

BY ELECTRONIC MAIL

29th August, 2019

To,
Shri. Arvind Kumar
Advisor (B&CS)
Telecom Regulatory Authority of India,
Mahanagar Doorsanchar Bhawan,
Jawahar Lal Nehru Marg,
Old Minto Road,
New Delhi – 110 002
arvind@traai.gov.in

Dear Sir,

Re: Submissions to Telecom Regulatory Authority of India (“TRAI”) in response to the Draft (Second Amendment) to the Telecommunication (Broadcasting and Cable) Services Standards of Quality Service and Consumer Protection(Addressable Systems) Regulations 2017.

At the outset, we would like to thank the Authority for giving us an opportunity to tender our views on the issues related to “Draft (Second Amendment) to the Telecommunication (Broadcasting and Cable) Services Standards of Quality Service and Consumer Protection Addressable Systems) Regulations 2017”.

In regard to the present consultation process, we submit that we have perused the said paper 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
Discovery Communications India

Encl: As above

Discovery Communications India
(A Private Company with Unlimited Liability)

Registered Office

125-B, Som Datt Chamber-1
5 Bhikaji Cama Place,
New Delhi-110066, India

Regional Office

Building No - 9, Tower A,
9th Floor, DLF Cyber City,
Gurugram - 122 002, Haryana, India
T: +91 124 4349100
F: +91 124 4349289

REPRESENTATION TO THE DRAFT (SECOND AMENDMENT) TO THE TELECOMMUNICATION (BROADCASTING AND CABLE) SERVICES STANDARDS OF QUALITY OF SERVICE AND CONSUMER PROTECTION (ADDRESSABLE SYSTEMS) REGULATIONS 2017 DATED 09.08.2019 ISSUED BY TELECOM REGULATORY AUTHORITY OF INDIA

The Telecom Regulatory Authority of India ('TRAI') has issued the Draft (Second Amendment) to the Telecommunication (Broadcasting and Cable) Services Standards of Quality of Service and Consumer Protection (Addressable Systems) Regulations 2017 dated 09.08.2019 ('**Draft Amendment**'). Discovery Communications India ('**Discovery**') would like to place for consideration of TRAI, the following submissions / observations on the Draft Amendment, which are without prejudice to Discovery's submissions before the Hon'ble Delhi High Court in Writ Petition No. 6915/2017 along with other batch of writ petitions challenging the Telecommunication (Broadcasting and Cable) Services Interconnection (Addressable Systems) Regulations, 2017 ('**Regulations**') and the Telecommunication (Broadcasting and Cable) Services (Eighth) (Addressable Systems) Tariff Order, 2017 ('**Tariff Order**'):

1. It is relevant to point out that TRAI has also issued a Consultation Paper on 16.08.2019 wherein it has raised certain grave allegations and concerns regarding the alleged role of broadcasters in distorting consumer choice through price manipulation. Discovery feels that the issues of consumer choice and consumer interest that are being raised by it, arises out of the market anomalies that have resulted from the introduction of Regulations and Tariff Order, and the undue and unregulated discretion in favour of distribution platform operators ('**DPOs**'), which has distorted the level playing field among stakeholders. These issues are pending for adjudication before the Hon'ble High Court of Delhi. TRAI as an economic regulator, is required to address the concerns of all stakeholders having due regard to applicable economic principles and market dynamics.
2. The Draft Amendment is purported to be introduced by TRAI in light of complaints by consumers that they are unable to choose the TV channels of their choice conveniently on the web portal / apps of the DPOs. According to TRAI, various DPOs are not providing adequate freedom and choice of channels to consumers. The Explanatory Memorandum to the Draft Amendment has noted that DPOs have no interest to provide consumer friendly and easy channel selection options as it clashes with their own vested interest. Consumers have complained that DPOs with the interest to maximise their revenue are imposing their preferred pack / bouquet on the subscribers.
3. At the very outset, we would like to point out that even as on date, majority of DPOs have not complied with the provisions of the Telecommunication (Broadcasting and

Cable) Services Standards of Quality of Service and Consumer (Addressable System Regulations 2017 (as amended) ("QoS Regulations"). In this regard, the DPOs do not have operational website with a consumer corner, call centers, consumer care centre, etc. Discovery has time and again sent out many letters to the DPO requesting their compliance wherein TRAI has been marked a copy of the same. It is important to note that these are the basic prerequisites prescribed under QoS Regulations, which DPOs have to mandatorily comply before providing broadcasters' channels to consumers. However, the DPO's are continuing to provide services without meeting these requirements.

4. It is imperative to point out that TRAI itself has been issuing directions to various DPO's directing them to comply with the provisions of the QoS Regulations. It is submitted that Regulation 3(2) of QoS Regulations stipulate that every DPO shall adopt consumer friendly methods, including but not limited to website and telephonic call to customer care centre, for requesting subscription of broadcasting services related to television. However, despite such letters being sent and directions being issued by TRAI, the DPOs have yet not complied with such mandatory provisions of the QoS Regulations. Given this background, it is not clear whether TRAI or the Regulation can ensure that the DPOs will comply with an API integration of a third-party Apps/portal and ensure it is made effective and compliant with their systems. Hence, it is submitted that before prescribing new provisions/amendments, TRAI should ensure complete compliance of the existing provisions of QoS Regulations (including those relating to channel / bouquet selection / deselection). Further, TRAI ought to take strict action and levy penalties in case of non-compliance. TRAI should look into smooth and complete implementation of the existing provision rather than again disrupting the market again by way of introduction of further regulation.
5. At the very outset, it is pointed out that TRAI has not disclosed the details of the consumer complaints, and the exact nature of their concerns, which would have helped all stakeholders to not only respond to the suggested approach of TRAI, but also offer alternate solutions to address these concerns. The Draft Regulation has proposed web / mobile based solutions for ensuring effective consumer choice. Given the large base of subscribers residing in semi urban and rural areas; and the current levels of limited technology literacy or absence thereof for a large part of the subscriber base; the mobile technology etc, it has to be ascertained whether the proposed solution would reach majority of the intended subscriber base. It is also noteworthy that despite the new tariff regime, consumers in such semi-urban and rural areas will continue to have limited choice on account of the lack of initiative in developing network.
6. It may be pointed out that it has been a consistent submission of Discovery to TRAI that the introduction of the Regulations and the Tariff Order by TRAI would adversely affect the interests of consumers and broadcasters as they have been left completely at the discretion and mercy of the DPOs in relation to the distribution/ reach of channels

to the consumers. The Regulations and Tariff Order leave a wide scope for nepotism and manipulation by the DPOs, who have been given unwarranted and undue discretion in terms of channel selection for its consumer base. While the Draft Amendment tries to address the issue of ease of selection of channels offered by a DPO on its platform, TRAI has failed to address some of the basic and fundamental issues of non-regulation of the carriage capacity of DPOs under the Regulations which, reverberates in the concerns raised in the Explanatory Memorandum. Some of these concerns have been raised herein after.

7. The broadcaster and the subscriber constitute the most important stakeholders in the broadcasting activity – the broadcaster being the content provider, which is ultimately viewed and enjoyed by the subscriber. The DPOs carry out the function of a conduit between the broadcaster and the subscriber. The DPOs constitute the necessary and unavoidable connect between broadcasters and subscribers under applicable government policies. The DPOs therefore constitute the backbone of the broadcasting industry. However, despite its unique and important role in carriage of signals from broadcasters to subscribers, there is absolute lack of regulation relating to the development / augmentation of carriage capacity and performance by the DPOs.

8. TRAI may kindly consider that the resistance that is being presently faced by the subscribers from the DPOs w.r.t. ease of selection of channels arises primarily due to (i) the complete non-regulation and therefore, the absolute discretion of a DPO to decide its carrying capacity; (ii) DPOs ultimate control over selection of channels and its absolute discretion to create channel packs including base packs. This gives the DPO the unwarranted and unfair advantage in packaging the bouquets of channels at its sole discretion and pushing it to consumers to maximise its revenue base.

9. In this regard, it may be pertinent to point out that TRAI had allowed absolute discretion to the DPOs to work out Best Fit plan for their respective consumers by its Press Release dated 12.02.2019. This Press Release legitimized and allowed DPOs to package channels and migrate their subscribers to such packages unless the subscribers exercise their option under the new regime. The consumers were thus deprived of their choice to continue under the earlier system by a regulatory fiat of TRAI. The Draft Amendment now seems to be blaming the DPOs for a situation that has resulted at least partly, from the Best Fit plan.

10. The Regulations constrains broadcasters to treat all DPOs irrespective of their size, target market, active subscription base, technology, and platform equally, which consequently adversely impacts the ability of the broadcaster to organize and carry out their business operations in a viable manner, and not to mention that it has a huge impact on the revenue of broadcasters. Such mandatory requirement of broadcasters to provide equal treatment to unequally & differently placed DPOs, is manifestly arbitrary,

iniquitous, and discriminatory in respect of the broadcasters and distorts the level playing field amongst service providers.

11. While the broadcasters' market, which is a fairly competitive market, has been sought to be regulated, the regulation of distribution network / capacity of DPOs which is essential for securing optimum carriage of channels, has been given a complete go-by. The Regulations and Tariff Order provides for must provide obligations on the part of broadcasters. The purpose behind the Regulations is to fix the terms and conditions of interconnectivity between different service providers including broadcasters, MSOs, cable operators and the subscriber / consumer. Under the TRAI Act, TRAI is required to ensure technical compatibility and effective interconnection between the service providers. However, TRAI has failed to regulate the connecting medium i.e. the DPO's role and obligations which is leading to the present situation.
12. TRAI may kindly appreciate that the issue of consumer choice will remain unaddressed in a holistic manner until and unless there is regulation of the network capacity of DPO to ensure there is sufficient bandwidth to carry the desired channels of consumers. If that is not so, DPOs will devise new and innovative ways to restrict / influence the choice of consumers to avail packs / channels that are most suited to maximise their revenue generation, given their existing network capacity. It is pertinent that in various other sectors, e.g. oil & gas or electricity, which requires transmission of content through conduit, one of the focus areas of regulation is the development and augmentation of the transmission network / conduit based on market demand - the pricing of content is left more to market forces.
13. Regulation 4(8) r/w 4(9) of the Regulations provide for network capacity fee to be paid by the subscriber and carriage fee (apart from distribution fee) to be paid by the broadcaster just for carrying TV channels on its network but there no obligation subsists requiring the DPOs to improve / enhance their network capacity. TRAI may kindly consider that the amount being earned by the DPOs on account of carriage fee ought to be used for capacity augmentation and development of infrastructure.
14. There is complete lack of transparency between the broadcaster and the end subscriber vis-à-vis the choice of channels, and the entire decision making process in the broadcasting activity has been forfeited to the DPOs. The effect of such unbridled and excessive discretion placed in the DPOs is being felt by consumers who are unable to exercise their choice to select channels in an easy and simple manner.
15. DPOs have the exclusive discretion to determine packaging of TV channels in particular bouquets or as a-la carte channels to subscribers. Therefore, it is for the DPOs to decide how and in what manner, the various channels will be provided to the subscribers. This has been treated as the prerogative of DPOs. Rule 4(2) of The

Telecommunication (Broadcasting and Cable) Services Standard of Quality of Service and Consumer Protection (Addressable Systems) Regulations, 2017 (**‘QoS Regulations’**) requires DPOs to provide broadcasting services on obtaining duly filled CAF from subscribers. However, the CAF is based on the channels/ packages offered by the DPO / local cable operator. Therefore, the ability on the part of the broadcaster to supply and on the part of the subscriber to enjoy any channel is ultimately decided by neither, but by the DPO, thereby defeating the very purport of the Regulations.

16. The free and unfettered choice of channels for the subscribers remain an illusory concept under the Draft Amendment, since the consumers are ultimately made to choose from the list of channels / bouquets / packs offered by the DPO. The subscribers’ choice is limited to the universe of channels offered by the DPO, and not necessarily what is available in totality. This conflict arises, yet again, due to the DPOs absolute discretion in terms of their carrying capacity. The DPO’s network and offering is not necessarily dependent on consumer choice - it is dependent on its investment appetite and motive of revenue maximization. Subscribers have been left at the liberty and at the sole discretion of the relevant DPO for access to any particular channel and are now forced to either choose the bouquet and/ or the relevant DPO which carries the particular channel as decided by the DPO or pay additional individual amounts for accessing the same on a-la-carte basis.
17. The allocation of channels in the absence of sufficient / spare network capacity on the part of DPO, is not carried out at the behest of the subscribers or even based on subscriber demand as borne out from Consumer Application Forms (**‘CAF’**) but on the basis of RIOs signed by the DPO. Therefore, consumer choice is contingent on the discretion of a DPO to carry a particular channel/ bouquet. The Amendment aims to smoothen the process of choice making by subscribers based on channels offered by the DPO in its platform. TRAI may consider development of necessary protocol / applications that allow consumers to select their channels from all existing channels so that TRAI can take a more informed view about the scope and expanse of consumer demand in a particular area and accordingly direct and supervise the necessary development, expansion or augmentation of DPO’s network capacity. This will also indicate whether consumers are agreeable to the channels subscribed by the DPO.
18. It is open to a DPO not to provide a particular channel requested by a local cable operator (**“LCO”**) on the ground of *feasibility*. However, the Regulations do not provide any indication on the nature of the “non-feasibility”. Therefore, the DPO has the discretion to decide what would be provided to the LCO in a target market without reference to the preferences of consumers. Naturally, the DPO will be more inclined to provide conventional “popular” channels over the niche educational channels provided by the Petitioner, which may not enjoy wide viewership, but may have group of passionate subscribers, who would have no say in the availability of channels through LCOs. This aspect needs to be addressed by TRAI.

19. The QoS Regulations require completion of CAF and updating details from CAF into SMS. Discovery has been repeatedly pointing out to TRAI that DPOs have not been making fair and transparent declaration of subscriber base. However, no audits / surveys appear to have been conducted by TRAI to ascertain the extent of compliance on this aspect, or the correctness of information contained in SMS vis-a-vis CAFs.

20. The Draft Regulations do not prescribe any limit on the number of Third Party Developers who may connect to a DPO platform, nor does it prescribe any qualification criteria for the Third Party Developers. This can have potential adverse effect on the operational ability and efficiency of the proposed system. Moreover, since, the Application is being provided and developed by a Third Party it is imperative that the User Data must be secured and should be stored in an encrypted format. The Draft Amendment fails to address the issue of securing personally identifiable data of the subscriber which can be accessed by the Third Party Developers. Further, TRAI is also required to prescribe penalties in case of non-compliance of data security by the Third Party Developers or breach/leakage of data.

21. The Application should be developed in such a manner that when the consumer makes a choice of a particular channel, the Broadcasters should receive a notification that its channel has been opted or has been removed. This will make the entire process transparent and give the Broadcaster visibility of the Consumer Choice. In absence of this feature, the DPOs may again misuse the application developed by Third Party and again push their own channels and bouquets.

22. The Draft Amendment and the Channel API system allows the Subscribers to change channel /bouquet selection at any given point in time during the month. This thereby allows the subscriber to activate / deactivate channels at any given point in time which may mean hourly/weekly/daily/monthly. If the channels are deactivated outside the stipulated reporting window of 7 PM to 11 PM on 7th, 14th, 21st or 28th of the month, such subscribers will not get reported. In the absence of clear reporting mechanism, the DPO will continue in a position to earn the subscription, while depriving the broadcasters of the subscription charges.

For Example: - The consumer may want to see a new show on Discovery Channel on 28th August, 2019 and the next date he deactivates his subscription. This subscriber may not be reflected in the cycle of DPO billing, hence thereby leading to loss of revenue.

The Draft Amendment does not look into this and does not secure the revenue of Broadcasters for the services and allows for leakage of revenue. Further, it is pointed out that in such a case the regulation should ensure that the subscriber reports should be made on real time basis and the DPO should provide the opening and closing balance of number of subscribers which have subscribed to the channel/bouquet of the broadcaster.