finding can be based either on facts or fiction created by the Legislature. The other important characteristic of such a provision is that it necessarily implies a discretion in the adjudicating authority to levy penalty within the limits prescribed by the Legislature.

Furthermore, it was held by the Hon'ble TDSAT in the case titled Aditya Thakrey V/s TRAI in Appeal No.1 of 2012 that :

"The Regulator cannot do indirectly what it could not do directly"

It is submitted that from the abovementioned judicial pronouncements it emerges that it is not permissible for the Authority to levy financial disincentive/penalty upon the Service Providers under the TRAI Act and only the parliament have exclusive authority to make laws in this regard.