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Ref: **ACTO's counter comments to the comments received on TRAI's Consultation Paper [07/2018] - Estimation of Access Facilitation Charges and Co-location Charges at Cable Landing Stations dated 18<sup>th</sup> October, 2018**

Dear Sir,

We appreciate the opportunity to provide our counter comments to the Hon'ble Authority on the comments received from stakeholders on this important consultation paper - Estimation of Access Facilitation Charges and Co-location Charges at Cable Landing Stations. ACTO is pleased to provide its counter comments to various comments on the twin issues posed in the captioned Consultation Paper.

We have reviewed comments received from all eleven stakeholders. The comments of two telecom service providers (Tata and Airtel) who are also OCLs, have a view which is not in agreement with the comments submitted by ACTO.

In addition to our comments provided vide letter dated 29<sup>th</sup> October, 2018, we would like to file our counter reply specific to the comments provided by both Tata and Airtel for the kind consideration of Hon'ble Authority.

We hope that our counter comments (enclosed as Annexure – I) will merit consideration of the Hon'ble Authority.

Respectfully submitted,  
Yours sincerely,  
**for Association of Competitive Telecom Operator**

**Tapan K. Patra**  
**Director**

Encl: As above

### Annexure – I

#### **ACTO's Counter Comments to TRAI Consultation Paper on Estimation of Access Facilitation Charges and Co-location Charges at Cable Landing Stations**

Eleven stakeholders have responded to the captioned consultation paper. The stakeholders included TSPs who are also OCLs, TSPs as seekers and Industry Associations.

Except two OCLs rest nine stakeholders (majority view) have unanimously acknowledged that – cable landing stations charges are abnormally high, are still a bottleneck in terms of charges, represents critical hurdle to cross in order to achieve objectives of seamless connectivity and have supported TRAI's earlier recommendations of 70% capacity utilization and 2.6 conversion factor to determine the charges of various capacities.

Therefore, TRAI should proceed and republish the Schedules I, II and III basis its earlier recommendations and regulation dated December 21, 2012 to be made effective from January 1, 2013.

Hon'ble Court's have upheld the power of TRAI to frame this regulation in exercise of its powers under Section 36 read with Section 11(1)(B)(i) &(iv) of the TRAI Act. It is well within TRAI's ambit to have the current consultation on the specific two issues mentioned in the order. In counter to the response of the two TSPs from legal aspects, we would like to mention the relevant sections of the order of divisional bench of Hon'ble high court Chennai as stated below are sufficient to demonstrate that TRAI is required to hold consultation on utilization and conversion factor only to rework Schedule I, II and III of the regulation dated 21.12.2012.

*"5(cf) Though the requirements of subordinate legislation making process in its evolved, developed form obtaining today has been discussed supra in this judgment, in the light of capacity utilisation being fixed at 70% becoming a major point of contention besides adoption of conversion factor of 2.6 turning heavily on this aspect of the matter impacting cost hugely, it is deemed appropriate to make some elaboration in this regard. To be noted, conversion factor is a costing methodology, but it is significant in terms of its impact on ultimate figures.*

*5(cg) As alluded to supra, in the Call Drop case, the Supreme Court has referred to Corpus Juris Secundum. Paragraphs 80 to 91 of Call Drop case have been extracted and reproduced supra. Our understanding of that portion of Corpus Juris Secundum pertaining to rule making requirements is, it is imperative that the rule making body explains how the rule making body resolved a significant problem raised by stakeholders in their comments and as to how the same was resolved leading to the ultimate rule. In fact, it is further explained by saying that a mere conclusory statement is not sufficient. It is clearly laid down that a mere conclusory statement will not fulfil the rule making body's duty to incorporate a concise statement of their basis and purpose. Rule making body should articulate a satisfactory explanation. In our understanding, 'satisfactory explanation' includes explanation regarding rational connection between the facts the rule making body finds and the choices it makes. In this regard, the rule making body may have to identify specific studies or data that they rely upon in arriving at a decision to adopt a rule and make it the ultimate rule. This is of utmost importance.*

5(cr) Both the appellants before us made elaborate submissions to show that the capacity utilization cannot be 70% at any point of time. We are not concerned with the correctness or otherwise of these numbers. We are not going into the arena of what exactly should have been the capacity utilisation and conversion factors qua numerical values. Therefore, on this ground, the numerical values of the three charges in the CLS Co-location regulation charges are certainly hit by the vice of both lack of transparency and arbitrariness. However, we are of the view that this does not render the entire impugned regulations invalid or hit by aforesaid vices. Equally, TRAI assigning capacity utilisation to be 70% without any basis (much less logical basis) or sequence to support the same clearly shows that the fixation of capacity utilisation at 70% is arbitrary. Therefore, in dealing with an answer to propositions 3 and 6, we hold in favour of the appellants that the the numerical values of the three charges in the Schedules to CLS Co-location regulation charges are hit by the vices of lack of transparency and manifest arbitrariness. We also hold that the process and procedure for making subordinate legislation in its evolved and advanced form as it stands today has not been followed qua numbers in aforesaid schedules, but this by itself does not render the impugned regulations invalid is our considered view. To be noted, it is not merely the process and procedure of subordinate legislation making in its evolved and advanced form as it stands today, but transparency that has been built into the very statute and the very provision of TRAI Act to which the impugned regulations are traceable has been breached qua aforesaid Schedules and numerical values therein. To be precise, it is traceable to sub-section 4 of Section 11 of TRAI Ac capacity utilisation and 2.6 conversion factor does not affect the impugned regulations as a whole, the numerical values of the three charges adumbrated in the three schedules to CLS Co-location charges regulations have to necessarily be reworked and redone in conformity with these parameters for subordinate legislation making. Considering the scope of powers of TRAI, CLS not qualifying as interconnection (owing to absence of one out of six determinants) does not denude the powers of TRAI as it is nobody's case that interconnection is covered / regulated by another separate statute or regime. This answers proposition No.1 along, with proposition Nos.3 and 6."

As this consultation paper is based on the directive of Hon'ble Supreme Court arises out the SLP and TRAI has asked comments for two specific questions only, therefore we are submitting our counter comments on the comments received by these two TSPs/OCLs challenging TRAI's power as well as earlier regulation. The comments from Tata and Bharti have challenged TRAI's authority on regulating CLS charges. However, at the same, they insist TRAI to rework schedule I, II and III based on new cost estimates – why would once advocate if they believe TRAI has no powers in this regard.

**Q.1What should be the ‘utilization factor’ for determination of annual access facilitation charges, annual operation and maintenance charges for capacity provided on IRU basis, and co-location charges in the Schedules appended to “The International Telecommunication Cable Landing Stations Access Facilitation Charges and Co-Location Charges Regulations, 2012” dated 21.12.2012?**

On utilization factor, only two TSPs have argued for lesser value of utilization factor and majority of stakeholders are in favour of keeping utilization factor as 70%. As per submitted

information the respectable two TSPs, have also asked for no regulation as there is enough competition due to increased numbers of CLS with the table as below-

Period	No. of CLS	CLS	Submarine Cable System	Year of commissioning	CLS Owner
Prior to 2002	3	LVSB, Mumbai	FEA	1997	TCL
		VSB, Cochin	SMW3/SAFE-SAT3	1999/2001	TCL
		VSB, Mumbai	SMW3	1999	TCL
As of 2007	8	Santhome, Chennai	i2i	2002	Bharti Airtel
		VSB, Chennai	TIC	2004	TCL
		RA Puram, Chennai	SMW4	2005	Bharti Airtel
		LVSB, Mumbai**	SMW4	2005	TCL
		Tuticorin	BSL	2006	BSNL
		Versova, Mumbai	Falcon	2006	RCom
As of 2012	13	Trivendrum	Falcon	2008	RCom
		VSB, Mumbai**	SEA Cable	2008	TCL
		BKC, Mumbai	IMEWE	2010	TCL
		Santacruz, Mumbai	IMEWE	2010	Bharti Airtel
		Versova, Mumbai	Gulf Bridge	2011	Sify
		Santacruz, Mumbai	EIG	2011	Bharti Airtel
As of 2017	17	Mumbai	BBG	2016	Vodafone
		Chennai	BBG	2016	RJIO
		Mumbai	AAE-1	2017	RJIO
		Chennai	i2i	2016	RJIO

Over last ten years number of CLS stations has been more than doubled. It is a fact now. Any company in the industry looks for further investment towards expansion or new set up when utilization factor of existing set up touches 80 % and above. The figure of utilization factor as reported by RBI across industry also indicated that average utilization factor was above 75 % in India in the last decade. The claim made by TSPs about the increased number of CLS is in sync with the RBI data about the utilization factor. Thus their own facts used for claiming no need for regulation, is an admission of proof of higher utilization factor in CLS. We have submitted details of RBI data in our past submission and it also available in RBI website. <https://rbidocs.rbi.org.in/rdocs/Publications/PDFs/OBI24010414.pdf>

It is also a fact that data consumption in India is growing exponentially with 1.2 Billion phone connection, over 450 Million broadband, high increase of smart phone adoption and Govt's Digital India initiative. We believe there is no doubt about exponential increase of data usage in India. One side lies with facts of increased data usage, increased number of CLS and other side is claim for low utilization factor in CLS. This is utter contradictory and argument for low utilization in CLS is completely absurd.

**It is natural that demand increases utilization and increased utilization leads to expansion or new set up.**

We restate our view that the utilization factor of 70% is based facts and figures. We also request TRAI to use the factor of 70 % for determining price in the said regulation.

**Q2 What should be the ‘conversion factor’ (refer Para 2.22) for determination Of annual access facilitation charges and annual operation and maintenance Charges for capacity provided on IRU basis in the Schedules appended to “The International Telecommunication Cable Landing Stations Access Facilitation Charges and Co-Location Charges Regulations, 2012” dated 21.12.2012?**

Cost recovery has been advocated as a justification for conversion factor of 4. Such a matter has to be determined by market forces. TRAI as a regulator is mainly required to ensure affordability, competition, consumer interest and overall growth of the sector. Cost recovery of a TSP is based on market forces and decisions taken by TSP.

Here “4” is technical factor arises out of multiplexing structure of SDH. The factor of “2.6” is commercial factor based on either purchasing cost or selling price or of both. During the last consultation, the factor of 2.6 was taken from the data collected by TRAI from TSPs of prevailing selling/ market price. Technical factor and commercial factor are not the same. Commercial factors are arises out of selling price and or cost to it. Individual cost of STM-1/STM-4/ STM-16 modules are available in the market. STM-1 and STM-4 are available even the in same card with the configuration through software. Cost of STM-1 or STM-4 more or less same.

One respected TSP have claimed that cost of these cards are nearly four times so, the factor should be 4 not 2.6. It means that TSP is in agreement to take this factor based on the ratio of the cost of individual STM-1/STM-4/ STM-16 modules.

*“Since AFA charges are worked out on cost basis, the concept of economy of scale is not applicable here. In the set up the STM-4 card cost is ~ 4 times to STM-16 cost and STM-16 cost is ~4 times the STM-1/4 cost.*

*And hence the division of higher capacity into lower by dividing the same by a factor of 2.6 is not appropriate as it would result in improper recovery of the cost.”*

To be more accurate and fair, commercial factor can be an average of the selling price and purchasing cost of the ratio of individual modules/ cards of STM-1:STM-4: STM-16. We welcome to take the conversion factor to be more corrected in order to include on the cost in addition to selling price as average two for individual STM-1:STM-4: STM-16 modules. We request TRAI to take the cost of individual STM-1: STM-4: STM-16 modules which can be collected from TSPs as well from vendors for correctness if it is not already available. In our past submission also, suggested for the ratio of cost of individual STM-1:STM-4:STM-16 modules.

**Commercial Conversion factor = {(Cost of Individual STM 16 module + Selling price of STM 16 bandwidth)/2}/ {(Cost of Individual STM 4 module + Selling price of STM 4 bandwidth)/2}.**

ACTO humbly submit that the 70% utilization factor used by the TRAI is well within the international norms and practice, which tend to have higher utilization. We also supports the TRAI’s earlier recommendation of fixing the conversion factor at 2.6 for determining access

facilitation charge for lower capacities i.e. STM-1, STM-4 and STM-16 from 10 G/ STM-64 capacity.

We sincerely request the Hon'ble Authority to publish the new rates to be applied to all access arrangements at India's cable stations from the effective date i.e., **January 1, 2013**.

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