

C. Radhakrishnan  
Deputy Director – Indian B'casting Foundation



17th Sept, 2012

Dear Sir,

Sub : Draft Regulations "Standards of Quality of Service (QOS) – Duration of Advertisements in TV channels (Amendment) Regulations, 2012".

This is further to our letter dt. 11th Sept. 2012.

Please find enclosed the response of Indian Broadcasting Foundation to the TRAI's Draft Regulation: "Standards of Quality of Service (Duration of Advertisements in Television Channels) (Amendment) Regulations, 2012

Thanking you,

Yours sincerely,

C. Radhakrishnan

Shri Wasi Ahmad  
Advisor (B&CS)  
Telecom Regulatory Authority of India  
New Delhi

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INDIAN BROADCASTING FOUNDATION'S RESPONSE TO THE TRAI'S DRAFT REGULATION  
"STANDARDS OF QUALITY OF SERVICE (DURATION OF ADVERTISEMENTS IN TELEVISION  
CHANNELS) (AMENDMENT) REGULATIONS, 2012"

Disclaimer

This response is being filed by the Indian Broadcasting Foundation ("IBF") and is without prejudice to the rights and contentions raised by it on behalf of all its members and various other broadcasters independently under the Appeal Nos. 6(C) to 10 (C) pending before the Telecom Dispute Settlement & Appellate Tribunal ("Appeals") whereby the jurisdiction of the Telecom Regulatory Authority of India ("TRAI") to regulate the duration of advertisements in television channels have been challenged. This response also does not derogate from our earlier position in this regard and further is without prejudice to our previous submissions to the Authority. We reiterate that the TRAI does not have any jurisdiction to regulate advertisement timings as per extant law and any such regulation per instant draft or otherwise that may be sought to be notified or implemented would be void ab initio, non est, without having the force of law.

Introduction

At the outset, we wish to reiterate that the ideal regulatory approach should be to simplify and minimise regulation given the goal of ushering in the evolution of a mature market where market forces and self-regulation would suffice. However, it appears that the earlier "Standards of Quality of Service (Duration of Advertisements in Television Channels) Regulations" dated 14<sup>th</sup> May 2012 ("Regulation"), the Standards of Quality of Service (Duration of Advertisements In Television Channels) (Amendment) Regulations, 2012 ("Draft Amendment") and the proposals set therein to bring in more stringent and universal guidelines are not in sync with such a progressive approach, especially when there is an existing framework which has not been faulted in its essence.

We further reiterate that TRAI has continued to assume that Digital Addressable System ("DAS") mandate will be implemented successfully in November 2012 as mandated by the Ministry of Information & Broadcasting ("MIB") while being fully aware on the outstanding issues arising on the implementation of DAS. Digitization, as is the case with extensive and large scale changes of this nature, there are challenges which are being faced on implementation of DAS, including the carriage fees being demanded by the Multi System Operators ("MSOs"), which have been reported to TRAI at various meetings. Even assuming that the first stage of implementation is successful, it would cover only the four metropolitan cities and not the whole of India. While the currently proposed date (which from past experience can be considered as tentative) for complete implementation of DAS is 31<sup>st</sup> March 2015, TRAI is proceeding under the unrealistic assumption that all challenges like under declaration, carriage costs etc. have been resolved.

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Therefore, to herald in radical changes of the nature proposed in the Regulation and Draft Amendment based on the assumption that proposed digitization will be a game changer would be premature at this stage. We hence state that it would be wiser to wait until the DAS environment is clearer before considering new restraints.

Further we state that the market dynamics are already playing its role and the advertisement break patterns have started to change to reflect this. This is evident from the fact that more and more channels have started putting on screen displays providing information of the duration of advertisement breaks with an aim to retaining viewers. These are broadcasters who transmit "break free" movies. Further, there are broadcasters who are launching or have launched "advertisement free" channels. Thus, market should be allowed to operate under self-regulated environment to achieve their objective. We further state that many of children's television shows are of a very short duration (7-8 minutes), hence to achieve the advertisement restrictions within a clock hour for Kids Channels does not make any sense.

#### PARAWISE RESPONSE

##### 1. Implementation of Draft Amendment

Considering that the Regulation have been challenged by the Broadcasters before TDSAT where TRAI has been directed to hold on to its commitment of not implementing Regulation till its further orders, we are of the view that the Draft Amendment should not be notified in the Official Gazette until judgement in the said matter by TDSAT.

##### 2. Regulation 3 of Draft Amendment

We note that the TRAI has proposed to delete some of the restrictions laid in the Regulation on advertisements and we welcome such decision. However, we note that the restriction on broadcasters to carry advertisements for duration of not more than the 12 minute per clock hour has been retained. We submit that the limits for the duration of advertisements should not be regulated on a clock hour basis and may continue to be regulated on a 24 hour basis in accordance with the extant laws. Further, advertisers are inclined to advertise more during such hours when viewers are likely to watch programs and the broadcasters should be provided flexibility to balance between retaining the viewer's interest in their channels and earning revenues from the advertisements. Any further restrictions on the timing of advertisements other than the present restriction of 12 minute under the Cable Television Networks Rules, 1994 (as amended) ("**Cable Rules**") would be misplaced and unwarranted.

##### 3. Regulation 4 of Draft Amendment

Without prejudice to the pending Appeals, we state that TRAI has been directed by TDSAT to not implement the Regulation till its further orders, and all the issues under such Regulation remain open till the matter is further heard on 03<sup>rd</sup> December 2012, as such, directing the broadcasters to furnish the report for quarter ending 31<sup>st</sup> December 2012 is *ultra vires*. Moreover, TRAI has not provided for any specific format in which the details of advertisements carried on the channels is to be reported by the broadcasters.



Conclusion

In light of the above, we submit that the Regulation itself is premature and merits reconsideration for the reasons elaborated above. It is submitted that TRAI now needs to only focus on the implementation of DAS. After reviewing the success of DAS implementation, through a transparent consultation process with all stakeholders, the issue as to whether there is any need for further regulation on advertisements be discussed based on the various factors including viewership and revenue pattern in the post DAS scenario and only thereafter if required, the necessary recommendations be made to the MIB. The MIB may, after examining such recommendations, notify such amendments as it may deem necessary in the Cable Rules.by .

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**Comments received w.r.t. OHD**

13

C. Radhakrishnan  
Deputy Director, Indian Broadcasting Foundation



30<sup>th</sup> November, 2012

Dear Sir,

Sub : IBF's Representation on Draft Regulations "Standard of Quality of Service (Duration of Advertisements in television channels) (Amendment) Regulations, 2012

This is with reference to the Open House organized by the Telecom Regulatory Authority of India (TRAI) on 23rd November, 2012 at New Delhi regarding the Draft Regulations "Standard of Quality of Service (Duration of Advertisements in television channels) (Amendment) Regulations, 2012.

During the Open House discussion, you had conveyed that broadcasters can send their written submission to TRAI on the above-mentioned subject on or before 30th November, 2012.

In this regard, please find enclosed the written submission on behalf of Indian Broadcasting Foundation.

Thanking you,

Yours sincerely,

C. Radhakrishnan

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**INDIAN BROADCASTING FOUNDATION'S RESPONSE TO THE "OPEN HOUSE" HELD BY TRAI ON FRIDAY, 23<sup>RD</sup> NOVEMBER 2012, AT NEW DELHI REGARDING DRAFT REGULATION "STANDARD OF QUALITY OF SERVICE (DURATION OF ADVERTISEMENTS IN TELEVISION CHANNELS) (AMENDMENT) REGULATIONS, 2012"**

**BACKGROUND**

At the outset, we would like to say that this response is being filed by the Indian Broadcasting Foundation ("IBF") without prejudice to the rights and contentions raised by it on behalf of all its members and various other broadcasters independently under the Appeal Nos. 6(C) to 10 (C) pending before the Telecom Dispute Settlement & Appellate Tribunal ("Appeals") whereby the jurisdiction of the Telecom Regulatory Authority of India ("TRAI") to regulate the duration of advertisements in television channels have been challenged. This response also does not derogate from our earlier position in this regard and further is without prejudice to our previous submissions to the Authority. In particular this response may not be deemed as an acceptance of the jurisdiction of the TRAI to formulate or enact/notify the "Standards of Quality of Service (Duration Of Advertisements in Television Channels) Regulations" dated 14th May 2012 ("***Impugned Regulations***"), the Standards of Quality of Service (Duration of Advertisements in the Television Channels) Regulations, 2012 ("***Draft Amendment***") and we reiterate that the TRAI does not have any jurisdiction to regulate advertisement timings as per extant law.

It is now a matter of record that IBF together with certain broadcasters, challenged TRAI's jurisdiction to notify the Impugned Regulations by way of appeals filed and currently pending before the Hon'ble Telecom Disputes Settlement Appellate Tribunal ("***TDSAT***") and the enforcement of Impugned Regulations has been kept in abeyance, on the basis of the statement made by the Counsel for TRAI that the Impugned Regulations shall not be given effect to.

At the last date of hearing in the matter, i.e. 30.08.2012, when the Appeals came up for hearing, the Hon'ble TDSAT also had occasion to peruse the Impugned Amendment. On the said occasion as well the IBF together with the other broadcasters reiterated the objection to the jurisdiction of the TRAI to formulate even the Impugned Amendment, on the basis that since there is no right to formulate or notify the Impugned Regulations, the power and jurisdiction to amend the same also does not exist. Counsel for TRAI submitted to the Hon'ble TDSAT that TRAI is assessing the Impugned

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Regulations afresh and hence the Impugned Amendment is issued to invite comments from the stakeholders with the amendments proposed in the Impugned Regulations.

TRAI, through its counsel, also submitted at the last date of hearing that TRAI is willing to consider all submissions made by broadcasters during the process of inviting objections against the Impugned Amendment and any open house discussions following the submission of such objections, including but not limited to the challenge to the TRAI's jurisdiction. The Hon'ble TDSAT then directed the matter to be listed in December, 2012 giving liberty to the broadcasters to continue agitating their respective appeals in case the objections of the Broadcasters are not adequately addressed by TRAI. The Hon'ble TDSAT has directed the TRAI to consider all the objections to be raised by the broadcasters and further made it clear that the participation of the broadcasters in such a process of considering the Impugned Amendment would be without prejudice to the broadcasters' challenge to the jurisdiction of the TRAI to frame the Impugned Regulations.

TRAI called for an "Open House" in New Delhi on 23<sup>rd</sup> November 2012 and during the course thereof the Hon'ble TRAI Chairman requested participants to submit their points of view as expressed during the Open House to TRAI not later than 30<sup>th</sup> November 2012.

#### **INTRODUCTORY COMMENTS**

The process followed by TRAI, of inviting an "Open House" after passing/ issuing of the Impugned Amendment itself explains the approach adopted by TRAI in this matter. In fact, it is only after the Impugned Amendment was challenged before the Hon'ble TDSAT and the operation of the Impugned Amendment was kept in abeyance that TRAI came up with an "Open House".

At the outset, we wish to reiterate that the ideal regulatory approach should be to simplify and minimize regulation given the goal of ushering in the evolution of a mature market where market forces and self – regulation would suffice. However, it appears that the earlier Impugned Regulations read together with Draft Amendment and the proposals set therein to bring in more stringent and universal guidelines are not in sync with such a progressive approach, especially when there is an existing framework. As part of our response, we would again like to reiterate the following before addressing the proposed specific regulations stated in Draft Amendment:

#### **1. LACK OF JURISDICTION**

We believe that TRAI does not have the authority to regulate advertising air time on television, this being the prerogative of Ministry of Information and Broadcasting (MIB). This being confirmed by TRAI by its own admission in the affidavit filed by TRAI before the Hon'ble Telecom Disputes Settlement & Appellant Tribunal in the petition No. 34(C) of 2011 filed by a society called Utsarg against TRAI and several other broadcasters and content aggregators seeking a cap on television advertising time on the ground that these advertisements interfered with viewership of television programmes.



## 2. IMPLEMENTATION OF DIGITAL ADDRESSABLE SYSTEM ("DAS")

We believe that any recommendations for regulation of advertisements should be brought about in tandem with the phased digitalisation plan of the Central Government. It is hoped that the situation will change after effective and successful implementation of Digital Addressable System ("DAS"), therefore, the changes of the nature proposed in the Regulation and draft Amendment ought to be deferred in sync with the analogue "sunset" date.

## 3. CONTINUOUS INCREASE IN INPUT COSTS

In this regard it is pertinent to point out that the channel prices have been frozen since 2003. Since the pricing for digital addressable systems are also derived from non-CAS prices (which at present is 42% of non-CAS prices), they are also indirectly frozen. On the other hand the costs for acquiring the content has increase manifold. In addition, there has been substantial increase in operational costs including the increase in manpower. Recently in June 2012, the Copyright (Amendment) Act, 2012 has introduced provisions which increase the costs that the broadcaster has to incur toward procurement of content. Therefore, any attempt to indirectly cap advertising revenues earned by the channels will jeopardize the business models of the broadcasters when they are already reeling under the impact of frozen channel pricing and continuous increase in input and operational costs.

### SPECIFIC RESPONSE TO DRAFT AMENDMENT:

The relevant portion of the proposed regulation is reproduced below for quick reference:

#### **I. Regulation 3**

*"No broadcaster shall, in its broadcast of a programme, carry advertisements exceeding twelve minutes in a clock hour.*

**Explanation:** *The clock hour shall commence from 00.00 of the hour and end at 00.60 of that hour (example: 14.00 to 15.00 hours)."*

#### **Submission # 1 – Advertisement Time in Live Sporting Events**

- A. Live sports programming should be exempted from any cap on advertisement time. Instead as originally proposed by TRAI, live sporting events should be permitted to carry advertisements during "natural" breaks in play during the sporting event.



- B. In this regard it must be emphasised that in Para 8.12 of its 2004 recommendation TRAI did not make any recommendation on capping advertisement time for sports channels by observing that “ **Moreover for sports, advertisements can only be inserted only during natural breaks, like in between overs for a cricket match or during lunch/tea**” (emphasis supplied). Further TRAI impliedly acknowledged the distinction between live sports broadcast and other television formats. In games like hockey and football, on field action is continuous from kick off till half time. Hence there is no question of broadcasters cutting to commercials when the sporting action is occurring. But during half time or other times when no sporting action is taking place or when there is any interruption in play, broadcasters must be at liberty to insert advertisements for the duration of the break in live sporting action. TRAI must appreciate that given the short nature of these breaks, Broadcasters cannot switch to other programmes during such breaks. Hence irrespective of the duration of such breaks there should not be any limitation on the Broadcasters inserting advertisements during such breaks as this is the only recourse the Broadcaster has to recover the cost of acquiring the rights to telecast live events.
- C. In certain sports like Formula1 and Golf, there are no breaks and advertisements are inserted before and after the live action ends. In other sports like cricket, when a ball is dead, it means no match play is in progress. Law 23 of ICC defines “dead ball”. A “dead ball” may happen at different times during a match: when the ball crosses the boundary line, when a batsman is declared “out”, when the ball is collected by the wicket keeper, at the end of an over while the wicketkeeper changes ends, etc. No balls can be bowled or runs scored when the ball is dead as per ICC Law 23. When the ball is “dead” and there is no live action on the field, the host broadcaster switches to static images to enable licensees to go into commercial breaks in their respective territories. Hence local broadcasters around the world and in India cannot continue showing no live action on the ground.

**In short, live transmissions of sporting events have their own run of play that dictates when the broadcaster can cut to commercials. Viewers do not miss any live sporting action. Hence there is no need for a regulation that pre-determines when advertisements should be played during live telecasts.**

**Submission # 2 – Advertisement Time in Non Sporting Live Television Programs**

- A. A distinction must be made between the taped/recorded television programs (soaps and serials, etc.) and live television programs because live television programs are telecast in the same way as the live sports. The action in the program is telecast as it is performed and from where it is uplinked unlike the recorded programs where the slots of specified duration are created for insertion of advertisements.



- B. The opportunities for inserting the advertisements in a live television program arise only when there is a changeover of anchors, performers etc. and the duration of such break is limited to the extent of time required for the changeover to take place. The idea of live television programs is to enhance the experience of television viewing by bringing to the viewers live performances (singing, dances, acrobats, etc.) and hence advertisements are only inserted during breaks in live action.

**Advertisement time in such live television programs must not be capped but instead live programs must be treated as live sports and the advertisement insertion should be allowed to be self regulated so that advertisements are inserted during breaks depending upon the genre of the live television program.**

**Submission # 3 – Advertisement Time in Non-Live Television Programs**

- A. TRAI's capping of the rate at which broadcasters distribute content at a retail price of Rs. 5.35 per channel per subscriber per month in CAS areas out of which a broadcaster's share is about half, results in huge losses in distribution if other modes of monetisation are not available. Similar is the case in non-CAS areas where even a GEC rate is capped at about 0.55 paise per day, irrespective of the content made available on that channel whether it is a show produced for crores of rupees or a show produced for a few lakhs.
- B. These price caps have remained in place for almost a decade despite increases in infrastructure costs, increases in content costs and overall inflation. Even the prices of essential commodities have quadrupled in this time but the cost of distributing content has been kept artificially low. This has left broadcasters with no option but to monetise breaks between and during programmes in an attempt to recoup costs and break even. However it is also a fact that ratings during breaks tend to fall as viewers switch to other programmes. Broadcasters therefore face a twin dilemma- on the one hand distribution revenue is capped and on the other too many ad breaks reduces TRPs and advertiser interest. Despite innumerable representations TRAI has declined to review these pricing caps.
- C. Capping of advertisement time on television channels without a review of caps on pricing of channels will therefore put an onerous financial burden on broadcasters. The Government's ambitious digitalisation plan has become effective from 1 November 2012 which in phases will see the entire country switching from analogue to digital distribution with addressability. As digitalisation gets phased in and distribution revenues improve, broadcasters will be more inclined to increase programming content time and reduce ad breaks. TRAI must appreciate that revenue ratio of broadcasters which is skewed in favour of Ad revenue due to non-addressability, will with digitalization, even out. Market forces themselves will act as a self regulating barrier limiting ad time on television. If at all TRAI wishes to regulate and assuming it has the competence to do so, which remains under challenge before the TDSAT, it is submitted without prejudice that any cap on ad time must only be brought about in tandem with the phased digitalisation plan of the Central Government.



- D. It needs no repetition to say that the skewed ratio of advertisement vs. subscription has its basis in legacy issues such as under declaration and piracy and ad hoc regulatory interventions by TRAI in form of price caps and 'must provide' regime which ensures that subscription fees are the lowest in the world and continue to decline in the present inflationary spiral.

**TRAI should therefore phase the introduction of any caps on advertisement time in a manner that coincides with the "sunset" date of analogue distribution in the country.**

**TRAI should also first by empirical study determine the current average percentage time per hour which broadcasters in different genres devote to advertisements. The initial caps should be pegged at these levels which can then gradually be reduced to 25% per hour of programming time.**

**Submission # 4 – Clock Hour**

- A. TRAI has explained the clock hour to commence at 12 AM (midnight) for purposes of capping the advertisement time at 12 minutes per clock hour. In doing so TRAI has failed to distinguish between the programming which is telecast during the day time and in watershed hours after 10 PM and before 5 AM.
- B. No distinction is made between the programming which is broadcast in prime time and non-prime time hours of the day.
- C. No distinction is also made for "teleshopping" programmes: during early morning and watershed hours time slots some channels run "teleshopping" programmes about products and services which can be ordered online or via telephone.

**The clock hour cannot be uniform for across all time zones during a given period of 24 hours. Instead there should be clear distinction between "watershed" hours, "day parts" and "prime time". There should not be any restrictions in insertion of advertisements in watershed hours when the consumption of television is miniscule. The cap if at all must be on the basis of the "average" per hour of programming and only be applicable for programs that are telecast during the day time i.e. from 8 AM in the morning through 10 PM at night when the watershed hours commence.**

**Submission # 5 – Exclusions:**

**We believe that the following should be excluded from advertising duration:**

- (a) *Teleshopping* is a genre/program by itself and hence any cap should exclude this genre altogether otherwise it will kill the business.
- (b) Non paid Public service advertisements or advertisements issued in the Public interest should be excluded from any cap. Similarly advertisements inserted at the request of or on the notification of any Governmental or statutory body must also be excluded.



- (c) In-house “on-air” promos for promoting shows of the channels on its networks. These promos are not shown on other channels. Such promos are meant merely to inform about upcoming shows and the time during which they can be watched by the viewers. These are not “commercials” as normally understood in advertising parlance.

## II. Regulation 5

### Submission # 1 – Reporting Requirements

- A. The reporting requirements of advertisements inserted in each channel as provided in Impugned Regulation # 5 casts an onerous obligation on broadcasters. Further advertisements being a source of revenue, the type, nature, category and pattern insertion of advertisements in any channel forms commercially sensitive information which TRAI by mandating it to be submitted via a public filing is exposing the channels against their competitors.
- B. With approximately 700 channels in the country, it is not possible to comprehend how such a requirement will serve the purpose of regulating the insertion of advertisements in the television channels.
- C. With no confidentiality obligations on the part of TRAI to keep the reports strictly confidential, Regulation # 5 is absurd and against the commercial interests of the channels.
- D. Further where every entity as part of its corporate social responsibility is making paradigm shift towards e-billing, e-governance, e-documents etc., this Impugned Regulation requiring reams of papers for submitting the reports in each quarter dilutes the Government’s “green” initiatives.

The above reporting requirement must be deleted.

## II. APPLICABILITY OF THE IMPUGNED REGULATIONS AND THE DRAFT AMENDMENT TO MSO CHANNELS

Submission #1: Currently, it appears that the Impugned Regulations read together with the draft amendment apply only to “TV Channels” which has been registered under the uplinking and downlinking guidelines. However, channels operated by MSOs/LCOs are mostly not registered with the Ministry of Information and Broadcasting under their Downlinking

Guidelines nor do they follow the Programming Code or the Advertising Code. However to the lay viewer, these channels are just another channel they get to see on screen. To create a level playing field, any regulation on advertisement time must apply to all channels carried on a cable network, including the channels of the cable operator.



### III. TIME FOR MIGRATION

#### Submission #1: Time for migration

Any regulation which attempts to change or modify existing Industry practice must be prospective in operation and provide sufficient time for Industry to migrate to the new regulatory regime. Advertising deals are done in most cases for a period of time. In the case of sports events rights are acquired much ahead of the actual event and for periods that range from three to five to seven years. The calculation for monetisation of the rights is based on the regulatory regime in force at the time of the acquisition. If the regulatory regime changes mid-way and such time is not given it will lead to disruption and financial hardship for broadcasters who have acquired such rights at immense cost.

**It is therefore submitted that TRAI must give due consideration to providing sufficient time for stakeholders to migrate to any new regulatory regime that TRAI may choose to introduce with respect to caps on advertisement time. Sufficient time in this case would be not less than six months from the date of issue of the notification in the official gazette.**

### IV. REGULATORY OVERLAP

#### Submission #1: Regulatory Overlap

TRAI is aware that currently under the Cable Television Networks Rules, 1994 framed by Parliament ("Cable Rules"), there is a restriction on the amount of advertisements that can be shown per hour of television programming. Since this regulation does not have the concept of a "clock hour", Industry practice has been to treat the requirement as an "average" per hour calculated on the basis of 24 hours of telecast.

If TRAI was to now come out with a different regulation, even while the cap under the Cable Rules remains, there will be a regulatory overlap between TRAI and the Ministry of Information and Broadcasting, the nodal ministry for the Cable Rules. This will create confusion amongst broadcasters as they would be subjected to possible penal consequences under two different legislation each having its own compliance requirements.

**Hence if at all any ceiling on advertising time is proposed it must be under the aegis of only one regulatory body.**



**CONCLUSION**

In light of the above, we submit that the Impugned Amendment/ Regulation itself is premature and merits doing away with completely, for the reasons elaborated above. If required, the necessary recommendations may be made to the MIB for their consideration.

**For The Indian Broadcasting Foundation**



**C. Radhakrishnan**  
**Deputy Director**

**Dated:** 30th November 2012

**Place:** New Delhi