Counter comments of Dish TV India Limited

to the

Responses given by Stakeholders to the

Consultation Paper

on

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

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Counter comments on behalf of Dish TV India Limited to the comments made by stakeholders to the consultation paper on "The Register of Interconnection Agreements (Broadcasting and Cable Services) Regulations, 2016"

Dish TV India Limited has provided its comments on the Consultation Paper vide its response dated 25.04.2016. We are now submitting the counter comments for consideration by the Authority.

- **CONFIDENTIALITY HAS BECOME A TOLL TO CREATE DISCRIMINATION. TRANSPARENCY IS THE KEY TO ACHIEVE THE OBJECTIVES OF THE REGULATIONS:**

At the outset we may state that the TRAI in the Consultation Paper has itself clearly identified as under:

> 13. The basic principles of the existing interconnection regulations for broadcaster are 'must provide' and 'non-discrimination'. Therefore, 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.
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> 14. Similarly, the distributor of TV channels is governed by 'must carry' and 'non-discriminatory' provisions including carriage fee for distribution of the TV signals. ----------."
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> 15. ***The objective of 'non-discriminatory' interconnection agreements cannot be effectively achieved by denying access to certain commercial information of the signed agreements to interested stakeholders.*** Providing access to relevant commercial information will help service providers to engage in interconnection arrangements looking at the data and trends. It will support level playing field and encourage competition based on efficiency and quality of service. ----------."

Despite the above observation made by the Authority which is also in line with the opinions expressed by the Hon'ble TDSAT in various judgment, the attempt of a section of stakeholders to push for confidentiality is nothing but a last ditch effort to continue with the malpractice which has plagued the industry for a long time now.

In this regard it is worthwhile to note that even RTI Act gives privilege to 'public interest' over 'confidentiality' and provides for sharing of commercially sensitive information and trade secrets if in the sole opinion of the Information Officer public interest outweighs such sensitivity. It is an established fact that the discrimination has been ever prevalent in the industry which has been accentuated because of the confidentiality issue. Now the time has come when the Authority needs to take a strong decision and decide against such confidentiality which was not only against the industry but also against the public at large.

For ensuring level playing field, it is the 'Transparency' which is required and not protection of commercially sensitive information. It is a matter of record that such practice has been plagiarizing the industry and has resulted into a situation where the Hon'ble TDSAT had to step in. In view of the same all these contentions have become worthless and especially when the Hon'ble Supreme Court also did not give any reprieve to the broadcasters who had gone into an appeal against the order of the Hon'ble Tribunal.

The citation of two judgments of Hon'ble Supreme Court as quoted by Star India Private Limited does not hold good considering the basic principles of the Interconnect Regulations, which is 'Non-discrimination' and 'Transparency'.

The judgement of Supreme Court in 'Sterlite Industries' case has been quoted, however the complete paragraph which in effect indicates the very intention of the Court regarding the disclosure of information was not reproduced. For clarity the relevant paragraph is reproduced as under:

> *"In our view, it is not necessary for us to go into the merits of this matter as we propose to send the matter back to CEGAT after laying down certain guidelines. From what has been argued before us, it appears that in pursuance of Rule 7 of the Customs Tariff (Identification, Assessment and Collection of Anti-Dumping Duty on Dumped Articles and for Determination of Injury) Rules, 1995 the Designated Authority is treating all material submitted to it as confidential merely on a party asking that it be treated confidential. In our view, that is not the purport of Rule 7. Under Rule 7, the Designated Authority has to be satisfied as to the confidentiality of that material. Even if the material is confidential the Designated Authority has to ask the parties providing information, on confidential basis, to furnish a non-confidential summary thereof. If such a statement is not being furnished then that party should submit to the Designated Authority a statement of reasons why summarization is not possible. In any event, under Rule 7(3) the Designated Authority can come to the conclusion that confidentiality is not warranted and it may, in certain cases, disregard that information.* ***It must be remembered that not making relevant material available to the other side affects the other side as they get handicapped in filing an effective appeal. Therefore, confidentiality under Rule 7 is not something which must be automatically assumed.*** *Of course in such cases there is need for confidentiality as otherwise trade competitors would obtain confidential information which they cannot otherwise get. But whether information*

supplied is required to be kept confidential has to be considered on a case to case basis. It is for the Designated Authority to decide whether a particular material is required to be kept confidential. Even where confidentiality is required, it will always be open for the appellate authority, namely, CEGAT to look into the relevant files."

It is therefore clear that while the Hon'ble Supreme Court have considered confidentiality of any information, however while weighing the same against need for disclosure, it is latter which has been given the preference if it warrants on case to case basis.

In the second judgment i.e. in "The Institute of Chartered Accountants of India v. Shaunak H. Satya and Ors.", the relevant portion as quoted in the response only would make it amply clear that the Hon'ble Supreme Court have cautioned that disclosure of information should be made considering other public interest involved. It is therefore clear that where there is no public interest involved in keeping any information confidential or where no public interest is impacted by disclosure of any information even the Apex Court is of the view that such disclosure should be made. In the present case it is wrong to even suggest that any benefit would be caused by keeping the commercial sensitive information as confidential. On the contrary, it is the non-disclosure of the information which has caused all disparities in the industry where the broadcasters have been found to have given lower rates to the DPOs associated to it as compared to other similarly placed DPOs which was raised and was elaborately dealt with by Hon'ble TDSAT in the matter of 'Hathway vs. Star'.

Advocacy of confidentiality on the garb that since the TRAI is in the process of coming up with comprehensive regulations based on the principles of transparency and non-discrimination and also that any differentiation post the said regime would be only based on transparent published schemes/criteria is also not well founded. This is for the reason that if all such schemes follows the regulatory requirement of being transparent there would be no requirement for them to be kept confidential.

The contention that the proposed requirement would negatively impact the broadcasters only is also incorrect as the requirement to disclose the information would be applicable for all and not solely to the broadcasters. One should be aware that under the proposed regulation, the objective of the Authority is be to implement the 'Non-discrimination' and 'Transparency' regime in the industry, which cannot be achieved without requiring the parties to submit commercial data. As stated in our response that since such information shall primarily be of packaging and pricing and not crucial and sensitive business information of the submitting parties, it is not correct to oppose the same citing '***Business Confidentiality'*** which relates to the trade secrets and confidential data pertaining to the business of any party and is not related at all to the information pertaining to the agreements executed under the Interconnect regulation.

The contention regarding duties of the parties under a contract or violation of the provisions of IT Act has been quoted out of context as the subject at hand does not relate to any act of illegally extracting or pulling any information out of any agreement but seeks to implement the principles of transparency and non-discrimination to ensure level playing field for all the stakeholders to

ensure overall growth and development of the sector. Comparison drawn with Competition Act is also misplaced as bare perusal of the provision contained in the same would make it clear that if a party wishes to make any part of information submitted by it as confidential, such a request must be accompanied with a cogent reason. However in the present case such need gets outweighed by the overall objective of the regulation which is to maintain Non-discrimination and Transparency.

For the same reason we oppose the contention of a stakeholder wherein it has been stated that "Divulging of commercial understanding between two parties to a third part is violation of privacy". In this context we would like to state that in no way it is violation of privacy or intriguing in their personal matter as the word "Privacy" according to the constitutional law means, the right of people to make personal decisions regarding intimate matter, and in no way relates to disclosure of commercial details. The stakeholder, while making the statement, seems to have been oblivious of the fact that unless the information is available to all the stakeholders, the position of non-discrimination can never be achieved.

The contention put forth by IndiaCast that "The right to privacy though not specifically granted has been derived by the Supreme Court of India using the provisions of Articles 21, 19(1)(a) and 19(1)(g) given in the Constitution" is also not well founded. It may be stated that the Article 21 of the Constitution of India which deals with Protection of life and personal liberty states that "No person shall be deprived of his life or personal liberty except according to procedure established by law." The said Article can only be claimed when a person is deprived of his "life" or "personal liberty" by the "State" as defined in Article 12. In fact and to the contrary by holding that the right to life has reached new dimensions and urgency the Hon'ble Supreme Court in **R.P.Limited v. Indian Express Newspapers**, has read into article 21 of the Constitution regarding the right to know and has held that the Right to know is a basic right which citizens of a free country aspire in the broader horizon of the right to live in this age in our land under Article 21 of the Constitution. In **Essar Oil Ltd. v. Halar Utkarsh Samiti & Ors.**, the Hon'ble Supreme Court held that there was a strong link between Article 21 and Right to know, particularly where "secret government decisions may affect health, life and livelihood".

Similarly, the reference to Article 19(1)(a) and 19(1)(g) is misplaced.

Thus, the contention that there is no requirement to revise the existing register of Interconnect Agreement Regulation for the reasons already detailed by the Authority in the Consultation Paper is totally misplaced and should not be accepted. Further, the review of the regulation also became imperative after the judgment dated 07.12.2015 of passed by the Hon'ble TDSAT reasserting and reemphasizing 'Non-discrimination' and 'Transparency' as the ultimate goal and objective of the Interconnect Regulations. It is for this reason also that we suggest that the Authority should do away with the provision of having part A and Part B in the Regulation and there should not be any impediment for any person to get any information pertaining to the agreements, subject of course fulfillment of the minimum requirement of making such payment as the authority may decide from time to time.

In fact it would be a fallacy to assume that the parties would start complying with the requirements of 'Non-discrimination' and 'Transparency' as required under the said judgment. On the contrary keeping the information pertaining to any agreement executed after the said judgment open for public inspection would work as a heavy deterrent for strict compliance of the judgment. We therefore find no reason for any party to shy away from furnishing the information as expected from them under the said judgment and making it subject to public inspection. It is matter of record that such position was not achieved when the confidentiality provisions were in place. Now, its time to give non confidentiality a try so that the desired best practices in the industry can be achieved and the litigations are reduced.

We support the idea of disclosure of information in a controlled manner only upon receipt of a request but the same should not be restricted to the service providers only and should be made available to any person as is followed under RTI Act. There is no logical reason to agitate that disclosure of information to any person would give an opportunity to a dishonest person to wriggle out of its contractual obligation on the basis of unfounded assumption and challenge validly concluded contracts. Time has proved how useful the RTI Act has become for a normal citizen to get through the governmental data. We therefore fail to understand that as to why the same principle should not be applicable in the B&Cs industry especially when such is the requirement of the very regulation and why the information submitted by the stakeholders should be treated differently. The contention put forth in this regard is a fallacy also for the reason that if at all any party, which may wish to cause any damage by getting the data, would only be a service provider and not a common man since a common man cannot be expected to have any such intention nor has any avenue to cause such harm and therefore the assumption is baseless.

We again reiterate that there is no requirement of making a provision of Part A and Part B in the proposed regulation as the same would be directly contrary to the intent shown by the TRAI in the consultation paper as well as against the direction of the Hon'ble TDSAT. However in case the Authority decides this issue in affirmative, then the Part B, proposed to be containing commercially sensitive information related the contracts executed between the service providers, may be subject to disclosure in the above manner upon receipt of any request from any person.

We strongly oppose the idea that the objective of non-discrimination is achieved by having the provision of intervention of TRAI either *suo-moto* or upon receipt of any specific complaint. While this will only perpetuate the wrong doings prevalent in the industry for so long, the same will only put hindrances in achieving the objective.

Regarding the report we would like to reiterate that the format should contain columns for disclosure of all sorts of payment being made by the broadcasters to the DPOs under any nomenclature and should clearly contain commercial understanding arrived between the service providers i.e. packaging and pricing. Further the broadcasters should also be mandated to 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.