



WITHOUT PREJUDICE

TCL/RA/TRAI-CP/CLS/2018/11

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Principal Advisor (NSL)
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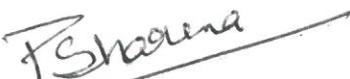
Sub: TCL Counter Comments on the Response by various stakeholders to TRAI Consultation Paper dated 18.10.2018 on Estimation of Access Facilitation Charges and Co-location Charges at Cable Landing Stations

Dear Sir,

Kindly find attached herewith TCL Counter Comments to the response submitted by various stakeholders to TRAI Consultation Paper dated 18.10.2018 on Estimation of Access Facilitation Charges and Co-location Charges at Cable Landing Stations. This is in continuation to the TCL response to TRAI Consultation Paper mentioned as above.

We reserve the right to file additional submissions, if required in future.

Kind regards,
For Tata Communications Ltd.


(Praveen Sharma)
Authorized Signatory

Encl: a/a.

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TCL COUNTER COMMENTS

We would like to submit our counter comments to the response of various stakeholders as follows:

Q 1. What 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 ?

BIF, ACTO, BSNL, AT&T, RCOM, Verizon, BT, RJIL: All the Access Seekers/Associations/Forum have recommended that TRAI should adopt 70% utilization factor since Day-1.

Vodafone: Vodafone has recommended that TRAI should adopt utilization between 50-60% .

TCL Counter Comments:

TCL does not support the 70% utilization factor for determination of charges. In our submissions made in the comments to the CP, we have stated that built capacity and capacity utilization/forecast are the important factors which need to be factored in for determining the CLS access charges. Taking a uniform built capacity and utilization/forecast for all CLSs will not result in cost based charges.

Access Facilitation capacity build should be based on utilization forecast over a period of time as otherwise it will lead to improper recovery of cost. This will also facilitate proper build up of the Access Facilitation set-up including interface cards & required infrastructure. More over there will always be a ramp up period to reach the forecasted capacity levels which needs to be factored-in in the costing methodology. The Access Facilitation capacity requirement of each cable landing station would have a different assumption of ramp up depending upon the past trends & popularity of the submarine cable.

TCL as a OCLS, creates the access facilitation infrastructure beforehand so that upon receiving request for Access Facilitation, access can be provided within the prescribed

time frame. In the Consultation Paper, TRAI has assumed cost recovery from the total capacity on day-1 itself for each CLS Access Facilitation infrastructure which is not true.

Capacity utilization is thus a function of build capacity basis forecast over a given period of time and the actual uptake measured over the period.

TRAI assumption of capacity build of 60G & 70% capacity utilization across all landing stations is erroneous for the following reasons :

- a. The current costing methodology assumes that the entire 42G of capacity at each of the CLS would be consumed on day-1 which is not in-line with market forecast.
- b. In reality the capacity ramp-up happens over time and varies by each CLS as also evident from the table below.
- c. Based on the forecast provided by TCL the actual utilization in Year-1 ranges from 1% to 27%.
- d. The below table also emphasizes the need for taking different capacity & capacity utilization across different CLS.

S. No	CLS	Year-1(A)	Year-2	Year-3	Year-4	Year-5	Capacity as proposed by TRAI in Year-1(B)	Utilization factor as proposed BY TRAI for Year-1(C)	Actual customer activation as per TRAI in Year-1(in Gbps) as per 70% utiliz.(BxC)	% utilization in year-1 as per the actual trend of activation provided by TCL Vs the 60G capacity as considered by TRAI[(A/B)%]
1	LVSb, Mumbai	15.9	32.0	48.0	64.1	80.0	60	70%	42.00	27%
2	VSB, Mumbai	5.9	10.0	24.1	32.0	40.0	60	70%	42.00	10%
3	VSB, ERK	0.5	0.9	1.6	2.0	2.5	60	70%	42.00	1%
4	VSB, Chennai	8.0	15.9	24.1	32.0	40.0	60	70%	42.00	13%
5	BKC, Mumbai	2.2	3.8	7.5	11.3	15.0	60	70%	42.00	4%

In view of the above, it is recommended that the capacity built at each CLS should be a function of capacity forecast over a defined period of time (say 3 years) for that CLS. The capacity forecast should be based on past trends and adjusted basis firm requirement, if any, received from the Access Seekers.

Same principle should apply for arriving at Co-location charges.

Q 2. 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?

BIF, ACTO, BSNL, AT&T, RCOM, RJIL, Vodafone, Verizon, BT: They support 2.6 as 'conversion factor' basis market rate of BW in International and Domestic service market.

TCL Response to Submissions in this regard:

The conversion factor of 4 was arrived at by TRAI was on the basis of examination of costing details/POs for the equipment submitted by TCL during the process for approval for rates in the year 2007. In fact in the Minutes of Meeting issued by TRAI in August, 2007 in respect of process for approval of charges, it has been categorically mentioned that there is no economies of scale. The statement made by ACTO that cost of cards/modules in the equipment for STM-1/STM-4/STM-16 are not in a factor of 4 is wrong and not borne out by the data submitted by TCL to TRAI in 2007 and 2012 and the admission of the same by TRAI in the year 2007.

As per the Consultation Paper of 19.10.2012 and Explanatory Memorandum to the Regulation dated 21.12.2012, TRAI has adopted the conversion factor of 2.6 for the following reasons:

- (a) scale of economy for higher capacities
- (b) prevailing market factor in domestic leased circuit.

On the economies of scale for higher capacities there is already documentary evidence and TRAI admission that there is no economy of scale. However, ACTO submission keeps harping upon the issue of economies of scale which is contrary to the costing evidence presented before TRAI.

It is our submission that prevailing market factor in the domestic leased circuit cannot be taken as the basis for determining the conversion factor as in the present case TRAI is required to reimburse cost based charges in respect of the access facilitation set up created by OCLS only for the purpose of facilitating access to the eligible ITEs of their own bandwidth through the CLS of the OCLS. It is therefore not correct to base the conversion factor on the prevailing market price of DLC.

RJIO has drawn an analogy of AFA rates with the NLD BW pricing - the factor of 2.6 on the basis of the ratio prevalent in the market for domestic leased circuit charges. It is submitted that the consideration for computation of Access facilitation Charges is different and based on cost recovery. This cannot be predicated upon ratio prevalent for the charges of DLC which are market determined and are variable. Moreover, it has already been demonstrated to TRAI in 2007 itself that the cost of higher capacities are a linear multiplies of the physical capacity

The submission of ACTO also quoted para 33 of the Explanatory Memorandum as follows:

"TRAI is of the opinion that if the higher factor of 4 as proposed by OCLSs is used for calculation, then price of STM-1 will be very low and price of STM 64 will be on higher side and this will also not provide advantage of scale of economy for higher capacities.

Therefore, keeping in view the prevalent conversion factor in the market which is also generally agreeable to most of the stakeholders, TRAI has used factor of 2.6 in place of 4, ensuring that the cost incurred is recovered.”

From the above, it is obvious that TRAI was more concerned with the access facilitation price than deriving the cost based charges due to which it has used the market conversion factor which was recommended by or acceptable to most of the stakeholders who are buyers of services from OCLS like TCL. There is no rationale for predicating the conversion factor on the market conversion factor in a exercise purportedly done to determine cost based charges.

We would also like to refer to our response to the present Consultation Paper wherein it has been demonstrated that unless the actual Access Facility capacity sold is as per the exact mix of volumes of interface types assumed by TRAI, there will be under or over recovery of cost in case conversion factor of 2.6 is used. It is also a fact that the Access Facilitation Capacity requirement will vary from the assumed model and will also vary from one CLS to another. However, when the `conversion factor` is considered as 4, the cost recovery remains at 100% and is not dependent on the volume mix of interface types. It is therefore all the more important recommended that multiplier of 4 should be taken in the costing exercise.

During the meetings held with TRAI in the year 2007 for finalization of Access Facilitation charges, the issue had come-up for discussion and after verification and due consideration of the various documents submitted by TCL, it was concluded by TRAI that there is no benefit of scale of economy in case of higher capacity i.e. STM - 4, STM-16. There is no change in the position in respect of the costing of the cards and equipment used in CLS and therefore the conversion factor of 2.6 cannot be made applicable if the charges are to be cost based.

It may also be noted that for any type of configuration, the OCLS has to equip all type of interfaces from STM-1 to STM-64. Further, TRAI should be cognizant of the fact that even for single port order, the OCLS will have to equip 16 port card and the rest of the ports shall remain unutilized. Further, all the capacity is incapable of being utilized on the day one, however, any OCLS will need to arrange the facilities, space and other resources in terms of long term requirement.

Other issues raised by ILDOs.

1. RJIL general comments:

- **Para 3 Page 1** : “..... it is imperative that this critical infrastructure should not be permitted to be a source of supernormal profits to the incumbent players”

TCL Response : Charges for Access facilitation are cost based. It is denied that OCLS is earning any supernormal profits as stated by RJIL and would like to state that the rates

which were determined in the schedules to the Regulations dated 21.12.2012 were way below the cost based charges which should have been determined. The process has been that respective CLS owner submits the cost incurred on number of items needed to construct, operate and maintain the access facilitation infrastructure needed for providing access to the access seeker to its own bandwidth. These costs were further reviewed & approved by TRAI. The very basic flaw in the current methodology adopted (in current CP of 08.10.2018) is that, TRAI is going back on many of it's own agreed & defined principles.

- **Pt # 4 :** *RJIL has also stated that its comments are from the perspective of both the OCLS and capacity seeker.*

TCL Response : RJIL owns Two (02) cable landing stations for AAE-1 & BBG Submarine cables. However, RJIL is not providing access to its Cable Landing Stations and is not responding to the requests made by TCL. We have also observed that no AFA document is available on their website. It is very clear from the above that their claim to be having the experience of being both access seeker and access provider in respect of access to CLS is not borne out from TCL experience of dealing with them requesting access to the their CLS. RJIL comments are more or less only from the perspective of access seeker (capacity seeker) and should be dealt accordingly.

- **RJIO in response to the Q-1 of the CP has quoted 28.11.2005 judgement of Hon'ble TDSAT in respect of IPLC Half Circuit rates.**

TCL Response : The reliance on the extract of judgment is not correct and relevant as the 30% unutilized capacity mentioned in the case of IPLC Half Circuit is very different from the Access facilitation set-up which is the subject matter of this CP. In any case, a separate Access Facilitation set-up is made for providing Access of international bandwidth to the eligible ITEs. The actual figures in terms of capacity forecast utilization of various CLSs of TCL is as per below :

S. No	CLS	Yr 2013	Yr 2014	Yr 2015	Yr 2016	Yr 2017	Capacity as proposed by TRAI in Year-1(B)	Utilization factor as proposed BY TRAI for Year-1(C)	Actual customer activation as per TRAI in Yr-2013(in Gbps) as per 70% utiliz.(BxC)	% utilization in yr-2013 as per the actual trend of activation provided by TCL Vs the 60G capacity as considered by TRAI([(A/B)%]
1	LVSb, Mumbai	15.9	32.0	48.0	64.1	80.0	60	70%	42.00	27%
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4	VSB, Chennai	8.0	15.9	24.1	32.0	40.0	60	70%	42.00	13%
5	BKC, Mumbai	2.2	3.8	7.5	11.3	15.0	60	70%	42.00	4%

2. Response to issue raised by BSNL in respect of market share.

BSNL Response Para v) Page 2 “...two OCLS still hold more than around 60% if the CLS resources of submarine cable landing in India. Since both OCLS are providers of Internet Broadband and Wireless/Wire line data services and controls the major share of total activated International Bandwidth from India.”

TCL Response : BSNL has erred on the number of CLS owned by TCL - as per our data submitted in response to CP and as mentioned in below table – TCL owns only 29% of the CLSs in India.

Period	No of CLS	CLS	Submarine Cable System	Year of commissioning	CLS Owner	TCL share of CLS
Prior to 2002	3	LVSB, Mumbai	FEA	1997	TCL	100%
		VSB, Cochin	SMW3/ SAFE-SAT3	1999/ 2001	TCL	
		VSB,Mumbai	SMW3	1999	TCL	
As of 2007	8	Santhome, Chennai	i2i	2002	Bharti Airtel	50%
		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	38%
		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	EJG	2011	Bharti Airtel	
As of 2018	17	Mumbai	BBG	2016	Vodafone	29%
		Chennai	BBG	2016	RJIO	
		Mumbai	AAE-1	2017	RJIO	
		Chennai	i2i	2016	RJIO	

Also, there is no nexus of AFC charges with broadband penetration, evident from three Government documents, White Paper of August 2010 from Advisor to PM, recommendations on Broadband by TRAI on December 2010 and National Telecom Policy of 2012.

3. The Schedules can only be prescribed prospectively

- **ACTO, AT&T, BSNL, BT, Verizon, RJIL :** That in the comments to the Consultation Paper on Estimation of Access Facilitation Charges and Co-location Charges at Cable Landing Stations, certain stakeholders have stated that the Schedules should be prescribed w.e.f. 01.01.2013.

TCL Counter Comments

- TCL submits that in terms of the directions of the Hon’ble Supreme Court and the Hon’ble Madras High Court, the Schedules to the December 2012 Regulation have to be re-worked/re-enacted/re-framed. Since the effective findings of the Hon’ble High Court of Madras have not been modified by the Hon’ble Supreme Court as on date they apply with full vigour and it is only the time line of giving effect to the Judgment and order of the Hon’ble High Court of Madras, for re-working/re-enacting/re-framing the Schedules I,II,III of the Regulations, which has been modified by the Hon’ble Supreme Court from 6

months to 6 weeks. It is most respectfully submitted that since the Authority is re-enacting the Schedules, the Schedules can only apply prospectively.

- It is settled law that of the various rules guiding how a legislation has to be interpreted, one established rule is that unless a contrary intention appears, a legislation is presumed not to be intended to have a retrospective operation. The idea behind the rule is that a current law should govern current activities. Law passed today cannot apply to the events of the past. If we do something today, we do it keeping in view the law of today and in force and not tomorrow's backward adjustment of it. Our belief in the nature of the law is founded on the bed rock that every human being is entitled to arrange his affairs by relying on the existing law and should not find that his plans have been retrospectively upset. This principle of law is known as *lex prospicit non respicit* : law looks forward not backward. It is submitted that a retrospective legislation is contrary to the general principle that legislation by which the conduct of mankind is to be regulated when introduced for the first time to deal with future acts ought not to change the character of past transactions carried on upon the faith of the then existing law.
- It is submitted that in cases such as the instant one, retrospectively is attached to benefit the persons in contradistinction to the provision imposing some obligation/liability where the presumption attaches towards prospectivity. In the instant case, the Schedules to the December 2012 Regulation casts an obligation/liability upon the OCLs including TCL. On the contrary, it is a provision which is onerous to OCLs including TCL. Therefore, in a case like this, we have to proceed with the normal rule of presumption against retrospective operation. Reliance is placed on the 5 judge bench decision of the Supreme Court in *CIT vs Vatika Township, Pvt Ltd, (2015) 1 SCC 1* and all other related judgments on the subject.
- That even otherwise since the Hon'ble Davison bench of the Madras High Court vide its Judgment dated 02.07.2-18 has held that the Schedules are vitiated for the lack of transparency requirement prescribed under Section 11 (4) of the TRAI Act, it is humbly submitted that the earlier schedules are *non-est* in the eyes of law. Without prejudice, It is submitted that the new Schedules which are to be inserted after carrying the mandate as required by law, would be the first time such Schedules lawfully come into effect and hence even otherwise they cannot have a retroactive operation.
- Whether there is any public interest for justifying the retrospective application has already been answered by the Hon'ble Division Bench of the Madras High Court in the year 2013 vide its judgement dated 25.06.2013 which has attained finality. The Division Bench in its judgment dated 25.06.2013 on a consideration of the facts and circumstances rejected the submissions on public interest and concluded that there was no public interest in the case

Hence, even otherwise it cannot be stated that Regulations are for the benefit of the community at large and consequently cannot have a retroactive application.