Bharti Airtel Ltd.
India & South Asia
Airtel Center, Plot No. 16,
Udyog Vihar, Phase - IV,
Gurugram - 122 015

www.airtel.in
Call +91 124 4222222
Fax +91 124 4248063

Dated: 29.10.2018
Ref. No: RP/ FY 18-19/ 062/ 548

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.

Subject: 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 our response 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
Encl: a.a.

[WITHOUT PREJUDICE]

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

At the outset, we would like draw attention of the Authority towards para 1.20 and para 2.28 of the Consultation Paper. The plain reading of these paragraph suggest that the Authority is assuming that the three annexures i.e. Annexure I, II and III of the regulations are still surviving. In that view, the Authority has narrowed the scope of the present consultation to determination of only two factors i.e. "utilization factor" and "conversion factor".

In this regard, reference is invited to the Hon'ble Supreme Court's order dated 08.10.2018 which states as below:

> *"In these Special Leave Petitions filed against the High Court judgment, it is clear that the Division Bench of the High court has interfered only on two counts. Insofar as both the counts are concerned, the ultimate finding is that both need to be re-worked by the Authority.*
>
> *We would request the Authority to re-work the figures on both counts within a period of six weeks from today. It will be open to the Authority, if it so finds, to re-determine the same two figures that have been accepted by the learned Single Judge.*
>
> ***All contentions may be raised and are kept open to both sides.** The parties shall not take adjournment on any count.*
>
> *The Special Leave Petitions are disposed of accordingly. Pending applications also stand disposed of."*

As per the order, while TRAI is required to re-work the figures on both counts, Hon'ble Supreme Court has also allowed any other contentions to be raised from both sides. In this regard, while we are making our submissions on the two issues raised by TRAI as part of the consultation process, it is well within our rights to request the Authority to also dwell upon other aspects of the issues, as the same require re-consideration. Further, please note that these submissions are without prejudice to our rights to raise any related issues at the appropriate forum.

Brief Background:

The constitutional validity of Regulations framed on CLS in 2007 and 2012 were challenged by Bharti Airtel Limited (hereinafter referred as "Airtel") before the Hon'ble Madras High Court by way of the Writ Petition No. 3652 of 2013, on various legal grounds including lack of legislative competence, violation of fundamental rights guaranteed under the Constitution of India, failure to conform to the statute under which it is made and manifest arbitrariness /

unreasonableness, etc. The said Writ Petition was dismissed the Ld. Single Judge of Madras High Court vide its Order dated 11.11.2016. The order dated 11.11.2016 was challenged before Hon'ble Division Bench vide Writ Appeal No. 285 of 2017. This writ petition was partly allowed by the judgment and order dated 02.07.2018.

The Hon'ble Division Bench 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.

Hon'ble Division Bench also held that TRAI has the power to frame the above-mentioned regulations in exercise of its powers under Section 36 read with Section 11(1)(B)(i) &(iv) of the TRAI Act. All the three Regulations have been kept in abeyance for a period of six months from the date of receipt of the copy of order of the Hon'ble Division Bench of High Court.

The operative part of the Judgment of Hon'ble Division Bench of Madras High Court under the heading "Decision" is reproduced below:-

> *"(a) Both appeals are partly allowed. We partly confirm the dismissal of writ petitions, W.P.Nos.1875 and 3652 of 2013. We confirm the dismissal of the writ petitions insofar as it pertains to challenge to 'International Telecommunication Access To Essential Facilities At Cable Landing Stations Regulations, 2007 (5 of 2007)' dated 7.6.2007, i.e., 'CLS Regulation' and 'International Telecommunication Access To Essential Facilities At Cable Landing Stations (Amendment) Regulations, 2012 (No.21 of 2012)' dated 19.10.2012, i.e., 'CLS Amendment Regulation'.*
>
> *(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.***
>
> *(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.*

(d) Consequently, 'International Telecommunication Access To Essential Facilities At Cable Landing Stations Regulations, 2007 (5 of 2007)' dated 7.6.2007, 'International Telecommunication Access To Essential Facilities At Cable Landing Stations (Amendment) Regulations, 2012 (No.21 of 2012)' dated 19.10.2012 and The International Telecommunication Cable Landing Stations Access Facilitation Charges and Co-location Charges Regulations, 2012 (No.27 of 2012)' dated 21.12.2012 are kept in abeyance for a period of six months from the date of receipt of a copy of this order or redoing / re-enacting aforesaid Schedules whichever is earlier.

(e) Writ appeals are partly allowed to the limited extent set out supra. Considering the nature of the matter and trajectory of the hearings, parties are left to bear their respective costs."

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.

Hon'ble Supreme Court 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 of the Division bench of the Hon'ble High court of Madras. It has modified the high court's judgment to the extent of reduction in time for re-enactment of annexure from 6 months to 6 weeks while leaving all other contentions open for all parties.

Therefore, the conclusion of TRAI in para 1.20 and para 2.28 does not accurately represent the orders of Hon'ble Supreme Court read with judgment of the division bench of Madras High Court.

Any selective reading of the orders of the Hon'ble Supreme Court by TRAI would mean setting aside the judgment of the Hon'ble Madras High Court which is not the case. Therefore, we believe that the orders of the Hon'ble Supreme Court do not set aside the judgment of division bench of the Hon'ble Madras High Court and only modify it to a limited extent of reducing the timeline for enactment of Annexure I, II and III or the regulation dated 21.12.2012.

Preliminary Submissions:

Without prejudice to our contentions raised earlier including but not limited to High Court of Madras, and without admitting the power of TRAI to regulate the charges for CLS, we would like to submit the following response:-

A. Cable Landing Station is no longer a bottleneck facility

1. **Brief Background:**

ILD sector:

- The ILD sector was opened for private players in year 2002 vide DoT's guidelines for issue of License for International Long Distance Services dated 15th January, 2002. VSNL was the only ILD operator prior to the issue of those guidelines. Therefore, the submarine Cable Landing Station (CLS) and the associated international cable landing in to India were considered to be the bottleneck facility at that time and thus equal access to these facilities to the new ILD licenses were mandated by DoT as under:

> *"2.2 (c) Equal access to bottleneck facilities for international bandwidth owned by national and international band width providers shall be permitted* ***for a period of five years*** *from the date of issue of the guidelines for grant of license for ILD service or* ***three years*** *from the date of issue of first license for ILD service, whichever is earlier, on the terms and conditionals to be mutually agreed".*

- In June 2005, TRAI initiated a Consultation on measures to promote competition in International Private Leased Circuits (IPLC) in India under which one of the issues was whether the submarine CLSs could still be considered as an essential/ bottleneck facility. TRAI subsequently gave its recommendation on the issue of access to essential facilities including landing facilities for submarine cables at CLSs in December 2005, wherein it was recommended that:

> *"equal access to bottleneck facility at the CLS, including landing facilities for submarine cables by licensed operators on the basis of non discrimination, without any sunset clause, should be mandated"*

- Based on TRAI recommendations of December 2005, the ILD service license was amended vide DoT's amendment letter dated 15.01.2007 as under:

> *"2.2 (C) Equal access to bottleneck facilities at the Cable Landing Stations (CLS) including landing facilities for submarine cables for licensed operators on the basis of non discrimination shall be mandatory. The terms and conditions for such access provision shall be published with prior approval of the TRAI, by the Licensee owning the cable landing station. The charges for such access provision shall be governed by the regulations/ orders as may be made by the TRAI/DoT from time to time".*

- Meanwhile, in January 2006, in order to enhance competition in this sector, the terms and conditions of the ILD license were liberalized with reduction in entry

fee to Rs 2.5 Cr and license fee to 6%. This has resulted in 27 ILD licensees as on date.

- Further, TRAI vide its Regulation on the "Access to essential facilities at Cable Landing Station" dated June 7, 2007, mandated the CLS owners to publish the "Cable landing Station – Reference interconnect offer" with the T&C of access facilitation charges and collocation facilities.

After 12 years of the regulation, one of the most important question which arises is, whether CLS is still a Bottleneck Facility in India.

Without prejudice to our contentions raised earlier and without acceding to the Authority's power to regulate charges for any bottleneck facility, we would like to explain why the CLS is no more a bottleneck facility in India.

2. Whether CLS is still a Bottleneck Facility in India?

a) Status of Cable Landing Stations and Cable Systems in India: Currently, we have 15 submarine cables landing in to India at 19 CLS locations. The table below shows the details of the Owner of Cable Landing Stations along with the Submarine Cable and CLS Locations:

S. No.	OCLS	Submarine Cable Name	CLS Location
1	Bharti Airtel Limited	(i) i2i (ii) SEA-ME-WE 4 (iii) IMEWE * (iv) EIG *	Chennai (2), Mumbai (2)
2	Tata Communications Limited	(i) FEA (ii) SEA-ME-WE 3 (iii) SAFE (iv) TIC (v) SEA-ME-WE 4 (vi) SEACOM * (vii) IMEWE *	Cochin(2), Mumbai (4), Chennai(1)
3	Reliance Communications Limited	(i) FALCON (ii) FLAG *	Mumbai (1), Chennai (1)
4	Bharat Sanchar Nigam Limited	(i) Bharat Lanka Cable *	Tuticorin (1)
5	Sify	(i) GBI * (ii) MENA *	Mumbai (2)
6	Reliance Jio	(i) AAE-1 * (ii) BBG *	Mumbai (1) Chennai (1)

7	Vodafone	(i) BBG *	Mumbai (1)

Note: * Established after 2007

Till 2007, there were 3 owners of Cable Landing Stations (OCLSs) with about 7 international submarine cables landing on 8 CLSs in the country. Presently, India has 7 owners of Cable Landing Stations (OCLSs) with 15 international submarine cables landing on 19 CLSs in the country, an increase of more than 100% in the number of OCLS, international submarine cables and CLSs from 2007 to till date.

On the contrary, the number of major access providers who are the ultimate users have reduced to only four i.e. Bharti Airtel, BSNL/MTNL, Vodafone-Idea and RJIL. Therefore, 19 (nineteen) cable landing stations owned by 7 companies while serving only 4 major access providers cannot be called a bottleneck facility by any stretch of imagination.

b) Insignificant Entry barrier:

At present, any company can procure an ILD license by paying an entry fee of merely 2.5 Cr and set up its own CLS. An ISP can also setup a CLS at a meagre entry cost of 30 Lakhs.

Further, it may be recounted that up till FY 2005-06 only four operators had taken ILD licenses and the number of ILD service providers increased to 27, post reduction in one time Entry fee and recurring license fees. Seven operators have already setup 19 number of CLSs as compared to only 3 operators owning 8 CLS during the year 2005-2006. Therefore, the CLS cannot continued be called as bottleneck facility in eternity.

c) In past CLS has not been a bottleneck for the Growth of International Bandwidth:

While TRAI has been treating CLS as a bottleneck facility and has made recommendations for mandatory provisioning of Access Facilitation, a large number of cable owners continued to prefer establishing new CLS for their upcoming/ planned cables in-spite of the availability of choice of landing at existing CLS. This clearly indicates that Cable Landing Station facility was being continuously created along with the new cables and cannot be treated and called a bottleneck facility.

d) Adequate Competition for ITEs/Access Providers intending to buy International Bandwidth:

There is ample competition in the market and the ITEs have adequate choices with regards to availability of International Bandwidth to a particular location abroad.

For example, an ITE intending to take international bandwidth from India to a location in Europe may approach Bharti, Reliance or TCL for end to end international Bandwidth. SMW 4 (Bharti/TCL), EIG (Bharti), IMEWE (Bharti/ TCL), SMW 3 (TCL), SEACOM (TCL), FLAG (Reliance), BBG (Vodafone/ RJio) and AAE-1 (RJio) are major cables from India that carry traffic towards Europe. TCL, Bharti, Vodafone, RJio and Reliance land these cables in India and compete with each other for connectivity to Europe. Since, different landing points in Europe (Palermo, Catania, Mazara, Monaco, Marseilles, Gibraltar, Seisembra, Bude) are also equally placed w.r.t. connectivity within Europe and therefore the customer in India has free choice w.r.t. cable to carry its traffic on, and is not compelled to carry traffic on a particular cable for a particular location in Europe. Therefore, it can be safely concluded that the capacity on all these cables is substitutable, and hence, the CLSs landing these cable are also substitutable.

Similarly, an ITE intending to take international bandwidth from India to Singapore or Asia/ USA via Singapore has multiple choices available. TIC (TCL), I2I (Bharti), SMW4 (Bharti/ TCL), SMW3 (TCL), BBG (Vodafone/ RJio), AAE-1 (RJio) and FLAG (Reliance) cables compete with each other, whereby they land at different CLSs in Singapore and also have connectivity to other cables from Singapore for other parts of Asia and to the USA. Thus, for traffic to Asia and USA via Singapore, the customers have enough choices of cables to choose from in India as well as the choice of cable landing in Singapore.

In view of the multiple choices of submarine cables and the CLS as explained above, we believe that for a market of 4 major Access services providers and a few major ISPs, the IPLC/International bandwidth market in India (*with 7 owners of CLS, 19 CLS and 15 Cables*) is very competitive. Therefore, the CLS is no longer a bottleneck facility and therefore should not be treated as bottleneck in perpetuity.

e) Global trends in CLS Regulation:

India has much greater competition in comparison with countries like Australia, UK, Brazil, Philippines and Canada where the CLS access are not regulated. It may be noted from examination of global practices that even in countries where CLS access was historically regulated, the regulations have been withdrawn at a time when these countries had much lesser number of Cables, OCLSs and CLSs as compared to India.

On the examination of the global practices and the current status of competition in long distance sector in India, a clear case is made out for withdrawal of regulation in respect of CLS in favour of market forces taking over.

The country specific scenario in terms of regulatory practices on CLS regulation is as below:

- **Market Governed:** In most European countries, North America, South Africa, South Korea, Thailand, Hongkong etc. the telecom operators are charging access facilitation charges/collocation for Cable Landing station (CLS) based on market determined pricing model.

- **Single Operator System:** In countries, like Saudi Arabia, Qatar, UAE, Egypt, Tunisia, China etc. where there are incumbent operators (who are also the CLS owners), the access facilitation charges are completely governed by the single operator. Italy is one of the examples wherein Telecom Italia decides the access facilitation charges.

- **Regulatory Framework:** To the best of our information, the Regulated Access facilitation charges are only prevalent in India and Singapore.

It can be safely concluded that India is an exceptional country where CLS charges are regulated despite of the market being competitive.

f) CLS is not an Essential/ Bottleneck facility even as per ITU/WTO definition[1] of Essential facilities:

ITU has defined the essential facilities as follows:-

> *"**Essential facilities** mean facilities of a public telecommunications transport network or service that*
> *(a) are exclusively or predominantly provided by a single or limited number of suppliers; and*
> *(b) cannot feasibly be economically or technically substituted in order to provide a service."*

As explained above, 7 ILDO/ISPs establishing 19 CLS, for the use of predominantly 4 operators' access market, cannot be called as a limited number of suppliers by any stretch of imagination. Nor the non-availability of one CLS cannot be substituted by the other CLS/Cable by the end user of bandwidth.

[1] Definition of Essential facility taken from Telecommunications Regulation Handbook:
ITU website: http://www.itu.int/ITU-D/treg/Documentation/Infodev_handbook/5_Competition.pdf

Therefore, even by the definition of essential/bottleneck facility by ITU, the CLSs in India (with 7 OCLS, 19 CLS and 15 Cables) cannot be treated as a bottleneck facility.

In light of the above it is urged that:

- **There is no justification to continue treating Cable Landing Station as an Essential/ Bottleneck facility in perpetuity.**
- **In wake of sufficient competition, the Access Facilitation Charges and Co-Location charges for Cable Landing Stations should be left to the determination by market forces.**

B. Power to regulate the CLS charges:

We strongly believe that TRAI does not have statutory powers to regulate the charges for CLS be it AFC or co-location. This is explained as follows:-

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

> "***Section 36.*** *Power to make Regulations.- (1) The Authority may, by notification, make Regulations consistent with this Act and the rules made there under to carry out the purposes of this Act.*
>
> *(2) In particular, and without prejudice to the generality of the foregoing power, such Regulations may provide for all or any of the following matters, namely:-*
>
> *(a) the times and places of meetings of the Authority and the procedure to be followed at such meetings under sub-section (1) of section 8, including quorum necessary for the transaction of business;*
>
> *(b) the transaction of business at the meetings of the Authority under sub-section (4) of section 8;*
>
> *(d) matters in respect of which register is to be maintained by the authority [under sub-clause (vii) of clause (b)] of sub-section (1) of section 11;*
>
> *(e) levy of fee and lay down such other requirements on fulfillment of which a copy of register may be obtained [under sub-clause (viii) of clause (b)] of sub-section (1) of section 11;*
>
> *(f) levy of fees and other changes [under clause (c) of sub-section (1) of section 11;"*
>
> "***Section 11 –***

Functions of Authority (1) Notwithstanding anything contained in the Indian Telegraph Act, 1885 (13 of 1885), the functions of the Authority shall be to-

(b) discharge the following functions, namely:-
(i) ensure compliance of terms and conditions of licence;
(ii) notwithstanding anything contained in the terms and conditions of the licence 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 provider;
(iii) ensure technical compatibility and effective inter-connection between different service providers;
(iv) regulate arrangement amongst service providers of sharing their revenue derived from providing telecommunication services;
(v) lay-down the standards of quality of service to be provided by the service providers and ensure the quality of service and conduct the periodical survey of such service provided by the service providers so as to protect interest of the consumers of telecommunication service;
(vi) lay-down and ensure the time period for providing local and long distance circuits of telecommunication between different service providers;
(vii) maintain register of interconnect agreements and of all such other matters as may be provided in the Regulations;
(viii) keep register maintained under clause (vii) open for inspection to keep member of public on payment of such fee and compliance of such other requirement as may be provided in the Regulations;
(ix) ensure effective compliance of universal service obligations;"

Section 11(1)(b)(i) relating to ensuring compliance to license terms & conditions cannot confer the Jurisdiction to TRAI.

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

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

The above provision is purportedly the basis for the Regulations as reflected in the recommendations of 16.12.2005, Consultation Paper of 13.04.2007 and Regulation of 07.06.2007 as stated hereinabove on the fallacious premise that amendment of licence will empower it to frame Regulations. Ostensibly, Section 11(1)(b)(i) has not been adverted to much less invoked in the Regulations dated 07.06.2007 and 19.10.2010 .

It is submitted that the power to frame Regulations, cannot be derived from provisions of a license agreement. The Regulations are in the nature of subordinate legislation, which u/s 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.

Framing of a subordinate legislation cannot be predicated and made subject to amendment of contractual clauses.

Section 11(1)(b)(ii)& (iii) Relating To Interconnection Is Not Applicable in the case of Access to CLS.

The relevant Sections read as under:
11 (1) Notwithstanding anything contained in the Indian Telegraph Act, 1885 (13 of 1885), the functions of the Authority shall be to-
(b) discharge the following functions, namely:-
(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;
(iii) Ensure technical compatibility and effective inter-connection between different service providers;"

Sub clause (ii) relates to the power of the TRAI to fix terms and conditions of interconnection between the service providers, Sub Clause (iii) relates to the power of TRAI to ensure technical compatibility and effective interconnection between service providers.

However, the provisioning of CLS facility i.e. AF and Co-location is not an interconnection services. This issues was deliberated by Division Bench of Hon'ble Madras High Court in its Judgment dated 02.07.2018 and it was rightly held that access to CLS is not a case covered under interconnection and therefore the Hon'ble Division Bench has not accorded the jurisdiction to TRAI on the basis of Section 11 (1)(b)(ii) & (iii) read with Section 36 (1) of the TRAI Act.

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.*

Reading of the above clause discloses that it is the revenue arising out of providing a service to a customer which has to be shared between various service providers. In a nutshell this clause, as evident from the above, relates to sharing of revenue generated by provision of a service by two or more operators to the end customer(s).

Section 11(1)(b)(iv) relating to sharing of telecommunication revenue in no manner covers the present case as there is no case of revenue sharing. While the ITE are being made to pay the cost of AFC and co-location but the ITE actually sells bandwidth to its customers. The revenue sharing would only be applicable if the ITE declares its revenue and agrees to share the same with the OCLS. On the contrary, it is a case where OCLS is declaring its cost and the charges for usages of the OCLS is being fixed by Authority without any

relationship with revenue. Therefore, in such a business scenario, the arrangement cannot be called as revenue share by any stretch of imagination.

C. Non-Transparent approach by TRAI while determining the charges:

The TRAI, in exercise of its power and function is required by the TRAI Act 1997 under Section 11(4) to ensure transparency while exercising its power. The relevant extract of Section 11 (4) reads as follows:-

> *"The Authority shall ensure transparency while exercising its powers and discharging its functions"'*

The division bench of High Court of Madras in its judgment dated 02-07-2018 has concluded the same and has accordingly mentioned the following in its judgment:

> *(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.*
>
> *(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.***

D. Calculation Methodology adopted by TRAI is flawed:

Without prejudice and without admitting the power of authority TRAI to regulate the CLS, we would like to highlight the following:

- The entire exercise of calculating CAPEX is vitiated by non- disclosure and non-transparency. The costing methodology adopted provides no clarity. There has been no explanation how the costs are flowing into the various tables for determination of AFC and O&M costs. No breakup/ justification has been provided with regards the Co-location charges

- TRAI has shown no transparency arriving at OPEX including that of disclosing the figures and workings.

- By adding up Capital Expenditure (CAPEX) and Operating Expenditure (OPEX) cost elements to arrive at a single figure of cost is the basis on which TRAI has purportedly fixed the Access Facilitation Charges. There has been no disclosure regarding the break up, methodology and rationale.

- While considering the capacity utilization, TRAI has clearly violated the requirement of transparency and principles of natural justice, apart from being arbitrary as well, assuming utilisation for in excess of actual fact and reducing per unit cost and timely charges.

- For the issues of Life of equipment, TRAI has disregarded the factual situation. Instead of taking actual life of equipment as 5-7 years, TRAI has considered it 10 years. There is no basis provided for the life being considered as 10 years.

- TRAI has used a WACC rate of 15% instead of 20% as recommended by Airtel, without providing any rationale for the same. By doing so, TRAI has failed to appreciate the characteristics of the Cable Landing Station business which requires high investments, has high risk and long gestation periods and also has a limited market. TRAI has also failed to appreciate the fact that the WACC represents the expected return by the shareholder/investor in any business. If the regulator, while deciding/regulating any charge, makes provisions for a lower WACC then it will force the investor to reconsider its investment decision in that business and would lead to either withdrawal of current investments or will result in lower/no further investments.

- TRAI has not considered the IT costs while determining Access Facilitation Charges. The capacities at CLS e.g. capacity of DXC, Co-location space and other infrastructure such as NoC, IT systems etc. are designed and deployed on the basis of the TSP's assessment of the business potential. The charging/costing of any components is consequent to the costs already incurred by the TSP.

  TRAI has totally ignored the land and Building cost as submitted and has arbitrarily used the space charges on rental per sq.ft. basis. Thus, ignoring the investment made in the building and purchase of Land by OCLS. It may be appreciated that the investment in Submarine Cable and the associated capacity is made assuming long term requirement of say 20-25 years. The associated land, building and cable landing system are also created taking long term utilization perspective. Hence, it is obvious that the utilization of the same will be low. For instance, SMW-4 launched in 2004-05 has a space utilization of only 50% despite being 13-14 years in service. Exclusion of land and building cost therefore, arbitrarily reduces the charges determined by TRAI and will also disincentivize the operators from setting up new CLS

Summarizing our submissions above:

- **TRAI does not have power to regulate Access Facilitation Charges and Co-location Charges at Cable Landing Station**
- **The costing methodology followed by TRAI is flawed and devoid of Transparency**
- **Cable Landing Station is no longer a bottleneck facility. The Access Facilitation Charges and Co-Location charges for Cable Landing Stations should be left to the market forces.**

In addition to the submissions above, please find our response to the two questions raised in the consultation paper on 'Utilization factor' and 'conversion factor'

Q 1. What should be the 'utilization factor' for determination of annual access facilitation charges, annual operation and maintenance charges for capacity provided on IRU basis, and co-location charges in the Schedules appended to "The International Telecommunication Cable Landing Stations Access Facilitation Charges and Co-Location Charges Regulations, 2012" dated 21.12.2012?

Bharti Airtel's Response:

TRAI, as mentioned in the consultation paper dated 19.10.2012, as part of its costing methodology has taken a utilization factor of 70%. The TRAI has failed to appreciate the fact that capacity of CLS is a long term capacity and cannot be calculated at any moment of time. CLS are setup for long term basis and therefore the capacity is calculated on the basis of long term demand forecast. IN such scenarios, the capacity utilization in the initial years is always very low and only reaches higher levels at a later stage. Therefore, this factor needs to be kept in mind while calculating the utilization factor for any CLS.

The said assumption is completely incorrect and flawed as is evident from the average utilization for cables landing at Chennai and Mumbai CLSs:

S No	CLS	2012	2013	2014
1	Chennai CLS	26	38	38
2	Mumbai CLS	2	16	27

Moreover, for any type of configuration, the OCLS has to equip all type of interfaces from STM-1 to STM-64. Further, the Authority should be cognizant of the fact that even for single port order, the OCLS will have to equip 16 port card and the rest of he ports shall remain unutilized.

Further, all the capacity is incapable of being utilized on the day one, however, any OCLS will need to arrange the facilities, space and other resources in terms of long term requirement and the utilization may vary from year 1 to year 3 viz. 20% capacity will be utilized for Year 1. It is therefore recommended that the utilization factor should be kept keeping in view the past trends on low utilization and further adjusted for future requirements.

Q2. What should be the 'conversion factor' (refer Para 2.22) for determination of annual access facilitation charges and annual operation and maintenance charges for capacity provided on IRU basis in the Schedules appended to "The International Telecommunication Cable Landing Stations Access Facilitation Charges and Co-Location Charges Regulations, 2012" dated 21.12.2012?

Bharti Airtel's Response:

Airtel had earlier submitted during the course of consultation process that for the purpose of cost calculations, a linear model be adopted, i.e. STM4 cost should be pegged at 4 x STM1, as the same would enable the CLS owner to recover the cost irrespective of the mix of interfaces sold. The same would ensure that the CLS owner does not take undue advantage of the interface mix nor be at a disadvantage due to unfair interface requirements.

As an illustration, we have created scenarios for various interface mix for the designed capacity of 60G. It will be seen that for factor 4 the cost for OCLS will remain the same, however for factor 2.6 the cost will vary with interface mix sometimes offering an advantage and sometimes penalizing the OCLS.

Assumption: Total cost of Rs. 1 Crores is to be divided based on a factor of 2.6 (as considered by TRAI) viz-a-viz 4 as recommended by Airtel:

	Capacity in Gbps	Bandwidth	No. of Interface	Factor of 2.6		Factor of 4	
				Per Unit Cost	Total Cost	Per Unit Cost	Total Cost
Mix of Capacity as considered by TRAI	10	STM-1	64	51,326	32,84,881	26,042	16,66,667
	10	STM-4	16	1,33,448	21,35,173	1,04,167	16,66,667
	20	STM-16	8	3,46,966	27,75,725	4,16,667	33,33,333
	20	STM-64	2	9,02,111	18,04,221	16,66,667	33,33,333
					1,00,00,000		1,00,00,000

Scenario 1	Capacity in Gbps	Bandwidth	No. of Interface	Factor of 2.6		Factor of 4	
				Per Unit Cost	Total Cost	Per Unit Cost	Total Cost
Actual Mix as STM-1 : 5G, STM-4: 5G, STM-16: 0G & STM-64: 50G	5	STM-1	32	51,326	16,42,441	26,042	8,33,333
	5	STM-4	8	1,33,448	10,67,586	1,04,167	8,33,333
	0	STM-16	0	3,46,966	-	4,16,667	-
	50	STM-64	5	9,02,111	45,10,553	16,66,667	83,33,333
	60				72,20,580		1,00,00,000

Note: Under recovery by Rs. 27,79,420 with factor of 2.6. Full recovery of cost with a factor of 4

Scenario 2	Capacity in Gbps	Bandwidth	No. of Interface	Factor of 2.6		Factor of 4	
				Per Unit Cost	Total Cost	Per Unit Cost	Total Cost
Actual Mix as STM-1 : 5G, STM-4: 5G, STM-16: 20G & STM-64: 30G	5	STM-1	32	51,326	16,42,441	26,042	8,33,333
	5	STM-4	8	1,33,448	10,67,586	1,04,167	8,33,333
	20	STM-16	8	3,46,966	27,75,725	4,16,667	33,33,333
	30	STM-64	3	9,02,111	27,06,332	16,66,667	50,00,000

Note: Under recovery by Rs. 18,07,917 with factor of 2.6. Full recovery of cost with a factor of 4

Scenario 3	Capacity in Gbps	Bandwidth	No. of Interface	Factor of 2.6		Factor of 4	
				Per Unit Cost	Total Cost	Per Unit Cost	Total Cost
Actual Mix as STM-1 : 10G, STM-4: 10G, STM-16: 30G & STM-64: 10G	10	STM-1	64	51,326	32,84,881	26,042	16,66,667
	10	STM-4	16	1,33,448	21,35,173	1,04,167	16,66,667
	30	STM-16	12	3,46,966	41,63,587	4,16,667	50,00,000
	10	STM-64	1	9,02,111	9,02,111	16,66,667	16,66,667
	60				1,04,85,752		1,00,00,000

Note: Over recovery by Rs. 4,85,752 with factor of 2.6. Full recovery of cost with a factor of 4

In view of the above submissions, it is recommended and requested that a conversion factor of 4 should be considered.

It may be noted that while the Authority has been asked to rework the figures only on two counts **within a period of six weeks w.e.f. 08.10.2018, from the day on which the Hon'ble Supreme Court passed the above-mentioned order. The said period expires on 19.11.2018.** Also, all contentions of both the sides have been kept open by the Hon'ble Supreme Court and liberty has been given to raise all contentions.

The Hon'ble Supreme Court has also not interfered with that part of the order of Hon'ble Division Bench wherein the Hon'ble Division Bench of Madras High Court has kept the three Regulations in abeyance for a period of six months from the date of receipt of copy of this Order or re-doing/re-enacting aforesaid schedules whichever is earlier. In our view, the Authority will therefore be required to re-do/re-enact/re-frame the Schedules I, II & III to the CLS Charges Regulation dated 21.12.2012.

It is our submission that the order of the Hon'ble Supreme Court dated 08.10.2018 has to be read harmoniously and in complement of the order of the Hon'ble High Court of Madras dated 02.07.2018. The Hon'ble Supreme Court in its order dated 08.10.2018 has modified the timelines only to re-work/re-enact/re-frame the Schedules I, II & III of the Regulations dated 21.12.2012 to six weeks with effect from 08.10.2018. It Is submitted that there is no further change in the order/directions/ judgement passed by the Hon'ble High Court of Madras.

Further, it is noted that in the Consultation Paper of TRAI while taking up the issues of the 'utilization factor' and the 'conversion factor' has relied on the same Access Facilitation design, cost data and other cost factors used in the previous exercise conducted vide it's Consultation Paper dated 19.10.2012. From the reading of the part/portion of the Consultation Paper it appears that TRAI is in the process of giving effect to the charges from a retrospective date which was not the intent of the Hon'ble High Court of Madras hence the intended action of TRAI amounts to malice in law.

The 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. This is without prejudice to the contention that the TRAI does not have the jurisdiction to frame the regulation.

However, it is submitted that since 2012 the market scenarios & other cost affecting parameters have changed. It would therefore be appropriate and in the fitness of things that

the Consultation Paper for considering the two issues of 'utilization factor' and 'conversion factor' should be based on the present day figures in respect of all the elements used for computation of annual access facilitation charges, annual operation & maintenance charges for capacity provided on IRU basis, and co-location charges.

We once again reiterate that the above submissions are without prejudice to our contentions and rights. Further, we 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'be High Court of Madras.

We further reserve our right to provide additional inputs to the said consultation paper.