RESPONSE BY SITI CABLE NEWTWORK LIMITED TO THE CONSULTATION PAPER ON TARIFF ISSUES RELATED TO BROADCASTING AND CABLE TV SERVICES FOR COMMERCIAL SUBSCRIBERS

PRILIMINARY SUBMISSIONS:

(i) At the outset, we welcome the consultation paper floated by the Authority wherein the Authority intends to have a holistic view from all stake holders and decide a firm view on Tariff issues related to broadcasting and cable TV services for "Commercial Subscribers". Unfortunately, the very premise on which the Authority has floated the issues to be discussed in our humble submission needs to be reconsidered and debated. The Authority has to be first conclude whether it is justified to differentiate between an "ordinary subscriber" from so called "commercial subscriber " when fact remains that the that the parent Acts namely The Cable Television Networks (Regulation) Act, 1995 (Cable TV Act) and the Telecom Regulatory Authority of India Act, 1997 (TRAI Act) does not make any such distinction.

(ii) This was reiterated by the Hon'ble TDSAT in Petition No.111 (c) of 2011 titled *Hotel Airlines International v/s TRAI,* wherein it was held that:

> *"By means of the said 'Tariff Orders', the Regulator defined separately the subscribers as 'ordinary cable subscribers' and 'commercial cable subscribers' although the parent Act, namely '1995 Act' or the 'Telecom Regulatory Authority of India Act, 1997' ('the Act') do not make any distinction between a 'commercial cable subscriber' and an 'ordinary cable subscriber'."*

In fact, recently the definition of "Subscriber" as provided under the Cable TV Act was amended which now states as follows:

> *"subscriber" ,means "[any individual, or association of individuals, or a Company, or any other organization or body] who receives the signals of cable television network at a place [indicated by him or it] to the cable operator, without further transmitting it to any other person.*

A bare perusal of the above definition makes the intent of the legislature clear that it does not wish to make any distinction between "subscriber". Any individual or association of individuals or a company or any other organization or body or entity who receives signals of cable television network at a place indicated by him or it to the cable operator without further transmitting it to any other person. It is submitted that any such transmission to any other person cannot be without a transmitter.

(iii) In fact, the Hon'ble Supreme Court in the case of *Hotel and Restaurant Association and Anr V/s Star India Pvt. Ltd, Appeal (Civil) No.2061 of 2006.* held that :

> *'Subscribers' has been defined in Section 2(i) of the 1995 Act to mean a person who receives the signals of cable television network at a place indicated by him to the cable operator, without further transmitting to other persons.*
>
> *The members of Appellants Associations stricto sensu do not retransmit the signals to any other person. It merely makes the services available to its own guests, which in other words, would mean to itself. If the amenities provided for by the management as a subscriber under TRAI Act is inseparable from the other amenities provided to a boarder of a hotel, it remains a subscriber by reason of making the services available in each of the rooms of the hotel. It is not transmitting the signals of cable television network to any other persons. TRAI Act and various orders*

made there under are required to be read conjointly with a view to give harmonious and purposive construction thereto"

(iv) The ultimate beneficiary of the channels, whether availed by Ordinary subscriber or so called Commercial subscriber is the Ordinary subscriber. Keeping the above in view, we humbly state that the legislature never intended to have any distinction between "subscribers". It is not the case that the so called "commercial establishment" like hospital, hotels, eating houses, cinemas, theaters, air port lounges utilizes the signals/channels received from the MSOs for any "commercial purpose" or "commercial gain". It is also not the situation that if these organizations/institutions will not provide the signals of cable TV channels, consumers will stop coming to those places. It is common parlance that any consumer goes to a cinema to watch movie or visits airport lounge because he has to catch flight. These consumers are not there to enjoy the cable TV channels. Also, all these so called commercial establishments like cinema hall, restaurants commercially gain from their respective product/service which they provide to the customer, which in case of cinema hall is the movie being played and in case of restaurant it is the food which is being served out and this is irrespective of the fact that cable TV channels are being run or not.

(v) In fact, the cable TV services have become part and parcel of our lives whereby we get all important news, updates, information which becomes useful for the customers. The provisioning of the

channels is only ancillary to the main service of the establishment. Any increase in cost of channels is passed on to the Ordinary Customer. Effectively, an Ordinary Customer ends up paying more for a channel at a Commercial Establishment that what he pays at his home. Such a differentiation falls foul of the Article 14 of the Constitution of India.

Apropos the above, the issue for consultation is,

1. **Do you agree with the definitions of "commercial establishment", "shop" and "commercial subscriber", given below?**

RESPONSE:

"Commercial Subscriber":

(i) In so far, as the definition proposed by the Authority with respect of "Commercial Subscriber" it is submitted that the same is flawed and unacceptable in the present form because of the simple reason that just because any person other than Distribution Platform Operator uses cable signals for the benefit of his clients, customers, members or any other class or group of persons having access to so-called "commercial establishment", he should be regarded as commercial subscriber. In fact, very importantly the Authority has to consider and include the concept of "commercial purpose" and/or commercial exploitation into this definition. If there is no commercial exploitation of the signal by the receipient thereof, there can not be any differential categorisation and Tarrif.

(ii) The fact remains neither the TRAI Act nor the present Consultation Paper has defined the meaning of “Commercial”. In the absence of a definition, we have to go by its ordinary meaning. "Commercial" denotes "pertaining to commerce" (Chamber's Twentieth Century Dictionary); it means "connected with, or engaged in commerce; mercantile; having profit as the main aim" (Collins English Dictionary) whereas the word "commerce" means "financial transactions especially buying and selling of merchandise, on a large scale" (Concise Oxford Dictionary). The above meanings make it clear that word Commercial denotes mercantile having profit as the main aim. Therefore, merely by the reason that a person or an entity is using cable signals for the benefit of his clients without any “commercial purpose” cannot be termed as “Commercial Subscriber”. One of the main reasons for the enactment of the TRAI was to protect the interest of the consumers which includes the institutes/persons like healthcare, educational institutions, hotel, cinema, theatres who come under the definition of ‘consumer’ as declared by TDSAT.

In fact, the Hon’ble Supreme Court in the case of *Hotel and Restaurant Association and Anr V/s Star India Pvt. Ltd.* and Ors, while holding these so called “commercial establishment” as consumer held further that :

> *“We have noticed hereinbefore that the members of Associations take TV signals either from Respondents Broadcasters under their respective contracts or Agreements or through Cable operators. Whereas in the former case, there exists a privity of contract between the broadcasters and the owners of*

the hotels, the owners of the hotels admittedly would not come within the purview of definition of MSOs. The owners of the hotels take TV signals for their customers / guests. While doing so, they inter alia provide services to their customers. An owner of a hotel provides various amenities to its customers such as beds, meals, fans, television etc. Making a provision for extending such facilities or amenities to the boarders would not constitute a sale by an owner to a guest. The owners of the hotels take TV signals from the broadcasters in the same manner as they take supply of electrical energy from the licensees. A guest may use an electrical appliance. The same would not constitute the sale of electricity by the hotel to him. For the said purpose, the 'consumer' and 'subscriber' would continue to be the hotel and its management. Similarly, if a television set is provided in all the rooms, as part of the services rendered by the management by way of an amenity, wherefor the guests are not charged separately, the same would not convert the guests staying in a hotel into consumers or subscribers. They do not have any privity of contract with broadcasters or cable operators. The identity of the guests is not known to the broadcasters or cable operators. A guest may not watch TV or in fact the room may remain unoccupied but the amount under the contract by the owners of the hotels whether with the broadcasters or cable operators remains unchanged. We therefore, are of the opinion that the members of the appellants' associations are consumers.

It is not disputed that the nature of supply of TV signals is not distinct and different. It is same both for the domestic consumers and commercial consumers.

'Subscribers' has been defined in Section 2(i) of the 1995 Act to mean a person who receives the signals of cable television network at a place indicated by him to the cable operator, without further transmitting to other persons.

The members of Appellants Associations stricto sensu do not retransmit the signals to any other person. It merely makes the services available to its own guests, which in other words, would mean to itself. If the amenities provided for by the management as a subscriber under TRAI Act is inseparable from the other amenities provided to a boarder of a hotel, it remains a subscriber by reason of making the services available in each of the rooms of

the hotel. It is not transmitting the signals of cable television network to any other persons. TRAI Act and various orders made there under are required to be read conjointly with a view to give harmonious and purposive construction thereto"

(iii) The fact remains that the "person" as referred in the proposed definition is already paying the subscription fees to its respective MSO for the content. It has to be borne in mind that the said person pays for each TV set and no discount is provided to him. Furthermore, the said cable facility is enjoyed by the end user customer free of cost and no "commercial purpose" is involved. Anything done for the benefit of the consumer for which no extra charge is levied cannot be termed as commercial and for this very reason the definition of "Commercial Subscriber" should be modified.

The broadcasters as such gain huge sums of profit from advertisements which are shown to the subscribers and they have to bear with the same. As a matter of fact, no broadcaster is adhering to the time lines as prescribed by the TRAI by way of Quality of Service Regulation pertaining to Advertisements while showing the content and they wish to earn more at the cost of customer by proposing differential tariffs for so-called "commercial establishments".

Commercial Establishment:

(iv) Again, the basis for evolving the term "Commercial Establishment" is not correct. It is submitted that the Authority has committed an error by including journalistic and printing establishments, educational, healthcare or other institutions run for private gain,

theatres, cinemas, restaurants, eating houses, residential hotels, clubs or other places of public amusement or entertainment under the ambit of “Commercial Establishment”.

The very idea of shifting focus from “end use” concept without evolving the concept of “commercial gain/purpose” is flawed and anti consumer. The following reason given by TRAI in para 1.24 of the Consultation Paper highly misplaced and wrongly emphasized:

“In order to ensure that only such commercial establishments which are engaged in commercial activities for private gain are covered by the definition, the term “commercial establishment has been defined”.

(v) It is to be noted that the commercial activities in which the so called commercial establishments are engaged for private gain is not from cable TV services. E.g. cinema, theatre, restaurant etc. are privately gaining by showing movie, showing drama and serving food respectively and not by showing cable TV signals for which no charges are levied. The reasoning is highly misplaced and totally out of context. There is no commercial exploitation of cable services in any of these activities.

(vi) Be that as it may, we reiterate that neither the Cable TV Act nor the TRAI Act provide for two different kind of subscribers. It is also submitted that it is not possible to categorise subscribers since there is no intelligible differentia. Further, any attempt to categorise

the subscribers will also fall foul of the Article 14 of the Constitution of India.

It is accordingly reiterated that since same programme / signals is being provided to the Subscribers be it Ordinary or Commercial and there is no element of value added service to the so called Commercial Customers. In view of this it does not call for any differential pricing.

2.1 Do you agree that further sub-categorizing the commercial subscribers into similarly placed groups may not be the way to proceed? In case the answer is in the negative, please give details as to how the commercial subscribers can be further sub-categorised into similarly placed groups along with full justifications?

RESPONSE:

(i) As submitted above, neither the Cable TV Act nor the TRAI Act provides for two different kind of subscribers. It is also submitted that it is not possible to categorise subscribers since there is no intelligible differentia. Further, any attempt to categorise the subscribers will also fall foul of the Article 14 of the Constitution of India.

(ii) It is reiterated that the there is a serious flaw in the very definition of the Commercial subscriber as pointed above and the preliminary response and response to Issue No. 1 as stated above are reiterated and reaffirmed.

(iii) Accordingly, there is no need to create the category of subscribers or any sub categorisation, since the end subscriber would always remain the same.

2.2 ***Which of the models, discussed in para 1.27, should be prescribed for distribution of TV signals to the commercial subscribers? Please elaborate your response with justifications. Stakeholders may also suggest any other model with justifications.***

RESPONSE :

(i) At the outset, the contents as stated above including the Preliminary Submissions are reiterated. It is further submitted that there is dire need to revisit and evaluate the definition as proposed by the Authority with regard to "Commercial Subscriber".

(ii) The manner in which the signals of TV Channels are to be distributed have been clearly provided for in the TRAI regulations. In terms of the extant TRAI Regulations, each Broadcaster is required to publish the Reference Interconnect Offer of its channels and the Distributor of TV Channels have the right to avail such channels / bouquet of channel as it may deem fit from the Broadcaster.

(iii) The three Options suggested in the Consultation Paper is a mix of the existing manner of provisions of channels to the subscribers. It is attempt of lay down a new process which according to us is not required.

(iv) The provisioning of channels of a Broadcaster to the subscribers – whether normal or an establishment, can and should continue to be in the same manner in which it is being done now. There is no

need for any change in the manner in which the provisioning of channels is to be done to the establishment. The Distributor of TV Channels shall avail the channels from the Broadcasters in terms of the extant Regulations and the establishment will be free to avail the channel from such Distributor by entering into an agreement with them.

(v) The broadcasters should be mandated to provide in their RIO's that the rates and term thereof, which was applicable for normal subscribers, should also cover all kinds of establishments and the Broadcasters should be prohibited from making any categorization of the subscribers.

2.3 In your view which of the 4 alternatives mentioned above, should be followed? Please elaborate your response with justifications

RESONSE:

(i) We are of the strong view that the tariff for commercial subscriber should be same as that of ordinary subscriber. In fact, as stated above, there should not be any differentiation or discrimination between the commercial subscriber vis-à-vis ordinary subscribers.

(ii) The reasons for having same tariff for Commercial and Ordinary subscriber have already been mentioned in response to Point 1 of the Consultation Paper. As there cannot be any intelligible differentia between various categories of the Commercial

Subscribers and also that the ultimate end user of the Broadcast channels are end consumer / an ordinary consumer, there is no reason for creating a difference between Commercial and Ordinary Subscriber.

(iii) In fact, the Hon'ble Supreme Court in the case of *Hotel and Restaurant Association and Anr V/s Star India Pvt. Ltd.* and Ors, while holding these so called "commercial establishment" as consumer held further that :

> *"We have noticed hereinbefore that the members of Associations take TV signals either from Respondents Broadcasters under their respective contracts or Agreements or through Cable operators. Whereas in the former case, there exists a privity of contract between the broadcasters and the owners of the hotels, the owners of the hotels admittedly would not come within the purview of definition of MSOs. The owners of the hotels take TV signals for their customers / guests. While doing so, they inter alia provide services to their customers. An owner of a hotel provides various amenities to its customers such as beds, meals, fans, television etc. Making a provision for extending such facilities or amenities to the boarders would not constitute a sale by an owner to a guest. The owners of the hotels take TV signals from the broadcasters in the same manner as they take supply of electrical energy from the licensees. A guest may use an electrical appliance. The same would not constitute the sale of electricity by the hotel to him. For the said purpose, the 'consumer' and 'subscriber' would continue to be the hotel and its management. Similarly, if a television set is provided in all the rooms, as part of the services rendered by the management by way of an amenity, wherefor the guests are not charged separately, the same would not convert the guests staying in a hotel into consumers or subscribers. They do not have any privity of contract with broadcasters or cable operators. The identity of the guests is not known to the broadcasters or cable operators. A guest may not watch TV or in fact the room may remain unoccupied but the amount under the contract by the owners of the hotels whether with the*

broadcasters or cable operators remains unchanged. We therefore, are of the opinion that the members of the appellants' associations are consumers.

It is not disputed that the nature of supply of TV signals is not distinct and different. It is same both for the domestic consumers and commercial consumers.

'Subscribers' has been defined in Section 2(i) of the 1995 Act to mean a person who receives the signals of cable television network at a place indicated by him to the cable operator, without further transmitting to other persons.
The members of Appellants Associations stricto sensu do not retransmit the signals to any other person. It merely makes the services available to its own guests, which in other words, would mean to itself. If the amenities provided for by the management as a subscriber under TRAI Act is inseparable from the other amenities provided to a boarder of a hotel, it remains a subscriber by reason of making the services available in each of the rooms of the hotel. It is not transmitting the signals of cable television network to any other persons. TRAI Act and various orders made there under are required to be read conjointly with a view to give harmonious and purposive construction thereto"

When there is no distinction between nature of supply of TV signals especially during digitalization regime and in the absence of any "commercial purpose"/commercial exploitation how can Ordinary subscriber be differentiated from so called "Commercial Subscriber".

Keeping the above in view, we request the Authority not to prescribe any separate tariff dispensation for so-called "Commercial Establishment" and/or "Commercial Subscribers" when in fact the beneficiary of the television services in all cases is "Ordinary Consumer" only and no

“commercial exploitation” of television signals is involved even if these are viewed by an ordinary subscriber in these establishments.