Comments of Sony Pictures Networks India Private Limited ("SPN") on consultation on (i) the draft Telecommunication (Broadcasting and Cable Services) (Eighth) (Addressable Systems) Tariff Order, 2016 ("Draft Tariff Order"), ((ii) the draft Telecommunication (Broadcasting and Cable Services) Interconnection (Addressable Systems) Regulations, 2016 ("Draft Interconnection Regulations") and iii) the draft Standards of Quality of Service and Consumer Protection (Digital Addressable Systems) Regulations, 2016 ("Draft QoS Regulations")

TRAI vide its Notification dated 29 January 2016 had issued the Consultation Paper on Tariff Issues related to television services, whereby comments were invited from all the stakeholders on wide ranging issues related to manner of offering at both wholesale and retail level. SPN had submitted its response dated 03 March 2016, and had given in detail the reasoning behind the issue wise response. SPN also submitted in the response that industry was ready for the price forbearance model. However, if price forbearance model is not completely accepted by TRAI/Authority, SPN alternatively proposed a blend of regulated RIO and flexible RIO model.

In furtherance of the responses received by the Authority from the stakeholders, the Authority has issued the present on Draft Tariff Order, Draft QoS Regulation and Draft Interconnection Regulations and has invited further comments on the same, which postulates the different provisions pertaining to tariff issues like manner of offering channels by broadcasters, genres of television channels, cap on the maximum retail prices for pay channels in addressable systems, manner of offering of channels by the distributors of television channels, quality of services etc.

At the outset we would like to state that we as a broadcaster and the owner of the content we are accorded certain rights under the Copyright Act, 1957 (the "**Act**") (as amended from time to time). The Act is a complete code which deals with all rights, liabilities and limitations in respect of the subject matter covered thereunder, including the broadcast reproduction

right. It is we as a broadcaster who owns the television channel and curates, assembles the programmes that are broadcast on the said channel. The term does not extend to a channel distribution network (DTH, cable, HITS etc.) who is only an intermediary in retransmission of the channels assembled by the broadcasting organisation. Given that the Copyright Act governs the broadcast reproduction right granted to a broadcaster like us in respect of its broadcasts, absence of any amendment to the Act itself, we wish to submit that TRAI ought not to do anything that would amount to a dilution of the unfettered rights granted to us thereunder nor should TRAI attempt to seek to regulate any aspect of our broadcast reproduction right. For this reason, we are of the view that the draft Regulations if issued, in the current form may suffer from a lack of jurisdiction.

Without prejudice to the aforesaid, we wish to respond to the points raised by the Authority in the aforesaid 3 drafts in order to suggest the Authority for further improvisation in the new regime that the Authority proposes to come out with which would govern the broadcasting industry. Below comments are without prejudice to the rights and contentions of SPN, including any ongoing or future litigations and we reserve our rights to modify, change and submission of further comments or counter comments to clarify our position on the issues under this consultation paper.

1. <u>Distribution Network Model based on MRP was not the choice of majority stakeholders:</u>

We submit that we have recommended a blend of wholesale regulated RIO Model and flexible RIO model in response to the Consultation Paper issued on 29 January 2016 by TRAI. We also understand that majority of stakeholders advocated for regulated RIO model. However, we are surprised to note that Authority has chosen to not consider the model which has been suggested by the Broadcasters/DTH operators and has instead proposed an MRP based Distribution Network Model which was in fact not properly articulated in the Consultation paper and recommended by very few of the stakeholders. Therefore, we believe that minimum changes to the current wholesale model to bring in greater amount of transparency would have sufficiently addressed the set objectives and at the same time would enable a smoother transition without causing any major disruptions and uncertainty across the value chain. Hence we would request the Authority

to reconsider its suggested model in the present draft and review the suggestions of the Regulated RIO model which the stakeholders had suggested to the Authority earlier.

2. <u>Implementation challenges of cable digitization across DAS markets continue to remain</u>

The new regulatory framework proposed by TRAI assumes existence of complete cable digitization and accordingly pre-supposes the existence of the requisite infrastructure to enable smooth implementation thus realizing the stated objectives of transparency, good conduct translating into consumer interest. However, it has failed to consider the current market realities and especially the poor state of implementation of cable digitization across DAS markets. In fact digitization of approximately 30% of DAS III cable (7 million analog homes) and almost all of DAS IV cable (~37 million analog subs) is still pending. Even in markets where DAS is implemented, QOS Regulations are yet to be executed in letter and spirit with no visibility to consumers on billing and adequate re-dressal of complaints. Even Broadcasters have no visibility on the actual subscriber numbers since there is reluctance on the part of many DPO's not to share the subscriber reports. In several areas DPOs digital headends, CAS and SMS systems are inadequate and do not comply with regulatory obligations. Further we strongly believe that the DPOs are currently not equipped with the requisite technology and infrastructure facilities which is necessary in order to ensure smooth implementation of the proposed new regime. Often while the feed is digital, the systems are not fully addressable. The DPO infrastructure has not adequately developed to raise consumer awareness on packaging and on a la carte uptake of channels. As a consequence, packaging implementation has not happened in majority of DAS III markets, despite it being in the interest of stakeholders across the value chain. Therefore, it would be highly unrealistic to introduce the proposed model at this stage knowing fully well that the market is currently not in a state of readiness to implement it and will only result in more chaos, disputes and non-transparency which will ultimately impact consumer interest and industry growth thereby defeating the very objective for which TRAI is proposing to bring in the new regime.

This entire regime is based on the assumption that Digitalisation shall be fully implemented by 31st December, 2016, which despite the best efforts of the government appears highly unlikely especially since Phase 3 itself has not been fully implemented more than 10 months after its effective date viz 31st December, 2015. Also DAS Phase-IV is the largest fragmented and most challenging markets compared to the other phases.

Hence we feel that the process of complete digitization would likely to take more time and not be over before October 2017. Hence it is suggested that the new regulatory regime be introduced only after October 2017 with a six month transition time to ensure smooth switch over i.e. with effect from 1st April, 2018. This would also help the DPOs to put in place the required infrastructure facilities and enhance its Technological capabilities.

3. <u>Pay TV Television Channels are not an essential services and there is enough competition and no evidence of market failure</u>

TRAI has in the past affirmatively concluded in its various prior papers and consultations that TV Channels are "esteemed" needs for consumers. However, the present Tariff Order proceeds on the erroneous premise that Pay TV channels are essential services. Further the Authority has not considered the fact that TV consumers in India can avail of the FTA services of the Public Broadcaster DD Free Dish which provides over 100 FTA channels and currently has around 30 million subscribers making it the largest platform in the Country. Therefore, the real question that arises for consideration by the Authority is that with over 830 channels for consumers to choose from and a large Public Broadcasting Service offering of over 100 private and public TV channels, is there really a need to regulate all aspects of a set of 200 odd pay TV channels. Conversely, the question for the Authority would be, is there proven evidence of market failure that a dire need has arisen to over-regulate these 200 odd Pay TV Channels. We are of the firm belief that there is no compelling reason to regulate these channels and accordingly, only a light touch regulation, if at all ought to have been proposed. Hence TRAI should

reconsider its decision and look at the other model viz. "Regulated RIO Model", which majority of the stakeholders had proposed earlier as stated aforesaid.

4. <u>De-classification of Commercial Subscribers and Ordinary Subscribers</u>

The Draft Tariff Order defines "Subscribers" to mean that "*any person receiving the television broadcasting services, provided by a service providers at a place indicated by such person without further transmitting it to any other person and each set top box located at such place, for receiving the subscribed television broadcasting services from the service provider, shall constitute one subscriber*". It seems that the Authority has done away with the distinction between two different classes of subscribers viz- ordinary and commercial, which existed since 2004. While there is no provision relating to commercial subscribers in the Draft Tariff Order, the Explanatory Memorandum has also failed to give any explanation of any sort as to why the issue of commercial subscribers/establishments has not been discussed in the Draft Tariff Order, if the Authority has done away with such a distinction, and has once again deviated from its position as is clear from the old tariff orders and regulations.

Besides the above, there is no discussion or explanation given under the explanatory memorandum appended to the Draft Tariff Order for the said declassification of the ordinary subscribers and commercial subscribers and for providing a generic definition of subscribers, thereby including within its ambit all distinct and separate classes of subscribers.

If TRAI at all has done away with the distinction, then it ought to have sought permission from Honourable TDSAT whereby a challenge to narrow distinction created by TRAI, vide its regulation being The Telecommunication (Broadcasting And Cable) Services (Fourth) (Addressable Systems) Tariff (Fifth Amendment) Order, 2015 dated 08.09.2015 vide

Appeal No. 4(C) of 2015 pending before the Hon'ble TDSAT. TRAI had issued the Consultation paper dated 29.01.2016 on issues relating to television services, when it had not raised any issue relating to commercial subscribers, it was anticipated and suggested that the Authority should also consider in detail the aspect of commercial subscriber. We had also suggested in our response to the said Consultation Paper, that the Authority should consider revisiting the definition of commercial subscribers/establishment. However, it seems that the Authority has not considered at all the suggestions of the different stakeholders and issued the present Draft Tariff Order. It is pertinent to mention here that TRAI, at this stage cannot deviate from its own past understanding and shy away from dealing with one of the major issues that govern the tariff dynamics in the broadcasting industry. In order to further elaborate as to how the Authority has accepted the stand that there is a need to distinguish between the commercial subscribers and the ordinary subscribers, it is necessary to narrow down the brief history between revolving around the long battle of litigation between the broadcasters and the Authority, which is enumerated in detail in **Appendix I enclosed herewith**.

The Authority while issuing a generic definition has violated the fundamental principle that distinct and separate classes or groups cannot be treated as equal hence, the same is arbitrary and invalid. The Authority in declassifying, has erred in allowing commercial establishments to receive the television signal of the television channels of the Broadcasters at the same rate that is applicable to the ordinary domestic subscribers for the said service, which direction/order violates the very underlying principle of Article 14 which mandates that all persons similarly situated or circumstanced shall be treated similarly and hence by corollary that persons that are situated/circumstanced differently shall be treated differently.

Therefore, it can be seen that the authority is under an obligation to maintain transparency in terms of Section 36 of the TRAI Act, 1997 and also mandate issued by the Hon'ble TDSAT from time to time.

Furthermore, by treating a separate class of commercial subscribers on the same footing as ordinary subscribers, TRAI has violated Article 19(1)(g) of the Constitution of India to

carry on business in the manner they desire, inasmuch as the exclusive right granted to the Appellant under the Copyright Act, 1957, to issue licenses in respect of communication to the public of the broadcast, has effective been taken away, without any reason therefore and especially as no "public interest" is being sub-served by treating the commercial subscribers as ordinary subscribers for the purposes of price ceiling.

Further, the Authority has failed to even acknowledge, let alone consider, the impact of the definition of subscribers as provided under the Draft Tariff Order on the exercise of the exclusive statutory copyright owned by the broadcasters/ Appellant's members. It is submitted that this omission is material inasmuch as a statutory right granted by Parliament in favor of the broadcasters is being withheld down, not by legislation but by way of a Tariff Order. Such encroachment upon the statutory right of broadcasters is constitutionally unsustainable.

We wish to note here that these comments are subject to and without prejudice to the rights and contentions raised by SPN, IBF and other Broadcaster in Appeal No. 4© of 2015, whereby the pleadings are complete and the matter is ripe for final hearing before the hon'ble TDSAT.

We are of the view that the Authority should reconsider this proposed definition of the term "subscribers", taking into due consideration the comments of all the stakeholders as stated aforesaid and draw an equal and unequivocal distinction between two distinct classes of subscribers, i.e. ordinary and commercial subscribers.

5. <u>Non level playing field vis-à-vis OTT platform</u>

The Authority would appreciate that the content of the television channels is also available on linear OTT platforms. Further, there are technologies such as Chromecast and Apple TV, which can cast streaming data on to TV. The adoptions of these technologies is likely to increase rapidly going forward and would compete with the existing platform. Hence to regulate only certain section of sector would amount to non-

level playing field, which is why the stakeholders have been requesting that the Authority should look into the aspect of having forbearance.

6. <u>Discourage of investments in the television broadcasting industry</u>

We think that the regime as proposed by the Authority is highly tilted in favour of the DPOs and gives them enormous advantage over the consumers and other stakeholders and would discourage investments in the television broadcasting industry due to the following reasons:

a) Disproportionate revenue share garnered by DPOs leading to lesser motivation to the broadcasters to invest in content.
b) Provisions in respect of discontinuation of channels below 5% reach for a period of one year would discourage broadcasters to invest in niche channels thereby depriving viewers of differentiated content.
c) No assured revenues to the broadcasters who spend enormous monies creating the content whereas the distributors of the content who do not invest anything in creation of the content are being given more than fair return. The industry growth is led by the Broadcasters and not by DPOs.
d) Enabling marketing, placement fees to the DPOs outside the ambit of the Regulations would imply that smaller/new entrant broadcasters would be at a severe disadvantage. Moreover, this would also lead to unhealthy practices which the Authority is aware of which has been haunting the industry all these years.

The proposed model if introduced would lead to double jeopardy to broadcasters as limited bouquet discounts would not only curb viewership but also adversely impact advertising revenues.

The regime confers on the DPOs unbridled powers which will severely restrict sampling and access to variety of content which is critical for innovative content and may ultimately lead to closure of many channels. Unless both advertising and subscription are balanced there will be very little incentives for investing in creating diverse & quality content. The proposed forbearance for Premium Channels would not serve its purpose as there is no mechanism in the proposed structure which will enable viewers to access or even sample such kind of content.

7. Issues with the regulatory framework proposed by TRAI in Draft Tariff Order, Draft Interconnection Regulations and Draft QoS Regulations:

I. Manner of offering of the channels by the Broadcasters:

In the Draft Tariff Order, the Authority has recommended to mandate the following with respect to the manner of offering of the channels by the broadcasters:-

A. Genre based price cap

The authority has prescribed that the MRP of a channel to the customer in that genre will be 1.20 times the existing price cap for that genre for addressable systems. In case, multiple genres have been clubbed to form a new genre, MRP of a channel in that genre to the customer will be 1.20 times the existing price cap of that genre which has the highest price cap, for addressable systems. There is further no explanation/criteria prescribed as to why the increase of 27.5% that was earlier given to the broadcasters is not effective and dependable, and why is there any need for prescribing the cap on MRP within a particular genre. Hence as suggested earlier by majority of the stakeholders, retail pricing should be under forbearance.

B. Formation of bouquet and tariff

The recommendation of the Authority to allow the broadcasters to provide their channels in bouquet form is a welcome suggestion. However, the rates of such bouquet should be left open to be decided by the broadcasters in order to balance the difference in the

different rates of the channels forming part of such bouquet especially in the light of the fact that under the proposed new regime the manner in which the broadcasters have to conduct its business would undergo change. Hence if the broadcasters have to directly reach out to the end consumers the broadcasters should necessarily be given freedom to price their bouquets. The *genre* caps are quite low, which amounts to slashing of retail rates by 50 percent.

The Authority while recommending the minimum price cap on the bouquet of channels has set the limits too high. The existing regulations provide for bouquet prices to be within the range of 55-65% of the sum of the rate of all a-la-carte in the bouquet, which variation is affordable and convenience for both DPOs and the subscribers. Broadcasters should be given complete freedom to package their channels.

Suggestion:

We believe that since the Authority has suggested cap on retail prices of channels, there is no reason for having any cap on bouquet prices as customers are free to choose channels on a la carte basis. The broadcasters should be free to declare the bouquet prices of its channels without any restrictions on the price of the bouquet.

II. Manner of offering of channel by the Distributor on its platform:

In the Draft Tariff Order Draft Interconnection Regulations, the Authority has recommended to mandate the following with respect to the manner of offering of the channels by distributors of television channels:-

i. The distributor of television channels shall not charge a rental amount exceeding Rs. 130/- per month per set top box from the a subscriber for providing a capacity so as to enable the subscriber to receive the signals of upto 100 SD channels;

ii. Every distributor to offer all the channels available on its networks on a-la-carte basis and declare the retail price of pay channels payable by the subscribers;

iii. Retail price of such bouquet of channels shall not be less than 85% of the sum of retail prices of the a-la-carte channels forming part of the bouquet;

iv. Every distributor to offer at least one bouquet, referred to as basic service tier, of one hundred FTA channel including all the channels notified by the Central

Government to be mandatorily provided to the subscribers and such bouquet shall contain at least five channels of each genre as specified in the Tariff order

v. The retail price of the bouquet of pay channel offered by a distributor of television channels in no case exceed the sum of a-la-carte MRP of the pay channels forming the bouquet;

vi. The rental amount shall not be increased for a period of six months from the date of subscription.

vii. The broadcaster shall declare a minimum 20% of the maximum retail price of pay television channel(s) or bouquet(s) of pay television channels, as the case may be, as the distribution fee.

viii. Broadcaster may also offer discounts on the maximum retail price provided that the sum of discounts and distribution fee in no case shall exceed 35% of the maximum retail price, so declared.

A. <u>Draft Tariff order is anti-consumer as it proposes high distribution fee and rental charge and arbitrary discounts</u>

The Authority has recommended that the maximum rental amount that could be charged by a distributor should not exceed Rs. 130/- excluding taxes per month per set top boxes. In our view, the customers will be over burdened with this hefty pricing model. In view of this, a customer is likely to end up paying 2to 3 times the existing tariff for the same channel consumption which he is doing today. A high ceiling of Rs. 130 plus additional monies for carriage and commission on MRP clearly suggests that the tariff order is favourable to the DPOs as it provides them with an assured income plus upside from carriage and pay channel pricing – thereby putting the rest of the value chain in jeopardy and huge escalation in consumer prices. Further, the customers should not be burdened with any additional cost for the additional channels and no incremental cost on over and above the maximum rental amount should be allowed to be charged by the distributors of television channels. Further, the Authority has prescribed that the distributor can charge Rs. 20/- for the additional set of 25 channels to be provided to the subscriber. This adds further to the woes of the consumers, since they will have to bear this additional cost of Rs. 20/- in addition to the a-la-carte rates of the channels to be paid to the

broadcasters. A consumer today subscribes for 150-200 channels, which implies he would end up paying Rs. 180 per taxes for bandwidth charges alone, which is higher than the billing for at least 50% of the consumers today

Further, it is feared that looking into the issues that the broadcasters had faced in implementation of DAS phase III, the proposed completion of analogue and implementation of DAS IV by 31st December, 2016 looks remotely possible. If consumer has to pay Rs. 130 plus channel MRP, the pricing may be too high for DAS IV segment, leading to hindrance in effective and efficient implementation of digitization.

There is no basis for quantifying the distribution fee to be paid by the broadcasters to the distributors at 20%. It is surprising to note that the obligation to pay the aforementioned fee to distributors emanates from the Para 51 of Explanatory Memorandum and not the tariff order itself. Further in the present model, DPO is assured of multiple revenue streams such as - Distribution fees, Rental fees, Carriage charges, Placement fees and Marketing fees. Since the Draft proposes to charge rentals to the consumer purportedly for access and ROI for capacity enhancements, it completely obviates the need to charge carriage from the broadcasters for the very same purposes.

Further this would also be anti-consumer. The consumer will either end up paying substantially more for the same set of channels that they avail today or will end up receiving significantly lesser number of channels for the same price.

A minimum commission of 20% to distributors (as proposed by the Authority) again reiterate our point that the tariff order is highly in favour of the DPOs. A minimum commission of 20% even if an operator does not submit timely subscriber reports or make timely payments to broadcasters seems unreasonable.

Broadcaster may also offer discounts on the maximum retail price provided that the sum of discounts and distribution fee in no case shall exceed 35% of the maximum retail price, so declared. Therefore, a total discount of 15% may not be sufficient. Since in the proposed model placement fee and marketing fee can be mutually negotiated and are outside the regulatory ambit this has the potential to completely distort and vitiate the entire non-discriminatory principles. This would create a back door entry for packaging

and side-deals. While the Authority seeks to reduce the burden of carriage fee by capping the same, it has been rendered illusory by allowing negotiated agreements between DPOs and Broadcasters for LCN and Marketing. Hence these should also be brought within the regulatory ambit.

Suggestion:

We propose that the fixed the rental fee shall be reduced from Rs. 130/- to say Rs. 75/- for 100 channels. Further, for additional channels, no additional rental to be charged by DPOs

We also propose that the distribution fee to be capped @ 10%. However, this 10% shall only be available to the DPO if he makes timely payment and regularly submits monthly subscriber reports, and provides minimum threshold penetration for the broadcaster's channels.

We suggest that the quantifiable discounts basis certain parameters (like packaging, penetration, platform size as decided by the broadcaster) including Marketing/placement fee be increased from 15% to 40%. It should cover all discounts criteria which can be offered by Broadcaster and the distributor cannot in any form ask for any other fee. These discounts will be on a fair, quantifiable and transparent manner to ensure there is no discrimination, and will ensure broadcaster's and DPO's interests are aligned in ensuring delivery of content to consumer homes.

DPOs often charge exhorbitant amount in the name of providing favourable LCNs to broadcasters. They have themselves often complained that broadcasters ask for preferred LCN, and the fact that an LCN can be offered to only 1 channel needs to be appreciated. Taking due cognisance of this, we suggest that LCN issue be brought to rest by developing a fair, transparent methodology to be followed by the DPOs while according LCN to channels of various broadcasters.

There should be no distributor commission for LCN and the distributor should not be allowed to charge any fee for LCN placement. Thus, we propose that the distributor of platforms shall maintain the LCNs in respect of the respective channels that are existing on their platform as on date. This will help the subscribers as the transition to a new regime will be smoother. Alternatively, the LCN for pay channels to be allotted basis BARC ratings with no fees to be separately charged. Twelve (12) preceding months average ratings shall be the basis of deciding the sequence of channels on EPG. Such allotment of LCNs shall be in force for 12 months. As FTA channels are mandatorily being offered as part of basic service tier by DPOs, pay channels category should get preference in EPG ranking. EPG should be common for all distribution platforms.

No further transaction between the broadcasters and the DPOs should be allowed outside the interconnect agreement, to maintain the sanctity of the interconnect provisions. Otherwise DPOs are likely to charge additional monies under various pretexts as is the case today, thereby making this whole exercise futile.

B. Time limit imposed on the broadcaster in case of change of price of channels.

The Authority has stated that the in case of the broadcaster proposes to change the price of the channels, it cannot change the same for a period of 6 months, and also need to inform TRAI 90 days in advance. This restriction imposed on the broadcaster seems to be unreasonable. This restriction imposed on the broadcaster seems to be unreasonable.

Suggestion:

Ideally there should not be any such restrictions imposed on the broadcaster and it should be their prerogative to change the price of the channels as and when it deems fit.

Alternatively, we would recommend that the 6 months period be reduced to 3 months and 90 days period be reduced to 15 days. Further the period of 15 days would run concurrent.

We also propose that free preview offers, schemes should be permitted to be announced by broadcasters, if offered on a non-discriminatory basis.

III. No prohibition on carriage/placement fee.

The Draft regulatory framework proposes as under:

i. No prohibition on carriage fees
ii. Enabling Marketing and Placement fee to be charged outside the interconnect agreement.
iii. The Interconnect Regulation restrains the broadcaster for giving discount for packaging of channels in the bouquets offered by the DPOs.
iv. "Must carry" provision for all addressable systems, on first come first serve basis. DPOs to publish information about its platform including available capacity and declare the rate of carriage fee.
v. No carriage fee is to be paid by a broadcaster if the subscription of the channel is more than or equal to 20% of the subscriber base.
vi. The rate of carriage fee has been capped at 20 paisa per channel per subscriber per month. Further, the carriage fee amount will decrease with increase in subscription.
vii. The distributors of TV channels may offer discounts on the carriage fee rate declared by them not exceeding 35% of the rate of the carriage fee declared

The proposed regulation by the Authority in connection with the carriage fee has brought in a regime of "Must Pay" for the broadcasters. The authority has recommended that the distributors of television channels can refuse to carry the channels of a broadcaster in the event the broadcaster refuses to pay the carriage fee to the distributor. This provision amounts to denial to easy access to the broadcasters, more specifically to the small broadcasters or new broadcasters or broadcasters of a new channel. While there is a corresponding obligation on the broadcasters to provide the channel on non discriminatory basis and have to maintain parity in all circumstances, the liberty granted to the distributors to deny the access to the broadcasters who will not be able to pay the

carriage fee, is definitely against the principles of parity and reasonableness thereby depriving the consumers to have access to all such channels.

We believe that carriage is a regressive business practice, as it amounts to undue fee charged to broadcasters for providing market access. The industry is steadily moving towards a reducing carriage fee, and there has been no carriage fee on DTH and sports. This framework in the process of providing another revenue stream for DPOs, have institutionalised carriage which is regressive.

Further, there is no study or explanation for the prescribed rate at which the carriage fee is to be calculated for a particular channel. The provision is based merely on the supposition that the distributor of TV channels should be able to recover the additional re-transmission cost for distribution of the channel on its network, and hence the broadcasters have been obligated to pay the carriage fee, and in the event of any refusal by the broadcaster to pay the carriage fee, the distributors shall have the right not to carry the channel of the broadcaster.

It also needs to be pointed out here that the authority has directed the broadcasters to pay the carriage fee and the distribution fee to the distributors in the same breath. The authority has also failed to provide any explanation for obligating the broadcasters to pay both, the distribution fee as well as the carriage fee. The Authority has also provided for a "rental" to be paid by the subscribers to the DPOs Hence we feel that when the question is the recovery of the additional cost incurred towards re-transmission by the distributors of TV channels, there is no requirement for mandating the broadcasters to pay to the distributors via two channels, viz. distribution fee as well as carriage fee.

The current provision in the present Draft Regulations also fail on the count that they are against the right to equality granted to the broadcasters under Article 14 of the Constitution of India, 1950, as amended, on the following counts:-

- While the broadcasters have been directed to receive subscription on the basis of actual subscribers watching the channel, the carriage fee has to be paid on the basis of active subscribers of the DPO. This is clearly violative of Article 14 of the

Constitution of India, firstly because a class in a class is being created without any basis, and secondly, same class is not treated equally and there is no basis for creating such a differentia. More so, TRAI fails to give any reason for such a differentia.

- There is no basis for prescribing the rate of carriage fee. No study has been undertaken by the Authority in this regard and rates have been prescribed arbitrarily.
- The minimum percentage of active subscribers for a broadcaster to seek "Must Carry" has been kept at 5% without any basis or discussion.

  The 5% cap is arbitrary as channel penetration depends on:

  - Demographic profile of DPO's sub base
  - Marketing / promotion and packaging done by DPOs
  - Nature of channel –
  - a) English/ niche likely to have low penetrations
  - b) Sports - Live Sports consumption is seasonal / cyclical and is event based. Hence this criteria of 5% average viewership should not be applicable on Sports channel.
- At many places in the Explanatory Memorandum, it has been stated that discussions are based on various studies and data available with TRAI but no discussion is available nor has TRAI shared such study and data to the stakeholders.
- Authority has failed to define the minimum number of channels that a distributor is obliged to make available. If the minimum number of channels is not prescribed, the provisions relating to "Must Carry" will never work and in fact will lead to a failure of this provision.
- The subscription of a particular channel is dependent on the efforts and pricing of that channel by the DPO. This is absolutely arbitrary and could be a wall for a new broadcaster in the industry leading to concentration of power in the hands of a few and not allow a new broadcaster to enter the market.
- The Authority has failed to distinguish between commercial subscriber and ordinary subscriber.
- Creation of a common interconnection regulation fails to recognize that DTH is a different technology altogether than HITS and MSO. Even otherwise while DTH reaches a subscriber directly without any intervening operator, HITS and MSO require

a link cable operator. Hence, both are different classes and same formula cannot be applied, as is being sought to be done. The understanding of TRAI as reflected in the Explanatory Memorandum as detailed hereinafter is wrong, even though it admits that every type of distribution network has different capabilities.

Further, The Draft Tariff Order does not provide for any prohibition of carriage/placement fee as has been proposed by the broadcasters (other than recording in paragraph 5 of the explanatory memorandum that broadcasters face entry barriers despite must carry obligations as DPOs ask for significant amounts of carriage fee). The Authority should look into this aspect and clearly lay down prohibition to seek carriage fee by the DPOs from the broadcasters.

Suggestion:

We are of the view that the carriage fee should be discouraged since it is regressive and leads to market distortion, and should be gradually phased out especially in view of a DAS scenario. TRAI itself has opined on various occasion that carriage fee should be discouraged.

No further commercial transaction between the broadcasters and the DPOs should be allowed outside the interconnect agreement.

We also propose the proposed definition of Carriage Fee needs clarity. Carriage Fee should only be on active channel subbase on the platform. For HD channels only HD sub base to be considered. Carriage fee agreements to be concluded for a minimum period of one year and the terms and conditions applicable for subscription agreements regarding renewal, negotiation etc. should apply with requisite changes.

IV. Must Carry- A Misnomer

In terms of Clause 3(11) of the Draft Regulations, every distributor is mandated to carry, upon receiving the request from the broadcaster, on non discriminatory basis, the signals

of television channels or convey the reasons for rejection of request if the re transmission is denied to the broadcasters.

Further, in terms of Clause 3(12) of the Draft Regulations, the distributor has been given the right to disconnect any channel which could not attain the prescribed benchmark of 5% of the total subscriber base of the distributor.

The "first come first serve" provisions in connection with the "Must Carry" principle is opaque as they do not lay out an independent standardised process for effective implementation of the same.

A bare perusal of these two provisions would demonstrate that by way of these provisions, unrestricted powers have been vested in the hands of the distributors, who will now have the privilege to restrict the entry, disturb the existence of the existing channel merely on the basis of the popularity of a channel. Further, the parameters are also ill defined, since the basis of attaining the prescribed benchmark is set on the total subscriber base of the distributor. No study, data whatsoever has been shared with the stakeholders, nor have been explained in the Explanatory Memorandum in any manner whatsoever.

It is pertinent to mention here that in terms of Clause 3(10) of the DAS Regulations, 2012 an obligation has been cast upon the MSO to carry the channels of the broadcasters on non discriminatory basis. Clause 3(10) of the Regulation reads as-

> "(*10) Every multi system operator shall, within sixty days of receipt of request from the broadcaster or its authorised agent or intermediary, provide on non-discriminatory basis, access to its network or convey the reasons for rejection of request if the access is denied to such broadcaster.*
> *Provided that it shall not be mandatory for a multi system operator to carry the channel of a broadcaster if the channel is not in regional language of the region in which the multi system operator is operating or in Hindi or in English language and the broadcaster is not willing to pay the uniform carriage fee published by the multi system operator in its Reference Interconnect Offer.*

Provided further that nothing contained in this sub-regulation shall apply in case of a broadcaster who has failed to pay the carriage fee as per the agreement and continues to be in default.

Provided also that imposition of unreasonable terms and conditions for providing access to the cable TV network shall amount to the denial of request for such access.

Provided also that it shall not be mandatory for the multi system operator to carry a channel for a period of next one year from the date of discontinuation of the channel, if the subscription for that particular channel, in the last preceding six months is less than or equal to five per cent. of the subscriber base of that multi system operator taken as an average of subscriber base of the preceding six months".

Further, the understanding of the authority on the aspect of "Must carry" can be seen from the Explanatory Memorandum:-

"33. As per the down-linking guidelines of the Ministry of Information & Broadcasting (MIB), a broadcaster can distribute its TV channel through distributors of TV channels only. Therefore it becomes essential that a broadcaster desirous of serving a particular market should be able to access that particular market through distributors of TV channels present in that market. Denial of access to that particular market by a DPO may cause double jeopardy to that broadcaster as it cannot access that particular market through any other alternate means also. However, a DPO decides the capacity of its distribution network on the basis of its business plans and market need. Therefore, there is a distinct possibility that at a given time when a broadcaster approaches a distributor for re-transmission of its channels, spare capacity in the distribution network may not be available. To strike a balance between two different needs of the service providers, it necessary that a DPO transparently declares the information about its distribution network. The non-discriminatory access of the network is possible if the DPO transparently publishes on its website the channel carrying capacity of its network, the list of channels available on its network, spare capacity available, if any, and the list of channel(s) for which requests

are pending with the broadcaster for access of the network for re-transmission. Such declaration of capacity of the network and its availability or waiting list would remove entry barriers for new channels which will provide availability of choice of channels to the subscribers. Subject to availability of capacity for carrying channels, the access to the network should be provided on first come first serve basis on payment of applicable carriage fee. In this manner the issues relating to capacity constraints due to non-availability of transponders would get addressed and access to a particular market in non discriminatory manner would become available to a broadcaster.

34. In relation to the issue of discontinuation of a channel by DPO if the subscription falls below certain percentage, a broadcasters opined that such provision should not be there as this will give unilateral power to DPOs to discriminate and will be against the principle of network neutrality and will enable operator to act as gate keepers for channels. A broadcaster suggested that a provision may be made for DTH and HITS operators to discontinue a channel if the subscription, in the preceding six months is less than or equal to a given minimum of 10 percent of the total active subscriber base of that operator averaged over that period. Some DPOs quoted that it should be permitted to discontinue the channel on the average subscriber base of the past 3 months instead of 6 months, and the period after refusal should be increased from 1 year to 3 years.

35. The 'must provide' principle ensures that the channels having demand in a particular market are available on the network of a DPO. The 'must carry' principle removes the entry barrier for channels and ensures that distribution network is accessible for testing of channel. However, in order to ensure that non popular channels do not occupy the valuable space on a distribution network, the DPO should have an option to discontinue re-transmission of such channels on the basis of pre-defined criteria. This would ensure that, in the event of capacity constraint in the distribution network, popular channels in a particular market occupy the distribution network. This will create a space for new channel that can be given access in terms of its position in the

waiting list. Therefore the Authority has decided that it shall be open for a DPOs to discontinue carrying of a TV channel in case the monthly subscription in a the immediately preceding six consecutive months is less than five percent of the subscriber base in the relevant geographical area. In case of failure to maintain the required subscription levels, a DPO, in its discretion, can refuse to grant further access to the network for a period of further one year. Such a refusal cannot be considered a violation of the "must carry" provision. Accordingly, provision has been made in these regulations.

36. Before providing signals of television channels or access to the platform, the service provider should not impose any condition which is unreasonable as such imposition of condition violates the principles of "must provide" or "must carry". Since, packaging and placement of a channel is the prerogative of the DPOs, any pre-condition for placing the channel in any specified position in EPG or assigning a particular number to a channel may affect the right of the distributor.

Such pre-condition has also been qualified as unreasonable. The parties to the interconnection agreement must not include any clause in the interconnection agreement which directly or indirectly require the DPOs to include the channels or bouquet of pay television channels in any particular bouquet offered by the distributor as this may affect the choice of the consumer. However, the parties can provide discounts for placing of channels for allocating a particular number to a channel on the basis of parameter disclosed in the RIO.

37. Similarly at the time of providing access to its network by a distributor for retransmission, a pre-condition for minimum guarantee period or minimum number of channels may pre-judicial to the competition as this will create entry barrier of the new channels as well as it may create exit barrier to channels. However, the distributor may offer discount on the rate of the carriage fee to the broadcasters for longer period interconnection agreements or for carrying more number of channels in the RIO."

Before proceeding to respond on the present provision inserted in the Draft Regulation, we need to revisit the background relating to must carry provisions.

The Telecommunication (Broadcasting and Cable Services) Interconnection (Digital Addressable Cable Television Systems) Regulations, 2012 dated 30.04.2012 provided for Clause 3.5 and Clause 3.8 in the following terms:-

> "*(5) A multi system operator, who seeks signals of a particular TV channel from a broadcaster, shall not demand carriage fee for carrying that channel on its distribution platform."*
>
> *8) Every multi system operator, operating in the areas notified by the Central Government under sub-section (1) of the section 4A of the Cable Television Networks(Regulation) Act, 1995, shall have the capacity to carry a minimum of five hundred channels not later than the date mentioned in the said notification applicable to area in which the multi system operator is operating."*

These two provisions were challenged before the Hon'ble TDSAT. The Hon'ble TDSAT while addressing the concerns of the different stakeholders, set aside these two provisions, in the following terms;-

> *"53. Submission of the Appellants in this behalf is so far as the Tariff Order providing for payment of Carriage Fee is concerned, the same is to be charged by the MSO in terms of the clause 3(5) of the Regulation but the same has been restricted only to a case where the broadcasters approach the MSOs so as to compel them to carry its channel. However, indisputably when the MSOs approach the broadcasters, no Carriage Fee shall be payable.*
>
> *54. The only submission made by the Respondent in this behalf is that keeping in view the analogy between „must provide clause‟ as contained in clause 3.2 of the 2004 Regulations whereby and whereunder the distributors of TV channels are prohibited from asking the broadcasters to pay any "Carriage Fee‟, clause 3 (5) of the Regulations provide for a similar effect.*
>
> *55. It is difficult to comprehend the said submission. Such a criteria has not been adopted so far as the CAS operators or the DTH operators are concerned.*

56. Clause 3.2 of the Regulations may not be attracted in the case of DTH operator, but we may notice that the restrictions put therein are only limited to "at the same time".

57. Payment of Carriage Fee, therefore, cannot be put in as a condition on the „distributor of a TV channel" for all time to come only because at one point of time it had asked the broadcaster to supply signal of its channel.

58. Perusal of clause 3.5 of the Regulations as also the proviso appended to clause 3.2 thereof would show that both the provisions would not have the same effect. While applying the said principle in a case of "must provide", the same would not mean that the MSOs would never be entitled to take any Carriage Fee throughout the period during which the original agreement remain valid and/or renewed. It is a privilege of the broadcasters and the MSOs.

59. It is only for that purpose, we intend to place emphasis on the words on record "at the same time".

The Hon'ble TDSAT further held that-

"*The direction that the MSOs must set up head-ends having carrying capacity of 500 channels is set aside. If the market forces play an important and significant role in the matter of carrying capacity of the MSO, the same may not be required to be regulated. However, if the Regulator deems fit, it may consider making provision for MSOs to have capacity to carry number of channels based on different categories of area i.e. city/towns/rural area etc. in which MSO will be operating.*"

Perusal of the aforementioned clauses and the judgments cited hereto above, it can be noted that the principles of non exclusivity, must provide and must carry are necessary for orderly growth of the sector. In order to maintain level playing field for all the stakeholders, and also to ensure effective competition, these principles play an important role and form the backbone of the broadcasting industry. The problems cited in the Consultation Process relating to the capacity constraint does not hold ground in the era of addressability. The Authority also needs to analyse and do a fact finding exercise to ascertain if the said transponder limitation is real or a created scarcity. The Authority must

also do a consultation process on this aspect and invite comments from the various stakeholders.

Further, if the DTH and HITS operator are allowed to discontinue any channel including FTA channel, owing to the penetration of the said channel depending on its popularity, it would also amount to discrimination towards one channel with respect to other channel.

Hence, the concept of "Must Carry" in the present form would remain a misnomer and would depend totally on the whims of the distributor of TV channels.

We suggest that the existing channels which are there on DPOs platform should continue to be made available under the proposed regime.

V. Channel visibility on EPG

We support the authority's recommendation that the EPG should display details of all the channels and their MRP, carried over the DPOs network and the channels should be arranged genre wise for easy navigation by the subscribers and in order to enable them to make informed decision about the same.

Suggestion:

We propose that authority may provide clarification that the broadcaster's MRP information shall be made available to end consumer. We would also like clarification as to how would an EPG show MRP if it varies between States and feed of a DPO goes from one State to another.

VI. SIGNIFICANT MARKET POWER

We feel that in a market that is driven by profit and there is cut throat competition between the stakeholders, there cannot be a situation where there is any significant

market power marking its dominance in the market. Moreover, the content of each broadcaster is different in the same genre. There is no channel or broadcaster that controls absolute monopoly in the market. The monopolistic control of the broadcasters has already been taken care of by TRAI by Content Aggregator Regulations of February 10, 2014 and hence there is no further need to identify and regulate the significant market power.

VII. REPORTING REQUIREMENT

We welcome the recommendation of the Authority with regard to the furnishing of the information to the Authority by the broadcasters and the distributors of television channels.

Further, there does not seem any basis for calling upon the broadcasters to share the details of the advertisement revenue with the Authority. The function of the Authority as enshrined under Section 11 of the TRAI Act, 1997 contemplates that the Authority shall endeavour to improve the standard of quality of service to be provided by the service providers. By no stretch of imagination, it is comprehendible that for improving the standard of quality of service, the Authority needs to study the advertisement revenue of the broadcasters. This requirement has come up for the first time, without any study thereof or consultation or deliberation with the stakeholders on this aspect.

Suggestion:

We are of the view that there should not be any requirement for the disclosing the advertisement revenue by the broadcasters.

As regards the reporting format for subscriber reports, we would suggest that the subscriber reports to be provided by the DPOs should mention figures not only at a head end level but at least at a state level. The subscriber reports should also mention retail prices of channels and bouquets.

VIII. Discrimination at consumer level due to no linkage between MRP declared by broadcaster and retail price declared by DPO

At the retail level no cap has been stipulated for retail price of the DPOs vis-à-vis the MRP of the broadcasters. This will result in different retail prices for the same channel in the same geographical area, thereby resulting in discrimination at consumer level and defeating the purpose of MRP stipulations

Fundamental flaw of the MRP model is that it does not take cognizance of vested interest arising out of cross holdings, which might lead to resorting to unfair trade practices.

Suggestion:

Discounting between retail and MRP should be capped at the discount offered on that channel by the broadcaster.

IX. Provision in connection with obligation on broadcasters to specify arrears in the invoices and waiving of broadcasters right to claim the same

In the draft Interconnect Regulations, the Authority has mandated that broadcasters shall have no claim on any arrear amount which has not been specified by it in the immediate next three consecutive invoices issued after the due date for the invoice to which the arrears pertain.

While mandating this provision, we believe that the Authority has not appreciated the fact that this would be challenging especially in view of non-receipt of subscriber reports on time.

Suggestion:

We suggest that there should not be any such provision. Anyways there is a law of limitation which prescribes a period of 3 years to recover the money.

X. Audit process

The broadcasters should be given the right to conduct audit of the technical systems of the distributors through its own technical team and only in case of dispute between the parties, BECIL or empaneled auditor may be appointed to conduct the audit. TRAI has neither empaneled any auditor not has it ensured that BECIL has the bandwidth to conduct audits as is contemplated. In any event, the stipulation that finding of BECIL's auditor shall be final is arbitrary and cannot be permitted. Further, even in case the addressable system was audited in the last 1 year by BECIL or any other agency, broadcaster should have been granted the right to conduct the audit of the distributor of TV channels' addressable system to ensure technical compliance in accordance with regulation and raise technical issues if the same is found during the audit. This would also ensure that the DPOs cannot unduly take advantage and tamper with the Systems later on the pretext that their Systems are audited by BECIL.

XI. Authority's power to intervene

The Draft Regulations recommends that the authority may intervene by order or directions from time to time in order to protect the interest of the consumer or the service provider.

In order to facilitate itself, the authority has prescribed in the Explanatory Memorandum that-

> "*58. The requirement of submission of final RIO published by the service providers and its amendment to the Authority, has been kept with a view that a reference copy is available with the regulator for future use, if any. Further, the Authority, may on suo-motu basis or otherwise, examine any RIO for its compliance with the regulatory framework and if the Authority is of the opinion that the RIO has not been prepared in accordance with the provisions of relevant regulations/ orders, such broadcaster or the DPO may be directed to carry out modification as may be necessary for compliance with the regulations. Accordingly such provisions have been made.*"

Thus, the authority by way of the present regulation seeks to vest in itself the power to intervene, which is not permissible by law. The role and function of the authority is limited to ensure effective functioning of the interconnection framework and nothing further, and hence, it cannot issue any order or direction, which would mean that the TRAI is subsuming powers to adjudicate disputes by resorting to adjudicatory powers, which it inherently lacks and which is actually vested with the Telecom Dispute Settlement and Appellant Tribunal (TDSAT) which is the exclusive forum available under the law to adjudicate any disputes or differences arising between the Broadcasters and DPOs.

XII. Discontinuation and re-continuation of channels

The authority has prescribed that a distributor of TV channel can discontinue carrying any channel which has less than 5% monthly subscription of the total subscriber base of that distributor.

The authority has prescribed in these provisions that if a particular channel does not attract the minimum prescribed subscriber base for a minimum period of six months, then the distributor shall have the liberty to disconnect the said channel. But for the purpose of reconnection of the same channel, a broadcaster will have to wait for one year and the distributor can keep on denying access to the said channel despite the fact that the said channel may have attained the prescribed limit, in a short span of time after the discontinuation of the channel by the distributor. This gives an arbitrary power in the hands of the distributors who shall have free hand in denying access to the channels of a new broadcaster or a new channel of an existing broadcaster. Reading these provisions together would yield that the distributors can now deny the signals to the regional channels on the ground of the channel being not popular and, this power can be arbitrarily used.

XIII. Quality of Services

We believe that in order to have effective implementation of the Quality of Service (QoS) provisions on the ground there should be effective penal consequences to be prescribed so that the same can be deterrent in nature. Moreover, it is submitted that in order to

achieve efficiency, transparency and neutrality at digital distribution platform's end *inter-alia* for ensuring protection of interests of all stakeholders in the value chain (including consumers) it is of paramount importance that QoS Regulations should be first implemented. TRAI should also ensure existence of proper infrastructure and compliance of QoS Regulations at the end of DPOs, since otherwise any attempt to implement the new Tariff Order and/or the Interconnection Regulations will have an adverse and cascading effecting on all stakeholders.

TECHNOLOGICAL CONSTRAINTS

We think that the proposed model envisages delivery of channels i.e. FTA or Pay based on choice of the consumers. Given that the DPOs would tend to offer various options i.e channel on ala carte basis, channel basis the broadcaster's bouquet and his own tailor made bouquet of channels, which would lead to countless combination for which we believe that the DPOs lack requisite technology and infrastructure (e.g. bills, consumer awareness, package creations, subscriber reports) . Hence given this technological constraints this model will not be workable until the DPOs invest in the requisite infrastructure.

XIV. Other suggestions:

a. Authority should also come out with a provision to ensure that Broadcasters get their subscription fees on a timely basis. As on date there has been unreasonable delay on the part of the DPOs to remit the subscription revenues to the Broadcasters though most of the DPOs would have a prepaid model between them and the subscribers.

b. The Authority should provide for exemption in connection with the promotional channel bundling similar to the one prevailing in the telecom sector (e.g. Reliance Jio).Promotional offers may be on short term basis (e.g. Festive season, Sampling) for a period of say upto 90 days. This would encourage sampling of new channels. Authority should allow for free preview offers / schemes as may be declared by broadcasters, if offered on a non-discriminatory basis.

c. The Authority should also provide for DPOs to offer incremental discounts to encourage longer term subscription by consumers as this would bring stability and also an assured source of revenue.

d. The Platform Services offered by the distributor of TV Channels are completely unregulated and the same gives the distributor of TV channels an undue advantage to place and/or offer the said channels in any manner of their choice. Further, several distributors of TV channels place their respective Platform Services in EPG listing in priority over the satellite television channels of the broadcasters. Hence TRAI should look into the aspect of regulating the same.

e. The Authority should ensure that the DPOs should be permitted to offer monthly or more than one monthly subscription periods to subscribers, as the MRP of channels is on a per month basis. The DPOs should not be allowed to offer weekly, event based or daily offers of subscription.

f. As on date there has been unreasonable delay on the part of the DPOs to remit the subscription revenues to the Broadcasters though most of the DPOs would have a prepaid model between them and the subscribers. Hence in such cases, the DPOs should be mandated to made advance payment to the Broadcasters in line with their pre-paid collection model.

   Further, the Authority should push pre-paid model for all DPOs due to the following reasons:

   a) Consumption does not change over a period of month
   b) Post-paid in DAS III and IV areas would lead to accumulation of huge outstanding and revenue leakages across the value chain leading to considerable tax loss for the government as well.
   c) Pre-paid model would also help to reduce the disputes/litigations between the broadcasters and the DPOs, which is prevalent today.

The present government's focus is on electronic payments as it envisages India becoming a "cash-less" economy. The Authority should therefore encourage the DPOs to set up suitable arrangements with payment gateways that would enable customers to make payment electronically so that the entire system is transparent and also ensuring elimination of potential revenue leakages.

In view of the above, we are of the view that the present draft regulatory framework prescribed in Draft Tariff Order, Draft QoS Regulation and Draft Interconnection Regulations needs further deliberation by the authority and the comments/concerns of all the stakeholders need to be holistically considered so that the ultimate benefit of the subscribers is achieved to the maximum.

Appendix I

a. On 10.12.2004, the Authority notified the Telecommunication (Broadcasting and Cable Services) Interconnection Regulations, 2004 ("Interconnection Regulations"). Hotel Associations of India & other filed petitions before the Hon'ble TDSAT challenging the action of the broadcasters requiring them to pay subscription fee beyond that which was prevalent on 26.12.2003. The hon'ble TDSAT vide its interim order directed maintenance of status quo and further directed that the Hotel Association and its members will continue to pay subscription fee at the rate at which they were paying immediately prior to the passing of the interim order. Thereafter vide order dated 17.1.2006, the hon'ble TDSAT disposed off the petitions by holding that members of the Hotel Association are not subscribers/consumers. The Hon'ble TDSAT also held that the tariff notifications relied upon by the Petitioners were only applicable to the domestic viewers and not to hotels etc. The Hon'ble TDSAT had further directed TRAI to consider whether or not it is necessary to fix Tariff for use of broadcast services for commercial purposes.

b. Thereafter, on 7.3.2006, TRAI issued the fourth amendment to the second tariff order defining commercial subscribers and further declaring that commercial cable subscribers would pay subscription fees at rates prevailing on March 1, 2006.

c. The aforesaid association aggrieved by the Hon'ble TDSAT's order dated 17.1.2006 filed an appeal before the Hon'ble Supreme Court.

d. On 21.4.2006, TRAI, issued a consultation paper on the question of commercial tariff.

e. In the meanwhile, the Hon'ble Supreme Court admitted the appeals and directed maintenance of status quo in Civil Appeal No.2061 of 2006. Vide order dated 19.10.2006, the Hon'ble Supreme Court directed TRAI to proceed with the process of framing the tariff under Section 11 of the TRAI Act, 1997, uninfluenced by any observation of the Hon'ble TDSAT. Thereafter, TRAI invited comments from all stakeholders to its consultation paper on commercial subscribers.

f. After the consultation process, TRAI, on 21.11.2006, issued two Notifications bearing No. F1-18/2006-B&CS and No.F 1-19/2006 B&CS. By the said Notification, hotels with ratings of 3 star and above, Heritage Hotels and other hotels, motels and Inns and commercial establishments providing for boarding and lodging and having 50 or more rooms were put under forbearance and the tariff was left to be mutually determined by the parties.

g. The Authority's justification at that time appeared to be that "large" commercial subscribers like 5 Star hotels did not require tariff protection as they passed on the cost of services they provided to their guests. However, in the process of sub-classification created by TRAI and the Authority's reluctance to include all commercial establishments (irrespective of place and nature of activity) within the fold of "commercial subscriber" gave rise to the prolonged litigation, ending up with the TDSAT setting aside TRAI's differentiated classification of commercial subscribers and finally in the Hon'ble Supreme Court, which disposed of all appeals and directed to TRAI to examine the issue of commercial tariffs afresh. It is pertinent to note that no other Country anywhere in the world, to the best of our knowledge and belief, has any form of tariff protection for commercial subscribers.

h. The Hon'ble Supreme Court vide judgment dated 24.11.2006 gave a limited ruling that hotels are covered by the definition of 'consumer' within TRAI Act and remanded the matter in relation to those hotels who are receiving signals of broadcasters through cable operators to the Hon'ble TDSAT.

i. The notification dated 21.11.2006, issued by the TRAI, were challenged by hotel associations before the Hon'ble TDSAT on the ground, inter alia, that certain categories of hotels had been discriminated against for the purpose of price fixation by the TRAI.

j. Vide judgment dated 28.05.2010, the Hon'ble TDSAT while holding that the distinction between ordinary subscribers and commercial subscribers was valid, set aside the notifications dated 21.11.2006 and further directed the TRAI to broadly re-analyse the sub-classification of commercial establishments for the purpose of fixing differential tariff.

k. The judgment dated 28.5.2010, vide which the Hon'ble Tribunal set aside the notifications dated 21.11.2006, was challenged by broadcasters before the Hon'ble

Supreme Court and vide order dated 16.8.2010, the Hon'ble Supreme Court was pleased to grant a stay on the operation of the judgment dated 28.5.2010, passed by this Hon'ble Tribunal.

l. Thereafter, vide order dated 16.4.2014, the Hon'ble Supreme Court set aside the order of TDSAT while upholding the distinction between commercial subscribers and ordinary subscribers and dismissed the appeals of the broadcasters with the direction that the TRAI will within a period of three months, carry out a fresh consultation on this issue and come out with appropriate measures in accordance with the TDSAT order. For the said period of three months, the Hon'ble Supreme Court directed that status quo be maintained as on date of passing of the order.

m. On 11.6.2014, TRAI issued a fresh consultation paper on Tariff Issues related to Broadcasting and Cable TV services for Commercial Subscribers. All stakeholders were directed to submit comments by 27.6.2014. The broadcasters had sought forbearance on tariff fixation in relation to all commercial subscribers and sought no interference in the continuity of practice that its members shall prescribe a separate RIO for commercial subscribers and designate appropriate DPOs to give signals to commercial establishments.

n. Unlike other consultation processes and in stark contrast to the last occasion where a consultation was carried out in relation to the same subject matter, and despite being aware of the enormity of the change being brought about by the said tariff order, TRAI only provided for a very short window of 12 working days for stakeholders to submit their responses and took only 7 working days after the open house discussion scheduled on 4.7.2014, to completely change its position which was prevailing during the last 8 years, on this issue.

o. On 16.7.2014, TRAI, without taking into consideration the comments of the Broadcasters and other stakeholders, notified the Telecommunication (Broadcasting & Cable) Services (Second) Tariff (Twelfth Amendment) Order, 2014, wherein, while the difference between Ordinary Subscriber and Commercial Subscriber is recognized, however, TRAI, even after making the said classification, decided to treat the said two classes on the same footing, with regard to tariff fixation.

p. On 18.07.2014, TRAI notified the Telecommunication (broadcasting and Cable) Services (Fourth) (Addressable Systems) tariff (Fourth Amendment) Order, 2014 amending the Principal Addressable (Digital) Tariff Order, thereby treating the commercial subscribers on the same footing as ordinary subscribers in addressable systems. On the same day, TRAI also promulgated the Telecommunication (Broadcasting and Cable) Interconnection (Digital Addressable Systems) (Fourth Amendments) Regulations, 2014.

q. Furthermore, the above said definitions were part of the earlier set aside tariff orders as well. Thus, to change the entire nature of definition without any justifiable reason whatsoever, and which reasoning was missing in the explanatory memorandum as well, TRAI had acted in an arbitrary and illegal manner.

r. On 06.08.2014, a representation was filed on behalf of the IBF without prejudice to its rights and contentions requesting TRAI to re-consider and review, as a matter of extreme urgency, the Tariff Orders dated 16.07.2014 and 18.07.2014 as expeditiously as possible.

s. On 14.08.2014, Indian Broadcasting Foundation along with Sony Pictures Networks and one other broadcaster challenged the tariff Orders dated 16.07.2014 and 18.07.2014 before the Hon'ble TDSAT in Appeal No. 7(C) of 2014. The Hon'ble TDSAT issued notice in the Appeal No. 7(C) of 2014 upon the Respondent herein on 21.08.2015. However, no stay was granted on the operation of the Tariff Orders dated 16.07.2014 and 18.07.2014. The Hon'ble TDSAT had further directed that all the agreements executed with the commercial subscribers shall be kept in abeyance subject to the outcome of the Appeal No.7(C) of 2014 but not be terminated.

t. On the same date, writ petition being W.P.(C) No. 5161 of 2014 preferred before the Hon’ble High Court of Delhi by Star India Pvt. Ltd. impugning tariff Orders dated 16.07.2014 and 18.07.2014 and The Telecommunication (Broadcasting and Cable) Interconnection (Digital Addressable Systems) (Fourth Amendment) Regulations, 2014 dated 18.07.2014.

u. TRAI notified the Telecommunication (Broadcasting and Cable) Services (Second) Tariff (Fourteenth Amendment) Order, 2015 on 6.1.2015 amending the principal Non-CAS Tariff Order. Clauses 6 and 7 along with the explanation appended to

Proviso 7 to Clause 3 of the Principal Non CAS Tariff Order was impugned by the Appellants therein by preferring an appropriate application and with the leave of the Hon'ble TDSAT.

v. The Hon'ble TDSAT on 9.3.2015, while setting aside the Tariff Orders dated 16.07.2014, Tariff Order dated 18.07.2014 and Clauses 6 and 7 along with the explanation appended to Proviso 7 to Clause 3 of the Principal Non CAS Tariff Order, observed that, while notifying the Tariff Orders dated 16.07.2014 and 18.07.2014, TRAI has broken away from the past and has reversed the regulatory scheme in treating the entire body of commercial subscribers at par with the home viewer. The Hon'ble TDSAT had also directed TRAI to come out with an interim arrangement within a period of one month from the date of the Order. TRAI was further directed to undergo a fresh exercise TRAI on a completely clean slate. It was observed that TRAI must put aside the earlier debates on the basis of which it has been making amendments in the three principal tariff orders none of which has so far passed judicial scrutiny.

w. On 08.09.2015, TRAI issued The Telecommunication (Broadcasting And Cable) Services (Fourth) (Addressable Systems) Tariff (Fifth Amendment) Order, 2015, whereby the Authority had defined the commercial subscriber to mean and include " *a subscriber who causes the signals of TV channels to be heard or seen by any person for a specific sum of money by such persons"*. While this definition still remains under challenge, the authority has decided to deviate from its historic position and completely do away with the classification and treat commercial subscribers on the same footing as ordinary subscribers as it seems. In the absence of any discussion or deliberation by the Authority on the issue whether there is any requirement of distinction/de-classification between ordinary subscribers and commercial subscribers, and also in light of the judgment dated 09.03.2015, whereby the authority was directed by the Hon'ble TDSAT to conduct a study afresh as to whether commercial subscribers should be treated equally as home viewers for the purpose of broadcasting services tariff or there needs to be a different and separate tariff system for commercial subscribers or some parts of that larger body. However, the Authority after issuing the Tariff Orders dated 08.09.2015, which is also under challenge, has all of a sudden done away with the issue of differential

treatment for commercial subscribers. The Authority at this stage needs to consider the aspect that there are distributors who wish to conduct business only with the commercial subscribers, and hence, in the absence of any specific provision relating to commercial subscribers, the broadcasters will be over burdened and there shall be consequential loss of revenue to the broadcasters.