

Response of Dish TV India Limited

to the

Consultation Paper

on

The Register of Interconnection Agreements (Broadcasting and Cable Services) Regulations, 2016

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Response of Dish TV India Limited to “The Register of Interconnection Agreements (Broadcasting and Cable Services) Regulations, 2016”:

At the outset, we would like to again thank the Authority for undertaking the present exercise to have a relook into the provisions of Regulations for Register of Interconnect Agreements. The present exercise along with exercise of fixation / finalization of Wholesale Tariff / Retail tariff will certainly result into a robust regulatory framework which will put the industry on the growth path and tackle the every growing discrimination in the industry.

As the authority is well aware, Dish TV has repeatedly been highlighting the disparities in the Industry, largely owing to the huge amount paid by the Broadcasters to the MSO's under various heads, whether it be carriage fee or marketing fee which basically were “reverse fee” having the effect of reducing the subscription pay out liability of the MSO's. Effectively, various nomenclature were being given to the said payments to keep them out of the Regulatory ambit. The direct effect of these payments was creating of disparity in the market and not creating a level playing field, which is till now heavily tilted towards the Cable Operators / MSO's. The TRAI in the last Consultation Paper namely “Consultation Paper on Tariff Issues related to TV Services” has observed this fact. In its response to the said Consultation Paper, Dish TV has highlighted that present regulatory regime is heavily tilted towards the MSOs and cable operators as compared to the DTH operators which allows the payment of huge carriage by the Broadcasters only to the MSO's / LCO's and thereby creating disparity and discrimination towards the DTH operators. This is evident from the fact that the regulation have allowed the MSOs and DAS operators to continue demand the carriage, marketing, placement and packaging fee from the broadcasters and no such provisions have been made for the DTH operators. This while creating a large gap between the revenue generation capacities of the MSOs vis-à-vis the DTH operators has caused further prejudice to the DTH operators considering the fact that the MSOs and DAS operators and also the HITS operator are not required to pay any Entry Fee, Bank Guarantee and Annual License fee which are required to be paid by the DTH operators. Clearly therefore there is no level playing field for the DTH operators and the DTH operators are competing with the operators who are

much better placed. This is despite the fact that DTH services brought transparency in the sector giving the much needed boost which was required by the sector to tackle the persisting problem of under declaration by the cable operators.

With regard to the Carriage Fee, it is stated that the present regulatory framework has allowed the MSOs and DAS operators to continue demand the carriage, marketing, placement and packaging fee from the broadcasters and even the Broadcasters have happily supported the carriage fee model. It is a matter of fact that because of the huge carriage fee paid by the broadcaster, the subscription cost for the MSO is nil to negligible. A bare look at all the agreements entered into between a Broadcaster and an MSO will clearly establish that the subscription cost of an MSO ranges around Rs. 10 – Rs. 20 per subscriber where the same is in the range of Rs. 80 to Rs. 100 for a DTH operator. The TRAI being the regulator ought to be in possession of this data and needs to take urgent steps to remove this anomaly and create a level playing field between all the DPO's.

Such a practice has created a large gap between the revenue generation capacities of the MSOs vis-à-vis the DTH operators has caused further prejudice to the DTH operators considering the fact that the MSOs and DAS operators and also the HITS operator are not required to pay any Entry Fee, Bank Guarantee and Annual License fee which are required to be paid by the DTH operators.

Clearly therefore there is no level playing field for the DTH operators and the DTH operators are competing with the operators who are much better placed. This is despite the DTH services brought transparency in the sector giving the much needed boost which was required by the sector to tackle the persisting problem of under declaration by the cable operators.

The above is clearly in teeth of the Regulation which mandates that the Broadcaster has to offer its channel on non-discriminatory basis to all Distribution Platform Operators. By offering their channel at heavily discounted rates to the MSO's, the Broadcasters have been perennially discriminating against the DTH operator which discrimination needs to be removed now.

Another major issue which has been plaguing this industry has been the transparency of the deals which a Broadcaster has with the Distributor of Television channels. The direct impact of non-transparency is discrimination between two operators.

Background

The current Consultation Paper in Para 6 acknowledges that – “The primary objective of register of interconnection regulations is to prescribe the contours of a reporting system to service providers to report interconnection agreement details to the Authority so as to enable the Authority to maintain register of interconnect agreements as per the provisions of TRAI Act. It is also useful for monitoring and analyzing market practices prevailing for interconnection agreements. Presently, the regulations mandate service providers to report the prescribed information, annually.” In addition to the same, we would also like to state that the Register of Interconnection Regulations is the only way through which the prime objective of the Regulations – “TRANSPARENCY” and “NON DISCRIMINATION” can be achieved.

However, non-compliance of the provisions of Register of Interconnect Regulations by certain sections of the industry has resulted into a total anarchical situation with no transparency and only discrimination. The said section of the industry make all possible efforts to keep the contours of their transactions with certain parties close to their heart and do not disclose the same to the Authority. The sole objective and result of this actions is that the “Discrimination” is perpetuated. Even the Authority, in the absence of such information, is unable to take any corrective / preventive action. This practice, i.e. the practice to execute the agreement in a discriminatory and non-transparent manner and evasive attitude to not to disclose the details in respect of the agreements was visible in the recent matter i.e. in the Petition Number 295(C) of 2014 and in Petition Number 526 (C) of 2014 pending before the Hon’ble TDSAT, where despite the repeated orders of the Hon’ble Tribunal, the broadcasters showed visible non inclination to file the interconnect arrangements. In this regard, we would like to reproduce certain Orders of the Hon’ble TDSAT in the said matter which clearly highlight that the interconnection agreements / arrangements are non-transparent:

(i) **Dated 29th January, 2016:**

“The above interim and ad hoc arrangement is only upto 30.9.2015 in case of Star and upto 30.6.2015 in case of Taj. We are still required to make an arrangement w.e.f. 1.10.2015, in case of Star and w.e.f. 1.7.2015 in case of Taj. For that, we direct Star to submit before the Tribunal the details of its interconnect arrangements with three pan India MSOs namely DEN, Hathway and Siti. Star is directed to also file an affidavit explaining the flow of money both ways, that is to say, the licence fees that it receives from the three MSOs and the concessions that it makes in regard to payment of the licence fees by way of incentive scheme(s) or volume discounts etc. It would also state in case any money by way of carriage fee is paid by it to the three distributors. Needless to say that the affidavit would enclose the necessary materials i.e. the relevant agreements between broadcaster and the three distributors both for DAS and analogue areas in a sealed cover. Taj will submit similar details and will also submit its agreements with DEN, Hathway and Siti both for DAS and analog areas.....”

(ii) **Order dated 29.01.2016:**

“.....In this regard it to be noted that neither Star nor Taj has submitted its interconnect arrangements with three pan-India, namely DEN, Hathway and Siti as directed in the order dated 18.12.2015 nor the two broadcasters have filed the affidavits as directed.

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It is thus clear that rather than disclose its commercial terms with the three distributors even to the Tribunal, Star is willing to supply its signals to the petitioner

on deferred payment and is willing to have its dues against the petitioner accumulate to several crores of rupees.”

(iii) Order dated 16.02.2016:

“.....In course of hearing in Broadcasting Petition no.295 of 2014, the Tribunal was repeatedly told by the counsel representing TRAI that non-discrimination is the essence of interconnect regulations. We fail to see how would non-discrimination can be made effective while the broadcasters so rigidly guard the commercial details of their interconnect arrangements with other distributors of signals.”

Dealing specifically with this issue i.e. issue regarding confidentiality of the information in respect of the agreements executed by the broadcasters, the TDSAT in its judgment dated 07.12.2015 in the Petition No. 295(C) of 2014 filed by NSTPL negated the contention of the broadcasters/IBF that the Access Regulation hold supremacy over the Interconnect Regulations and therefore the information pertaining to the agreements executed should not be disclosed. The Hon’ble Tribunal held as under:

“The Written Submissions filed behalf of TRAI describes Clauses 3.1 and 3.2 as the “most essential conditions of the interconnection regulations”. We are in full agreement with this view of the Interconnect Regulations, 2004 and in that view the commercial terms of the interconnect agreement cannot be held to be exempt from disclosure under the Access Regulations. In view of the “must provide & non-discrimination” obligation there can be no secrecy in the commercial terms, because they cannot be permitted to be the source of any comparative or competitive advantage. In our considered opinion, therefore, the broadcasters cannot hide behind the Access Regulations on the plea that the distributor must first obtain an order of disclosure from TRAI.”

By acknowledging in more than clear terms that the non-discriminatory provision in Clause 3.2 is the essence of the Regulations and that the broadcasters have since long been taking benefits of

the loopholes in the regulation and silence of TRAI in this regard have already caused much damage to the industry the Hon'ble Tribunal went on to hold as under:

“The non-discrimination obligation, which TRAI acknowledges as the pivot of those Regulations, appears inconsistent with a regime where parties are allowed full latitude to mutually negotiate their agreements and also not disclose the commercial terms of the agreement to other market participants.”

Establishing therefore that disclosure of information forms that very basis for achieving the ultimate objective of Interconnect Regulation i.e. non-discrimination the Hon'ble Tribunal held as under:

“In the present scenario, the issue of disclosure indeed becomes basic for the enforcement of non-discrimination. But the matter of disclosure may be seen from two angles. First we are not satisfied with Mr. Sibal's submissions based on the Access Regulations. The provisions of an ancillary set of Regulations cannot be left out for being interpreted in a manner as to set at naught the very soul of the primary Regulations that form the mainstay of the regulatory regime for the broadcasting service.”

Accordingly, in the present situation, it is the need of the hour for the Authority to bring necessary changes in the existing regulation for Register of Interconnect Agreements to remove the ambiguities in the earlier regulation which had given a leeway to the broadcasters to continuously evade the obligation to diligently complying with the requirement of the same and thereby flouting with the regulatory requirement of disclosing the details pertaining to the agreement executed by them. In addition to making necessary addition / changes in the Regulation, it is imperative that the Authority ensures that the Regulation is complied with by all the stakeholders since any Regulation can become effective only if the same is strictly complied with.

We would like to state that the basis for the Regulation of the Carriage Fee has to be the basis on which the entire Interconnect Regulation has been made – “NON DISCRIMINATION AND FULL

TRANSPARENCY". All the Broadcasters as well the DPO's must be required to submit full details of each and every transaction entered into them. The Broadcasters, while making any offer to the DPO's, must consider and take into account any Carriage fee paid to another DPO. Such a step will eradicate the issue of Non-discrimination and will create level playing field among the DPO's.

In order to ensure complete transparency and ensure non-discrimination, the parties should be directed to submit all the Agreements for whatever purpose, whether Subscription / Carriage / Marketing / Support or any other name entered into them. This will ensure that no Agreement remains outside the realms of the Regulator and will also remove any possibility of providing any favourable treatment to any party. Further, the regulations should also provide the parties shall submit on quarterly basis, the amount paid to each other, duly certified by their respective Statutory Auditor.

The compliance of the above shall not only ensure transparency but will also enable the TRAI to be in possession of all the relevant information which will assist them in periodic review of the industry. It should be clarified by the TRAI that the parties should submit "ALL" Agreements / Arrangements entered into between the parties or with their associate / related companies, whether interconnect agreement or any other agreement.

It is also important to bring to the notice of the Authority, certain Broadcaster, with an intention to defeat the DAS I and DAS II deadlines, had shifted their carriage agreements to DAS III and DAS IV area operators. The same also happened in DAS III deadline where the carriage agreements were shifted to DAS IV area operators.

Regarding the contours of confidentiality of any information under any agreement one can think of only two possible aspect for which any executing party may insist for greater restriction from disclosure i.e. commercial terms and packaging. It is stated that except these two aspects no other part of the agreements would be treated with such sensitivity and it may be seen the discrimination persisting in the broadcasting industry for such a long time has been solely due to these two factors. It would therefore sufficient for the Authority to make a provision under the

proposed regulation for the Service Providers to disclose all information pertaining to these aspect to achieve remove all ambiguities and achieve transparency. This in line with the already existing provision of clause 3 of the Interconnect Regulation which has received much needed vigour after the judgment of Hon'ble TDSAT would force the broadcasters to not only disclose all the terms of RIO in completely non-discriminatory manner on its website and then to exhibit its compliance of the said terms by submitting to the Authority all the relevant information pertaining the agreements executed by it.

Regarding the issue about the duplicity of the information as raised in the Consultation Paper under reply, we may wish to bring into the notice that in paragraph 18 of the Consultation Paper the Authority has stated that in order to remove have easy compilation and easy reporting and also to remove duplicity of reporting, the Authority has stated that the details of interconnect agreements between broadcaster of pay channel and distributor of TV channels shall be reported by the broadcaster of pay channel and similarly the interconnect details of MSO/HITS and LCO shall be reported by the MSO/ HITS whereas the MSOs/HITS/DTH operators would be liable to provide only the carriage details wherever applicable. However the Regulation 5 of the proposed regulation mandates compliance of reporting requirement by each of the broadcasters and service providers.

While we suggest removal of this inconsistency, we may suggest that the provision as stated in the regulation 5 may be retained thereby requiring each of the entity to submit the relevant information to the Authority. This will on one hand ensure that all the parties come under the purview of the Regulation to submit all relevant information with none of the parties left behind, this will also enable the authority to cross check and verify the details submitted by one party vis-à-vis an agreement with that the information submitted by the other executing party. This may involve a little more effort and more manpower, however this would be immensely helpful to achieve the overall goal of the regulation.

Lastly, as pointed out in our previous response to the "Consultation Paper on Tariff Issues related to TV Services", for the sake of clarity, we would like to again point out that Para 14 of the

Consultation paper has wrongly mentioned that the “Must carry” provisions are applicable for all the Distributor of TV Channels. It is reiterated that the said provision is not applicable to a DTH platform. We would like to state that there is no provision / regulation or law which mandates the DPO’s to compulsorily carry the channels and any insinuation to the contrary is totally wrong. The extant Regulations has the provision only for “Must Provide” to ensure that there is no discrimination meted out to any platform and that a consumer does not require to subscribe to multiple platforms to view the channels of his choice.

In the above backdrop, we provide our response to the issue for consultation as under:

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

Dish Response: Dish TV strongly supports the stand taken by TRAI which is in line with the judgment dated 07.12.2015 passed by the Hon’ble Tribunal that in order to achieve the overall objective of ‘must provide’ and ‘non-discrimination’, submission of all the crucial information pertaining to the agreements executed amongst the service providers including the relevant commercial information should be provided to the Authority so as to make them accessible by any person. This will not only provide a level playing field for all the stakeholders and increase competition in the market and thereby improving the quality of services by the broadcasters but also ensure that ultimate consumers are benefitted which is the backbone for the success of any industry.

It is stated that the existing Regulations in respect of Register of Interconnect Regulations has not been able to serve the purpose only because of – (1) Non provision of data in respect of the amounts paid by the Broadcasters to the DPO’s & (2) The provision of Confidentiality in the Regulations. Even those information which were filed were never put to scrutiny. The objective of the overall Regulations can be achieved only if Transparency is forced by the Regulations. The removal of Confidentiality conditions will also help in reducing the litigation since the stakeholders would be fully aware of the commercial terms under which the channels are being offered by the Broadcasters. If the Regulations provide for the Commercial Information being a

confidential information, the situation will remain the same and Non-discrimination cannot be achieved.

As stated above, the self-serving interest of the certain stakeholders to either deliberately misinterpret or to not follow the regulations has been plaguing the industry for so long. This resulted intervention by the Hon'ble TDSAT which has endeavored to remove all such ambiguities and loopholes and has therefore set the tone to achieve an ideal situation to ensure overall growth and development of the broadcasting industry.

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 fulfill the objective of non-discrimination?

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

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

Dish Response: Dish TV believes that all the relevant information pertaining to an agreement should be subject to disclosure without any restriction. As stated above, under any agreement in the broadcasting sector it is only the commercial consideration and the packaging details which are generally considered as sensitive by the service providers. Therefore provision of these information along with the incentive scheme(s) provided by any broadcaster should be mandated for disclosure and such disclosure should not be made subject to any restrictive condition and should be made available to any person. However the Authority may prescribe certain charges for the information seeker to access such information.

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?

Dish Response: In view of the responses given above, the response to this consultation is not required.

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

Dish Response: At the outset, we would like to highlight to the Authority that the proposed Clause 5 of the draft Regulations has an ambiguity. The title of the clause reads as under:

“Reporting of information, relating to interconnect agreements, by broadcaster of pay channel and the distributor of TV Channel”

Looking at the past practice of certain section of the stakeholders, the above title may be read in a manner in which the Broadcaster will submit the information only relating to the pay channels and will abstain from providing the information about the free to air channels which are being distributed by them. Accordingly, the Regulation should clarify that any Broadcaster which is distributing even one Pay channel shall be considered as a Pay Broadcaster and the said Broadcaster should be obligated to submit information of all the channels, whether Pay or FTA.

In respect of frequency of submission of the data, we are of the opinion that the frequency for submission of the data along with the interconnect agreements should continue to remain as one year. However as rightly observed by the Authority in the present consultation paper that since the validity of most of the interconnection agreements is also one year therefore by the time these are reported as per the requirement specified under the regulations, their validity is already over, it is suggested that there should be a requirement for quarterly submission of the fresh agreements/renewal/addendums of all such agreements the validity of which expires within the said period of one year. This will ensure timely updation of the information pertaining to the agreements executed throughout the year. Any period lesser than three months would amount continuous updation of information by each and every party and such a mechanism would lead to a chaotic situation where it will be extremely difficult for any person to analyze and assess the market situation and reach to a logical conclusion.

Q5. Please provide comments on how to ensure that service providers report accurate details in compliance of regulations?

Dish Response: The agreements would be submitted by all the stakeholder in the value chain at least once in every year along with the details thereof in electronic form. These agreement would remain in the possession of the Authority. Therefore accuracy in the said reports can be ascertained by cross checking with the info provided by the other party and also with the agreements submitted before the Authority. This may be little tedious and may involve more manpower, however considering the ultimate objective of achieving greater transparency such cumbersome process may not be undesirable.

Q6. Please provide comments on digitally signed method of reporting the information.

Dish Response: Dish TV is of the opinion that TRAI should adopt the 'Go Green' policy and that not only the reports but the entire filing of the agreements should be made electronic so as to save paper. The documents so filed should be digitally signed to ensure authenticity of the same and fix the responsibility of the parties.

Q7. 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.

Dish Response:

In line with what has been suggested above, we request provision of additional column for commercial consideration and packaging should also be provided. Similar modification is suggested for the reports to be submitted by the MSO/HITS operators.

The schedules attached with the Consultation paper refers the word "Carriage Fee" – information of which has to be provided by MSO / Broadcaster. However the TRAI is aware that fee may be paid under different heads and the information of which will not be provided to the TRAI in case the same are not paid as carriage fee and the payment is made under a different header.

Accordingly, the format should not use the term – “Carriage fee”. It should simply require the parties to submit the information of all payments made irrespective of any header. As an alternative, the Authority can define the term – Carriage Fee which should be an inclusive definition covering each and every payment made in any form by the Broadcasters.

This could be done by either adding a column in the Table B of Schedule I or the Broadcaster may be required to submit the information in a separate format which can be prescribed by the TRAI. It should be clearly mandated by the TRAI that each Broadcaster should furnish the following information:

- Quarterly statement on all payments which has been made by the Broadcaster to a Distributor of TV Channel, on any account whatsoever;
- Quarterly statement on all payments made by the Broadcaster on behalf of the Distributor of TV Channel which may include payments to clubs, payments for foreign trips etc;
- Yearly statement containing the entire information of the amount paid / received. In addition, the Broadcaster must be required to provide the amount which has been written off or the discount which has been given over and above the amount provided in the agreement should be disclosed by the Broadcaster.

The same requirement should also be imposed on all the Distributors of TV Channels who should disclose the similar information to the TRAI.

Q8. Any other suggestions relevant to the draft regulations.

Dish Response: As observed by the Hon’ble TDSAT and also by the Authority in the present consultation paper that the basic principles of the existing interconnection regulations for broadcaster are ‘must provide’ and ‘non-discrimination’ and that every broadcaster is required to disclose its commercial terms transparently, so that distributor of TV channels can seek interconnection and access the TV signal from the broadcaster on non-discriminatory terms for retransmission in its network. In line with the same, we feel that there is no requirement to have

two separate parts in the register for maintaining the data and attaching the requirement of confidentiality to a particular part. Having such a provision in the regulation would ultimately defeat the very purpose of the regulation which aims at greater transparency in the sector leading to overall growth of the industry. It is therefore suggested that Regulation 4 may be deleted and regulation 3 may be modified accordingly.