

Ref. No.: 031/TRAI/2012-13/ACTO

Date: 26th April 2012

**Dr. J. S. Sarma
Hon'ble Chairman
Telecom Regulatory Authority of India
Mahanagar Door Sanchar Bhawan
Jawahar Lal Nehru Marg,
New Delhi - 110 002**

**Subject: TRAI Consultation Paper No. 08/2012 dated 22nd March 2012
on "Access Facilitation Charges and Co-location Charges at
Cable Landing Stations"**

Ref.: ACTO's response / letter No. 030/TRAI/2012-2013/ACTO dated
19th Apr' 2012

Respected Sir,

This is with reference to the captioned consultation paper (No. 08/2012) released by Hon'ble Authority and our detailed response submitted vide letter dated 19th April 2012.

We are thankful to the Hon'ble Authority for placing the responses in the public domain which will allow stakeholders to provide further comments / counter comments/ analysis on the responses received on the captioned consultation paper.

On behalf of its members, the Association of Competitive Telecom Operators (ACTO) would like to file counter comments on the response(s) filed by the two OCLs (Tata Communications Limited and Bharti Airtel Limited).

In summary, we would like to respectfully submit the following counter comments for consideration of the Hon'ble Authority, these are;

- We do not agree with Bharti & Tata's comments that charges in the Cable landing station (CLS) segment should be left to market forces. We are also not in agreement with various rationales given by these two companies for de-regulation of charges for access facilities at cable landing stations in India due to the reasons indicated in the main responses and detailed counter comments attached here with this letter.
- The present cable landing station segment is highly concentrated and Bharti & Tata together have 98% market share and these are dominant operators in this segment controlling essential/ bottleneck facility to access the international bandwidth under consortium system in India. Therefore, regulations of this segment (including charges) need to be continued. Furthermore, they are providing wholesale & Retail services in the same market, therefore there is strong possibility to misuse of dominant positions and further cross subsidization between wholesale and retail services, to stop the effective competition in the international bandwidth segment.
- As per TRAI's published data , 85% India's LIT capacity are landing on those cable landing stations which are managed & Controlled by these two operators (Bharti and Tata). Therefore, cable landing station (CLS) is still essential / bottleneck facility for other operators who have capacities at these landing stations.
- As, over the period of time, percentage of CLS access charges/ charges for facilities available at cable landing stations have increased from 2~5% to 50%~60% of the bandwidth charges. Such upward increase in the percentage of share of CLS access charges to total cost of bandwidth, undoubtedly establishes that there is a market failure in the cable landing station segment. Therefore, it is not only necessary for TRAI to continue with the present regulation/ regulatory framework, but also review these charges and CLS access charges should be aligned on cost oriented principles so that anti competitive behaviors of the dominant/ SMP operators can be stopped and benefit can be passed on to the end users which would ensure further growth and affordability in the international bandwidth/ broadband segment.

- Any further delay in the downward revision of CLS access charges would have very serious financial implications on ILDOs and those operators having capacities in these CLSs. These operators are unable to offer the competitive services to end users due to very high CLS access charges, levied by them when compared to international data.
- From the analysis of data and responses of other stakeholders, it appears that CLS access charges are not cost based and are not reflecting the true costs for providing access facilities at cable landing station. It is requested that CLS access charges may be reduced by at least 95% keeping in view the facts indicated in our response to the consultation paper.

We trust that the Hon'ble Authority would find our counter comments in order and will duly consider the same including our response filed on 19th April 2012 while finalizing and determining the AFC and CLC charges.

Thanking you,

Respectfully submitted,
for **Association of Competitive Telecom Operators**

Naveen Tandon

Naveen Tandon
Vice-President

Encl.: As above

ACTO's COUNTER COMMENTS REGARDING ACCESS FACILITATION CHARGES AND CO-LOCATION CHARGES AT CABLE LANDING STATION

a) Availability of Competition in the CLS Segment

The key test to determine level of competition is reduced charges to bring affordability and that end user price is comparable with other competitive market for the same product/service.

We are of the firm view that the claims and justification made by Tatas and Bharti on evolution and maturity of competition in the CLS segment are not tenable by any means and regulatory principles. **They have deliberately avoided the key issue of affordability which is the key test of effective competition in the segment. Moreover, these two operators (Bhart&Tata) together have market share of 98% in Cable landing station segment. In such a situation where market power is concentrated with two operators and present charges are not reflective of the true costs of the services, the justifications given by Bharti and Tata are not tenable.**

All the policy announcements and measures initiated by Government so far to bring competition are for bringing affordability to the consumers. Affordability cannot be ignored or undermined.

Evolution and maturity are different terms and cannot co-exist. It needs sufficient time and continued regulatory intervention for reducing charges for a market to mature. The maturity of market and competition should result in affordability which is absent in the CLS segment. With only 4 years of regulation, it is unjustified to claim maturity of this segment when the high charges continue and there is no reduction in the charges over the said period.

The ILD sector was opened up by the government with an objective to promote competition and at the same time bring affordability to the end users. However, the sound policy decisions of the Government have **resulted in competition in the overall ILD segment but not in the**

cable landing station segment due market concentration and very high CLS access charges.

The cable landing access facilitation charges which are part of the international connectivity chain have not moved at all and continue to be at the same or even higher as in case of new cable system EIG since the last review in 2007. **Such charges used to be just less than 10-12% of the overall international connectivity cost in 2007 and today they constitute more than 60% of the overall cost.** This has been duly demonstrated by all the stakeholders in their respective responses filed with the authority.

The removal of entry barriers to ILD sector by the government has certainly resulted in competition and reduced international cable bandwidth prices but the CLS AFC charges have not reduced correspondingly and continue to be extremely high thereby putting the ILD operator in a significantly disadvantageous position vis a vis the incumbent CLS owner.

The incumbent OCLS vis M/s Tata Communications Ltd and M/s Bharti Airtel Ltd have failed to provide any justification for charging such high AFC and CLC cost in India as compared to other charges. Competition in the International cable bandwidth charges cannot be applied *mutatis mutandi* to cable landing segment which needs continued regulatory intervention by Hon'ble Authority to bring down the astronomical charges in line with international prices.

More so, the number of OCLS continues to be the same. There has not been any increase in the numbers in last 4 years. The trend towards increase in the number of ILD players and the related affordable prices of international bandwidth is not at all visible when we look at the cable landing station segment. These are two different aspects of the international connectivity chain.

It is to be noted that in 2007 when there were 4 OCLS, still TRAI rightfully concluded to regulate the CLS access segment in its regulation of 2007 as:

“The Authority is of the view that adequate competition is not there at present in accessing international bandwidth. Therefore, to create effective competition in the sector, Cable Landing Station-Reference Interconnect Offer (CLS-RIO) needs to be mandated for the owner of all cable landing stations including those would be commissioned in the future”

Between 2007 and today nothing has changed on the ground in terms of number of CLS and the AFC and CLC charges and this clearly demonstrates that the level of competition in the CLS segment continues to be status quo as was in 2007. This situation coupled with astronomically higher prices makes it quite evident that affordability in CLS segment has been sacrificed and not given attention.

It is pertinent to note that the other two OCLS M/s Bharat Sanchar Nigam Limited and M/s Reliance Communications have also expressed similar view on lack of adequate competition and need for a review of the charges thereby demonstrating the cascading effect of the higher prices.

b) Bottleneck still remains in the form of Exorbitant Charges

M/s Tata Communications Ltd and M/s Bharti Airtel ltd have again tried to mislead the Hon’ble Authority by again showing one side of the coin in the context of Bottleneck. It needs to be understood that bottleneck is not only about access and choice it equally relates to the cost at which the facility is being provided on a fair and transparent basis. It is also important to note that these two operators are controlling /managing those cables landing stations which are landing 85% LIT capacity of India.

Cost has been and continues to be a major bottleneck to access capacity at the cable landing station. It is still not justifiable that when major costs have been reimbursed to the OCLs, through consortium and other cost of infrastructure is shared (the international gateway and CLS are located in the same premises), still the CLS charges continue to be very high. It is quite clear that such vertically integrated operators are cross subsidizing their

prices for international bandwidth by charging high CLS charges thereby resulting in vertical price squeeze in the CLS segment.

c) Essential Facility

The explanations provided in support by M/s Tata Communications Ltd and M/s Bharti Airtel Ltd are not sustainable on this point as well. The definitions when compared to the scenario in India clearly demonstrate that this is an essential facility and cannot be easily duplicated.

TRAI has rightfully concluded in its 2005 recommendations that setting up a CLS is a very time consuming and capital intensive process and it is not feasible nor does not make economic sense to duplicate the expensive CLS infrastructure in the country.

The access to cable capacity should continue to be treated as essential facility as higher charges still continue thereby making it difficult for the ILDO's to access the capacity at fair prices. The definitions of essential facilities provided in their responses truly demonstrate the real scenario on the ground. These are critical inputs, fully owned and controlled by vertically integrated companies/dominant/SMP, its not feasible economically or otherwise to duplicate or substitute the same.

d) Diversity and Choice of Cables as mark of Competition

M/s Tata Communications Ltd and M/s Bharti Airtel Ltd have mentioned in their response that in the present scenario there exists sufficient choice of submarine cables and diversity available on various international routes. However, again they have failed to address the basic point of high charges which still exists. It's akin to state that multiple infrastructure/highways have been laid with a cost which is already reimbursed and subsidized but to ride on the same one has to pay extremely high charges instead of a reasonable token amount. There is an artificial justification on undermining the cost reimbursement or subsidy provided by consortium and over stating the 3% of the overall expenditure incurred. This is beyond anybody's imagination that for mere 3% of the cost incurred, OCLS charge for the entire 100%.

Instead of optimally utilizing the existing infrastructure, multiple channels are opened. This has led to sub-optimal utilization of resources for which they expect the CLS seekers to compensate.

There is an urgent need for TRAI to monitor and regulate these charges in the overall interest of the ILD sector.

The issue for deliberation of the authority is not of lack of choice or capacity but of higher charges which has been deliberately kept under the carpet or not addressed by OCLS. One can have multiple cables / station. However if it does not result in low price for end users, it means there is an abuse of dominant position thereby creating a monopoly / cartelization and resultant lack of competition. The question on high charges and cost reimbursement has been deliberately avoided even when the stakeholders have demonstrated on record by furnishing data, extracts of C&MA agreements.

Further it has factually demonstrated in the consultation paper and echoed by the industry that more than 90% of the CLS capacity is owned by two OCLs.

e) Market Governed Vs Regulated

M/s Tata Communications Ltd and M/s Bharti Airtel Ltd have provided international experience of de-regulation. However, they have ignored the basic point that such measures were taken when the charges drastically came down. In fact in some cases even the AFC charges were removed completely. No such steps have been taken by them to reduce the charges.

f) Cost of setting up CLS already Reimbursed

OCLS as members of various International Consortiums (e.g. EIG, SMW4 etc) are signatories to the joint consortium agreements (C&MAs). As per generally accepted commercial practices in this segment, the costs (CAPEX and OPEX) to build and operate a Cable Landing Station, in the

C&MA, are billed out to all the consortium members so that the terminal party (i.e. Cable landing station owner) is **reimbursed for both the capital construction costs and the ongoing Operation and Maintenance Expenditure (O&M)**. Therefore, it can be easily inferred that each consortium reimburses to CLS owners the cost associated with building and operating these stations.

Since the major costs (capex and opex) are already reimbursed by the Consortium, there seems to be little justification for charging higher from operators seeking access to the CLS.

Such expenditures which have already been reimbursed by any means shall not be part of the calculation of access facility charges. However, it appears RIO charges have been applied to compensate the landing party for expenditure to provide the Cable Station.

g) Infrastructure creation by foreign carriers / ILDOs in the country

It is important to mention that under the consortium system generally local telecom service providers (who are also member of consortium) are given preference and responsibility for construction and management of cable landing stations in their terrestrial space and the costs (CAPEX and OPEX) of construction and management of cable landing stations are being reimbursed by the consortia. Therefore, the question of investment by foreign operators/carriers in that terrestrial does not arise as it will not be cost effective.

The arguments of Bharti and Tata with respect to investment by foreign operators in CLS segment are not tenable in view of above, as it is generally accepted practice in consortium system that local telecom operator will take the responsibility for construction & Management of cable landing station in its country. There is no significant investment required from the operators (who have been nominated / designated by the consortia) for management of cable landing station as the costs (Capex +Opex) shall be reimbursed by the consortia.

Further more, the point on option to build CLS was open to all and the argument on deliberate decision to refrain from investing in infrastructure cannot be held tenable. Under sound regulatory principles it is not justifiable to keep on duplicating and creating own infrastructure if the charges for accessing the infrastructure continue to be high. It's akin to stating that if a consumer is complaining of being charged higher charges for a service, then the solution is that they should build their own infrastructure.

There can be only one cable landing station to land a cable. The point about other ILDOs/ISPs setting up their own cable landing station is irrelevant and un-workable. Also, the Construction and Maintenance Agreement for the sub-sea cable ensures that the consortium as a whole picks up the costs of the individual cable stations. So what is the rationale of high charges and justification on building own infrastructure. The need of the hour is to significantly reduce charges, optimum utilization of existing infrastructure and not duplication.

In conclusion:

The charges for AFC and CLC charged by OCLs are extremely high and have remained at same high level since 2007. This is not a reflection of maturity or competition in the CLS segment. The charges are not consistent with international trends.

There is an urgent need for the review of CLS access and CLC charges and to continue to be adequately regulated by the regulator including periodical reporting requirements to check prices.

The cost to build and operate CLS are already reimbursed to and recovered by the OCLs in India. Only incremental cost on work done principle incurred in providing access to ILDOs should be included in AFC and CLC on per link basis and not on capacity.

We believe that with continued regulatory intervention and due consideration to our detailed responses there is certainly a case for more than 95% reduction in the present charges.

We believe that with the entry of foreign carriers in the ILD segment there is sufficient availability of untapped submarine cable capacity through the consortium of foreign carriers, which is currently underutilized due to higher CLS and CLC charges. Bringing down the AFC prices would have a positive impact on ability to access these capacities at cheap and affordable prices by ILDO's, which would be further on passed to end users in the form of affordable prices thereby leading to increase retail/enterprise consumption, and increasing over all broadband penetration in the country.
