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Shri S.K. Gupta
Pr. Advisor (B&CS)
Telecom Regulatory Authority of India
New Delhi
[via email to: pradvbcs@trai.gov.in; umesh@trai.gov.in]

Dear Shri Gupta:

On behalf of the U.S.-India Business Council (USIBC or "Council"), we appreciate The Telecom Regulatory Authority of India (TRAI) for undertaking this comprehensive exercise to determine an appropriate tariff structure for the broadcast industry. As you are aware, USIBC represents over 350 companies, including industry leaders in the broadcasting, film and technology sectors. The rate and manner that India digitizes is crucial to the ongoing investments made in the broadcasting and cable/satellite markets.

The total amount of FDI inflows in India in the Information and Broadcasting sector has been very low (1.61%) of total FDI inflows from April 2000 to September 2015. Though the number of channels have increased, over the years several broadcasters have had to exit Indian markets or downsize operations – ESPN; Imagine TV, HBO Define and TCM owned by Turner; RTL (Bertelsmann) being some of the notable ones among others. While ESPN has made a comeback of sorts by partnering with Sony, it has not reached the same level of investment in India as it had done before.

Given that some of the largest U.S. studios and networks have been deeply invested in India over the last 10-15 years and further the potential interest in investments that this sector is generating, it is our endeavor to contribute constructively towards formulation of an investor friendly, economically rewarding regulatory framework. We therefore propose the following principles, which we believe could form the basis of a successful channel pricing construct:

I. Pricing Construct:

- **Regulating channel prices misplaced**: For any pricing model to be acceptable across the board, transparency is vital. This becomes even more pertinent since India's ambitious program of digitalization has not yet rendered desired results, leading to throttling of potential investments in broadcasting sector. Therefore, we support TRAI's push for a transparent Reference Interconnect Offer (RIO) based model. However, USIBC members are concerned with TRAI's focus on regulating prices at the wholesale level across all genres of channels. *No two TV channels are the same whether in terms of quality or quantity of content or in terms of investment or in reach/penetration/popularity even if they are in the same genre and should therefore not be treated as such. Ultimately the economic viability and popularity of the channel depends purely on the quality and popularity of its content, which is driven purely by consumer choice. Therefore, it is best that the pricing of the channel is left to market forces and TRAI ensures transparency in such pricing.*

- **Focus should be on ameliorating last mile competition**: Globally, regulators have stayed away from regulating wholesale prices. Satellite and cable TV enjoy forbearance in most jurisdictions. If the motive is to protect the consumer interest at large, it would be prudent to focus on creating effective competition at the retail level through a "network neutral" access proposition i.e. break the last mile monopoly of the cable operator by unbundling the local last mile fiber, just as the FCC did in amendments to the Telecommunications Act of 1996 or mandating the FRAND approach to the last mile operators. Hence, a cable operator who may be able to give better service in any given area is not allowed to enter due to the fact

that the incumbent cable operator owns the cable and wiring. One solution here may be, rather than create an "overbuild" of cable wiring, TRAI can regulate access through infrastructure sharing arrangements at a regulated access cost to be paid by the new operator so that the last mile monopoly on fiber to home is opened to competitive forces.

II. Numerous Litigations and Disputes

One of the big concerns that investors constantly fear is the large number of litigations and disputes that seem to be a regular feature of this industry. We understand that a lot of these litigations arise due to failure of negotiations between stakeholders on commercial matters.

The Federal Communications Commission (FCC) in the US has successfully implemented the "Good Faith Negotiation" model alongwith its entailing parameters. We believe that going forward the same would be extremely beneficial for a developing economy like India, where TRAI is of the view that market is yet to mature. Some of the key parameters of Good Faith Negotiations are as follows:

- a party may not be entitled to threaten a breach of contract in order to bargain for a lower settlement sum than it genuinely recognizes is due;
- a party would not be entitled to pretend to negotiate, having decided not to settle what is recognized to be a good claim, in order to drive the other party into an expensive litigation that it believes the other party cannot afford; and
- if a party recognizes, without qualification, that a claim or some material part of it is due, the obligation may require payment to be made

We are happy to provide more insights on good faith negotiation principles in case TRAI believes that these would be helpful in mitigating disputes across the value chain.

III. Niche Channels

We would like to inform at the outset that no concrete definition of "niche channels" exists in any jurisdiction. Hence, any attempt at creating a definition of the same would be highly subjective and opaque. Therefore, at most it can safely be said that these are "specialty" channels driven by a very specific socio-economic and demographical subscriber base. Moreover, we would like to point out that there is no hard and fast rule that niche channels have to be advertisement free. Also such channels will not be able to survive if an a-la-carte mandate is thrust upon them.

IV. HD Channels

HD channels are only technologically advanced audio-visual experiences and constitute a minute share (<5%) of the total cable and satellite TV universe in India. While TRAI seeks to regulate HD channel pricing it has not built any socio economic case to justify its intent. Thus, we believe that such channels should be clearly kept out of the TRAI regulations as any adverse regulation for HD channels would definitely impact investments in newer upcoming technologies such as, Virtual TV, 3D and 4K adversely as it will send out a negative signal to those who are looking towards funding these innovations in India.

V. Pay Per View (PPV):

The basic pretext of the PPV programming is that any programme available through PPV is never simulcast on the normal satellite cable TV. This includes both new/live shows (e.g. boxing matches etc.) as well as library shows (say previously high rated off air shows).

Therefore, as the content available through PPV is not available via linear TV, it is governed by the principles of copyright the world over. Hence, the pricing of such exclusive shows should continue to be under forbearance as is the global practice. Surely TRAI does not believe that any socio economic purpose would be served by regulating the pricing of content available on pay per view. Even if it does so, the said socio economic justification has not been articulated in the Paper. We would urge the Authority not to extend the "Must Provide" mandate to individual pieces of content as no socio economic causes would be sub served through it.

There are exclusive PPV service providers like HBO PPV, ESPN PPV who enter into content agreements with platforms whereby, the event is available only for such platforms and not on linear TV. The pricing of PPV thus operates independent of the linear TV regulations and takes into account many other factors including popularity of the event, sponsorship and revenue share. Hence, PPV is governed by the copyright principle and is thus always priced on principles that have nothing to do with the pricing of linear TV channels given that business models of PPV and linear TV channels are not comparable. Having perused the Consultation Paper particularly on the approach outlined for PPV, our members have expressed serious concerns that successive regulatory intervention towards disaggregation (by first mandating channels to be offered on a-la-carte in 2007 and then disallowing multi-broadcaster packages at the whole sale in 2014) could now extend to another extreme where the channel itself would be required to be disaggregated by TRAI thereby striking a death knell to the very currency that informs the narrative of Indian Broadcasting, namely TV channels.

VI. Harmonization of TRAI Regulations with Copyright

In the US, specific amendments were made to strike reconciliation between copyright laws with communication laws so that the interests of owners of copyright were duly protected. We note that the Indian Copyright Act was promulgated to align the Indian copyright regime with the Berne Convention and WIPO guidelines. India is a signatory to the Berne Convention that allows for "The right to authorize public performance or broadcast, and the communication of broadcasts and public performances". However the Regulations and Tariff Orders of TRAI have significantly whittled down these rights. This is also proving detrimental to creativity and innovation, restricting growth and impeding investments in the sector. The broadcasting sector is no longer an attractive investment destination due to the sectoral regulations not being enabling enough nor being in sync with India's copyright laws. It is therefore urged that the Authority recognizes applicable copyright laws in all their rule making exercises that have implications for the broadcasting sector.

- **Bundling and A-la-carte**

The globally established practice is to offer channels in bundle as well as a-la-carte. In the US, the bundling and a-la-carte offerings operate at both wholesale as well as retail level with neither of the offerings' price being derived from each other.

Throughout the Paper TRAI seems to be attempting to make out a case for a-la-carte offering of channels both at the wholesale as well as retail. Most of the models proposed have an inbuilt bias towards a-la- carte offering which gets more pronounced in the case of "Niche Channels". The notion—giving consumers the right to pay for only the TV channels they want, without having to purchase a full bundle—is highly appealing on the surface, and well-intended advocates on both sides of the political divide, including the TRAI, are no doubt acting out of the best of intentions. But a closer look suggests that a la carte Regulation would be a classic case of what we refer to as Sowell's Law of Wishful Thinking. Indeed, it would likely have *the exact opposite effects* of what its proponents intend, leaving consumers and families worse off than they are today.

Proponents of an a la carte mandate suggest that they can improve on the market in two primary ways. First, since people would no longer be forced to pay for channels they do not watch, they would pay less for cable television. Second, since people could choose not to buy certain channels, they would no longer be forced to subsidize weaker TV channels hence resulting in their eventual demise. Thus, an a la carte mandate is presented as both economic regulation, designed to reduce prices, and social regulation, designed to "clean up the airways."

If cable prices were rising faster than inflation, there might well be a strong political though not an economic case for mandating ala carte. However in India that's clearly not the case. Statistics shows that retail prices or ARPU by the most accurate measure, are not only not rising faster than inflation, they are actually going down.

Regulation, if at all should be considered only if a case can be established for market failure—in which case it might be possible, at least in theory, for regulation to improve on the market outcome and lead to lower prices in the long run. But a la carte advocates have failed to demonstrate that bundling constitutes a market failure of any sort.

Bundling is, of course, pervasive throughout the economy, and while the economics of bundling are complex, economists universally agree that it is generally efficient and beneficial to consumers. Bundling improves economic efficiency in a variety of situations, including when there are economies of scope and scale. One particularly significant and relevant efficiency motivation, advanced many years ago by Nobel Prize winner George Stigler, occurs when there are high fixed costs of production and consumers have differing preferences for various "flavors" of a product.

A simple example illustrates the point. Suppose there are two TV channels, "sports" and "business," each of which costs $10 to produce including normal profilts. Suppose further that there are two consumers, one of whom is willing to pay $7 for the sports channel and $4 for the business channel, while the other is willing to pay only $4 for sports, but will pay $7 for business. If the two channels are offered separately, there is no price at which demand will be sufficient to cover cost: if each is offered for $10 (its cost), no one buys either channel; if each is offered at $7 and is purchased by one consumer ie one takes Sports and the other Business, revenue is $7 for each channel and each channel loses $3; and, if each is offered at $4 and purchased by both consumers, ie both consumers buy both the channels, revenue is $8 for each channel, and each channel loses $2. In short, in an a la carte world, neither channel is produced.

If bundling is permitted, on the other hand, the two channels can be offered together for $10, and both consumers (each of whom values the two channels at a total of $11) will purchase. Revenues are now $20, covering the costs of both channels, and each consumer receives $1 in consumer surplus resulting in actual social welfare.

Bundling also provides a means for cable channels to expand their distribution, thereby increasing advertising revenues (and defraying costs that would otherwise be passed on to consumers in the form of higher subscription fees); it allows consumers to sample cable channels, thereby reducing marketing costs; and, it reduces transactions costs by avoiding the need for cable operators to constantly add and subtract channels from individual consumers' feeds.

If a la carte was an economically efficient business model, we would expect to see at least some of the firms in a competitive market to offer it voluntarily, yet none have done so. Back in 2004, when the FCC first considered (and rejected) a la carte regulation, a group of respected economists wrote to the agency's Media Bureau warning that the proposal would not achieve its purported objectives. Their conclusion:

"(1) mandatory a la carte distribution would very likely raise overall prices; (2) consumers' viewing decisions would very likely be distorted and their ability to sample alternative networks and shows would very likely be suppressed; and (3) mandatory a la carte distribution would very likely harm new and niche networks, which would result in fewer viewing options for consumers." In short, when it comes to a la carte, the economics of cable TV are clear: Rather than reducing prices and increasing choice, as proponents hope, it would do precisely the opposite.

A la carte proponents point to another supposed benefit of regulation: it could help "clean up" the character of pay TV. But this is highly unlikely; the reason is two-fold. First, as made clear above, a la carte regulation threatens the wonderful diversity of programming on television today. That also explains why a la carte proponents are wrong when they suggest that it would "clean up" pay TV and allow us to purchase just the "good stuff " The "good stuff " is not likely to survive in a world of mandatory a la carte regulation. Most family-focused/children's networks, female oriented channels, and religious programmers oppose a la carte mandates for this reason. They understand that their programs attract only a small subset of the overall universe of viewers. If their networks are not bundled alongside other channels, they might disappear entirely.

We need to consider how India is now a country with so many Pay and FTA networks offering a universe of diverse viewing options on cable and satellite. All of these channels didn't just appear all of a sudden. Companies and investors took risks developing unique networks to suit diverse interests. Fifteen years ago, few could have imagined a world of 24-hour channels devoted to cooking, travel, religion, golf, etc. Yet, today we have Channels that cater to each such theme on a 24/7 basis.

The answer is "bundling." Many niche-oriented TV channels only exist because they are bundled with stronger channels. On their own, the smaller channels can't survive; nor would anyone have risked launching them in the first place. "Bundling" is a means for firms to cover the enormous fixed costs associated with developing TV programming while also satisfying the wide diversity of audience tastes. Bundling channels together allows the niche, specialty networks to remain viable alongside popular networks. Bundles, therefore, are not anticonsumer but proconsumer.

Thus, when critics claim that making bundling illegal would offer consumers "choice" and lower prices, they're ignoring the long-term consequences. Their static view of things takes the more than 700-channel universe for granted; they assume it will always be with us and that it's just a question of dividing up the pie in different (and cheaper) ways.

But if a la carte regulation is mandated and smaller, niche-oriented channel networks are "unbundled" from other stronger channels, they will immediately struggle to attract enough subscriber and advertiser support to prosper. That will make survival extremely difficult. That is why a la carte regulation is so dangerous in the long-run; it threatens the wonderful diversity of programming we have at our disposal today in India.

In the U.S. most family-focused networks, female-oriented channels, and religious programmers oppose a la carte mandates for this reason. They understand that their programs attract only a small subset of the overall universe of eyeballs. If their networks are not bundled alongside other channels, they might disappear entirely.

Consider an analogy: Could the Metro section of a local newspaper survive on its own if the government mandated it be sold separately in the name of bringing more "choice" to the sale of newspaper sections? Probably not; if newspapers had to produce and distribute each section separately, costs would skyrocket.

In that scenario, people who bought the paper primarily for the sports section (for example), but sometimes glance at the Metro section would only buy sports — thus giving up the "options value" of checking out the weather or obituaries, and depriving the newspaper of the ability to charge for that value.

In other words, the whole is greater than the sum of the parts for both newspapers and cable TV systems. Consumers derive great value and benefits from the diversity associated with such bundled media products.

Of course, a critic might argue that they don't care about programming diversity; they just want a few TV channels at a lower price. But who's to say that one's channels are everyone else's preferred channels and will continue to exist under an a la carte regime? Moreover, it's unlikely that prices will actually fall for the most popular channels that do survive. Channel bundling not only promotes programming diversity; it also keeps the cost of the most popular channels in check by spreading out costs across a bigger group of subscribers.

For example, The Disney Channel, Discovery Channel, MTV are received in virtually every cable or satellite subscriber's home today. Because they are on almost every platform, the higher cost of those networks is spread across all subscribers. If such channels lose subscribers in an a la carte environment, the cost per network will increase until, eventually, consumers are stuck paying about the same amount they do today, yet with far fewer channels to show for their money. If in addition prices were to be regulated to make them affordable, these networks will have no other option but to shut operations.

Economists recognize that bundling is a routine and pervasive business arrangement in modern economies. Examples of bundling include round trip airline flights, "triple-play" voice/video/data packages, automobiles with music systems and accessories, shoes with laces, and computers with software. Economists are virtually unanimous in agreeing that bundling in competitive markets is efficient and generally pro-consumer.

- **Commercial Establishment**

As already iterated above, we fully support and appreciate TRAI's comprehensive exercise to determine tariff structure for cable and satellite TV services. However, for the exercise to be effectively comprehensive, we believe that tariff for commercial establishments must also be included.

Commercial establishments such as hotels subscribe to cable TV services not for their own consumption, rather for offering such facility to their patrons. Thus, provisioning of cable TV is a quintessential requirement of their business model in order to attract customers. Hotels recover all input costs of amenities through the room tariffs they levy on their guests. It would thus be unfair upon broadcasters that they are deprived from levying commercial tariffs. Extending the rates meant for ordinary subscribers to commercial subscribers and prohibiting broadcasters from levying fair charges on such subscribers effectively mean that broadcasters have to subsidize the operations of such commercial subscribers. The rates for ordinary subscriber are highly regulated in India. Due to the commercial nature of the services provided by commercial subscribers for gain, benefits available to ordinary subscribers should not be extended to a competitive profit making industry.

Even the so called "free" breakfast or "free" use of wi-fi or "free" use of special lounges are all part of the overall tariff.

At the same time we believe, such differential prices would not prejudice the commercial establishments as these monthly levies would in turn be recovered by the commercial subscriber from the guests on a daily basis through the daily room tariffs.

For example, in the UK, the broadcasters are permitted to offer their channels to hotels through packages that are different from the ones they offer ordinary subscribers. Usually, such offering entails price of a bouquet of broadcasters' channels multiplied by the number of rooms in which TV services are offered. Moreover, for any extra services such as pay per view, charges have to be paid separately. It must be kept in mind that the aforementioned charges are much more than what have to be paid by the ordinary subscribers.

Sir, we thank you and your colleagues at TRAI for the opportunity to comment. Please let us know if you have any questions. USIBC and our membership look forward to our continued partnership on various issues impacting India's digital rollout.

Sincerely,

Dr. Mukesh Aghi
President
U.S.-India Business Council