

Zee Entertainment Enterprises Ltd

Response to TRAI Consultation Paper

on

Distribution of TV Channels from Broadcasters

to Platform Operators



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Our response to various issues/assertions raised in the CP is being given hereinafter

1. **CONSULTATION PAPER IS BASED ON UNSUBSTANTIATED ALLEGATIONS & SURMISES**

1.1 A perusal of the Consultation Paper (CP) would reveal that it proceeds on the basis of certain complaints and allegations made by the MSOs without any evidence and substantiation thereof. It is regretting to point out that TRAI has chosen to take these allegations on their face value without carrying out any investigation as to the veracity of such allegations and has proceeded to issue the present CP. These unsubstantiated allegations are:

- (i) The Aggregators are misusing their dominant position;
- (ii) The Aggregators wield substantial negotiating power which can be, and is often misused and has led to several market distortions;
- (iii) There has been number of complaints from smaller MSOs about the abuse of market powers by the Aggregators which inter alia include:
 - (a) forcing to accept all the channels of the Aggregators
 - (b) forcing fixed fee deals
 - (c) charging based on the entire subscriber base and not as per actual off take of channels
 - (d) insisting on minimum guarantee
 - (e) Other unreasonable terms & conditions (without any elaboration)

1.2 It may be pointed out that all the above mentioned allegations are based on mere surmises and conjectures as not even a single instance has been cited in the entire CP where any of the Aggregators has been

found to have indulged in the violation of TRAI Regulations and Tariff Orders on above mentioned aspects. Each of these allegations has been responded to in the subsequent paras. It is not even the case of TRAI that since the Aggregators are outside the Regulatory framework (which assertion is also otherwise incorrect as explained hereinafter), they have gone scot free even after committing these violations.

- 1.3 It is submitted that these allegations are nothing but the regular “disputes” raised by MSOs which are inherent and bound to occur in the sector keeping in view the nature of cable business which is characterised by lack of transparency, skewed distributions of revenue across the value chain, high carriage fee etc. Regarding the alleged complaints referred to by TRAI in respect of contracts for DAS notified areas, it is stated that these have been made by disgruntled MSOs who wanted to avail the content/channels on their own terms, wholly disregarding the tariff framework stipulated by TRAI for DAS notified areas.
- 1.4 It may be noted that for resolution of these “disputes” there is an effective adjudicatory forum – TDSAT which adjudicates disputes between the service providers when cases are filed against “Aggregators” alleging discrimination, imposition of unreasonable terms, forcing all channels etc. TRAI has instead chosen to suggest unwarranted modifications/amendments in its Interconnect Regulations/Tariff Orders by targeting a stakeholders who has been in existence since last 10-12 years and safeguarding the interest of broadcasters who always have been at the receiving end because of tariff freeze, ever increasing high content cost, lack of transparency, high carriage fee etc.
- 1.5 In fact as explained hereinafter the TRAI itself has on various occasions in its consultation papers, regulations and in Affidavits

before Hon'ble Supreme Court has stated the ground realities which are quite contrary and opposite to the assertions made in the present CP.

It is really unfortunate that, no effort whatsoever has been made by TRAI to independently investigate the above mentioned complaints/allegations by the MSOs before coming to the conclusion that the Aggregators have misused their dominant position and/or any kind of market distortions have been caused because of the alleged monopoly/anti-competitive behaviour of the Aggregators.

2. **TRAI APPROACH – VIOLATION OF TRANSPARENCY**

2.1 In addition to the above mentioned submissions, it is stated that the approach followed by TRAI in the present CP is not only quite surprising and perplexing but also give rise to the apprehension that TRAI has already made up its mind to issue amended Regulation/Tariff Orders and is merely completing the formalities of going through the consultation process in a mechanical manner. This is quite evident from the following assertions made in the CP:

3. *The broadcasting and cable TV services sector is a content driven market. Unless a distribution platform carries all the channels popular in the relevant market, it cannot be a viable distribution platform. As on date, the distribution business of around 73% of the total pay TV market, including high definition (HD) TV channels, is controlled by a few authorised distribution agencies. These channels include almost all the popular pay TV channels. These authorised distribution agencies wield substantial negotiating power which can be, and is, often misused leading to several market distortions.*

5. *To address the issues that have arisen out of the present role assumed by the authorised distribution agencies of the broadcasters, it is essential to amend the regulatory framework by adding provisions that clearly demarcate the role and responsibilities that can be assigned by the broadcasters to their authorised distribution agencies for distribution of TV channels to various platform operators.*

2.2 Thus the TRAI has already come to the conclusion that it is “essential” to amend the Regulatory framework. The said apprehension is further fortified from the fact that in the CP not only the above mentioned unsubstantiated assertions have been made but also the proposed amendment in the Interconnect Regulations as well as in the Tariff Orders have been suggested. Normally, whenever a consultation process is initiated by TRAI, different issues are identified and listed in the CP for comments by various stakeholders. After analysing the comments/response received from various stakeholders, the TRAI notifies the draft amendment/changes in the concerned Regulations/Tariff Orders and again the comments of stakeholders are invited on such draft changes/amendments. It is only after receipt of such comments/response that the final decision on various issues is taken.

2.3 However, in the present case, a perusal of the CP would reveal that TRAI has already concluded that Aggregators are misusing their bargaining powers, exploiting the MSOs and thus abusing their dominant position. The TRAI has also concluded that it is essential to amend the Regulatory framework and accordingly has suggested amendments to the Interconnect Regulations and Tariff Orders which have been specified in the CP itself. Such an approach is in clear violation of the principle of transparency enshrined in the TRAI Act

and raises the doubts on the bonafide of the entire exercise undertaken by TRAI in this behalf.

3. **NO CHANGE IN THE GROUND REALITIES EVEN AFTER IMPLEMENTATION OF DAS PHASE-I & PHASE-II**

3.1 At the outset, it is stated that at present only phase-I and phase-II of Digital Addressable System (DAS) have been implemented. Almost 50% of the total C&S homes are still under analogue regime as DAS phase-III & phase-IV are yet to be implemented. Even in phase-I & phase-II there are lot of problems relating to Subscriber Management System (SMS), SAFs, reporting of subscriber numbers, continuation of carriage fee regime etc. The MSOs have not collected SAFs from the subscribers. The SMS systems are full of glitches and are non-operational.

Despite the expiry of about 10 months since the implementation of DAS phase-I, Broadcasters/Aggregators are yet to receive the subscriber reports from MSOs. In fact in the DAS notified areas the aggregators have repeatedly approached the MSOs for conducting audits as per the contractual arrangements with them but they have been avoiding the same on one pretext or the other. It is a matter of record that TRAI has to intervene by way of issuance of Directions and initiation of prosecution after repeated extension of deadlines to ensure collection of SAFs and operationalisation of SMS. In the analogue – non-DAS areas the problem of lack of transparency, skewed distribution of revenue, high carriage fee are prevalent causing severe commercial detriment to the broadcasters.

In addition, in the analogue areas rampant piracy of signals takes place which causes huge losses to the broadcasters. The aggregators help broadcasters in curbing piracy of channels which not only results in arresting the loss of revenue because of leakages but also create avenues for more investment in creation and delivery of content by

bringing back the leaked revenue in the system. The anti-piracy initiatives undertaken by the aggregators also results in proper transparency at consumer end and ensures the availability of high quality content to the consumers through legitimate delivery means. This also leads to better viewing experience for the consumers.

The role and functions of the Aggregators have to be appreciated in the above mentioned backdrop. It is the **“MSOs” not the “Aggregators” who are wielding the considerable bargaining powers.**

3.2 Although the government has mandated digitisation of all television channels by 2014, it's proving to be a painfully slow process and broadcasters have little choice but to rely on the analog cable network to air their channels, which today remains the dominant medium of carriage. The MSOs have glossed over all TRAI directives of CAFs and full declaration. Broadcasters for Rural India still vie for the 65 channels which can be seen on Analog TV in most markets. Digital TV is not rated and it is not yet monetizable even in Phase-2 areas.

3.3 As per outlook business report:

*“Of these (65 channels on Analog Cable), the first 40 channels (prime band, colour band and S band) are of the best quality and broadcasters pay a higher carriage fee for placement here. As channels proliferate, carriage fees have escalated: from Rs 600 crore a year across all channels in 2006 to Rs 1,600 crore now. **According to a report by Batlivala & Karani, the top five MSOs alone garnered Rs 1,300 crore as carriage fee revenue in 2010-11.** Broadcasters pay annual fees of around Rs 20-40 crore per channel for top placement. But as competition intensifies, higher sums also change hands: a Chrome Media report says a recently-launched music channel has shelled out Rs 23 crore for a place on the UHF band (channels 40 to 60), where*

broadcast quality is poorer. And newer GEC channels like Colors and Imagine are said to have paid up close to Rs 100 crore each as carriage fees for prime band placement across all cities.

In sharp contrast to the carriage fees, broadcasters earn next to nothing as distribution revenue (cable operators are supposed to share a portion of their subscription revenue, typically 50%, with the broadcaster). But not only is the share very low, under-reporting of subscriber numbers by LCOs means broadcasters depend on advertising revenue for survival—at present, over 80% of the broadcasting industry’s income is from advertising. ... The MSOs find it difficult to discipline the LCOs and, therefore, have no option but to take carriage fees from the broadcasters. Unless we find a way to fix the industry, there is no way the broadcast industry will survive.”

CARRIAGE FEE CONCERNS

	S BAND (₹cr)	UHF 550 AND BELOW (₹cr)
NEW LAUNCHES AND DEALS*	73.05	46.67
EXISTING DEALS#	58.60	36.55

*Note: *October 2010 To February 2011; #Ending March-April 2011; In terms of quality of reception, Prime and Colour bands are the best followed by S-Band, Hyper band and UHF band.
Source: Chrome Distribution Investments Index, April 2011

3.4 In this context, it is also pertinent to refer to MPA Report 2011 wherein at page 274 it has been observed:

‘Competition is intense, as there are 550 channels in the marketplace despite limited spectrum on dominant analog cable networks. As a result, carriage and placement fees continue to grow for new entrants and, in some cases, existing players. According to MPS analysis, the carriage fee pool topped US\$ 400

mil. In 2010, while total affiliate fees for channel suppliers on cable (i.e. excluding DTH) reached only US\$ 425 mil.”

- 3.5 The approach in the CP therefore is entirely mis-directed as it ignores the reality of the Cable TV Industry where carriage fees rather than RIOs dominate the scene. The same is the case for DTH. The reality of the industry is that an MSO/DTH can charge carriage fees and still charge subscribers for the channel via a bouquet pricing.

In the above backdrop who is wielding the bargaining power - the distributor of channel (MSO/DTH) or the Aggregator? The answer is obvious.

4. **TARIFF AND COMPOSITION OF BOUQUET UNDER FREEZE SINCE DECEMBER 2003**

- 4.1 **The Broadcasters/Content Aggregators are already aggrieved by the fact that the tariffs for channels in analogue cable TV system have been under freeze both at wholesale level and at retail level since December 2003** and only inflation related increase is being allowed at periodic intervals. The input costs (production costs) are continuously rising without any respite. The 2-3 inflation related hikes allowed by TRAI are wholly inadequate to meet these ever increasing input costs. Even newly launched channels have to comply with the similarity principles qua their rates vis-à-vis the rates of existing channels as per Tariff Order dated 31st July 2006. Thus, the tariff is completely regulated in the cable. **In this context, it is pertinent to point out that not only the tariff of the channels is under freeze but even the composition of bouquet has also been frozen. In other words, no new channel can be added in the existing bouquet and that it has to be separately sold/form the part of newly launched bouquet.**

In this context it is also relevant to point out that in 2004 when the tariff freeze was introduced, it was termed as a temporary

measure. It has been repeatedly stated by TRAI in its various consultation papers, recommendations, tariff orders and other documents that “tariff freeze” would be withdrawn once digitalization is implemented. It is regretting to point out that despite the implementation of phase-I & phase-II of the digitalization, the tariff freeze which was termed as a “temporary measure” in 2004 still continues both in addressable & non-addressable areas, thus causing severe financial detriment to the broadcasters.

4.2 In addition, the **TRAI has also stipulated the total amount of ceiling at retail level based on the classification of cities ranging from Rs. 130/- per month to Rs. 250/- per month** depending upon the number of pay channels/FTA channels and the classification/categorization of cities as per the Tariff Order dated 4/10/2007.

4.3 **The MSOs are free to choose the bouquet of channels from broadcasters/content aggregators and under the prevalent regulatory regime it is not obligatory for MSO to carry all the bouquets of channels of the particular content aggregator and MSO can exercise its option to carry the bouquet of its choice and pay for the said chosen bouquet only.**

Thus **in analogue cable TV system, the tariff is regulated both at wholesale level i.e. for the provision of the channels from content aggregator to MSO/LCO and at retail level i.e. the provision of contents by LCO to a consumer.**

Tariff for DTH Sector and other Addressable platforms – also under freeze since December, 2003.

- 4.4 The Telecom Regulatory Authority of India (TRAI) has vide Part II (Wholesale Tariff) of the Tariff Order dated 21/7/2010, inter alia, prescribed that the *ala carte* rate for a pay channel for addressable systems shall not be more than 35% of the *ala carte* rates of a channel as specified by the broadcaster for non-addressable systems. The TRAI has also prescribed that where a broadcaster in addition to offering all its channels on *ala carte* basis offers Pay channels as a part of bouquet, then the **rate for a bouquet of channels for addressable systems shall not be more than 35% of the rate for such bouquet as specified by the broadcaster for non-addressable systems.**
- 4.5 On challenge of this cap of 35% by broadcasters before TDSAT and finally before the Supreme Court, the Hon'ble Supreme Court vide its order dated 18/4/2011, has stayed the judgment of Hon'ble TDSAT subject to the substitution of the figure 42% in place of 35% in proviso to clause 4(1) & in proviso (b) to clause 4(2) of the Tariff Order.
- 4.6 Thus at present the tariff of 42% of non-DAS (analogue) rate is applicable for all addressable platforms including DTH at wholesale level in accordance with the order dated 18/4/2011 of Hon'ble Supreme Court. **It is also pertinent to point out that the said tariff of 42% is applicable both for Basic Tier as well as on Add-on Packages.** An application was filed by a broadcaster – ESPN to Hon'ble Supreme Court for seeking permission to charge differential tariff for 'add on' packages. However, Hon'ble Supreme Court has dismissed the said application vide Order dated 18/11/2011.
- 4.7 **It is also pertinent to point out that since the tariffs for non-DAS (analogue) areas are under freeze since December 2003 and** since benchmark adopted by TRAI for the determination of tariff in addressable platforms including DTH & DAS (cable) are the tariffs prevalent in non-DAS areas, **the tariffs for addressable platforms**

including DTH are also under indirect freeze. Thus, both in non-DAS areas as well as in addressable sectors, including DTH, the tariffs of channels are under freeze.

4.8 In addition, the contracts/interconnections are further regulated through various Regulations issued by Authority. The present CP seeks to curtail the limited freedom the Broadcasters/Aggregators have under the prevalent regulatory regime, which is highly unjust and discriminatory.

5. **PROPOSED AMENDMENTS CONTRARY TO THE ORDERS OF HON'BLE SUPREME COURT**

5.1 It may be pointed out that Hon'ble TDSAT vide its order dated 15/01/2009 had set aside the Tariff Order dated 4/10/2007 issued by TRAI inter alia dealing with price freeze, freeze on composition of bouquet etc and the requisite amendments in the Principal Tariff Order of 2004. TRAI had filed an Appeal with Hon'ble Supreme Court against the said order of Hon'ble TDSAT vide Civil Appeal No. 829-833 of 2009. In the said Appeal all the major content aggregators are the respondents. Hon'ble Supreme Court vide its order dated 12.02.2009 had ordered "status quo" in the said Appeal and the said interim order is continuing till date. On the directions of Hon'ble Supreme Court, TRAI has also filed a detailed report dated 21st July 2010 on the Broadcasting and Cable sector, the extracts whereof have also been referred to and reproduced in the present response. The matter is still pending with Hon'ble Supreme Court.

5.2 Since the Apex Court has ordered "status quo", any amendment/modification in the Principal Tariff Order qua composition/reconfigurations of Bouquets as now sought to be proposed in the present CP, would not only be violative of the said

order but also have a direct bearing on the pending Appeal as well as on the interest of content aggregators/broadcasters.

6. **ASSERTIONS IN THE CP - CONTRARY TO THE STATED POSITION OF TRAI ON OATH BY WAY OF AFFIDAVIT BEFORE HON'BLE SUPREME COURT**

6.1 The TRAI had filed a detailed report dated 21/07/2010 by way of an affidavit on Tariff issues related to Cable TV services in non-CAS areas in Hon'ble Supreme Court in pursuance of its Orders dated 13th May, 2009 passed in Civil Appeal Nos.829-833 of 2009. The assertions in the present CP are totally contrary to the said report. The attention is invited to the following extracts of the said report which are being reproduced as under:

(ii) Aggregator

2.5 *The TV channels can be distributed by the broadcaster himself or through authorized distribution agencies to the distribution platforms. An aggregator is a distribution agent who undertakes the distribution of TV channels for one or more broadcasters. The role of the aggregator in the value chain is to provide bundling and negotiation services for subscription revenue on behalf of the broadcasters. The sale of channels by the broadcaster/aggregator to the distributor can take two forms a) A-la-carte: one channel is sold as a single unit and b) Bouquet: two or more channels are bundled and sold as a single unit.*

2.6 *There are around 24 aggregators/ agents of broadcasters. Of these, the four main aggregators are Zee Turner (31 channels), Star DEN (23 channels), MSM Discovery (21 channels) and Sun*

Group's SDS (23 channels). The business model of an aggregator is largely commission-driven. They charge the broadcaster commissions in the range of 5%-10% for distributing these channels across different platforms.

- 2.7 These entities have a relatively small cost base, comprising salaries, travel and other operating costs. **The key drivers of the aggregator business are a) Economies of scale i.e. large number of channels, b) Competitive offerings i.e. popular channels and innovative packaging and c) Market knowledge i.e. strong understanding of the market, both in terms of the subscriber base and their willingness and ability to pay for different channels. A key trend observed in this market is the entry of large broadcasting alliances in aggregation. This may be attributed to the market environment in which pay channels operate, which is characterized by lack of addressability.**

(iii) Multi System Operator (MSO)

- 2.8 The MSO's role is to downlink the broadcasters' signals, decrypt any encrypted channels and provide a bundled feed consisting of multiple channels to the LCO. The following paragraphs explain the evolution of the Multi-System Operator (MSO).

- 2.9 In the early days of cable, there were no MSOs and the broadcasters negotiated directly with LCOs as the number of broadcasters was limited and most channels were Free to Air. However, the number of operators grew significantly, driven largely by the prospects of this industry and the absence of a regime to cap the number of operators. As a result, the subscriber base became increasingly fragmented across thousands of LCOs.

Thus, it became expensive and ineffective for broadcasters to negotiate with several thousand operators. As the cost of down-linking signals grew (in line with the number of channels), it also became inefficient for every LCO to invest in equipment to service a few hundred households. The MSO then emerged as a “master distributor” who would purchase content from various broadcasters and provide it to multiple LCOs.

2.10 It is estimated that around 6,000 MSOs are present in the Indian market today. There are national MSOs who have presence across the country, regional MSOs having presence across a few states, state wide MSOs who have presence within a state and local city based MSOs. The prominent MSOs who have large networks and reach in the country are Asianet, DEN Networks Ltd., Digicable, Hathway Datacom, IndusInd Media and Communication, KAL Cables (Sumangali), Ortel and Wire and Wireless India Ltd (WWIL).

2.11 The MSO business is dependent on the broadcaster/ aggregator for content and on the LCO for last mile connectivity and subscription revenue collection. Some MSOs also have “direct points” through which they service the last mile.

2.12 The key growth drivers for the MSO business are the following. MSOs with significant reach (i.e. a large network) are able to reduce their costs by leveraging the same infrastructure on a large subscriber base. Operators need to leverage their scale of operations to receive bulk discounts for content purchased from broadcasters. The choice of markets (across states, cities and even localities) is an important determinant of the growth potential of an MSO. This increases the bargaining power of the MSO (since these are “must-reach” markets for the broadcaster).

It also increases the potential of revenue from carriage and placement fee.

2.13 Recent trends observed in the MSO business are as follows. MSOs are observed to be gaining depth not just in their traditional markets but are also looking at lateral growth by entering into new regions. One of the ways in which MSOs have tried to expand to new regions is by buying out LCOs. This has led to huge premiums being paid for LCO operations in markets where the MSO perceives value in reaching out directly to the consumer. The recent corporate participation and investor interest in the MSO business has led to two unique market outcomes. Certain states and cities (e.g. Delhi, Maharashtra, Haryana and Bangalore) have a large number of MSOs (5-7) servicing each city. In contrast, it has been reported that certain markets are characterized by the presence of a single MSO.

2.22 The incidence of Carriage and Placement Fee is a recent phenomenon in the MSO business. Traditional cable services consisted of signals being carried in analog mode, thereby significantly restricting the capacity of the cable. Since the number of channels present in the market outnumbered the capacity, MSOs charge carriage and placement fee for channels to be carried on their networks. These payments are essentially a mechanism for the MSO to realize the efficient value of a “scarce” commodity – bandwidth to transmit channels.

b) Subscription Revenue

2.45 As mentioned earlier in para 2.39, the analog cable subscription market is estimated at Rs.13,500 crore. The flow of content from the broadcaster to the consumer is compensated by the flow of

subscription revenue in the reverse direction. The pass-through of television subscription – from the local cable operator, to the multi system operator and further down to the aggregator and broadcaster – is the key transaction that links the value chain. At each step, the stakeholder involved adds value to the service and receives a share of the revenue. The estimated distribution of subscription revenue across the value chain, based on information received from stakeholders, is as follows:- Broadcaster/Aggregator around 20% (Rs.2,900 crore) and Distributor (MSO+LCO) around 80% (Rs. 10,600 crore). As regards distribution of subscription revenue across the supply chain, it is relevant to note that there is very limited visibility on the subscriber base consuming and paying for the 129 pay channels analyzed for this exercise. In the absence of addressability, the subscription revenue transaction is being undertaken either as a fixed fee (lump sum), or on the basis of a “negotiated” subscriber base. The distribution of subscription revenue is also skewed due to lack of visibility.

.....

- 2.5 The Authority has examined the collateral evidence available in this regard. Figures in the inter-connect filings and other stakeholder data indicate that the ‘negotiated’ base of even the most popular channels is much lower than the total estimated number of about 68 million analog cable homes in the country. The maximum connectivity (number of subscribers) declared by major broadcasters/ aggregators through interconnect agreements is in the range of 4-5 million consumers. The level of reporting varies from area to area and also depends on the relative bargaining powers of the stakeholders. While the level of the negotiated base for different channels cannot be taken as conclusive proof of under-reporting, it is nonetheless difficult to

believe that the most widely distributed channels reach less than 10% of analogue cable TV homes.

7. **NO DEFINITION OF AGGREGATOR IN THE LAW/REGULATORY FRAMEWORK**

7.1 In para 9 of the draft Explanatory Memorandum it has been stated as under:

The broadcasters, MSOs, cable operators, DTH, HITS and IPTV operators are recognised as entities in the policy guidelines and regulatory framework of MIB and TRAI respectively. Aggregators, as a separate entity, have not been specifically defined anywhere; neither in the law or the statutory Rules, nor in the regulatory framework for the broadcasting and cable TV services sector.

7.2 The above mentioned averments of TRAI are incorrect and contrary to the Regulations issued by TRAI itself and also to the provisions of the Cable Television Networks (Regulation) Act, 1995.

The attention in this regard is invited to the following:

Section 2(aii) of the Cable Television Networks (Regulation) Act, 1995 defines a Broadcaster as under:

“Broadcaster” means a person or a group of persons, or body corporate, or any organisation or body providing programming services and includes his or its authorised distribution agencies;”

7.3 The Aggregators are the authorised distribution agent of the Broadcasters and accordingly are duly recognised under the Cable Act.

The “Aggregators” are duly recognized under the **TRAI Interconnect Regulations of 2004 as amended** also. In fact, all the provisions of Interconnect Regulations apply to the agents/distribution agencies of broadcasters.

In this connection, attention is invited to the following provisions of the said Regulations :

*Section 2. (b) “**agent or intermediary**” means any person including an individual, group of persons, public or body corporate, firm or any organization or body authorised by a broadcaster/multi system operator to make available TV channel(s), to a distributor of TV channels;*

*(e) “**broadcaster**” means any person including an individual, group of persons, public or body corporate, firm or any organization or body who/which is providing broadcasting service and **includes his/her authorised distribution agencies;***

*3.4 A broadcaster **or his/her authorised distribution agency** would be free to provide signals of TV channels either directly or through a particular designated agent or any other intermediary. A broadcaster shall not be held to be in violation of clauses 3.1 and 3.2 if it is ensured that the signals are provided through a particular designated agent or any other intermediary and not directly. Similarly a multi system operator shall not be held to be in violation of clause 3.1.and 3.2 if it is ensured that signals are provided through a **particular designated agent or any other intermediary and not directly.***

Provided that where the signals are provided through an agent or intermediary the broadcaster/multi system operator should ensure that the agent/intermediary acts in a manner that is (a) consistent with the obligations placed under this regulation and (b) not prejudicial to competition.

3.5 Any [broadcaster, multisystem operator or HITS operator, as the case may be **or any agent/ any other intermediary of the broadcaster**, multisystem operator or HITS operator, as the case may be to whom a request for providing TV channel signals is made, should either provide the signals on mutually agreed terms to the distributor of TV channels who is seeking signals, or specify the terms and conditions on which they are willing to provide TV channel signals, in a reasonable time period but not exceeding sixty days from the date of the request. In case, the [broadcaster, multisystem operator or HITS operator, as the case may be **or any agent/ any other intermediary of the [broadcaster, multisystem operator or HITS operator, as the case may be to whom a request for providing TV channel signals is made, turns down the request for TV channel signals, the reasons for such refusal must also be conveyed within sixty days from the date of the request for providing TV channel signals so as to enable the distributor of TV channels to agitate the matter at the appropriate forum.**

- 7.4 It is submitted that Hon'ble Supreme Court in **Star India Pvt. Ltd. vs. Sea TV Networks Ltd and others** [2007] 4 SCC 656 has held that so long as the agent/intermediary of a broadcaster is not a MSO/LCO (a competing distribution platform), it is permitted under the Regulations.

7.5 It is also pertinent to point out that what is prohibited under TRAI Regulations is the exclusive contract by a broadcaster with any distribution platform to the exclusion of other distribution platforms which has the effect of denying content to the other distribution platforms. Clause 3.1 of the Regulations provides that “*No broadcaster of TV channels shall engage in any practice or activity or enter into any understanding or arrangement, including exclusive contracts with any distributor of TV channels that prevents any other distributor of TV channels from obtaining such TV channels for distribution.*”

7.6 Further, the expression “distributor of TV channels” has been defined under Clause 2(j) of the TRAI Regulations which reads as under:

(i) “**distributor of TV channels**” means any person including an individual, group of persons, public or body corporate, firm or any organization or body **re-transmitting TV channels** through electromagnetic waves through cable or through space intended to be received by general public directly or indirectly. The person may include, but is not limited to a cable operator, direct to home operator, multi system operator, head ends in the sky operator;

7.7 It is submitted that appointing agent/intermediary (Aggregators) does not in any manner affect the availability of channels to the distribution platforms as these agents/intermediaries (Aggregators) being agents of the broadcasters are bound by all the provisions of Interconnect Regulations and are required to provide their channels to MSOs/LCOs/DTH operators on must provide basis and on non-discriminatory terms. Thus, it is submitted that dealing through aggregators has no effect whatsoever on the availability and access to the channels by the distribution platforms. The assertions and observations to the contrary in the CP are incorrect.

8. **THE CP IS DIRECTLY CONTRARY TO THE CABLE MONOPOLY CONSULTATION PAPER NO. 05/2013 DATED 3RD JUNE 2013 ISSUED BY TRAI.**

8.1 It is relevant to point out that in the above mentioned CP on cable monopoly, TRAI has categorically stated that there exists significant bargaining power and monopoly at the MSO/LCO level which is being abused. This is not only affecting the growth of this sector, but also adversely affecting the consumer interest. The present CP on the contrary wrongly accuses the Aggregators of being monopolistic and misusing their bargaining power. The attention is invited to the following extracts of the said consultation paper.

1.12 The size of markets catered to (across States, cities and even localities) by an MSO determines its market power and influence. One of the ways in which MSOs have tried to expand and increase their size (and influence) is by buying out LCOs and smaller MSOs. The joint venture/ subsidiary model has emerged as a result of mergers and acquisitions (M&A) of LCOs/MSOs by large MSOs. The MSOs have varying levels of ownership interest in these LCOs. Typically, MSOs provide more favorable terms and financial assistance to joint venture companies and subsidiaries. The point is that, by way of acquisition, joint venture or subsidiary, some MSOs have been increasing their presence and size leading to a situation of market dominance.

1.13 There are instances where the dominant MSOs are misusing their market power to create barriers of entry for new players, providing unfair terms to other stakeholders in the value

chain and distorting the competition. MSOs with significant reach (i.e. a large network and customer base) are leveraging their scale of operations to bargain with broadcasters for content at a lower price and also demand higher carriage and placement fees. Such MSOs are in a position to exercise market power in negotiations with the LCOs on the one hand, and with the broadcasters on the other.

1.14 Large MSOs, by virtue of securing content at a lower price and charging higher carriage and placement fee from broadcasters, are in a position to offer better revenue share to LCOs. They, therefore, can incentivize LCOs to move away from smaller MSOs and align with them. Such MSOs use their market power to provide unfavourable terms or make it difficult for the broadcasters to gain access to the distribution network for reaching the customers. There are instances where a dominant MSO has made it difficult for some broadcasters to have access to its distribution network for carrying content to consumers. Blocking content selectively can also become an obstacle to promoting plurality of viewpoints.

1.15 One such case of denial of market access was also brought to the notice of Competition Commission of India (CCI) in 2011, when a broadcaster M/s Kansans News Private Limited alleged that a group of MSOs, operating in the State of Punjab, in which M/s Fastway Transmission Pvt. Ltd. holds majority shares, had acquired substantial market share in the cable TV distribution and denied market access to its channel. The CCI investigated the case and imposed penalties of Rs. 8.04 Crore on the MSOs for violating the provisions of sections 4(2)(c) of the Competition Act 2002, which states that there shall be an abuse of dominant

position if an enterprise or a group indulges in a practice or practices resulting in denial of market access in any manner.

1.21 Though DTH has emerged as an alternate to Cable TV and its subscriber base is growing at a faster rate compared to cable TV, the percentage of cable TV homes is significantly larger vis-à-vis DTH subscribers. Cable TV subscribers constitute approximately 60% of the total TV homes in the country, whereas the share of DTH is about 35% (Figure 1.2). DTH operates on a national basis and transmits all channels throughout the country irrespective of variations in demand of channels in different markets. Cable TV networks on the other hand operate on a regional basis and can choose channels to be supplied according to the demand in the area served. In the pay DTH sector, there are six major players providing services on a national basis. In contrast, Cable TV operators are limited in a particular area and in most cases the customer is served by a single local cable operator. On the technical front also, there are differences between DTH and cable TV in terms of the number of channels the platform can support, acquisition cost for the consumer, type of services supported etc.

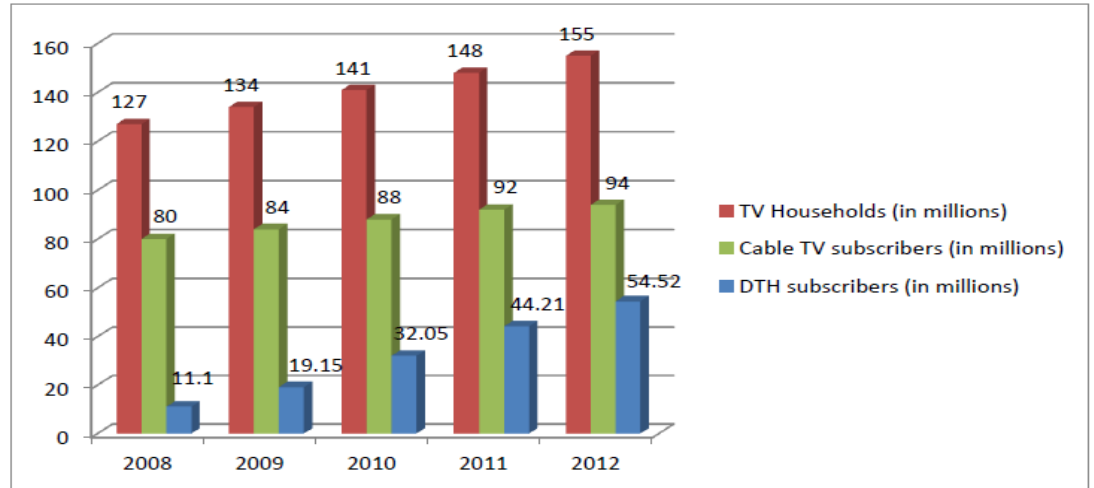


Figure 1.2: Growth of Cable TV & DTH subscribers

1.22 In sum, though DTH and cable TV are competing platforms, they are not perfect substitutes of each other and their operating circumstances and environment vary significantly. Hence, the monopoly/market dominance issue in cable TV continues to be of significance, if only because of the sheer size of the cable TV segment in the overall distribution market.

9. NO RATIONALE IN PROHIBITING MULTI BROADCASTER BOUQUET

9.1 The proposed Regulation seeks to debar the authorised distribution agent viz. the Aggregator from creating multi broadcaster bouquet. It is submitted that the proposed Regulation in this behalf is violative of the fundamental rights of the Broadcasters/Aggregators under Article 19(1)(g) of the Constitution of India whereby unreasonable restrictions are sought to be placed in the manner of structuring and carrying business by the Broadcasters/Content Aggregators. Under the proposed Regulations only specific roles and responsibilities can be assigned by a broadcaster to its distribution agent. This clearly

violates the freedom to carry on business/trade by the Broadcasters and their authorised agents. This is also against the well recognised concept of “agency” as provided under Chapter X of the Indian Contract Act. A Broadcaster is free to outsource any of its activities to its duly authorised agent/distribution agency. Under the Indian Contract Act a Principal (Broadcaster) is bound by the Acts of his Agent (distribution agency/aggregators).

9.2 Attention in this regard is invited to Section 226 of the Indian Contract Act which reads as under:

S. 226. Enforcement and consequences of agent’s contracts. – *Contracts entered into through an agent, and obligations arising from acts done by an agent, may be enforced in the same manner, and will have the same legal consequences, as if the contracts had been entered into and the acts done by the principal in persons.*

The above quoted section postulates that contracts entered into through an agent and obligations arising from an act done by an agent may be enforced in the same manner and will have the same legal consequences as if the contracts have been entered into and the acts done by the principle in person. Thus, the Aggregators being the agents of the Broadcasters, are subject to same obligations and responsibilities as are that of Broadcasters including compliance of various Acts, Rules and Regulations. The proposed amendments seek to curtail the freedom available to the Broadcasters as well as to the Aggregators in structuring their business in the manner deem fit, keeping in view the prevalent circumstances/scenario in the Cable TV and content distribution sector.

9.3 The multi broadcaster bouquet is beneficial for the distributor of channels inasmuch as the MSOs/DTH operators can avail the wholesome offering comprising of different genres of channels through these bouquets which otherwise may not be available in the bouquet offered by a single broadcaster.

9.4 Formation of Bouquets is also done by the MSOs and DTH operators which bundle channels from different broadcasters and genres into Bouquets such as “Basic”, “Value” “Gold”, “Silver”, “Platinum” etc.

It would have bode well if the TRAI had analyzed in its consultation paper how “such bouquets” when formed by MSOs or DTH operators are distinctively different from the bouquets that are formed by each Distribution agency.

9.5 The TRAI has itself acknowledged the advantages of multi-broadcasters bouquet and has allowed both MSOs as well as DTH operators to create the bundle/packages of different channels procured from various Broadcasters/Aggregators and offer these channels to the Local Cable Operators (LCOs)/subscribers respectively. In fact both MSOs/DTH operators also act as Aggregators of channels.

The attention in this regard is invited to the following:

TRAI Interconnect Regulations dated 10/12/2004 as amended – proviso to Clause 13.2A.11, which reads as under:

“13.2A.11 It shall be mandatory on the part of the broadcasters to offer pay channels on a-la –carte basis to direct to home operators and such offering of channels on a-la-carte basis shall

not prevent the broadcaster from offering such pay channels additionally in the form of bouquets.

Provided that no broadcaster shall, directly or indirectly, compel any direct to home operator to offer [any channel of channels or bouquet] or bouquets offered by the broadcaster to such operator in any package or scheme being offered by such direct to home operator to its direct to home subscribers.”

Thus, while the broadcasters are required to provide their channels on non-discriminatory basis and at the frozen prices at wholesale level to the distribution platforms, the distribution platforms are free to package these channels in a manner deem fit and proper and price them accordingly for the end consumers.

9.6 It is not stipulated by TRAI that MSOs/DTH operators should also provide bouquet procured from a broadcaster *as it is* to the subscribers. It is because the packages/bundles formed by MSOs/DTH operators consist of channels of various genres of different broadcasters so as to cater to the needs of subscribers at an affordable price and obviate the requirement to avail the channels on ala-carte basis which is comparatively costlier. The same is equally true for multi-broadcasters bouquet(s) formed and provided by Aggregators at wholesale level for various distributors of channels viz. MSO/DTH.

We would also have liked TRAI to present in the consultation paper on what would have been the a-la-carte value of these channels had the bouquets not been formed as in the case of MSOs and DTH operators as distinct from Distribution agencies. The fact is that it is a reality for the customers to receive channels in bouquets, and the TRAI will not

be able to take away this benefit from them. Now the question is why only the MSO should be allowed to form Bouquets and not the Aggregators so long as they conform to the TRAI guidelines on Bouquet pricing?

Prohibiting Aggregators to create multi broadcaster bouquet on the one hand and permitting the MSO/DTH operator to do the same on the other would clearly amount to discrimination on the part of TRAI.

10. **RESPONSE TO VARIOUS ASSERTIONS/ALLEGATIONS IN THE CP**

Certain unsubstantiated assertions/allegations have been made in the CP which are being responded to as under:

10.1 **Para-13 of the draft Explanatory Memorandum**

In the absence of any regulatory framework for the aggregators (including possible restrictions on the authorised agencies), they started to bundle channels of more than one broadcaster and form bouquets. These bouquets, having popular channels of a number of broadcasters, provided a better marketing proposition. These bouquets grew larger and larger with time, as the aggregator started to piggy back more and more channels, especially those having lesser standalone market values. The strategy seems to have been to add such lower value channels to the popular bouquets, so that such channels could be pushed along with the popular channels. This fetched higher commission for the aggregators and better revenues to the broadcasters, especially advertisement revenue. This together with the misuse of market dominance by the aggregators has led to aberrations in the market. With time, consolidation has taken place in the aggregators business and now the top four aggregators control around 73% of the total pay TV channel market and wield substantial negotiating power which can be, and is often misused.

Para-14 of the draft Explanatory Memorandum

The market distortions, arising out of the current role assumed by the aggregators, were amply reflected during the implementation of digital addressable cable TV systems (DAS), Phase I and Phase II. Several MSOs have complained that they were forced to accept unreasonable terms and conditions to obtain signals of the broadcasters through some of the major aggregators, that too at the fag end of the implementation deadline. According to the non-vertically integrated MSOs as well as smaller MSOs, they always get a raw deal. This impacted the smooth implementation of DAS. In the Open House Discussions (OHDs) held in various parts of the country on „Issues related to Media Ownership”, concerns have been vehemently voiced by various MSOs and LCOs regarding the monopolistic practices of the major aggregators

RESPONSE

- (i) The above mentioned assertions are factually incorrect. As mentioned earlier, not only the tariff but also the composition of bouquet are under freeze since December 2003. The reference is invited to the Principal Tariff Order dated 01/10/2004 and also the Tariff Order dated 04/10/2007 in this context. As per the provisions of these Tariff Orders, no new channel can be added to the existing bouquet. Therefore the assertion of TRAI that *“These bouquets grew larger and larger with time, as the aggregator started to piggy back more and more channels, especially those having lesser standalone market values. The strategy seems to have been to add such lower value channels to the popular bouquets, so that such channels could be pushed along with the popular channels”* is quite contrary to the stipulations contained in the above mentioned Tariff Orders.

- (ii) It has been baldly asserted without any substantiation/evidence that Aggregators have misused the market dominance which has led to market aberrations. As submitted earlier also, in the backdrop of the prevalent market scenario in the content distribution sector (Cable TV, DTH etc.) and the stringent Regulatory framework of TRAI, it is not possible to indulge in any anti-competitive behaviour as sought to be alleged. Merely because 73% of pay channels are controlled by four major Aggregators does not result in any kind of abusive dominance as they are subject to “must provide”, “non-discrimination” regime of TRAI Regulations. It is pertinent to mention that there is no “must carry” either on cable or on DTH.
- (iii) It is stated that on the contrary MSOs enjoy significant “bargaining power”. The TRAI in its consultation paper on Tariff Issues relating to Cable Services in Non-CAS Areas dated March 25, 2010 has observed:

“The key growth drivers for the MSO business are the following. MSOs with significant reach (i.e. a large network) are able to reduce their costs by leveraging the same infrastructure on a large subscriber base. Operators need to leverage their scale of operations to receive bulk discounts for content purchased from broadcasters. The choice of markets (across states, cities and even localities) is an important determinant of the growth potential of an MSO. This increases the bargaining power of the MSO (since these are “must-reach” markets for the broadcaster). It also increases the potential of revenue from carriage and placement fee.” (Emphasis Supplied) (Paragraph 2.2.23 at page 17 of the Consultation Paper on Tariff Issues)

2.2.15 A key trend observed in this market is the entry of large broadcasting alliances in aggregation. This may be attributed to

the market environment in which pay channels operate, which is characterized by lack of addressability.

2.4.12 The distribution of subscription revenue across the value chain in India is different from the distribution observed in international markets. This is illustrated below:

Stakeholder	Broadcaster/ Aggregator	Distributor (MSO + LCO)
India	~20%	~80%
Analog cable – international markets	50%	50% - LCO acts as agent of MSO
Digital cable – international markets	60%	40% - MSO services subscriber directly

(iv) It is reiterated that there cannot be any kind of monopolistic practice/abuse of dominance by a Content Aggregator on account of the following:

(a) **“Must provide”** Regulation under which a broadcaster is obliged to provide its channels on request by MSOs/LCOs on non-discriminatory basis.

(b) No **“Must carry” obligation** for MSOs/LCOs and other distribution platforms

It is also pertinent to mention that while there is ‘must provide’ requirement mandating broadcasters to provide their contents/channels on request to the distribution platforms, there is no “must carry” regulation/requirement (except in case of Doordarshan channels) **i.e. the MSOs cannot be compelled by the broadcasters/content aggregators to carry their channels on their networks. The MSOs are free to decide**

which bouquet of channels they wish to carry for onward transmission to LCOs and finally to consumers.

(c) Complete choice of bouquet of channels/ala carte choice.

Under the Regulations issued by TRAI, the MSO/LCOs /DTH operators are free to choose the bouquet of channels and/or the channels on ala carte basis. The TRAI has even laid down elaborate Regulations for determining the pricing of ala carte channels.

(d) Tariff Regulations

The rates of all the channels provided by the broadcasters are under freeze both for analogue cable as well as for DTH since December 2003. **In this context, it is pertinent to point out that not only the prices of channels have been frozen but even the composition of bouquet of channels which were in existence as on 26th December 2003 and 1/12/2007 have been frozen.** New channels launched after these dates have to comply with the similar price criteria vis-à-vis the rates of the existing channels in the same genre as per the Tariff Order dated 21st July 2006 issued by TRAI.

(e) Detailed Regulations have been formed by TRAI to ensure Interconnection Agreements between content aggregators and distribution platforms. Thus **no unreasonable terms can be imposed by the broadcasters as this would amount to denial of channels under the Regulations, thus inviting the consequences as provided therein.**

(f) Restriction on disconnection of channel by a broadcaster/content aggregator without giving a mandatory 21 days notice to the distribution platform and also a public notice in newspapers and that too only on account of default by a distribution platform and/or breach of terms & conditions of the interconnection agreement.

(g) Effective adjudicatory mechanism by the sector Tribunal – TDSAT in case of any grievance including pertaining tariffs and terms & conditions of the interconnection agreements.

10.2 Para-15 of the draft Explanatory Memorandum

A scrutiny of the interconnection agreements for the DAS areas filed with the Authority by the broadcasters, reveals that fixed fee deals have been made by the aggregators with most of the leading MSOs. In such deals, the MSO is required to pay a fixed fee per month as the license fee, irrespective of the subscriber base of the MSO or the uptake of channels offered by the aggregator. In some cases, agreements have also been entered into on Charge per Subscriber (CPS) basis, based on the total number of active STBs and not on the actual uptake of the individual channels. In a few other cases, a minimum guarantee money is charged, up to a certain subscriber base, beyond which, an additional license fee per subscriber is charged by the aggregator.

RESPONSE

- (i) It is absolutely wrong on the part of TRAI to allege that the Aggregators had forced MSOs to accept fixed fee deals and/or to accept unreasonable terms and conditions. All the Aggregators had declared and made available their Reference Interconnect Offers (RIOs) in respect of the channels dealt by them in terms of the Tariff Orders

and Interconnection Regulations as applicable to the addressable systems/DAS areas issued by TRAI . On the contrary, since the MSOs were not at all prepared in terms of operationalised subscriber management system (SMS), non receipt of Subscription Application Forms (SAFs) etc, they requested for continuation of the analogue deals which were on fixed fee/lumpsum basis. It is stated that even after about 10 months of implementation of DAS, the Broadcasters/Content Aggregators are yet to receive the subscribers report from the SMS systems of MSOs. It is a matter of record that TRAI had to intervene by way of issuance of directions and initiation of prosecution etc. to ensure the operationalisation of SMS and procurement of SAF.

- (ii) The assertions/allegations regarding the CPS deals are also incorrect and denied. Under the prevalent regulatory regime, an addressable platform can enter into Interconnection Agreements with an Aggregator either on a mutually negotiated terms and in case there is no mutual agreement, on the basis of RIO declared by the Broadcasters/Aggregators. There is nothing wrong in entering into mutually negotiated fixed fee contracts and/or the contracts based on fixed fee up to certain level and CPS thereafter once the agreed level is crossed. In case a distributor of channel is not interested in entering into mutually negotiated contracts, it can always avail channels on the basis of RIO. The attention in this regard is invited to the extract of Explanatory Memorandum to tariff order dated 21st August 2010 which reads as under:

20. Based on the information submitted by the stakeholders to TRAI, an analysis was carried out to assess the price at which broadcasters provided TV channels to DTH operators. Since DTH has become the predominant addressable system compared to CAS and IPTV, the related data of DTH has been considered in

this exercise. It has been noticed that different methods are followed for securing content at the wholesale level. In one method, a long term contract is entered into for payment of a fixed annual fee. Various factors, including subscriber base and growth, number of channels and their reach and duration of the contract are likely to influence such contracts. In another method, the agreements are based on the unit price of a channel and the corresponding subscriber base ascertained from the subscriber management system. A percentage discount is made available by the broadcaster on the channel price depending on the target subscriber base. In both models, it is noticed that the content is made available at a discounted price by the broadcasters to the addressable platform distributor.

11. **ISSUE OF ABUSE OF DOMINANCE, MISUSING OF BARGAINING POWER, VERTICAL INTEGRATION – UNDER CCI DOMAIN**

11.1 The entire CP is based on the purported misuse of market power, dominance, monopoly by the aggregators and market aberrations etc which are under the exclusive domain of Competition Commission of India.

In this context, it is relevant to point out that while no investigation whatsoever has been carried out by TRAI before bringing out the present CP, a detailed investigation was carried out by CCI on the basis of a complaint/information filed by some stakeholder (Shri Yogesh Ganeshlaji Somani) against an Aggregator – Media Pro on the very same ground of alleged monopoly/market power/abuse of dominance etc.

11.2 The attention in this regard is invited to the following extracts of the orders passed by Ld. CCI.

Case No. 31/2011 dated 21/03/2013
Order under Section 26(6) of the Competition Act
2002

2.5 *As per the Informant, the news article published in the Financial Express, New Delhi Edition dated 26.05.2011 had brought out that channel distribution industries was worth Rs.2500 crore of which share of Opposite Party No.1 was about Rs. 800 crore and share of Opposite Party No. 2 was about Rs. 1000 crore which is 70% of the market in total. The Informant has alleged that the creation of JV between Opposite Parties No. 1 & 2 would strengthen their position by adversely affecting the competition in the market. The proposed JV would force the small players to shut down or to join hands with each other. The JV in the market would not only adversely affect the competition among the broadcasters/channel owners but also would adversely affect the interests of distributors like MSO, DTH operators and IPTV operators which in turn would adversely affect the interests of end subscribers/consumers.*

2.6 *The Informant has further stated that the said JV would be much stronger intermediary in the market which would be able to kill the competition as after subscribing channels out of 63 channels offered by the JV, the MSOs, LCOs, DTHOs & IPTVOs would not be having enough financial capacity to subscribe channels of other broadcasters. The Informant has also stated that due to the monopoly of the JV in the satellite TV market, channels like Colors & Sony (not distributed by OP 1 and OP 2) would not be able to fully exploit the market and lag behind the*

channels of Opposite Party No. 1 and 2 irrespective of being popular among the end subscribers.

2.8 According to the Informant, players in the market would suffer due to undue advantage available to the JV and the consumers interest would also suffer as the consumers would be deprived of the prices available in the market and also would not be able to get competitive rates for the channels subscribed by them.

.....

3.3 DG has also examined the structure of the cable Industry in India, structure of the Analogue / Digital Cable Distribution, structure of the Direct to Home (DTH) and structure of IPTV. DG has further highlighted in his report, the major broadcasting and distribution technologies (Broadcasters, Content Aggregator, DTH Operator, Internet Protocol Television (IPTV), Multi System Operator (MSO), Local Cable Operator (LCO) and Terrestrial) present in India. DG has further reported that as per the uplinking/downlinking guidelines framed by the Central Government, channels are registered in two categories - News & current affairs; and Non-news and current affairs (General entertainment--GEC).

3.6 Keeping in view the aforesaid factual position of the TV industry, DG has reported that the services and activities of the Opposite Parties through their JV or other aggregator are a specialized area of service which involves important responsibilities of “content aggregator” in the broadcasting industry. To this effect the aggregator bundles a number of channels licensed to it by broadcaster and sells them to MSOs, DTHOs, and IPTVOs on behalf of the broadcaster. It distributes

channels in two ways: - either on a-la-carte basis where a channel is sold individually or in the form of a bouquet where two or more channels are bundled. There are also many broadcasters who do not engage any aggregator for distribution of their channels and directly deal with the distribution platforms. Out of about 800 channels only about 175 channels are distributed through aggregators. Thus, as per the DG report, the services of aggregators are generally used by those broadcasters who have many channels for distribution.

3.7 As per DG report, an aggregator is engaged in activities of aggregation and distribution of any television channel via liner and / or non-liner means, arranging carriage, band placements, setting up of set top boxes, etc. within India and to collect subscription revenue for the broadcasters either in form of bouquet of channels or individual via all modes of distribution including but not limited to cable, digital or analog, direct-to-home (DTH), head end in the sky (HITS), MMDS, SMATV, internet protocol television (IPTV), terrestrial satellite or any other emerging mode. Thus, as per the DG report, from the supply side, the aggregators can only substitute distribution of channel from cable to DTH and thus, the services of television channels through cable or DTH by the broadcaster is substitutable with the services of aggregators.

3.15 DG has further reported in the broadcasting and distribution of TV channels in India, each stakeholder like broadcasters aggregators, MSOs, LCOs, DTHOs and IPTVOs has a major role to play in the industry and exerts significant countervailing power on the others in the value chain. It needs to be noted that it is not the JV that controls or determines the choice of television channels where the distribution of television

channels takes place on a non-addressable system, it is the MSO that decides the channels that would finally be made available to the subscriber, whereas on an addressable system, DTHOs and IPTVs, it is the end consumer who decides the channels it wants to view.

3.16 DG has further reported that TRAI has issued various Rules and Regulations to monitor and regulate the Cable TV broadcasting industry and in its Telecommunication (B&C) Service Inter Connection Regulation 2004, in Clause 3.2, 3.3, 3.4 and 3.5, specific directives have been issued with regard to distribution of channels on Non-discriminatory terms; Pricing of channels and limiting downstream investments. The broadcasters are under obligation to file Reference Inter Connect Offer (RIO) under Clause 13.2 of TRAI Regulation, the charges from the Broadcaster or the Content Aggregator are governed by the Reference Interconnect regulations of the TRAI. The rates charged by the Broadcaster or the Content Aggregator are same for all the service providers under the RIO regime. The Interconnect Regulations of the TRAI mandates that all broadcasters/ aggregators are required to provide TV signals to MSOs/LCOs/DTH service providers on request on non-discriminatory terms. All broadcasters/aggregators to whom a request is made for TV signals by a distributor are required to negotiate with such distributor within a 60 day period. In the event of disconnection of signals, a broadcaster/aggregator is required to provide 3 weeks prior notice to the distributors providing reasons as to why the channels are being disconnected. Further, broadcasters are also not allowed to enter into an agreement with any distributor, including exclusive

contracts in manner so as to preclude other distributors from obtaining access to TV signals of their channels. As per the Interconnect Regulations, any person may approach the broadcaster directly to obtain channels if an agent or any other intermediary of a broadcaster or MSO does not respond to a request for provision of TV signals.

5. The Commission has carefully gone through the information, the report of the DG, the documents and evidence relied upon by the DG and the other relevant material available on record and is of the view that the following issue is for consideration before the Commission:-

Whether the Opposite Parties have contravened the provisions of Section 3 or Section 4 of the Act?

6. For the proper disposal of the aforesaid issue, it is required to briefly discuss the supply chain and regulatory framework of the cable TV broadcasting industry in India. The supply chain for broadcasting of television channels through analog cable network comprises the following: - (i) companies operating the television channels (broadcasters); (ii) Aggregators; (iii) Multi System Operators (MSO); and (iv) Local Cable Operators (LCO). The broadcaster owns the contents that are transmitted to the end consumers. The broadcaster may either produce its own content or source content from 3rd party. The broadcaster uplinks the content signals to the satellites which are in turn downlinked by the distributors. The broadcaster may transmit its content either directly or through an aggregator. An aggregator is a distribution agent who undertakes the distribution of television channels for one or more broadcasters. Aggregator also does bundling of television channels of different broadcasters and negotiates on their behalf with the distributors viz MSOs/DTHOs/IPTVOs

regarding subscription revenues. The sale of television channels to the distributors by the broadcasters or the aggregators may be on a-la-carte basis (one channel sold as a single unit) or as a bouquet (two or more channels bundled and sold as a single unit). The MSOs downlink the content signals of the broadcaster and further distribute the same to LCOs for retail distribution to the end consumer. Recently, measures have been taken by the Government of India towards digitization of the cable television system to have an addressable system that enables identification of subscriber base. These measures are primarily with a view to overcome the limitations of analog cable systems including the lack of clarity on the subscriber base and the limitations on transmitting more number of channels to the end consumers. In this system also, the distribution of TV channels to end consumer is done through MSOs and LCOs.

7. Similar to analogue cable distribution system, in DTH distribution system and IPTV distribution system, the broadcasters/aggregators sell their television channels to the DTHOs and IPTVOs for onward transmission to the end consumer. It is observed that DTH distribution system has gained significance in recent times. However, IPTV distribution system's subscriber base is comparatively insignificant.

8. 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. The relevant rules and regulations framed by the TRAI, in its Telecommunication (B&C) service inter connection Regulation 2004, are as under:-

9. 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.

10. It is also 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. Further, the investigation has also revealed that so far as the prices of channels are concerned, they have remained at pre JV level even after one year of JV agreement. Therefore, the Commission notes that there is no evidence which establishes that the OPs through their JV have influenced or fixed the prices of their channels in violation of section 3 (3) (a) of the Act.

18. The DG has also not reported that due to formation of the JV, the entry of any new broadcasters, aggregators, MSOs, DTHOs and IPTVOs was restricted or hindered in any manner.

Due to the present regulatory framework, it is mandatory upon a broadcaster/ content aggregator to provide its channels to all MSOs and other distribution platforms (including DTH) on a non-discriminatory basis and the broadcaster/ aggregator cannot enter into exclusive agreements with any distributor that prevents others from obtaining such television channels for distribution. There is no “Must Carry” obligation for MSOs and other distribution platforms rather MSOs are free to decide number of channels and contents which they wish to carry for onward transmission to end consumers.

20. Accordingly, the Commission notes that since, the JV formed by the Opposite Parties is not dominant in terms of section 19(4) of the Act in the relevant market; it cannot abuse its position.

21. In view of the above discussion, the Commission observes that the Opposite Parties have not contravened either the provisions of Section 3(3) or Section 4 of the Act. The Commission also notes that the Informant has also not placed any evidence or data which can contradict the findings of the DG report. Therefore, given the facts and circumstances of the case, the Commission is of the view that the proceedings in the instant case should be closed under section 26(6) of the Act as the Commission agrees with the recommendation of the DG in his report. Accordingly, the matter is hereby closed.

11.3 The attention is also invited to another order of Ld. CCI in case of another Content Aggregator – IndiaCast, the extracts whereof are reproduced below:

Combination Registration No. C-2013/01/07

Order under Section 31(1) of the Competition Act, 2002
dated 19th February, 2013

5. *IndiaCast, a company incorporated under the provisions of the Companies Act, 1956, is engaged in the business of aggregation of television channels broadcast by TV18 Broadcast Limited (hereinafter referred to as “**TV18**”), Viacom18 Media Private Limited (hereinafter referred to as “**Viacom18**”) and certain other broadcasters. IndiaCast is currently a subsidiary of TV18. It has been stated in the notice that TV18 is a subsidiary of Network18 Media and Investments Limited (hereinafter referred to as “**Network18**”), which also holds fifty percent of the shareholding in Viacom18. Network18 with its subsidiaries and affiliates (hereinafter referred to as the “**IndiaCast Group**”) operates in the media and entertainment sector, with interests in television, internet, film entertainment, digital content, e-commerce, magazines, mobile content, event management services and other allied businesses.*

6. It has been stated in the notice that the Disney Group and the IndiaCast Group shall grant exclusive licence to IC to distribute their television channel(s). It has also been stated in the notice that post-combination, UGBL and IndiaCast would cease their aggregation business in India as they now propose to carry out the business of providing the service of aggregation in India through IC by way of the proposed combination.

7. *Since the business of aggregation of the television channels offered/broadcast by the Disney Group and the IndiaCast Group, in India, is proposed to be transferred to IC by way of issuance of exclusive licenses, in terms of sub-regulation (9) of Regulation 5 of the Combination Regulations, the value of assets and turnover of*

the respective licensors is attributed to IC. The proposed combination falls under Section 5 (a) of the Act.

9. As stated in one of the earlier orders of the Commission, the supply chain for broadcasting of television channels through analog cable network comprises the following: (i) Companies operating the television channels (broadcasters); (ii) Aggregators; (iii) Multi System Operators (MSOs); and (iv) Local Cable Operators (LCOs). The broadcaster owns the content that is transmitted to the end consumers. The broadcaster may either produce its own content or source content from a third party. The broadcaster uplinks the content signal to the satellite which is in turn downlinked by the distributors. The broadcaster may transmit its content either directly or through an aggregator. An aggregator is a distribution agent who undertakes the distribution of television channels for one or more broadcasters. The aggregator also does bundling of the television channels of different broadcasters and negotiates on their behalf with the MSOs regarding subscription revenues. The sale of television channels to the MSOs by the broadcasters or the aggregators may be on a-la-carte basis (each channel sold as a single unit) or as a bouquet (two or more channels bundled and sold as a single unit). The MSOs downlink the content signals of the broadcaster and further distribute the same to LCOs for retail distribution to the end consumer. As per the Telecom Regulatory Authority of India (TRAI) estimates, India is stated to have around 200 broadcasters, 24 aggregators, 6000 MSOs and around 60,000 LCOs (Source: TRAI Consultation Paper on Implementation of Digital Addressable Cable TV Systems in India dated 5th August, 2010).

12. As already observed that both UGBL and IndiaCast are engaged in the business of aggregation of television channels operated/ broadcasted by their respective group companies. As a result of the proposed combination, the aggregation business of both the entities would be combined and carried out by IC. It is also proposed that exclusive distribution licenses would be granted to IC for aggregation of the television channels operated by the Disney Group and the IndiaCast Group. It has been stated in the notice that IC could provide aggregation services to other broadcasters also. Further, the broadcasters enter into aggregation tie-ups to correct the market imbalances created on account of information asymmetry/non-transparency regarding subscriber base. An aggregator offering bouquets consisting of television channels of different broadcasters makes the offering attractive and consequentially places the aggregator in a better position to negotiate subscriber numbers and placement/carriage fees.

13. 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 and not to enter into exclusive agreements with any MSO/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. It is observed that the market for providing the service of aggregation is competitive with a number of players operating therein. Even after the combination there will be 24 (twenty-four) aggregators in the market which would provide enough competition in the

market. As per the details provided in the notice, it is also observed that the market share, based on the estimation of TAM for the period 2010-2012, of six television channels aggregated by UGBL along with three other television channels of Disney Group is around 4 percent only. Further, as a result of the proposed combination, IndiaCast would discontinue its aggregation tie-up with Sun Distribution Services Private Limited and accordingly the market share of channels which would be aggregated by IC would be less than that of IndiaCast.

14. Considering the facts on record and the details provided in the notice given under subsection (2) of Section 6 of the Act and the assessment of the proposed combination after considering the relevant factors mentioned in sub-section (4) of Section 20 of the Act, the Commission is of the opinion that the proposed combination is not likely to have an appreciable adverse effect on competition in India and therefore, the Commission hereby approves the proposed combination under sub-section (1) of Section 31 of the Act.

It seems while issuing the said CP that the TRAI has completely ignored and has failed to consider the above mentioned orders of Ld. CCI.

The proposed amendments in the Regulations/Tariff Orders are directly in conflict with the above mentioned orders of Ld. CCI.

11.4 The attention in this regard is also invited to Section 21 of the Competition Commission Act, 2002 which reads as under:

21. Reference by statutory authority

(1) Where in the course of a proceeding before any statutory authority an issue is raised by any party that any decision which such statutory authority has taken or proposes to take, is or would be, contrary to any of the provisions of this Act, then such statutory authority may take a reference in respect of such issue to the Commission:

[PROVIDED that any statutory authority, may, suo motu, make such a reference to the Commission.]

[(2) On receipt of a reference under sub-section (1), the Commission shall give its opinion, within sixty days of receipt of such reference, to such statutory authority which shall consider the opinion of the Commission and thereafter, give its findings recording reasons therefore on the issues referred to in the said opinion.]

It is also pertinent to point out that as per Section 60 of the CCI Act, 2002 the provisions of the CCI Act shall have the overriding effect on all other enactments.

No reference seems to have been sent to CCI on this aspect and accordingly the entire consultation process stands vitiated because of non-compliance of Section 21 of the Competition Act.

12. **CONCLUSION:**

12.1 TRAI must appreciate that the “Distribution Function” remains the primary function of the “Distribution Agencies” and they have an extremely critical and useful role in the Media distribution ecosystem. Therefore it is essential to formalize their role rather than force the broadcasters to live with Bouquet formation by MSOs and LCOs.

12.2 Over 400 channel in India are provided by broadcasters operating from overseas and having downlink permissions. Many such

broadcasters broadcast their channels to over 100 countries in Asia Pacific alone, and they neither have distribution skills nor the expertise to deal with LCOs and take up on their own the job of forming bouquets with 60,000-70,000 operators and negotiating carriage fees. If the proposed modifications/amendments are notified, it would also sound death knell for channels of small broadcasters which will not get carriage on Cable/DTH unless they shell out heavy carriage fee. Thus these channels would suffer heavy losses and would eventually shut down.

12.3 We believe that the proposal of the TRAI in making broadcasters directly responsible for the RIOs, A-La-carte and Bouquet pricing by banning the distribution agencies of making their own bouquets by including channels of other broadcasters is seriously flawed. It ignores the reality of the industry of Carriage fees and the benefits of bouquet pricing. In fact it is painful to point out that TRAI has not come out with any carriage fee regulation despite availability of abundant bandwidth with cable networks in the digital regime.

For the reasons stated in the present response, we request the Authority to drop the present CP.
