

BY HAND/ELECTRONIC MAIL

6<sup>th</sup> May 2019

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 Draft Regulation on “Telecommunication (Broadcasting and Cable) Services Register of Interconnection Agreements Regulations, 2019”.**

At the outset, we would like to thank the Authority for giving us an opportunity to tender our comments on the “Draft Telecommunication (Broadcasting and Cable) Services Register of Interconnection Agreements Regulations, 2019”.

In this regard, we submit that we have perused the said draft Regulation 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,

  
Ms. Mansha Shukla

Director Legal Affairs – South Asia

Encl: As above

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**Submissions to the Telecom Regulatory Authority of India  
("TRAI/Regulator") in response to the Draft Telecommunication  
(Broadcasting and Cable) Services Register of Interconnection Agreements  
Regulations, 2019**

At the outset, we would like to state that the present draft Regulations issued by TRAI have been issued with the objective to formulate the contours of reporting system so that the service providers can report the details of their Interconnect Agreements including commercial details to the Authority and in TRAI's own words are consistent with the present TRAI Regulatory Framework.

The year 2004 saw a new era in the Broadcasting sector, wherein The Register of Interconnect Agreements (Broadcasting and Cable Services Regulation) was introduced as an important tool for prescription of modalities for the maintenance of the Reference Interconnect Agreements ("RIOs") for broadcasting and cable services. Since then, the TRAI has been attempting to understand the amendments necessary for a dynamic Industry in its nascent stage. It is pertinent to state here that the terms and conditions of the sensitive portion of agreements between distributors and broadcasters should not be the subject of public knowledge. Confidentiality of information is a necessity to ensure freedom of trade and commerce as envisaged in the introduction. Interconnection Agreements hold a sacred value under "Freedom of Contract" which comprises of principles of "free will" and "Consensus ad idem". The Authority will appreciate that TV channels are not homogenous goods for sale at a retail store and have different value scheme that are in their own respect unique offerings in different markets. It is important that TRAI's stated policies should result in a "light touch" regulatory regime. Like any other industry in India, the TV Broadcast Industry too needs a clear and friendly regulatory framework to operate and effectively, seamlessly and grow orderly, resulting in better efficiencies in terms of Cost, Quality, Service & Speed. The abovementioned idea stems from the fact that industries only flourish in environments that are not overly regulated.

In light of the abovesaid, we have attempted to put together our preliminary submission and we are furnishing our comments in respect to Chapters II, III and IV of the Draft Regulations which are in essence the Operative Portion of the Regulations. The comments on each of the Clauses are given herein-below-

**Chapter II – PROCEDURE FOR REPORTING OF INFORMATION**

**3. Reporting of information relating to interconnection agreements by broadcaster and distributor of television Channels.**

**4. Details of information to be reported.**

**5. Consequences of delay in reporting.**

Firstly, in terms of Clause 3(1) of the draft Regulations, the Regulator has proposed the reporting requirements of Service Providers to be furnished to the Authority

within 30 days from the end of each "calendar quarter". This would essentially mean that the Service Providers including the Broadcasters would need to meet the reporting requirements proposed in the Draft Regulations four times in a year. We strongly feel that a compliance of this nature is not required as the information which needs to be reported by the Service Providers will be enormous and it will become very strenuous for Broadcasters to conduct this activity on 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.

Further TRAI in its previous Regulations while noting yearly compliance has stated as follows:

In its explanatory memorandum to the "The Register of Interconnect Agreement (Broadcasting and Cable Services) (Second Amendment) Regulation, 2005 (12 of 2005)" Dated: 2nd December 2005 TRAI stated the following-

*1. Telecom Regulatory Authority of India notified separate regulation namely, The Register of Interconnect Agreements (Broadcasting and Cable Services) Regulation 2004". (15 of 2004) on 31.12.2004, for the purpose of registration of interconnect agreements entered into by broadcasters with the service providers. In terms of clause 5 read with clause 6 of the The Register of Interconnect Agreements (Broadcasting and Cable Services) Regulation 2004". (15 of 2004) as amended, the broadcasters are required to file details of interconnect agreements entered into with the service providers in part A containing standard forms of contract/agreement/MOU etc and in Part B containing specified details of individual agreements both in print and electronic form with quarterly updation at the expiry of one month from the end of each quarter.*

*2. A proposal for amendment to the above regulation was received from a broadcaster expressing difficulties in filing in print form of part B at the end of every quarter. It was indicated that new agreements are entered /renewed/modified continuously throughout the year. In view of a large number of agreements involved, the process of tracing amendments /changes becomes laborious and time consuming and the filing in print form at the end of every quarter becomes very voluminous. It was pointed out that it is easier to file the entire updated details of agreements at the end of every quarter in Electronic form and requested for amendment to the above regulation to provide freedom to the broadcasters to file details of part B in Electronic Format at the time of quarterly updation.*

*3. The request for amendment and options for facilitating filing in Electronic format without compromising on authenticity and security of data was examined in consultation with major broadcasters/distributors of TV channels. It has been experienced during the implementation of above regulations that the filing in print form, in view of the large number of agreements, becomes very voluminous. It was noted that various options of filing in electronic form ranging from filing in CD-ROM bearing the signature of the authorized representative of the service provider to e-*

*filing with digital signature have distinct merits and demerits and could become a viable option over a period of time. While examining the proposal it was also viewed from a broader angle that the regulations would need to be made flexible enough to facilitate adopting a particular procedure not only with reference to a particular form in which the filing is to be done but also with reference to a number of other procedural matters, through a simplified process, instead of resorting to the need to amend the regulations time and again.*

*4. Accordingly TRAI has decided to amend the existing clause 6 of the above regulation so as to enable the Authority to specify a particular procedure in regard to the manner of filing of data or information; to the form or formats of filing; to the number of copies to be filed; and, to such other procedural issues connected to the filing of details of interconnect agreements through a simplified process instead of the need to amend the regulation every time whenever a change in procedure is necessitated. Consequential amendment in clause 5 of the regulation has also been made to give effect to the proposed change. The Authority would separately be specifying the procedure to be adopted by the broadcasters for the filing(s) due after amended regulations are notified.*

In its - Register of Interconnect Agreements 1 (Broadcasting and Cable Services) (Fourth Amendment) Regulations, 2009 dated 18th March, 2009, TRAI made the following amendment-

*3. In regulation 5 of the principal regulations, ----- (a) for sub-clause (3) of clause (b), the following sub-clause shall be substituted, namely:- "(3) Annual Reporting. The reporting of interconnection agreements shall be done on or before the 31st day of July of each year for all interconnection agreements including modifications or amendments made therein, which remained valid as on the 30th day of June of that year or during a part of the period from 1st July of the previous year till the 30th day of June of that year, as the case may be, or as may be specified by the Authority from time to time in terms of the second proviso to regulation 6: Provided that the Authority may, without prejudice to its powers under section 12 of the Telecom Regulatory Authority of India Act, 1997 (24 of 1997), at any time, call for the details of any interconnect agreement from any broadcaster, and such broadcaster shall furnish such details within such time limit as may be specified by the Authority in the communication calling for such details."*

In its Explanatory Memorandum to the said Regulation, TRAI stated the following-

*4. The Authority discussed the issue of periodicity of filing the agreements in the consultation paper titled "Consultation paper on Interconnection Issues relating to Broadcasting & Cable Services" issued on December 15, 2008. A majority of stakeholders are in favour enlarging the periodicity of filing these agreements with the Authority. Based on the analysis of the written comments received, and open house held at Kolkata on February 06, 2009, the Authority has come to the*

conclusion that the filing of the interconnection agreements should be on annual basis. The Authority has decided to receive annual filing for period 1st July to 30th June by 31st July of every year. The period is chosen to cover the industry practices of agreements on calendar year basis or financial year basis.

5. The Authority has also decided that all the interconnection agreements should be in written form by the broadcasters. Accordingly, a provision has been made by an amendment dated March 17, 2009 to the Telecommunication (Broadcasting and Cable Services) Interconnection Regulation 2004 (13 of 2004) whereby it is the responsibility of the broadcasters and MSOs to hand over such written agreements after execution to the distributor of TV channels. Correspondingly, a provision of submitting a certificate in this regard has also been incorporated in the present regulation.

6. Though the Authority is empowered under Section 12 of the TRAI Act, 1997 as amended to call for information from the Service providers, the issue of notice period to be given to a service provider for any specific interconnection agreement was discussed in above mentioned consultation paper. The stakeholders were of the view of having 15 to 30 days' notice period for furnishing such information. Upon careful consideration of the issue, the Authority has decided that the time frame for submission of such information/details may be specified in the communication calling for such information/detail, based upon the need and urgency.

7. The Authority has also discussed the period for retention of the details of interconnection filing with the Authority in the above-mentioned consultation paper. The comments for retention period varied from 3 to 5 years. Based on the inputs from the stakeholders and considering large volume of data being filed by various service providers, the Authority is of the view that these filings may be kept for a period of three years from the date of their filing or till the expiry of the validity period of the agreement, whichever is later and accordingly the regulations have been suitably amended for this purpose.

8. These regulations have also been amended to enable the new platform such as HITS operators and IPTV service providers to file their interconnection agreements with the broadcasters on annual basis to the Authority.

It is also a point of reflection for the Regulator that while the TRAI Interconnection Regulations themselves suggest a period of Audit of the Systems of the Distributor once a year and allow Broadcasters to audit the systems of the Distributor only once a year, it will not be prudent to allow for a regime wherein the Service Providers including the Broadcasters are meeting compliances of TRAI four times in a single year. Further TRAI has in the past accepted the request of Broadcasters about the difficulty in furnishing information on a quarterly basis and hence allowed for the furnishing of information on a yearly basis vide its Second and Fourth Amendments to the Register of Interconnect Agreements (Broadcasting and Cable Services); 2005.

It is our suggestion that the Broadcasters may report "information relating to all the interconnection agreements of its pay and FTA channel or modifications or amendments or addenda thereto, pursuant to the interconnection regulation" only once a year.

Secondly, in terms of Clause 3(2) in cases where the average active subscriber base of the entire distribution network of a Distributor falls below two Lakhs (Two hundred Thousand) in the month of March of any of the subsequent years, such Distributors are exempt from furnishing the information relating to all interconnection agreements or modifications or amendments or addenda thereto. In the era where the entire Broadcasting Industry is still pacing itself to the new Regulations, such a Regulation will not be in the best interest of the entire sector. The ground reality in the present regime is that at this point of time while agreements have been signed the Broadcasters are unable to raise invoices because only a handful of the Distributors out of those agreements have been able to give a valid subscription report to the Broadcasters as mandated under the Interconnect Regulations, 2017 and the periodicity of audit is also miniscule. Carving out an exception by the Authority at this stage will further give an incentive to Distributors to misreport and underreport in order to avoid the compliances and this will result in huge loss to the Broadcasters.

Thus, we believe that such reporting requirements if kept in place must be done keeping all stakeholders including DPO's at an equal pedestal so that any parameter is not violative of Article 14 of the Constitution. The view taken by TRAI to keep Distributors out of the ambit of reportage only because they are at the nascent stage is completely unfounded. Thus, a Regulation that favours one stakeholder over another that too for a reporting requirement will not be in the interest of equity for the sector.

Thirdly, the draft Regulation suggests penal consequences for non compliance of the said Regulations in terms of compliance from it. However, given that the Regulatory Framework already stipulates that Service Providers strictly follow the norms of the Authority, there is no need to enforce any penal consequences. Suggestion of issuance of show cause notice in case of any lapses by the Authority is sufficient.

Thus, in a sector wherein the extremely conscious Service Providers are already being regulated by a very active Regulator, additional regulations that specify penal consequences is not necessary.

### **CHAPTER- III -PROCEDURE FOR MAINTENANCE OF REGISTER AND ITS INSPECTION**

#### **6. Maintenance of the register.**

#### **7. Inspection of the register.**

TRAI in the Chapter read with Clause 4 of the Draft Regulations effectively allows through its Clause 7(2) to keep even the commercial and sensitive portions of the Register to be kept open for inspection to any member of public and as governed by the relevant provision of the Telecom Regulatory Authority of India (Access to information) Regulation, 2005 and the rules made thereunder.

We are of the strong opinion that any information which includes commercial portion of a register should not be made accessible to any third party as the information related thereto is of confidential nature. For instance, each agreement signed by a Distributor even if having a similar subscriber base can be different due to various reasons including but not limited to a Distributor choosing the different schemes on offer by a Broadcaster. Thus, a Distributor may opt for all incentives or only some incentives on offer by a Broadcaster. Thus, in such a situation, the commercial and confidential portions of such agreements not only reflect the pricing of channels but are also capable of disclosing other strategic details such as business plan and business model adopted by such Distributors. It is stated that by disclosing the entire agreement even on a specific basis would not only compromise the competitive advantage of a Distributor but also to the Broadcaster which it has earned by virtue of meticulous business planning and pricing strategy. Thus, in the interest of the business of all service providers, the vital and commercially sensitive information must be protected from disclosure as otherwise it would severely compromise the competitive position of that Service Provider and is the same will have an adverse effect on the orderly growth of the sector.

If commercial information pertaining to agreements is made accessible to any third party, this will violate 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 and the same are also required to be filed with the Authority to ensure transparency. Publishing commercial information pertaining to 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. This will also defeat the purpose of having confidentiality clause in all such agreements.

Further, disclosing such information as mandated in Part B and Part C of the Draft Regulations would also result in frivolous and roving requests. Even the Telecom Regulatory Authority of India (Access to Information) Regulation, 2005 in its Section 6 provides for exemption from disclosure of certain information. The relevant extract of the abovesaid Section 6 is reproduced herein for the sake of ready reference-

*“6. Exemption from disclosure of information*

*Information covered by any of the following categories shall be exempt from disclosure under the provisions of Regulation-*

- (i) *Trade and commercial secrets and information protected by law;*
- (ii) *Commercially and financially sensitive information, the disclosure of which is likely to cause unfair gain or unfair loss to the service provider or to compromise his competitive position.”*

It is pertinent to mention that there are other similar provisions in various statutes which protect commercial and sensitive information of businesses such as –

- a. Section 35 of the Competition Commission of India (General) Regulations, 2009 which deal with confidentiality of information.
- b. Section 8d of the Right to Information Act which deals with exemption from disclosure of information.
- c. Section 11 of the Right to Information Act which deals with protection of third-party information in case of trade and commercial secrets protected by law.

Thus, it is our view that in the interest of the sector as a whole, such specific commercial information should not be allowed to be sought by any member of the general public as it compromises the entire business model, trade and commercial secret of parties involved. Such a Clause in the Draft Regulation opens up the market for any disingenuous player or a disgruntled competitor to obtain the commercial and trade secrets of a successful Service Provider in order to gain unfair advantage in business. The 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 telecommunication and broadcasting sector.

The Telecommunication and Broadcasting market in India is in its blooming and competitive phase. If there is implementation of any stringent regulations in reference to the market dealings, the sense effective competition and providing qualitative services will be hampered to a great extent. The commercial portion of the register is like the trade secret for any of the players of the broadcasting sector which shall not be disclosed to any third party.

It is pertinent that the sanctity of the agreements between Broadcasters and Distributors should be kept out of the purview of Regulations otherwise, it shall be resulting in the breakdown of the business model of the industry, 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.

Given that in the present Regulatory Framework wherein TRAI has already inscribed the principles of transparency and non-discrimination, there will be no interconnect agreement that is likely to be de-hors the published RIOs of the service providers. Therefore, it is in the interest of the entire sector to not allow the commercially sensitive information to be disclosed to members of the general public. Further, given that the Authority already mandates that all documents,



modifications, amendments to agreements are already being filed on a yearly basis and the same parameter can continue. TRAI has in the past accepted the request of Broadcasters about the difficulty in furnishing information on a quarterly basis and hence allowed for the furnishing of information on a yearly basis vide its Second and Fourth Amendments to the Register of Interconnect Agreements (Broadcasting and Cable Services), 2005. Thus, there exists no reason or change in the present circumstances for TRAI to warrant a change in system which is being followed smoothly.