

Consultation Paper No.16/2019

Consultation Paper on Issues related
to Interconnection Regulation, 2017

25th September, 2019

Telecom Regulatory Authority of
India, (TRAI),
Mahanagar Doorsanchar Bhawan
Jawaharlal Nehru Marg
New Delhi- 110 002

Last Date for comments:

23-10-2019

Counter Comments by:

06-11-2019

Comments emailed on:

05-10-2019

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emailed to: sapna.sharma@trai.gov.in.

Dear Sir,

Sub: Consultation Paper (CP) No:16/2019 on
Issues Related to Interconnection Agreement
Regulation, 2017 –

(1.0) I refer to the above CP dated 25-09-2019 seeking and inviting written comments on the above subject from the stakeholders by 23-10-2019 (Counter Comments by: 06-11-2019)

(2.0) I give my written comments herein. Please arrange to open and read the attached bookmarked PDF file named "TRAI-1619-05102019-psn.pdf"

(3.0) I thank you for providing an opportunity to present my comments on this subject.

Yours Sincerely,

(P.S.Natarajan)

05-10-2019

Category of Comments: Individual/Member of the Public.

ISSUES FOR CONSULTATION – CHAPTER II

2.33 Do you think that the flexibility of defining the target market is being misused by the distribution platform operators for determining carriage fee? Provide requisite details and facts supported by documents/ data. If yes, please provide your comments on possible solution to address this issue?

(1.0) Yes..the target market area is being misused. The areas of contention revolve around the "Target Area", the Regulation/Sub-regulations and the Schedule.

(2.0) Taken together and if read together they serve to bolster the case of the DPOs. The cumulative effect of all these provisions provides avenues for further exploitation and misuse. These are discussed under each head. Finally, the provisions in the Interconnection Agreement itself, if signed, and agreed between the parties serves to close all exit options# (#unless assailed as being invalid and so on) for the affected party on this signature alone as it is "as agreed". ICS/RIOs are also likely to be renewed, replaced or substituted with fresh agreements or similar modes from time to time and they tend to extend the opportunities of exploitation, misuse and also bring in elements of uncertainty if not roped in by regulatory measures.

(3.0) Sub regulation (2) Regulation 8 of the Interconnection Regulation, 2017

"where the rate of carriage fee per standard definition channel per subscriber per month to be declared by a distributor of television channels shall not exceed **twenty paisa** while the rate of carriage fee per high definition channel per subscriber per month to be declared by a distributor of television channels shall not exceed **forty paisa**.

[NB: the rate for HD is double SD and in other tariff provisions elsewhere where the subscriber computes the number of channels he wants to view, one SD channel is considered to be equal to 2 HD channels.]

(4.0) The Calculation of the carriage fee amount as per Schedule I

The calculation of the carriage fee amount as per Schedule I that varies to less than 5%, and there are slabs at 5%-10%(0.75), 10%-15%(0.50), 15%-20%(0.25) and 20% and above (NIL)

(a) If the **monthly subscription** for a channel in the **target market** is less than five percent of the **average active subscriber base** of the distributor in that month in the **target market**, then the carriage fee amount shall be equal to the rate of carriage fee **per channel per subscriber per month**, as agreed under the **interconnection agreement**, multiplied by the average active subscriber base of the distributor in that month in the target market

(b) If the monthly subscription for a channel in the target market **is greater than or equal to twenty percent** of the average active subscriber base of the distributor in that month in the target market, then the **carriage fee amount shall be equal to 'Nil'.**"

(5.0) It is very strange that the regional share of the pie is not recognised at all. The DPOs gets to define the "Target Market" and to maximize the revenue an "All India Basis" is followed. These two aspects and the DPOs dropping channels below 5% make it indeed difficult for the Broadcasters to survive or operate freely. It is a difficult "ask or "task"" but one would try and reach the exempt category of 20% while the other is hard pressed to stop just that situation. One tries to avoid the dreaded exit signal percentage of 5%, which reached percentage, would mean that their signals would no longer be carried

and the other is just waiting in the wings for that event to happen making it a simmering see-saw battle.

(6.0) One way to go forward is to realign the "**Target Market**" by taking it away from the DPOs and involve the broadcasters also. A reputed and credible independent external auditing agency with expertise arrives at the **active subscriber base for regional as well as PAN -India level figures** that is acceptable to all stakeholders and put in the public domain, websites and so on. This would be based and included on the signed Interconnection Agreements which specifies the extent or intended coverage of the "Target Markets".

(7.0) According to Regulation 4 of the Interconnection Regulation, 2017 in Sub Regulation (8)

(a) "It shall be permissible to the distributor of television channels to discontinue carrying of a television channel".....

(b) The Regulation allows wide berth by using the words "**shall be permissible**" and offers a mandatory permission situation by the use of the words "**shall**" besides forming part of the regulations. Any Regulation derives its origin, source and operative legal powers from its Parent Act that govern them, nevertheless, and one must remember that these Regulations are always subservient to the Parent and operative Act and cannot overrule or override its Parent Act.

(8.0) Next "channel dropping" scenarios must be totally eliminated based on percentages, if feasible, as "channel dropping" option in favour of the DPO is a multi edged sword and would be used to further vested interests.

(9.0) Some of the issues are:-

- * It could tantamount to a "penalty" or a "penalize" situation,
- * It aids arm twisting options,

- * It introduces an arbitrary decision making issue environment,
 - * It deters new entrants,
 - * It puts fear into existing players,
 - * It stifles competition,
 - * It affects regional pluralism,
 - * It might rob subscribers from watching their favourite regional news or programmes,
 - * It imposes unjustified costs as they pay on "All India basis" and yet watch "Regionally"
 - * It might introduce "hidden" and latent cost structure which break-up if not provided and if is not provided or known to the public eye, the world at large and public domain.
 - * It could impact the players additionally by way of financial strangulation that is slow and pernicious and yet with passage of time would also force the affected players to accept the situation as they need to survive and is a subtle form of a coercive action where consent is nullified, not free, or if made, is under duress and pressure situations. One party dominates over, and either rules, or takes over, the free will of the other and affected party.
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2.34 Should there be a cap on the amount of carriage fee that a broadcaster may be required to pay to a DPO? If yes, what should be the amount of this cap and the basis of arriving at the same?

(1.0) The cap could be by regulation on a lower scale than the present 20 paise or 40 paise and may be linked to the cost of carrying the channel as discussed in the next paragraph.

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

(1.0) The cost of carrying a channel can be based on

Response to TRAI's Consultation Paper No:16/2019 – Issues Related to Interconnection Regulation, 2017 from: P.S.Natarajan Category: Member of the Public/Individual emailed from:nspblitz@gmail.com
the following factors:-

(a) A properly defined and logical Target Market that factors in and accepts the possibility of a "Regional" share of the cake or pie by considering it smaller in size (a slice) as opposed to the "whole" cake (That is PAN-India).

(b) Where there are contiguous and nearby border areas geographically, some "satellite footprint spill-over" is possible that cover territories that might belong to one State or the other, in a two State situation.

(c) Technology perhaps, it is said, is unable to zero only to transmit to a particular city within a State or district within a State as contended in this paper due to satellite spillovers, but the question is: can geo-coordinates or geo-fencing be used to set boundary limits in a "Regional" scenario as geo-fencing geo co-ordinates lend themselves to greater target market precision and accuracy. The costs obviously should not be prohibitive or too expensive and must NOT be passed on to the subscriber.

(d) Here the "Regional" area would be of two States with a predominant State and an Ancillary border State with the "spillover" zone of the satellite that are geo-coordinated or geo-fenced.

(e) An example:

Let the State of Tamilnadu be the "Regional" area with some portions being watched in the State of Karnataka also. Tamilnadu is the predominant State and Karnataka is the "Ancillary" State here. Active subscriber base will be high in Tamilnadu and lesser in Karnataka zones as the DPO is operating in Tamilnadu.

(f) Conversely, a Karnataka DPO operating from that State will have a higher active subscriber base in Karnataka (Predominant) and a lesser active subscriber base in Tamilnadu (Ancillary) on its border "satellite footprint spillovers".

(g) Both DPO operators in Tamilnadu and Karnataka would benefit by using a ratio that uses as the numerator, the **Regional Active Subscriber Base (RASB)** and the denominator is the **PAN-India Active Subscriber Base (PASB)**. This ratio recognises and gives credence to a slice of the cake by treating that portion as "a slice" only, and not treat "a slice" like the "whole cake" itself just because it is easier for the DPOs to collect and augment revenues in this fashion on an All India basis.

(2.0) Some loud thinking and this is not addressed to any Member/Personnel at TRAI but to perhaps ponder over and addressed at larger audiences where many more comments and views would be forthcoming....

- * What is "PAN India" and what areas are to be covered must be defined precisely.
- * In many States "Hindi" is spoken besides other languages. How does one factor this?
- * Can say five States NOT be covered under "Hindi" Regional?
- * Some States might enjoy a sizable multi language presence. How does one decide what is "Regional" and what is not "Regional" in a multi language State and which language would be the predominant language for that State?
- * There are situations where a sizable population speak multiple languages like the instance discussed by TRAI in this Consultation Paper, where Maharashtra and Madhya Pradesh were sought to be covered as "Regional" target areas. That should not mean that Gujarat and Kerala are covered on the premise that Gujarati and Malayalam are spoken in either of the States or that there is a sizable population to cater to in these States.
- * Which Government Agency can provide an

authenticated figure that would be the benchmark acceptable to all parties, is relevant, to both the broadcaster and the DPOs.

(3.0) The **Regional Active Subscriber Base (RASB)** that bears a ratio to the **PAN-India Active Subscriber Base (PASB)** may be used.

(4.0) The cost of carrying the channel is computed after considering the transponder capacity, satellite access charges, satellite bandwidth charges, decoders, all related equipment, network access charges, other transmission in the intermediate/ final stages, electricity and power bills, overheads, staff deployment etc which is basically a costing exercise.

(5.0) This can be matched and be multiplied with a flat rate which flat rate will be, as decided by TRAI and may be lesser than 20 paise or 40 paise or based on a enumerative and explained formula. Now all these items can be authenticated and verified through audited figures as they appear in the balance sheets, wherever possible (not for all cases) and would be disclosed to TRAI. There can be some co-relation with the number of active subscriber base either PAN India or Regional. One could get the cost of carrying the channel per subscriber either PAN -India or Regional, SD or HD.

(6.0) The Institute of Management Accountants of India/ ICAI/could with their proven expertise and combined knowledge, fine tune models, for arriving at cost computation/other accounting implications/ for arriving at cost of channel carrying more precisely. It may require some time for an ideal model, but once in place, it would appeal to all as the figures are there in "black and white" for all to see. There are fewer occasions for disputes or disagreements if made part of the signed Interconnection Agreements between the parties and that promotes transparency.

2.36 Do you think 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 likely to be misused? If yes, what can be done to prevent such misuse?

(1.0) Yes..... There is the possibility of misuse as it gives scope for financial arm twisting by the DPO as a small time player broadcaster may have to look to the DPO to carry or not to carry his signals. The DPOs get added strength from the Regulations.

(2.0) Regulation 4 (8) of the Interconnection Regulation, 2017 which provides for mandatory permissions to discontinue signal carrying in each month of the preceding six month period where the subscriber base is less than 5% of the monthly average active subscriber base in the target market areas as specified in the interconnection agreement.

(3.0) Schedule I of Interconnection Regulation 2017 also provides a slab structure for calculation of the carriage fee. When such provisions are found in the regulations itself that would be exploited by the DPO by taking advantage by stating that the Regulations provide for it and as it is sanctioned by law, they enjoy a wide playing arena in which to operate.

(4.0) It is time for TRAI to examine whether such regulations are to be allowed and most importantly whether they either affect FTA channels or act against public interests or impact regional viewing options or plurality.

(5.0) In fact, any issue that might impact competition might be referred or *suo moto* taken up by the Competition Commission of India but as the stage is that of seeking responses from the public and holding of stakeholders' meetings by TRAI, any future lacunae might be occasions for the exercise of this function by the CCI.

(6.0) TRAI and CCI are mutually respecting each

other's territorial outreaches presently but may have to share data and co-operate in the interests of the subscribers to set rights things later on as is mandated by law for both TRAI and the CCI in the overall protection and interests of the subscriber for both these Regulators in their related domain areas of expertise.

ISSUES FOR CONSULTATION – CHAPTER III

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.

(1.0) Yes....A well defined framework must regulate placement agreements and the placement fee as well. Placement fee must find its place in the Interconnection Agreement. Placement Agreements cover a wide range of subjects such as EPG, LCN(one year no change situation), genre declaration, genuine marketing and genuine promotional offers, genuine discounts, among others. These relate to "Technical" (such as EPG, LCN) or "Commercial" (such as genuine marketing, genuine discounts and so on.)

(2.0) As per regulation 8 of the Interconnection Regulation, 2017 quoted below:-

*"(2) The reference interconnection offer, referred to in sub-regulation (1), shall contain the **technical** and **commercial** terms and conditions relating to, including but not limited to, target market, rate of carriage fee per month, average active subscriber base of standard definition set top boxes and high definition set top boxes at the time of publication of the reference interconnection offer, **discounts, if any, offered on the rate of carriage fee**, manner of calculation of carriage fee payable to the distributor and other necessary conditions:*

(3.0) The discounts, if offered, are on the rate of carriage fee, but a "discount" offered by a broadcaster for placing his preferred channel in a preferred location on the EPG or preferred LCN might well be a discount that has **commercial** implications for carrying out a **technical matter or issue** and hence is required to be covered under the Interconnection Agreement or Reference Interconnection Offer (RIO) though there is a mandate that no incentive can be given by the broadcaster to the DPO for inclusion of its channels in the DPO's bouquet.

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

(1.0) Yes....."Forbearance", used very loosely and perhaps even imprecisely, in the context of "keeping a distance" or "non interference" or "let them be" might embolden DPOs to distort and upset level playing field situations.

(1.1) If transparency is impacted or if subscriber's viewing options and choice is hampered or the customer-subscriber finds it more inconvenient or cumbersome, these are some occasions where interference and intervention is called for. If "Forbearance" offers a sense of "all-is-well-and-business-as-usual" when in reality it is not so, such "forbearance" phases would enable problems to be entrenched even deeper and TRAI is aware of this possibility. It must then act and remove the veil of "Forbearance".

(2.0) To add further, TRAI can *suo moto* take up issues

such as non level playing field issues, transparency concerns (as when things are opaque) or hidden away with no disclosure issues, lack of fairness and unjust enrichment issues, more revenue-less-service-orientation to subscribers issues and issues that lead to throttling competition in industry or tend to promote discriminatory practices, cartel and collusive pricing arrangements, unjustified and unsupported unilateral cost/subscriptions impositions, among others.

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?

Yes....there should be Regulation and also intervention by TRAI.

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.

(1.0) "Forbearance" adds an environment of boldness and thus imparts more flexibility to the DPOs to further their vested interests. Various methods such as in the modes adopted in developing packaging channels, bouquet offerings, BST offers, and offers under the guise of "Marketing" "Promotion" may be screens to hide other charges that are collected. These are not "under the table" or surreptitious but may be blatantly collected under the guise of, and in the garb of, marketing, offer or promotion.

(1.1) The basic idea is to avoid the regulatory glare of TRAI and it could give rise to a contentious stand taken by involved players that.....

(a) "it is not mentioned in the interconnection agreement anywhere"....

[as it is not recorded herein between the parties and offers no documentary evidence] or

(b) "nowhere is it stated to be subject to regulation or regulatory measures.....

[and what is not expressly prohibited or regulated can well be undertaken"]...or

(c) "We may agree among ourselves not to put it in writing or in the Interconnection Agreement or in the RIO, but you can pay "Promotion" charges for XYZ channel"...

(1.2) In fact, TRAI is well within its terms of mandated reference to examine the true nature of the transaction or seek information in "suspicious" cases where in placement agreements there are various things that more than meets the eye.

(2.0) As TRAI has cited instances in this paper, these relate to package offerings where specified channels are put in a package as per DPOs decisions and the element of free choice is missing but a fee is collected or these could relate to non inclusion in the BST or introduce supplementary terms, or there could be a threat of discontinuance of a carrying channel either done or imminent, or require a signature on some other unrelated agreement that has nothing to do with placement agreement scenarios.

(3.0) For all the reasons mentioned above in the answer in paragraph (3.26) above, such agreements must be reported to TRAI and find its place in the official records of TRAI or in the filed returns, schedules and such papers.

(4.0) TRAI can well examine whether the provisions of the Contract Act have been followed or breached as the issue could strike at the root of the very definition of a Contract/Agreement as if found to be a unconscionable one, then, such agreements could well be set to naught or ordered to be struck down.

(5.0) The solution may be to require registration of the placement agreements before prior use and in the form of a pre-approval-before-launch with TRAI or if they are included in the Interconnection Agreement or the RIO such an approval may be made mandatory.

(6.0) If such a course of action is adopted by TRAI that would have been supported by previous precedents such as the practice where Insurers file their Insurance Policies with the Regulator for insurance namely The Insurance Regulatory Authority of India (IRDA) for pre-approval-before-launch just as TRAI is the Regulator for Telecom and other matters.

 (7.0) A clause could be included in the Interconnection Agreement where it is mentioned that

(a) " ...includes agreement or any arrangement of any kind or in the nature of, by whatever name called or so described of Placement, Marketing, Promotion, Offers, Discounts, Incentives, whether relating to technical or commercial matters which forms part and parcel of the Interconnection Agreement whether or not that has not been so stated or so intended to govern between the parties.

(b) It is hereby clarified that a Placement Agreement is distinct and severable and nothing herein shall affect the validity of the Interconnection Agreement in case the Placement Agreement is found to be illegal, invalid or otherwise unenforceable in law."

3.29 Any other issue related to this consultation paper? Give your suggestion with justification.

(1.0) It is requested that in future TRAI provide samples/model agreements or calculations from Interconnection Agreements to enable the public to understand better and offer better comments.

(2.0) In order to protect the privacy, the names of

the parties could be "masked" or obliterated fully with dotted lines or such. After all it is the academics of the exercise that TRAI is venturing into, and in which they are interested, when they seek the views of the public/stakeholders and not a "witch hunt" to target "undesirable" DPOs or other players for they, as Regulator have to consider all issues to provide a balanced view, of protection, regulation, and yet enrich the industry practices.

(3.0) The free-to-air and all mandatory channels including regional based channels, news based channels that are likely to be in public interest must not be subject to the vagaries of the carriage fee.

(4.0) The carriage fee must have a sense of balance with the infrastructure cost or the cost of carrying the channel, wherever feasible and practical.

(5.0) TRAI should take appropriate action in all cases where the Interconnection Agreements/RIOs have either by action taken already or otherwise present on record were proven or shown to have engaged in practices that are disregarding or have disregarded the consumer/subscriber's interests in any form or manner and that need not necessarily be confined to issues such as tariff, choice of channels, packages and the like only. This obviously cannot be on retrospective application basis but can well be used as per extant and prevailing regulations in force.
