

IBDF Submissions to the Consultation Paper on Framework for Service Authorisations for Broadcasting Services under the Telecommunications Act, 2023 issued by the TRAI on 30.10.2024

I. Introduction

The Indian Broadcasting and Digital Foundation (“**IBDF**”) is the apex organisation representing television broadcasters and digital platforms in India. IBDF’s members manage over 400 channels accounting for approximately 91% of television viewership across the country. IBDF recognises the impact government policies have on its various constituents and appreciates the opportunity to submit these comments in response to the Telecom Regulatory Authority of India’s (“**TRAI**”) Consultation Paper on “*Framework for Service Authorisations for provision of Broadcasting Services under the Telecommunications Act, 2023*” dated October 30, 2024 (“**Consultation Paper**”).

IBDF has carefully examined the proposals in the consultation paper and has serious concerns about their implications for the broadcasting sector. Through this submission, IBDF aims to highlight fundamental issues with bringing broadcasting services under the telecommunications authorisation framework, which we believe would create regulatory uncertainty and potentially infringe on constitutional rights.

II. Note on Nature of Submissions

The issues raised by this Consultation Paper touch upon fundamental aspects of broadcasting regulation in India that are currently subject to constitutional challenge. IBDF has consistently maintained that content regulation of broadcasting, whether through the Cable Television Networks (Regulation) Act, 1995, the Uplinking/ Downlinking guidelines, or now through proposed authorisations under the Telecommunications Act, 2023, raises serious constitutional concerns regarding freedom of speech and expression under Article 19(1)(a) of the Constitution. Therefore, while these submissions primarily address TRAI’s lack of jurisdiction to regulate content, they should be read in the broader context of our position that content regulation itself requires careful constitutional scrutiny.

III. Preliminary Submissions

The fundamental nature of IBDF’s concerns regarding TRAI’s jurisdiction to make recommendations as proposed in the Consultation Paper necessitates that we address these threshold issues before engaging with specific questions posed in the Consultation Paper. These submissions focus on TRAI’s attempt to enter the content domain through the proposed authorisation framework - an expansion of power that we believe is neither

contemplated by the TRAI Act, 1997, nor permissible under the broader legislative framework governing broadcasting in India. However, we reserve our right to provide detailed responses to individual questions at an appropriate stage, should the need arise after these jurisdictional issues are addressed.

1. Matter Outside TRAI's Jurisdiction

- a. The Consultation Paper seeks to create an authorisation framework for broadcasting services under the Telecommunications Act, 2023. However, this exercise appears to be beyond TRAI's jurisdiction and statutory mandate. Under Section 11(1)(a) of the TRAI Act, 1997, TRAI's powers are limited to making recommendations on "need and timing for introduction of new service provider" and "terms and conditions of license". The current consultation seeks to fundamentally alter the regulatory framework for broadcasting by bringing it under a telecommunications licensing regime. This goes well beyond TRAI's remit of making recommendations on license terms and conditions.
- b. **Historical Development of the Regulatory Framework:** The current regulatory framework for broadcasting in India has evolved through careful legislative design and policy decisions that deliberately separate content and carriage regulation. This separation can be traced through several key developments:
 - i. The Cable Television Networks (Regulation) Act, 1995 established the primary framework for content services, placing it under the Ministry of Information & Broadcasting's ("MIB") purview.
 - ii. The TRAI Act was amended in 2000 to include broadcasting services, but specifically limited TRAI's role to carriage-related aspects like interconnection, technical standards, and quality of service.
 - iii. The Policy Guidelines for Uplinking and Downlinking of Television Channels, first issued in 2005 and subsequently revised, makes it clear that content services are within the scope of MIB.
 - iv. The establishment of self-regulatory bodies like BCCC in 2011 under MIB's oversight strengthens the position that the content regulatory framework is outside TRAI's domain.

- c. **Separation of Content and Carriage:** The distinction between content and carriage regulation is not merely administrative but reflects fundamental constitutional principles:
- i. Carriage regulation deals with technical and infrastructure aspects that may legitimately require licensing due to use of public resources like spectrum.
 - ii. Content regulation, however, involves restrictions on speech and expression that must meet the higher threshold of Article 19(2) and cannot be imposed through technical or licensing frameworks.
- d. **Analysis of TRAI's Limited Authority:** TRAI's authority regarding broadcasting services must be understood within the strict confines of its enabling statute. TRAI's authority stems from the TRAI Act, 1997, which was amended to include broadcasting services within its ambit. However, this inclusion was specifically limited to carriage-related aspects such as technical standards and interconnection, quality of service parameters and tariff-related matters. The TRAI Act provides specific and limited powers:
- i. Recommendations Power: Under Section 11(1)(a), TRAI can make recommendations only on matters that fall within its technical and carriage-related mandate.
 - ii. Regulatory Functions: Section 11(1)(b) limits TRAI's regulatory functions to technical and carriage-related aspects. The proposed recommendations for authorisation framework would exceed these limits by creating backdoor content regulation.
 - iii. Tariff Setting: While TRAI has power to set tariffs under Section 11(2), this power is limited to carriage aspects and cannot extend to content-related restrictions.
- e. Further, the Supreme Court in *Star India Pvt. Ltd. v. DIPP* (2019) 2 SCC 104 has also emphasised that TRAI Act does not regulate the content of the TV channels that are broadcasted by the broadcaster.
- f. From the above, it is clear that TRAI's powers under the TRAI Act are limited to making recommendations on licensing terms and conditions within its carriage-related domain and the Act nowhere contemplates TRAI's

involvement in content regulation, either directly or indirectly through licensing conditions. We, therefore, urge the TRAI to limit its role to carriage-focused aspects, excluding any content-related regulation or oversight.

2. Constitutional Rights Considerations

- a. **Fundamental Rights Protection:** The constitutional framework of India provides explicit protection to freedom of speech and expression under Article 19(1)(a), which naturally extends to broadcasting activities. Any attempt to regulate broadcasting must necessarily be viewed through the lens of these constitutional guarantees. The present consultation exercise, seeks to create a licensing regime for broadcasting services, which imposes restrictions that go beyond the reasonable restrictions permissible under Article 19(2) of the Constitution.
- b. **Impact on Editorial Freedom:** The proposed authorisation framework poses significant concerns for editorial independence and creative freedom in broadcasting. The Supreme Court of India, in a series of judgments, has consistently held that any regulation of media must be narrowly tailored and must not create a chilling effect on free speech. The proposed framework risks precisely such an outcome by subjecting broadcasters to a telecommunications-focused licensing regime.
- c. **Distinction from Utility Services:** Broadcasting services fundamentally differ from utility-based telecommunication services in their constitutional positioning. While telecommunications infrastructure can be legitimately subject to licensing as a scarce public resource, creation and dissemination of broadcasting content are exercises of fundamental rights. The Supreme Court, in *Ministry of Information & Broadcasting v. Cricket Association of Bengal* (1995) 2 SCC 161, has clearly recognised this distinction, noting that broadcasting freedom is an integral part of freedom of speech and expression.

3. Proposed Authorisation Framework Exceeds Authority

In view of the above, we submit that the Consultation Paper's attempt to provide recommendation for an authorisation framework for broadcasting services suffers from multiple legal infirmities:

- a. It exceeds TRAI's statutory mandate under the TRAI Act by attempting to regulate content through licensing conditions.

- b. It draws up the existing framework of content regulations that are themselves subject to constitutional challenge.
- c. It attempts to regulate speech and expression through subordinate legislation without clear parliamentary authorisation.
- d. It fails to distinguish between technical aspects that may legitimately require authorisation and content aspects that engage fundamental rights.

IV. Way Forward

In light of these submissions, we respectfully urge the TRAI to:

1. Limit its recommendations strictly to carriage-related aspects of broadcasting that fall within its statutory authority
2. Explicitly exclude all content-related matters from any proposed authorisation framework
3. Acknowledge that fundamental questions about the constitutional validity of content regulation must be resolved before creating additional regulatory frameworks
4. Recognise that broadcasting services, unlike pure telecommunications services, engage fundamental rights that require special protection

V. Conclusion

The consultation paper represents an expansion of TRAI's regulatory authority into content regulation - an area that not only exceeds its statutory mandate but also raises serious constitutional concerns. This expansion must be viewed in the context of existing content regulation frameworks whose constitutional validity is already under challenge. We urge TRAI to reconsider this approach and limit itself to technical and carriage-related aspects of broadcasting that fall within its legitimate domain.