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No. RP/FY18-19/062/560
Dated: 03.11.2018

To,

Shri U.K. Srivastava,
Principal Advisor (NSL),
Telecom Regulatory Authority of India,
Mahanagar Door Sanchar Bhawan,
Jawahar Lal Nehru Marg, Old Minto Road,
New Delhi -110002.

Sub: Consultation Paper on "Estimation of Access Facilitation Charges and Co-location Charges at Cable Landing Stations."

Dear Sir,

This is with reference to your above mentioned consultation paper. In this regard, please find enclosed additional/ counter comments for your kind consideration. All prior submissions to the Authority on the issue and to the Courts may also be treated as a part of the submission.

Thanking You,
Yours' Sincerely,

For **Bharti Airtel Limited**

Ravi P. Gandhi
Chief Regulatory Officer
End: a.a.

[WITHOUT PREJUDICE]

Bharti Airtel's additional submissions to the Consultation Paper on Estimation of Access Facilitation Charges and Co-location Charges at Cable Landing Station

At the outset, we state that our submissions are without prejudice to our contentions and rights. We once again request that the submissions made by us in the Hon'ble High Court be treated as part of our response herein and issues dealt therein are also considered as part of the exercise being undertaken by the Authority in terms of the orders of the Hon'ble Supreme Court and the Hon'ble High Court of Madras.

We are providing our additional submissions to the CP for the consideration of the Authority.

A. Schedules I, II and III of the 21.12.2012 regulation have been quashed by the Hon'ble High Court of Madras and the same can be re-worked/re-enacted and re-framed from a prospective date only.

1. We have reviewed the submissions of the various parties to the Consultation Paper and note that the some of the parties in their submissions are requesting the Authority to make the re-enacted Schedules, which shall be arrived at post the completion of the Consultation Process, effective from January 1, 2013. Essentially, requiring the rates to be given effect retrospectively.

2. We submit that the Hon'ble Division Bench of the High Court of Madras vide its Order set aside and quashed Schedules I, II, III of the "The International Telecommunication Cable Landing Station Access Facilitation charges and Co-location charges Regulations, 2012 (no. 27 of 2012)" dated 21.12.2012 and directed TRAI to redo and re-enact the said schedules within six months.

   In this regard, we reiterate the appropriate part of the order, which states as follows:

   > *"(b) Insofar as dismissal of the aforesaid writ petitions qua 'The International Telecommunication Cable Landing Stations Access Facilitation Charges and Co-location Charges Regulations, 2012 (No.27 of 2012)' dated 21.12.2012, i.e., 'CLS Co-location Charges Regulation' is concerned,* ***we partly set aside the same holding that Schedules I, II and III of 'The International Telecommunication Cable Landing Stations Access Facilitation Charges and Co-location Charges Regulations, 2012 (No.27 of 2012)' dated 21.12.2012 stand quashed."***

3. Further, the Hon'ble Division Bench also held that TRAI is required to 'redo' and 're-enact' the quashed schedules within the time frame provided, which time frame has been modified by the Hon'ble Supreme Court. In this regard, we reiterate the appropriate part of the order, which states as follows:

"(c) TRAI shall redo and re-enact the aforesaid quashed schedules, i.e., schedules I, II and III of 'The International Telecommunication Cable Landing Stations Access Facilitation Charges and Co-location Charges Regulations, 2012 (No.27 of 2012)' dated 21.12.2012 after strictly following the procedure for subordinate legislation making, particularly transparency and principles of natural justice which have also been built into section 11(4) of TRAI Act within six months from the date of receipt of a copy of this order."

4. It is submitted that the Hon'ble Division Bench has also in its Order directed the Authority to strictly follow the procedure for subordinate legislation making, particularly transparency and principles of natural justice in accordance with Section 11(4) of the TRAI Act. Therefore, the exercise that the Authority is undertaking is a fresh exercise in terms of the Order. **It is clear from the judgement that all three annexures have been completely set aside and TRAI has been directed to re-enact and rework these annexures within six months.**

5. Further, the Hon'ble Supreme Court (vide its Judgment/order dated October 08th, 2018) while disposing of the SLP, on behalf of RCOM, ACTO and TRAI, with prayer for grant of interim stay on the operation of the judgment dated 02.07.2018 has not stayed the operation of the judgement dated 02.07.2018 of the Division bench of Hon'ble High court of Madras. It has rather only modified the Hon'ble High Court's Order to the extent of reduction in time for the Authority to re-enact the Schedules from 6 months to 6 weeks while leaving all other contentions open for all parties.

6. In line with the Orders of the Hon'ble High Court and the Hon'ble Supreme Court, the Authority is required to do a completely fresh exercise and redo and re-enact the Schedules, in a proper manner. Any Schedules that will be enacted pursuant to the fresh exercise has to necessarily be given effect from the date the same are re-enacted and not with retrospective effect. In support thereof, we refer to the Judgment of the Hon'ble Supreme Court.

State of Karnataka & ors. Vs. the Karnataka Pawn Brokers Association – Judgment dated 15th March, 2018 (Reported in 2018 6 SCC 363)

The issue before the Hon'ble Supreme Court was whether the amendment brought by Karnataka Government in the Money Lenders Act and the Pawn Brokers Act by inserting provisions in the laws for non-payment of interest on amount deposited by money lenders as security before the government agency for getting a license for their business, was constitutionally valid or not. The amendments were brought in 1998 but were implemented retrospectively to overrule a 1995 HC judgment which had held that the government should pay interest on security deposit as there was no provision to deny it to the money lenders.

The Hon'ble Supreme Court on the specific issue of the retrospective applicability of the amendments stated:

> *"**22**. On analysis of the aforesaid judgments it can be said that the Legislature has the power to enact validating laws including the power to amend laws with retrospective effect. However, this can be done to remove causes of invalidity. When such a law is passed the Legislature basically corrects the errors which have been pointed out in a judicial pronouncement. Resultantly, it amends the law, by removing the mistakes committed in the earlier legislation, the effect of which is to remove the basis and foundation of the judgment. If this is done, the same does not amount to statutory overruling.*
>
> ***23.** However, the Legislature cannot set at naught the judgments which have been pronounced by amending the law not for the purpose of making corrections or removing anomalies but to bring in new provisions which did not exist earlier. The Legislature may have the power to remove the basis or foundation of the judicial pronouncement but the Legislature cannot overturn or set aside the judgment, that too retrospectively by introducing a new provision. The legislature is bound by the mandamus issued by the Court. A judicial pronouncement is always binding unless the very fundamentals on which it is based are altered and the decision could not have been given in the altered circumstances. The Legislature cannot, by way of introducing an amendment, overturn a judicial pronouncement and declare it to be wrong or a nullity. What the Legislature can do is to amend the provisions of the statute to remove the basis of the judgment."*

It is therefore clear that while laws can be brought for the purposes of the removing causes of invalidity, the same cannot be having an effect of nullifying a Court Order.

Conclusion

The Schedules I, II and III of the 21.12.2012 regulation have been quashed and set aside by the Hon'ble High Court of Madras and the same are required be re-worked/re-enacted and re-framed and that too from a prospective date only. Any enactment of the quashed set-aside Schedules from a retrospective date shall render the entire exercise meaningless and amount to circumventing the Orders of the Hon'ble Court of Law. Clearly, any act of the Authority of giving effect to the Schedules from a retrospective date would be against the law settled by the Hon'ble Supreme Court of India and would amount to malice in law.

B. TRAI cannot regulate/ issue regulations for ensuring compliance to the terms and conditions of license.

Section 36 of the TRAI Act, 1997 provides for the power to make Regulations by TRAI consistent with the Act, and the powers and functions of the TRAI are set out in Chapter III under Section 11 to 13, of which, Section 11(1)(b) is relevant in the present context.

Section 11(1)(b)(i) relates to ensuring compliance to license terms & conditions and does not confer the jurisdiction to TRAI to frame regulations.

Section 11(1)(b)(i), reads as follows:-

"Sec. 11(1)(b)(i) - ensure compliance of terms and conditions of license;"

In this context, it is relevant to mention that it has been a consistent stand of TRAI that its jurisdiction, power and authority to frame the Regulations on Cable Landing Station is derived from a license amendment.

It is submitted that terms and conditions of the license cannot empower TRAI to regulate a business, since it would amount to violation of the fundamental right to carry on business guaranteed by Article 19(1)(g) of the Constitution of India. Any restriction to such a constitutional right can only be in terms of Article 19(6) of the Constitution of India.

It is on this basis of an amendment to the Licence Agreement on which the TRAI seeks to trace its power to frame the Regulations. Also, under Section 36(1), the power of the TRAI is to make Regulations consistent with this Act and the rules made thereunder; a license agreement issued by the DoT under an enabling provision of the proviso to Section 4(1) of the Indian Telegraph Act, 1885 cannot confer any power or authority to the TRAI to frame Regulations nor TRAI can issue any Regulations on the pretext of ensuring compliance to the terms and conditions of the license, if it does not have the power under the Act to issue those Regulations.

In this context, we would also like to bring forth the Supreme Court Judgement in Civil Appeal No. 5253 of 2010 between BSNL and TRAI.

> *27. After the amendment of 2000, the Authority can either suo motu or on a request from the licensor make recommendations on the subjects enumerated in Section 11(1)(a)(i) to (viii). Under Section 11 (1)(b), the authority is required to perform nine functions enumerated in clauses (i) to (ix) thereof. In these clauses, different terms like ensure, fix, regulate and lay down have been used.* ***The use of the term ensure implies that the Authority can issue directions on the particular subject.*** *For effective discharge of functions under various clauses of Section 11(1) (b), the authority can frame appropriate regulations. The term regulate contained in sub-clause (iv) shows that for facilitating arrangement amongst service providers for sharing their revenue derived from providing telecommunication services, the Authority can either issue directions or make regulations.*

The above provision clearly indicates that TRAI only has the power to issue directions for ensuring compliance of terms and conditions of the license. Without prejudice to our contentions, assuming but not admitting that TRAI's has the power is to make regulations to ensure compliance of terms & conditions of the license, the same would result in a

conflict with the license agreement. The license agreement, being a contract, has to be governed by the provisions of the Contract Act and cannot be overridden by the way of regulation. The Hon'ble Supreme Court in the Civil Appeal No. 5059 OF 2007, vide its judgment dated 11.10. 2011, has held that the license is a contract.

> *40 ….. that this Court has consistently taken a view that once a licensee has accepted the terms and conditions of a license, he cannot question the validity of the terms and conditions of the license before the Court. We, therefore, hold that the TRAI and the Tribunal had no jurisdiction to decide on the validity of the definition of Adjusted Gross Revenue in the license agreement and to exclude certain items of revenue which were included in the definition of Adjusted Gross Revenue in the license agreement between the licensor and the licensee.*

Regulations are in the nature of subordinate legislation, which under Section 36 of the Act has to be conferred by the Act. **There is admittedly no power conferred by the Act to frame the regulations under various provisions of the Act and the same, therefore, cannot be justified on the basis of seeking compliance of a term of license. Moreover, framing of a subordinate legislation cannot be predicated and made subject to amendment of contractual clauses.**

C. Section 11(1)(b)(iv) relating to Revenue Sharing is Not Applicable in the Case of Access to CLS reads as follows:

Section 11(1)(b)(iv) regulate arrangement amongst service providers of sharing their revenue derived from providing telecommunication services.

A reading of the above clause clarifies that TRAI has the power to regulate the sharing of revenue between service providers. The pre-requisite for any arrangement to be called as revenue share would be that both the parties in a transaction clearly agree and acknowledge that revenue being generated from the end customers will be shared equitably between both parties.

The VAS arrangement is a good example of such revenue sharing regime in which the revenue from each VAS service is known to both the parties and is shared accordingly.

However, in case of CLS, the revenue earned by ITE using the bandwidth is not known to the OCLS. This is due to the fact that the CLS is used as an infrastructure by the ITEs and not as an end-to-end service with clear demarcation of revenue associated with it. Therefore, it cannot be called a revenue sharing arrangement and TRAI does not have the power to regulate it under section 11(1)b (iv).

D. CLS is an infrastructure facility and TRAI has no power to regulate under Section 11(1)(b)

The fact that CLS is an infrastructure facility has been acknowledged by TRAI in its Consultation Paper on 'Issues related to Telecommunications Infrastructure Policy' dated 14th January 2011, wherein it categorizes various infrastructure elements as follows:

> *"D3 – Cable Landing Stations*
> *1.31 A submarine cable landing station has the following infrastructure to which other eligible service providers will need access:*
> - *Fibre Distribution Frame*
> - *Equipment Room*
> - *Network Operation Centre (NOC)*
> - *Digital Distribution Frame*
> - *Backhaul Termination*
> - *Landing Facilities*

1.32 The service provider seeking to use submarine cable landing facilities need to collocate their equipment in the owner's premises and for this they need facilities including building space, power, environment services, security and site maintenance."

From the above discussion, the following issue emerge for consultation:

1. *Do you agree with the classification of infrastructure elements described in this chapter? Please indicate additions/modifications, if any, particularly where you feel that policy interventions are required.*
2. ***What measures can be taken to encourage more ILDOs and ISPs to set up cable landing stations?***

Vide its recommendations on Telecommunications Infrastructure Policy dated 12th April, 2011, TRAI again recognized CLS to be an infrastructure facility and recommended the following:

> *1.107 The Authority recommends that a single window system for providing clearance to the operators intending to establish cable landing station should be established at DoT. The operator desiring to establish cable landing station should submit all the forms required by all concerned ministries to this single window agency and final approval of clearance should be intimated by the single window agency within six months.*

It is clear from the above that CLS is an Infrastructure facility, however, has still categorized 'access to CLS' as a case of infrastructure sharing. Further, the power to frame Regulations in case of Infrastructure sharing, which is a subordinate / delegated legislation, is not governed by a provision of the TRAI Act.

Clearly, the Authority itself also recognises the limitation to its power and jurisdiction under Section 11 (1)(b)(ii) to (iv) read with Section 36 (1) of the TRAI Act, and sought an amendment to the terms and conditions of the license for enabling TRAI to issue the Regulations on the subject. TRAI consciously sought an amendment to Section 11(1)(b) for insertion of 'access' in Section 11(1)(b)(ii). This was also reported publically by the media and we refer to the news report in Telecom LIVE, a Magazine published in Delhi in February 2013. The relevant extract from the said proposal is reproduced as follows:-

> *"Existing Section 11(1)(b)(ii): Notwithstanding anything contained in the terms and conditions of the license granted before the commencement of the telecom Regulatory Authority of India (Amendment) Act, 2000, fix the terms and conditions of inter-connectivity between the service providers;*
>
> *Proposed: Notwithstanding anything contained in the terms and conditions of the license fix the terms and conditions of access and inter-connectivity between the service providers.*
>
> *Decision: It was agreed to as the per the stand of DoT conveyed in the ongoing matter between TRAI and BSNL in an ongoing supreme Court case based on advice of Attorney General."*

It is clear from the actions of the Authority itself that it has admittedly no power to regulate Infrastructure sharing charges under section 11 (1) (b) of TRAI Act. Since CLS is an Infrastructure facility and access to CLS is a case of infrastructure sharing, framing regulations to govern the same is beyond the jurisdiction and power of the TRAI.