COMMENTS TO TRAI CONSULTATION PAPER

ON

THE REGISTER OF INTERCONNECTION AGREEMENTS (BROADCASTING AND CABLE SERVICES) REGULATIONS, 2016

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THE WORLD IS MY FAMILY

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Preliminary Submissions:

- Zee Network, while welcoming the consultation paper on the Register of Interconnection Agreements (Broadcasting and Cable Services) Regulations, 2016 would like to take this opportunity to convey that TRAI has rightly observed in the consultation paper that "transparency and non-discrimination are the essence of the TRAI Interconnection Regulations". It essentially means that the content/TV channels should be available to all the distributors of TV channels which are similarly situated in a non-discriminatory manner.

- In order to ascertain as to whether the non-discriminatory principles have been scrupulously observed by the Service Providers, it is imperative that the basis for their commercial transactions should be "transparently" known. This is to ensure that level playing field is maintained and no favorable treatment is accorded to any service provider.

- In order to achieve the abovementioned objectives, the Hon'ble TDSAT in its latest judgment dated 7th December, 2015 in NSTPL matter has laid down the principles on which the revised Reference Interconnect Offer (RIO) are to be issued by the broadcasters by 30/4/2016. The attention is particularly invited to the following extracts of the said judgment which reads as under:

> *"Thus, in the interpretation that we have placed on the Regulation, there is the obligation to frame a meaningful RIO in which all bouquet and a la carte rates are specified, and there is also some room for mutual negotiation (even on rates) within certain specified parameters. This will achieve the objective of introducing a transparent non-discriminatory regime whereby distributors can obtain access to content, while still retaining some latitude to mutually negotiate the terms and conditions of access. It will also make the nexus between a la carte and bouquet rates, which the regulator thought fit to introduce, applicable to all mutually negotiated agreements. Negotiations must be within the parameters to those mandatory conditions specified in the Regulations that cannot be avoided or waived, and the mutual negotiation course cannot be used as the means to completely step out of the Regulations. ……"*

"As the Regulations stand in its present form, we are clearly of the view that the RIO must reflect not only the rates of channels but also the different formations, assemblages and bouquets in which the broadcaster wishes to offer its channels for distribution along with the rates of each of the formation or bouquet. Further, the a la carte rate and the bouquet rates must bear the ratio as mandated in clause 13.2A.12. The RIO must also clearly spell out any bulk discount schemes or any special schemes based on regional, cultural or linguistics considerations that would be available on a non-discriminatory basis to all seekers of signals. To sum up the RIO, must enumerate all the formats, along with their respective prices, in which the broadcaster may enter into a negotiated agreement with any distributor. To put it conversely, the broadcaster cannot enter into any negotiated deal with any distributor unless the template of the arrangement, along with its price, consistent with the ratio prescribed under clause 13.2A.12 is mentioned in the RIO. In addition, any volume-related price scheme must also be clearly stated in the RIO so as to satisfy the requirement of clause 3.6 of the Interconnect Regulations."

- A perusal of the aforesaid would reveal that w.e.f. 01.05.2016, the RIOs to be issued by the broadcasters have to contain all the negotiation parameters and also the manner in which the interconnection agreements would be concluded with the distributor of channels. It is also pertinent to point out that the RIO would form the "sole basis" for the interconnection agreement and no agreement, after 30.04.2016, would be permissible outside the terms of RIO. Thus, the basis on which various distributors of channels would enter into agreements with broadcasters would be transparently reflected in the RIO inter alia including various incentives and discounts on account of various parameters thereby duly complying with the principles of non-discrimination and transparency.

- Accordingly, once the new RIOs are uploaded by the broadcasters, the issue of discrimination and non-level playing field because of the alleged lack of information about the various deals would be taken care of as the RIOs would uniformly apply to all the addressable systems for conclusion of interconnection deals. Therefore, the long standing

grievance/allegation of DPOs that the deals between broadcasters and DPOs take place behind a closed doors and there is neither any reason nor any justification for different deals with different DPOs stands addressed by the aforesaid judgment of TDSAT dated 07.12.2015. Since all the agreements will flow from the RIO, there will be neither any occasion nor any reason for any DPO to complain that the negotiations have happened behind closed doors and that they are not aware of the incentives and/or discounts given to any particular DPO.

The Hon'ble TDSAT itself has observed in the NSTPL Judgment (supra) that:

> *"A proper RIO would, thus, form the starting point for any negotiations which would be within the limits allowed by the ratio between the a la carte and the bouquet rates as stipulated under clause 13.2A.12* ***and the margins between different negotiated agreements would be such as they would hardly be any requirement for disclosures"****.*

- **Viewed in the light of above, the need of "disclosure" qua the pricing/rates has more or less lost its relevance because of the ensuing transparent RIO regime as detailed above.** However, as detailed in the subsequent paragraphs, the Interconnect Agreements between the service providers to be executed based on such RIOs would still have lot of commercially sensitive information pertaining to the manner of doing business/operations in various areas. These factors are unique to each service provider and provide competitive edge/advantage vis-à-vis other service providers. This vital and commercially sensitive information needs to be protected from disclosure as otherwise it would severely compromise the competitive position of that service provider in the market and would cause serious harm and damage to its business.

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

Response:

- In our view all information including commercial portion of a register should not be made accessible to any interested

stakeholder as the information related thereto is of confidential nature and the parameters applied to arrive at a commercial deal may vary from DPO to DPO. For instance each agreement signed by a DPO even if having a similar subscriber base can be different due to various reasons including but not limited to the options that the said DPO chooses regarding the schemes/incentives/discounts offered in RIOs by various broadcasters. The scheme of a broadcaster could be based on number of subscribers and/or penetration level and/or number of channels and/or LCN number and/or geographical location etc. A DPO may opt for all the incentives and another DPO may opt for incentives pertaining to only 2-3 parameters.

- It is the absolute prerogative of the DPOs to choose which of the above mentioned schemes/incentives they would choose depending upon their business model. As pointed out hereinabove, it is possible that two DPOs which are similarly placed may opt for different incentives at different levels thereby resulting in a difference in their pay-out to the broadcaster. This cannot by any stretch of imagination be termed as "discriminatory". For examples DPO -1 and DPO -2 may have a similar Subscriber base of say 5.00 Million, but the visibility and reach of the Broadcaster's channels opted by DPO -1 and DPO -2 may vary and accordingly the incentives which are extended by a Broadcaster to two different DPO's would vary and depend on parameters like (i) Penetration (ii) LCN Placement, (iii) Channel count incentive.

- Therefore, from the above, it can be clearly seen that in such a situation the agreements between the broadcaster and the DPOs would not only reflect the pricing of channels but are also capable of disclosing the other strategic details such as business plan and business model adopted by such DPOs. It is stated that by disclosing the entire agreement publicly and/or even on a specific basis would severely compromise the competitive advantage of a particular DPO by following a particular business model or pattern.

- Further disclosing the information in general would also result in frivolous and roving equerries/requests and would open floodgates which are likely to lead to disputes and litigations in the sector.

  Accordingly, it is imperative to keep commercial portion of register included in Part – B of the Interconnect register as sensitive and confidential thereby exempt from disclosure.

- The attention is invited to Section 6 of "Telecom Regulatory Authority of India (Access to Information) Regulation, 2005" which reads as under:

  6. Exemption from disclosure of Information
  Information covered by any of the following categories shall be exempt from disclosure under the provisions of the 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.

- In this regard the attention is also invited to the similar provisions in various other statutes as per following details:

  (i) Section 8(1)(d) of the Right to Information Act

  Exemption from Disclosure of Information
  …….

  (d) information including commercial confidence, trade secrets or intellectual property, the disclosure of which would harm the competitive position of a third party, unless the competent authority is satisfied that larger public interest warrants the disclosure of such information;

  (ii) Section 11 of Right to Information Act

11. Third party information.—(1) Where a Central Public Information Officer or a State Public Information Officer, as the case may be, intends to disclose any information or record, or part thereof on a request made under this Act, which relates to or has been supplied by a third party and has been treated as confidential by that third party, the Central Public Information Officer or State Public Information Officer, as the case may be, shall, within five days from the receipt of the request, give a written notice to such third party of the request and of the fact that the Central Public Information Officer or State Public Information Officer, as the case may be, intends to disclose the information or record, or part thereof, and invite the third party to make a submission in writing or orally, regarding whether the information should be disclosed, and such submission of the third party shall be kept in view while taking a decision about disclosure of information:

Provided that ***except in the case of trade or commercial secrets*** *protected by law, disclosure may be allowed if the public interest in disclosure outweighs in importance any possible harm or injury to the interests of such third party.*

(iii) Regulation 35 of Competition Commission of India (General) Regulation 2009

Confidentiality. *– (1) The Commission shall maintain confidentiality of the identity of an informant on a request made to it in writing.*

(2) Any party may submit a request in writing to the Commission or the Director General, as the case may be, that a document or documents, or a part or parts thereof, be treated confidential.

(3) A request under sub-regulation (2) may be made only if making the document or documents or a part or parts thereof public will result in disclosure of trade secrets or destruction or appreciable diminution of the commercial value of any information or can be reasonably expected to cause serious injury.

(4) A request under sub-regulation (2) shall be accompanied with a statement setting out cogent reasons for such treatment and to the extent possible the date on which such confidential treatment shall expire.

(5) Where such document or documents, or a part or parts thereof, form part of the party's written submissions, the party shall file a complete version with the words "restriction of publication claimed" in red ink on top of the first page and the word 'confidential' clearly and legibly marked in red ink near the top on each page together with a public version, which shall not contain such document or documents or part or parts thereof.

(6) The public version of such written submissions shall be an exact copy of the confidential version with the omissions of the confidential information being indicated in a conspicuous manner, as stipulated in sub-regulation (5).

(7) [***]

(8) On receipt of a request under sub-regulation (2), the Commission or the Director General, as the case may be, if satisfied, shall direct that the document or documents or a part or parts thereof shall be kept confidential for the time period to be specified. Provided that the Commission or the Director General, as the case may be, if satisfied, may give such confidential treatment to any other information or document or part thereof also in respect of which no request has been made by the party which has furnished such information or the document.

(9) The Commission or the Director General, as the case may be, may also 16 consider the following while arriving at a decision regarding confidentiality: – (a) the extent to which the information is known to outside public; (b) the extent to which the information is known to the employees, suppliers, distributors and others involved in the party's business; (c) the measures taken by the party to guard the secrecy of the

information; (d) the ease or difficulty with which the information could be acquired or duplicated by others.

(10) In case the Director General has rejected the request of the party made under sub-regulation (2), the party may approach the Commission for a decision regarding confidential treatment.

(11) Where the Director General or the Commission has rejected the request for confidential treatment of a document or documents or a part or parts thereof and has informed the party of its intention, such document or documents or part or parts thereof shall, subject to sub-regulation (13), not be treated as confidential.

(12) [***]

(13) The document or documents or a part or parts thereof that have been granted confidential treatment under this regulation shall be segregated from the public record and secured in a sealed envelope or any other appropriate container, bearing the title, the docket number of the proceeding, the notation "confidential record under regulation 35" and the date on which confidential treatment expires.

(14) If the Commission includes in any order or decision or opinion, information that has been granted confidential treatment under this regulation, the Commission shall file two versions of the order or decision or opinion. The public version shall omit the confidential information that appears in the complete version, be marked "subject to confidentiality requirements under regulation 35" on the first page, shall be served upon the parties, and shall be included in the public record of the proceeding. The complete version shall be placed in the confidential record of the proceeding as provided in sub-regulation (13).

(15) Any person or party, including any officer or employee appointed by the Commission under sub-section (1) of section 17 of the Act and any expert or professional engaged by the

Commission under sub -section (3) of section 17 of the Act or any expert called upon to assist the Commission under subsection (3) of section 36 of the Act privy to the contents of the document or documents or a part or parts thereof that have been granted confidential treatment under this regulation shall maintain confidentiality of the same and shall not use or disclose or deal with such confidential information for any other purpose other than the purposes of the Act or any other law for the time being in force:

Provided that breach of confidentiality by any officer or employee of the Commission appointed under sub-section (1) of section 17 of the Act shall constitute a ground for initiation of disciplinary proceedings under the relevant rules or regulations, as the case may be:

Provided further that breach of confidentiality by any expert or professional engaged by the Commission under sub-section (3) of section 17 of the Act or any expert called upon to assist the Commission under subsection (3) of section 36 of the Act shall be sufficient ground for termination of the engagement or contract, as the case may be.

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?

<u>Response</u>:

- As pointed out hereinabove in Preliminary Submissions, the issues of non-discrimination and transparency have already been taken care of in the new RIO regime applicable w.e.f. 01.05.2016. Accordingly, we are of the view that out of the three ways

discussed in the Consultation paper, commercial information may be allowed to be made accessible only by way of trend analysis in the form of Reports. We are not in agreement with providing of commercial information by way of providing access to relevant commercial information to the interested stakeholders and also in not in agreement to disclose the commercial information after hiding the identity of the provider and the seeker since the names of the channels would any which way reveal the identity of the Broadcaster/service provider.

- We are also of the opinion that whatever commercial and other information is made accessible by way of trend analysis in the form of reports can be made available to service providers as well as the general public at large on payment of such fee and compliance of such other requirements as may be provided in the regulation. There should not be any blanket disclosure of the particular/specific information pertaining to a service provider.

- Since we are not in favour of disclosing specific information and since only the trend analysis in the form of reports will be made available to the service providers, there may not be any need for imposing any condition. However, if specific commercial information regarding a particular service provider is sought to be disclosed, the information seeker must be put to the condition of complete confidentiality and non-disclosure. Further such information (if at all) be disclosed, should not be accessible either to general public or to other service providers.

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?

<u>Response</u>:

- We suggest that the following process may be adopted in order to implement the provisions under clause (vii) and (viii) of Section 11 (1) (b) of TRAI Act so as to meet the objective of non-discrimination on the one hand and the protection of interest of the service

providers on the other. As pointed out hereinabove, instead of general disclosure, the request for access to information be entertained and dealt with on case to case basis. The following two alternatives may be adopted:

Alternate 1

(i) At the first instance, the DPO-1 alleging discrimination should approach the broadcaster for disclosing the information in respect of the agreement qua which the alleged discrimination has been claimed.

(ii) The broadcaster would then take such a request and ask the concerned DPO-2 (in respect of whom the commercially sensitive information is sought) for permission to disclose such information.

(iii) In case, the concerned DPO-2 permits the broadcaster to disclose the information, then the broadcaster would disclose such information and the matter would rest.

(iv) However, in case the concerned DPO-2 declines the request for disclosure of commercially sensitive information, then the broadcaster should withhold such information which would now take the shape of a dispute between the DPO-1 and the broadcaster/concerned DPO-2.

(v) Such a dispute would be required to be adjudicated by the TDSAT and in case, it is felt by the TDSAT to call for such information, such commercially sensitive information should be disclosed to TDSAT by TRAI.

Alternate 2

The provisions of "Telecom Regulatory Authority of India (Access to Information) Regulation, 2005" already contain the necessary procedure in this behalf. The attention is invited to the following extracts of the said Regulation:

3. Request for confidentiality and decision thereon

*(1) A service provider furnishing any information to the Authority under the Act**,** may make a request in writing to keep that information or a part thereof confidential, in which case he shall also furnish a non-confidential summary of the portion sought to be kept confidential. Such a request shall be accompanied by the reasons for keeping the information confidential, and the information or the part thereof shall also be marked as confidential.*

(2) Where the Authority is of the opinion that it is necessary or expedient to disclose the information in public interest , it shall do so in the light of the provisions of Regulation 6; provided that where the Authority proposes to reject the request of the service provider, it shall inform him in writing the reasons for doing so, and give him an opportunity to make a representation against the same within a period stipulated by it. On consideration of his representation, if any, the Authority shall take a final decision. Where the Authority rejects the request of the service provider, it shall communicate to him in writing the reasons for doing so, at least 7 days before making the disclosure.

4. Seeking Access to information

A service provider seeking access to information of another service provider shall make a request in writing to the Authority, with a copy to the service provider whose information is being sought. Such a request shall clearly state the purpose and the reasons for which the information is required.

5. Rejection of Request for Disclosure

On receipt of a request under regulation 4, the Authority shall examine whether the information sought is exempt from disclosure under regulation 6, or is covered by one of the grounds for refusal contained in regulation 7. If the Authority is of the view that the information is so exempt, or is covered by one of the grounds for refusal, or the request is not reasonable or genuine, or has not been made for legitimate purpose, or is not in public interest, the Authority shall reject

the request. . The Authority shall communicate in writing the reasons for rejection of the request to the service provider who had sought access to information.

6. Exemption from disclosure of Information

Information covered by any of the following categories shall be exempt from disclosure under the provisions of the 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.

7. Grounds for refusal of access to information

Without prejudice to the provisions of regulation 6, the Authority may refuse access to information where:
(i) the request is too general in nature; or
(ii) the information required is so voluminous that its retrieval would involve disproportionate diversion of the resources of the Authority; or
(iii) the information has already been published, or is likely to be published soon, or is regularly published from time to time.

8. Form of Information

The Authority shall provide the information in the form it considers proper

- The only modification we suggest in the above mentioned procedure is that when an information seeker approaches the Authority for a specific information about the agreement terms of a service provider, such request must be referred to the service provider in respect of whom the information is being sought for ascertaining its comments/response thereto

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

Response:

- In our view the periodicity of reporting of information relating to Interconnect agreements by broadcaster of pay channel and distribution of TV channel(s) shall be done on half yearly basis within 15 days after end of six months. For example details of all Interconnect agreements executed by a Broadcaster during the quarter 1st July to 31st December, 2016 will have to be reported on or before 15th January 2017.

- As far as authentication of Agreements/addendums executed is concerned we are of the opinion that a Legal counsel/Compliance Officer should furnish a certificate digitally signed rather than a company secretary as suggested in the consultation paper. The rationale for this suggestion is based in terms of Section 203 of Companies Act 2013 read with Companies (Appointment and Remuneration of Managerial Personnel) Rules, 2014, which necessitates that every listed company and every other public company having paid-up share capital of Rs 10 crores or more to appoint the Company Secretary in whole-time employment. All Private companies and such public companies having Paid-up share capital lower than Rs 10 crores were not required to appoint a Company Secretary.

- In view of the above specific provision of the Companies Act 2013, there might be a situation that a Public Limited/Private Limited may be in business having a paid up capital of less than Rs. 10 Crores and therefore there would not be a company secretary in whole-time employment with such companies to issue such certificate suggested in the consultation paper.

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

Response:

In terms of our response to question no: 4 herein above, we reiterate that the information/details/report submitted by service providers in compliance of the regulation shall be authenticated by General Counsel/Compliance Officer of a company providing details of each and every Agreement/addendums executed by the Broadcaster with any MSO/DTH operator/IPTV operator/HITS operator in the specific formats prescribed by the Authority.

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

Response:

In our view while reporting the information to the Authority, it should be done by way of signing off digitally by either the General Counsel/ Compliance Officer or the authorized representative rather than making it mandatory for two signatures i.e. the Company Secretary and the authorized representative for the reasons explained in our response to question no: 4 herein above.

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.

Response:

We are in agreement with the formats suggested by the Authority in Schedule – I of the Consultation paper for furnishing information relating to Interconnect Agreements signed between Broadcaster of pay channel and distributor of TV channel for providing signals of TV channels.

As far the format for DTH and IPTV provider as prescribed in Schedule – III (Table A1) is concerned, we suggest a change in the format in column no: 2 with regards to Registration/License number of Broadcaster. In the present scenario there is no such registration/License number assigned/allotted to a Broadcaster and therefore this column needs to be deleted.

Q8. Any other suggestions relevant to the draft regulations.

Conclusion: We welcome the proposed standardized format of reporting of information pertaining to the Interconnect Agreements to ensure uniformity across the Industry for all Distribution platforms. We also appreciate that the Authority has taken into account the voluminous nature of the information, its validation and the need to maintain the Interconnect Register for easy analysis/information retrieval and has proposed that the reporting system be changed to electronic format.

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