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Dear Sir,

Re: Comments of News Broadcasters Association [NBA] on Consultation Paper "Issues related to Interconnection Regulation, 2017" dated 25.9.2019

The Telecom Regulatory Authority India (TRAI) released/circulated a Consultation Paper dated 25/09/2019 dealing with issues relating to the Interconnection Regulation, 2017 (said Consultation Paper).

1. The said Consultation Paper makes a note of certain important facts which were a part of the Telecommunications (Broadcasting and Cable) Services Interconnection (Addressable Systems) Regulations 2017 (the said Regulations) and are detailed below:

(a) There are 902 private satellite channels that have been permitted by Ministry of Information and Broadcasting (MOI&B) to uplink only and /or downlink their channels or both as on 31/03/2019.

(b) There are 328 TV broadcasters and approximately 529 regional language TV channels which cater to regional audiences.

(c) The numbers of Direct to Home (DTH) Operators as of 01/06/2019 are 4.

(d) The numbers of active Multi System Operators (MSO) as of 01/04/2019 are 1143.

(e) There is one operational HITS operator and a few IPTV operators in the country.

(f) The genesis of the Carriage Fee regime stems from the fact that every Distribution Platform Operator (DPO) which includes DTH and MSO operator, creates an infrastructure to distribute television channels and that there is a cost associated with the development of such infrastructure.

(g) As per the said Regulations, Carriage Fee is defined at 2 (m) of the Regulations and Schedule I of the Regulations mentions the manner and method by which Carriage Fee must be calculated.

(h) The news broadcasters are required to pay monthly Carriage Fee depending upon the average subscriber base of the DPOs in the 'Target Market' declared by the DPOs.

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(i) Furthermore, the DPOs are given the authority to declare their Target Market for the purpose of ascertaining Carriage Fee as Chapter II Clause 4 (3) of the said Regulations which states that every distributor shall declare coverage area of each distribution network as 'Target Market'.

(j) As per the said Regulations, placement agreement, marketing agreement and/or any other technical or commercial agreements between news broadcasters and distributors are in forbearance.

(k) A 20% distribution fee is also charged by the DPOs from Pay channels.

(l) That apart from receiving Carriage Fee and others fees like placement, marketing, distribution etc., the DPOs also receive Network Capacity Fee (NCF) from the subscribers.

(m) Declarations of Target Markets by the MSOs, at times have not been aligned with regional markets.

(n) In its Consultation Paper relating to issues for Broadcasting and Cable Services dated 16/08/2019, TRAI recognised the fact that small broadcasters specially the ones who are not horizontally integrated are constrained to convert their Pay channels to Free to Air channels (FTA).

2. After analysing the above, it appears that the news broadcasters, in particular, face certain serious problems in respect of the present regime established by the said Regulations which are that:

i. Excessive Carriage Fee is being charged by the DPOs from the new broadcasters in view of the Target Markets declared by the DPOs. Either the DPOs declare the entire country as their Target Market or declare random Target Markets by virtue of which the subscriber numbers are inflated. Once the DPOs inflate the subscriber numbers, the Carriage Fee payable by the news broadcasters, whether the channel is Pay or FTA, is excessive. This method of calculating Carriage Fee payable by the news broadcasters based on the Target Market determined by the DPO is detrimental to all news channels, more particularly to the FTA channels which include a number of regional channels, as paying excessive Carriage Fee on inflated subscriber numbers makes most of these channels commercially unviable.

ii. When DPOs declare the entire country as the Target Market or declare random Target Markets to inflate subscriber numbers, ultimately the subscribers suffer as the declaration of Target Markets by the DPOs are not aligned with regional markets.

iii. In fact in several cases the Carriage Fee charged is much higher than the cost of development and maintenance of the relevant infrastructure of the DPOs.

iv. Since NCF is charged from subscribers for news channels it is in the interest of the subscriber that the FTA regional channels be included in the base pack on which the DPOs charge NCF. Therefore, it is submitted that no Carriage Fee be charged from the FTA channels.

v. In view of the above, it may be noted that apart from Carriage Fee, the regional channels face another problem which is where the Target Market is declared to be PAN India, the regional channels never reach the requisite threshold as envisioned by the said Regulations and the subscriptions of such regional channels on a national basis continues to be lower than the minimum threshold of 5% despite a very high subscription in their respective regional market.



This situation is used by the DPOs by invoking the said Regulations to drop channels from their platform since a DPO is not mandated to carry channels having less than 5% of monthly average active subscriber base. This in turn creates 'Barriers to Entry' for small regional broadcasters.

vi. As a result of excessive Carriage Fee payable, the number of the regional channels is reducing which will eventually affect the plurality of the regional content available in the Indian market.

vii. The impact of the said Regulations on Pay channels is that they are being coerced under the circumstances to convert to FTA channels in order to survive commercially. FTA channels rely only on advertising revenue and not subscription fee to carry on their business. As Carriage Fee charged is excessive being based on the Target Market which is determined by the DPOs, even after conversion from a Pay channel to a FTA channel, the excessive Carriage Fee continues to affect the FTA news channel equally in terms of its revenue.

viii. Furthermore, as Carriage Fee is not payable by news channels who reach beyond the 20% subscriber base, the DPOs ensure that the news channels, FTA, regional or otherwise never reach the said subscriber base. Therefore, it appears that the DPOs actually define their Target Markets depending on the Carriage Fee that they will earn.

ix. DPOs are arm twisting many news broadcasters to sign placement agreements de hors the interconnection regime.

x. Fees are being charged by the DPOs from the news broadcasters in the name of marketing fees for promotion and advertisement of its channel and on not adhering to such request, the news broadcasters are threatened with disconnection of their channels.

3. In view of the above, the definition of Target Market needs to be reviewed and Carriage Fee needs to be abolished or the method of calculating Carriage Fee needs to be modified for both Pay and FTA, specially the regional channels.

4. After having specified TRAI's observations in the said Consultation Paper and the problems faced by the news broadcasters, NBA seeks to deal with the issues raised in the said Consultation Paper:

5. Issues for Consultation:

2.33 Do you think the flexibility of defining the Target Market is being misused by the Distribution Platform Operator for determining carriage fee? Provide requisite details and facts supported by documents/data? If yes, please provide your comments on the possible solution to address this issue?

At the outset, NBA submits that news channels, whether FTA or Pay, national or regional have a fundamental right of freedom of speech and expression under Article 19(1)(a) of the Constitution of imparting information to the public and in public interest just as the public has a right to receive information and therefore levying Carriage Fees or any other fee in the garb of Carriage Fee which creates a hindrance either in the telecast of news or in the survival of a news channel should be abolished as it is violative of the media's right to freedom of speech and expression. The news media is considered to be the fourth pillar of democracy, and it is integral to and of grave

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importance to public interest and to the survival of democracy. Therefore, NBA requests that Carriage Fee be abolished with respect to the News genre.

NBA further submits that news channels should be treated as a different genre/class and such classification would be based on intelligible differentia and would have the nexus with the objective sought to be achieved.

1. Without prejudice to the above and in reply to Clause 2.33 of the said Consultation Paper, NBA submits that the flexibility of defining Target Market is being misused by the DPOs for determining and increasing the amount of Carriage Fee payable by the news broadcasters and this is clearly reflected in the submissions made in paragraph 2(i) (iii) (v) (vi)(vii) and (viii) hereinabove, particularly as the DPOs are not defining Target Markets correctly and are defining it in order to increase Carriage Fee.
2. NBA submits that in respect to the DTH operators the news broadcasters find it extremely difficult to invoke 'must carry' provisions for carriage of their channels on DTH platforms since, even though the focused market for such news broadcasters' channels is limited to a few states yet, if they choose to invoke the 'must carry' provision, then they will be compelled to pay for an active subscribers base of DTH platform across India. This unintended outcome of said Regulations has resulted in a situation where Carriage Fee agreements between news broadcasters and DTH operators are far and very few.
3. Furthermore, the declaration of the whole of India as Target Market by DTH operators is posing an entry barrier for the news channels since as they are unable to get on to DTH platforms to reach the audience in a channel's focused markets. This is the result of PAN-India subscribers being described as the Target Market by the DTH operators which inevitably leads to inflation in the subscriber figures thereby, resulting in an unrealistic and exorbitant Carriage Fee being demanded.
4. The bouquets offered by the DPOs very often do not cover the news channels of that particular region but contain FTA channels of a different region.
5. It is submitted that in case of DTH operators, back of the envelope calculations would show that applicable Carriage Fee payable under the present regime for a handful channels itself would be much more than total infrastructure costs that DTH operators may be incurring. On account of shortcomings in the definition of Target Market, the existing Carriage Fee regime has resulted in a situation where it is skewed in favor of DPOs and thereby, resulting in a non-level playing field and creation of a negative economic barrier especially for regional news channels.
6. DPOs ensure that the news channels do not reach beyond the threshold of 20% subscriber base as then a news broadcaster would not be liable to pay Carriage Fee to the DPO.
7. DPOs threaten regional channels of not carrying them as they are below the 5% threshold for the reasons stated the paragraph 2 (v) above.
8. In its Consultation Paper relating to issues for Broadcasting and Cable Services dated 16/08/2019, TRAI recognised the fact that small broadcasters specially the ones who were

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not horizontally integrated were constrained to convert their Pay Channels to FTA as survival strategy.

9. It is evident from the submissions of the DPOs at paragraph 2.25 of the said Consultation Paper that “smaller target market will mean more and more broadcasters will achieve subscription threshold of 20%. As soon as the subscription crosses the threshold, their Carriage Fee revenue will reduce to zero”. Therefore, it appears that the DPOs deliberately define incorrect and random Target Markets to be able to earn substantial Carriage Fees from the news broadcasters. The apprehension of the news broadcaster that the DPOs will ensure that the news channels never reach the said subscriber base of 20% is not a conjecture but a reality.
 10. The main reason for conversion of a Pay channel to an FTA channel is that the Target Market is defined by the DPO so as to gain the Carriage Fee at rates which are excessively high.
 11. Channels which could not afford the Carriage Fee in the present regime have had to shut their operations in India.
 12. NBA submits that Pay news channels are priced very reasonably *inter-alia*, such news channels compete with FTA news channels. It is submitted that in several cases the Carriage Fee is excessive and much more than the price of Pay news channels.
2. a) The solution to the above issue may lie in letting the news broadcasters define the term ‘Target Market’ as they would define Target Market, on the basis of the nature /content produced for their channel.

It is important that the definition of Target Market in the said Regulations be suitably amended to redefine the term based on the language of a state/territory or the total subscriber base of a DPO subscribing to a regional pack of that DPO. It must be noted that language is the most important determinant for defining Target Market.

Furthermore, since it is the news broadcaster who creates the content, it would be in the best position in determining the type of region /audience that is being catered to and what content to create. Usually all regional broadcasters would want that the Target Market for their regional news channels be such state / territory where the language of the channel is predominantly spoken and understood. A regional channel in Malayalam would have largely viewers who understand the said language and a large number of these viewers would be from the state, Kerala, where the dominant population speak Malayalam. Similarly, the population in States like, Andhra Pradesh, Tamilnadu, Karnataka, West Bengal, Orissa, Punjab, Gujarat, Assam, other North Eastern states etc., would essentially watch channels in the language spoken by the majority of the population in those states. It is submitted that if the focused market for a channel is limited, then it would be unfair for a news broadcaster to expect to pay Carriage Fee for the entire universe, PAN-India.

It is submitted that the said Regulations need to be revisited and suitably amended so that there is a level playing field between news broadcasters and DPOs, and also to ensure that stipulations in the said Regulations pertaining to discontinuation of a channel for inability to



meet / maintain threshold levels of penetration *vis-à-vis* total subscriber base of DPO in the Target Market is not misused.

b) It is submitted that DPOs already earn 20% of MRP of a Pay channel on a monthly basis as commission and an additional 15% as incentive. Further, the DPOs are also entitled to NCF from subscribers for each channel and this is evidence of the fact that all infrastructure costs of DPOs are sufficiently hedged from various sources thereby warranting waiver of requirement of Carriage Fees by whatever name or nomenclature called, for at least news channels.

c) Since NCF is charged from subscribers for FTA channels, it is in the interest of the subscriber that the FTA regional channels be included in the base pack on which the DPOs charge NCF and no Carriage Fee be charged from the FTA / regional channels.

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

a) In respect of the question as to whether there should a cap on Carriage Fee that a news broadcaster may be required to pay to a DPO, in view of the submissions made in paragraph 2(i) (iii) (v) (vi) (vii) and (viii) herein above, Carriage Fee should be abolished.

b) It is reiterated that in case of Pay channels, on a monthly basis, DPOs already earn 20% of MRP of a Pay channel as commission and an additional 15% as incentive. Further, on a monthly basis, DPOs are also entitled to NCF from subscribers for each channel. Since all infrastructure costs of DPOs are sufficiently hedged from various revenue sources, it thereby warrants waiver of requirement of Carriage Fees for at least news channels.

c) A FTA news channel which relies only on advertising revenue for survival, has to bear the teleport costs, licence costs, operation costs, content costs, employees costs, bureau costs in various states, costs of retaining reporters in states, branding costs and distribution costs and therefore looking at the cost-benefit analysis for these channels, there should be no Carriage Fee or any other fee charged from FTA channels.

d) Based on the fact that the DPOs earn NCF from the subscribers, no Carriage Fee be charged from the FTA channels particularly as the DPOs earn NCF using FTA channels and don't have to share any channel subscription revenue of NCF with the news broadcasters. It is the popular regional channels that help the DPOs penetrate regional markets and enable them to earn their NCF by using the FTA channels without the DPOs having to share any NCF or subscription revenue with news broadcasters. As a result of which the FTA channels help the DPOs to recover bandwidth cost of the channel slots allocated for it. For this reason also, no Carriage Fee should be charged from FTA channels.

e) In fact, if the FTA channels are included in the base pack (NCF) of its relevant territory and the Target Market is defined appropriately, it would reach the relevant households and hence no Carriage Fee would be liable to be paid as per the existing slab system.

f) Without prejudice to NBA's submissions that no Carriage Fees should be levied for news channels/ Pay / FTA news channels, if TRAI abolishes the slabs and Carriage Fee were still to be



charged, then it should be capped at 10 paise per active subscriber base of the DPO in the relevant Target Market for the concerned channel. However even in the said scenario FTA channels would still require substantial concessions to operate. Furthermore, if Carriage Fee is to be levied, the manner and methodology for calculating the Carriage Fee should be disconnected from defining the term Target Market and Target Markets should be determined by the news broadcasters.

g) The rationale under the said Regulations for determining 20 paise has been provided in paragraph 89 of Explanatory Memorandum which also clearly states that Carriage Fee should be reviewed on periodic basis say in every 2 to 3 years period. In case of some material changes in the input costs, the review can be initiated early also. Therefore, NBA requests the definition of Target Market and the methodology of defining Carriage Fee should be reviewed.

h) NBA notes that since the objective of the said Regulation is that “the consumer choice should prevail” and the cost of digitalization has been substantially recovered by the DPOs; there is no dearth for Network Capacity, as a result of which the choice of the consumer would never exceed the capacity in a practical scenario, therefore all channels serving quality content would find place within the network. The said Regulations continued the principle of “must carry” and therefore the Carriage Fee is paid by the news broadcasters without any reciprocal guarantee that the same would be necessarily carried unless and until the subscriber exercises its choice. The “must carry” principle is now more or less a “make available” principle.

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

i. It may not be feasible to accurately determine the costs involved in carrying a channel both for DTH as well as MSO platforms. However, an endeavour to determine the same may be made by considering costs attributable towards overall operations of DPOs. Submissions made above, may be read as forming part of the present reply.

2.36 Do you think that the right granted by 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?

i. NBA submits 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 being misused by the DPOs and the regional channels have to suffer as a result. The submissions made in the paragraphs above may be read as a part of the present paragraph.

ii. This is a lacuna in the said Regulations where Carriage Fee is permitted to be computed on the entire subscriber base declared by a DPO, which creates problems for FTA /regional channels as FTA/ regional channels have to pay a substantial amount of Carriage Fee based on inflated subscriber numbers.

iii. Where the Target Market is declared by the DPOs to be PAN India, the regional channels never reach the requisite threshold as envisioned by the said Regulations and the subscriptions of such channels on a national basis continues to be lower than the minimum threshold of 5% despite a very high subscription in their respective regional market. This situation is used by the DPOs to drop channels from their platform since the DPO is not mandated to carry channels having less than 5% of monthly average active subscriber base. This in turn creates ‘Barriers to Entry’ for small regional broadcasters.

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iv. By letting the news broadcasters define the term “Target Market”, misuse of the stipulations of the said Regulations by the DPO’s will be prevented. If the term Target Market is determined by the news broadcaster, then it is likely that these problems would not arise as it is the news broadcaster who creates the content, it would be in the best position to determine the type of region /audience being catered to and what content to create.

v. It is submitted that in case of DTH operators, a regional news channel (because of the very nature of target audience of such channel) may never be able to achieve five (5) percent reach on a DTH platform thereby, leaving such channels at the mercy of DTH operators for their continuation on DTH platform. It is for this reason, the threshold requirement of five (5) percent should either be reviewed or abolished.

Chapter 111

Issues related to Placement and other agreements between broadcasters and Distributors

NBA submits that placement of a channel is a part of the carriage because the channel gets a LCN- which is a relative positioning within its respective genre in the Electronic Program Guide (EPG) etc. through placement and hence it cannot be completely delinked from carriage. Even if Carriage Fee is abolished or regulated, DPOs can still charge placement and other fees arbitrarily. Hence it is necessary to regulate placement, marketing or any other fee by whatever name called in order to bring about a certain level of transparency and to bring about a level playing field amongst stakeholders.

3.25 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.

i. NBA submits that there should be a framework for Interconnection Agreements for placement and placement fee should be regulated as news channels are being forced to sign placement agreements, marketing agreements; and therefore, exorbitant fees are charged under these heads by the DPOs. The arbitrary demands of the DPOs, by whatever name called leads to blackmailing the news channels who are expected to pay the Fees demanded or risk being dropped from the platforms.

ii. NBA also states that Carriage Fee is taking different forms, colors and shape in the form of placement, marketing etc. and DPOs are charging arbitrary amounts in the form of placement, marketing and distribution fee. The DPO is able to manipulate and arm-twist the FTA/ regional channels in the present regime of the said Regulations to its advantage and may even refuse to carry a popular channel with good content on threats of not meeting its demands for carriage and/or marketing and/or placement etc. Therefore, there is an urgent need to end the forbearance in respect of placement, marketing fees in all forms and by whatever name called.

iii. Big broadcasters use their clout to displace smaller and stand alone broadcasters and some Pay channels offer huge discounts on their bouquets to DPOs and name it placement fee. TRAI should ensure a level playing field, parity and establish transparency where placement and marketing fees are concerned.

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iv NBA suggests that if TRAI comes to the conclusion that some fee needs to be levied, then Carriage Fee, all inclusive of placement marketing etc., should be capped at a maximum of 10 paise for news channels. The submissions made above may be read as a part of the present paragraph.

3.26 Do you think that the forbearance provided to the service providers for agreements related to placement, marketing or any other agreement is favouring 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)

a) NBA submits that forbearance provided to the service providers for agreements related to placement, marketing or any other agreement favours the DPOs. These submissions have already been made in paragraph 2(i) to (ix) above and may be read as a part of the present paragraph.

b) NBA further submits that in view of the above, some news channels which sign placement fee agreements are getting pre-assigned Local Channel Number (LCN) and a better relative position for channels in the EPG in their respective genre. These fees are not related to the cost of the bandwidth. In the interest of the subscribers and other stakeholders, there needs to be transparency to enable a level playing field and these fees need to be regulated.

c) Forbearance provided to the service providers for agreements related to placement, marketing or any other agreement is also distorting the level playing field as many FTA/ regional news broadcasters are being forced by the DPOs to sign marketing /promotion /placement fee agreements or threatened by the DPO's that their channels would not be included in case they do not agree to pay the charges .

3.27 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?

i. If TRAI does not intervene and regulate the interconnection agreements such as placement, marketing or other agreement, the FTA/regional channels will become commercially unviable to run and as a result the plurality of regional content will decline as will competition. There will be no transparency or level playing field established for the stakeholders as the news broadcasters will always be susceptible to threats from DPOs; small news broadcasters from larger players in the market which could lead to monopolistic practices being established in the industry.

3.28 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.

i. The submissions made in the paragraphs above may be read as a part of the present paragraph. There is a need to establish a level playing field between various stakeholders including FTA and Pay channels, Regional and National channels and news broadcasters and DPOs operating in various geographical locations. There is a need of greater equity and transparency in the industry in respect of the fees charged by the DPOs.

ii. If Carriage Fee is not abolished, TRAI may consider regulating all fees charged by the DPOs by bringing an overall cap on carriage / marketing / placement and same should be much less than what is prescribed in the said Regulations.

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iii It is reiterated that news channels should be charged less placement or other fee as they have a greater right under Article 19 1(a) of the Constitution to disseminate information and are not run purely on a commercial basis.

iv. In the alternative and without prejudice to the submissions made above, if possible a slab rate may be fixed for various groups and genre of channels created and carried by DPOs. The slab rate may vary between various groups (language/genre) in each platform like news, sports or general entertainment. Since news channels have a right to free speech and thereby a right to disseminate information and its revenue earning potential is limited, the slab rate for this genre could be kept at the lowest.

v. Platform's reach/sub-base in a relevant language (being the Target Market) of the channel can be the sum of a channel's reach in the relevant linguistic state plus the reach of that particular language bouquet in the rest of the country outside the state and this would point to the absolute number of households.

vi. Channel carrying capacity can be used to arrive at the cost of one slot which may vary from DPO to DPO.

vii. Without prejudice to the submissions above, FTA channels should be included in the base pack and should also enjoy an additional discount on LCN placement fee since there is only one stream of revenue for FTA channels. This submission is being made in case all fees are not regulated under one Fee, as suggested, but continue to be regulated as separate fees being charged from the news broadcasters.

viii. Without prejudice to the submissions above, since there is a set off option available for Pay channels between Pay channels revenue and Carriage Fee/placement fee, the same percentage of discounts and facility of discount available for Pay channels should be extended to FTA channels too or else FTA channels will be over charged for placement fee as compared to Pay channels and parity and equity will be lost for FTA channels. This submission is being made in case all fees are not regulated under one Fee, as suggested, but continue to be regulated as separate fees being charged from the news broadcasters.

ix. If a channel is popular and there is a large subscriber demand and the channel remains FTA, then additional discounts should be offered to such popular FTA channels since that would not only benefit subscribers and increase the DPO's subscriber base but the DPO/subscribers would not have to pay any monies to the FTA channels.

The above submissions have been made on behalf of the members of the News Broadcasters Association.

Annie Joseph
4/11/2019

Annie Joseph
Secretary General
News Broadcasters Association

November 4, 2019