Inspiring a billion imaginations

Mr. S.K. Gupta

Principal Advisor – B&CS

Telecom Regulatory Authority of India

Mahanagar Doorsanchar Nigam

Jawahar Lal Nehru Marg

New Delhi - 11002

Dear Sir,

Re: Consultation on the (i) Draft Telecommunication (Broadcasting and Cable Services) Interconnection (Addressable Systems) Regulations, 2016; (ii) Draft Telecommunication (Broadcasting and Cable Services) (Eighth) (Addressable Systems) Tariff Order, 2016; and, (iii) Draft Standards of Quality of Service and Consumer Protection (Digital Addressable Systems) Regulations, 2016 (collectively, the "**Consultation**" or the "**Draft Regulations**").

We refer to the Consultation and have set out below our consolidated response thereto. The response is divided in to several parts – the first dealing with what we have identified to be threshold / preliminary issues and the remaining dealing with specific issues that we find with the various Draft Regulations. Please note that each of the threshold objections is taken in the alternative and without prejudice to the other. Further, needless to add, the remaining parts of this response are being provided only in the alternative and without prejudice to Part I while reserving all our rights under law, equity or otherwise.

Part I - Threshold Objections:

1. Occupied Field:

   A broadcasting organization has been accorded certain rights under the Copyright Act, 1957 (the "**Copyright Act**"). The Copyright Act is a complete code which deals with all rights, liabilities and limitations in respect of the subject matter covered thereunder, including the broadcast reproduction right. The Copyright Act has been amended from time to time (the latest being an amendment of 2012) *inter alia* to be compliant with the Indian Republic's obligations under the Agreement on Trade Related Aspects of Intellectual Property Rights and to reflect the evolving position of various aspects of copyright and broadcast reproduction rights through international conventions such as the *Berne Convention for the Protection of Literary and Artistic Works*, the *Universal Copyright Convention, 1952* etc. A regulatory decision must be in conformity with applicable law and any Indian treaty obligation. The Draft Regulations put out have not taken into account this vital crucial factor. Primarily, Sections 2(dd), 2(m), 33, 33A, 37 and 39A of the Copyright Act are relevant for outlining the rights available to a broadcasting organization under the Act.

The Copyright Act is thus a complete self-contained code which deals exclusively and exhaustively with all aspects of the rights governed by the Copyright Act viz. copyrights and broadcast reproduction rights and occupies the field in so far as the scope, nature, exploitation, monetisation and limitations over copyright and broadcast reproduction right is concerned. Any tariff applicable for the broadcast reproduction right is subject to judicial overview of the Copyright Board and recourse consequently exists in the Copyright Act as per application of Section 33A. The legislative intent to cover all aspects is evident from the Copyright Act i.e. all dimensions of copyright and broadcast reproduction rights have been subsumed under one enactment - the Copyright Act.

A broadcast organization, in the current context, is the entity which owns the television channel and curates, assembles the programmes that are broadcast on the said channel. The term does not extend to a channel distribution network (DTH, cable, HITS etc.) who is only an intermediary in retransmission of the channels assembled by the broadcasting organisation.

Another aspect which needs to be appreciated is that the Copyright Act promotes and rewards creativity by economically incentivizing creators. Creative works are products of human expression and ingenuity and cannot have a uniform economic value (unlike products created by machines). The object of copyright law is to encourage authors, composers, artists and designers to create original work by rewarding them with an exclusive right for a limited period to exploit the work for monetary gain. The economic exploitation is done by licensing *inter-alia* by publishers, film producers and record manufacturers for monetary consideration.

Any direct or indirect form of control on the rights of such content creators (through pricing of content) will be violative of the provisions of Copyright Act. There is therefore an urgent requirement to harmonize all TRAI regulations (including the Draft Regulations) in a manner as to not dilute or take away any of the rights available under the Copyright Act including the broadcast reproduction right available to broadcasting organizations thereunder.

The Copyright Act deals exhaustively with all aspects of exploitation and monetization of content. However, despite providing for statutory licensing provisions, the Parliament did not deem it fit to fix any price for content under the Copyright Act. Thus, what has not been done directly under the Copyright Act is indirectly being done through regulations issued under the TRAI Act (as defined below). Respectfully, the Copyright Act and the TRAI Act operate in two different fields. The Copyright Act – a self-contained code is content-centric and a complete licensing regime for Broadcast Reproduction Rights lies exclusively in the domain of the Copyright Board as broadcasting signals are protected under the Copyright Act and this subject matter is covered under section 33(A) of the Copyright Act. The TRAI Act was framed to regulate telecommunication services which is carriage related.

To conclude, we urge the TRAI to issue any regulations (including the Draft Regulations) in a manner as to not take away from rights available under the Copyright Act.

2. Subordinate Legislation yields to Statute

The Telecom Regulatory Authority of India ("**TRAI**") was formed under the Telecom Regulatory Authority of India Act, 1997 ("**TRAI Act**"). The definition of "telecommunication services" under the TRAI Act specifically excluded "broadcasting services" from its ambit when enacted in 1997. A proviso came to be introduced to this definition in the year 2000 providing that *"the Central Government may notify other service to be telecommunication service including broadcasting services"* [Emphasis supplied]. In exercise of this proviso, the following notification came to be issued:

Notification No. 39 issued by Ministry of Communication and
Information Technology dated 9 January 2004. S.O. No. 44(E) and 45 (E) issued by TRAI, vide F. No. 13-1/2004 states as follows:

S.O. 45(E).— *In exercise of the powers conferred by clause (d) of sub-clause (1) of section 11 of the Telecom Regulatory Authority of India Act, 1997 (24 of 1997) (hereinafter referred to as the Act), the Central Government hereby entrusts the following additional functions to the Telecom Regulatory Authority of India, established under Sub-section (1) of Section 3 of the Act, in respect of broadcasting services and cable services, namely:*

(1) …

(b) the parameters for regulating maximum time for advertisements in pay channels as well as other channels.

(2) Without prejudice to the provisions of sub-section (2) of section 11 of the Act, also to specify standard norms for, and periodicity of, revision of rates of pay channels, including interim measures. [Emphasis supplied]

Therefore in discretionary exercise of the ability granted to the Central Government, the Central Government by way of an executive order not only notified "broadcasting services" to be "telecommunication services" but went on further to define what constituted "broadcasting services". Pursuant to this notification, TRAI went on to issue various regulations and tariff orders (including the Draft Regulations) from time to time in apparent exercise of its ability under the TRAI Act. The regulations and tariff orders issued from time to time are in the nature of subordinate / delegated legislation.

Given that the Copyright Act occupies the field, any subordinate / delegated legislation which conflicts with the Copyright Act would be liable to be struck down as being in violation of the Copyright Act. In any event, even assuming to the contrary, given that the conflict with the Copyright Act emanates from the Draft Regulations framed pursuant to an executive order (notification of January, 2004), the Draft Regulations and / or the notification would have to yield to statute i.e. the Copyright Act to the extent of such overlap. We would therefore once again urge the TRAI to ensure that any regulations (including the Draft Regulations) are issued in a manner which do not undermine in any manner the rights granted under the Copyright Act.

3. <u>Special v. General</u>:

It is submitted that both – the TRAI Act and the Copyright Act are special in nature. The former deals with the special field of regulation of the medium or form of communication and the latter deals with the special field of the content being communicated. It is settled law that a statute may be special for certain cases and may be general for other purposes. However, qua their own respective fields, such special statutes would have an overriding effect.

The Copyright Act is a special enactment introduced to regulate copyright and allied matters (a subject under Entry 49 of List I under the Constitution). The broadcast reproduction right is an inalienable right available to a broadcast organization in respect of its broadcasts i.e. the content carried on its channels under the Copyright Act. The TRAI Act has been introduced under Entry 31 of List I of the Constitution which essentially attaches to different forms of communication, including broadcasting – essentially being restricted to the different means of communication. The phrase "broadcasting" used in Entry 31, applying the maxim *noscitur a sociis* (meaning of the word to be judged by the company it keeps), is clearly seen to refer to carriage aspect of broadcasting.

For this reason, any regulations (including the Draft Regulations) which seek to regulate any aspect of content would not result in a construction harmonious with the provisions of the Copyright Act.

4. Later v. Earlier:

The Copyright Act was enacted in the year 1994 and has been amended several times including in 2012 which introduced certain specific aspects of the Act which would apply to the Broadcast Reproduction Right under S.39A thereof. The 2012 amendments are a later addition/ enactment to the Copyright Act. For this reason also, the Draft Regulations in the current form or any other form which affects in any manner the broadcast reproduction right, would be contrary to the Copyright Act.

Conclusion: It may be noted that the request to harmonize the Regulations issued by the TRAI (including during the Consultation) with the Copyright Act have been raised by stakeholders previously. In essence, we would urge the TRAI to ensure that any Regulations issued by it do not undermine any rights available under the Copyright Act. Any Regulations which impinge on the rights granted under the Copyright Act, including those enumerated below, ought to be urgently done away with in their entirety:

a. Any restrictions on the nature of content, prices of channels, discounting, commissions, manner of offering etc.;

b. Any restrictions on the broadcasting organization's exclusive right to deal and negotiate their terms of trade;

c. Any regulations which impact the ability to classify subscribers (e.g. commercial establishments) and seek differential tariff.

Part II – Preliminary objections to the Consultation

1. Non-transparent exercise:

The draft Consultations do not meet the threshold of transparency mandated by Section 11(4) of the TRAI Act, 1997, which requires that the Authority shall ensure transparency while exercising its powers and discharging its functions. Further, the drafts also do not meet the ratio of the judgment of the Supreme Court in **Cellular Operators Association of India vs. TRAI**, which held that:

> *"The finding that a transparent process was followed by TRAI in making the Impugned Regulation is only partly correct. While it is true that all stakeholders were consulted, but unfortunately nothing is disclosed as to why service providers were incorrect when they said that call drops were due to various reasons, some of which cannot be said to be because of the fault of the service provider. Indeed, the Regulation, in assuming that every call drop is a deficiency of service on the part of the service provider, is plainly incorrect."*

2. Concept of Interconnection is not applicable to broadcasting sector:

We strongly believe that though the interconnect regulations have been framed, the concept of interconnect agreements does not apply to the Broadcasting Sector as the sector has vertical arrangements. Interconnect concept as it stands today is a "telecommunication concept" and is meant and "intended for horizontal transactions" and "not intended for vertical transaction" between Broadcaster and DPOs. Hence, interconnection as a concept in this sector is therefore a misnomer, misinterpretation. This is also supported by the recently issued Consultation Paper on "**Review of the regulatory framework for interconnection**" in the "telecom scenario which clearly demonstrates and establishes ***the non-applicability of the concept of interconnection to the broadcasting sector***.

3. Prohibition on mutually negotiated contract impinges on "freedom to contract"

We submit that the present Consultation has prohibited mutually negotiated contracts between Broadcasters and DPOs which severely compromise their right of freedom to contract and the same is not in consonance with the principles laid down by the Supreme Court in the Judgment of COAI vs. TRAI para 23 as reproduced below:

"*It will thus be seen that though the Regulation making power under the said Act is wide and pervasive, and is not trammeled by the provisions of Section 11, 12(4) and 13, it is a power that is non-delegable and, therefore, legislative in nature. The exercise of this power is hedged in with the condition that it must be exercised consistently with the Act and the Rules thereunder in order to carry out the purposes of the Act.*"

It was further held that TRAI cannot indirectly interfere with contracts through regulations as has been extracted below from para 62 of the aforesaid judgment:

Further, in para 62 with respect to TRAI's power, the Supreme Court observed thus:

"62. Having regard to the above, it is clear that the licence conditions, which are a contract between the service providers and consumers, have been amended to the former's disadvantage by making the service provider pay a penalty for call drops despite there being no fault which can be traceable exclusively to the service provider, and despite the service provider maintaining the necessary standard of quality required of it – namely, adhering to the limit of an average of 2% of call drops per month. We have already seen that condition 28 of the licence requires the licensee to ensure that the quality of service standards, as prescribed by TRAI, are adhered to, and that the Impugned Regulation does not lay down quality of service standards. This being so, it is clear that the laying down of a penalty de hors condition 28, which, as we have seen, also requires establishing of fault of the service provider when it does not conform to a quality of service standard laid down by TRAI, would amount to interference with the license conditions of the service providers without authority of law. On this ground also therefore, the Impugned Regulation deserves to be struck down."

4. Distorts/ disturbs level playing field:

The Regulations and Tariff Orders are skewed, lopsided and in favour of DPOs, thereby tilting the balance towards one stakeholder which is violative of the basic tenet of ensuring level playing field conditions.

5. Pay TV Channels are not Essential Services; no evidence of market failure

TRAI has in the past affirmatively concluded in its various prior papers and consultations that TV Channels are “esteemed” needs for consumers. However, the present Tariff Order proceeds on the erroneous premise that Pay TV channels are essential services. This sudden “U” turn in stance of the Authority is neither backed by study justifying such conclusion. Further the Authority has not considered the fact that TV consumers in India can avail of the FTA services of the Public Broadcaster DD Free Dish which provides over 100 FTA channels and currently has around 30 million subscribers making it the largest platform in the country. Therefore the real question that arises for consideration by the Authority is that with over 830 channels for consumers to choose from and a large Public Broadcasting Service offering of over 100 private and public TV channels, is there really a need to regulate all aspects of a set of 200 odd pay TV channels. Conversely, the question for the Authority would be, is there proven evidence of market failure that a dire need has arisen to over-regulate these 200 odd Pay TV Channels. We are of the firm belief that there is no compelling reason to regulate these channels and accordingly, only a light touch regulation, if at all ought to have been proposed.

6. <u>Regulated Rio Is The Preferred Choice Of Majority Stakeholders</u>

We submit that significant number of stakeholders including us recommended a wholesale regulated RIO Model in response to the Consultations issued by TRAI which met the criteria of transparency, non-discrimination and the other objectives of consultations sought to be achieved by the Authority. However, we are surprised to note that Authority has chosen to not to consider the same and has instead proposed an MRP based Distribution Network Model which was which was not properly articulated in the Consultation paper and recommended by very few of the stakeholders. In fact the majority of the stakeholders had recommended the wholesale Regulated RIO Model given that the industry has over the last decade already settled down to the same and was functioning smoothly. Hence, minimum changes to the current wholesale model to bring in greater amount of transparency would have sufficiently addressed the set objectives and at the same time would enable a smoother transition without causing any major disruptions and uncertainty across the value chain.

(Illustration: break-up of stakeholders responses supporting wholesale Regulated RIO set out below)

Broadcasters	**DTH**	**MSOs**
Zee, Sony, Viacom, Star, ABP	Videocon, Dish, Reliance, Sun Direct	Siti, IMCL, Asianet, Ortel, NSTPL

7. New Regime will lead to de-growth of the industry and discourage investments and production of good quality content in the television industry

We believe that the proposed regime is skewed hugely in favour of the DPOs and gives them unequal bargaining power over the consumers and other stakeholders. s. The regime confers on the DPOs unbridled powers which will severely restrict sampling and access to variety of content which is critical for innovative content and will ultimately lead to closure of many channels. It seeks to almost encourage curbing viewership and adversely impact advertising revenues without providing any opportunity to balance returns on investments through subscription. Unless both advertising and subscription are balanced there will be very little incentives for investing in creating diverse & quality content. The proposed forbearance for Premium Channels would not serve its purpose as there is no mechanism in the proposed structure which will enable viewers to access or even sample such kind of content. Further DPOs becomes the unfettered gatekeepers between consumers and content owners as they are the one who will decide which content to pass through their network without any say from either consumer or content providers.

8. Regulatory Regime Regresses Rather Than Advances

The industry had hoped that in keeping with TRAI's stated policies the present exercise will result in a light touch regulatory regime given that digitalization has ushered in a highly competitive pay TV market with multiple digital platforms offering diverse content and choice to consumers. However, instead, in our humble view the proposed regime seek to introduce more stringent, onerous and intrusive regulatory dispensation virtually micromanaging the activities and that too only in respect of one stakeholder, i.e. broadcasters, by regulating pricing, discounting, manner of offering, bundling and legitimizing carriage fee leaving total uncertainty in both advertisement and subscription revenues. This would also create a fertile ground for disputes and avoidable litigation that was never the intent of the instant exercise.

9. Implementation challenges of cable digitization across DAS notified areas

The proposed Distribution Network model assumes existence of 100% cable digitization and accordingly pre-supposes the existence of the requisite infrastructure to enable smooth implementation thus realizing the stated objectives of transparency, good conduct translating into consumer interest. However, it has failed to consider the current market realities and especially the poor state of implementation of cable digitization across DAS markets. In fact approximately 36% of DAS III (9 million analog homes) and 80% of DAS IV (27 million analog subs) is still pending. Even in markets where DAS is implemented, QOS Regulations are yet to be executed in letter and spirit with no visibility to consumers on billing and adequate re-dressal of complaints. Even Broadcasters have no visibility on the actual subscribers for their channels as DPO's continue to not share the subscriber report. In several areas DPOs digital headends, CAS and SMS systems are inadequate and do not comply with regulatory obligations. The Authority will appreciate that despite its own efforts to correct these ills, there has been no change and the state of implementation continues to be in a state of mess. Hence, it would be highly unrealistic to introduce the proposed model at this stage knowing fully well that the market is currently not in a state of readiness to implement it in letter and spirit and thus fail to achieve the stated objectives and will only result in more chaos, disputes and non-transparency which will ultimately impact consumer interest and growth of industry.

10. Commercial Subscriber Issue

Broadcasters have been making specific representation to the Authority to consider and address the long pending issue of commercial subscribers which are already treated as distinct and different class from the ordinary residential subscribers. On the contrary, in the proposed regime, TRAI has removed that distinction and has treated commercial subscribers at par with ordinary subscribers for the purpose of payment of subscription thereby further encroaching upon the rights of the broadcasters granted under the Act. As oppose to ordinary subscribers these commercial establishments exploits the channels of the broadcasters directly or indirectly to further their commercial interest hence threat them at par with an ordinary subscriber demonstrates lack of application of mind.

Part III – Specific Objections to the Distribution Network Model

1. Distribution Network Model in the current form is devoid of the principles of a MRP construct and hence renders it illusory

   The model allows DPOs to fix any retail prices less than the MRP declared by the broadcasters and also create multi-broadcaster bouquets. This will render both the broadcaster MRP and bouquets which are key to any MRP construct completely redundant in the absence of (i) unconditional "must carry" by DPOs of all the channels comprised in the broadcaster bouquets and (ii) enabling broadcasters to offer market based discounts on MRP without any cap as in the case of retail pricing by DPOs

   The Authority has failed to create distinction between cap on incentives by broadcasters to DPOs and the discounts that a Broadcaster may offer to consumers on MRP. It has erred in assuming discounts to dealers/distributors in an MRP construct is based on the MRP of the product. Moreover, restricting the ability of the Broadcaster to offer discounts to the consumers on the MRP is in fact anti-consumer. The creators/producers of content should be given the complete flexibility to offer discounts on MRP based on consumer demand. Unlike FMCG or any other homogenous products, channels comprise diverse content with fluctuating demand and hence the discounting parameters for channels cannot be identical to other product markets.

2. <u>Draft Tariff, Interconnect & QOS fails to meet the objectives it sought to be achieved by the Authority through the consultation:</u>

   The Authority's stated objectives while initiating the instant consultation in January was to achieve the following objectives:

   a. Review the existing Tariff arrangements and developing a Comprehensive Tariff Structure for Addressable TV Distribution of "TV Broadcasting Services" across Digital Broadcasting Delivery Platforms (DTH/ Cable TV/ HITS/ IPTV) at wholesale and retail level.
   b. To ensure that the tariff structure is simplified and rationalized so as to ensure transparency and equity across the value chain;
   c. To reduce the incidence of disputes amongst stakeholders across the value chain encouraging healthy growth in the sector;
   d. To ensure that subscribers have adequate choice in the broadcast TV services while they are also protected against irrational tariff structures and price hikes;
   e. To encourage the investment in the TV sector;
   f. To encourage production of good quality content across different genres;

However for the reasons set out herein below, the Authority has failed to achieve any of the aforesaid stated objectives

A. <u>ANTI-CONSUMER</u>

<u>i.</u> **<u>Affordability:</u>** The stipulation of a rental cap of Rs 130 for 100 channels and an additional slab wise rent of Rs 20 for every 25 channels over and above the 100 channels by consumers to DPOs acts as a huge entry barrier thus severely hampers affordability. For example, if we assume that on an average consumers will subscribe to a minimum of 200 channels which is the preferred choice of consumer across all DPOs today - vide the instant Tariff Order, the consumer will either end up paying substantially more for the same set of channels that they avail today or will end up receiving significantly lesser number of channels for the same price of which Rent alone will constitute Rs

230. This will impact approximately 3.5 Cr rural households who today enjoy a wide variety of pay content at low market based prices.

In this context it is pertinent to note that at present the Direct-to-Home (DTH) services of Doordarshan is offering around 100-110 FTA channels. In other words, it is absolutely free with no rentals. Hence, there is no rationale for enabling DPOs to charge a rental of Rs 130 from the consumers for delivering 100 FTA channels. This creates a non-level playing field which will result in discrimination amongst the same set of consumers.

Moreover, for the same set of basic services the DPOs would be able to enjoy double revenue streams i.e. Rs.130/- per subscriber per month access fee to consumers and carriage fee from the broadcasters. On the other hand the public broadcaster, DD Free dish DTH, provides basic services to consumers for free while charging a carriage fee from the broadcasters through a transparent e-auction process without resorting to any first-come-first serve basis.

Further there is no rationale or logic for prescribing the additional rental slab for channel in excess of 100 which is totally unacceptable and hence should be repealed.

ii. **Diversity:** By imposing artificial limits on bundling discounts, the choice and diversity available to consumers will be adversely impacted. The consumer proposition of TV as an audio-video medium has always been to deliver diverse content at reasonable prices through bundles. By pushing an a-la-carte mandate and rendering bouquets illusory the strength of broadcaster bouquets will be significantly diluted leading to the survival of only fewer larger channels. (Illustration – restricting discounts, impacting diversity at reasonable prices, by pushing ala carte will end up killing a large number of small channels and thus impact plurality and diversity of view point)

Moreover, the Authority has capped the MRP rates at half the current retail prices which it believes is realistic which makes a-la-carte price a real market based choice. Hence there is no logical reason to fix a correlation between bouquet rates and a-la carte pricing and must be best left to market forces.

iii. **Sampling:** The draft Tariff Order proceeds with the assumption that the consumer wants to access a limited number of channels which, we humbly submit, is an erroneous assumption. Today consumer samples various channels across genres and decides to spend significant time on the content of his choice. Therefore the consumer needs to access wide variety of content to make an informed choice in order to exercise consumer preference. This choice is critical from a consumer perspective which we believe has been taken away in the recommended model since the option of sampling in the true sense is not being given to the consumers.

iv. **Discrimination at Consumer Level:** In the proposed model there is a discount cap (15%+20%) at the wholesale level (MRP). However, at the retail level no cap has been stipulated for retail price of the DPOs vis-à-vis the MRP of the broadcasters. This will result in different retail prices for the same channel in the same geographical area, thereby resulting in discrimination at consumer level and defeating the purpose of MRP stipulation

B. Fails tests of Transparency & Non-Discrimination

1. While the proposed regime strongly recommends for a must-carry provision, the non- stipulation of minimum channel capacity for DPOs to carry

channels and the principle of first-come-first serve basis severely dilutes the same. This will also result in chaos and disputes at multiple levels which both the Authority and the industry are keen to avoid. Moreover it is very likely that because of this principle consumers may not even get the channels of their choice. Additionally access based on “first-come-first-serve” basis, will enable channels regardless of quality and innovation to gain access to DPOs network by merely timing the request. As a result deserving channels will be denied access despite superior quality content. This also works against incentivizing DPOs to increase capacity. Further stakeholders would be left litigating to assert their rights under this new mandate.

2. In the present model, DPO is assured of multiple revenue streams such as – Distribution fees, Rental fees, Carriage charges, Placement fees and Marketing fees. Since the Draft proposes to charge rentals to the consumer purportedly for access and ROI for capacity enhancements, it completely obviates the need to charge carriage from the broadcasters for the very same purposes.

3. However, there is no assured revenue model for the broadcaster which creates an undue advantage for DPOs at the cost of other stakeholders in the value chain. By way of an illustration assuming the present ARPU to be INR 200 the DPO would end up cornering close to 75% of the ARPU and in addition will also earn carriage, placement and marketing fees. This will take away the incentive for broadcaster to continue investing in innovative content for consumers.

4. The Interconnections Regulations prohibits mutually negotiated contracts between DPOs and Broadcasters on the ground that it will lead to discriminatory and non-transparent dealings. However, by allowing mutually negotiated contracts between MSOs and LCOs (with RIO as a default mechanism), the principles of non-discrimination has been fully compromised.

5. Marketing And Placement Fee, Which Is Non-Regulated, Can Make The Model Non-Transparent - Since in the proposed model placement fee and marketing fee can be mutually negotiated and are outside the regulatory ambit this has the

potential to completely distort and vitiate the entire non-discriminatory principles. This would create a back door entry for packaging and side-deals. While the Authority seeks to reduce the burden of carriage fee by capping the same, it has been rendered illusory by allowing negotiated agreements between DPOs and Broadcasters for LCN and Marketing. Hence these should also be brought within the regulatory ambit.

C. GENRE PRICES

The Draft tariff order takes the historical non transparent whole sale genre caps and superimposes it on the retail in the new dispensation without offering any basis as to how these ceilings were arrived at in the first place. The genre caps are abysmally low which will prevent further investments from coming into the genres. It says that the historical genre ceilings have been working well, without for once disclosing what these ceilings were and how they had been arrived at. Also if such ceilings were indeed working well, the question that begs an answer is why then attempt a fresh review of the Tariff dispensation at all.

There is no consideration of the existing retail tariffs prevailing in the market basis the Tariff Order ('TO') dated 29th Dec 2015. The said TO was never challenged by any stakeholder nor has it come in for any questioning from any quarters. The ceilings that have been proposed amount to slashing almost 50 percent of existing retail rates for no reason in less than one year without conducting any study or market survey to justify the same. Further there is no mechanism provided for making any inflation link adjustments.

D. Quality of Services:

There is no tooth to get any of the Quality of Service (QoS) mandates implemented on the ground as no effective penal consequences have been prescribed.

There are no punitive measures in the form of financial disincentives and/or recommendation of cancellation of licenses in the event of default. This was the need of the hour given the current state of affairs in relation to implementation of mandatory cable digitization which has been once again overlooked by the Authority resulting in erosion of revenues across the value chain.

It is not clear on what basis or standards would it be verified that a DPO has or does not have capacity to carry the broadcasters signals. If a minimum bitrate for MPEG2, H.264 and HEVC is set then this can be ascertained. Another option to ascertain is to ensure that the signal quality deterioration is not more than 8% from the quality of the signal supplied by the broadcaster when compared to the output at the broadcaster's decoder at the DPO's head-end to the highest resolution output of the CPE at the DPO's subscriber home. The standard for compliance to be followed should be as defined in ITU-R. BT500. STAR has already submitted these requirements to TRAI in the QoS CP 2016 addressing Quality of Service. This should be also be subject to audit.

E. <u>TECHNOLOGICAL CONSTRAINTS</u>

We believe the proposed model envisages delivery of channels based on choice of the consumers (both FTA and Pay) which is likely to result in countless combination which we believe are not supported by the technology and infrastructure of the DPOs (both MSOs and DTH). It may not be possible to practically implement the same and the choice mechanism so stipulated would only be illusory.

<u>Part IV - Issues not addressed by the Authority</u>

The proposed draft regulation and tariff order suffer from the following inherent flaws:-

1. It does not address transparency in subscriber's declarations by the DPOs. As the workability of the model proposed is fully dependent on true and current subscriber

declaration by DPOs. Lack adequate safeguards and punitive measures to check bad conduct by DPOs can make the entire model redundant.

2. The DPO can choose not to carry some broadcaster channels, hence, rendering broadcaster bouquets meaningless for consumers. The consumer choice completely takes a back seat as DPOs will demand placement, carriage and marketing fee to carry and offer the broadcaster bouquets.

3. While the proposed model enables the broadcaster to fix monthly MRP of the channel but the mechanism for calculating the active subscriber base for the purpose of determining license fee allows DPOs to collect charges for the month from the consumer but does not pass on the same to broadcasters.

4. While most of the operators are operating under the pre-paid model by collecting the subscription fee in advance the draft Interconnect paper enables an operator to avail a credit period of 60 dates plus which is unfair and inequitable. Given the past precedents where the subscriber reports are either not submitted or submitted with a considerable delay, this credit period is likely to extend to 120 to 180 days. In other words the broadcasters are made to finance the funding requirements of the DPOs.

5. With the technological constraints as stated above, there is likely to be another problem of getting subscriber reports from DPOs. In this context it is pertinent to point out that even today it is a challenge to get subscriber reports out from DPOs. Now with thousands of packages for each DPOs, provisioning such packages will pose a huge challenge and so will subscriber reports to be generated therefrom. This will also impact billing by broadcasters and securing timely payments more so in the absence of any effective penal consequences being prescribed for non-compliance.

6. Channels are disallowed if they fail to meet the minimum threshold of 5% subscription but there is no corresponding duty on the DPOs to maintain a minimum number of channel carrying capacity. This will act as a disincentive for DPOs to invest in infrastructure.

7. The definition of carriage fee, and particularly manner of calculation of subscriber base for determining the carriage fee lacks clarity and appears to be one sided. On a plain reading it appears that the carriage fee needs to paid to the DPOs for the target market irrespective of whether a subscriber has subscribed for the channel or not. In effect it compels the broadcaster to pay carriage fee for even de-active subscriber for such channel. Further it also fails to clarify what does the universe include.

8. There is no mechanism for renewal of carriage agreement similar to that prescribed for subscription agreement.

9. We have proposed various CAS & SMS requirements as envisaged in Annexure A to maintain transparency and hygiene in the value chain but same has not been considered by the authority which interalia will result in breakdown of the proposed tariff and interconnect regime;-

Annexure A

The requirements of CAS, SMS, Fingerprinting and STBs as detailed in Schedule III of draft of interconnection regulation (October 2016) requires following changes:			
Schedule III Clause No.	**Present provision**	**Updates/Changes**	**Justification**
(A) Conditional Access System (CAS) & Subscriber Management System (SMS):			
(A) 13	The SMS should be capable of generating reports, at any desired time about: viii. The total number of active subscribers subscribing to a particular channel or bouquet at a given time.	The SMS should be capable of generating reports, at any desired time about: viii. The total number of active subscribers subscribing to a particular channel or bouquet at a given time & date upto past 2 years.	Log of all activation & deactivations are required from SMS for comparison with same logs of CAS to ensure there is no mismatch of report of subscribers by the DPO.
New	New Clause	The SMS & CAS should be able to handle at least one million concurrent subscribers on the system.	SMS & CAS is of large and reputed company with proven capacity for at least one million subscribers per network.
New	New Clause	Both CA & SMS systems should be of reputed organization and should have been currently in use by other pay television services that have an aggregate of at least one million subscribers in the global pay TV	SMS & CAS is of large and reputed company with proven performance.

		market.	
New	New Clause	CAS should have provision to tag and blacklist VC numbers and STB numbers that have been involved in piracy in the past to ensure that the VC or the STB cannot be re-deployed.	The STB which are blacklisted should reflect in CAS & SMS, so that they cannot be re-activated by mistake or by negligence.
New	New Clause	The CAS vendor should provide a declaration confirming that their product complies with the Schedule III requirement and should be signed by MD / CFO of the CAS vendor. However, in the event of any incident of default, the broadcasters should be exempted from “Must provide” provision.	To strengthen the exiting requirements under the Regulation and further to provide a commercial deterrent to prevent implementation of substandard CAS systems.
New	New Clause	The SMS vendor should provide a declaration confirming that their product complies with the Schedule III requirement and should be signed by MD / CFO of the SMS vendor. However, in the event of any incident of default, the broadcasters should be exempted from “Must provide” provision.	To strengthen the exiting requirements under the Regulation and further to provide a commercial deterrent to prevent implementation of substandard SMS systems.

New	New Clause	The CAS system should be independently capable of generating log of all activation and deactivation for the past 2 years. However, in the event of default, the DPO's registration and license should be revoked.	Log of all activation & deactivations are required from SMS as well, for comparison with same logs of CAS to ensure there is no underreporting of subscribers by the DPO.
New	New Clause	DPOs to declare number of instances of all CAS and SMS used for provision of services. In case of misleading declaration or under declaration, the DPOs registration and license should be revoked and a penalty of 200% of monthly subscription fee as calculated after taking the inconsistency into account should be levied.	The increase transparency and increasing tax base.
New	New Clause	Watermarking network logo for all pay channels to be inserted at encoder end only.	The network logo inserted at encoder end gets embedded in the video and cannot be removed by hacker or tampering of the STB. Any other method of logo insertion is prone to removal.
New	New Clause	DPO should provide Network MUX's control configuration.	The MUX control configuration gives complete information of TS streams, program information, audio and video

			PIDs, bandwidth of channel, LCN, whether the TS is encrypted etc. This information is essential for confirming that all channels are encrypted with correct channel description.
(B) Fingerprinting:			
(B) 10	The overt finger printing should be displayed by the distributor of television channels without any alteration with regard to the time, location, duration and frequency.	The overt finger printing of the broadcaster should be displayed by the distributor of television channels without any alternation with regard to the time, location, duration and frequency.	To ensure finger printing of broadcaster is not blocked or superimpose by any software by DPO. Also to identify DPO incase DPO boxes are hacked.
(C) Set Top Box (STB):			
(C) 6	The messaging character length should be minimal 120 characters.	The scroll messaging character length should be minimal 120 characters.	Replacement of OSD message requirement.(Character length should be enough for meaningful message)
New	New Clause	All STBs must have secure chip set with mandatory pairing.	To prevent hacking of security codes of conditional access in the STB.
New	New Clause	The STB should have a provision that On-screen-Scroll (OSS) is never disabled.	If the OSS message is disabled then DPO's customers will not be able to read the messages.

New	New Clause	STBs should have Content Copy protection systems such as HDCP, DTCP, Macrovision or equivalent on its outputs. STBs which have PVR or DVR or Catchup features (long term storage and short term storage on consumer STBs) should have Digital Rights Management (DRM). IPTV STBs should have DRM (Digital Rights Management System).	To comply with broadcaster's contractual obligation to content owners. These copyright protocols deter copying content from STBs for redistribution.
New	New Clause	Upon the de-registration of any STB from a subscriber account, all programme/content on that STB (recorded on internal or external storage) shall be immediately deleted or rendered un-viewable and shall also not be made available on any internet device.	To prevent misuse of content of broadcaster after subscriber is deactivated.
New	New Clause	A Subscriber that is entitled to receive programme/content in HD or SD shall receive such programme/content only on the STBs that are registered to that Subscriber Account.	To prevent unauthorized distribution of broadcaster channels.

New	New Clause	All transmissions from DPO's headend shall be encrypted and protected with an applicable security, and each STB shall employ an industry standard conditional access system for hardware STBs to protect the programme/content from unauthorized access, use and distribution and to meet the requirements herein, including the usage rules, provided that such system has DVB- CSA or AES 128 or greater encryption (or the equivalent encryption standard required by Indian law or regulations).	To ensure accurate record keeping of active subscriber numbers in DPO's headends and ensure security against unauthorized distribution of broadcaster channels.
New	New Clause	Forensic watermarking to be implemented on the MSO headend & STBs.	To have reliable process to detect source of unauthorized distribution of our channels.
New	New Clause	With respect to delivery of Set-Top Boxes, DPOs shall check a Subscriber’s residential address and billing address to ensure that neither is outside of the Territory. If either is identified as being outside of the Territory, then the subscriber shall not be allowed to subscribe.	To ensure the distribution of broadcaster channels is within the territory allowed by the DPO's operating license issued by the government.