



September 11, 2012

Mr. Wasi Ahmed
Advisor (B&CS)
Telecom Regulatory Authority of India
Mahanagar Doorsanchar Bhawan,
Jawaharlal Nehru Marg,
New Delhi- 110 002.

Dear Sir,

Response to "Standards of Quality of Service (Duration of Advertisements in Television Channels) (Amendment) Regulations, 2012 published by the TRAI on 27th August 2012

These submissions are being made on behalf of 'Times Now' and 'ET Now', operated by Times Global Broadcasting Company Limited (TGBCL) and Bennett, Coleman and Company Limited through its Television Division (BCCL), respectively (part of 'Times Television Network'/'TTN'), in response to the "Standards of Quality of Service (Duration of Advertisements in Television Channels) (Amendment) Regulations, 2012" published by the TRAI on 27th August 2012.

1. At the outset, we are participating in the present consultation process and submitting the present objections strictly without prejudice to all rights and contentions raised by the NBA in Appeal No. 10(C) of 2012 titled M/s. News Broadcasters Association & Ors Vs. Telecom Regulatory Authority of India" pending before the Hon'ble TDSAT.
2. We give the following response to the "Standards of Quality of Service (Duration of Advertisements in Television Channels) (Amendment) Regulations, 2012" published by the TRAI on 27th August 2012 (the "said Amended Regulations"):
 - 2.1 We reaffirm and reiterate that the TRAI has no power or jurisdiction whatsoever to issue any kind of regulations or orders in relation to the use, allocation and formatting of advertisements and advertising time on TV channels;
 - 2.2 We submit that the remit and power of the TRAI under section 11(1)(b)(v) of the Telecom Regulatory Authority of India Act 1997 (the "said Act") to "lay-down the standards of quality of service" to be provided by service providers does not include the power to lay-down regulations which amount to "content control" which is anathema to the constitutional scheme;
 - 2.3 The attempt to regulate advertisements on television channels even in the manner proposed in the said Amended Regulations clearly amount to "content regulation" and such regulation is wholly beyond the jurisdiction of the TRAI;

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- 2.4 By including Regulation 4 in the said Amended Regulations giving the TRAI power to issue orders and directions to ensure compliance of the said Amended Regulations, the Authority has bestowed upon itself wide and amplified powers that far exceed its jurisdiction. By doing so, TRAI has further exceeded its mandate under the TRAI Act since TRAI cannot issue orders and directions towards compliance of something that TRAI cannot regulate in the first place;
- 2.5 Yet again, by including a reporting requirement in Regulation 5 in the said Amended Regulations, the TRAI has exceeded its mandate under the TRAI Act since TV channels cannot be accountable to the TRAI in relation to a subject matter over which TRAI does not have jurisdiction at all;
- 2.6 As admitted in para 6 of the Explanatory Memorandum annexed to the said Amended Regulations, Rules 7(6), 7(10) and 7(11) of the Cable TV Rules already cover the ground in relation to the advertisements on television channels, and therefore, the Cable TV Rules eclipse the powers given to the TRAI vide Notification dated 9th January, 2004 issued by the Ministry of Communication & Information Technology (whereby Broadcasting and Cable TV Services were included within the ambit of 'telecommunications service' within the meaning of the TRAI Act);
- 2.7 Under the Cable TV Act, the Ministry of Information & Broadcasting (MIB), if at all, is the competent authority for regulating content in accordance with law as laid down by Parliament and not the TRAI, which (latter) has limited jurisdiction only over disputes involving "technical" issues concerning broadcasting and not over "content" related issues ; and TRAI would be acting far in excess of its jurisdiction in acting on content related issues ;
- 2.8 Advertisements are part of the free speech guarantee contained in Article 19(1)(a) of the Constitution of India, which is a fundamental right and a "preferred freedom" under the Constitutional scheme and any restriction upon such fundamental right to freedom of speech and expression can only be imposed by "law", which must pass the test of "reasonable restriction" within the meaning of the Article 19(2) of the Constitution of India and such freedom certainly cannot be curbed by regulations made by the TRAI;
- 2.9 In view of the admitted position that advertising revenue is the "lifeblood" of the media, restrictions imposed upon advertisements that may be carried on television channels would amount to unreasonable restriction, violative of Article 19(1) (g) r/w 19(6) of the Constitution;
- 2.10 The very proposal to introduce regulation on advertisements on television channels was contrary to the TRAI's earlier recommendations dated 1st October, 2004 on the same issue, whereby the TRAI had opined that there should not be any regulation at that time on advertisements on television channels and the situation today remains unchanged.

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- 2.11 Quite apart from the foregoing issues, even on a pure point of welfare of the consumers/viewers, any restrictions placed on advertisements would have the inevitable effect of a sharp increase in subscriptions charges for pay channels. On the other hand, self-correcting and self-regulating mechanisms would invariably be more effective than TRAI's intervention in regulating advertisements on TV channels; and if more advertisements are carried than are preferred by consumer viewership will drop and consequently, the broadcaster will have to reduce its advertising, rendering any outside regulation unnecessary;
- 2.12 Restrictions on availability of advertising time would have the inevitable effect of increase in advertisement rates, which would be detrimental to the interests of the small scale and medium enterprises ;
- 2.13 In purporting to control the duration of advertisements on a clock hour basis, TRAI has ignored that viewership pattern differs throughout the day & in any case such a restriction on News channel which have no appointment viewing & give live breaking news is devoid of any merits;
- 2.14 The TRAI has failed to appreciate that any such regulation on advertising time and its corresponding effect on the broadcaster's revenues would adversely affect the growth and competition in the broadcasting industry, since especially at present, the subscription fees of the TV channels under the present system are not only limited but are also regulated so that consumers would receive quality service at affordable prices ; and accordingly, broadcasters cannot even hike subscription rates to balance out the inevitable reduction in advertisement revenues that will arise from the said Amended Regulations ;
- 2.15 A consumer has an absolute choice over the TV channels he wishes to watch and pays accordingly for the same; thus, a consumer can choose to watch a TV channel with advertisements at lower cost or pay a premium to watch a TV channel without advertisements and thus there is no need to regulate advertising airtime;
3. That even otherwise and without going into the merits of the matter, it is submitted that only successful digitization across the country will enable TV channels to garner the Subscription Revenues to their potential & at the same time eliminate the unwarranted carriage cost in due course, thereby making TV channels viable and dependence on advertisements should eventually decrease.
4. We submit that instead of regulating advertisements, the effort should be on successful and urgent implementation of digitization of the cable television sector, with its concomitant availability of full choice of channels and the ability of consumers/viewers to exercise such choice.


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5. We wish to cite the following judgments of the Hon'ble Supreme Court on the free speech guarantee under our constitutional scheme and of advertising being part of such free speech guarantee :
- 5.1 In its decision in *Sakal Press Pvt. Ltd vs. UOI* (AIR 1962 SC 305), curtailment of "advertisement space" of a newspaper was held to lead to reduction in its revenues, which was struck down by the Supreme Court as being violative of Article 19(1)(a).
- 5.2 In *Bennett Coleman & Company vs. UOI* (AIR 1973 SC 106), it was held that if the area of advertisement is restricted, the price of a newspaper goes up, which results in circulation going down, which was again held to be violative of Article 19(1)(a).
- 5.3 In *Tata Press Limited vs. MTNL* (AIR 1995 SC 2438), the Supreme Court held that publication of advertisements, namely "commercial speech" is entitled to protection under Article 19(1)(a) of the Constitution of India. Any restraint on advertising revenue of a newspaper was held to be an infringement of the right to freedom of speech and expression under Article 19(1)(a).
- 5.4 More recently, in *Hindustan Times vs. State of UP* (AIR 2003 SC 250), an order directing the deduction of 5% from all bills for publication of Government advertisements in order to create a fund for granting pension to working journalists (a laudable objective, otherwise), was held by the Supreme Court to be an infringement of Article 19(1)(a). Yet again, in this case the Supreme Court reiterated that curtailment of advertisement revenue would lead to a newspaper having to increase its price which would lead to reduction in circulation, which would infringe the right to freedom of expression, which would therefore be unconstitutional.
6. It is submitted that what applies to newspapers, applies equally to the electronic media, since restriction on "advertising airtime" on a TV channel is *in pari materia* with the restrictions on "advertisement space" in a newspaper.
7. In view of the above objections, we submit that the said Amended Regulations should not be issued.

Thank you,

Yours Sincerely,

For Times Television Network


Authorised Signatory (JYOTI S KUMAR)

Comments received w.r.t. OHD

November 30, 2012

To,

Mr. Wasi Ahmed

Advisor (B&CS)
Telecom Regulatory Authority of India
Mahanagar Doorsanchar Bhawan,
Jawaharlal Nehru Marg,
New Delhi- 110 002.

Submissions on behalf of the Times Television Network following the Open House Discussion conducted by the TRAI on 23rd November, 2012 on the Standards of Quality of Service(Duration of Advertisements in Television Channels) (Amendment) Regulations 2012 (“Regulations”)

Dear Sir,

The following submissions are being made by the Times Television Network represented by Times Global Broadcasting Company Limited (operating TIMES NOW), Bennett Coleman & Company Limited (Operating ET NOW and ZOOM) and Zoom Entertainment Network Limited (operating MOVIES NOW) in addition to and in furtherance of its earlier submissions to the Consultation Paper dated 16th March, 2012 and the Draft Standards of QoS Regulations released by TRAI in August, 2012.

Without prejudice to the appeal pending before the Hon'ble Telecom Dispute Settlement Appellate Tribunal impugning the said Regulations, we give below our comments/suggestions on the proposed regulations following TRAI's Open House discussions held on November 23, 2012:

1. Provisions for regulation of advertisements on television channels have already been provided for by the Parliament vide Rule 7 (11) of the Cable Television Network Rules. By issuing the said Regulations the TRAI is attempting to lay down another legislation, the subject matter of which is already covered under the Cable TV Rules under the aegis of the Ministry of Information & Broadcasting. It is therefore unclear as to what the TRAI intends to achieve by bringing out the said Regulations. It would be prudent for the appropriate authorities to first look into the existing law on regulation of advertisements on television channels before imposing fresh regulations on broadcasters.
2. In fact, it is a matter of record that TRAI's stated position so far has been that of non-interference and claim of lack of jurisdiction to regulate advertisements on television. This stance has been claimed by TRAI itself in its submissions made before the TDSAT in Petition No. 34(C) of 2011. Therefore there are no real reasons shown by TRAI as to why it is attempting at the cost of exceeding its jurisdiction to raise a public debate on a subject which is well beyond its scope and authority. We reiterate that TRAI has no power or jurisdiction whatsoever to issue any kind of regulations or orders in relation to the use, allocation and formatting of advertisements and advertising time on TV channels. Given TRAI's lack of jurisdiction in regulation of advertisements on television, TRAI's current move is at best recommendatory in nature.

3. With cap on channel pricing and lack of visibility of subscription income until successful implementation of DAS across the country, Broadcasters continue to be heavily dependent on ad revenues to sustain their business operations. Moreover, Broadcasters also pay a large chunk of their revenue as carriage fee to have their channels placed on the cable operator's network, which imposes further economic burden. With so many existing challenges to grapple with, the regulation of advertisements will severely impact the survival and very existence of broadcasters.
4. Presently, Indian broadcasting is undergoing transformation from analogue to digital mode. It is only after effective and successful implementation of DAS, that Broadcasters will get a realistic estimate of subscription revenues. Hence, any recommendations for regulation of advertisements should be considered, if at all, only after reviewing the situation post DAS and when broadcasters are able to foresee subscription revenues for their business. Given the extensive burden that broadcasters are currently bearing, any such proposal to further regulate advertisements on TV channels should be implemented firstly, after digitisation is completed across the country; and secondly, in a phased manner, to enable broadcasters to effectively adopt and implement the same.
5. Please take note of our specific responses to each suggested amendments, discussed in the Open House Discussion:
 - a. **Regulation 3** of the suggested amendment to the said Regulations fails to recognise the Cable Television Network Act and Rules framed thereunder. Clock hour basis will result in great practical and programming difficulties for broadcasters by taking away the creative and programming freedom of broadcasters. Ad-breaks have to be judiciously planned and cannot be constrained by the clock hour as it will not only be impractical but also irrelevant. Commercial ad-breaks are usually planned keeping in mind the nature and duration of the programme, target audience and such metrics. Clock hour basis ad-break pattern will adversely impact quality of programming and impinge the operational independence of broadcasters. Further, in a live broadcast scenario, it would be impossible to apply this rationale as the nature of broadcast would not permit implementation of such restrictions. Therefore, it is our submission that it is necessary to take into account the genre of the content being aired on the channel and other related factors before even suggesting any such amendments via the said Regulations. While considering any cap on advertisements on a per hour basis, we submit that the TRAI should exclude advertisements in the nature of public interest messages, promotion of channels of the same network of the broadcaster, all commercials that are unpaid for, etc. In our view, it would be totally unfair and unjust to impose a blanket cap on advertisements, as is being proposed by the TRAI in the said Regulations, without taking into account or giving heed to the above factors that are peculiar to each genre of TV channels.
 - b. While it appears that the TRAI through these proposed regulations intends to further regulate advertisements on TV channels, we wish to draw the Authority's attention to channels carried by MSOs/cable operators locally, which also carry advertisements. These channels, being not directly under

license of the Ministry, do carry advertisements, which in our view should also be similarly dealt with as other licensed channels, to ensure there is no discrimination in the imposing of such restrictions on stakeholders of the same industry.

- c. **Regulation 4** of the suggested amendment to the said Regulations gives the TRAI power to issue orders and directions to ensure compliance of the said Regulations. With this the TRAI has bestowed upon itself wide and amplified powers that far exceed its jurisdiction. By doing so, TRAI has further exceeded its mandate under the TRAI Act since TRAI cannot issue orders and directions towards compliance of something that TRAI cannot regulate in the first place.
- d. **Regulation 5** of the suggested amendment to the said Regulations imposes uncalled for obligations on broadcasters to make detailed reporting to the TRAI regarding the advertisements carried on their channels. The information sought under this requirement covers extensive and confidential information pertaining to broadcasters' business and TRAI has not substantiated the need for imposing such reporting requirements when, very clearly, TRAI does not have the jurisdiction in the first place over the subject of regulation of advertisements on TV Channels. We suggest this requirement be done away with completely.

We request the TRAI to give due consideration to our submissions as above.

Thank you,

Yours Sincerely,

**On behalf of the Times Television Network
(TIMES NOW, ET NOW, ZOOM, MOVIES NOW)**

Authorised Signatory