COMPETITION COMMISSION OF INDIA

Case No. 70 of 2012

<u>In Re:</u>

Prasar Bharati (Broadcasting Corporation of India)
Mandi House, New Delhi - 110001 **Informant**

And

TAM Media Research Private Limited
2nd Floor, Phelps Building
9-A, Connaught Place, New Delhi - 110001 **Opposite Party**

<u>CORAM</u>

Mr. S. L. Bunker
Member

Mr. U. C. Nahta
Member

Mr. M. S. Sahoo
Member

<u>Appearances:</u>

For Prasar Bharati: Advocates Shri Rajeev Sharma and Ms. Radhalakshmi; and Shri S. K. Sinha, Asst. R.O and Shri Gurmail Singh, Associate (AR) of Prasar Bharati.

For TAM Media Research Private Limited: Sr. Advocate Shri Ramji Srinivasan; Advocates Shri Shruti Aji Murali, Shri Rahul Worah, Ms. Kamya Rajagopal, Ms. Kadambari Chinoy and Ms. Sara Sundaram; and Shri Amit Bajpai, Legal Counsel of TAM Media Research Private Limited.

Order

The information in the present matter was filed by Prasar Bharati (Broadcasting Corporation of India) [hereinafter, '**Informant**'] under section 19(1)(a) of the Competition Act, 2002 (hereinafter, the '**Act**') alleging, *inter alia*, contravention of the provisions of section 4 of the Act by TAM Media Research Private Limited (hereinafter, '**OP**'/ '**TAM**')

Information

2 As stated in the information,

2.1 Informant is established under the Prasar Bharati (Broadcasting Corporation of India) Act, 1990. It provides public broadcasting services through Doordarshan which is free to air covering the length and breadth of the country, including rural and remote areas, and can be accessed through an ordinary roof top antenna. OP/ TAM, a joint venture between Nielsen (India) Private Limited and Kantar Market Research, is a company established under the Companies Act, 1956 and provides television audience measurement services.

2.2 OP is the only entity which measures the television viewership in India in form of Television Rating Points (TRP)/ Television Viewership Ratings (TVR) since 2011. To measure viewership, it uses an electronic gadget called 'People Meter' which is connected to each TV set in the select sample households to monitor what is being viewed on the TV set and for how long. It has installed about 8,000 meters, which represent a very narrow statistical base. Further, these are installed in cities with population of more than one lakh. The TRP/ TVR generated by OP, therefore, underestimates the actual viewership of Informant, as it excludes the rural viewership.

2.3 The main source of revenue of broadcasting firms is advertisement. The advertisers place their advertisements on various channels/ programmes based on the TRP/ TVR as measured and reported by OP from time to time. The TRP/ TVR provided by OP, being an underestimate of the viewership of the Informant, puts Informant in a disadvantageous position.

2.4 Non-inclusion of rural areas by OP in television viewership measurement gives an undue advantage to the broadcasters who have programmes for the urban areas only over the broadcasters who have programmes for both rural and urban areas and have a pan India presence. This encourages urban centric programmes and amounts to imposition of discriminatory conditions on those broadcasters who cater to the rural areas also. This limits the market for measuring television viewership as well as the technological and scientific development relating to such services to prejudice of the consumers, broadcasters and a section of advertisers. This conduct of OP is abusive in contravention of the provisions of section 4 of the Act.

Investigation

3 Upon examining the information, the Commission, being of the opinion that there existed a *prima facie* case, directed the Director General (hereinafter, the '**DG**'), *vide* its order dated 05.03.2013 under section 26(1) of the Act, to cause an investigation to be made into the matter. On completion of the investigation, the DG submitted an investigation report in the matter on 19.12.2014 in terms of section 26(3) of the Act, a brief of which is as under:

3.1 The DG has delineated '*market for provision of services for audience measurement for channels and programs on television in India*' as the relevant market. While delineating the relevant product market, the DG has observed that audience measurement of other media platforms like print, radio, internet are not substitutes of audience measurement of TV. Compared to the audience measurement of TV, other audience measures such as IRS (Indian Readership Survey) and TGI (Target Group Index) are tedious, time consuming and do not capture audience viewership on real time basis. Moreover, such methods suffer from limitations like memory bias, truthfulness of the person providing data, completeness of information provided, *etc.* As regards the relevant geographic market, the DG has observed that within India there is no distinction in the conditions relating to supply of this service, including the logistic facilities, local specification requirement and language.

3.2 As per the DG report, in the relevant market as stated above, OP is dominant because it is the only player with 100% market share since 2011, when aMAP, the only competitor of OP, discontinued its operation. Further, during 2009-2013, OP's income from operations increased by 48.81% and its profit after tax increased by 49.3%, which is substantial. OP's JV partners *i.e.,* Nielsen (India) Private Limited and Kantar Market Research are large enterprises in terms of size of operations and resources. OP has link with the WPP Group which is a major advertising agency and has substantial presence in the advertising business in India. Thus, the DG concluded that OP is enjoying a position of strength which enables it to operate independently of the competitive forces prevailing in the relevant market.

3.3 The DG has found that the conduct of TAM in providing TRP/ TVR based on inadequate sample data by excluding rural and semi-urban regions results in imposition of unfair and discriminatory conditions on those broadcasters who have channels and programs focused to rural market as they are not duly compensated by the advertisers. Since the ratings do not reflect the viewers preferences of rural market, it has the consequence of the content produced being urban centric which amounts to imposition of discriminatory condition on those who produce for rural areas as well as denial of market access to them in violation of sections 4(2)(a)(i) and 4(2)(c) of the Act respectively.

Further, the conduct of OP in charging higher annual subscription fees from advertisers and media agencies to provide TV viewership data amounts to imposition of discriminatory price in violation of the provisions of section 4(2)(a)(ii) of the Act. Since OP has been the only user of 'People Meters' in India, this has led to the limiting of technology and scientific development for manufacturing of 'People Meters' amounting to infringement of section 4(2)(b)(ii) of the Act.

Submissions by the Parties

4 The report of the DG was provided to Informant and OP seeking their submissions on the findings of the DG. Informant did not file any written submission. However, the advocates for Informant were heard and it was submitted by them that they were in agreement with the findings of the DG.

5 While disagreeing with the findings of the DG, OP has made written and oral submissions as under:

5.1 The relevant market, as delineated by the DG, is incorrect. The DG not only failed to recognize the substitutability of different media platforms, including the internet and print media, but also the substitutability of television audience measurement services with other forms of media measurement services. The audience measurement services should be seen as a whole as various media platforms are substitutable and from each media platform, broadcasters as well as advertisers require audience measurement data.

5.2 The DG has failed to recognize that the market for television viewership measurement services is a two-sided market. The broadcasters are on the one side of the market and the advertisers/ advertising agencies are on the other side of the market and they are connected by the platform of rating services provided by OP. Since there is no direct network that connects the broadcasters and advertising agencies they do not form a part of a linked network, thereby the benefits that accrue to one side of the market are a 'positive externality' for the other side of the market.

5.3 TAM is not a dominant enterprise in the relevant market. The DG has incorrectly and artificially restricted the pool of its competitors by not considering the entire market for media audience measurement services. The observation of the DG that different methods of audience measurement such as people meters, diary system and survey method are not substitutable is incorrect. The Commission in its order in case no. 13 of 2009 '*MCX Stock Exchange Limited vs. NSE and others'* has observed that *"position of strength' is not some objective attribute that can be measured along a prescribed mathematical index. Rather, what has to be seen is whether a particular player in a relevant market has clear comparative advantages in terms of financial resources, technical capabilities, brand value etc. to be able to do things which would affect its competitors who, in turn, would be unable to or would find it extremely difficult to do so on a sustained basis."*

5.4 It is not a fact that OP was the only entity operating in the relevant market during the period of investigation with 100% market share as other providers of television audience measurement services such as aMAP and Doordarshan (conducted television audience measurement through diary system) had discontinued their operations and players like Broadcast Audience Research Council (BARC) and ESHA (Esha Media Research Ltd.) were yet to start their operations. Further, even though the DG has identified other methods for television audience measurement such as the TGI carried out by IMRB International and IRS carried out by the Media Research Users Council and internal surveys carried out by broadcasters and advertisers, he did not take them into account while calculating the market share of OP.

5.5 The Commission in its order in case no. 24 of 2011 '*Shri Sonam Sharma vs Apple Inc. USA & Ors.*' has recognized that relevant market generally cannot be limited to a single manufacturer's product and, therefore, viewed reasonable substitutability between Apple's iphone and other smart phones. The DG has itself recognized that in India 410 news and current affairs channels and 438 entertainment channels were available as of March, 2013. Further, OP's subscribers include nearly 150 television broadcasters/ channels and its audience measurement services cover only 617 channels which is not representative of the total universe of television content that could be measured. Thus, the DG has failed to appropriately assess actual market share of OP by excluding competing television audience measurement services.

5.6 The DG has failed to acknowledge the impact of BARC as a future competitor and setting up of BARC is an indicator that customers were not entirely dependent on OP. BARC was initially set to become operational in July, 2012 but due to certain delay in collection of information, it finally released its first set of data in April, 2015. The relevant market in this case is a contestable market and at no stage OP has been in a position to act independently of market forces or to the detriment of the customer. Moreover, OP does not have enough resources that give it any advantage over the competitors and it is a small enterprise in comparison to its customers which are large sophisticated conglomerates. The DG has failed to recognize the extensive competitive constraints faced by TAM from the customers.

5.7 It is further submitted that the size of OP's stakeholders is irrelevant to the determination of whether OP itself is a large enterprise or not, as its stakeholders are global companies with operations in a number of countries. OP's income from operations was just Rs 123.75 crore in 2014 as opposed to income of its customers. For instance, the advertising revenue of ZEE was Rs. 4000 crore and the turnover of the Informant was Rs 1192.86 crore in the financial year ending March, 2012. The DG's observation that OP has a significant financial advantages over its competitors as it received loans from various Nielsen entities such as Hindustan Thompson Associates (HAS) need to be seen in the context that these loans were necessary to keep OP afloat and continue its operations.

5.8 The DG has observed that broadcasters and advertisers are dependent on OP's data for negotiations in respect of advertising costs. It has also been stated in the DG report that the broadcasters and advertisers conduct their own internal surveys for audience measurement. It is evident from the depositions of advertisers and advertising agencies that OP forms a part of a larger set of factors considered by them in negotiating the advertising prices.

5.9 The DG is wrong in concluding that there are barriers to entry in the relevant market. The assessment of entry barrier by the DG is extremely cursory as it failed to account for the fact that several players have entered and operated in the relevant market for varying periods including DART, aMAP, MRAS and INTAM. Further, BARC has recently entered the relevant market and is likely to have a greater geographic reach in comparison to OP because it is using state of the art technology and has backing from major industry stakeholders, including IBF, AAAI and ISA. Therefore, OP's historical presence is sufficient for it to act as a barrier to entry is not borne out by facts and current developments in the industry.

5.10 OP has not imposed any unfair and discriminatory condition on any broadcaster or advertiser. The stakeholders and expert groups are aware that OP's data are largely representative of the viewers' preferences of the urban and semi urban population. This is very clearly stated on OP's website and also in every subscription contract entered into between OP and the broadcasters. Further, OP has been expanding viewership measurement into the rural areas to the extent it is financially viable. For instance, it has expanded its geographical reach to semi rural towns in certain states, including Gujarat, Punjab, Haryana. Expansion into rural areas is a heavy investment exercise with significant infrastructural limitations, including irregular/ unreliable power supply and varying cable band width, *etc.* Further, it is clear from the minority opinion held in the Commission's order in case no. 22 of 2010 '*Kapoor Glass vs. Schott Glass India Pvt. Limited*' which the COMPAT later concurred with, unlawful discrimination entails i) dissimilar treatment to equivalent transaction, and ii) harm to competition or likely harm to competition as buyers suffer a competitive disadvantage against each other. OP has not applied different conditions of sale upon broadcasters and advertisers so as to harm competition. There is no discrimination in quality or range of data provided to broadcasters/ advertisers/ advertising agents and they were aware of the limitations associated with data. Further, the question of harm to broadcasters and advertisers does not arise as OP is not a participant in the negotiation between the advertiser and the broadcaster. A number of factors including the cost of content, cost of promotion, and presence of competitive content on the other channels at the same time are taken into account while negotiating the advertising prices.

5.11 As regards the DG's finding that OP provided Raw Level Data (RLD) only to advertisers and not to broadcasters which amounts to imposition of discriminatory condition under section 4(2)(a)(i), OP has submitted that this issue does not fall under the purview of the Act and the DG has failed to adequately explain how this amounts to a contravention under section 4(2) of the Act. The reason why OP does not provide RLD to broadcasters is that media houses could potentially use the disaggregated data to gain knowledge of the specific sample towns and misuse that data to affect the integrity of the ratings as well as invade the privacy of OP's sample households. Advertisers and advertising agencies would not benefit from misusing this data and hence RLD is made available to them. Furthermore, the DG's argument that RLD cannot be misused as it is coded ignores the possibility that broadcasters could break the code.

5.12 OP has not imposed unfair or discriminatory conditions on broadcasters in regard to the price paid for subscription services and the data provided. The broadcasters, advertising agencies and advertisers are distinct groups with distinct functions and cannot be viewed as similarly situated enterprises and, therefore, OP is justified in adopting a differentiated pricing mechanism. The broadcasters are the primary users of the data of OP and they use it for multiple purposes, such as planning program content, program schedules, sponsorship revenue, air promotion, *etc*., whereas advertiser use this data only for the purpose of their negotiations with the broadcasters. Further, different subscription charges from the broadcasters is based on the number of channels in their network, *i.e.*, the subscription charges are higher for larger broadcasters as the information is used across different channels.

5.13 The DG has found that OP's decision on methodology, sample size *etc*. have the potential to generate data which favour subscribers affiliated to its promoters. OP has responded that tampering of information is not possible given the presence of other stakeholders and such tampering would dilute the credibility of OP's data and would result in loss of customer base. As such advertising agencies do not have an incentive to manipulate data in favour of any particular channel.

5.14 OP is not foreclosing the market to developers of regional content or broadcasters who broadcast regional content through the provision of its services. Since it is not a dominant player in the relevant market, the question of denial of market access does not arise. The technical specifications relied on by the DG to compare bar-o-meters and 'People Meter' are not accurate. Further, OP's dealings with its parent companies are on an arms' length basis and its decision to procure 'People Meter' from Nielsen was determined on grounds of technical requirements, quality and technological developments.

<u>Issues and Analysis</u>

6 The Commission has perused the material available on record, besides hearing the counsel appearing for Informant and OP. The following issues need to be determined:

a. Is OP in a dominant position?
b. Is OP imposing unfair or discriminatory condition in supply of its services in violation of section 4(2)(a)(i) of the Act?

c. Is OP imposing unfair or discriminatory price in sale of its services in violation of section 4(2)(a)(ii) of the Act?

d. Is OP limiting or restricting technical or scientific development relating to its services to the prejudice of its customers?

7 As regards dominance of OP,

7.1 The Commission notes that the DG has delineated the relevant market in the instant case as the 'market for provision of services for audience measurement for channels and programs on television in India'. There exists no substitutability amongst various media platforms such as print, radio, television and internet so far as placing of advertisement by broadcasters is concerned. The format and technical specifications of the advertisements placed on different media are not uniform and these platforms have different physical characteristics and the cost of advertising. The DG has reported that even though the content produced by a content provider can be broadcast on more than one media platform, it does not imply that there exists substitution across different media platforms as each media offers unique possibilities of reaching the target audience and comes with its own set of limitations due to reach, scale, expenses and population. The DG reported that the format and technical specifications of the advertisements placed on different media are not uniform and hence various media platforms are not substitutable. The DG has analysed the demand side substitutability of the television audience measurement services offered by OP with other audience measurement services. The survey methods like IRS and TGI do not capture TV audience viewership on real time basis and are manual, tedious and time consuming and also suffer from certain limitations. With regard to the relevant geographic market, the DG has reported that the whole of India is the relevant geographic market in this case as the sample households are in India and viewership captured is of channels broadcasted in India.

7.2 OP has objected to the relevant market definition provided by the DG. It has contended that the audience measurement services like people meters, diary system and various survey mechanisms should be seen as a whole as various media platforms are substitutable. Further, the market for television viewership measurement services is a two-sided market.

7.3 The Commission observes that in order to delineate relevant market in the instant case, it is necessary to determine whether there exists substitutability between different media platforms including TV, internet, print media and radio. It is observed that in India, internet penetration is limited leading to significantly lower coverage by this platform in comparison to television which has a pan India presence. Online websites like YouTube give an option to skip the advertisement to play the main video unlike on TV where the viewer would need to skip the channel to avoid the advertisement. With regard to Radio, the Commission notes that it has no visual component unlike TV which has both visual and audio components to reach the audience. In regard to print media, it is observed that it is an important media platform but its impact and reach is restricted on account of low level of literacy in the country. Further, in terms of physical characteristics, target audience, reach and cost of advertising television as a media platform for advertisement differs from other media platforms. Thus, in agreement with the DG's assessment, the Commission is of the view that television as a media platform forms a separate relevant product market.

7.4 On substitutability between the television measurement services offered by OP using 'People Meters' and other television audience measurement services including diary system and survey method, the DG concluded that they are not substitutable. The DG has also gathered that survey methods including TGI and IRS are not substitutable with audience measurement using 'People Meters' because of differences in methodology. On whether OP operates in a multi-sided market, it is observed by the DG that advertisers and broadcasters are consumers of OP's audience measurement service and hence belong to the same side of the market. Further, OP does not provide a platform for intermediation between the broadcasters and advertisers; rather, it provides a key parameter used by these parties in their negotiations on advertisement spending and advertisement placements. The Commission endorses these findings of the DG.

7.5 The DG has delineated the relevant geographic market in this case as India. It is observed from the DG report that the sample households used for television audience measurement are located across India and the viewership captured is of channels broadcasted pan India. Within India, there are no distinctions in the conditions relating to supply of this service, including any logistic facilities, local specification requirement and language. The Commission is of the view that the DG has defined the relevant geographic market in this case appropriately and there is no reason to deviate from the relevant geographic market definition provided by the DG. Thus, the Commission is in concurrence with the findings of the DG that relevant market in the present case may be considered as *'audience measurement for channels and programmes on television in India'*.

7.6 The Commission shall now proceed to assess the dominance of OP in the relevant market. It is noted that under explanation (a) to section 4 of the Act, 'dominant position' means a position of strength enjoyed by an enterprise in the relevant market in India which enables it to operate independently of competitive forces prevailing in the relevant market, or to affect its competitors or consumers or the relevant market in its favour. The DG has reported that OP has 100% market share since August, 2011 as it is the only entity providing the services of audience measurement for channels and programmes on television in India. Further, the DG has noted that the parent companies of OP, *i.e.*, Nielson (India) Pvt. Ltd. and Kantar Market Research are huge in terms of size and operations. Nielson has presence in over 100 countries and it is a leading global information and measurement company while Kantar is the data investment management of WPP group. WPP group is stated to be world's largest communication services group having its offices in over 110 countries and has over 50 affiliated companies in India. It is also gathered from the DG report that there is linkage of OP with WPP group which owns major advertising agencies and has substantial presence in the advertising business in India which confers OP with inherent advantage over other players in the market. The DG has stated that various stakeholders are dependent on OP's data in their decision making process. The DG has pointed out that for television audience measurement there are certain technical expertise required to handle the complexities involved in capturing the viewership and also it requires high cost as 'People Meters' needs to be installed across the country. Therefore, these two factors act as entry barrier for new entrants in the market. In view of the above, it was opined that OP has a dominant position in the relevant market as defined above.

7.7 OP, on the contrary, disagrees with the finding of the DG that it is in a dominant position in the said relevant market. It has contended that the DG has incorrectly restricted its competitors by not considering the relevant product market as the entire market for media audience measurement services. The DG has excluded other competing television audience measurement services that could fall within the relevant market. It also contested that the impact of BARC as a future competitor should have been assessed by the DG. Further, OP has contended that the size of OP's stakeholders has no relevance in determining its position in the market. Also, it has argued that OP's data is not the only factor relied upon by the advertisers and broadcasters in negotiating the advertising prices. It is also contested that assessment of entry barrier by the DG is extremely cursory as it fails to account for the fact that several players have entered and operated in the relevant market for varying periods, including DART, aMAP, MRAS and INTAM.

7.8 It may be noted that in order to determine dominance of an enterprise in a relevant market, the Commission requires to give due regard to all or any of the factors enumerated under section 19(4) of the Act, namely, market share of the enterprise; size and resources of the enterprise; size and importance of the competitors; economic power of the enterprise including commercial advantages over competitors; vertical integration of the enterprises or sale or service network of such enterprises; dependence of consumers on the enterprise; monopoly or dominant position whether acquired as a result of any statute or by virtue of being a Government company or a public sector undertaking or otherwise; entry barriers including barriers such as regulatory barriers, financial risk, high capital cost of entry, marketing entry barriers, technical entry barriers, economies of scale, high cost of substitutable goods or service for consumers; countervailing buying power; market structure and size of market; social obligations and social costs; relative advantage, by way of the contribution to the economic development, by the enterprise enjoying a dominant position having or likely to have an appreciable adverse effect on competition; and any other factor which the Commission may consider relevant for the inquiry.

7.9 Considering factors such as market share of OP, its size and resources, dependence of consumers, *etc*., the DG has reported that OP is dominant in the relevant market as defined *supra*. From the DG report, it is observed that there is no competitor of OP in the relevant market. It is noted that Doordarshan's television audience measurement data using diary system operates on different mode and the same is not substitutable with 'People Meter'. Moreover, such data is only for internal consumption of Doordarshan. The Commission further observes that the methodology involved in other existing surveys like IRS and TGI differ from OP's methodology and, therefore, cannot be included in the same product market. These factors itself indicate that OP is the only player in the relevant market. Further, the Commission is of the opinion that the argument of OP on future competitor's impact assessment does not hold any ground. An assessment of non-participant and also an uncertain operation in future has no relevance in determining the dominance of an existing enterprise. Therefore, the Commission is in agreement with the DG's finding that OP holds 100% market share in the relevant market since August, 2011, indicating market power of OP in the relevant market.

7.10 The Commission notes that there is dependence of both broadcasters and advertisers on the data provided by OP as it plays a crucial role in the decision making process for them. It is also admitted by OP that it is a part of a larger set of factors considered by the stakeholders in negotiating advertising prices. Furthermore, the dependence of consumer is evident from the fact that neither the broadcaster nor advertisers have any option to switch over to another player in the market for similar kind of services. This fact is also indicative of a weak countervailing buying power and the power of the enterprise to affect the ability of the consumer to effectively compete on the downstream market.

7.11 As regard the issue of entry barrier, the Commission is of the opinion that the DG is correct in concluding that the technical and capital requirements in installing and measuring the device 'People Meter' in each sample household across the country may prove to be difficult for new players wanting to enter the market. It may be noted that since OP has no competitor in the market, the analysis on commercial advantage over other players as enumerated by the DG in the report has no significance in assessing the dominance. However, the Commission is of the opinion that the concept of network effects is applicable in this case. Network effect means that a product/ service become valuable with the increase of the number of users. Therefore, this may act as entry barrier for new players because of OP's long standing association with the advertising industry for the past two decades and the number of subscriptions it has all over the country. Moreover, OP's parent companies, Nielson and Kantar apart from being the financial strength of OP, have the access to key inputs, skills, knowledge, technology, *etc.* which a new entrant may not have. This level of advantage which OP has in the market may also act as a barrier or difficulty for new competitors to effectively compete on par with OP.

7.12 In view of the above forgoing, the Commission is of the view that OP has the strength to operate independent of competitive forces prevailing and has the ability to impede or influence effective competition in the relevant market. Therefore, in consonance with the findings of the DG, the Commission holds the view that OP is in a dominant position in the market in the provision of services for audience measurement for channels and programmes on television in India.

8 The next issue is whether OP has imposed unfair or discriminatory condition in sale of its services by not factoring in rural viewership into its measurement. On this issue,

8.1 The DG has reported that there were a total of 1675 'People Meters' in 1998 across different states. This rose to 9602 in 2013, covering 8887 sample households. Considering the television owning population in India, the sample size OP is less than 0.005%, which is miniscule and constitutes a very narrow statistical base. The DG has observed that OP has not installed 'People Meters' in 13 states and Union Territories and its existing sample covers only 40% of urban and rural television owning population. The DG has also conducted a cross country comparison of sample size used for television audience measurement as a percentage of TV households in each nation and found that internationally the sample size falls in the range of 0.016% to 0.059% of the number of TV households in comparison to the Indian case which is glaringly low at 0.005%.

8.2 It is observed in the DG report that several broadcasters including Star India, NDTV India and Indian Broadcasting Foundation (IBF) and advertising agencies such as Madison, Asian Paints and Hindustan Unilever have stated that the sample size of OP was inadequate. The DG has also referred to the various expert group reports which have analyzed television viewership measurement in India from time to time including the 67th Report 'Television Audience Measurement in India' of the Standing Committee on Information Technology, 'Recommendations and Operational Issues for Television Audience Measurement/ Television Rating Points' (2008) by TRAI, Amit Mitra Committee Report (2010) and Policy Guidelines for Television Rating

Agencies in India (2014) by Ministry of Information and Broadcasting. They have observed that the sample size used by OP is inadequate and is non-representative of the television viewing population of India.

8.3 The DG has noted that rural areas are not covered by OP in measuring television viewership even though the agreement (through which OP was established in 1997) signed between Joint Industry Body (an autonomous governing council set up under the aegis of the Advertising Agencies Association of India) for TV audience measurement and the joint venture between Nielsen Private Limited and Kantar Market Research envisaged coverage of rural areas. The aforementioned agreement included an initial roadmap to attain full national coverage including expansion into rural areas in a phased manner but, the same was not implemented on account of financial constraints faced by OP, high cost of 'People Meters', unreliable power supply and high infrastructure cost in rural areas.

8.4 The DG has examined the data on cost of 'People Meter' to analyze the OP's contention that high cost of 'People Meter' was a significant reason for non-expansion into the rural areas. The suppliers of 'People Meter' are directly or indirectly linked to OP through its shareholding company. For instance, since 2009, OP has been purchasing 'People Meters' from Nielsen TV Audience Measurement S.A, which is a group company of one of the OP's promoters *i.e.* Nielsen India Pvt. Ltd. This company sources 'People Meters' from a third party manufacturer. The DG drew a comparison between the per unit prices paid by OP to Nielsen TV Audience Measurement S. A. and the per unit price paid by OP for procuring similar components from local vendors/ suppliers. It is observed that Nielsen was charging a significantly high margin from OP. The DG looked into the available alternatives to 'People Meter' procured by the OP and found that there existed another supplier called GFK Manufacturing, but OP preferred to procure from Nielsen. Further, BARC and ESHA, the two potential entrants in the relevant market, gave an estimate for the expected cost of 'People Meters' which ranged between Rs.10,000 to

Rs.30,000 per annum which is significantly lower than OP's cost of Rs.75000 to Rs.150000 per annum. This indicates that cheaper options were available in the market which OP did not avail. Accordingly, the DG found that the OP's conduct is anti-competitive as it adversely affects technical and scientific development for manufacturing of cheaper 'People Meters' in violation of section 4(2)(b)(ii) of the Act.

8.5 The DG has reported that as a consequence of non inclusion of rural areas, the data published by OP does not reflect the television viewers' choice in the relevant market. In such a scenario, broadcasters like Doordarshan which cater to the viewers living in the rural areas are placed in a disadvantaged position. The DG concluded that such conduct of OP is in contravention of section 4(2)(a)(i). The DG has stated that TRP generated by OP is the basic measure of popularity of a program of a broadcaster and assists advertisers in determining their advertisement spending and advertisement placement as well as serves as a common parameter for negotiation between broadcasters and advertisers. Non reflection and consequential non monetization of viewership pattern of rural market discourages broadcasters from airing programs targeted at rural viewers and thus imposes a discriminatory condition on the content provider focusing on programs in rural market and also results in denial of market access to such producers. This conduct amounts to denial of market access in violation of section 4(2)(c) of the Act.

8.6 *Per Contra*, OP has submitted that it has not abused its dominant position by indulging in conducts which are prohibited under section 4(2) of the Act. It has not imposed any condition on broadcasters or advertiser and all the broadcasters and advertisers are aware that its data is largely representative of the viewing preferences of urban and semi urban areas as well as its methodology and limitations. Further, inadequacy of coverage can constitute a flaw in the data provided and can amount to a deficiency in service but it does not constitute a competition concern. OP has contended that it can never involve in the negotiations between the advertisers and broadcasters for determining the cost and price of advertising slots and, therefore, it cannot impose a discriminatory and unfair condition on the broadcasters of certain type of content. Further, advertisers, broadcasters and advertising agencies are free to use alternate sources of television measurement data, if and when available.

8.7 OP has contended that the reason for its slow ingress into the rural market is based on practical considerations relating to current capacity, commercial means, need for large investment and infrastructure limitations. It is undertaking discussions with local 'People Meter' developers in order to make more cost effective expansion into rural areas. It has not denied market to developers of regional content. As regards contention that OP was procuring 'People Meter' from its shareholding company at a significantly higher price in presence of other cheaper local alternatives, OP has submitted that its dealing with its parent company are on an arms' length basis and its decision to procure from Nielsen is determined by quality, technical requirements and technological developments. Further, the basic premise for denying market access under section 4(2)(c) of the Act is that enterprise denying market access and the enterprise to whom market access is denied are competitors. This is not the situation in the instant matter as OP and broadcasters are not competitors.

8.8 As regards non-coverage of viewership in rural areas in measurement of audience viewership, the Commission notes that OP has clearly disclosed to its stakeholders and has also stated on its website as well in every subscription contract entered between OP and the advertisers / broadcasters that its data is largely representative of viewing preferences of the urban and semi-urban population. Hence, no unfair and discriminatory condition was imposed on any subscriber as all the subscribers to OP's data were well aware of the methodology used by the OP and its limitations. Further, the Commission notes that there is no contract that mandates/ obligates OP to enter into the rural area. The Commission is in agreement with the contention of OP that it is not involved in the negotiations between advertisers and broadcasters and its data only serves as a key parameter in determining the cost and price of advertising slots. Therefore, the Commission is of the view that OP is not imposing any discriminatory or unfair condition on broadcasters.

9 The next issue is whether OP is imposing unfair or discriminatory prices by on sale of its services to different categories of users. In this regard,

9.1 The DG has reported that OP is providing undue benefits to some advertising agencies and advertisers by providing access of RLD, while the same is not provided to broadcasters. He has analyzed the subscription rate cards of OP used by broadcasters, advertising agencies and advertisers and gathered that the charges were different for all. Further, broadcasters paid higher price even if they were taking the same services from OP as compared to advertisers and advertising agencies. The DG is of the opinion that this amounts to discriminatory behavior as it was biased in favor of the advertisers.

9.2 OP has explained that the reason of not providing RLD to broadcasters is to protect the integrity and accuracy of its sample base and its data. RLD is a disaggregated detailed viewing log, and if it disclosed to the broadcasters, it could reveal the specific towns in which OP's sample homes are present. In such a situation, broadcasters may influence the viewers in such sample homes to watch their channels. As such, due to a broadcaster's influence, channels which may not be actually popular would be reflected as having higher TRPs and thereby mislead advertisers and advertising agencies to increase their advertising revenues.

9.3 OP has stated that for an enterprise to be found guilty of violation of section 4(2)(a)(ii) of the Act, it is necessary that the enterprises upon which the condition is imposed are similarly placed. That the broadcasters, advertising agencies and advertisers are inherently differently situated enterprises operating in different markets with distinct functions. In such a scenario, OP is justified in adopting a differentiated pricing mechanism. It is also contended that if the subscription charges from the advertising agencies/ advertisers and the broadcasters were same, then the advertising agencies / advertisers would not be able to subscribe the data as the cost would be disproportionately high. Similarly, if OP were to charge the broadcaster the same rates as that of the advertising agencies/ advertisers, it would no longer remain profitable to conduct its operations. Thus, OP submits that the differential charges were objectively justified and does not amount to infringement of section 4(2)(a)(ii).

9.4 The Commission notes that Informant is a public broadcaster and is the only television broadcaster in the country providing terrestrial transmission services. In order to evaluate its reach and viewership, it entered into agreement with OP so as to have access to data of viewership in the form of TRP/ TVR. The data are used for measuring and comparing program popularity, understanding viewer preference, making effective business decisions such as evaluating return on investment, changing content and programming policy, launching of new channels, *etc*. Advertisers and advertising agencies on the other hand use the data generated by OP for deciding ad spend and ad placement on various channels and programmes on television, media planning, evaluating return on investment, campaign management and monitoring, *etc*. A substantial advertising business on behalf of advertisers is undertaken by the advertising agencies including interaction and negotiations with broadcasters for purchase of air time. Therefore, the only point of intersection between the two, *i.e.*, broadcaster and advertising agencies/ advertisers is that OP's data acts as a key parameter for negotiations between them for arriving at the rate for advertisement slot on television. OP's data is also used for several other purposes as per their requirements or business strategies. The functions and business of broadcaster and advertising agencies/ advertisers, their use of OP's data for their respective operations, the technicality involved, valuations, *etc.* are on different footings on several counts. Therefore, the Commission is in agreement with OP's contention on this aspect that broadcaster and advertising agencies/ advertisers are not similarly placed subscribers of OP. It may also be noted that since they are differently situated, the DG's conclusion that charging higher subscription rate on broadcasters was discriminatory does not hold any ground.

9.5 It may be noted that a dominant enterprise can charge different price for a particular service where the operation and use of the same are in different market conditions. In the instant case, apart from one intersection, the use of OP's data by the broadcaster and advertising agencies/ advertisers is for different purposes and, therefore, their transactions cannot be considered comparable. The Commission finds merit in the contention of OP that broadcasters and advertising agencies/ advertisers operate in distinct markets and have distinct functions, and, therefore, cannot be viewed as similarly situated enterprises or entities. In view of this, the Commission is of the opinion that the explanation offered by OP for setting a higher price for broadcasters than for advertisers or advertising agencies appears plausible since the transactions negotiated between OP and broadcasters are distinct and individually negotiated and thus, are offered to dissimilar and distinct group of consumers.

9.6 The Commission also finds force in the argument put forth by OP that if same rates are offered to differently placed consumers, *i.e.*, the broadcasters and advertisers/ advertising agencies; it would lose its subscribers and it would no longer remain profitable to conduct its business. Further, with regard to non-supply of RLD by OP to the broadcasters, the Commission is of the view that the possibility of tampering of information may result in skewed view in favour of the broadcaster's programme(s) thereby impeding effective competition in the market. Therefore, the justification offered by OP in this regard appears to be a valid one. In view of the above, the Commission is of the opinion that no case of imposition of unfair or discriminatory price is made out against OP.

10 The next issue is whether OP is limiting scientific and technical development? In this regard, the DG has observed that OP is procuring expensive 'People Meters' from the group company of one of it promoters. The Commission is of the view that the OP can choose to procure the said device from any supplier which meets its criteria. Therefore, the justification provided by OP for procuring the said device from its own promoters because of the superior quality and competitive price appears to be tenable. Therefore, the OP is not limiting scientific and technical development in manufacturing of 'People Meters' and hence no competition concern arises in this aspect.

11 In view of the above, the matter relating to this information is disposed of accordingly and the proceedings are closed forthwith.

12 The Secretary is directed to inform the parties accordingly.

Sd/-
(S. L. Bunker)
Member

Sd/-
(U. C. Nahta)
Member

Sd/-
(M. S. Sahoo)
Member

New Delhi

Date: 25.02.2016