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NEWS NETWORK

25th April, 2016

To,

Advisor (B&CS)
Telecom Regulatory Authority of India,
Mahanagar Doorsanchar Bhawan,
Jawahar Lal Nehru Marg,
Old Minto Road,
New Delhi – 110 002

Dear Sir,

Re: Submissions to Telecom Regulatory Authority of India ("TRAI") in response to the Consultation on the Register of Interconnection Agreements (Broadcasting and Cable Services) Regulations, 2016

At the outset, we would like to thank the Authority for giving us an opportunity to tender our views on the "Register of Interconnection Agreements (Broadcasting and Cable Services) Regulations, 2016".

In regard to the present consultation process, we submit that we have perused the **Register of Interconnection Agreements (Broadcasting and Cable Services) Regulations, 2016** carefully. We hereby submit our comments attached as Annexure. The said comments are submitted without prejudice to our rights and contentions, including but not limited to our right to appeal and/ or any such legal recourse or remedy available under the law.

The same are for your kind perusal and consideration.

Yours Sincerely,

Kishan Singh Rawat
Head – Admin and Regulatory Afairs

Encl: As above

Advisor (B&CS-II)
Dy. No. 196
Date 28/4/16

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BY HAND/ELECTRONIC MAIL

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Re: Submissions to Telecom Regulatory Authority of India ("TRAI") in response to the Consultation on the Register of Interconnection Agreements (Broadcasting and Cable Services) Regulations, 2016

Kind Attention:

Advisor (B&CS)

Telecom Regulatory Authority of India,

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INTRODUCTION

Since the post-liberalization era propelled India onto the path of economic growth, the policymakers have reflected a new thinking that service providers should not be limited by simulated and now aged authoritarian categories, but must be legitimized to compete in a healthy marketplace that includes many varied partakers. It is important to understand the

method in which the Reference Interconnect Offer ("RIO") theory found its way into the Indian regulatory scene. The concept of RIO may be traced to a document entitled "Trends in Telecommunication Reform; 2000-2001: Interconnection and Regulation" published by the International Telecommunication Union. Chapter 3 of the said report considered the relative merits of ex ante Regulation (sectoral regulation) versus ex post Regulation (general competition law). The report referred to a WTO Reference Paper which stated that transparency, non-discrimination, timeliness and anti-competitive safeguards are the cornerstone of interconnection rules.

Since its inception in 2004, The Register of Interconnect Agreements (Broadcasting and Cable Services Regulation) has been an important tool for prescription of modalities for the maintenance of the RIOs for broadcasting and cable services. Since then, the TRAI has been proactive in ensuring amendments in the said regulations take place from time to time in light of the changing dynamics of the telecommunications industry. From 2004, when broadcasting and cable services came under the purview of TRAI, to 2016 when TRAI has released this Consultation Paper market dynamics have changed significantly. The regulatory regime of the Indian Telecom Market maybe briefly understood by stating how the market is already regulated through the following:

Telecommunications (Broadcasting and Cable Services) Interconnection Regulations-

- These Regulations fix tariffs for television channels, lay framework for arrangements between broadcasters and cable network providers/DTH service providers etc. and regulates revenue sharing arrangement between them

Telecom Regulatory Authority of India ("TRAI")-

- Regulates, among other things, tariffs payable by subscribers of television channels and service providers in broadcasting sector
- Functions are diverse - recommendatory (in respect of licensing), mandatory (fixation of tariffs) and judicial (disputes arising under Regulations between parties or against TRAI, heard by the Telecom Disputes Settlement and Appellate Tribunal)

In light of the above submissions, it is clear that the main purpose of both regulations and intervention by the Regulatory Tribunal is to ensure a non-discriminatory regime. Even the Broadcasters have fairly acknowledged that non-discrimination must be enforced, but have caveated that by submitting that it must be on a case-to-case basis. A mandate requiring the Broadcaster to publish sensitive contractual information will however ensure that the offer will

be in public domain thereby tying the hands of the Broadcasting with respect to offers made to distributors. The pertinent question is that can any regulation take away the negotiating power of the Broadcaster with other operators, thereby placing them on the back-foot even before a deal is initiated be labelled as non-discriminatory?

What is required at this point is that the Authorities take note of the dramatic transformation in the Pay-TV industry over the past few years and determine whether continued regulation is even warranted with respect to the confidential contractual terms and conditions between the parties. As per the current market situation, it is relevant to note that the objective of the Register of Interconnection will be defeated if the agreements are not documented in the most efficient possible way for all stakeholders from Broadcasters to Distributers.

We have attempted to put together a preliminary submission on the various questions posed in the paper which by no means is indicative of our final position in the matter.

QUERY-WISE SUBMISSIONS

Q1.Why all information including commercial portion of register should not be made accessible to any interested stakeholders?

The Info-Communications Development Authority ("IDA") of Singapore has created a high standard in regulating the affairs of the Broadcasting Sector and has been aligning interests of public as well as market successfully. It provides that market forces are generally far more effective than regulation in promoting consumer welfare and those markets are most likely to provide consumers with a wide choice of services at just and reasonable prices. Therefore, to the extent that markets or market segments are competitive, the Authority will place primary reliance on private negotiations and industry self-regulation, subject to minimum requirements designed to protect consumers and prevent anti-competitive conduct. The Code also provides that to the extent that a given market is not yet competitive, significant ex ante regulatory intervention is likely to remain necessary. In regard to publishing information, the Licensee as per the Regulation[1] 3.2.2 is mandated to publish its standard RIO with standard tariffs, terms and conditions but there is no mandate to post sensitive contractual information. However, the Authority may, on its own motion or at the request of either of the Licensees, withhold from publication any portion of an Interconnection Agreement if the Authority determines that it contains proprietary or commercially sensitive information. This policy is killing two birds with

[1] https://www.ida.gov.sg/~/media/Files/PCDG/Practice%20Guidelines/TCC/TCC2012.pdf

one stone i.e. ensuring healthy competition between parties while securing the interests of the parties.

In light of this well rounded policy we head back to the concerned issue in the relevant market of India where the Broadcasting industry is at a nascent stage. As laid down by various market experts on the subject, an upcoming market in developing stage is in essence Darwinian in nature and ensures the survival of those players who can survive cut-throat competition. Implementation of any stringent regulations in reference to the market dealings such as publication of sensitive contractual information in such a market will deter the effective competition bearing a direct consequence on the quality of services which will be hampered to a great extent. The above stated consequence will follow given the mutually negotiated contract with its specific terms and conditions tailored to meet the needs of a particular agreement and party is like the trade secret for any of the players of the sector. Such information in public domain would mean every Distributor would want the same terms by quoting the regulation and terms from the published deal. In effect, this would lead to bad deals as the efficiency principle will be compromised for parity, that too with respect to entities with a difference in level of offering.

Currently, the parties of the Interconnect Agreement i.e. the Broadcasters, MSOs, LCOs, and other parties like DTH , HITS etc. have to adhere to the rules keeping in mind the standard agreement with scope for mutually negotiable points of agreement between the concerned parties. In consideration of the recent market trends and policies, kindly consider our following submissions in regard to the said question-

1. The commercial interest and the goodwill of the parties to the Interconnect Agreements can be protected under the ambit of "Freedom of Contract" which clearly states that it emanates from "free will" and the parties should be "Consensus ad idem" i.e. the parties should agree upon the same thing in the same sense. The Freedom of contract also includes that both the parties are in a state of negotiating the terms and conditions freely. In reference to the RIO, it is signed only when both the parties mutually and freely discuss the terms and conditions of the agreement post correspondence of their interest.
2. If the above stated sensitive contractual information pertaining to such agreements is made accessible, it will be a clear violation of the rights provided under Article 19 (1) (g) of the Indian Constitution, i.e. Freedom to Trade and Commerce. The Interconnect Agreements are made keeping in mind all the relevant compliances and provisions and interest of both the signing parties. Publishing sensitive contractual information

pertaining to such agreements will not only create more cause of disputes between the parties but also delay the functioning of day to day business due to the same.

3. Requesting the non-accessibility of the sensitive contractual information can also be read with the section 3 and 4 of The Competition Act, 2002. The agreements signed between the parties are neither promoting negative competition nor affecting the fair-competition of the market, because these exclusive agreements do not entail any such activities like determination of sale or purchase price, promoting big rigging or collusive rigging or putting any limit on any market functioning. While countering discriminatory practises by dominant players is essential, it is very important to first determine whether the party is in a "dominant position" in the first place so as to abuse its position. In case the same is determined, the authority can intervene.
4. Disclosing the crucial contractual portion of the Interconnection Agreements may infringe the confidentiality or non disclosure provisions of the agreements and affect the legal rights and interests of the contracting parties. A great degree of transparency can be achieved by publication of RIO and tariff information even without disclosing sensitive commercial information exclusive to the interests of the parties.
5. Thus, a viable solution for disclosure of information is ensuring that the Broadcaster publishes a standardized Interconnection Agreement with tariffs in public domain without disclosure of contractual information specific to the interests of the parties. Such sensitive information may be recorded in the confidential portion of the register as provided for in Rule 5 of the draft rules published by the Authority.
6. A provision may be made allowing the parties to contract to approach the Authority to hold back certain sensitive information in respect of the Interconnection Agreement thereby ensuring confidentiality of such information in the interest of the parties.
7. The TRAI (Access to Information) Regulations may be strengthened and given precedence to in cases where Distributors seek contractual information regarding contracts made by other parties and such information dissemination may be considered on case-by-case basis by the Authority post due consultation with the concerned parties.

Q2. If the commercial information is to be made accessible:

(a) In which way, out of the three ways discussed above or any other way, the commercial information should be made accessible to fulfil the objective of non-discrimination?

We would like to reiterate from our 1st answer that disclosing tariff information may be made mandatory but disclosing other sensitive information regarding contracts will not ensure competition and in fact deter it. Given the diverse nature of the Indian markets, Broadcasters have to endure cut throat competition to stay in the market. In such a scenario, the dominant player who causes discriminatory practises maybe pulled up by the Regulator and the Competition Commission of India ("CCI") who are there to play the role of *Parens Patriae*.

Having thus identified disclosure of commercial terms of every RIO entered into by the broadcaster as basic for enforcement of the non-discriminatory clause, a reference to the Access Regulations framed by TRAI is necessary. That set of Regulation has its own procedure and must receive its own interpretation by TRAI. Any seeker of channels demanding from the broadcaster disclosure of the commercial terms of the broadcaster's agreements with other distributors must approach TRAI and it would then be for TRAI post due consultation with the concerned parties to decide the dispute on an interpretation of the provisions of the Access Regulations.

Thus, the ideal way out would be to make it mandatory for Broadcasters to publish their standard RIO without disclosing sensitive contractual information which is a global norm followed in successful international market.

(b) Should it be accessible only to the service providers, general public or both?

The Regulatory authority is established with the clear motive to protect and promote the interest of the ultimate consumers and to ensure orderly and positive growth of the broadcasting sector. The authority in order fulfil the purpose of establishment has already framed a number of regulations and policies and the broadcasting sector is under incessant surveillance. Owing to the unique nature of agreements between broadcasters and operators with varying subscriber base catering to different regions, if a negotiating operator insists on quoting provisions from a standard agreement and rejects new proposals by the counter-party on the basis of discrepancies not relevant to their agreement, the negotiation will not only be delayed but also fail eventually giving rise to unnecessary Litigation. With interconnection agreements fully published in the public domain, it will not be possible for both contracting parties to commercially negotiate on terms and conditions unique to a particular operator or market.

(c) Should any condition be imposed on the information seeker to protect the commercial interests of the service providers?

It is reiterated that the confidential terms and conditions detailed between two service providers should not be made accessible to third parties and / or in public domain.

Q3. If the commercial information is not made accessible to stakeholders, then in what form the provisions under clause (vii) and (viii) of Section 11 (1) (b) of TRAI Act be implemented in broadcasting and cable sector so that the objective of non-discrimination is also met simultaneously?

In order to comply with the objective of 'non-discrimination' and provision under clause (vii) and (viii) of Section 11(1) (b) of TRAI Act, 1997, the RIO with standard tariffs detailing ala carte and bouquet rates of channels may be published. The stated information will meet the objective of section 11 (1) (b) and 'non-discrimination' will be simultaneously taken care of.

If such information is provided, it will also reduce the chances of allegations of 'non-discrimination' because the base information of the Interconnect Agreement is shared with the authority and public domain. The Broadcasters are also the players of the industry and have to face constant struggle in order survive and maintain themselves in the dynamics of the market and cut-throat competition. If sensitive contractual information of the service providers is made available in the public domain and standardized, this will automatically have an adverse effect on the revenues and prejudice the interest of the service providers. In fact, if there is a mandate on Broadcasters to publish sensitive contractual information in the public domain, they will be the subjects of discrimination as their negotiating power will be taken away thereby affecting the entire market adversely.

Unfairness and discrimination will not result merely because of the absence of benchmark or making the interconnection agreements public under the careful watch and guiding hand of the TRAI. Under the current regulatory framework, there are already safeguards detailed by the Authority. The presence of RIO with a variable clause for negotiation can take care of the current and future needs and objectives of the Government and industry.

Q4. Please provide suggestions on regulation 5 of the draft regulations regarding periodicity, authentication etc.

The periodicity of reporting the information can be done on either on half-yearly or quarterly basis. The periodicity of reporting the information should be in such a manner as it may remain appropriate for the both authority and the service providers. The timeline to provide the relevant information the authority should be based on two principles that are:

1. If the authority is introducing any amendments or new policies and regulations, there must be a mechanism for easy incorporation of such amendments by the Service Providers in their Interconnect Agreements, thereby increasing the degree of relevancy of the agreements making the process of scrutiny and supervision more efficient.
2. We reiterate the position of TRAI in respect of the second portion of regulation 5 stating the submission of the authenticated report i.e. in order to authenticate the submission of information in reference to an Interconnect Agreement, the company, the partnership firm or an individual firm shall provide a certificate digitally signed by the authorized person.

Q.5-6. Please provide comments on how to ensure that service providers report accurate details in compliance of regulations and digitally signed method of reporting the information.

We reiterate TRAI's position in the following answer as mentioned in the draft. In order to achieve accuracy and accountability, the information required can be submitted in the electronic form. The advantages of the submission of information in the electronic form are:

1. The voluminous paper work is shifted into the compact method of soft copies.
2. The designed electronic system will require only necessary and to the point information regarding relevant aspect and thus reducing duplicity and filling of unnecessary information.

Q.7. Please provide suggestions on regulation 6 of draft regulations and also the formats given in schedules? Stakeholders can also suggest modified format for reporting to make it simple and easy to file.

In respect of Non-DAS agreements the subscriber base is nearly impossible to determine owing to the massive problem of under declaration, thereby rendering entry of Column 6 redundant. In respect of DAS agreements, we reiterate the TRAI's position of the necessity to post RIO with details of tariffs but we would suggest a modification in the form excluding sensitive contractual information of contracts between the parties for the reasons mentioned above.

CONCLUSION

It is significant that the sanctity of the agreements between Broadcasters and Distributors should be kept out of the purview of Regulations as much as possible. Such policy will trigger conflicts of interests, blur dividing lines between Distributors and Broadcasters, and lead to unhealthy competition between broadcasters on the one hand and distributors on the other hand eventually resulting in the breakdown of entire industry. Further, the Interconnect Regulations, 2004 never intended to take away the broadcaster's right to freedom-of-contract and the ancillary right to mutual negotiations. Any interpretation of the Interconnect Regulations impinging upon mutual negotiations would be an infringement of the broadcasters' right to freedom-of-contract and the concomitant right to free negotiations guaranteed under Article 19(1)(g) and Article 300A of the Indian Constitution.

It must be borne in mind that the very object and purpose of Regulation is to promote competition. It, therefore, follows that at the level where there is little or no competition, the degree of Regulation would be much higher and the level at which competition is sufficient or near sufficient there might be less or even no Regulation. Keeping in mind this premise, will the Authorities be able to promote competition if one of the parties to a contract is forced to disclose the exact details of its contract with another, to the advantage of neither but the disadvantage of the broadcaster? Will this practise not be discriminatory toward the Broadcasters? Will it help increase the level of competition if parties do not have a free hand at negotiating?

On examination of the entire proposal we have realized that an efficient register is of great consequence to our industry in the long run. **We would therefore conclude by stating that the consequence of an efficient register ensuring healthy competition and eventually ensuring efficient markets which benefit Broadcasters, Distributers and the end consumer in the long run may not be determined by that which is put in public domain but that which isn't.**

A paper of this massive importance requires a lot more enquiry and far greater research and analysis which we admittedly could not afford at this stage owing to the shortage of time. We therefore request the Authority to grant us some more time in order for us to come back with a better-rounded and well considered response. In the meanwhile we request the Authority to take this preliminary submission on record.