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BY ELECTRONIC MAIL

4th November 2019

To
Shri Anil Kumar Bhardwaj
Advisor (B&CS),
Telecom Regulatory Authority of India
Mahanagar Doorsanchar Bhawan
Jawahar Lal Nehru Marg
Old Minto Road
New Delhi 110002

Dear Sir,

Sub: Response to Consultation Paper on Issues related to Interconnection Regulation, 2017 dated 25th September 2019

At the outset, we would like to thank the Authority for giving us an opportunity to tender our views on the Consultation Paper on Issues related to Interconnection Regulation, 2017.

In regard to the present consultation process, we submit that we have perused the said paper carefully. We hereby submit our comments attached as Annexure. The said comments are submitted without prejudice to our rights and contentions, including but not limited to our right to appeal and/ or any such legal recourse or remedy available under the law.

The same are for your kind perusal and consideration.

Yours Sincerely,

Authorized Signatory
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RESPONSE ON BEHALF OF DISCOVERY COMMUNICATIONS INDIA ("DCI") TO THE CONSULTATION PAPER ON ISSUES RELATED TO INTERCONNECTION REGULATIONS, 2017 DATED 25.09.2019 ("Consultation Paper") ISSUED BY THE TELECOM REGULATORY AUTHORITY OF INDIA ("TRAI")

1. PRELIMINARY COMMENTS:

1.1. It is pertinent to point out that DCI and certain other broadcasters had since the very stage of consultation process leading to the Telecommunication (Broadcasting and Cable) Services Interconnection (Addressable Systems) Regulations, 2017 dated 03.03.2017 ("**Interconnection Regulations**") pointed out some of the concerns that have been echoed by TRAI in the present Consultation Paper as well as in other consultation papers that have been issued by TRAI in past few weeks. Under the new regulatory regime, broadcasters have been left completely at the discretion and mercy of the distribution platform operators ("**DPOs**") in relation to the distribution/ reach of their channels to the consumers as the Interconnection Regulations and Telecommunication (Broadcasting and Cable) Services (Eighth) (Addressable Systems) Tariff Order, 2017 dated 03.03.2017 ("**Tariff Order**") (collectively, "**New Regulations**") leave a wide scope for preferential treatment and manipulation by the DPOs. Broadcasters have no control over the DPOs in matters of delivery of its channels to subscribers either through placement of channels in a particular position or bouquet.

1.2. TRAI, in the present Consultation Paper, has yet again delved into an area, which needs to be addressed through market forces, and not regulatory supervision.

1.3. By seeking disclosure of all marketing and other agreements entered into between broadcasters and DPOs, TRAI has resorted to a roving and fishing enquiry, without any clear rationale as to how agreements that are not related to the technical/ commercial terms governing distribution of channels concerns TRAI in discharge of its statutory functions. The TRAI Act, 1997 ("**TRAI Act**") vests specific powers on TRAI with regard to the operation of service providers, including inter-connectivity. Broadcasters as content creators, have a genuine commercial interest to improve viewership experiences for consumers across geographies. For this purpose, it is open to

broadcasters to enter into marketing, advertising and other agreements for promoting their channels and contents /programmes without having any relation to the interconnection process. This, by itself, cannot be a ground to carry out roving and fishing enquiries into all agreements entered between broadcasters and DPOs.

1.4. It is respectfully submitted that marketing activities towards promotion of channels are the natural activities of broadcasters to ensure a wider market for their content, based on commercial and business concerns. The manner of marketing, promotion, advertising and the general business mechanics of broadcasters and DPOs are not matters related to interconnection, and cannot be subject to regulation under the TRAI Act. The mere fact that the marketing and advertising activities are aimed at increasing the market reach of a broadcaster and will ultimately, result in higher subscribership of channels, does not bring such marketing activity within the fold of the TRAI Act. Unless such a distinction is clearly applied, any and every activity of a broadcaster can be claimed to be within the regulatory supervision of TRAI. Therefore, TRAI ought not regulate aspects of the broadcaster-DPO relationship that do not relate to subscription and/or carriage of channels *inter-alia* since, the same would not qualify as 'interconnection'.

1.5. The DPO is entitled under the New Regulations to refuse carrying a channel if the monthly subscription percentage falls below a certain percentage for a certain period. This allows the DPO to decide the fate of the channel qua the subscriber and the broadcaster alike. Such provision is ex facie in contravention of Article 19(1)(a) of the Constitution of India guaranteeing to every citizen, the right to receive, enjoy and be educated, and the right of expression, whether through print media or through television. The Hon'ble Supreme Court of India in ***Secretary, Ministry of Information and Broadcasting, Govt. of India and Ors. v. Cricket Association of Bengal and Ors.,*** **(1995) 2 SCC 161** has affirmed that the right to be informed, educated and entertained is part of the inviolable right of subscribers under Article 19(1)(a) of the Constitution of India. Such right can be curtailed by law only on grounds specified under Article 19(2) of the Constitution of India. The leeway provided to the DPOs under Regulation 4(8) of the Interconnection Regulations is not only a violation of such fundamental

right of every subscriber, but it allows DPOs to manipulate market and choice of consumers.

1.6. The power of DPOs to discontinue airing a channel is based on a fundamentally flawed and incorrect premise. Regulation 4(8) of the Interconnection Regulations suggests that only 'popular' channels aiding revenue generation for DPOs with a certain level of viewership are likely to be made available for subscription.

1.7. No broadcaster, however small their consumer base, can be denied the right to broadcast their channels when they are willing to pay the DPOs their fee for distribution.

1.8. The present Consultation Paper fails to consider the fact that the nature of operations and opportunities, and the challenges for broadcasters like DCI with unique and niche products are similar to regional channels, and need to be treated separately from broadcasters of "popular" channels, whose content, viewership as well as cost of production of content is significantly different.

1.9. It is pointed out that TRAI has been taking inconsistent stands in different consultation papers. For eg: while the present Consultation Paper is replete with instances of alleged malpractices on the part of DPOs, the consultation paper on tariff related issues has suggested formation of bouquets by DPOs as they have interface with subscribers. Such approach is clearly self-contradictory. It is therefore clear that TRAI has not deliberated on the regulatory philosophy and approach to be adopted by it. Moreover, while TRAI has been repeatedly harping on consumer choice, it has not taken heed of the various economic studies and material produced before it, which suggest that consumer choice will ultimately suffer under a-la carte system. The reason regional channels are today finding it difficult to engage with DPOs is because they have to justify the demand of their channels independently, and not as part of a bundle of channels, which would naturally result in an upward push of their costs..

2. RESPONSE ON SPECIFIC ISSUES / QUERIES RAISED IN THE CONSULTATION PAPER:

Q1. Do you think that the flexibility of defining the target market is being misused by the distribution platform operators for determining carriage fee? Provide requisite details and facts supported by documents/ data. If yes, please provide your comments on possible solution to address this issue?

Response: We are not aware of the rationale and basis as to how DPOs ascertain and declare their respective target market, however, we understand that the same is done in accordance with the business model being followed by each one of them. Currently, we do not have data on misuse of flexibility with respect to the DPOs defining target markets. As per current Interconnect Regulations, each DPO is required to define its target market for each distribution network/headend. It is humbly submitted and reiterated that DPOs already receive distribution fee from broadcasters, as well as network capacity fee from each subscriber for carrying channels. Given the complete control DPOs exercise over the target market/ subscriber base (without any intervention of a broadcaster), there is ample scope for DPOs to manipulate the market and ensure that the subscriber base of a channel of a broadcaster will never increase to greater than 20% even if a broadcaster is regularly making payments of carriage fee to a DPO.

It is our humble submission that for purposes of calculation of carriage fee, if a regional / small broadcaster has a subscriber base confined to a particular area/region, the regional broadcaster should not be compelled to pay carriage fee on "PAN India" or "combination of states" as target markets.

DCI does not have any data with respect to breakup of subscriber base in a particular market, as TRAI as well as DPOs do not provide such data.

Q2. Should there be a cap on the amount of carriage fee that a broadcaster may be required to pay to a DPO? If yes, what should be the amount of this cap and the basis of arriving at the same?

Response: In our view, there should not be any cap on the amount of carriage fee that a broadcaster may be required to pay to a DPO. The method of calculation of carriage

fee is already provided in Schedule I to the Interconnection Regulations and is highly regulated. In our view, carriage fee of a channel should be left to be determined by market forces.

Q3. How should cost of carrying a channel may be determined both for DTH platform and MSO platform? Please provide detailed justification and facts supported by documents/ data.

Response: As has already been stated above, the New Regulations provide for network capacity fee to be paid by the subscriber and carriage fee (apart from distribution fee) to be paid by the broadcaster to the DPO just for carrying TV channels on its network. We cannot comment on cost of carrying channels by DTH operators and MSOs as such costs vary from DPO to DPO. For instance, DTH operators are required to pay satellite bandwidth charges, transponder costs, as well as annual license fee to the Ministry of Information and Broadcasting. In our opinion, such costs of carrying channels by DTH operators and MSOs should be left to be determined by market forces.

Q4. Do you think that the right granted to the DPO to decline to carry a channel having a subscriber base less than 5% in the immediately preceding six months is likely to be misused? If yes, what can be done to prevent such misuse?

Response: Yes, in our view, the right granted to the DPO to decline to carry a channel having a subscriber base less than 5% in the immediately preceding six months is very likely to be misused.

It is submitted that broadcasters are entirely reliant on DPOs to ensure last mile connectivity to its subscribers in spite of introduction of digital addressability. No broadcaster, however small their consumer base, can be denied the right to broadcast their channels when they are ready to pay for the cost of distribution as the distribution fee, and this is a clear infringement of Article 19(1)(a) of the Constitution of India as it allows a DPO to obstruct the rights of a broadcaster to circulate its

programs. Additionally, the fundamental right of viewers that seek to access the content curated in the so-called 'less popular' channels is violated by allowing DPOs to discontinue carrying such channels. The graded scheme of calculating carriage fee envisaged in Schedule I to the Interconnection Regulations ensures that DPOs do not suffer any costs for carrying new/ niche channels with limited subscription. Once a broadcaster is paying carriage fee to a DPO for the carriage of its channels, there is no rationale to exclude channels

Further, the exclusion of channels on the ground of "non-popular" channels squatting on network capacity, is completely arbitrary as it does not consider the business of small and niche broadcasters, or regional broadcasters, who have limited viewership. The channels that fall within the genre of general entertainment, sports consisting only of Cricket and news channels will eventually be the only channels made available to the consumers at large. Such a provision is not in existence in any geography in the world for the sole reason that this is not only in grave violation of right to freedom of speech and expression of the citizens but also violative the right to freedom of the artists', content owners', producers' to express and produce contents that are meant for passionate or regional communities /audience such as international sports (eg. golf, motorsports, cycling, boxing etc.), wildlife, anthropology, science and technology, food and lifestyle. This will result in foreign companies that specialize in such contents / programming exiting from India. Indian audience will not have access to differentiating and niche contents. The will discourage a new entrant to invest in this sector as they would have to invest immense amount of money towards marketing and promotion of their channels to ensure that their subscriber base reaches more than 5% in the first year of their operation itself. If the problem that needs addressing is the carriage / network capacity of a DPO, we implore the Ld. Authority to address that independently without putting any more restrictions on the contents/ channel access to viewers. Ld. Authority is advised to perhaps look into instances of creation of artificial scarcity of network carriage capacity by DPOs. We hereby humbly submit to and implore the Ld. Authority to do away with the right granted to the DPOs to decline to carry a channel having a subscriber base less than 5% in the immediately preceding six months and allow niche broadcasters/ content

owners to exist in this sector. Such a provision is not only against the interest of content owners, artists, rights holders, producers, but also detrimental to the interests of public at large. The provision is counterproductive to TRAI's objective of encouraging foreign investments in this sector and Central Government's initiative of ease of doing business in India.

Q5. Should there be a well defined framework for Interconnection Agreements for placement? Should placement fee be regulated? If yes, what should be the parameters for regulating such fee? Support your answer with industry data/reasons.

Response: The New Regulations have already provided the manner in which placement of channels has to be worked out. Hence, regulation of placement fee should be brought about, if at all, after collection and analysis of sufficient data in relation thereto. TRAI should independently investigate on a case-to-case basis instances where specific allegations have been made about misuse and extortion of placement fee. There is no requirement to regulate placement fee or any such agreements. It is submitted that the broadcasting sector is already regulated in a heavy-handed manner under the New Regulations, even though sufficient level of competition exists in the market.

Q6. Do you think that the forbearance provided to the service providers for agreements related to placement, marketing or any other agreement is favoring DPOs? Does such forbearance allow the service providers to distort the level playing field? Please provide facts and supporting data/ documents for your answer(s).

Response: Agreements related to marketing, advertisement or any other agreement entered into between a broadcaster and a DPO are executed after extensive discussions and mutual negotiation. TRAI has itself stated in the Explanatory Memorandum to the Interconnection Regulations that the marketing fee towards promotion and advertisement of services contributes towards increase in business and is due to the effort of both parties and therefore, there cannot be a specific

parameter for regulating such fee. As submitted earlier, such agreements may not fall within the scope of interconnection as many such agreements have no correlation with the technical or commercial terms related to interconnection, and are therefore beyond the regulatory purview of the TRAI Act and regulations.

The "must carry" obligation on DPOs should be considered, and availability of variety of channels to consumers should not be subject to the availability of spare channel capacity. Real consumer choice can only be ensured when the subscriber has the ability to choose from the entire universe of channels, and not merely from the channels that the DPOs find profitable to carry on their network. This can only be addressed through regulation of the carriage capacity of DPOs.

Q7. Do you think that the Authority should intervene and regulate the interconnection agreements such as placement, marketing or other agreement in any name? Support your answer with justification?

Response: Kindly see responses to Q5 and Q6 above.

Q8. How can possibility of misuse of flexibility presently given to DPOs to enter into agreements such as marketing, placement or in any other name be curbed? Give your suggestions with justification.

Response: We do not agree that there is any misuse of flexibility given to DPOs to enter into agreements such as marketing, placement, etc. Such arrangements should be decided through mutual negotiations subject to business considerations and needs of a service provider and should be left to be determined on the basis of market forces. The manner of marketing, promotion, advertising and the general business mechanics of broadcasters and DPOs are not matters related to interconnection, and cannot be subject to regulation under the TRAI Act. The mere fact that the marketing and advertising activities are aimed at increasing the market reach of a broadcaster and will ultimately, result in higher subscribership of channels, does not bring such marketing activity within the fold of the TRAI Act. We respectfully submit that aside

from a service provider's business considerations, marketing and promotion campaigns serve in building consumer interest, ensuring the public's informed decision making facilitated by awareness and education towards diversity and plurality of views.

Q9. Stakeholders may also provide their comments on any other issue relevant to the present consultation.

Response: It is suggested that in the present hyper-competitive environment where vying for the subscribers' attention requires constant investment in programme and content creation to enhance the customers experience, that the Authority observes regulatory non-interference in view of submissions made above. Further, this approach would also serve the best interests of the consumers.

The comments / views of DCI are without prejudice to their rights and contentions in the proceedings pending before the Hon'ble Delhi High Court in W.P. (C) No. 6915 of 2017 and W.P. (C) No. 9431 of 2019.